



As one would expect, the most prominent words in the word cloud were “Tenant”, “Landlord”, “Lease”, “Project” and “Premises.”

This paper is about the word “termination. If the word cloud was the Milky Way Galaxy, the word “termination” would be the Earth; a mere blip in a constellation of language dominated by covenants, restrictions and conditions.

The following are some simple statistics derived from our sample lease that illustrate the rarity of termination rights. In the lease document there were a total of 30 occurrences of the word “terminate”. Of those 30 occurrences, 18 were in respect of mutual rights of termination (e.g. holding over, damage and destruction, expropriation) and 6 were in respect of the landlord’s right to terminate (e.g. right to recapture on tenant going dark, improper or prohibited transfers or assignments, environmental breaches, constructions breaches and Events of Default).

That leaves 6 references involving the unilateral right of the tenant to terminate, which relate to three circumstances: delay of possession, co-tenancy and a negotiated one-time right to terminate after a given period of time.

Assume in this lease the tenant was a major tenant with a lot of negotiating strength. It is very common for tenants to have no unilateral rights to terminate, few mutual rights to terminate and very little leverage to delete the landlord’s rights of termination. This is true because: (i) landlords typically hold the upper hand when a tenant is negotiating a lease for coveted space; and (ii) the inclusion of a unilateral termination right in favour of the tenant has definite financial consequences to the landlord when it finances or sells its property. Termination rights are rare for a reason.

### **Lessons In Drafting Termination Rights for Tenants**

Experience has taught us the following lessons when negotiating and drafting termination rights:

- (a) “Terminate” is one of the seven words a landlord does not want to hear on the first day of a lease negotiation. The others are “abatement”, “set-off”, “allowance”, “reimbursement”, “self-help” and “the-landlord-shall”. In all likelihood, to get any of these words into the lease you should have negotiated it into the offer to lease in the first place. Thereafter, to improve the prominence of one of those words you are going to give up the prominence of another.
- (b) Well drafted termination clauses are more likely to result in the avoidance of conflict and lead to negotiated resolutions. If the clause is well drafted and easy to understand, the parties are less likely to test it and it will include negotiated limits and pre-conditions on the right to terminate.
- (c) Poorly drafted termination clauses lead to conflict. Parties get their hopes up in the event they can put a self-serving spin on the language. Also, if particular circumstances are not anticipated and addressed in the drafting, uncertainty will work against the party seeking to rely on the termination right.
- (d) Resort to the Courts is an uncertain process and can result in unintended consequences and a great deal of expense. However, the finality of termination rights often leads parties to believe that they have no alternative but to seek Court intervention in order to obtain relief (i.e. relief from forfeiture or a favourable Court interpretation) or to delay the inevitable exercise of the termination right. Landlords will often attempt to use the Court process as a means of deterring the exercise of termination rights by requiring that termination be contingent on a judicial predetermination that the landlord is in fact in breach.

### **What to Keep in Mind**

Express written remedies such as a right to terminate are usually the final consideration in the tenant’s evaluation of the opportunity and the negotiation of the lease deal. Often, the issue of remedies is dealt with far too late in the negotiation and, if such remedies are negotiated, the parties do not come away from the negotiation with a sufficient understanding of which remedies are available in which circumstances. Further, in a graduated series of counter-proposals offered by the landlord in response to a tenant’s proposed termination right, what is ultimately agreed upon may seem like a reasonable compromise, but in practical terms provides very little protection to the tenant.

In order to avoid the foregoing issues and ensure the termination rights you negotiate into the lease are clear and responsive to the tenant’s concerns, consider adopting the following approaches:

#### *i. Identify Assumptions*

When prospective tenants draft a pro-forma business case for a lease deal, they should identify their assumptions. Next, the tenant and its advisers should ask themselves: “what is the appropriate remedy if those assumptions are not correct?”

