



Fall 2019

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Property Leasing

Recent Developments of Importance

PART 2

Each year we provide a summary and insight on key cases that apply to commercial landlords and tenants. We hope you enjoyed Part 1 in our Summer 2019 newsletter.

Formation of Contract & Fundamental Breach

In *Northridge Property Management Inc. v. Champion Products Corp.*, 2017 ONCA 249, the Court considered two issues relating to agreements to lease: (1) when an agreement to lease is binding, as opposed to an unenforceable “agreement to agree” and (2) when the threshold of a fundamental breach by the landlord is achieved.



Before discussing the decision in *Northridge*, let us go back to basics. The case law is well-settled – there are certain essential terms that must be agreed upon by the parties in order for a court to find there is a binding and enforceable lease agreement in place. The essential elements of a lease (as set out by *Williams & Rhodes* and approved in many cases) are: “the parties, a description of the premises to be demised, the commencement date and duration of the term, the rent, if any, and all material terms of the contract not incident to the relation of landlord and tenant.”

With respect to fundamental breach, contract law recognizes that when there has been a fundamental breach, the wronged party may terminate the contract and claim damages. Historically, fundamental breach was difficult to prove in the commercial leasing context, but since the late 1980s there have been a handful of cases where tenants argued successfully that the landlord’s breach was a fundamental breach and the tenants were entitled to treat the lease as at an end.

In *Northridge*, the landlord and tenant entered into an offer to lease for the tenant to operate a party supply business and a sanitation supply business on the premises. The offer outlined a list of renovations that the landlord was required to complete before or within the first month of the tenant’s possession of the premises. The landlord did not complete the renovations and the tenant subsequently abandoned the premises on the basis that the premises was zoned for warehouse use and not retail (and therefore, unsuitable for the tenant’s business). The landlord brought an action against the tenant for damages for breach of lease. The tenant argued there was no binding lease between the landlord and tenant and that the offer was a mere agreement to agree. In the alternative, the tenant argued that the landlord had fundamentally breached the lease.

The trial judge held that the offer to lease was binding because both the landlord and the tenant had carefully discussed the terms of the offer. In affirming the trial judge’s decision, the Ontario Court of Appeal also noted that the parties were sophisticated corporate entities that negotiated the terms of the offer, committed those terms to writing, and signed a document reflecting those terms. In addition, the Court found that the language and dispute resolution mechanisms contained in the offer represented the characteristics and fulfilled all the requirements of a valid lease. *Northridge* serves as a reminder for both landlords and tenants that offers to lease can create valid and enforceable obligations and therefore it is imperative for parties to ensure that their interests are properly reflected in such offers.

With respect to the fundamental breach issue, *Northridge* demonstrates that fundamental breach is a high standard to meet. The trial judge declined to find that the landlord had fundamentally breached the offer to lease and the Court of Appeal agreed. In regards to the zoning

argument, the court found the zoning was suitable as the tenant’s business was chiefly a warehouse and the first time the zoning issue was raised was in defense to this action. As for the outstanding renovation work, the judge found the deficiencies could be remedied for approximately \$25,000, which was relatively insignificant in relation to the value of the lease. The Court noted that the landlord’s failure to perform the repairs did not deprive the tenant of essentially the whole benefit of the agreement to lease.

OPTION TO RENEW: Waiving Strict Compliance by Conduct – Landlords Beware of How You Act

The decision in *L’Ouvrier Inc. v. Leung*, 2017 ONCA 589, acts as a warning to landlords to be careful about how they act following a casual or informal discussion about lease renewals with tenants. When a landlord waives its right to strict compliance with the lease, either explicitly or by its conduct, the terms of the lease no longer protect that landlord.

In this case, the dispute pertained to the tenant’s right to renew its 5-year lease. The lease contained an option to renew for two additional 5-year terms. The tenant could only renew if it provided the landlord with prior written notice and if it was not in default of the lease. Prior to expiry, the tenant approached the landlord to renew the lease. The landlord informed the tenant that it had lost its option to renew because it was in arrears of additional rent. The landlord, however, advised the tenant that it would allow a renewal if the renewal rent was double the basic rent of the original lease.

The tenant brought an application for summary judgment to enforce the terms of the lease. Although the landlord and tenant agreed to settle before the tenant’s motion, the settlement failed when the landlord demanded additional payments. The landlord refused to participate in the arbitration and locked the tenant out of the premises. The tenant brought a motion for summary judgment to enforce the terms of the contract.

