



## Exercising a Renewal/Extension Option

### WINTER 2005 - Part II

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Two recent decisions applied the following principle enunciated in *Ross v. T. Eaton Co. (1992)*, 11 O.R. (3d) 115 (C.A.): a departure in the method of delivery of notice should be deemed acceptable provided the method is not less advantageous to the offeror and acceptance is actually communicated.

In *DW Squared Limited Partnership v. Oxford Properties Canada Ltd.* [2002] O.J. No. 3642, the Ontario Court of Appeal affirmed a lower court decision and found that a notice of renewal was properly delivered by the tenant notwithstanding the fact it was delivered to security personnel in the lobby of the office building where the tenant leased its premises. The tenant had renewed the lease in the same manner on two previous occasions, both of which were accepted by the landlord. The lease “technically” required delivery of written notice to a “responsible employee” not less than nine months prior to the expiration of the

term or existing renewal term. The Court’s interpretation of “responsible employee” included a security guard employed by a company under contract to the landlord for two reasons: (i) on occasion, actual employees of the landlord would occupy the desk in lieu of security personnel; and (ii) the intention of the clause was to require notices to be given to responsible persons reasonably connected to the landlord. The Court of Appeal further determined, that by virtue of the landlord’s previous acceptance of departures from the prescribed form of notice delivery from this tenant and other tenants in the building, the

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notice in this case constituted proper notice by the tenant. Hence, it appears that if an offeree wishes to depart from the method of acceptance prescribed by the offeror (which is not insisted on as the sole method of acceptance), he or she can do so effectively if the communication is by a method which is not less advantageous to the offeror and acceptance is actually communicated.

In a more recent case, *Lions Gate Medical Clinic Inc. v. J.C.F. Development Corp.* (2003), 9 R.P.R. (4th) 9 (B.C.S.C.), the tenant claimed that it had forwarded (via regular mail) an envelope enclosing a monthly rent cheque and a brief letter indicating an intention to

exercise its option to renew the lease. The landlord claimed that it did not receive the letter, despite having cashed the rent cheque. The lease stated that notice would be deemed sufficiently given provided it was sent by registered mail. The court ultimately found in the landlord's favor because the method used was less advantageous and acceptance was not communicated. Noting that the landlord had consistently referred to a "new" lease and a change in rent, the court found that none of the social or business discussions between the parties amounted to conduct that would reasonably lead a tenant to believe that this landlord was not relying on the strict notice terms or that the lease would be extended.

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## **Court Notes**

Our client, Nation Wide Canning Ltd., a tomato product manufacturer and canner, stored nearly 300,000 cans of its crushed tomato product at a nearby warehouse. The next year, when it went to retrieve its product, Nation Wide Canning Ltd. discovered the majority of its stored cans had rusted.

Nation Wide Canning Ltd. sued the warehouse company for breach of its duty as bailee. The Warehouse company defended asserting that, given our client's extensive experience with its own storage requirements and their prior inspection and approval of the facility, they had assumed the risk of any damage.

Our client claimed losses including the value of over 50,000 unsalvageable cans, dumping fees, extra transportation costs, the cost of a unique rust-cleaning machine, labour costs for sorting and cleaning the cans and the profits lost on the cleaned cans, sold at a discount. Nation Wide Canning Ltd. also sought recovery of a truckload-worth of cans which our client claimed was never returned. In addition to denying

liability, the warehouse company disputed the legitimacy of all of these claimed losses.

After a seven-day trial, the court found the warehouse company had breached its duty to Nation Wide Canning Ltd. and granted judgment for all amounts being claimed (including for the "missing" truckload) totalling over \$500,000.

Nation Wide Canning Ltd. was represented by Ian J. Cantor.

## **Client News**

H&R Real Estate Investment Trust completed a purchase/leaseback transaction with RONA Inc. on November 2, 2004 regarding nine RONA stores in Quebec and Ontario. H&R acquired the properties for \$102.8 million and leased them back to RONA.

H&R was represented by a team that included David Kutner, Leonard Baranek and Robyn Kestenberg.



Photos Courtesy Getty Images

## Enforceable Renewal/Extension Options: Certainty of Terms

In respect of renewal or extension options, leases should outline as clearly as possible any rights granted to tenants, otherwise, in the event of a dispute, the court may determine that such rights are void for uncertainty and in effect strip a tenant of its intended special rights under a lease.

In a recent decision, *Holt v. Thunder Bay (City)* [2002] O.T.C. 662, the Ontario Court of Appeal overturned a lower court's interpretation of whether or not there was sufficient certainty in duration of a renewal option for it to be enforceable. The tenant leased certain premises for an initial term of 13 years and it had an option to renew the lease "on the same terms of the original lease, save and except for the rental rate, which was to be agreed upon by the parties or by arbitration if the parties were unable to agree."

