MINDEN GROSS LLP

Fall 2018

TOPICS:

Property Leasing – Recent Developments of Importance - Part 2
Page 1

Firm News
Page 9

Professional Notes
Page 10

PROPERTY LEASING Recent Developments of Importance

PART 2

Is a Landlord responsible to an abutting landowner for environmental contamination caused by a Tenant?

In an era when environmental contamination is causing increasing concern, the need to settle a landlord's responsibility for contamination caused by its tenant to neighboring lands becomes more and more apparent. In ***Sorbam Investments Ltd. v. Litwack***, the plaintiff landowner commenced an action for damages against

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an abutting landowner for the contamination of its land. It alleged that a former commercial tenant on the abutting lands operated a dry-cleaning business, which was the source of the contamination of the plaintiff's lands, and that as a result, the defendant was liable (1) in nuisance, (2) in negligence, or (3) pursuant to the *Environmental Protection Act* ("*EPA*"). The defendant brought a successful motion for summary judgment to dismiss the action.

In considering nuisance, the Court held that the defendant would be liable for the actions of its tenants only when the nuisance-causing behavior was plainly contemplated by the lease or that the nuisance was foreseeable as inherently part of the activity to be conducted on the lands. The plaintiff failed to provide sufficient evidence to satisfy the foregoing test (including no evidence of a lease), and accordingly, the Court dismissed this head of liability.

In considering negligence, the Court noted that a Landlord will rarely owe a duty of care to third parties for the negligence of a Tenant because imposing such an obligation would change the nature of the Landlord/Tenant relationship, as it would require the Landlord to play an active role in the activities on the premises in order to protect itself from liability. The plaintiff failed to demonstrate that the contamination was a foreseeable risk that the defendant knew or ought to have known. The Court also considered whether the defendant owed a duty of care after it discovered its own lands were contaminated, but again the plaintiff could not demonstrate sufficient evidence to prove foreseeability of harm. The Court dismissed the entire negligence head of liability.

Finally, having regard to the *EPA*, the Court stated that the right to compensation thereunder can only be claimed against the owner or the person having control of the pollutant immediately before the first discharge. The Court held that the defendant neither owned nor controlled any alleged pollutant immediately before its first discharge and accordingly dismissed this head of liability. The decision was upheld by the Ontario Court of Appeal

Tenant liable for slip and fall on sidewalk

Under section 3(1) of the *Occupiers' Liability Act* ("*OLA*"), an occupier of premises owes a duty to ensure the reasonable safety of persons on the premises. "Occupier" includes (a) a person who is in physical possession of premises, or (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises.

As the owner of the sidewalk, the municipality has the primary responsibility for its condition and owes a duty of care to persons who use the sidewalk. It is not, however, liable for personal injuries caused by snow or ice except in the case of gross negligence. Although occupiers of abutting properties are often obligated by municipal by-law to clear ice and snow on public sidewalks surrounding their property, the Court has held that that obligation alone is not sufficient to make them occupiers of the sidewalk within the meaning of the *OLA* (***Bogoroch v. Toronto (City)*, [1991] O.J. 1032 (Ont. Gen. Div.)**). What was necessary and at issue in ***MacKay v. Starbucks Corp.*** was whether the actions taken by Starbucks made them an Occupier under the *OLA*.

In *MacKay*, the plaintiff slipped and fell on a municipal sidewalk at the entrance to a patio in front of Starbucks. As part of its lease, Starbucks had exclusive use (and maintained) an outdoor patio abutting the municipal sidewalk. The patio was enclosed by a fence with a 3–4 foot opening, which effectively created a pathway from the store's side door through the patio and out over the sidewalk.

The trial judge held that by: (i) building the fence and patio; (ii) making a path over the sidewalk leading to its side door; (iii) monitoring the condition of the pathway; (iv) cleaning, salting, and sanding it; and (v) directing the movement of its customers in the manner it did, Starbucks assumed sufficient control over the sidewalk and was therefore an "occupier" (within the meaning of the *OLA*) of that part of the sidewalk adjoining the patio entrance and therefore owed the plaintiff a duty of care. Starbucks appealed the ruling but the Court of Appeal agreed with the trial judge and upheld the lower Court ruling.

