ANCHORS AWAY – WHERE DID ALL THE BIG BOXES GO?
THE IMPLICATIONS OF CO-TENANCY CLAUSES

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Introduction

Shopping Centres have traditionally been built around the concept that there is safety in numbers and that stores perform best in the presence of complementary retail uses with the cornerstone being one or more "anchor" tenants, which draw customers to the shopping centre thereby increasing revenues for both landlord and tenants. There are those that argue that a tenant's entry into a shopping centre is a marketplace risk and not a landlord risk and there should be no co-tenancy protection at all. They argue that the tenants can sufficiently assess the centre, surrounding demographics and the proposed tenant space in the centre prior to negotiating a lease. Nevertheless, landlords market their retail space based on the real or expected collection of tenants and retail uses in the development, and tenants enter into leases based on these representations. Co-tenancy provisions help protect the expectations of the tenant by ensuring that the shopping centre in which they find themselves remains consistent with the one originally marketed to them by the landlord.

Tenants want co-tenancy provisions, which may relieve them from being obligated to open, pay full rent or be bound by the lease in the event that the performance of a centre is not what the landlord promised or the tenant is anticipating. Landlords don't want co-tenancy provisions because they can significantly impact a centre's income stream and viability for reasons that are arguably outside of the landlord's control.

Co-tenancy provisions are typically tied to the presence of certain "key" tenants so-called because they are viewed by the tenant seeking co-tenancy as "key" to the success of the centre. Co-tenancy provisions can also require an occupancy threshold based on a certain percentage of tenants or a percentage of the leasable area in a shopping centre being open and operating. Co-tenancy provisions can take various forms, but in their simplest form typically allow a tenant to (a) delay possession, (b) obtain a reduction in rent, and/or (c) terminate the lease if a key tenant or a certain number of tenants leave or fail to occupy the retail development.[2]

In recent years, co-tenancy provisions can also be viewed as a sort of quasi-insurance scheme against the changing landscape of the retail industry. The combined forces of globalization and technology have ushered in new economic realities that have forced retailers to increasingly consolidate their physical locations,[3] which in turn can jeopardize the ongoing performance of

[1] This paper was first published for the 2016 ICSC Canadian Law conference and has been updated by the author.
[2] See generally Ben Viloski, "Avoiding big-box blocks**"** (2002) 31 Shopping Center World at 56; Randall Airst, Ready or Not: Real Estate Managers Need to Prepare for FAS 13 Amendments (2010) 6 Journal of Property Management at 45; Howard Jeruchimowitz, *Enforceability of Cotenancy Clauses: Remedy or Penalty?* (May 27, 2015) online: American Bar Association <www.americanbar.org>.
[3] Emanuel Halper "Supermarket Use and Exclusive Clauses, Part Two—The Industry Gains a Foothold" (2005) Real Property, Probate and Trust Journal at 262 [*Halper*].

neighboring tenants if an anchor tenant departs.[4] In 2015 alone, Loblaw announced plans to close 52 unprofitable stores[5] and Target wound up its operations in Canada.[6] Accordingly, as the commercial landscape for retailers in Canada continues to change and develop, co-tenancy provisions will continue to be an important point of negotiation for both landlords and tenants.

Types of Co-Tenancies

The ability of a tenant to negotiate the inclusion of co-tenancy provisions in its lease depends on a variety of factors, including the tenant's relative bargaining power and the nature, maturity and expected or current tenant mix of the retail development. Where successful, co-tenancy provisions usually take one or more of the following forms:

1. *Initial Co-tenancy*—An initial co-tenancy grants a tenant the right to refrain from taking possession of the leased premises and/or opening for business until a designated tenant or tenants are open and operating, the shopping center has achieved a certain level of occupancy and/or construction or certain phases of construction of the retail development have been completed. For example, a tenant's lease may require that one or more named co-tenants take possession and commence operations before the tenant is required to accept possession of the premises.[7] Initial co-tenancy is generally reserved for new shopping centers or redeveloping shopping centers,[8] and protects a tenant from investing capital or incurring expenses prior to the shopping center being ready for occupancy.[9] These provisions come in two varieties: opening co-tenancy and rent commencement co-tenancy. In the former, the tenant will not be obligated to open until the co-tenancy conditions are met, while under the later, the tenant will be entitled to reduced rent until such time as the co-tenancy requirement is satisfied.[10]

2. *Continuing or Operating Co-tenancy*—An operating co-tenancy obligates the landlord to retain certain designated tenants (or categories of tenants or retail uses) and/or maintain a minimum level of occupancy within the shopping center during the duration of the tenant's lease agreement.[11] Some landlords also seek to satisfy the key tenant requirements by agreeing that a minimum number of key tenants out of a pool of key tenants will be open and operating (for example, 3 of 6 key tenants).[12] A sub-type of the operating co-tenancy is

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[4] Connie Simmons Taylor, *Co-Tenancy Issues in Commercial Leases: What Happens When the Anchor Tenant Leaves?*, (July 17, 2008) online: ACC Real Estate Committee <www.acc.com/> [*Simmons & Taylor*], Cindy R Hamada, *Examining The Pros and Cons Of A "Co-Tenancy" Provision For Shopping Centers Owners & Tenants* (March 6 2012) online: Mondaq <www.moritthock.com/> [*Hamada*].

[5] Hollie Shaw, "Loblaw to close 52 unprofitable stores over next year as earnings spike 15%", *Financial Post* (23 July 2015) online: <business.financialpost.com>.

[6] Hollie Shaw, "Target Corp to exit Canada after racking up billions in losses", *Financial Post* (15 January 2015) online: <business.financialpost.com>.

[7] *Hamada*, *supra* note at 9.

[8] Tyler S Bobes, *Negotiating favorable co-tenancy provisions in retail leases* (October 27, 2014) online: Cleveland Business <www.crainscleveland.com/> [*Bobes*].

[9] *Ibid*.

[10] Matthew Seeberger, *Top Ten Issues in Co-Tenancy Provisions in Retail Leases*, online: American bar Association <www.americanbar.org> [*Seeberger*].

[11] *Ibid*.

[12] *Ibid*.

sometimes negotiated in a continuous occupancy clause, whereby the tenant agrees that it will open and operate as required by the lease provided that a certain percentage of the gross leasable area of the retail centre or a certain percentage of tenants are also open and operating. [13]

3. *Hours of Operation Co-tenancy*—Under this type of co-tenancy, the tenant is only obligated to operate in the retail centre so long as the other tenants in the centre maintain a certain number of hours of operation.