For example, a landlord may propose that a tenant pay a fixed rate of \$X per year in net rent for the premises rather than a rate per square foot. The tenant agrees to this proposal based on the assumption that the estimated area of the premises set out in the offer to lease is correct. But what if the offer states that the premise is approximately 8,000 square feet and the tenant

later discovers that it is only 6,500? If the premises are unsuitable as a result, is a reduction in rent sufficient? Or, as another example, consider a situation where the landlord commits to deliver the premises with all of the landlord's work completed by the possession date. What if it does not? What if the tenant has to leave its current premises and needs continuity for its office, warehouse or retail use? What if force majeure intervenes and the possession date becomes uncertain or delayed for a significant period of time? Does the tenant want to wait or could it (must it) find another location?

#### *ii. Obtain the Appropriate Remedy*

Don't just negotiate a remedy to address a general set of circumstances. Tailor the appropriate remedy to fit a particular circumstance or event. Sometimes a landlord will give a tenant a right of termination but such right is inappropriate in the circumstances. For example, it is common for a retail lease to provide the landlord with the right to relocate the premises within the shopping centre or building. A tenant will sometimes be able to negotiate the right to terminate if it is dissatisfied with the new location. However, tenants should also ensure that this termination right is conditioned on the landlord finding 'comparable premises' for the tenant (which will include a list of indices by which to assess whether the premises are comparable, such as visibility, size and traffic flow). This enables the tenant to avoid a situation where it is forced into terminating the lease due to relocation.

#### *iii. Combine Rights with Multiple Remedies*

Consider a combination of remedies over time. Co-tenancy rights are one such example. Co-tenancy rights enable a tenant to tie its obligation to lease the premises to the tenancy of other tenants that draw customers to the shopping centre or building<sup>iii</sup>. Such a right ensures that the tenant's expectations as to the economic viability of the premises are met and holds the landlord to account for its failure to achieve a certain minimum occupancy threshold.

Co-tenancy rights are typically drafted in the form of "Opening Co-tenancy" and "On-going Co-tenancy" clauses. A third type of co-tenancy clause known as a "Lease-Up Co-tenancy" may also be negotiated, which requires the landlord to confirm that it has signed lease agreements with the minimum number of tenants required to satisfy an Opening Co-tenancy requirement. Failure of the landlord to achieve the minimum occupancy thresholds set out in each of the foregoing co-tenancy clauses can entitle the tenant to terminate the lease, among other things.

A termination right does not make the most sense if the tenant will have already spent money on its leasehold improvements when the time comes to evaluate the co-tenancy threshold (on opening for instance). By that stage, the tenant's only concern is rent. The tenant agreed to pay a certain rent for a certain occupancy threshold and if that threshold is lower, rent should be lower. If the co-tenancy default continues for a period of time then it is arguable that the tenant did not get the deal that it bargained for. Accordingly, the tenant should be able to exercise one or more other remedies before the termination right kicks in. For example:

- (a) the rent can be reduced or switched to a percentage of sales or a gross rent;
- (b) the tenant can elect to go dark (close the premises) and pay no rent or some reduced rent; or
- (c) the tenant can terminate the lease.

#### *iv. Attach Conditions to Right of Termination*

Protect the tenant's assumptions with conditions in the offer to lease and provide for sufficient time to complete due diligence. By doing so, you may be able to avoid having to include termination rights in the lease document. This is a better approach for the landlord, particularly with respect to those conditions which require verification on or before the tenant takes possession of the premises, such as zoning, permits and environmental due diligence.

A landlord may compromise and permit the tenant to insert conditions in the offer to lease which are for the sole benefit of the tenant. This enables the tenant to do its due diligence over an agreed period of time and either waive the condition or terminate the agreement before the landlord and tenant have incurred the additional expense of negotiating a lease and beginning the build-out of the premises.