Eligibility of certain operating costs

In ***Trenchard v. Westsea Construction Ltd.***, the Landlord refused the Tenant's request to disclose certain documents/information relating to Operating Expenses. The Tenant brought a petition and on the fourth day of the hearing, the parties reached an agreement. The Landlord sought to include the legal costs it incurred in responding to the Tenant's petition in its Operating Expenses which would be charged back to all tenants. The Tenant argued that those legal costs were not related to the covenants in the Lease and could not be charged back.

Operating Expenses was defined under the Lease as "the total amount paid or payable by the Lessor in the performance of its covenants herein contained …" and included a non-exhaustive list of examples, one of which was "legal and accounting charges … paid or payable in connection with the Building, the common property therein or the Lands." The Lease further provided that the Landlord was to exercise "prudent and reasonable discretion" in incurring Operating Expenses. In reading the contract as a whole, the Court stated that the Lease only authorized the Landlord to include in Operating Expenses the legal costs incurred in the performance of its covenants under the Lease. The Court held that the legal costs were not incurred in the performance of its covenants under the Lease, but rather, were incurred to interpret the terms of the Lease and accordingly, the Landlord could not include its legal costs in Operating Expenses.

In ***Shapes South Ltd. v. ADMNS Pembina Crossing Investment Corp.***, the Landlord renovated the façade of the shopping centre and sought to recover a portion of the cost of the renovations from the Tenant. The Court found that the Landlord had the right to undertake the façade renovation, but not necessarily the right to make the Tenants share in the cost. The requirement for the Tenants to pay was due to the Tenants' requirement to pay as additional rent their proportionate share of common area costs, which included costs for "alteration, restoration, repair, and replacement". The only caveats were that the costs be incurred by the Landlord "acting reasonably" and that the "costs of repairs to the structural components and elements" were specifically excluded. The Court ac-

knowledged that the façade project would not fall into the latter. However, the Lease provided that common area costs also specifically excluded (in addition to the foregoing) "the costs of structural maintenance, repair, reconstruction and/or replacement of the Common Areas or the Center or any part or parts thereof." The Court found this provision ambiguous and stated it was unclear whether "structural" was a modifier of all four nouns or just of "maintenance". Accordingly, the Court resorted to extrinsic evidence to determine the intention of the parties. It was on this basis that the Court dismissed this portion of the Landlord's motion, finding that the Landlord failed to produce sufficient evidence to satisfy the Court that the agreements permitted it to allocate a share of the costs of the façade renovation to the Tenants.

Relief from forfeiture

Where a Landlord has terminated a tenancy, an Ontario Court may grant a Tenant relief from forfeiture pursuant to subsection 20(1) of the *Commercial Tenancies Act* or section 98 of the *Courts of Justice Act*. In determining whether this relief should be granted, the Courts have begun to take a more liberal approach and to consider all the circumstances including: the history of the relationship, breaches of other covenants of the lease by the Tenant, the gravity of the breaches, the Tenant's conduct or misconduct, its good faith or bad faith or want of clean hands, whether the object of the right of forfeiture in the lease was essentially to secure the payment of money, and the disparity or disproportion between the value of the property forfeited and the damage caused by the breach. In ***2405416 Ontario Inc. v. 2405490 Ontario Ltd.***, the Tenant had an option to purchase provided there were no uncured defaults at the time of exercise. When the Tenant sought to exercise this option, the Landlord sought to terminate the Tenant's lease and purchase its business – a right the Landlord was entitled to in the event that base rent remained outstanding for over 45 days. The Court ultimately found that there was no default but noted that even if the Tenant was in default, it would have granted the Tenant relief from forfeiture given that the relationship between the parties was good until the Tenant decided to exercise the option to purchase. The alleged failure of the Tenant to seek written consent to the leasehold improvements was clearly mitigated by the fact that the Landlord was aware of and approved of them and the Landlord would have had to provide consent if formal consent had been sought.