4. *Construction Commencement Co-tenancy*—A construction commencement co-tenancy is usually negotiated by a big box retailer, and only requires them to commence construction on a ground lease or reverse build-to suit lease after a certain number of co-tenants or a percentage of the overall gross leasable area of the retail centre is under construction.

Considerations When Negotiating and Drafting Co-Tenancy Provisions

Within these four types of co-tenancy provisions, there are variety of issues and considerations that may apply when negotiating and drafting co-tenancy provisions, including:

(a) the nature of the co-tenants;

(b) replacement or substitution of a co-tenant;

(c) remedies for a breach of the co-tenancy provisions;

(d) sunset clauses and curative provisions;

(e) continuous operating clauses; and

(f) financing.

Each of these issues and considerations are discussed further below:

Nature of Co-Tenants

Traditionally, co-tenancy provisions either named an anchor tenant that belonged to a national or regional retail chain or provided for a specific class of use (for example, a grocery store or a department store).[14] Increasingly, the approach has tended towards greater flexibility. If the concept of an anchor tenant is retained, anchor tenants should be defined flexibly with reference to factors such as: (a) minimum number of stores, (b) an established operating history, (c) minimum annual gross sales, (d) occupation of a minimum amount of gross floor area, and/or (e) a specified percentage of the gross leasable floor area leased, occupied and open for business.[15]

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[13] *Ibid*.

[14] M Rosie Rees & Stephanie J Kim, "Enforcement of Co-tenancy Remedies: A Review of Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc" (2015) 35 Shopping Center Legal Update at 9 [*Rees & Kim*].

[15] Janis B Schiff, *The New Normal in Read Development and Leasing* online: Washington Business Journal online: <www.hklaw.com> [*Schiff*].

For an example of this more flexible approach, a co-tenancy provision may define an anchor tenant as a national retailer with more than 25,000 square feet of floor space.[16]

An increasing number of leases with co-tenancy provisions are abandoning the notion of an anchor tenant all together. Within this paradigm, the "co-tenancy:" instead mandates a certain number of stores with specified uses at a shopping center: for example, at least one national clothing store and at least one computer or electronics store.[17] These types of provisions are more common in "lifestyle centre" leases, commercial villages developed in affluent areas that have large trade areas from 150,000 to over 500,000 square feet.[18] Lifestyle centres focus heavily on the visitor experience, and, as a result, contain a mix of restaurants and entertainment venues, and generally use restrictive covenants in their leases that specify that co-tenants must be other similar, upscale, specialty retailers.[19] For lifestyle centres, co-tenancy provisions may focus more on occupancy and retailer mix, rather than the traditional concept of an anchor tenancy. The International Council of Shopping Centers estimates that there are approximately 150 lifestyle centres currently in operation, with many more under development, suggesting that adapting co-tenancy provisions to these types of retail developments will continue to be important.[20]

Unsurprisingly, when required to give co-tenancy provisions, landlords will push to keep the description of co-tenants as broad as possible, to allow the landlord to quickly cure a co-tenancy failure. Tenants, however, are often motivated to keep the definition of an anchor tenant more specific, particularly if the anchor tenant has unique attributes that benefit the tenant's business.

Replacing a Co-Tenant

A related issue to defining what constitutes a co-tenancy is the issue of replacing or substituting a co-tenant. This issue most commonly arises where the lease contains a named co-tenant or a specific category of co-tenant. A landlord without the express right to replace the named co-tenant can be in an untenable position if the named co-tenant, or the co-tenant in a required category goes bankrupt or otherwise ceases to operate.[21] [For an example of this see the case of Kleban Holding Co. LLC v. Ann Taylor Retail, Inc. discussed later in this paper]. Accordingly, the right to replace a co-tenant should be seen as an essential corollary in any co-tenancy provision, particularly where the lease contains one or more named co-tenants or a narrowly prescribed category of co-tenant.

For landlords, there are a number of pitfalls that should be avoided when negotiating and drafting replacement provisions. First, a landlord should resist naming a specific co-tenant in the lease, particularly where that co-tenant does not have an additional obligation to remain open or operate or related indemnities.[22] Second, landlords should equally resist replacement clauses that

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[16] Darnell Little, "Main Street goes mainstream: with their Main Street" (2006) 71 Journal of Property Management at 37 [*Little*].
[17] *Simmon & Taylor, supra* note 4.
[18] *Little, supra* note 16 at 37.
[19] *Ibid.*
[20] *Ibid at* 35.
[21] *Simmons & Taylor, supra* note 4.
[22] *Seeberger, supra* note 10.

require a replacement co-tenant that operates in the same business category.[23] Such provisions can hinder the landlord's ability to find a replacement tenant, particularly if there is a sector wide downturn. For example, a landlord would not want to be bound to replace a 50,000 square foot grocery store with another 50,000 square foot grocery store, as the business reasons causing the first to close can often be applicable to another retailer with a similar business model.

Accordingly, the preferred approach for landlords when considering how to replace a co-tenant should focus on generic factors, such as national operational or financial indicia as the desired attributes for the named co-tenant. For example, a replacement co-tenant could be required to meet certain operational thresholds such as a minimum number of stores operating within Canada, minimum net worth or gross revenues. Also, landlords should seek to include an option to replace a large co-tenant (for example, one occupying 50,000 square feet or more) with several replacement co-tenants that each occupy a minimum size.[24] These types of provisions are particularly useful in case of 'big box' tenants, and landlords should aim to negotiate the right to break up large spaces and replace co-tenants with general categories like "national retailers" so that a large store can be replaced by three or more smaller national retailers in any category. This approach is particularly relevant at present since several national retailers have announced plans to reduce their overall lease footprint in the coming years.[25]

Tenants, on the other hand, will want to negotiate narrower replacement clauses that require a landlord to substantially comply with the original bargain when the parties entered into the lease. Drafted too generically, a co-tenancy provision could allow for absurd or unintended substitutions that do not align with the tenant's business needs. Accordingly, tenants should seek to link co-tenancy provisions to specific uses and push to include specific financial and commercial attributes that must be met for any replacement co-tenant.[26]

Remedies

Several remedies can accompany co-tenancy provisions, which vary depending on the nature of the co-tenancy provisions. The standard remedies are alternate rent and rights of termination, but these can be combined in various permutations or added to depending on the negotiations between the parties.[27] Common remedies include:

1. *Reduction in Rent*—An alternate (i.e. reduced) rent remedy gives a tenant either a reduction in the base rent payable under the lease or eliminates base rent and requires the tenant to pay a lower percentage of gross sales than otherwise would be payable during the continuance of the co-tenancy failure. In some cases, particularly if a co-tenancy failure continues for an extended period of time, a tenant may negotiate full rent abatement as a remedy, which is a more common remedy in opening co-tenancies. As a pre-condition to this remedy, a landlord may require a tenant to demonstrate that the co-tenancy failure caused an economic impact by comparing gross sales prior to the failure to gross sales after the failure. When pre-conditioned

[23] *Simmons & Taylor, supra* note 4.
[24] *Schiff, supra* note 15.
[25] *Ibid*.
[26] *Seeberger, supra* note 10.
[27] *Simmons & Taylor, supra* note 4.

upon actual loss, both landlords and tenants should exercise caution and carefully consider what metrics will be used, how to resolve disputes and inspection and audit rights. Whatever alternate rent structure is agreed upon, landlords should insist that a tenant continue to pay additional rent, as a tenant in possession will incur expenses relating to the operation and maintenance of the retail centre.[28]

2. *Termination of Lease*—Tenants may also seek a right to terminate the lease on a co-tenancy failure on the basis that the failure has substantially altered the terms of its original bargain with the landlord. This remedy is often included as the ultimate remedy, triggered after a series of escalating remedies over the course of the co-tenancy failure. A termination right may not, however, make the most sense if the tenant has 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. As discussed further in relation to sunset provisions, landlords usually want to force the tenant to choose to terminate the lease upon failure of a co-tenancy, rather than continue indefinitely at reduced rent. A landlord's rationale in this is that the tenant has had the opportunity to operate during the co-tenancy failure and can generally judge whether the impact has been great enough to require an exit from the retail centre. If they choose not to leave, then the tenant should commence paying full rent.

3. *Delay in Opening / Possession*—This remedy only arises in the context of initial co-tenancy provisions, and allows a tenant to delay the date of possession, date of opening and/or the rent commencement date. However, in opening co-tenancies, most tenants will also seek to have the right to open, but with rent abatement as set forth above.[29]

4. *Right to Go Dark*—The right to go dark can be added to an operating co-tenancy and allows the tenant to close its store, limiting its operating expenses while the co-tenancy failure is continuing.[30] Typically, the landlord will insert clauses that make the tenant choose between enjoying alternate rent or going dark, but will not allow the tenant to claim both remedies simultaneously. If a right to go dark is advanced during negotiations by the tenant, landlords should insist on adding a right to terminate the lease if the tenant ceases operations for an extended period of time. As discussed later in this paper, this can be a dangerous remedy for landlords to grant as allowing a tenant to go dark can trigger a breach of other tenant's co-tenancy provisions requiring a certain percentage of the gross leasable area of a centre or a certain percentage of tenants to be open and operating.

5. *Reimbursement for Leasehold Improvements*—If either party terminates the lease due to a co-tenancy violation, the landlord or the tenant may want to be reimbursed for the unamortized leasehold improvements (typically amortized on a straight-line basis over the initial term).

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[28] Lori E Kilberg, *The Co-Tenancy Conundrum* online: The Retail Newsletter <www.bdplaw.com> [*Kilberg*].
[29] *Rees & Kim, supra* note 14 at 10.
[30] Joel R Hall and Jennifer R Van Ness, *Co-Tenancy Issues & Covenants to Operate*, presented at ICSC Law Conference, October 22-25, 2008, online: <www.joelhallattorney.com> at 13.

Sunset/Curative Provisions

Sunset and curative provisions are landlord-friendly provisions. Such provisions acknowledge that even the best laid commercial plans can change unpredictably, and operate to transfer some of this risk back to the tenant.

Sunset provisions can take at least two forms. First, a sunset clause can limit the amount of time a tenant can enjoy a remedy for a co-tenancy failure. At the end of the remedy period, a sunset clause will require the tenant to choose between: (a) cancelling its lease, (b) taking possession of the premises or opening (in the case of initial co-tenancies), or (c) reverting to full base rent (in the case of an operating co-tenancy provision). The landlord's rationale behind such clauses is that it would be imprudent to have a tenant occupy space indefinitely without opening or paying reduced rent. If a tenant does not terminate, then the tenant is showing that it still wants the location and should return to full base rent payments. Anything else would fall outside the parameters of the original bargain the parties negotiated. Sunset provisions hinge on notice. Landlords are generally motivated to require the Tenant to provide notice of its election shortly after the right to terminate has accrued (i.e. to terminate or revert to the original lease).

The second type of sunset provision is on the co-tenancy provisions themselves. In these types of sunset clauses, the landlord will typically set up a condition that, once fulfilled, will prevent the tenant from exercise any co-tenancy rights. These types of sunset provisions are often included with renewal or extension provisions, and expressly provide that the co-tenancy provisions will not continue. Other potential conditions could include occupancy over a certain threshold, completion of all phases of construction, time from the commencement date or various combinations of these factors.

Landlords should additionally seek to protect themselves by adding curative provisions. Curative provisions operate as conditions precedent to a tenant's remedies for a co-tenancy failure. The oft-cited condition is that the tenant should not be in default under the lease. Other similar conditions may include: (a) that the tenant itself to be operating at the time of a violation of the co-tenancy provision; and (b) that the tenant show a drop in sales during the co-tenancy violation period as compared to the period prior to the violation. In addition, landlords should ensure that they have a cure period prior to the tenant being entitled to any remedy for a co-tenancy failure.

In addition to sunset and curative provisions, there are a variety of other strategies landlords can use to limit their liability. For example, the landlord can provide that any remedy elected by the tenant for a co-tenancy failure is the tenant's sole remedy.[31] Also, the landlord can seek to negotiate a cancellation penalty from the tenant for the unamortized costs for tenant improvements and real estate commissions.[32]

[31] *Ibid.*
[32] *Ibid* at 45.

Considerations for Leases with Anchor Tenants: Continuous Operating Clauses

When a named anchor tenant ceases operations or fails to occupy a retail centre, it usually results in the loss of one of the main driving forces bringing customers to the shopping center. This often has a cascading effect, where the landlord, in addition to lost rent, may suffer increased insurance costs, reduced rent or termination by other tenants with co-tenancy clauses, and heightened risk that other tenants may fail or abandon their leases, which can ultimately lead to the closing or failure of the entire retail centre.

