# Tenants: Be Mindful of the "Change in Control" Clause in Your Lease

**KATHERINE KOWALCHUK**

If you are a tenant and are thinking of restructuring your business (i.e. merging or amalgamating with another company or otherwise changing the effective voting control of your business) during these uncertain economic times, be aware of the change in control provision which might be lurking in your lease.

Most leases will limit a tenant's right to assign or sublet a lease, either wholly or partially, in some form or another, including a "change in control" provision, which invariably favours the landlord. These provisions will usually require that the tenant obtain the landlord's prior written consent, which consent usually cannot be unreasonably withheld.

The following is an example of a typical change in control clause found in many leases:

> "The Tenant shall not Transfer the Lease, without the Landlord's prior written consent, which consent shall not be unreasonably withheld.
>
> "Transfer" shall mean a transfer or issue by sale, assignment, bequest, inheritance, operation of law or other disposition, or by subscription of all or party of the corporate shares of the Tenant or an "affiliate" (which for the purposes of this Article means "affiliate" as that term is defined under the *Alberta Business Corporations Act*) of the Tenant which results in a change in the effective voting control of the Tenant or a merger, amalgamation or other corporate reorganization of the Tenant."

In a recent Alberta Court of Appeal decision, *550 Capital Corp. v. David S. Cheetham Architect Ltd. et al.* 2009 ABCA 219, the original tenants (a partnership) formed a corporation for tax reasons and assigned the lease to the corporation, without obtaining the prior written consent of the landlord, 550 Capital Corp. (the "landlord"). The principals of the partnership and corporation were the same, however the corporation was a legal entity distinct from the partnership. The corporation continued to pay the rent to the landlord on time, executed an estoppel certificate at the request of the landlord and notified the landlord of the assignment, albeit six months after the assignment to the corporation. Further, the landlord sent various letters dealing with the lease to the corporation.

The landlord took the position that the partnership had assigned the lease without the landlord's prior written consent and therefore was in default under the lease. The landlord advised the tenant that it was terminating the lease and would be re-taking possession of the premises. The tenant argued, among other things, that there had been no change in control and accordingly no assignment.

The lower court ruled that an assignment had occurred and that the tenant was in default, which ruling was upheld on appeal. Luckily for the tenant in this case, however, the tenant cured the default (by assigning the lease back to the partnership) and was permitted by the court to remain in possession of the premises due to an inconsistency between two clauses in the lease, which negated the landlord's positive obligation to not unreasonably withhold its consent to the assignment.

2000, 10235 - 101 Street
Edmonton, AB T5J 3G1
PH: 780.423.3003

400 The Lougheed Building
604 1 Street SW
Calgary, AB T2P 1M7
PH: 403.260.8500

201, 5120 - 49th Street
Yellowknife, NT X1A 1P8
PH: 867.920.4542

www.fieldlaw.com

**General Considerations if you are Thinking of Assigning or Subletting Your Lease**

1. Review the assignment provision in your lease carefully. If you have any questions, consult your legal advisor.
2. Communicate your intention to assign or sublet your lease with your landlord as early as possible.
3. Ensure that when the time comes to put forward your request to assign or sublet your lease that it is done precisely in accordance with the lease.
4. Do not assign or sublet without consent, if the lease requires consent.