The Court also granted relief from forfeiture in ***Velouté Catering Inc. v. Bernado***, where the Tenant failed to deliver its written notice of renewal within the requisite notice period. As in *2405416 Ontario Inc.*, the Landlord and Tenant were friendly toward one another. Although they had some informal discussion beforehand regarding renewal, the Tenant failed to exercise its option to renew in time because it was under a mistaken belief (perpetuated by the Landlord's misstatements) that the lease ended a year later. As soon as the Tenant realized its mistake that the notice period had expired, it took diligent steps to comply with the terms by attempting to arrange a meeting with the Landlord to discuss the renewal. In light of the foregoing and the fact that the Tenant had made significant improvements to the premises, which would be lost because it failed to provide timely written notice to renew, the Court granted the Tenant relief from forfeiture.

Is a right of first refusal triggered by a package sale?

There have been some case authorities which appear to suggest that rights of first refusal are not triggered by package sales that include assets other than the property subject to the right of first refusal. The case of ***Alim Holdings Ltd. v. Tom Howe Holdings Ltd.*** examines these authorities and clarifies the Tenant's rights under a right of first refusal ("ROFR") in the case of package sales. In *Alim*, the Vendor entered into a purchase and sale agreement with Alim Holdings ("Alim") to sell two parcels of land. Each parcel was subject to a lease containing an ROFR in favour of the lessee to purchase the land. The Agreement was conditional on Alim receiving notice that the lessees had not exercised their individual ROFRs. One of the lessees ("White Spot") claimed that it validly exercised its ROFR and was also entitled to purchase both parcels of land. Alim commenced an action against the Vendor claiming breach of its purchase agreement and White Spot commenced an action against the Vendor claiming that there was a binding agreement for the sale of both parcels to White Spot. Both actions were heard together.


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At issue was whether White Spot's ROFR allowed it to match an unsegregated offer for both parcels of land or whether it was limited to making an offer for only the one parcel of land which was leased to it ("Parcel A"). The summary trial judge dismissed Alim's action against the Vendor and granted specific performance to White Spot. The Court of Appeal affirmed the summary trial judge's decision.

The Court of Appeal judge stated, "Rights of first refusal are creatures of contract…The rights of the grantor and the grantee are determined by the wording of the right of first refusal…Each case turns on the wording of the right of first refusal, the circumstances of the offer made to purchase the property subject to the right of first refusal, and the exercise of the right by its holder." Further, the Court of Appeal held that a ROFR will be triggered by a package sale unless the wording of the ROFR is to the effect that it will only be triggered by an offer to purchase the property subject to the ROFR and no other assets.

The judge held that White Spot did not have the right to purchase both parcels of land through its ROFR. However, White Spot provided notice of its intent to exercise its ROFR and elected to purchase both parcels. Though the Court found that the two parcels could not be purchased under the ROFR, White Spot's letter nevertheless constituted a valid exercise of the Lessee's ROFR to purchase Parcel A. The Court further concluded that White Spot's right to exercise its ROFR was separate from its offer to purchase the other parcel ("Parcel B").

Consequently, White Spot's valid exercise of its ROFR made Alim's original offer null and void because the condition precedent was not satisfied. This, in turn, allowed White Spot to make an offer to purchase the other parcel of land which the Vendor could then, at its option, accept.

Termination

In ***M. Thompson Holdings Ltd. v. Haztech Fire and Safety Services***, the Landlord terminated the Lease as a result of a breach by the Tenant and subsequently began efforts to find alternate tenants. At issue was whether (1) the Landlord failed to mitigate its losses and (2) an award for future losses was appropriate on summary judgment. On the first issue, the Court found that the Tenant did not satisfy its obligation to establish the Landlord's failure to mitigate. On the second issue, the Court concluded that on summary judgement the Court may award pre-breach and post-breach (i.e., from breach

until the date the premises are re-let) losses, but cannot award future losses because future losses are a triable issue to be decided on a periodic basis that should be periodically returned to the Court to be assessed. The Tenant appealed the lower Court ruling. The Court of Appeal affirmed the Chamber judge's reasoning regarding failure to mitigate. However, the Court of Appeal found that the Chamber judge erred in the manner in which she granted the Landlord leave to go back to Court to assess future damages.

According to case law, because the Landlord terminated the lease, it cannot periodically assess its future losses but has to prove all its damages as of the date of adjudication. The Court of Appeal referred to *Highway Properties* as establishing that future losses are "to be assessed at the present value of the unpaid future rent for the unexpired period of the Lease less the actual rental value of the premises for that period."