### **Rights, Assumptions and Expectations Worth Protecting with Termination Clauses**

The following is a list of assumptions and business terms that tenants should consider protecting with termination clauses:

#### *i. Rights, Assumptions and Expectations at the Pre-Possession Stage:*

- (a) The area and frontage of the premises;
- (b) The payment of a tenant allowance or inducement;
- (c) Signage rights and landlord's representations regarding availability of signage;
- (d) Representations regarding the existing site plan and site plan agreement;

- (e) Representations regarding the zoning of the premises and/or the building in which the premises are located;
- (f) Parking facilities serving the premises and/or the building in which the premises are located;
- (g) The availability of Building permits;
- (h) Municipal licenses and approvals (i.e. signage, liquor license, drive-thru permits, etc.).

*ii. Rights, Assumptions and Expectations at the Post-Possession Stage:*

- (a) Co-Tenancy rights;
- (b) Damage and destruction;
- (c) Failure to meet sales levels;
- (d) Loss of funding (i.e. if the tenant is a government agency or non-profit enterprise);
- (e) Exclusive use covenants;
- (f) No-build rights and rights of visibility and access to the premises;
- (g) landlord's maintenance and repair obligations;
- (h) Demolition and re-development by the landlord;
- (i) Environmental contamination;
- (j) Relocation of the premises;
- (k) Rights vis-à-vis a mortgagee in possession.

Although an in-depth discussion of each of the above-noted rights, and the types of clauses used to protect such rights, is beyond the scope of this paper, the following case example will highlight the importance of identifying the tenant's assumptions and negotiating termination clauses into the lease to ensure such assumptions are protected.

In *Grant Park Shopping Centre v. San Francisco Gifts Ltd.*<sup>iv</sup>, a long-term tenant of a shopping centre had entered into negotiations with the landlord to enter into a new five-year lease. The tenant's business involved the sale of novelties and seasonal gifts and was heavily reliant on impulse purchases derived from the predestination traffic generated by the anchor tenant, Wal-Mart. However, prior to entering into the new lease, the landlord had advised all tenants of the shopping centre that Wal-Mart would be leaving the mall. Notwithstanding this information, the tenant executed the lease without negotiating co-tenancy rights. Following two years of poor sales performance, the tenant abandoned the premises without notice to the landlord. The landlord commenced an action for breach of contract.

In its defence, the tenant argued, *inter alia*, that there was an implied term in the lease that Wal-Mart would continue to operate in the mall. On this basis, the tenant argued that it was entitled to terminate its lease. The Court rejected the tenant's argument, finding that:

To infer that a written agreement contains a term not included in the words of the agreement requires a reasonable foundation for interpreting this to be the intention of the parties. The usual source for determining whether that intention exists is the content of the agreement itself.

After due consideration of the language used in the present lease, and the absence of any reference whatsoever in the lease to Wal-Mart or of consequences to follow if Wal-Mart moved out of the mall, I am satisfied it is not possible to discern any justification for inclusion of the alleged implied term as a part of the lease<sup>v</sup>.

Accordingly, the Court permitted the landlord to recover the unpaid rent and associated costs payable under the lease, less an amount representing the landlord's failure to mitigate during the last year of the term.

### **How to Draft Termination Rights**

The drafting of a right of termination does not always get the attention it deserves. It is a complicated thing to draft at the time when expediency and speed are encouraged to get the deal done. Litigation lawyers will have months to scrutinize your drafting in the event of a dispute. Accordingly, the tenant's solicitor should always analyze and review the proposed termination clause from the perspective that it is being exercised (and contested) on the date it is drafted.

The landlord probably does not want the termination right to be exercised by the tenant. It can have consequences for, among other things, the value of the property, the mortgages on the property, the financial success of the shopping centre or building and other tenants' leases. If it is exercised, the landlord will want the triggering events to be carefully limited and conditioned.