Based on the principles outlined in the Supreme Court of Canada decision, *Gourley v. Canada Department Stores Ltd.*, [1933] S.C.R. 329, the lower court in *Holt*

held that the renewal provision lacked an essential ingredient because it did not literally specify a conclusive duration of the term to be granted by the renewal (e.g., five years) and declared the renewal provision void for uncertainty. The Court of Appeal also applied *Gourley* but disagreed with the lower court's interpretation, stating that certainty of duration could be ascertained from an express provision in the lease or by reference to some other collateral matter.

The court found the tenant was entitled to a renewal term equal to that of the original term of 13 years because the exact wording in the renewal provision provided that the renewal term would be based on the same terms of the original lease. The court held that since certainty of term could be concluded based on a careful interpretation of the language, the contract was neither ambiguous nor absurd and therefore the renewal option was in fact enforceable.

## How Do You Assess Realty Taxes?

In *Zellers Inc. v. Orlando Corp.* (2002), 62 O.R. (3d) 220 (S.C.J., affirmed by C.A), the parties included a formula in the lease for apportioning realty taxes in the event the shopping centre was assessed *en bloc* or the Zellers' building was no longer assessed and taxed separately. On the basis of changes made to the *Assessment Act* in 1999 that no longer permitted the Ontario Property Association Corporation ("OPAC") to assess and tax tenants' premises as separate and independent tax lots for real property, school or local improvement purposes, the landlord attempted to rely on the "proportionate share" mechanism set out in the lease.

The tenant argued that because OPAC continued to publish "working papers" that indicated the value attributable to each individual unit and the tenant was entitled to access the working papers under a right-to-information statute, the value attributed to the Zellers' building in the working papers should be considered as a "separate assessment" and used as the basis of apportionment. The lower court, affirmed

by the Court of Appeal, noted that: (a) the *Assessment Act* permits the Minister to make regulations providing for separate assessments of a portion of property, but the tenant had not requested such a regulation, nor had it made an application for a separate or independent tax lot; (b) OPAC did not divulge the figures in its working papers voluntarily, and OPAC had clearly indicated that at least one reason for the reluctance to divulge its figures was that "this separate tenant assessment...was not established for the purpose of allocating realty taxes under lease agreements"; (c) the formula in the lease was designed specifically for the eventuality that the landlord's lands (including the buildings and tenant's premises) would be assessed as one lot; and (d) while what the tenant proposed might have been equitable, equity was not the criterion for construction of the lease provisions.

The court held that (i) at the time of entering into the lease, the parties had set out the procedure to deal

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## Commercial Leasing

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For more information, please contact any member of our Commercial Leasing Group:

**Stephen Posen**  
(416) 369-4103  
sposen@mindengross.com

**Michael S. Horowitz**  
(416) 369-4121  
mhorowitz@mindengross.com

**Marco A. Gammone**  
(416) 369-4126  
mgammone@mindengross.com

**Stephen J. Messinger**  
(416) 369-4147  
smessinger@mindengross.com

**Christina Kobi**  
(416) 369-4154  
ckobi@mindengross.com

**Mordecai L. Bobrowsky**  
(416) 369-4129  
mbobrowsky@mindengross.com

**C. Robyn Kestenberg**  
(416) 369-4313  
rkestenberg@mindengross.com

**Adam L. Perzow**  
(416) 369-4132  
aperzow@mindengross.com

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with the allocation of real property taxes, separate and apart from whatever system was adopted by the taxing authority, and (ii) since the shopping centre was now assessed *en bloc* and the Zellers' building was "no longer assessed and taxed separately," the landlord's position must prevail and the proportionate share allocation was deemed enforceable.

Applying *Zellers v. Orlando*, it appears that where leases provide for a specific formula to be applied whenever the leased premises are not separately assessed, courts will enforce such a formula unless separate assessments are levied sometime in the future.

While it may be argued that this case is authority for the proposition that an assessor's working papers do not constitute separate assessments, it should be noted that the lease specifically used the words "assessed and taxed as separate..." To avoid any attempts made by tenants to distinguish the *Zellers v. Orlando* case, prudent landlords should ensure that their lease forms allow separate assessments to prevail only if both separate assessments and tax bills are available for the leased premises.