The issue of future losses was a triable issue because there was no evidence at summary judgment as to its amount. The Court of Appeal allowed the appeal and referred the issue of future losses to trial.

Landlord's Remedies

The authors provided an update on ***Pickering Square Inc. v. Trillium College Inc.*** in our Summer 2017 article concerning limitation periods. As a reminder, the case involved a breach of the Tenant's continuous operating covenant which the Tenant argued was time-barred.

The Court of Appeal decision is important as it relates not only to limitation periods but also to the Landlord's remedies and how the remedy selected by the Landlord will affect the running of the applicable limitation period. Referring to *Highway Properties*, the Court stated that in the face of the Tenant's breach of its continuous operating covenant, the Landlord had an option to either cancel the lease or affirm it and require performance. If the Landlord (the innocent party) elected to cancel the lease, the parties are relieved from any further obligation, but the innocent party may sue for damages for breach of contract. If the innocent party elects to affirm the lease, the contract remains in force, the parties are required to perform their obligations, and the innocent party retains the right to sue for past and future breaches. Since the Landlord elected not to cancel the Lease in this case, both parties were required to perform their obligations under the Lease and each day that the Tenant failed to perform its obligations (*i.e.*, continuously operate its business), a new cause of action arose.

Special acknowledgement and thanks to Melodie Eng, Steven Birken, and Hayley Larkin (student-at-law) for their valuable assistance in preparing this article.

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Firm News

Minden Gross LLP welcomes **David Judson** and **Dan Doliner** to our Business Law Group, **Joanne Golden** and **Sheila Morris** to our Wills and Estates Group, **Caroline Elias** to our Tax Group, and **Marta O. Lewycky** to both our Commercial Leasing and Commercial Real Estate Groups. Welcome back to **Hayley Larkin** (Financial Services) and **Alexander Katznelson** (Business Law) who have returned as associates after articling with the firm from 2017 to 2018.

Congratulations to **Yosef Adler** on being named as a 2018 Lexpert Rising Star: Leading Lawyers Under 40. The Lexpert Rising Stars is a prestigious award that honours law firm and in-house lawyers who demonstrate leadership in the Canadian legal community.

The 2019 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 Messinger** (Commercial Leasing Law and Real Estate Law); **Hartley Nathan, QC** (Corporate Law); **Adam Perzow** (Commercial Leasing Law and Real Estate 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.

Minden Gross LLP has been awarded recertification in Meritas Law Firms Worldwide, the premier global alliance of independent law firms.

Congratulations to **Stephen Messinger** on receiving the Seymore Obront Award for Outstanding Service in Retail at the 2018 ICSC Canadian Convention. This award is presented to an individual who shows leadership in his or her particular area of expertise, offers a distinguished service displayed in the shopping centre industry, and is significantly involved in community service.

As recreational cannabis is now legal in Canada our informative *Canada Cannabis Legal* blog is proud to launch its new look! Check it out at canadacannabislegal.com

Professional Notes

Michael Goldberg hosted the first session of Tax Talk: Season 6 on Sept. 12. He presented "Family Business Succession & Equalization Planning" on Nov. 6 and "Planning For High Net Worth Clients in 2018" on Oct. 10. He published three articles in *Tax Notes* including "21-Year Tax Issues and the Non-Specialist Advisor – Part 3" in Aug. His article "The Passive Investment Rules and their Associates" was published in the Sept. edition of *Tax Topics*.

Samantha Prasad published four articles in *The Fund Library* including "More tax-loss selling tips and tactics" on Sept. 6. *The TaxLetter* published three of her articles including "Trusts - New Requirements" in Nov. She co-presented on "Estate Freezes 2018 and Beyond – A Case Study" at the Cidel Conference on Sept. 15.

Samantha Prasad and **Rachel Moses** mentored new lawyers at a Young Women in Law speed mentoring event on Sept. 26.

Joan Jung presented "Private Corporations Case Study: TOSI, AAII, NERDTOH and Other Letters of the Alphabet" at the Ontario Tax Conference of the Canadian Tax Foundation on Oct. 22. Her paper will be published on *TaxFind*.