At some point, when a notice of termination is given, that notice will be reviewed for compliance with the terms of the lease; claims will be made that the notice is out of time, improperly delivered or defective in its content. You can expect that the landlord will canvas with their legal counsel the possibility of seeking relief from forfeiture from the Courts or a declaration that the tenant has not complied with the conditions for exercising the termination right (i.e. it was not exercised before the agreed deadline or has been conducted incorrectly).<sup>vi</sup>

Given the above, the following drafting techniques and approaches may be employed to ensure your termination clause survives scrutiny by the Courts and the landlord:

- i. Is the clause easy to understand? Make the language simple and use examples if there is a math calculation involved. Use defined terms consistently and appropriately.
- ii. In the case where the termination right arises by virtue of a default, add an obligation to negotiate at the business level first.
- iii. Make it clear that the remedy is not the sole remedy so that the tenant may be able to choose damages or specific performance.
- iv. What is the trigger that gives rise to the right to terminate? Draft any preconditions to exercising the termination right clearly with objective thresholds.
- v. If the trigger is discretionary, make it clear that it is at the tenant's sole option and exercised at its sole discretion without regard to a reasonability standard. Where termination rights are concerned, "reasonable" is a synonym for "litigation".
- vi. Reconcile the timing of notice with the general notice requirements under the lease. How many days' notice do you have to give? What is the last day to exercise the right? When is the notice effective? Draft the particular dates into the clause if they are capable of being determined.
- vii. Draft language into the lease to deal with what happens after the notice of termination is given. For example, deal with the date of delivery of the premises, adjustments of rent, restoration of the premises, reimbursement of tenant allowances, removal of leasehold improvements and trade fixtures. These factors may influence whether to exercise the notice in the first place and may inform issues such as the length of notice needed or a need to revisit those clauses. A significant financial obligation to make a substantial restoration of the premises could prevent you from taking advantage of your termination right.
- viii. Review the case law respecting termination rights for some tips and traps that you can try to address.

### **When to Rely On "Silent Remedies"**

Many tenants assume they have a right of termination even if it is not expressly provided for in the Lease. There are very few situations where that is true. However, being silent on the remedy is sometimes easier than negotiating a termination right for a circumstance that may never occur. In such cases, the following common law doctrines may serve as additional avenues through which a tenant may seek relief from a lease.

#### *i. Fundamental Breach*

Fundamental breach is an oft-cited ground upon which a tenant may rely in order to terminate a lease without an express right to do so. In order for a breach to qualify as "fundamental", the breach must deprive the innocent party of 'substantially the whole benefit of the contract'<sup>vii</sup>. In *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*<sup>viii</sup>, the Ontario Court of Appeal identified five factors for judicial consideration when determining whether a fundamental breach has occurred:

- (a) the ratio of the party's obligations not performed to that party's obligations as a whole;
- (b) the seriousness of the breach to the innocent party;
- (c) the likelihood of repetition of such breach;
- (d) the seriousness of the consequences of the breach; and
- (e) the relationship of the part of the obligation performed to the whole obligation.<sup>ix</sup>

The determination of whether a landlord has committed a fundamental breach will depend upon the terms of the lease and the particular circumstances of the tenant. Due to the subjective nature of the test for fundamental breach, the Courts have accepted, and rejected, fundamental breach arguments by tenants in a wide-range of circumstances.<sup>x</sup> Accordingly, tenants should be weary when relying on fundamental breach as a basis for termination of lease. If the tenant is ultimately unsuccessful in establishing that it is denied of substantially the whole benefit of the contract, the tenant must perform its obligations and will only be able to sue the landlord for damages.<sup>xi</sup>

In the right circumstances, however, fundamental breach can serve as an effective means of obtaining relief from a lease. A clear example is found in the recent decision of *1723718 Ontario Corp. v. MacLeod*.<sup>xii</sup> In that case, the tenant, unable to operate his medical practice due to the disrepair of the building, found replacement premises and notified the landlord that it was terminating the lease. In response, the landlord sued for breach of contract, claiming unpaid rent for the balance of the lease. In turn, the tenant counter-claimed for fundamental breach.