The motion judge held that the landlord was in breach and that the tenant had properly exercised its right to renew the lease. In coming to its decision, the motion judge relied on the decision of *Director’s Film Co. v. Vinifera Wine Services Inc.*, (1998), 1998 Carswell Ont 977. In that decision, the judge held that a tenant’s casual or informal communication of its desire to renew can constitute a valid exercise of its option to renew if the landlord, by its conduct, waives its right to strict compliance with the terms of the lease. In this case, the motion judge found that the tenant’s text message

to the landlord served as sufficient written notice to exercise its renewal option. The Court pointed out that following delivery of the text message, the parties acted in a manner consistent with the notice having been properly provided. As well, the Court held that the landlord's demand for additional rent was not authorized by the lease. The lower court granted the summary judgement and ordered the landlord to pay damages in excess of \$140,000 to the tenant for loss of the ability to sell its business. The Court also granted punitive damages of \$20,000 for the "sufficiently egregious" actions of the landlord. The landlord's conduct following the text message also showed that the tenant's notice was properly provided. The landlord appealed the judgment on the basis of administrative fairness issues. The Court of Appeal dismissed the appeal.

The *North Elgin Centre Inc. v. McDonald's Restaurants of Canada Ltd.*, 2018 ONCA 71, decision provides additional clarity with regard to situations where a landlord who has waived its right to strict compliance wishes to reinforce those rights. In this case, although the tenant gave proper notice to renew, the parties failed to agree on rent for the renewal period nine months prior to the expiration date. Following this, the landlord applied for a declaration that the lease would terminate on March 20, 2017. The tenant applied for a declaration that the lease had been renewed and that parties should proceed to arbitration to establish a fair market rental rate.

The application judge held that the renewal provisions required the tenant to do more than simply provide notice. As a result, the application judge granted the landlord's orders and dismissed the plaintiff's application. On appeal by the tenant, however, the Court of Appeal set aside the application judge's orders and declared that the lease had been renewed and that the parties should proceed to arbitration to determine the fair market rental rate for the premises.

The Court noted that there was no error in the application judge's conclusion that the landlord waived strict compliance with the renewal provisions under the lease. However, the application judge erred in finding that the waiver was subsequently revoked by an email sent by the landlord to the tenant in 2016. The Court held that for a waiver to be revoked, the receiving party must receive reasonable and clear notice that the party who granted the waiver will now insist upon the strict enforcement of its legal rights. In addition, the notice must also provide the receiving party with an opportunity to cure any defect resulting from its reliance on the waiver. In this case, the Court found that the 2016 email did not clearly indicate that the landlord would

be asserting strict enforcement of its legal rights. The email also did not provide the tenant with a reasonable period to cure the breach of the lease.

Both *L'Ouvrier Inc.* and *North Elgin Centre Inc.* emphasize the importance of the parties' conduct in relation to renewing leases. If a landlord does not want to waive its rights to strict compliance, the landlord must act carefully and be mindful of how its actions may be perceived by the tenant or a court in the context of a dispute. If a landlord wants to reinstate its waived rights, the landlord must provide sufficient and reasonable notice for the tenant to cure the breach of the lease.

RELIEF FROM FORFEITURE: Not Available if Tenant's Breach is not "Technical"

In *Wittington Properties Ltd. v. Goodlife Fitness Centres Inc.*, 2017 ONSC 1426, the tenant entered into a lease to operate a fitness club. According to the lease, if the tenant was not in default, it had an option to extend the lease for an additional 5-year term. In 2014, however, the landlord informed the tenant that it had lost its right to extend the lease due to ongoing breaches.

The landlord brought an application against the tenant to seek an order that (1) the tenant lost its right to extend the lease, (2) the tenant lost its entitlements to exercise a further option to extend, (3) the lease would expire on February 28, 2017, (4) the tenant would be required to vacate the premises on or before the expiry date, and (5) there would be leave to issue a writ of possession after March 1, 2017. In response, the tenant brought an application for a declaration that (1) the lease was in full force and effect, (2) the tenant validly exercised its option to extend the lease, and (3) the landlord must provide possession of the premises to the tenant for the extension period. In the alternative, the tenant applied for an order for relief from forfeiture.

With respect to the tenant's application for relief from forfeiture, the Court assessed the tenant's diligence in complying with the terms of the lease and landlord's financial losses. The tenant argued that its breach of the lease amounted to a technical breach that did not result in any financial loss for the landlord. The tenant also submitted that the technical breaches were examples of situations where the courts should exercise their discretion and grant relief from forfeiture.

In the end, the Court granted the landlord's order and declared that the tenant had no right to extend the lease (as the tenant's breaches were not merely technical) and

that the tenant must deliver vacant possession on or before February 28, 2017.

