

FAST EFFECTIVE PAIN RELIEF...

McLEAN & KERR LLP'S

UPDATE ON OVER-THE-COUNTER

COMMERCIAL LEASE REMEDIES

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**McLEAN & KERR LLP'S
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COMMERCIAL LEASE REMEDIES**

PART 1 BEWARE THE WHOLE AGREEMENT CLAUSE

BEWARE THE WHOLE AGREEMENT CLAUSE

1. BEWARE THE WHOLE AGREEMENT CLAUSE

WHOLE AGREEMENT – SAMPLE CLAUSE

This lease contains the whole agreement between the parties with respect to the subject matter of this lease. There is no promise, inducement, representation, warranty, collateral agreement or condition affecting the Project, the Store, the business to be conducted by the Tenant, or this lease or supported by this lease other than as expressed in this lease. All representations and inducements made by either party or their representatives which are relied upon by the other party are contained herein and each party disclaims reliance on any other representations or inducements. Furthermore, and without limiting the generality of the foregoing, Tenant specifically acknowledges and agrees that it has not relied upon any information provided to it by Landlord, the Manager or their representatives respecting the Project, the Store or otherwise and including, without limitation, sales, customer traffic, market and demographic information, statistics, projections analysis and studies and Tenant expressly disclaims reliance on same. Furthermore, Tenant acknowledges and agrees that its decision to enter into this lease is based solely upon its own investigations and analysis.

Beware the Whole Agreement Clause. Put simply, the presence of a clause such as this means that you must find your remedy in the lease itself or you do not have a remedy except statutory remedies.

This clause provides that there is no promise or agreement or inducement affecting the bargain between the Landlord and the Tenant, other than as expressed in the lease.

In the event of conflict between the Landlord and Tenant, only the lease provisions alone will be interpreted to determine the rights and obligations of each party to the contract.

It is essential that all promises, arrangements, inducements, representations and agreements exchanged between the Landlord and the Tenant in the business negotiation of the deal become clearly written into the lease.

BEWARE THE WHOLE AGREEMENT CLAUSE

2. GOOD FAITH IN NEGOTIATING A LEASE

In the recent decision of *Her Majesty The Queen v. Martel Building Ltd. (2000)*, S.C.J. No. 60 the Supreme Court of Canada considered whether the good faith doctrine applied during the negotiation stage of a commercial lease. The specific issue which the Supreme Court considered was whether one party to a lease negotiation owed a duty of care to the other party during the negotiation. For the following reasons, the Supreme Court held that there is no duty of care between parties during negotiations:

First, the goal of commercial negotiations is often to realize a financial gain at the expense of the other party.

Second, socially and economically useful conduct could be deterred by depriving a party of any advantageous bargaining position. It would defeat the essence of negotiation and hobble the marketplace to label a party's failure to disclose its bottom line, its motives or its final position as negligent.

Third, tort law could become after-the-fact insurance against failures to act with due diligence or to hedge risk of failed negotiations through the pursuit of alternative strategies or opportunities.

Fourth, the courts would assume a significant regulatory function - scrutinizing the minutia of pre-contractual conduct - when other causes of action provide alternative remedies.

Fifth, needless litigation should be discouraged.

In the circumstances of the *Martel* case, any prima facie duty of care was outweighed by the deleterious effects that would be occasioned through an extension of a duty of care into the conduct of negotiations.

BEWARE THE WHOLE AGREEMENT CLAUSE

3. GOOD FAITH IN PERFORMANCE OF LEASE

A. GOOD FAITH – SAMPLE CLAUSE

This is a lease as well as a business contract. The parties expect and intend that each will act in good faith and in a commercially reasonable manner in accordance with this agreement in enjoying and performing the rights and obligations of each party as set forth in this agreement. It is intended that this lease be an absolutely net lease for Landlord and that rent be received by Landlord free of any cost or obligation concerning the Store or the Project unless specified in this lease. Each provision of this agreement applicable to each party although not expressed as a covenant, shall be construed to be a covenant of such party for all purposes.

A basic principle in all contractual and commercial relations is that the parties to an agreement will act in accordance with the terms and intent of the agreement and will perform all covenants and obligations contained in the agreement in a good faith manner. In fact, the common law has implied the good faith doctrine in situations where the parties have not specifically included the duty to act in good faith within the lease. (See, for example, *Gateway Realty Limited v. Arton Holdings Limited* (1991), 112 N.S.R. (2d) 180 (N.S.C.A.); *MDS Health Group Ltd. v. King Street Medical Arts Centre Ltd.* (1994), 12 B.L.R. (2d) 209 (On. Gen. Div).)

