

Publisher's Note

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<p>A Commercial Tenancy Handbook Olson Release No. 1, April 2022</p>

Publisher's Special Release Note 2021

The pages in this work were reissued in April 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the April 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

This release features updates to the case law and commentary 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), 4 (Missing Terms, Representations, Collateral Agreements and Amendments), 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), 12 (Possession of Premises Without a Lease), 14 (Special Issues Arising from Subleases), and 17 (Shopping Centres).

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Highlights

- **Express and Implied Terms of Leases — Exercise of Unilateral Discretion** — The Supreme Court of Canada explained the “source or content of the specific duty to exercise discretion in good faith.” Where discretion is exercised in a manner that matches its purpose, it may be characterized as reasonable according to the agreement between the parties. Generally, when discretion is exercised in good faith, unless other concerns are raised it should be insulated from judicial review as a matter of fairness: *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.*, 2021 SCC 7, 2021 CarswellBC 265, 12 B.L.R. (6th) 1 (S.C.C.).
- **Problems Encountered by Landlords — Read the Lease! — Limitation Periods** — The key issue in a limitation period case is when the party claiming discovered the claim. The Supreme Court of Canada has held that a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant’s part can be drawn. Pursuant to s. 5(2) of New Brunswick’s *Limitation of Actions Act*, a claim is discovered when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage has occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant. This list is cumulative, not disjunctive. For example, knowledge of the loss, without more, is insufficient to trigger the limitation period: *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, 2021 CarswellNB 373 (S.C.C.).
- **Exercising the Option to Renew — Generally** — Delivery of a notice of exercise of an option to renew before the period specified in the lease is not a valid exercise of the option to renew. A landlord is not obliged to correct a tenant’s misapprehension about the provisions of the lease unless the landlord has “lied or knowingly misled [the tenant], created a false impression through its own actions, or actively contributed to [the tenant’s] misapprehension:” *Subway Franchise Restaurants of Canada Ltd. v. BMO Life Assurance Company*, 2021 ONCA 349, 2021 CarswellOnt 7396 (Ont. C.A.).

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