To mitigate these risks, landlords often seek to expressly oblige key tenants to operate their business in the premises throughout the term of the lease. These provisions are often referred to as continuous operating clauses, which help ensure the presence of an active and operating tenant for the duration of the term.[33] Continuous occupancy provisions provide some insurance to the landlord against losses it may suffer under any co-tenancy provisions in its other leases, since the lease with the key tenant will also usually contain an indemnity or a guarantee of the tenant's obligations under the lease.

In practice, continuous operating clauses may provide little comfort. In the recent Target Canada restructuring (described further below), the court issued a temporary stay of the rights of Target Canada's landlords to claim an indemnity or call on the guarantee of Target Canada's parent company for breaching a continuous operating clause, because granting such rights would threaten the ability of the anchor tenant to effectively restructure. A recent attempt by Target Canada and its parent to limit the liability under this guarantee was rejected by the court.[34]

Financing

Co-tenancy provisions present financial risks to landlords, and lenders are increasingly attuned to co-tenancy issues in retail developments. Lenders financing a retail centre that relies heavily on one anchor tenant will be concerned about financial risks, particularly where there are co-tenancy provisions that would substantially reduce the landlord's rental revenue on the departure or bankruptcy of an anchor tenant.[35] To limit these risks, lenders may set parameters for the landlord when negotiating co-tenancy provisions. Also, as a sub-issue, certain lenders may have provisions in their loan documents that prohibit significant changes to the property without the lender's consent.[36] With some forms of securitized loans, obtaining consent to make significant changes can be a long and cumbersome process that can be a significant barrier to finding an appropriate replacement tenant. This situation is most likely to arise in the case of large big box stores where the landlord has significantly improved the leased premises to meet specific needs of the tenant, and the landlord seeks to break the space into three smaller stores. Where these

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[33] Alan Kaufman, "Operating Clauses in Shopping Centre Leases: Lights Out for the Vacating Tenant." (1991) 18 Can Bus LJ at 245 [*Kaufman*].

[34] See "Twenty-Fourth Report of the Monitor Alvarez & Marshal Canada Inc.", Ont Sup Ct, 9 Feb 2016, online: <www.alvarezandmarsal.com/target-canada-co-et-al> [*24th Report of the Monitor*]. **[NTD: the most recent monitor's report is the thirty third report. It can be found at https://www.alvarezandmarsal.com/sites/default/files/canada/target_canada_co._et_al_ccaa_proceedings_-_court_file_no._cv-15-10832-00.pdf]**

[35] *Little, supra* note 16 at 37.

[36] J Adam Rothstein, "Bring It Back from the Dead: Issues in Resurrecting the Distressed Center" (2014) 28 Probate & Property Magazine at 6 [*Rothstein*].

facts exist, landlords should carefully review and consider their obligations to their lender when negotiating co-tenancy remedies.

Litigation

Canadian Case Law

Canadian jurisprudence considering co-tenancy clauses is not as common as it is in the United States. Interestingly, when two of the largest retailers in Canada restructured (and ultimately closed) their operations each of such retailers utilized the provisions of the *Companies Creditors Arrangement Act*[37] (the "***CCAA***") to stay any ability of other tenants to take any proceedings or exercise any rights or remedies against their landlords as a result of the retailer's restructuring. These orders may have reduced or eliminated the ability of tenants to enforce co-tenancy provisions as against their landlords. The Target stay discussed below has been recently extended until April 28, 2017. It will be interesting to see what, if any, actions arise after the stay is ultimately lifted.

T. Eaton Co., Re[38]

T. Eaton Company Limited ("**Eaton**") entered into restructuring proceedings under the ***CCAA***. The court permitted the company to present a plan of compromise and arrangement to its creditors. The order contained a clause preventing tenants at retail shopping centers in which Eaton was an anchor tenant from terminating their leases during the restructuring period.[39] However, the defendant tenant was not served with the original notice of the application and could apply for variation as a result.[40] The tenant brought a motion to vary the order to allow it to exercise its co-tenancy rights. However, the motion was dismissed.[41] The court stated that if it were to grant the order it would have to grant the same relief to other tenants in similar positions.[42] If this were to happen, Eaton's restructuring plan would be seriously jeopardized. In giving this order, the court noted that it had jurisdiction to make the order as section 11 of the *CCAA*, together with the inherent jurisdiction of the court, gave the court sufficient authority to make orders against third parties who were not creditors.[43] An additional factor that swayed the court's opinion was that no stores had yet been closed and the defendant had not suffered any prejudice.[44]

Implications: A tenant's rights upon a co-tenancy failure can be limited by restructuring proceedings under the *CCAA*.

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[37] RSC 1985, c C-36.
[38] (1997) 46 CBR (3d) 293, [1997] OJ No 6411 (QL) [*Eaton*].
[39] *Eaton*, *supra* note 38 at para 1.
[40] *Ibid.*
[41] *Ibid* at para 8.
[42] *Ibid* at para 7.
[43] *Ibid* at para 6.
[44] *Ibid.*

Target Canada Co., Re[45]

Target sought to wind down its Canadian operations and applied for relief under the *CCAA* proceedings. Many of Target's landlords had leases with third-party tenants that contained co-tenancy clauses that would have been triggered upon Target closing its stores. In order to alleviate the financial distress incumbent upon the landlords if any non-anchored were to terminate their leases, the Ontario Supreme Court granted a stay of proceedings.[46] The court found jurisdiction under section 11 of the *CCAA* and its inherent jurisdiction, as the court in *Eaton* had done.[47] In granting the stay, the court kept open the possibility that affected parties could challenge the stay at a comeback hearing.[48]

Since the original stay in *Target* on January 15, 2015, the Court has continued to extend the general stay. As of the time of writing, the stay has been extended until April 28, 2017.

Implications: As in *Eaton*, a tenant's rights upon a co-tenancy failure can be limited by restructuring proceedings under the *CCAA*.

Grant Park Shopping Centre[49]

The landlord sued the tenant for failure to pay rent and associated costs. The tenant disputed claim, arguing that its lease renewal contained an implied term that the anchor tenant would continue to operate in the mall through the entire renewal period.[50] However, prior to the lease renewal, the anchor tenant had decided to vacate the mall or was seriously considering leaving, and left after the renewal came into effect. The tenant alleged that the landlord wrongfully concealed this information, and stopped paying its rent as a result.[51] The court allowed the landlord's action for damages against tenant.[52] In deciding for the landlord, the court held that the landlord did not conceal information regarding the departure of the anchor tenant, and that since the tenant knew or ought to have known regardless there was no concealment.[53] The court also added that there was no justification to imply a co-tenancy provision in the lease,[54] nor was there any evidence that the parties had intended to include an implied term.[55]

Implications: Co-tenancy provisions are unlikely to be read into an agreement. If a tenant requires co-tenancy rights, it should negotiate and expressly include these in the lease.

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[45] 2015 ONSC 303, 22 CBR (6th) 323 [*Target*].
[46] *Ibid* at para 44.
[47] *Ibid* at paras 44, 48.
[48] *Ibid* at para 48.
[49] *Grant Park Shopping Centre v San Francisco Gifts Ltd.*, 2004 MBQB 109; 130 ACWS (3d) 1205 [*Grant Park Shopping Centre*].
[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid* at para 60.
[53] *Ibid* at para 31.
[54] *Ibid* at para 63.
[55] *Ibid* at para 65.

Calloway REIT[56]

This dispute related to the interpretation of a shopping centre lease agreement. The question was whether the tenant was required to pay rent, despite the fact that construction of the shopping centre was not fully completed.[57] The tenant argued that, per the wording the lease, rent should only commence when construction of the shopping centre was complete, and construction would only be considered complete when all the buildings in the shopping centre had been fully constructed.[58] In its submissions, the landlord argued that rent should commence when construction of the leased premises and the initial required common areas were completed, per the terms of the lease. The landlord also highlighted the fact that the form of lease had been used by the tenant in other dealings with the landlord, and that in prior dealings the tenant had started to pay rent well before all of the buildings and common areas were fully built out. [59]

The court found for the landlord on both first instance and appeal. At first instance, the court focused on the fact that the tenant's position did not accord with good business sense, as it would permit the tenant to occupy the premises rent free until the shopping centre was fully constructed, despite the tenant being fully operational and having the benefit of the common areas.[60] On appeal,[61] the court held that in instances of latent ambiguity, an interpretation should be reached that accords with good business sense and avoids a commercial absurdity.[62] The court found that it was commercially absurd to allow the tenant to accept delivery of the leased premises, open its store and accept the landlord's provision of services but then argue that rent was not payable.[63]

Implications: Courts are unlikely to read co-tenancy provisions into a lease. If alternate rent or other inducements are intended, the parties need to expressly include these in the lease.

US Case Law – Two recent cases of note

Grand Prospect Partners, LP v Ross Dress for Less, Inc, et al

The recent *Ross* decision by California's Fifth Appellate Court affirmed the enforceability of co-tenancy provisions but also called into question whether rent abatement provisions will be enforced, particularly in the context of initial co-tenancy provisions.[64] This case is important because it was also the first time an appellate court in California considered enforceability of co-tenancy provisions. In *Ross*, the landlord agreed to a lease with Ross Dress for Less, Inc. ("**Ross**") in 2008. The terms of the lease contained a co-tenancy provision that required the

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[56] *Calloway REIT (Westgate) v Michaels of Canada* [2009] OJ No 761, 175 ACWS (3d) 553, aff'd 2009 ONCA 713 [*Calloway REIT*]
[57] *Ibid* at para 44.
[58] *Ibid* at para 49–54.
[59] *Ibid* at para 44–48.
[60] *Ibid* at para 76.
[61] *Calloway Reit (Westgate) Inc v. Michaels of Canada* 2009 ONCA 713.
[62] *Ibid* at para 2.
[63] *Ibid*.
[64] *Grand Prospect Partners, LP v Ross Dress for Less, Inc, et al* (January 12, 2015, F067327) Cal 4th 2015 DJDAR 409 [*Ross*].

named tenant, Mervyn's, located in the shopping center to be open and operating as of the commencement date under Ross' lease. If this condition was not met, the co-tenancy provision allowed Ross to possess its leased premises rent-free, regardless of whether it opened its own store for business. Ross could continue to possess the property in this manner until landlord caused Mervyns or an alternate anchor tenant to open for business in the requisite amount of floor area. If landlord was unable to cure this situation within a period of 12 months following the lease commencement date, then at any time thereafter, but before the landlord found a replacement co-tenant, Ross could terminate the lease upon 30 days' notice. Mervyns filed for bankruptcy protection soon after the landlord had completed the tenant improvements for Ross. Ross accepted delivery of the premises but never opened for business or paid rent during the 13 months that it possessed the premises. During that period, Ross negotiated with the landlord for potential modifications to the lease to address the loss of Mervyn's. Those negotiations included a proposal to convert the Ross lease from a net lease to a gross lease, at a lower overall rental rate. The landlord and Ross were unable to come to terms on a lease modification and, at the end of the 12-month period, Ross notified the landlord that Ross was terminating its lease under the operating co-tenancy provision. At this point, Ross had never taken possession of the premises nor paid any rent under the lease (Ross's total rent for that initial year of the lease would have totaled over $650,000). In response to Ross's termination notice, the landlord brought an action challenging the enforceability of both the opening and operating co-tenancy provisions in the lease and seeking both past and future rent and expenditures on tenant improvements from Ross. The trial court found the co-tenancy provisions unenforceable on the basis that they were unconscionable or unreasonable. The court then awarded the landlord $3.7 million in damages, which included lost rent over the term of the lease.[65] Ross appealed.

The court of appeal partially overturned the original verdict, finding that the co-tenancy provisions were not unconscionable, but that the rent abatement provision operated as an unreasonable penalty against the landlord.[66] In reaching this finding, the court noted that the parties were both sophisticated and had spent considerable time negotiating the lease. The court further found that the termination provision was enforceable against the landlord, as it did not cause the forfeiture.[67] The court added that there was no forfeiture as the parties were sophisticated, had both agreed to the co-tenancy conditions, and neither had the right to control whether Mervyn's continued to operate in the shopping center. A lease provision is a penalty, and is therefore void, when it requires a landlord to forfeit money or property without regard to the amount of damage that, at the time the parties negotiate the agreement, a tenant anticipates it might suffer due to the landlord's noncompliance with that provision. The Ross rent abatement clause amounted to a penalty because the $39,500 per month in rent that the landlord lost due to Mervyns' bankruptcy bore no reasonable relationship to the $0.00 in harm Ross anticipated it would suffer from the lack of an operational Mervyns or from Ross's inability to open and operate a store in this location. Here, the balance between an outcome in favor of the tenant and one in favor of the landlord, was decided in favor of the landlord because the landlord had no control over whether Mervyns occupied or operated its business in the adjacent property. In a another factor that might have swayed the court to ignore the contractual provisions, the court

[65] *Ibid* at p 9.
[66] *Ibid* at p 18.
[67] *Ibid* at p 40.

noted that the landlord had paid for over $2,300,000 in tenant improvements before Ross took possession of the leased premises. In the end, Ross was held liable for the payment of rent until the date it terminated the lease.[68]

Implications: In opening co-tenancies, rent abatement provisions may not be enforceable. If negotiated, tenants should ensure these provisions include language that links rent abatement to the tenant's liquidated damages. For landlords, this case illustrates the need to broadly define co-tenants such that key tenants can be replaced.

Kleban Holding Co. LLC v. Ann Taylor Retail, Inc.[69]

The *Ann Taylor* case is a cautionary note to landlords when negotiating co-tenancy provisions. In 2000, Ann Taylor Retail, Inc. ("**Ann Taylor**") negotiated and entered into a lease for retail premises, which was later assigned to Kleban Holding Co. LLC, as landlord. The initial term of the lease was ten years, and Ann Taylor exercised its option to extend on April 11, 2011.[70] The lease contained opening and operating co-tenancy provisions. Although the initial co-tenancy provisions allowed the landlord to substitute three named co-tenants with "a suitable replacement tenant", the operating co-tenancy provision only provided that if Borders, Inc., a bookstore, ("**Borders**") or fifty percent of the other retail space is not open and operating, Ann Taylor was entitled to abated rent.[71] On May 16, 2011, Borders closed its store in connection with its bankruptcy filing. The landlord replaced Borders with two other bookstores, which operated more or less continuously after Borders closed.[72] However, Ann Taylor paid abated monthly rent starting in July 2011 up to the date of the decision, despite the landlord's argument that such an abatement would result in Ann Taylor being provided with an $800,000+ windfall. The landlord eventually sued, arguing a breach of the lease, anticipatory breach of the lease, and unjust enrichment.[73]

The court held for Ann Taylor, and upheld its right to abated rent. In so finding, the court relied on the clear unambiguous language of the operating co-tenancy provision, finding the lease unambiguously set out the parties expectations and would be defeated by any other contractual interpretation.[74] The landlord's arguments regarding unjust enrichment also failed because such an unjust enrichment claim is actionable in Connecticut only in instances where there was no valid lease or contract in place-unlike the scenario in this case. Lastly, because the lease contained an attorney's fees provision for the prevailing party, the Court requested that Ann Taylor submit evidence of attorney's fees for the Court's consideration.

Implications: As Canadian principles of contractual interpretation and unjust enrichment differ from those in Connecticut, it is unclear whether a Canadian court would have reached the same result if deciding *Ann Taylor*. However, this case emphasizes that landlords should strongly

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[68] *Ibid* at p 41.
[69] *Kleban Holding Co LLC v Ann Taylor Retail, Inc*, 2013 U.S. Dist. LEXIS 168231 (D. Conn. Nov. 26, 2013) [*Ann Taylor*].
[70] *Ibid* at 2.
[71] *Ibid* at 2-3.
[72] *Ibid* at 3.
[73] *Ibid* at 4.
[74] *Ibid* at 20.

insist upon flexibility in the definition of a co-tenant, as it could potentially result in a sizable windfall for the tenant with devastating effects on the landlord. Also, landlords should fight for a co-tenancy provision that **c**ontains an expiration date well short of the tenant's lease term or at least does not extend to renewals.

The situation in Quebec[75]

As is the situation in other provinces, the ability of a tenant to obtain co-tenancy clauses is largely dependent on the negotiating power of the tenant in question and its level of sophistication. While courts have commented on the utility of such clauses,[76] very few cases have been brought to the attention of the courts where co-tenancy provisions were in issue. That being said, the *Civil code of Québec*[77] codifies legal obligations on landlords and courts have occasionally inferred an implied co-tenancy provision in particular leases, which arises from the landlord's obligations to provide peaceful enjoyment of the leased premises and not to change the destination of the premises during the term of the lease. This paper reviews decisions rendered by Quebec courts that were tasked with interpreting co-tenancy provisions as well as cases where an implied obligation was imposed by the courts on shopping centre landlords.

Co-Tenancy Clauses

The departure of a key tenant in a shopping centre has been acknowledged by courts as having an impact on the business operations of other tenants. In *Les centres d'achats Beauward Ltée v. Provigo Distribution Inc. and Provigo Inc.*,[78] the Quebec Superior Court interpreted a clause providing that the tenant would continue to operate its store during the term of the lease as long as a department store (without limiting it to a store in particular) maintained its business operations in specific premises of the shopping centre.[79] At the commencement of the proceedings, two department stores were in operation in the shopping centre, but these were not situated at the specific location set out in the lease. The tenant petitioned the Court to obtain the termination of the lease on the basis of an alleged breach of the co-tenancy clause. The landlord applied for a safeguard order to compel the tenant to continue its operations until the final judgment of the court with respect to interlocutory and permanent injunctions to the same effect would be rendered. The Court granted the safeguard order by construing the co-tenancy clause according to the parties' intent at the time the lease was entered into, which was to ensure the presence of a department store, regardless of its location in the shopping centre and,

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[75] The author wishes to acknowledge Stephanie Hamelin, McMillan LLP for her assistance in the preparation of this portion of the paper.

[76] *9142-9134 Québec inc. v. 9180-9293 Québec inc*., 2010 QCCS 4397 at paras 154-156; see also *9183-7831 Québec Inc. v. Location Faubourg Boisbriand inc*., 2011 QCCS 5304 at paras 70-90; *9202-9131 Québec inc. v. 6943870 Canada inc*., 2015 QCCS 1209 at paras 39-40; *Riokim Holdings (Québec) Inc. v. Commerce LJ inc*. at paras 31-32.

[77] Article 1854 : "The lessor is bound to deliver the leased property to the lessee in a good state of repair in all respects and to provide him with peaceable enjoyment of the property throughout the term of the lease."
Article 1856: "Neither the lessor nor the lessee may change the form or destination of the leased property during the term of the lease."

[78] J.E. 2005-1560.

[79] *Les centres d'achats Beauward Ltée v. Provigo Distribution Inc. and Provigo Inc.*, *supra* note 3 at para 16.

consequently, held that the landlord had not contravened the clause, since two other department stores were operating in the shopping centre.[80]

Courts have also implicitly inferred co-tenancy provisions in leases. In *126232 Canada Inc. v. 2957-8705 Quebec Inc.*,[81] upon the renewal of the lease, the tenant was told by the landlord that an anchor tenant would remain in the shopping centre. Less than a year later, the anchor tenant in question ceased its operations and the landlord did not lease the premises vacated by such tenant, creating a domino effect on the other tenants and eventually leaving only a total of four stores in operation in the shopping centre. Consequently, the tenant vacated its premises a year and a half prior to the expiration of the lease. The landlord brought an action against the tenant for the unpaid rent until the expiration date of the lease. In counterclaim, the tenant sued the landlord for lost profits. The court commented that the synergy among stores in a shopping centre is important and referred to five general clauses in the lease to illustrate the presence of such synergy in the case at hand.[82] The court founded its ruling on two distinct concepts: the implicit obligations of a landlord arising from the *Civil code of Québec* (the "CCQ") and the "Competition by the Shopping Centre" provision set out in the lease. It is worth noting that the lease between the landlord and the anchor tenant contained a "continuous operation" clause. The Court found that the landlord should have made efforts to force the anchor tenant to respect its continuous occupation obligations under the lease. By its lack of action, the landlord did not provide, as required under the CCQ[83], peaceable enjoyment of the premises to the other tenants of the shopping centre, and changed the destination of the premises. Also, article 85 of the lease referred to the shopping centre as a whole (*i.e.* as an integrated marketing unit), with a variety of merchandising and service facilities.[84] The court inferred from this language a provision relating to the synergy of the stores in the shopping centre and, particularly, to the influence of an anchor tenant. Since the departure of the anchor tenant, the shopping centre was no longer an integrated marketing unit and therefore, the tenant was justified to unilaterally vacate the premises and cease paying rent to the landlord.[85]

Furthermore, Quebec courts have repeatedly observed that a low occupancy rate in a shopping centre is detrimental to the proper conduct of the tenants' businesses.[86] In *Protégé Properties inc. v. Provigo Distribution inc.*,[87] a co-tenancy clause allowed the tenant to unilaterally terminate the lease if more than 25% of the total area of the shopping centre, excluding the department store located therein, was not used to sell merchandise during a period of 18 months. Since no department store was operating in the shopping centre, the landlord argued that the clause was inapplicable or, alternatively, that the calculation of the 25% excluded the area that a department

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[80] *Les centres d'achats Beauward Ltée v. Provigo Distribution Inc. and Provigo Inc.*, *supra* note 3 at paras 17-24.
[81] [2002] R.D.I. 307.
[82] « Competition by the Shopping Centre », « Type of Business Permitted », « Conduct of Business », « Repairs by Landlord », « Landlord's Covenant for Quiet Enjoyment » : *126232 Canada Inc. v. 2957-8705 Quebec Inc., supra* note 81 at paras 37-45.
[83] Articles 1854 and 1856 C.c.Q.
[84] *126232 Canada Inc. v. 2957-8705 Quebec Inc., supra* note 81 at paras 70-71.
[85] *126232 Canada Inc. v. 2957-8705 Quebec Inc., supra* note 81 at paras 72-74 (in appeal (J.E. 2004-491), the Court stated that the tenant was justified to terminate the lease but it should have paid its rent until the termination according to a settlement between the parties prior to the motion).
[86] *Immeubles Gabriel Azzouz inc. v. Orbite Optique Ghobril inc.*, 2006 QCCS 3926 at paras 23-30.
[87] REJB 1998-10195 (Appeal dismissed [2002] R.D.I. 36).

store would have occupied in the shopping centre. The judge adopted a textual reading of the clause, as it had been negotiated between two sophisticated business parties and there was no reason to exclude the application of the clause or to change the interpretation of the calculation.[88] In other words, no exclusion was taken into account on the basis that there was no department store. In light of the foregoing, it appears that a clearly drafted co-tenancy clause, negotiated between sophisticated parties, is likely to be confirmed and applied by a court.

In the absence of an explicit co-tenancy provision, the court may associate a general clause ensuring the presence of commercial activities with intent of the landlord to be subject to an occupancy threshold provision. In *Immeubles Gabriel Azzouz inc. v. Orbite Optique Ghobril inc.*,[89] the anchor tenant left the shopping centre and created a chain reaction which led to other stores vacating the shopping centre. Consequently, the tenant vacated the premises before the end of its lease and sought damages from the landlord. Under a provision of the lease, the landlord committed to offering diversified commercial activities in the whole shopping centre.[90] According to the evidence, 95% of the premises in the shopping centre were vacant, resulting in hardly any commercial activities being conducted. It was clear to the court that the landlord failed to fulfill its obligation to maintain commercial activities in the shopping centre.[91] The Quebec Court of Appeal[92] reached the same conclusion as in the first instance, but on different grounds. In addition to concluding to the presence of a breach of contract, the Court of Appeal found that the landlord had breached its general obligation to provide peaceable enjoyment to the tenant and, accordingly, changed the destination of the premises,[93] which justified the tenant's termination of the lease.

Implied Obligations under Leases

In light of the above, landlords and tenants have obligations arising not only from the lease, but also from the CCQ. The obligation to provide peaceable enjoyment is a fundamental obligation of the landlord. As a consequence, the landlord cannot change the destination of the premises without the prior consent of its tenants.[94] These obligations extend to all of the accessories and advantages relating to the lease.