Although the common law requires the parties to an agreement to act in a good faith manner, it is always advantageous to include an express provision such as the above example clause and formally acknowledge that there is the expectation of both parties that the lease will be performed in a good faith and commercially reasonable manner.

BEWARE THE WHOLE AGREEMENT CLAUSE

3. GOOD FAITH IN PERFORMANCE OF LEASE

B. REASONABLENESS – SAMPLE CLAUSE

Each of Landlord and Tenant agrees that it will not unreasonably withhold or delay any consent, approval, permission, designation or direction required under this Lease, except to the extent otherwise specifically provided for in this Lease.

Our example expressly provides that the parties will not withhold or delay any consent, approval, permission, designation or direction required under the lease. The provisions may be modified to specifically list all exceptions. One obvious benefit of such a clause is to avoid the requirement to insert the words “acting reasonably” throughout the lease.

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PART 2 STANDARD DEFAULT AND REMEDIES CLAUSES

STANDARD DEFAULT & REMEDIES CLAUSES

1. EVENTS OF DEFAULT

A. MONETARY DEFAULT

Landlord's Standard Clause:

An event of default occurs when:

- *Tenant defaults in the payment of Rent when due whether lawfully demanded or not;*

Suggested Revision:

- Tenant defaults in the payment of Rent and fails to remedy the default within ten (10) days after written notice;

STANDARD DEFAULT & REMEDIES CLAUSES

1. EVENTS OF DEFAULT

B. BREACH CAPABLE OF REMEDY

Landlord's Standard Clause:

An event of default occurs when:

- *Tenant commits a breach other than a default in the payment of Rent, and fails to remedy the breach within ten (10) days after written notice;*

Suggested Revision:

- Tenant commits a breach other than a default in the payment of Rent and fails to remedy the breach within **fifteen (15)** days after written notice that (1) specifies particulars of the breach, and (2) requires the Tenant to remedy the breach (or if the breach would reasonably take more than **fifteen (15)** days to remedy, fails to start commence to remedy the breach within **fifteen (15)** day period, or fails to continue diligently and expeditiously to complete the remedy);

STANDARD DEFAULT & REMEDIES CLAUSES

1. EVENTS OF DEFAULT

C. BREACH NOT CAPABLE OF REMEDY

Landlord's Standard Clause:

An event of default occurs when:

- *Tenant commits a breach of this Lease that is not capable of remedy and receives written notice specifying particulars of the breach;*

Suggested Revision:

- Tenant commits a substantial and material breach of this Lease that is not capable of remedy and receives written notice specifying particulars to qualify the breach;

STANDARD DEFAULT & REMEDIES CLAUSES

1. EVENTS OF DEFAULT

D. FALSE OR MISLEADING STATEMENT

Landlord's Standard Clause:

An event of default occurs when:

- *a report or statement required from the Tenant under this Lease is false or misleading;*

Suggested Revision:

- A report or statement required from the Tenant under this Lease is deliberately or intentionally false or misleading other than a misstatement that is the result of an innocent clerical error;

STANDARD DEFAULT & REMEDIES CLAUSES

1. EVENTS OF DEFAULT

E. BANKRUPTCY OR INSOLVENCY

Landlord's Standard Clause:

An event of default occurs when:

- *the Tenant, or a Person carrying on business in a part of the Premises, or an Indemnifier becomes bankrupt or insolvent or takes the benefit of any statute for bankrupt or insolvent debtors (including, but not limited to, the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended), or makes any proposal, assignment or arrangement with its creditors;*

Suggested Revision:

- The Tenant, or a Person carrying on business in a part of the Premises, or an Indemnifier becomes bankrupt or takes the benefit of any statute for bankrupt debtors (including, but not limited to, the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended), or makes any proposal, assignment or arrangement with its creditors, which is not terminated, stayed or set aside within thirty (30) days;

STANDARD DEFAULT & REMEDIES CLAUSES

1. EVENTS OF DEFAULT

F. APPOINTMENT OF RECEIVER

Landlord's Standard Clause:

An event of default occurs when:

- *a receiver or a receiver and manager is appointed for all or a part of the property of the Tenant, or of another Person carrying on business in the Premises, or of an Indemnifier;*

Suggested Revision:

- A receiver or a receiver and manager is appointed for all or a part of the property at the Premises of the Tenant, or of another Person carrying on business in the Premises, which is not terminated, stayed or set aside within thirty (30) days;

STANDARD DEFAULT & REMEDIES CLAUSES

1. EVENTS OF DEFAULT

G. DISSOLUTION OR LIQUIDATION

Landlord's Standard Clause:

An event of default occurs when:

- *steps are taken or proceedings are instituted for the dissolution, winding up or other termination of the Tenant's or the Indemnifier's existence or for the liquidation of their respective assets;*

Suggested Revision:

- steps are taken or proceedings are instituted for the involuntary dissolution, winding up or other termination of the Tenant's or the Indemnifier's existence or for the liquidation of their respective assets and such steps are not terminated, stayed or set aside within thirty (30) days;

STANDARD DEFAULT & REMEDIES CLAUSES

1. EVENTS OF DEFAULT

H. BULK SALES

Landlord's Standard Clause:

An event of default occurs when:

- *the Tenant makes or attempts to make a bulk sale of any of its assets regardless of where they are situated (except for a bulk sale made to a Transferee when the Transfer has been consented to by the Landlord);*

Suggested Revision:

- the Tenant makes or attempts to make a bulk sale of any substantial portion of its assets on the Premises (except for a bulk sale made to a Transferee when the Transfer has been consented to by the Landlord);

STANDARD DEFAULT & REMEDIES CLAUSES

1. EVENTS OF DEFAULT

I. VACANT OR UNOCCUPIED PREMISES

Landlord's Standard Clause:

An event of default occurs when:

- *the Premises are vacant or unoccupied for five (5) consecutive days or the Tenant abandons or attempts to abandon the Premises, or sells or disposes of property of the Tenant or removes it from the Premises so that there does not remain sufficient property of the Tenant on the Premises free and clear of any lien, charge or other encumbrance ranking ahead of the Landlord's lien to satisfy the Rent due or accruing for at least twelve (12) months;*

Suggested Revision:

- the Premises are vacant or unoccupied for fifteen (15) consecutive business days or the Tenant abandons or attempts to abandon the Premises, or sells or disposes of a substantial portion of the property of the Tenant or removes it from the Premises, unless replaced within a reasonable time so that there does not remain sufficient property of the Tenant on the Premises free and clear of any lien, charge or other encumbrance ranking ahead of the Landlord's lien to satisfy the Rent due or accruing;

Note:

Tenant's may wish to negotiate a deletion of the remainder of the section after "Premises" in the second line. The Tenant may have bank or other financing, thus Tenant property is not "free and clear". Six (6) months rent usually exceeds the value of the chattels.

STANDARD DEFAULT & REMEDIES CLAUSES

1. EVENTS OF DEFAULT

J. TRANSFER

Landlord's Standard Clause:

An event of default occurs when:

- *the Tenant effects or attempts to effect a Transfer that is not permitted by this Lease;*

Suggested Revision:

- the Tenant effects or attempts to effect a Transfer that is prohibited by this Lease unless Landlord is unreasonably withholding or delaying any requested consent;

STANDARD DEFAULT & REMEDIES CLAUSES

1. EVENTS OF DEFAULT

K. SEIZURE OF ASSETS

Landlord's Standard Clause:

An event of default occurs when:

- *this Lease or any of the Tenant's assets on the Premises are taken or seized under a writ of execution, an assignment, pledge, charge, debenture, or other security instrument; or*

Suggested Revision:

- this Lease or any substantial portion of the Tenant's assets on the Premises are taken or seized under a writ of execution, an assignment, pledge, charge, debenture, or other security instrument, provided that such seizure is not terminated, stayed or set aside within thirty (30) days;

STANDARD DEFAULT & REMEDIES CLAUSES

1. EVENTS OF DEFAULT

L. TERMINATION OF INDEMNITY AGREEMENT

Landlord's Standard Clause:

An event of default occurs when:

- *Indemnity Agreement is terminated for any reason whatsoever, whether by the Indemnifier or by other Person or by effect of law, or alternatively, if the obligations of the Indemnifier under the Indemnity Agreement are reduced, modified or otherwise limited except by way of any agreement made in writing by the Landlord.*

Suggested Revision:

- Indemnity Agreement is terminated, whether by the Indemnifier or by effect of law, or alternatively, if the obligations of the Indemnifier under the Indemnity Agreement are materially reduced, except by way of any agreement or acquiescence by the Landlord.

STANDARD DEFAULT & REMEDIES CLAUSES

1. EVENTS OF DEFAULT

Commentary

Prior to acting upon a tenant's default it is important to understand if the default is a monetary or non-monetary breach. In a commercial lease, rent generally includes minimum rent, additional rent and all other sums payable by the tenant to the landlord under the lease. As such, other charges that the landlord may seek to recover from the tenant (i.e. operating costs) must be specifically set out in the lease and defined as rent (*Dylex Ltd. v. Premium Properties Ltd.*, [1996] O.J. No. 2165 (Gen. Div.); *Han v. 9938 Investments Ltd.* (1995), 45 R.P.R. (2d) 100 (B.C.C.A.); *KPMG Peat Marwick Thorne and Johnson & Higgins Ltd. v. SPE Operations Ltd.*, unreported, No. 4675/94, April 6, 1995). A benefit that the landlord derives from an expansive definition of rent is that a default in the payment of rent generally has a shorter and less onerous procedure regarding notice requirement than defaults in non-monetary matters (ie. need not comply with strict notice provisions in Section 19(2) of the *Commercial Tenancies Act*).

Section 18(1) of the *Commercial Tenancies Act*, provides that a landlord has the right to re-enter the leased premises if rent has been outstanding for more than 15 days. However, section 18(1) does not require that the tenant be given notice prior to said termination. Note that section 18(1) clearly states that parties can contract out of or modify the provisions of the *Commercial Tenancies Act* regarding the breach of rent payments. As such, in the event of a monetary breach, the parties must always look to the lease to determine their respective rights and remedies. For instance, the 15 day statutory period is often reduced to 3 to 7 days as many landlords do not wish to allow tenants a 15-day grace period for the payment of rent. Landlords may even seek to have the right to re-enter the premises immediately if rent is not paid on the date agreed upon.

However, it is important to note that for breaches other than for non-payment of rent under section 19(2) of the *Commercial Tenancies Act*, the landlord must provide the tenant with appropriate notice of the alleged breach, must also set out a reasonable time to correct said breach, unless the lease specifies time for cure and must require the Tenant to make compensation in money for the breach. It is only after this period expires and the tenant fails to comply with this notice that the landlord has a right to forfeit/terminate the lease and re-enter the premises.

STANDARD DEFAULT & REMEDIES CLAUSES

2. LANDLORD'S REMEDIES

A. ACCELERATION OF RENT/RIGHT TO RE-ENTER – SAMPLE CLAUSE

Upon the occurrence of any Event of Default the full amount of the current months and the next three (3) months' instalments of Minimum Rent, Percentage Rent (calculated according to Section 16.02(b) above), Sales Taxes and Additional Rent, will become due and payable, and at the option of the Landlord, this Lease shall be ipso facto terminated. If this Lease is so terminated, the Landlord, to the extent permitted by law, may immediately repossess the Premises and expel all Persons from the Premises and may remove all property from the Premises, sell or dispose of it as the Landlord considers appropriate, or store it in a public warehouse or elsewhere at the cost of the Tenant, all without service of notice, without legal proceedings, and without liability for loss or damage and wholly without prejudice to the rights of the Landlord to recover arrears of Rent or damages for any antecedent default by the Tenant or its obligations or agreements under this Lease or of any term or condition of this Lease, and wholly without prejudice to the rights of the Landlord to recover from the Tenant damages for loss of Rent suffered by reason of this Lease having been prematurely terminated.

Commentary

The standard lease provision of 3 months' accelerated rent upon the tenant's default is derived from section 136(1)(f) of the *Bankruptcy and Insolvency Act* ("BIA"). Section 136(1)(f) provides a landlord with a "preferred" claim for, among other things, 3 months' accelerated rent if the lease entitles the landlord to claim acceleration. Therefore, Canadian landlords generally insist that a 3 month rent acceleration provision be included in all leases or else they will not be entitled to the preferred claim recognized under section 136(1) of the BIA. Generally speaking, it would be very difficult to convince any landlord to give up its statutory preferred claim. A preferable approach for a tenant would be to negotiate realistic cure periods and extend the relevant time periods after which a tenant can be considered to be in default.