The Court dismissed the landlord's action and allowed the tenant's counter-claim for fundamental breach. Heeney J. held that, under the circumstances, the landlord's breach of the covenant to maintain and repair the premises amounted to a fundamental breach entitling the tenant to terminate the lease:

This breach was fundamental in nature because it deprived Dr. MacLeod of substantially the whole benefit of the lease. The premises could no longer be used by him as a medical office, and would continue to be unusable until the boiler was replaced (which never did happen) or until late spring, when the outside temperature would have warmed up to a sufficient point where the lack of a functioning boiler no longer mattered. The very purpose of the lease was undermined in a fundamental way.<sup>xiii</sup>

## ii. Negligent Misrepresentation

In the absence of an express right of termination, a tenant may also assert a claim of negligent misrepresentation to obtain relief from a lease. If a tenant establishes that it was induced into signing its lease by the landlord's negligent misrepresentations, it may be permitted to abandon the lease without paying damages to the landlord.

To establish negligent misrepresentation, the following five elements must be proven:

- (a) The representor must owe the representee a duty of care;
- (b) The representor must have made a representation that was untrue, inaccurate or misleading;
- (c) The representor must have acted negligently in making the representation;
- (d) The representee must have relied in a reasonable manner on the negligent representation; and
- (e) The reliance must have been detrimental to the representee in the sense that damages resulted.<sup>xiv</sup>

In addition, in order for a statement to constitute negligent misrepresentation, it must be a factual statement.<sup>xv</sup> Statements of opinion or intention will not give rise to a claim of negligent misrepresentation.

The case of *Campbell River Common Shopping Centre Ltd. v Nuszdorfer*<sup>xvi</sup> illustrates the type of scenario in which a tenant may claim negligent misrepresentation in order to terminate its lease without incurring damages.<sup>xvii</sup> In that case, the Court applied the five-part test for negligent misrepresentation to the facts and found that the landlord's representations regarding the impending arrival of certain anchor tenants were made to induce the tenants to relocate their business to the landlord's mall and that it was reasonable for the tenants to rely on these representations.<sup>xviii</sup> The Court further held that a duty of care existed between the landlord and the tenant in the circumstances.<sup>xix</sup> Accordingly, the Court concluded that the landlord's statements were negligently made.<sup>xx</sup>

In its defence, the landlord argued that the "entire agreement clause" in the lease precluded the tenant from relying on any of the landlord's prior representations that were not otherwise incorporated into the lease. The Court rejected this argument, citing the well-established principle that the tort of negligent misrepresentation is not dependent on contractual terms such as the entire agreement clause and is a wholly separate cause of action<sup>xxi</sup>. Further, the Court noted that an entire agreement clause that does not specifically exclude claims for negligent misrepresentation will not operate to exclude liability for such claims<sup>xxii</sup>. Accordingly, the Court dismissed the landlord's claims against the tenant and granted the tenant damages of \$25,583, including \$10,000 for negligent misrepresentation.

## Consider the Consequences of Wrongful Termination

When determining whether to terminate a lease without an express contractual right to do so, a tenant should be mindful of the risks involved and the potential costs of an adverse finding by the Courts.<sup>xxiii</sup> As noted above, claims of fundamental breach and negligent misrepresentation are granted on a highly subjective and fact-specific basis. Accordingly, tenants should be advised to weigh the costs of honouring the lease against the legal consequences of being found to have wrongfully terminated the lease.

Two recent examples of unsuccessful claims for fundamental breach and negligent misrepresentation will serve to highlight the high costs of being wrong when asserting a right to terminate a lease.

### i. Fundamental Breach

In *Spirent, supra*, Spirent Communications of Ottawa Limited (the "sub-landlord"), leased the majority of an office building that was under construction. Spirent entered into an offer to sublease a portion of the building to Quake Technologies (Canada) Inc. ("the sub-tenant"). Two months prior to the specified occupancy date, the sub-landlord notified the sub-tenant that, due to construction delays caused by weather and construction mistakes, the occupancy date would be delayed for six weeks. Shortly thereafter, the sub-tenant notified the sub-landlord that it would not proceed with the sublease agreement.

