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A Commercial Tenancy Handbook

Olson

Release No. 1, May 2024

This release features updates to commentary and case law in the following chapters: 1 (Leases and Related Uses of Land), 2 (Commercial Leases of Land: The Essential Terms), 3 (Express and Implied Terms of Leases), 5 (Exercise of Options to Renew), 6 (Problems Encountered by Landlords), 7 (Problems Encountered by Tenants), 8 (Remedies of Landlord and Tenant), 10 (Commencing and Conducting an Arbitration), and 13 (Easements). Additionally, Appendix C, Selected Precedent Provisions, Appendix E, Provincial Procedures, Appendix F, Legislation, and Appendix WP, Words and Phrases have been updated.

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Highlights

- **§ 3:16.50 – Obligations to Consult** — Rarely, a lease may contain a provision that if a certain event occurs either or both of the landlord and tenant will “consult”, “discuss”, or “consider” the effect of the event with the other. Often such a provision relates to changes in law or regulations that affect a tenant’s business. If the provision does not have a formula or metric by which the consultations are to be measured, then it is equivalent to the exercise of a discretion. The discretion will have been exercised honestly unless it can be shown that “the exercise of discretion [was] unconnected to the purpose for which the contract granted discretion”. A renewal option that provides: “the Tenant may renew this Lease for an additional one term of Five years (5 years) sole and absolute discretion. All terms of the renewed lease will be reviewed and discussed” imposes an obligation to consult after the lease has been renewed.
- **§ 6:15.30 – Claims Against the Principal of a Corporate Tenant** — In some circumstances a landlord may have a claim against a corporate tenant’s shareholders or directors even though there is no guarantee or indemnity. Claims against parties that are not guarantors or indemnitors are difficult and require establishing either: 1) The receipt of payments from the tenant at the time when the tenant is insolvent; 2) the receipt of payments from the tenant on debts in priority to the claims of the landlord; or 3) the transfer of funds, or other assets, from tenant to related parties. The first two categories will generally fall under fraudulent conveyance or fraudulent preference statutes. The third category may also fall under fraudulent conveyance or fraudulent preference statutes but may also fall under the oppression remedy available under some Company or Business Corporation Acts. To succeed in a claim of oppression against a corporate tenant a landlord must show: 1) First, the complainant must identify the expectations it claims have been violated by the conduct at issue and show that those expectations were reasonably held, and 2) Second, the complainant must show that these reasonable expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of any security holder, creditor, director, or office.