There are two other important reasons why a landlord includes a 3 months' accelerated rent provision in its lease. The first has to do with the remedy of

distress. If a landlord chooses to distrain as a result of a tenant's breach, the landlord can distrain for accelerated rent if there is an accelerated rent provision in the lease. This increases the debt for which the landlord can collect. The second is leverage. If a tenant has the threat of owing the landlord 4 months' rent for any breach of its obligations under the lease, no matter how minor, this may help to ensure that the tenant adheres to the provisions of its lease.

With respect to the landlord's re-entry of the premises, the tenant should ensure that this section of the lease includes a provision that the landlord will act reasonably and that the tenant will receive notice in every instance prior to the landlord terminating the lease.

STANDARD DEFAULT & REMEDIES CLAUSES

2. LANDLORD'S REMEDIES

B. RIGHT TO TERMINATE OR RELET THE PREMISES – SAMPLE CLAUSE

- (a) *If the Landlord does not exercise its right under Section 16.01 to terminate this Lease, it may nevertheless relet at arm's length the Premises or a part of them for whatever term or terms (which may be for a term extending beyond the Term) and at whatever Rent and upon whatever other terms, covenants and conditions the Landlord considers advisable. On each such reletting, the Rent received by the Landlord from the reletting will be applied as follows: first to the payment of amounts owed to the Landlord that are not Rent or Sales Taxes; second to the payment of any reasonable costs and expenses of the reletting including reasonable brokerage fees and reasonable solicitors fees (on a solicitor and client basis), and the costs of any alterations or repairs needed to facilitate the reletting; third to the payment of Rent; and the residue, if any, will be held by the Landlord and applied in payment of Rent and Sales Taxes as it becomes due and payable. If the Rent and Sales Taxes received from reletting during a month is less than that to be paid during that month by the Tenant, the Tenant will pay the deficiency, which will be calculated and paid monthly in advance on or before the first day of every month. No repossession of the Premises by the Landlord will be construed as an election on its part to terminate this Lease unless a written notice of termination is given to the Tenant. If the Landlord relets without terminating, it may afterwards elect to terminate this Lease for the previous default. If the Landlord terminates this Lease for a default, it may recover from the Tenant damages it incurs by reason of the default, including, the reasonable cost of recovering the Premises, reasonable legal fees (on a solicitor and client basis), and the worth at the time of the termination, of the excess, if any, of the amount of Rent and Sales Taxes required to be paid under*

this Lease for the remainder of the Term over the rental value, at the time, of the Premises for the remainder of the Term, all of which amounts will be due immediately and payable by the Tenant to the Landlord.

(b) If an Unexpected Termination of this Lease occurs (as that term is defined in Section 16.01(c)), after the expiration of two (2) or more twelve (12) month Rental Years, then the annual Rent, for the purposes of calculating the Landlord's damages, will be considered to be equal to the average annual Minimum Rent and Percentage Rent (or, if no Percentage Rent was payable, the highest annual Minimum Rent that was payable for those expired Rental Years), plus Additional Rent and Sales Taxes. If an Unexpected Termination takes place before the expiry of two (2) twelve (12) month Rental Years, the annual Rent, for the purpose of calculating the Landlord's damages, will be considered to be equal to twelve (12) times the average monthly payment of Minimum Rent and Percentage Rent based on Gross Revenue for each full month of the Term, (or, if no Percentage Rent was payable, the highest Minimum Rent that was payable), plus Additional Rent and Sales Taxes.

(c) In this Article XVI, an "Unexpected Termination" means (i) a termination of this Lease or a re-entry by the Landlord due to a default under this Lease, (ii) a surrender of this Lease to which the Landlord does not consent in writing or (iii) a repudiation, disclaimer or disaffirmance of this Lease.

Commentary

If the landlord elects to re-enter the premises, it may either do so as an agent of the tenant, without terminating the lease, for, by way of example, the purpose of re-letting the premises. On the other hand, a landlord may re-enter the premises to extinguish the landlord/tenant relationship. If a landlord terminates the lease, it may quickly obtain control of the premises and avoid the rights of the tenant's trustee in bankruptcy if its action is taken in advance of the bankruptcy. However, the landlord must mitigate its damages and may have to obtain third parties' approval (for example, mortgagees). If a landlord chooses to terminate, it must ensure that any notice required under the lease or the *Commercial Tenancies Act* is prepared and properly served and that the appropriate time period has expired. In addition, in case of abandonment of premises or other fundamental

breach the landlord must give written notice to the tenant of the landlord's intention to claim damages for the loss of the benefit of the lease to the end of the term either concurrent with the notice of termination or shortly thereafter (*Highway Properties Ltd. v. Kelly, Douglas & Co.* (1971), 17 D.L.R. (3d) 710, [1971] S.C.R. 562 (S.C.C.)). Failure to provide the tenant with such notice will result in the landlord losing its right to claim for future damages.

