NEGOTIATING TRANSFER PROVISIONS

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Various Transfer Types: When tenant assigns, it transfers all of its rights and interests in the premises to the assignee. If the assignee defaults, the original tenant does not have any rights to re-take possession. Under a sublease, the tenant grants to the subtenant a right to occupy all or part of the premises for a specified period of time. The relationship between the landlord and the tenant remains unaffected. If the subtenant defaults, the tenant can terminate the sublease and re-take possession. Tenant can also share possession of its premises by way of license. Finally, an identity of the party controlling the tenant corporation can be changed by changes in control, and is typically caught within the transfer provisions of the lease.

Reasonableness Standard: Absent anything to the contrary in a lease, a tenant at law has a right to assign the lease or sublet the premises without restriction. The leases typically tightly control assignments, subleases, changes of control or any other changes of tenant's identity, and sometimes provide that the landlord can unreasonably withhold its consent. Otherwise, as per *Commercial Tenancies Act*, a lease is deemed to include a requirement for the Landlord to be reasonable with respect to its consent. Note that there is some case law which provides that the Landlord's right to "arbitrarily" withhold its consent does not contract out of the *Commercial Tenancies Act*, because "arbitrarily" is not the same as "unreasonably".

Grounds for Withholding Landlord's Consent: While case law establishing what is reasonable continues to develop, the following has been confirmed as reasonable: (a) failure of the transferee to demonstrate the ability to operate the business or meet financial obligations under the lease; (b) the proposed use being more demanding on the existing infrastructure; (c) refusal to consent until damages to the space are repaired; (d) the proposed use being different from existing use; (e) failure to provide transferees financials; (f) the character or experience of the transferee being unrespectable or irresponsible (ie, poor credit, bankruptcies, criminal activities etc.); (g) proposed subtenants in possession before consent was requested; (h) transfer creating a breach of existing exclusive covenants; (i) propose transfer likely to affect the business of existing tenants; (j) the landlord having alternative, equivalent premises available for lease in the property. Leases often list these and other grounds that are deemed to be reasonable with respect to Landlord withholding its consent, for example: (i) setting out the minimum amount of time since the commencement date or the last transfer; (ii) where the proposed transferee is an existing tenant or has been in recent negotiations with the landlord.

Change of Use: The tenant's covenant as to permitted use is a separate and independent covenant from the prohibition on assignment by tenant without landlord's consent (ie, landlord's consent to an assignment does not constitute a waiver of the permitted use covenant). In "non-insolvency" context, it is well established that the landlord can take into account the transferee's proposed use, and the courts have rejected the argument that the "permitted use" clause is binding only on the original tenant. From the tenant's perspective then, the use clause should be drafted as broadly as possible. The tenant should also keep in mind the clause requiring the tenant to operate only under a specified trade name, and as such, should try and negotiate to have: (i) other trade names approved by the landlord, acting reasonably; or (ii) include other trade names that the tenant or permitted transferees may use in all their location in specified region. In the "insolvency" context, the *Commercial Tenancies Act* provides that notwithstanding any lease provision, the lease can be assigned to any business with use that is "*not reasonably of a more objectionable or hazardous nature*". As such, the landlord may end up with a very different use, as the court is required to balance the landlord's rights with the goal of maximizing the realization of the bankrupt's assets. In any event, if the parties agree to a change of use, make sure that all relevant lease provisions are amended as appropriate.

Procedure: If not already in the lease, the parties should negotiate a clear mechanism and timelines relating to the tenant's request, which should be in writing and accompanied by specific documents and information, as well as the timelines for landlord's response. It is prudent for landlords to be clear that the consent is under no circumstances deemed to be provided. It is reasonable for the landlords to obtain information with respect to the proposed transferee's financial covenant, terms of the proposed transfer and copy of related documents; details relating to the proposed business etc.

Conditions: Many leases will contain conditions to landlord's consent, including: (i) increasing rent; (ii) payment of additional deposit or other security; (iii) entering into landlord's then current form of lease; (iii) deleting certain personal rights – for example, an exclusive covenant or an option to extend (but tenants should be careful that parking, storage or other rights relating to the space are not caught here); (iv) waiver by tenant of certain statutory provisions; (v) receipt by landlord of any amounts payable in excess of rent or with respect to the transfer. With respect to this last condition, tenants should be able to negotiate a carve-out so that any amounts payable with respect to the tenant's goodwill or property are excluded, and only amounts payable that relate to desirability of the location are captured. However, landlords should limit these only to broker commissions and similar costs, and not leaving such carve-out too broad.

No Release: The leases will almost always make it clear that the original tenant is not released from its obligations. Even if the lease is silent on this point, tenant is not released at law. Unless specifically negotiated otherwise, the original tenant remains liable during any extensions or with respect to any other amendments.

Permitted Transfers: Every tenant's business is different, and these provisions should be tailored to the specific situation. Common examples of "non-consent" transfers address corporate or operational needs. For example, from corporate perspective, the tenant may address assignments to a company to be incorporated; transfers to affiliates, amalgamations or transfers between existing shareholders or family members. From operational perspective, tenants may ask for non-consent transfer relating to assignments or subleases to franchisees or dealers; subleases or licenses to associated professionals (for example, medical doctors or dentists); purchasers of substantially all of the assets or shares. Some major franchisors may also ask for re-assignment rights from original franchisees or rights to further assign to new franchisees. However, there can be other "unique" types of non-consent transfers. For example, where the tenant is an individual who is a medical or similar professional, they may wish to negotiate a right to transfer, without consent, in case of death, retirement or permanent withdrawal from practice, to another individual licensed to practice. The practice point is to always discuss in detail the tenant's actual or potential needs in this regard. From landlord's perspective, these "non-consent" transfers still must be subject to certain conditions. At minimum, there has to be a direct covenant from the transferee, as well as certain financial threshold to ensure that the transferee will be able to meet the obligations under the lease. More specifically, keep in mind that in Ontario, unless there is a specific agreement to release the original tenant, it will remain on the hook, due to privity of contract. On the same note, there is no privity of contract with the transferee, so one of the conditions to a non-consent transfer, must be a direct written covenant from the transferee to be bound by all of the terms and conditions in the lease. Without such document, the landlord can only enforce against the transferee covenants that "run with the land" (for example, covenant to pay rent, but not covenants which are not personal or collateral / contractual in nature, such as obligation to continuously operate). In addition, it should be clear that such permitted transfer can only proceed without consent if it is shown that the financial covenant will not be adversely affected. While these clauses will often confirm that the transferor will not be released, the practical reality is that after the transfer is completed, the original tenant will either be dissolved or will not have any significant assets anyway.

Costs: The landlord will typically require its legal and administrative costs to be covered. At minimum, tenants will try to limit this to only reasonable costs, but some may be able to negotiate actual caps to such costs.

Limitation on Damages: From the landlord's perspective it is prudent to include the provision that if the landlord withholds its consent, the landlord will not be liable for any losses or damages and the tenant's sole remedy is to bring an application before a judge for an order determining whether consent was unreasonably withheld, in accordance with *Commercial Tenancies Act*.

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