

ASSIGNMENT OF LEASES

BY JUDY ROST AND EMILY CLOUGH

What happens if you receive a request from your tenant to assign or sub-lease their tenancy? The brief answer: act carefully. This article addresses assignment, but the same general principles apply for sub-leases.

In commercial leases, the lease usually contains a term that a tenant can only assign the lease upon receiving the landlord's consent. The landlord cannot refuse to consent at its whim – the lease will also usually contain a term that the landlord must not “unreasonably withhold” consent if asked by the tenant.

Arbitrary Refusal to Consent for Commercial Leases

In general, a landlord can withhold consent for any reason, arbitrary or not, unless a term of the contract or a statute states otherwise. In some provinces (Ontario, Manitoba and Saskatchewan, for example), there is a law that imposes on all leases the term that the landlord cannot unreasonably withhold consent. In British Columbia and Alberta, no such law exists. Landlords in British Columbia must be cautious not to make a discriminatory decision under the Human Rights Code, but otherwise may act arbitrarily in their decision as long as their contract does not state otherwise.

Residential Leases

In residential leases, s. 34 of the Residential Tenancy Act automatically incorporates the terms that the tenant must request consent and that the landlord cannot unreasonably withhold consent of an assignment into the lease.

Unreasonable vs. Reasonable Refusal to Consent

So when is it unreasonable and when is it reasonable to withhold consent to a proposed assignment? A few examples may assist you in understanding how a judge would assess the situation should it be taken to court.

It will likely be unreasonable to withhold consent for a collateral purpose. For example, it is unreasonable to withhold consent in an attempt to financially ruin the tenant and regain control of the premises. It is also unreasonable to withhold consent in order to obtain a higher rent.

It has been found to be unreasonable to refuse to respond to the request for consent, or to refuse consent without providing any reasons for the refusal.

Some circumstances in which it may be reasonable to withhold consent include:

- (a) the tenant did not make a clear request for consent, but was just “testing the waters”;
- (b) the landlord has reason to believe that the new tenant would not be able to pay the rent, based on the tenant's business reputation or experience;
- (c) the landlord was provided with little or no information regarding the proposed new tenant's identity and/or the proposed use of the property;

- (d) there would be a negative economic impact to the landlord's property if the assignment was permitted; and
- (e) the proposed new tenant would unreasonably disturb other current tenants or occupants. For example, courts have held that it is reasonable to withhold consent where the proposed new tenant's business will compete with other current tenants or would cause congestion in the parking lot.

If the landlord's refusal to consent is challenged, the tenant must prove that the refusal to consent was unreasonable. It is not the landlord's obligation to prove that the refusal was reasonable. The court will question whether the conclusions reached by the landlord are ones that might have been reached by a reasonable person in the same circumstances.

What happens next if the landlord refuses consent?

A tenant has several potential remedies should their landlord refuse consent to assign the lease:

- (a) sue the landlord for a declaration that the tenant is entitled to make the assignment;
- (b) treat the refusal to consent as a breach of the lease and sue for damages;
- (c) treat the refusal to consent as a repudiation of the lease and leave the tenancy; or
- (d) assign the lease without the landlord's consent, assuming that the refusal will be found “unreasonable”.

Strategy (d) is certainly the riskiest. If the tenant is wrong, then the tenant is in default of the lease and the landlord can terminate the lease or sue the tenant to recover for damages.

Tips If Your Tenant Requests An Assignment

Respond to the tenant's request to assign the lease within the time prescribed in the lease, or if no time is prescribed, within a reasonable amount of time

- If you are refusing consent, give your tenant written reasons explaining your decision
- Make sure your reasons are reasonable
- Be fair and honest
- Refer to the facts you have considered in making your decision

Remember, should the tenant bring you to court for your refusal to consent, the judge will review everything that you did in the process of making your decision. Make sure you act carefully, and seek legal advice early in the process. ♦

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