Although the trial judge agreed with the sub-tenant that such delay amounted to a fundamental breach, the Ontario Court of Appeal reached a different conclusion. Applying the five-factor test for fundamental breach, the Court of Appeal concluded that a delay in occupancy of approximately six weeks on a three year lease was not sufficiently significant to amount to deprivation of "substantially the whole benefit of the contract" and that the trial judge erred in finding that such delay gave rise to a fundamental breach.<sup>xxiv</sup>

Having found no fundamental breach, the Court of Appeal concluded that the sub-tenant wrongfully repudiated the contract. The landlord made an election to treat the sublease as at an end and as a result the Court of Appeal awarded the sub-landlord damages of more than \$1 million.

## *ii. Negligent Misrepresentation*

The recent case of *Dufferin Street Professional Centre v. Medrehab Group Inc.*, *supra*, illustrates the difficulty in establishing negligent misrepresentation in order to obtain relief from a lease. In *Dufferin Street*, the tenant entered into a two-and-a-half year lease to operate a physiotherapy clinic. Shortly after the first year of the term, the tenant prematurely vacated the premises and stopped paying rent.

In applying the five-factor test for negligent misrepresentation noted above, the Court stated that a duty of care would only exist if the landlord ought to have reasonably foreseen that the tenant would rely on its representations, and reliance by the tenant was, in the circumstances, reasonable.<sup>xxv</sup> The Court also noted that a duty of care would not normally arise in the context of a contractual negotiation.<sup>xxvi</sup>

The Court found that the alleged misrepresentations were made before any contractual negotiations between the parties took place. In the Court's view, it was the tenant's responsibility to exercise due diligence in its negotiations with the landlord and that the landlord did not owe a duty of care to the tenant. Further, the Court found that even if the landlord owed the tenant a duty of care, it did not make any representations to the tenant that were untrue, inaccurate, or misleading, nor did the landlord act negligently in making any representations to the tenant. The fact that the landlord indicated to the tenant that it would have access to a pool of potential patients could not be construed as an assurance or a guarantee.

The Court also noted that the tenant was an experienced business person who had negotiated a number of concessions from the landlord, such as an exclusive, leasehold improvement allowance and rent free period. The Court found that there was no mention in the lease of the types of tenants visiting the building or any future referrals that the tenant expected to receive from the doctors who were supposed to move into the building.

Accordingly, the Court concluded that the tenant was not coerced or induced into entering into the lease and ordered the tenant to pay to the landlord the outstanding amounts due under the lease.

## **Other Factors Affecting Termination Rights**

### *i. Business Considerations*

There are other business considerations to take into account when making the decision whether or not to terminate the lease. Such considerations include closure costs, staff severance issue, and issues of handling inventory.

### *ii. Other Lease Considerations*

The tenant should review its obligations under the restoration provisions of its lease as well as the terms of paying back any inducements or allowances.

### *iii. Accounting and Tax implications*

We offer no advice to a prospective tenant on these points other than to consultant an accountant. If a lease is terminated before the end of the term, the unamortized portion of the leasehold improvements can be written off in some circumstances. This hits the bottom line for that year from an accounting point of view and from a tax point of view.

### *iv. CCAA Orders*

A tenant's ability to exercise its negotiated rights, such as co-tenancy remedies, may be prevented by a "stay order" made by a Court under the Companies' Creditors Arrangement Act (the "CCAA") as part of a Plan of Compromise or Arrangement of another tenant in the same centre. The typical CCAA Court order involving the insolvency of a retail entity [such as the recent order of Justice Morowitz dated January 15, 2015 dealing with the Target Canada stores] provides for the following:

18. THIS COURT ORDERS that during the Stay Period, no Person having any agreements or arrangements with the owners, operators, managers or landlords of commercial shopping centres or other commercial properties (including retail, office and industrial (warehouse) properties) in which there is located a store, office or warehouse owned or operated by the Target Canada Entities shall take any Proceedings or exercise any rights or remedies under such agreements or arrangements that may arise upon and/or as a result of the making of this Order, the declarations of insolvency by the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to this Order and, without limiting the generality of the foregoing, no Person shall terminate, accelerate, suspend, modify, determine or cancel any such arrangement or agreement or be entitled to exercise any rights or remedies in connection therewith.