Sheila Morris spoke on "Maintaining Civility in Estates Litigation" at an OBA seminar on Oct. 23. She published "New Reporting Requirements for Practitioners Providing Medical Assistance in Dying" in the Elder Law section of the OBA newsletter on Oct. 31. She posted "Interest and the Executors Year - Convenience is King" in Oct.

Rachel Goldman, **Joanne Golden**, **Howard Black**, and **Matthew Getzler** posted a wills and estates bulletin on "Multiple Wills - An Important Notification" on Oct. 25. **Howard** also presented to the Ontario Trial Lawyers Association at their 2018 Fall Conference on "Undue Influence Claims: What Are They, What's the Motivation for Them, and Are They Successful?" on Oct. 19.

Melissa Muskat posted "Property Tax Reminder: Important Deadline for Toronto Vacancy Rebate Applications!" in Aug. She volunteered as a mentor at the UJA's Mentorship Moments: A Law Firm Recruitment Prep Night on Aug. 27. She also presented "Understanding Property Assessment and Taxation in Ontario" at the OREA Commercial Emerge Conference on Nov. 15.

Tracy Kay was part a panelist on "Impacts of Cannabis in the Workplace: Are You Ready?" on Oct.10 for the Governance Professionals of Canada. She posted "Cannabis in the Workplace: Steps Employers can take to Maximize Employee and Organization Protection" in Oct.

Hartley R. Nathan, **QC**, and **Sasha Toten** published "Conflicts of Interest by Officers" in *The Directors' Briefing* for Aug 2018. They also posted "Due Diligence before Becoming a Director of a Cannabis Company" on *Canada Cannabis Legal* on Aug. 8.

Andrew Elbaz, **Sasha Toten**, **Alexander Katznelson**, and student-at-law **Darren Nguyen** posted "Will Canada Finally See a National Securities Regulator?" on Nov. 13. **Andrew**, **Alexander**, and **Darren** also posted "CSA Provides Further Guidance on Reporting Issuers' Disclosure Obligations in the Cannabis Industry" on Oct. 11.

Irvin Schein was quoted in "Backing out

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of a deal" in *Canadian Lawyer* in their Aug. edition. He published "The Latest on Representations and Warranties in Real Estate Contracts" on *irvinschein.com* on Aug. 17.

Hayley Larkin attended an OBA Insolvency Law Program on Oct. 2 and a IWIRC Ontario Network event on Oct. 3.

Andrew Elbaz, **Yosef Adler**, **Sasha Toten**, **Jessica Thrower**, and **Alexander Katznelson** acted for Enthusiast Gaming Holdings Inc. as it began trading on the TSX-V as EGLX on Oct. 10. Minden Gross LLP opened the TSX-V with Enthusiast on Oct. 26.

Stephen Messinger, **Stephen Posen**, **Christina Kobi**, **Boris Zayachkowski**, **Michael Horowitz**, **Steven Birken**, and **Marta Lewycky** attended the 2018 ICSC Canadian Convention from Oct. 1-3. **Christina** was on the program planning committee and Minden Gross LLP was a sponsor.

Stephen Posen and **Stephen Messinger** were recognized as Lexpert-Ranked Lawyers in the *2018 Lexpert Special Edition – Infrastructure*.

Michael Horowitz and **Steven Birken** posted "Incorporating Cannabis into a Permitted Use? Leasing Considerations for Commercial Landlords" on *Canada Cannabis Legal* on Jul. 26.

Whitney Abrams published seven articles on *Canada Cannabis Legal* including "Ontario Announces Proposed Legislation for Private Cannabis Retail" on Sept. 26. *CannaInvestor* published three of her articles including "Calculating "CST": Taxing Cannabis in Canada" in their Oct. edition. Her article "Familiarity with retail cannabis rules needed" was published in *Law Times* on Nov. 5 and they also quoted her on the cannabis retail plan opt-out option on Sept. 10. She spoke on a cannabis panel at the Meritas Canadian Regional Meeting on Sept. 7.

Whitney Abrams and **Ethan Eisen's** article on "The Coming Tide of Debt Financing in the Cannabis Industry" was published in *Cannainvestor*'s Sept. edition.

Brian Temins and **Jessica Thrower** acted on behalf of Lynx Equity Limited on its acquisition of Integrity Signs.

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