The importance of "full occupancy gross-up" language was apparent in a recent case where a

landlord was ordered to account to a tenant for vacancy rebates of property taxes recouped from the taxing authority in *CT Securities Inc. v. Oxford Properties Canada Ltd.* [2003], 172 O.A.C. 193 (C.A.). The lease provided that in the absence of a separate property tax assessment for the leased premises, the tenant would pay its *pro rata* share of the property taxes for the entire building. As a result of the *Fair Municipal Finance Act, 1997*, the landlord was paying lower tax rates for the vacant spaces in the building, and the tenant wanted to share *pro rata* in the benefit of that reduction by applying the proportionate share calculation to the "net" taxes for the building after taking into account the vacancy rebates.

The court was of the view that a tenant who agrees to pay a percentage of real property taxes payable by the landlord with respect to the building in which the premises are situated would reasonably assume that such taxes would be calculated net of any refund or rebate of real property taxes paid to the landlord in respect of the building. The court held that if the landlord wished to charge proportionally, assuming that the building was fully occupied, then gross-up language should have been inserted in the lease.

*By: Stephen J. Messinger, C. Robyn Kestenberg and Christina Kobi  
Minden Gross Grafstein & Greenstein LLP*

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## Professional Notes

**Howard Black** spoke on "Estate Planning Essentials" at the 2004 Passport to Excellence Breakfast sponsored by the Osgoode Hall Law School/Schulich School of Business on September 22, 2004. In November, Howard was co-chair of the Osgoode Hall Law School Professional Development Program "Wills and Estates Workshop" and also presented a paper entitled: "Family Disputes: A Strategy to Limit the Potential for Estate Disputes Over Wealth Transfer" at the Strategy Institute Wealth Management Summit.

**Catherine Francis** spoke and presented a paper on "The Lawyer as Director: Are Higher Standards Expected?"; **Phillip G. Bevans** spoke and presented a paper on "Due Diligence Before Becoming a Director and During Directorship"; and **Hartley R. Nathan, Q.C.** chaired an Ontario Bar Association seminar on "How to Be a Diligent Director" held on November 30, 2004. Hartley also delivered a lecture on "Letters of Intent" for The Canadian Institute on September 30, 2004.

The Standing Senate Committee on Banking, Trade and Commerce, **Senator Jerry S. Grafstein, Q.C.**, Chair, tabled its interim report on charitable giving on December 15, 2004. The objective of the report is to "encourage ideas and to propose policies that will unlock greater amounts of personal wealth for charitable purposes, in a cost-effective way." The Committee will submit its final report by March 31, 2005. For more information, visit [www.senate-senat.ca/bancom.asp](http://www.senate-senat.ca/bancom.asp).

**Michael Goldberg's** comments on income splitting appeared in "Ottawa to get tougher on income splitting" in the *Globe and Mail*, September 17, 2004.

**Stephen J. Messinger** was a panelist discussing "Mastering Lease Negotiations" at the RealLeasing Conference held in Toronto on October 5, 2004. He was also a guest lecturer on "The Anatomy of a Lease" at the ICSC's "Law For Non-Lawyers" conference in Los Angeles, CA held on October 13, 2004.

**Reuben M. Rosenblatt, Q.C.** spoke to the Thunder Bay Law Association in Thunder Bay on "Cases That Scare Me" in "Reuben's Horror Show" on October 29, 2004. He also took part in the The Law Society of Upper Canada's "Six Minute Real Estate Lawyer" where he submitted and spoke on a paper titled "King Lear Should Have Had a Lawyer" about resulting and constructive trusts on November 17, 2004. On November 29, 2004, Reuben spoke to the Ontario Bar Association's Young Lawyers' Division on "rainmaking" and marketing.

**Daniel Sandler** spoke on tech-led development and the role of the state and federal governments in the United States in November 2004 at the National Association of Seed and Venture Fund Conference in Salt Lake City, UT. In December, he spoke at the Bombay Management Association's 10th Annual International Tax Planning Conference in Mumbai, India on controlled foreign company legislation and developing countries.

**Irvin Schein**, as one of two co-chairs of the Litigation Section of Meritas, co-organized and co-chaired a conference of the Meritas Litigation Section in conjunction with the American Corporate Counsel Association's (ACCA) annual meeting on October 25 and 26, 2004 in Chicago, IL. As a Meritas representative, Irvin also addressed the ACCA delegates at a Meritas-sponsored dinner.

**David T. Ullmann** was interviewed on ROB TV's *The Trading Desk with Pat Bolland* on September 21, 2004 about Stelco's attempt to extend their stay period for insolvency. On November 9, 2004, he was interviewed on ROB TV's *The Wrap with Amanda Lang* on the offer made by Russian steel giant, Severstal, to buy Stelco. David and **Ignatius Navascues** presented "SPAM and Canadian Law" at a seminar on Advertising and Marketing Law hosted by Insight Information Co. on November 29, 2004.