As part of the legal saga[95] regarding the decision of Aéroports de Montréal to transfer all of its passenger flights from Mirabel to Dorval, the Quebec Superior Court established the grounds of the notion of "change of destination". In these decisions, the tenants (hotel and the air cargo building) obtained the termination of their leases and were awarded damages. The Court acknowledged that there is a change of destination of the leased property when an essential

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[88] *Protégé Properties inc. v. Provigo Distribution inc., supra* note 87 at paras 59-60.
[89] 2006 QCCS 3926.
[90] *Immeubles Gabriel Azzouz inc. v. Orbite Optique Ghobril inc., supra* note 86 at paras 16-17.
[91] *Immeubles Gabriel Azzouz inc. v. Orbite Optique Ghobril inc., supra* note 86 at para 32.
[92] 2008 QCCA 135.
[93] *Immeubles Gabriel Azzouz inc. v. Orbite Optique Ghobril inc., supra* note 92at paras 5-6.
[94] *Source unique Kirkland inc. v. Bozzo*, J.E. 2001-411 (appeal dismissed: C.A., 2001-10-09)
[95] Especially : *Hôtel de l'Aéroport de Mirabel Inc. v. Aéroports de Montreal* , 2002 CanLII 11294 (QC CS) and 2003 CanLII 22050 (QC CA) *; Leasehold Construction Corporation v. Aéroport de Montréal*, 2004 CanLII 40330 (QC CS) and 2005 CanLII 23042 (QC CS).

condition of the contract is deprived of its fundamental purpose.[96] In each of the leases, there were no clauses specifically guaranteeing the operation of an airport with passenger flights in Mirabel. However, as it appeared from many clauses in the leases, the passenger flights (and their ridership) were the main reason why the tenants entered into leases with the landlord, therefore creating an implied obligation on the landlord to maintain passenger flights at the Mirabel airport.[97] The loss of almost all of the clients of the tenants following the transfer of activities from the airport constituted a breach of the landlord's obligations. Where the breach of an essential condition causes serious injury to the tenants (here, the decline in customer traffic), tenants can apply for the termination of their respective leases.[98] The court compared the situation to a very high vacancy threshold in a shopping centre where the termination of a lease is justified.[99] The Court construed the breach of the implied obligation to maintain passenger traffic at the airport as a change of destination of the premises permitting the termination of the lease.[100]

In a similar fashion, the Quebec Superior Court[101] found a landlord liable for the change of destination of the premises in a bus station and awarded damages to a tenant for loss of profits due to the early termination of the lease. In this case, the anchor tenant, a bus company offering most of the departures at the bus station, terminated its lease. Consequently, the landlord advised the other bus companies that it would cease operating the bus station. By stopping all bus traffic, the landlord altered the essence of the other leases and consequently, the destination of the premises.

In contrast with the foregoing, in *9142-9134 Québec inc. v. 9180-9293 Québec inc.*,[102] a tenant argued that the landlord had failed to provide peaceful enjoyment of the leased premises, notably by neglecting to address the lack of customers in the shopping centre[103] due to the reduction of the customer traffic flow of the anchor tenant.[104] In the absence of a clause requiring the landlord to guarantee that the anchor tenant's customers would continue to come to the shopping centre, the Quebec Superior Court concluded that the landlord should not be found liable for the acts of a third party, since the anchor tenant was still operating its business from its premises.[105] The Court indicated that in the absence of a co-tenancy clause, the landlord nonetheless had the legal obligation not to change the destination of the premises.[106] In fact, leaving premises empty can be considered a change of destination when such vacation results from the landlord's inaction to

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[96] *Leasehold Construction Corporation v. Aéroport de Montréal*, 2004 CanLII 40330 (QC CS) at paras 54-57.
[97] *Hôtel de l'Aéroport de Mirabel Inc. v. Aéroports de Montreal*, 2002 CanLII 11294 (QC CS) at paras 52-79; *Hôtel de l'Aéroport de Mirabel Inc. v. Aéroports de Montreal*, 2003 CanLII 22050 (QC CA) at paras 34- 36.; *Leasehold Construction Corporation v. Aéroport de Montréal*, *supra* note 21 at paras 38- 42, 47- 49.
[98] Article1863 C.c.Q.; see also *Hôtel de l'Aéroport de Mirabel Inc. v. Aéroports de Montreal, supra* note 22 at paras 80-83.
[99] *Hôtel de l'Aéroport de Mirabel Inc. v. Aéroports de Montreal*, *supra* note 22 at para 84.
[100] *Leasehold Construction Corporation v. Aéroport de Montréal*, 2005 CanLII 23042 (QC CS) at paras 36-37.
[101] *Duchesne v. Audet*, J.E. 82-162 at pages 2, 8-9.
[102] *Supra* note 76. The application to dismiss the appeal was partially granted but only to order to the appellant to provide a suretyship (2011 QCCA 58) and the appeal on the merits was dismissed (2013 QCCA 1829) .
[103] *9142-9134 Québec inc. v. 9180-9293 Québec inc.*, *supra* note 76 at paras 123 – 182.
[104] *9142-9134 Québec inc. v. 9180-9293 Québec inc.*, *supra* note 76 at paras 45-64, 79-81.
[105] *9142-9134 Québec inc. v. 9180-9293 Québec inc.*, *supra* note 76 at paras 143-148.
[106] *9142-9134 Québec inc. v. 9180-9293 Québec inc.*, *supra* note 76 at paras 157- 158.

promote rentable area in the shopping centre.[107] In this case, considering that 92% of the shopping centre was rented, the court dismissed the action, since the landlord established that it had actively attempted to lease premises[108] and, therefore, had not breached its obligation not to change the destination of the premises.

To summarize, where a lease agreement contains no co-tenancy clause, Quebec courts have tended to dismiss tenants' claims where landlords have acted in accordance with the terms of the lease in general.[109] Courts have generally recognized the existence of a breach of the landlord's legal obligation not to change the destination of the premises in cases implicating anchor tenant departures or important reduction of tenant occupancy only. Therefore, tenants should negotiate the inclusion, in their leases, of express and specific co-tenancy provisions where the presence of an anchor tenant or a certain occupancy threshold is of critical importance to the tenant.[110]

[107] *9142-9134 Québec inc. v. 9180-9293 Québec inc*., *supra* note 76 at paras 159-164; *9202-9131 Québec inc*. *v. 6943870 Canada inc*, *supra* note 76 at paras 41-42.
[108] *9142-9134 Québec inc. v. 9180-9293 Québec inc*., *supra* note 76 at paras 164-168; see also *Riokim Holdings (Québec) inc*. *v. Commerce LJ inc*., *supra* note 76 where in absence of co-tenancy clause that ensures a certain traffic flow, the court stated that the landlord actively promoted to lease premises and therefore should not be found liable.
[109] *9202-9131 Québec inc*. *v. 6943870 Canada inc*, *supra* note 76 at paras 34-35, 39-44.
[110] *9202-9131 Québec inc*. *v. 6943870 Canada inc*, *supra* note 76 at paras 34-35, 39-44.