

Commercial Leasing Bulletin

Landlord Redevelopment Rights 2.0 – The Details Continue to Matter!

By: [Boris W. Zayachkowski](#) – [Commercial Leasing Group](#) and [Commercial Real Estate Group](#) –
Minden Gross LLP

June 26, 2023

As redevelopment plays an increasingly more significant role in the commercial real estate landscape across Canada, particularly in large urban centers, we continue to see increased judicial determination regarding a landlord's exercise of its demolition rights contained in a commercial lease where the landlord wishes to demolish, alter or redevelop its property.

The Meridian Case

In [our firm's bulletin dated August 2, 2022](#), our firm reviewed the recent case of [Meridian C.C. Intl. Inc. v. 2745206 Ontario Inc., 2022 ONCA 12](#) (heard January 4, 2022) where the Ontario Court of Appeal upheld a successful challenge by a tenant to the landlord's exercise of a demolition right in its favour contained in a commercial lease. In that case, the Landlord had the right to terminate the Lease on 180 days' notice if the Landlord desired to remodel or demolish any part of the premises "to the extent that renders continued possession by the tenant impracticable." The Landlord issued the appropriate notice of termination and then moved to the court for summary judgment seeking a court order enforcing the termination. While the motion judge found at first instance that the Landlord was entitled to rely on the demolition clause and properly terminated the Lease, the Ontario Court of Appeal held, perhaps somewhat surprisingly, that "the motion judge failed to determine the principal question that he had to decide, namely, the question of whether the proposed renovations rendered continued possession by the tenant impracticable." As a result, the dismissal of the action by the motion judge was set aside and the matter was referred back to the Superior Court for reconsideration.

The Meridian case was followed by the decision of the Ontario Court of Appeal in the case of [Bennett Law Chambers Professional Corporation v. Camcentre Holdings Inc., 2022 ONCA 658](#), released September 22, 2022. In the Camcentre case, the Ontario Court of Appeal upheld the finding of the Superior Court of Justice that a Notice of Termination of a commercial lease was insufficient to terminate the lease.

The Camcentre Case

Background

In the Camcentre case, the Tenant leased premises in a property comprising an office building located in the City of Mississauga. The Landlord purchased the property with the intention of developing the property as a condominium complex, set up a sales office and sold approximately 943 residential units with advance sales totaling more than \$557 million dollars.

The physical redevelopment of the property was scheduled to commence in April, 2020. However, before demolition could occur, asbestos removal was required, which process was to commence at the beginning of May, 2020 and take two months to complete. No permit was required to remove asbestos. However, in order to commence the asbestos removal, all tenants were to have vacated the building. By October 2019, the remaining tenants in the building were given 6 months' notice to vacate pursuant to the exercise of the Landlord's termination right contained in their respective leases, effective on or before April 30, 2020.

The relevant termination provision in the Lease reads as follows:

“15.05 TERMINATION ON DEMOLITION

If at any time the Landlord shall have decided to substantially redevelop or reconstruct the Project to the extent that vacant possession of the Leased Premises is necessary or expedient or to demolish the building of which the Leased Premises form a part, the Landlord may terminate this Lease by giving six months' notice in writing to the Tenant. ***Such termination shall not be effective unless at the end of the notice period the Landlord shall have obtained all requisite permits and authorizations for the commencement of such redevelopment, reconstruction or demolition.***” (emphasis added).

In reliance on Section 15.05 of the Lease, the Landlord delivered the following written notice to the Tenant on October 31, 2019 (the “Notice of Termination”):

“Please be advised that, pursuant to Section 15.05 of the Lease, the Landlord has decided to demolish the building of which the Leased Premises forms a part and is hereby exercising its right to terminate the Lease as set out herein.

The Landlord does hereby provide six (6) months written notice of the termination of the Lease and the Tenant is required to deliver vacant possession of the Leased Premises by April 30, 2020.”

By March 30, 2020, due to the COVID-19 state of emergency, the Tenant was no longer operating its business from the premises but was, instead, operating remotely. On or about April 24, 2020, the

Tenant made inquiries at the City of Mississauga and was advised that the Landlord had not obtained a permit to demolish or substantially renovate the building. On or about April 27, 2020, the Tenant requested an extension of the termination date in order to provide it with additional time to relocate its offices, which request was refused by the Landlord. The Landlord proceeded to exclude all tenants from the building on May 1, 2020 in order to commence the asbestos abatement. While no permit was required to commence the asbestos abatement, all authorizations necessary to commence the abatement had been obtained. The Tenant thereafter brought an application for a declaration that the Lease had not been validly terminated by the Notice of Termination because the Landlord had not obtained a demolition permit. The Landlord defended the Tenant's application and concurrently took the alternate position that subsequently delivered notices of default to the Tenant purporting to terminate the Lease for unrelated reasons had the effect of terminating the Lease.

The Court Decisions

The issue for the application judge was “whether the asbestos abatement, which did not require a permit or authorization, was the commencement of the demolition process.” The Landlord argued that the Notice of Termination was effective because the asbestos abatement phase was the commencement of the demolition process and that all permits required for the commencement of the asbestos abatement phase had been obtained. The Landlord further argued that it could not obtain a demolition permit until the asbestos abatement phase was complete although the evidence before the court was that the Landlord could have applied for a conditional demolition permit pending the completion of the asbestos abatement phase and elected not to do so.

