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Lease Registration

by Practical Law Canada Commercial Real Estate

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This Practice Note provides guidance for the registration of leases in Ontario, although all other jurisdictions also provide for the registration of leases (or notices, caveats or memorandum thereof). Ontario allows the registration of both the lease itself (in both long and short forms), as well as by way of notice, each with different rights and remedies, the nuances of which can be quite relevant and even strategic. For the purposes of this note, references to "registering the lease" will also be deemed to be a reference to "registering a notice of lease" unless the context requires otherwise.

Why Register a Lease

Registration does not affect, in any way, the validity of a lease as between the landlord and the tenant, however, registration may affect priority as between a tenant and a successor landlord or mortgagee. In Ontario, which is almost exclusively governed by a Torrens statute (the *Land Titles Act*, R.S.O. 1990, c. L.5), order of registration governs priority relative to leases, except for limited exemptions for:

- Short-term leases.
- Actual notice.

So, unless one of the exceptions applies, a successor landlord or tenant (or, practically more often, a successor mortgagee) whose transfer, lease, or mortgage (as the case may be), is registered on title prior to a lease registration may claim priority over that lease and may evict that tenant (subject to any non-disturbance agreements that might exist with that tenant).

As a tenant can never be sure when a landlord may sell or mortgage the reversion and may not have an opportunity to provide all future purchasers and mortgagees with actual notice of the existence of the tenancy, registration provides the requisite notice to the world and guarantees priority.

The First Exception: Short-Term Leases

In Ontario, 99.5% of the properties are now under the *Land Titles Act*, making a discussion of the *Registry Act*, R.S.O. 1990, c. R.20 practically academic. Section 44(1), paragraph 4 of the *Land Titles Act* states that there is an exclusion from the requirement to register for:

> [a]ny lease or agreement for a lease, for a period yet to run that does not exceed three years, where there is actual occupation under it.

This means that, even without registration, a lease (or any less formal agreement that creates a tenancy) that has a term yet to run of three years or less (including any renewals or extensions) has priority over all subsequent registrations, even without the lease having to be registered. A few key words have been emphasized. The test is based on the remainder of the term, irrespective of how long the actual term is. An unregistered lease with a hundred-year term (or more) of years demised thereunder can still take priority over a current registration if there is only three years or less left to run. In contrast, under the *Registry Act*, the test is a seven-year absolute term of years, irrespective of how many years there are left to run. Note also that there also must be actual occupation thereunder. The leased premises cannot be vacant. This makes sense since the exception for short-term leases is a conceptual derivative of actual notice. The tenant has to be relatively visible to those who take title. Practically speaking, it is very rare to see any lease with a term of three years or less ever registered on title. The practical threshold of lease registration starts with leases exceeding three years in term. Although what constitutes "short term" varies from province to province, all common law provinces have some sort of exception from the need to register short term leases.

The Second Exception: Actual Notice

Under the *Land Titles Act*, priority is generally determined by order of registration but, in Ontario, priority for leases is also subject to the doctrine of actual notice. Therefore, in the case of leases with terms longer than three years, priority is determined by the order of registration unless a competing party had actual notice of an unregistered lease. Where such competing party has such actual notice, that party with actual notice is subordinate in priority to that unregistered lease, at least initially (see discussion of *DeGasperis Muzzo Corp. v. 951865 Ontario Inc., 2001 CarswellOnt 2285 (Ont. C.A.)* (DeGasperis Muzzo) below).

The seminal case on point (and to date still the most illustrative case on the doctrine of actual notice in Ontario) is the Supreme Court of Canada leasing case, *United Trust v. Dominion Stores*, *1976 CarswellOnt 383 (S.C.C.)*. Greatly paraphrased, in *United Trust v. Dominion Stores*, a purchaser of the freehold reversion knew of an existing long-term tenant on the property long before closing. The evidence showed that the purchaser had not only known about the long-term tenant, but, indeed, had had lengthy negotiations with the tenant prior to closing. After closing, the purchaser-become-landlord sought to evict the tenant on the basis that the tenant had not registered its lease on title. The Supreme Court of Canada refused the purchaser's argument, noting that the purchaser had actual notice of the long-term tenant before closing and could not then evict the tenant based on nominal priority based on registration.

An unintuitive and potentially dangerous exception to priority by actual notice is set forth in the case of DeGasperis Muzzo Corp. In DeGasperis Muzzo, it was determined that the tenant had priority over an existing mortgagee of the landlord/owner by way of actual notice (the mortgagee had notice of the unregistered lease before registering its mortgage). At that point, the mortgage priority analysis followed *United Trust v. Dominion Stores*: the mortgage was subordinate to the unregistered lease because the mortgagee had prior actual notice of the unregistered lease; however, the tenant in *DeGasperis Muzzo* then registered notice of its lease. According to the court, by so doing, the tenant, by that very fact, lost that priority immediately upon and as a result of such registration. The court in DeGasperis Muzzo concluded that the rule in *United Trust v. Dominion Stores* applies only to a priority dispute as between registered interests and unregistered interests. A priority dispute between competing registered interests is always governed by the order of registration. This case creates a conundrum for tenants who enjoy the benefit of priority by actual notice; any subsequent registration automatically destroys existing priorities derived from actual notice. This makes the immediate registration of leases imperative. Although the decision has been widely criticized academically, it is now fairly long-standing appellate law.

The Second Exception: Actual Notice (Plus an Element of Fraud) in Western Torrens Jurisdictions

United Trust v. Dominion Stores, a Supreme Court case emanating from Ontario, has an unusual application in jurisdictions west of Ontario. As aforesaid, in *United Trust v. Dominion Stores*, the Supreme Court of Canada found in favour of the tenant (not the purchaser for value), notwithstanding that the lease had not been registered on title, because the purchaser had actual notice of the existence of the lease. *United Trust v. Dominion Stores* is not binding in Alberta, where the opposite paradigm likely applies (i.e. a purchaser for value will be able to evict an unregistered tenant, whether or not the purchaser had notice of the existence of the tenant). This is because Alberta has express statutory provision that says that, absent fraud, actual notice is not an exception to the priority of registered interests. Indeed, the Supreme Court of Canada expressly notes as much at p. 951-2 of *United Trust v. Dominion Stores*:

> Counsel for the respondent Dominion Stores Limited submits, and I agree with him, that the many cases cited by counsel for the appellant for the proposition that actual notice is ineffective, including some cases which bear an almost exact resemblance to the present, are cases which depend upon the statutory provisions in the various jurisdictions containing such express provision and, therefore, are irrelevant in considering the situation in Ontario which lacks such a provision. I have read the authorities cited by the appellant and I do find that in each of those cases there is express reference to such a section. As an example, may be cited the provisions of s. 203 of The Land Titles Act of Alberta, R.S.A. 1970, c. 198
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> 203. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance or lease from the owner of any land in whose name a certificate of title has been granted shall be

> bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor is he affected by notice direct, implied, or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding, and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud. [R.S.A. 1955, c. 170, s. 203] [R.S.A. 1955, c. 170, s. 203]
> There is no doubt that when such a term appears in the governing statute, *the result is that unregistered encumbrances fail in any way to affect the title of the purchaser for value*. [emphasis added]

A similar anti-actual notice clause exists in all western provinces. Accordingly, in all jurisdictions west of Ontario, unregistered tenants cannot rely actual notice alone to excuse their failure to register notice of their leases. However, in these western jurisdictions, an unregistered tenant can obtain priority over a purchaser for value with notice, if such notice is somehow coupled with some element of fraud. What constitutes an "element of fraud" is itself not without considerable doubt and some controversy.

This requirement for "an element of fraud" is demonstrated in *Holt Renfrew & Co. v. Henry Singer Ltd., 1982 CarswellAlta 92 (Alta. C.A.)*. In Holt Renfrew, the tenant, Holt Renfrew, occupied a prime retail site under a lease for which a caveat had been registered on title. Subsequently, Holt Renfrew negotiated an extension of the lease term, but did not register a caveat on title reflecting the amended term. A purchaser for value acquired the site, and then refused to honour the extended term (even though it had actual notice of the amended lease with the longer term before closing). The Alberta Court of Appeal determined that the purchaser for value would have priority over Holt Renfrew's extended version of the lease unless it could be established that the purchaser acted "fraudulently" within the meaning of section 195 the Alberta *Land Titles Act* [formerly section 203, as referred to in *United Trust*] which it in turn defined as a "dishonesty of some sort".

The Court of Appeal analyzed the conduct of the purchaser in Holt Renfrew and found that the purchaser's lawyer had represented that the purchaser would assume the lease on closing, then concluded that closing with such an assumption promise in place made the subsequent rejection of the leases a "dishonesty of some sort". Having, therefore, an "element of fraud", the purchaser was ordered to take subject to the unregistered extended term. Denying an unregistered lease of which a purchaser has notice when the purchaser has agreed with the vendor to assume such unregistered lease, has routinely been found to be "an element of fraud" (see also *1198952 Alberta Ltd. v. 1356472 Alberta Ltd., 2010 CarswellAlta 197 (Alta. C.A.)*, where the Alberta Court of Appeal, some thirty years after Holt Renfrew, again found that denying leases in the face of a contractual obligation to assume same was enough of an "element of fraud" to make the purchaser take title subject to the unregistered leases).

However, this "element of fraud" is somewhat fickle to find. On facts arguably very similar to those in Holt Renfrew (i.e., lease with notice registered, but lease amendment extending the term not registered), the Manitoba Queen's bench in *Willman v. Ducks Unlimited (Canada), 2003 CarswellMan 63 (Man. Q.B.)* found that the purchaser had actual notice but did not have the necessary element of fraud. As such, the unregistered tenant lost priority to the purchaser as to the lease extension, even though the purchaser knew about the lease extension before closing.

The fact of the matter is that there is almost no reason to rely on actual notice as an excuse not to register notice of a lease. In Ontario (and likely common law jurisdictions east of Ontario), actual notice might save a tenant from its decision not to register a lease, and in Alberta (and the other jurisdictions west of Ontario), actual notice (plus an "element of fraud") might save a tenant from its decision not to register a lease, but actual notice, with or without an element of frauds is unpredictable at best. From a practical perspective, it is hard to find a persuasive reason not to register a long term lease (and by long term, we mean any term longer than that afforded under the applicable statutory exception for short term leases). As set forth in Nancy Chaplick, "The Position of a Lessee Under an Unregistered Lease", (1974) Vol. 8, *Law Society of Upper Canada Gazette*, pg. 285:

> To summarize this point, a lessee would not be wise to assume his interest under an unregistered lease would be protected against registered interests merely because he is visible occupation of the premises, and has been in possession for some time, under what is most certainly a leasehold arrangement. The courts consistently allow a claimant under a subsequent instrument to ignore

> the obvious existence of another's prior interest and rely upon the registered title. The subsequent claimant has no obligation to make any inquires as to the term of the lease, and if he does make inquiries, he does so at his peril for he will then in fact have actual knowledge. It is, therefore, only in the most blatant cases that actual notice will exist...
>
> (pg. 300)

Action on the Covenant

As can be gleaned from the cases referred to above, a tenant that has not registered its lease (or notice thereof) on title, may, subject to the exceptions noted above, lose that leasehold to a purchaser, mortgagee, or new tenant, as the case may be. However, even after the leasehold is lost, the tenant almost certainly has an action on the quiet enjoyment covenant against the landlord with whom the tenant had privity of contract. As such, an existing landlord has every incentive to consider guarding against that lawsuit. In the case of a sale, the existing landlord should obtain an assumption covenant from the purchaser (see Holt Renfrew and 1198952 Alberta Ltd. above). In the case of a mortgage, it would be a non-disturbance agreement between the tenant and the mortgagee (although, from a practical perspective, landlords rarely are the driving force behind non-disturbance agreements since non-disturbance agreements only become relevant after a landlord default under its mortgage, after which time, most landlords are hardly worried about further lawsuits). In the case of a landlord leasing to a new tenant, the landlord has likely already determined that the existing tenant is in some fatal default under its lease.

Registering the Full Lease on Title

Ontario has an unusual registration protocol for registering a lease on title, allowing, in effect, three variations of any given lease to be registered. Firstly, the full-length original lease can always be registered on title. The downside of registering the full-length lease on title is that the rent will be disclosed on title for all to see, as well as any favourable or unusual covenants. As such, it is almost never the preferred route, for landlord or tenant, and is rarely seen except with some long-term ground leases. It is also permitted to register a notarial copy of a full lease in lieu of an original copy, although it is extremely rare to find notarial copies registered on title in Ontario.

Registering the Short-Form Lease on Title

In Ontario, it is possible to register a copy of a modified "short-form lease" (this is essentially a lease with the relevant rent provisions and some other business details left silent). The use of the short-form lease is almost always required by most landlords in multi-unit properties (shopping centres, office buildings, etc.) because the landlords (and sometimes the tenants as well) do not want any evidence of the rent being disclosed on title. In these short-form leases, the rent is either left out altogether or substituted with phrasing like, "the tenant agrees to pay such rent as may have been agreed to from time to time between the landlord and the tenant ...". This short-form lease is not to be confused with leases drafted under the Short Forms of Leases Act, R.S.O. 1990, c. S.11 (i.e., the statute that allows for truncated phrases and statutorily implied defined terms in leases drafted thereunder). The short-form lease allowed to be registered is simply a lease without the rent specified and may or may not be drafted under the Short Forms of Leases Act (which are now rarely, if ever, seen). It is critical to understand that the short-form lease is a two-party registration, requiring the electronic signature of both the landlord and the tenant (the relevance of which is discussed below in the context of the alternative, a notice of lease).

Registering the Notice of Lease on Title

Ontario also permits the registration of "notice of lease" under section 25 of the *Electronic Registration*, O. Reg 19/99. This notice of lease is similar to "memorials" and "caveats" in other jurisdictions, a document on title that alerts searchers to an existence of the lease and provides some information about the basic details of the tenancy, but without actually requiring a signed lease (long form or short form) to be registered on title. In terms of details provided (typically: parties, term of years, legal description, etc.), there is little difference between the notice of lease and the registration of a short-form lease (neither approach provides any details of the rent payable); however, there are two critical differences between the two registration methodologies.

Firstly, with the notice of lease option, the document can be registered (typically by the tenant) with a single signatory. The landlord need not electronically sign the

document. This is relevant because it gives the tenant a unilateral ability to protect its tenancy even where the landlord is recalcitrant or otherwise uncooperative. It also allows the tenant to register a form of notice not approved by the landlord. So, why would a tenant risk registration contrary to the terms of the lease, when such an act would be a default under the lease? In some cases, where the tenant suspects that the landlord is about to sell, mortgage, or re-lease the premises, and the tenant is or is about to be in litigation with the landlord in any event so that one further breach may not be consequential and can probably be dealt with in the litigation. Such a registration would not be possible if the notice of lease in Ontario is returned to a two-party document (because then the landlord would need to be a party and the tenant would not be able to register notice on title unless the tenant was prepared, in effect, to forge the landlord's signature). Reforms turning the notice of a lease back into a two-party document in Ontario (as was the case prior to electronic registration) were contemplated by the Land Registry Office around 2015, but to date remain unimplemented.

Secondly, with the notice of lease option, the registrant must provide a covenant promising to produce the actual lease within fourteen (14) days of receiving a request therefor, failing which the notice of lease can be deleted by the registrar. This is a significant consequence. The demand for production must be formal (in writing, unambiguous, and with evidence of delivery by registered mail or personal service), unless the recipient of the demand acknowledges receipt of the demand. The production requirement does not require delivery of a copy of the lease to the requesting party (simply making the lease available for inspection with a reasonable opportunity to review same and to take notes, etc. is sufficient). The lease produced for inspection may not be redacted and, in a similar vein, it is not sufficient to produce a summary or altered variation of the lease. Furthermore, there is no restriction as to who may demand production, including business competitors of the tenant or the landlord. While disputed production requests brought to the attention of the Director of Titles are relatively rare, there have been deletions of notices of lease for want of such timely production.

Registering Ancillary Lease Documents

Ontario accepts leases as encumbrances on land. While this sounds trite, some jurisdictions do not allow the registration of leases on title. It follows, therefore, that, in addition to a full lease, short-form lease, or notice of lease, Ontario's *Land Titles Act* also accepts all ancillary lease documents for registration:

- Notice of determination/surrender of lease.
- Notice of sublease.
- Notice of assignment of rents.
- Notice of assignment of lessor's interest.
- Notice of assignment of lessee's interest.
- Notice of oil and gas lease.
- Leasehold PINS (see Leasehold PINs).
- Notice of subordination and non-disturbance agreements (pursuant to section 71).

Leasehold PINs

Section 38(1) of the *Land Titles Act* authorizes the creation of separate leasehold parcels. These are only available where the term exceeds 21 years (inclusive of renewals). Leasehold titles are very useful when there is anticipated subleasing underneath (a shopping centre built on a ground lease, etc.). The lease creating the leasehold has to be registered. Although it is rare, the Ontario land registry offices could accommodate a leasehold PIN within a leasehold PIN (i.e., a sublease parcel).

Planning Act Implications of Registration

Registration is not a guarantee of compliance to the Planning Act, R.S.O. 1990, c. P.13. The Land Registry office allows the registration of leases whether or not they offend the Planning Act (the Land Registry Office does not police the Planning Act. Registrants are entitled to register whatever is otherwise registrable and the validity of their registrations is forever subject to *Planning Act* compliance).

For more information on the Planning Act, see Practice Note, Planning Act Consents.

Landlord Consent

While there are very few reasons not to register notice of a lease on title, most leases either prohibit registration of notice on title or require landlord consent for any registrations (which landlord consent is not required by statute to not be unreasonably withheld and is often accompanied by a requirement that the form of notice to

be registered on title be prepared by the landlord at the tenant's expense). Landlords have a vested interest in limiting registration by tenants for a variety of reasons, but the principal fear is that tenants will expose the rent paid and other special provisions afforded them under the lease, in an environment where the landlord is simultaneously trying to lease nearby space (say in a mall or elsewhere in the building) to other tenants and would be prejudiced by the publication of such details. In all jurisdictions in Canada, a lease may by contract prohibit, restrict, or condition the tenant's right to register notice of its lease on title (other than Quebec, where the tenant's right to register on title cannot be contracted out of), and almost all leases have some degree of restriction on the right to register a lease (see, Standard Document, Commercial Lease (Short Form).)

As aforesaid, currently in Ontario, the notice of lease is a one-party document, meaning that it can be registered by the tenant alone. The Land Registry Office does not police the registration of the notice of lease – the Land Registry Office staff do not check the lease to review the for compliance with landlord consent provisions of the lease, nor would the Land Registry Office staff delete a notice of lease even if it could be demonstrated that the registration was an unequivocal breach of the terms of the lease.