Although this case reiterates the limited scope of granting relief from forfeiture, it follows previous case law to confirm that in the event of a technical breach, courts have the discretionary power to grant such relief.

Repudiation of Lease by Tenant – Landlord’s Options?

In *Highway Properties Ltd. v. Kelly Douglas & Co.*, (1971) SCR 562 (SCC), the Supreme Court identified four mutually-exclusive courses of action open to landlords when a tenant repudiates a lease: (1) do nothing to alter the tenancy relationship but insist on performance of the terms and sue for outstanding rent or damages, (2) elect to terminate the lease but retain the right to sue for outstanding rent or damages, (3) advise the tenant that the landlord proposes to re-let the property as an agent of the tenant and enter into possession, and (4) elect to terminate the lease but with notice to the tenant that damages will be claimed for future damages (on a present value basis) for losing the benefit of the lease over its unexpired term.

In a recent case, *Stearman v. Powers*, 2017 BCCA 165, the Court considered: (a) was the lease terminated? and (b) had the landlord provided the tenant with clear and unequivocal notice of its intention to insist on the tenant’s obligations to pay rent?

In this case, the tenant entered into a 5-year lease to operate a retail clothing business in 2008. During the following year, the tenant complained of a strong odor that was interfering with her business. By November 2009, the tenant stopped paying rent and vacated the premises. The landlord

brought an action for arrears of rent against the tenant and the tenant counterclaimed for damages arising from breach of the landlord’s covenant of quiet enjoyment.

At the first trial, the judge held that the landlord’s failure to eliminate the odor constituted a fundamental breach of the lease. The landlord’s claim was dismissed and the tenant was awarded damages. On the first appeal, however, the Court of Appeal set aside the trial judge’s decision and referred the landlord’s claim to the British Columbia Supreme Court for retrial of the claim for damages. The BC Supreme Court held that the landlord failed to provide the tenant with a clear notice of its intention to hold the tenant accountable for the rent during the remaining term of the lease and that the lease was terminated as a result of the landlord’s conduct after the tenant vacated the premises.

The landlord relied on *Highway Properties Ltd.* to again appeal the decision by claiming that the lease was never terminated. The landlord argued that it acted as an agent of the tenant to re-let the property. The Court of Appeal accepted the BC Supreme Court’s reasoning and held that the landlord’s conduct as a whole was consistent with an intention to terminate the lease. The Appeal Court held that since the *Highway Properties* case, landlords have the option to take steps to mitigate damages without the risk that they will be later estopped from claiming ongoing or prospective damages.

Special acknowledgement and thanks to Stephen Messinger and Nusrat Ali (Student-at-Law), for their valuable assistance in preparing this article. Previously published in the Canadian Lexpert Directory – 2019.



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Firm News

Minden Gross LLP welcomes...

Abbasali (Ali) Kermalli to our Business Law Group as a Partner. His practice focuses on commercial transactions, particularly mergers and acquisitions, as well as commercial financing, corporate governance, and everyday corporate matters.

Samantha Schreiber to our Litigation Group as an Associate. Her practice focuses on commercial litigation and real estate disputes.

Welcome back to our newest Associates who articulated at the firm in 2018-2019

Nusrat Ali to our Business Law Group. Her practice primarily focuses on corporate transactions, including mergers and acquisitions.

Samantha Bogoroch to our Litigation Group. Her practice focuses on corporate and commercial litigation as well as bankruptcy and insolvency proceedings.

Darren Nguyen to our Business Law and Securities and Public Markets Groups. He works with clients primarily in cor-

porate transactions, such as starting a business, mergers and acquisitions, and public offerings.

The 2020 edition of *The Best Lawyers in Canada* acknowledged our lawyers as leaders in their fields. The firm congratulates **Howard Black** (Trusts and Estates); **Andrew Elbaz** (Mining Law); **Michael Horowitz** (Commercial Leasing Law and Real Estate Law); **Christina Kobi** (Commercial Leasing Law); **Stephen Posen** (Commercial Leasing Law and Real Estate Law); and **Reuben Rosenblatt, LLD, QC, LSM** (Real Estate Law), who were recognized by their peers for the knowledge and expertise they bring to their work. Special recognition to **Howard, Stephen, and Reuben**, on the 15th anniversary of their recognition in *The Best Lawyers in Canada*.

Minden Gross LLP congratulates Employment and Labour lawyer **Carrington Hickey** on acquiring her Master of Law (LLM) from the University of Cambridge.