The judge found in favour of the Tenant, holding that the commencement of the demolition process was a date later than the date on which the asbestos abatement phase commenced. In addition, the Landlord's failure to obtain a conditional demolition permit (notwithstanding how impractical such a step might have appeared to the Landlord under the circumstances) before delivering the Notice of Termination rendered the delivery of the Notice of Termination ineffective. Further, in reviewing the notice of termination provisions in the Lease by way of a flexible rather than a technical test as required by law, the judge found that the Landlord, having elected to reference “demolition” in the Notice of Termination as the reason for requiring vacant possession, was actually required to obtain a demolition permit in order to comply with the provisions of the Notice. Finally, the judge found that the Landlord's subsequent delivery of notices of default did not have the effect of terminating the Lease and, in fact, had the contrary effect of waiving the Notice of Termination issued under the Landlord's demolition provision.

On appeal, the majority of the Ontario Court of Appeal (in a 2 to 1 majority) upheld the decision of the lower court for the following reasons. The Landlord was not prevented from obtaining a conditional demolition permit by April 30, 2020 had it sought to do so, and, in failing to do so, the Landlord failed to satisfy the pre-conditions for the delivery of a valid Notice of Termination. In addition, based on the fairness over technicality analysis adopted by the application judge, while the

Tenant knew that redevelopment, including demolition, of the building was imminent, it was not unfair to require the Landlord to obtain a demolition permit when relying on a provision entitled “Termination on Demolition” to terminate the Lease.

The dissenting opinion of the Ontario Court of Appeal ruled that the Notice of Termination was effective and that the decision of the application judge was unreasonable. Demolition commenced upon the commencement of the asbestos abatement for which no permit was required. In addition, there was no question that the Landlord was genuinely invoking Section 15.05 of the Lease to terminate the Lease for reason of demolition and that there was no danger of misuse of the termination clause by the Landlord. The Landlord was not acting in bad faith by pretending to demolish a building in order to rid itself of tenants and the Tenant, in fact, admitted in court that it was aware of the Landlord’s redevelopment plans, including its intention to demolish the building. Further, the dissenting judge opined that, although not necessary to do so, she would have found that the notices of default delivered by the Landlord subsequent to the delivery of the Notice of Termination did not constitute a waiver of the original Notice of Termination and merely advanced an additional and different basis upon which to terminate the Lease not inconsistent with the delivery of the Notice of Termination.

Recommended Steps Going Forward

Landlords should review the provisions of their demolition clauses carefully to ensure that they are complying with all of the applicable pre-conditions to the delivery of a notice of termination, no matter how impractical or unreasonable they may seem at the time. In addition, the terminology used in a notice of termination should be internally consistent with the language in the relevant lease provision pursuant to which the notice of termination is being issued. Further, the delivery of a notice of termination for breach of a lease for unrelated reasons subsequent to the delivery of a Notice of Termination under a demolition provision may constitute a waiver of the Landlord’s reliance on such Notice of Termination.

Conclusion

Given the split decision at the Ontario Court of Appeal in the Camcentre case and the Ontario Court of Appeal’s decision to reverse the decision of the motion judge in the Meridian case, we expect to see continued challenges to the consistent application of relevant legal principles by a court when judicially reviewing a landlord’s exercise of its demolition rights contained in a commercial lease.

We will continue to provide updates on commercial leasing topics of interest. If you have any questions or would like to obtain legal advice on any leasing issues or commercial leasing litigation, please contact any lawyer in our [Commercial Leasing Group](#).



Commercial Leasing Group

Stephen Posen

Chair, Commercial Leasing Group
e: sposen@mindengross.com
p: (416) 369-4103

Catherine Francis

Partner, Litigation Group
e: cfrancis@mindengross.com
p: (416) 369-4137

Christina Kobi

Partner, Commercial Leasing Group
e: ckobi@mindengross.com
p: (416) 369-4154

Benjamin Radcliffe

Partner, Commercial Leasing Group
e: bradcliffe@mindengross.com
p: (416) 369-4112

Steven Birken

Partner, Commercial Leasing Group
e: sbirken@mindengross.com
p: (416) 369-4129

Alyssa Girardi

Associate, Commercial Leasing Group
e: agirardi@mindengross.com
p: (416) 369-4104

Michael Horowitz

Chair, Commercial Leasing Group
e: mhorowitz@mindengross.com
p: (416) 369-4121

Ian Cantor

Partner, Litigation Group
e: icantor@mindengross.com
p: (416) 369-4314

Boris Zayachkowski

Partner, Commercial Leasing Group
e: bzayachkowski@mindengross.com
p: (416) 369-4117

Melodie Eng

Partner, Commercial Leasing Group
e: meng@mindengross.com
p: (416) 369-4161

Leonidas (Lenny) Mylonopoulos

Associate, Commercial Leasing Group
e: lmylonopoulos@mindengross.com
p: (416) 369-4324

Benji Wiseman

Associate, Commercial Leasing Group
e: bwiseman@mindengross.com
p: (416) 369-4114

This article is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisors.