

LEX MUNDI
PUBLICATION



ISSUES RELATING TO COMMERCIAL LEASING

CANADA – NOVA SCOTIA McInnes Cooper

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1. Describe [National][state][territorial][provincial] or local transfer taxes payable on creation or assignment of a lease.

In Nova Scotia, leases with terms of 21 years or more are subject to payment of deed transfer tax. Deed transfer tax is levied at the municipal level in Nova Scotia. Whether or not a deed transfer tax applies depends upon the municipality in which the property is located. Both registered and unregistered leases are subject to such taxation. The rate of deed transfer tax can vary from 0% (where no tax is imposed) to 1.5% depending upon the municipality. The applicable deed transfer tax rate is applied to the entire consideration for the property in order to arrive at the amount payable.

2. Describe any legal restrictions limiting the maximum term of a lease (including renewals).

A lease for a term of more than 20 years (inclusive of any renewal provisions will require subdivision approval) if the lease only applies to a portion of an approved parcel or a parcel for which subdivision approval is not required (eg. a lot created before subdivision approval was required). Failure to obtain such subdivision approval does not invalidate the lease as between the parties but does prevent the lease from creating any interest in land. There is no specific exemption for a lease of a portion of a building but the general

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view is that such leases would be exempt as subdivision approval could not be obtained for a portion of a building.

3. Describe any laws requiring landlords to allow a tenant to renew its lease.

There are no such laws. If the lease does not grant the tenant a right of renewal, the tenant has no legal right to remain in the premises at the expiry or earlier termination of the term.

4. Describe any restrictions on rent that may be charged for to a tenant.

There are no restrictions. Rent is freely negotiable both initially and in respect of renewals.

5. Describe any laws permitting tenants to terminate a lease prior to its stated expiration date.

Under common law, a tenant is permitted to terminate its lease if the landlord has committed a fundamental breach. The threshold for establishing a fundamental breach is very high as the Courts have interpreted fundamental breach to mean a breach which essentially deprives the tenant of the entire benefit of its lease. An insolvent commercial tenant making a proposal to its creditors under the Bankruptcy and Insolvency Act has rights to disclaim or resiliate a commercial lease subject to satisfaction of certain conditions.

6. Describe any laws allowing tenants to assign or sublease without landlord's consent.

In the absence of any restrictions contained in the lease, a tenant may assign or sublet without restriction. However, most leases require the landlord's prior written consent to be obtained (and, in most cases, the landlord is required to act reasonably in considering the tenant's request).

Where the lease requires the landlord to act reasonably, a tenant may seek redress from the Courts if the tenant is of the view that the landlord has unreasonably refused to grant consent. If the tenant is successful, the Court has the authority to order the landlord to permit the assignment or sublet, as the case may be.

7. Describe any laws allowing landlord to restrict assignments or subleases by tenants.

It is possible to have an absolute prohibition on assignment or subletting. However, as noted above, most leases oblige the landlord to act reasonably in considering the tenant's request.

8. What is the common form of eviction proceeding? What is the customary length of time for that proceeding?

Termination is a self-help remedy in Nova Scotia and Court involvement or supervision is not required. Typically, the landlord provides a notice of default requiring the tenant to

remedy a breach within a stipulated cure period. Once the cure period has expired, the landlord may re-enter and terminate the lease.

9. Are there any legal restrictions on pledging a leasehold interest as security for a financing?

No. However, leases typically stipulate that the pledging of a leasehold interest will constitute a default under the lease unless the landlord's prior written consent is obtained. Some leases require landlords to act reasonably in granting their consent; others permit the landlord to arbitrarily withhold consent.

10. Describe any requirements for landlords to hold security deposits in separate accounts and, if such requirements exist, describe if there can be one separate account for all tenant security deposits or whether each security deposit must be held in its own separate security deposit.

There are no legislated restrictions regarding the handling of security deposits for commercial leases.

11. Describe any required statutory or other legal disclosures to be made to all tenants.

There are no legal disclosure obligations.

12. Describe all taxes on rent or other taxes that landlord are required to collect from tenants.

Landlords are required to collect and remit to the Government of Canada Harmonized Sales Tax (HST) which consists of the Federal Goods and Services Tax in an amount equal to 5% and Provincial Sales Tax in an amount equal to 8% for a total HST of 13% of the rent payable by the tenant to the landlord. HST applies to all rent payable by the tenant (i.e. both net rent and any additional rent such as recovery of operating costs and property taxes).

13. Describe any limitations on the ability of landlords to exercise self-help.

A landlord may terminate the lease and retake possession of the leased premises and exercise a power of distress (if available) without court order. The landlord's rights are limited by the tenant's common-law right to apply for relief from forfeiture.

14. Describe whether remedies such as acceleration of rent must be expressly stated or whether they are implied.

The remedies of termination and distress are implied. However, rent cannot be accelerated unless the lease expressly provides for it. Further, the lease must expressly grant the landlord the right to enter the premises to cure a default on behalf of the tenant.

15. Describe whether there are any expedited remedies for tenant default and, if so, what lease provisions (such as waiver of jury trial, for example) would be required for a landlord to seek expedited remedies.

There are no such expedited remedies available.

16. Describe any formal requirements for the execution of a lease.

Although there are no formal requirements, the Statute of Frauds requires the lease to be in writing to be enforceable.

17. Describe whether a memorandum of lease or other document would need to be recorded for the lease to be enforceable against third parties.

For properties not yet converted to our Land Registration System, a lease for a term exceeding three (3) years has to be registered to be effective against any person claiming under a subsequently registered instrument. Unfortunately our Registry Act does not include any provision for the filing of a Memorandum of Lease or Short Form of Lease. For properties which have been converted to our new Land Registration System, a lease for three (3) years or less under which there is actual occupation by the tenant does not need to be registered. A lease for a term of more than three years (3) must be registered in order to create an interest in land and to ensure priority of the lease against third parties with another registered interest in the property. Our new Land Registration Act does provide for the registration of a Notice of Lease.

18. Describe any restrictions on the transfer of ownership of real properties subject to a lease. Does such a transfer affect the tenant's rights or obligations?

There are no legislated restrictions on such a transfer. Any restrictions would be found in the lease document. It is not uncommon for a lease to provide that the landlord may transfer its ownership of the real property and only be liable for the landlord's covenants under the lease during its period of ownership.



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