## **v. Good Faith**

Parties to a contract are required to act in good faith.<sup>xxvii</sup>

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<sup>ii</sup>A word cloud is a visual representation of text data. The more prominent a word in a document the larger it appears in the word cloud.

<sup>iii</sup>Susan D. Rosen, "Building in Lease Protections for the Landlord and the Tenant in Anticipation of Changes in the Marketplace" (Paper delivered at Commercial Leasing Essentials: Leasing in a Time of Economic Change, 24 September 2008), at 5-5.

<sup>iv</sup>[2004] M.J. No. 176 [hereinafter *Grant Park*].

<sup>v</sup>*Ibid.* at paras 59-60.

<sup>vi</sup>See *Ontario Pension Board v. H&M Hennes & Mauritz Inc.* [2013] ONCA 352.

<sup>vii</sup>Richard Olson, *A Commercial Tenancy Handbook*, (Toronto: Carswell, 2014) at 6-7. See also *Hunter Engineering Co. Inc. v. Syncrude Canada Ltd.* [1989] 1 S.C.R. 426.

<sup>viii</sup>[2008] ONCA 92 [hereinafter *Spirent*].

<sup>ix</sup>*Ibid.* at para 36.

<sup>x</sup>Daniel S. Parlow, "Ending Commercial Tenancies", at 2, online: Kornfeld LLP (2014) at 2. <<http://www.kornfeldllp.com/wp-content/uploads/EndingCommercialTenancies.pdf>>.

<sup>xi</sup>Robert V. Wickett, "Problems Encountered by Tenants: Occupation, Use, and Enjoyment of Premises", *Commercial Leasing Disputes* (CLE Materials: 2007) online: <[http://www.mackenziefujisawa.com/News\\_Articles/Robert\\_Wickett-Commercial\\_Leasing\\_Disputes.pdf](http://www.mackenziefujisawa.com/News_Articles/Robert_Wickett-Commercial_Leasing_Disputes.pdf)> at 10.

<sup>xii</sup>1723718 *Ontario Corp. v. MacLeod*, 2010 ONSC 6665.

<sup>xiii</sup>*Ibid.* at para 100.

<sup>xiv</sup>*Queen v. Cognos* [1993] 1 S.C.R. 87.

<sup>xv</sup>*Dufferin Street Professional Centre v. Medrehab Group Inc.* [2013] O.J. No. 485 at para 22 [hereinafter *Dufferin Street*].

<sup>xvi</sup>2013 BCSC 141.

<sup>xvii</sup>See also *Country Style Food Services Inc. v. 1304271 Ontario Ltd.* [2005] O.J. No. 2730 for another example of the successful use of negligent misrepresentation to obtain relief from a lease. For a summary and discussion of this case we refer you to Dennis Tobin, "Site Plans and Site Lines - What to look for in Site Plans," in *The Six Minute Commercial Leasing Lawyer 2008* (LSUC: 2008) at 17-20.

<sup>xviii</sup>*Supra* note xv at para 40.

<sup>xix</sup>*Ibid.*

<sup>xx</sup>*Ibid.*

<sup>xxi</sup>*Ibid.* at para 30.

<sup>xxii</sup>*Ibid.*

<sup>xxiii</sup>Tenants should also be advised of the potential cost of wrongfully exercising an express right of termination. In the past, Courts have granted equitable relief to landlords from the wrongful termination of a lease by tenants. See *Altius Centre Ltd. v. BMP Energy Systems Ltd.* [1996] A.J. No. 1177 (landlord granted relief from forfeiture after tenant terminated the lease over the late payment of a cash bonus that tenant was entitled to under the lease).

<sup>xxiv</sup>*Supra* note viii at para 45.

<sup>xxv</sup>*Supra* note xv at para 19.

<sup>xxvi</sup>*Ibid.* at para 21

<sup>xxvii</sup>See *Bhasin v. Hrynew* [2014] SCC 71.



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