Professional Notes

Whitney Abrams' article "How to win friends, influence people, and be compliant" was published in the July/August 2019 edition of *CannaInvestor*. She was quoted in the whitepaper "Global Cannabis Industry: The Essential Primer" published by Meritas. **Whitney** and **Sepideh Nassabi** posted "The Trouble with Cannabis

Trademarks outside Canada" on *Canada Cannabis Legal* on Aug. 26. **Whitney** also spoke about cannabis updates on a panel at the RealTrends Conference on Sept. 17. **Christina Kobi** and **Lenny Mylonopoulos** attended the conference and Minden Gross LLP was a sponsor.

Sepideh Nassabi posted five articles including “The Canada Border Service Agency Wants to Help You Maximize Brand Protection” on Aug. 2.

Christina Kobi, Marta O. Lewycky, and **Melodie Eng** took part in the inauguration ceremony for Jollibee’s new Toronto Location on Sept. 5.

Steven Birken, Melodie Eng, David Holmes, Michael Horowitz, Christina Kobi, Marta O. Lewycky, Andrian Lozinski, Leonidas Mylonopoulos, Stephen Posen, Benjamin Radcliffe, and **Boris Zayachkowski** attended the 2019 ICSC Canadian Convention from Sept. 23-25. **Christina** was on the program planning committee and she was a moderator for “Cannabis One-Year Later” where **Sasha Toten** was one of the panelists.

Marta O. Lewycky, Stephen Posen, Robert Beattie, Raymond Slattery, Melissa Muskat, and **Andrian Lozinski** presented at a seminar on the New Construction Act hosted by Minden Gross LLP on Aug. 14. **Marta** posted two articles and a bulletin including “Construction Act – When Is a Landlord an ‘Owner?’” on Sept. 5.

Timothy Dunn was quoted in “Man discharged from his fourth bankruptcy” in *Law Times* on Sept. 18. He was quoted in *Advocate Daily* in “Multiple discharges from bankruptcy ‘not unheard of’” on Sept. 25. He was also profiled in *Advocate Daily*’s article “Creative problem-solving core to Dunn’s financial practice” on Sept. 9.

Howard Black was profiled in “Client-first approach bolsters Black’s reputation” in *Advocate Daily* on Sept. 23.

Danna Fichtenbaum posted “Changes to Probate Tax: What to do with your new-found \$250?” on Sept. 6.

Joan Jung spoke on “Tax Issues for Estate Administration Lawyers” at the LSO seminar, “Practice Gems: Administration of Estates” on Sept. 10. She moderated a STEP Toronto seminar, “Private Corporation Tax Planning and Inbound Structuring” on Oct. 16.

Carrington Hickey posted “Updated! Canada Votes 2019: Employers’ Federal Election Day Obligations” on Sept. 24.

Irvin Schein published “When is the driver of a car considered not to be in possession of their own vehicle?” on *irvinschein.com* on Aug. 27.

Samantha Prasad published three articles in *The TaxLetter* including “Q4 Tax Planning Tips” in Sept. *The Fund Library* published her article “How to protect ‘retiring allowances’ from the tax man” on Sept 24.

Michael Goldberg hosted the Tax Talk Summer Social on Jul. 17 to wrap up its 6th season and launched the 1st session of Tax Talk: Season 7 on Sept. 11. He co-presented on insurance planning at the Cidel Provence Conference in France on Sept. 13.

Jennifer Katz (Student-at-Law) posted “Quebec’s Ban on At-Home Cultivation Ruled Unconstitutional” on *Canada Cannabis Legal* on Sept. 16.

Joshua Hersh (Student-at-Law) posted “Update on the Status of the Cannabis Allocation Lottery” on *Canada Cannabis Legal* on Aug. 30.

Leonard Baranek, Leah Silber, Yosef Adler, Samantha Prasad, Tracy Kay, Ethan Eisen, and **Leonidas Mylonopoulos** acted for First Gulf as it completed the sale of the East Harbour Project to Cadillac Fairview on Sept. 25.

Andrew Elbaz was profiled in “Knowledge, integrity vital to Elbaz’s securities practice”

in *Advocate Daily* on Sept. 16. He was quoted in “Securities regulators looking to change rules on business reporting, investment fund regulation” by *Lawyer’s Daily* on Sept. 17.

Yosef Adler, Andrew Elbaz, Jessica Thrower, and Alexander Katznelson acted as Enthusiast Gaming Holdings

Inc.’s legal advisors as it completed its arrangement with J55 Capital Corp. and Aquilini GameCo Inc. to form the leading publicly-traded esports and gaming media organization in North America on Sept. 3. They were also mentioned in *MicroSmall-Cap* in relation to this deal.

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