

When the Trigger is Pulled: Shotgun Termination Clauses

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Many commercial leases contain a “shotgun termination clause” which is triggered in the event that a Tenant wishes to assign or sublease leased premises to another party.

In its simplest terms, a shotgun termination clause provides that:

- (a) if a Tenant wishes to assign the lease or sublease the premises, it must first provide notice to the Landlord of such intent;
- (b) the Landlord, within a certain period of time, can either consent to the assignment or subleasing arrangement, or terminate the lease; and
- (c) where the Landlord elects to terminate the lease, the Tenant must either withdraw its request for consent, or accept the termination of the lease.

Tenants beware: as a shotgun termination clause can effectively prevent a Tenant from:

- (a) subleasing excess leased space: creating undue economic hardship for the Tenant;
- (b) moving to new leased space that is more suitable for its business operations; and
- (c) selling its business if the leased space is integral to the business.

In *550 Capital Corp. v. David S. Cheetham Architect Ltd.*, 2009 ABCA 219 (“*Capital Corp.*”), Justice Kenny, in a unanimous decision of the Alberta Court of Appeal, held that the shotgun termination clause was “repugnant” on the facts as it was inconsistent with an earlier clause within the lease which stated that the Landlord would not unreasonably withhold its consent to the assignment of the lease.

The facts in *Capital Corp* are not unlike the facts present in many commercial leasing arrangements. The Tenant, at the time of executing the lease, was a partnership. During the term of the commercial lease, the partnership incorporated and all of the assets of the partnership (including the lease) were transferred to the corporation. The Tenant understood that their change in status from a partnership to a corporation would not

impact their lease, as there had been no change of control. However, the Landlord insisted that there had been an unapproved assignment, in contravention of s. 10.02 of the lease, and warned that the Landlord would terminate the lease if the Tenant did not seek the Landlord’s consent.

Section 10.02 of the lease stated:

“The Tenant shall not pledge or assign this Lease or sublet or part with possession of the Premises or any part thereof, directly or indirectly, without the prior written consent of the Landlord which consent the Landlord agrees not to unreasonably withhold or delay. . . .”

Although the Tenant disputed that consent was required, the Tenant nonetheless sought the Landlord’s consent to the assignment in an effort to satisfy the Landlord’s concerns.

Immediately upon receipt of the request for consent, the Landlord served notice that it was terminating the Tenant’s lease pursuant to the following section (s. 10.03):

Notwithstanding section 10.02, within 30 (30) days after the receipt by the Landlord of such request for consent...the Landlord shall have the right upon written notice to the Tenant, if the request is to assign this lease or sublet the whole of the Premises, to cancel and terminate this Lease . . . on a termination date to be stipulated in the notice of termination which shall not be less than sixty (60) days or more than ninety (90) days following the giving of such notice. . . . If the Landlord shall not exercise the foregoing right of cancellation then the Landlord’s consent to the Tenant’s request for consent to assign or sublet shall not be unreasonably withheld . . .

Unlike some shotgun termination clauses, the lease did not empower the Tenant to withdraw its request for consent to the assignment. The Tenant refused to vacate the leased premises, and the Landlord sought to enforce its right of possession under the lease. The master in chambers refused to grant the Landlord its remedy as it found ss. 10.02 and 10.03 of the lease inconsistent with each other, and struck out s. 10.03 as unenforceable. This decision was upheld by the chambers judge on different reasons.

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In dismissing the Landlord's appeal, the Alberta Court of Appeal applied the rules of contract interpretation to the lease: specifically that the objective of contract interpretation is to discover and give effect to the real intention of the parties, and where an earlier clause is followed by a later clause that destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails.

On this basis, the Alberta Court of Appeal held that:

- the effect of the shotgun termination clause is to fetter, jeopardize and effectively destroy the Tenant's rights as agreed to under s. 10.02;
- the shotgun termination clause eliminates the Landlord's contracted obligation not to unreasonably withhold or delay its consent to an assignment;
- sections 10.02 and 10.03 cannot be read harmoniously: in s.10.02, a Tenant seeking consent to assign a lease can expect that the Landlord's consent will not be unreasonably withheld; however, in s. 10.03, the Landlord's consent can be arbitrarily withheld and the lease terminated; and
- a Tenant should not be required to jeopardize its tenancy in the course of requesting the Landlord to do something which it has promised: namely, not to unreasonably withhold its consent to an assignment.

It is important to emphasize that this decision is highly fact-based and it cannot be assumed, based on this decision, that all shotgun termination clauses are unenforceable. However, the decision does seem to limit the enforceability of shotgun termination clauses under specific circumstances. Further, it may suggest that the courts will be loathe to enforce a provision of the lease where enforcement of such provision would effectively eliminate a right that is specifically granted to the other party earlier in the lease.

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