If a landlord chooses to re-let, the tenant should ensure that the reletting is at arm's length and at fair market value, that it is limited to the balance of the original term, and that the landlord has acted reasonably in exercising its rights and that the landlord's costs or fees are reasonable.

STANDARD DEFAULT & REMEDIES CLAUSES

2. LANDLORD'S REMEDIES

C. EXPENSES – SAMPLE CLAUSE

If legal proceedings are brought for recovery of possession of the Premises, for the recovery of Rent or Sales Taxes, or because of a default by the Tenant, the Tenant will pay to the Landlord its expenses, including its reasonable legal fees (on a solicitor and client basis). In the case a suit shall be brought because of any breach of any covenant herein contained on the part of the Landlord to be kept or performed, and a breach shall be established, the Landlord shall pay to the Tenant all expenses incurred therefor, including a reasonable solicitor's fee (on a solicitor and his client basis) unless a court shall otherwise award.

Commentary

A landlord will want to seek costs incurred as a result of a tenant's default. However, when negotiating a lease a tenant should strive to ensure that it does not become responsible for the payment of legal fees and court costs. Furthermore, a tenant should ensure that all possible expenses are identified as "reasonable."

STANDARD DEFAULT & REMEDIES CLAUSES

2. LANDLORD'S REMEDIES

D. DISTRAINT - SAMPLE CLAUSE

Despite the Commercial Tenancies Act, or any other applicable Act, legislation, or any legal or equitable rule of law, none of the inventory, furniture, equipment or other property that is, or was at any time owned by the Tenant is exempt from levy by distress for Rent.

Commentary

LANDLORD'S DISTRESS PROCEDURE

The following is an overview of the landlord's right to distrain and a summary of the steps to be followed in exercising landlord's right to distrain against a tenant's goods, chattels and equipment.

(1) **A landlord can only distrain for arrears of rent.**

A landlord has the common law right to distrain for arrears of rent even if the lease or offer to lease is silent as to the landlord's right to distrain. You should note that rent which is due for example, on March 1, 2001 is not in arrears until March 2, 2001. On March 2, 2001 the landlord would be in a position to distrain for all arrears of rent to March 2, 2001.

(2) **A right of distress may be reserved in the lease with respect to 3 months' accelerated rent.**

For example, a standard form of lease provides in part as follows:

"It is a condition of leasing the Store to Tenant that when:

1. Tenant is in default in the payment of any rent, and such default continues for a period of 5 days after notice from Landlord,

...

then and in any such event the then current month's rent together with the rent for the 3 months next ensuing shall immediately become due and payable, ..."

Under such a provision of the standard form of lease, the landlord could not distrain for 3 months accelerated rent until it has complied with the 5 days written notice requirement.

If the landlord wishes to distrain for any accelerated rent, the default provisions in each lease should be carefully reviewed to see if there is any right to claim for the accelerated rent and, if so, whether there are any notice requirements.

- (3) **The landlord's right of distress ceases upon the appointment of a trustee in bankruptcy under the Bankruptcy and Insolvency Act.**
- (4) **The landlord cannot change the locks when distraining.**

If a landlord enters the premises and terminates the lease, he cannot subsequently distrain for rent and a purported distress in such circumstances is illegal and a trespass. **DON'T CHANGE THE LOCKS.** Attempts have been made to preserve the right of distress notwithstanding the exercise of the right to forfeit but such provisions will not be given effect.

- (5) **A distress for rent cannot be made after sunset and before sunrise.**
- (6) **Where the tenant attempts to remove the goods to defeat the landlord's right, the distress can be levied in the truck or car carrying such goods.**

Any person who assists a tenant in removing or concealing goods to defeat the landlord's right of distress is liable to the landlord for double the value of the goods and chattels so removed or concealed.

- (7) **A distress may be made by the landlord or, as is the usual practice, by his duly authorized agent or bailiff.**

We recommend that an agent or bailiff be retained in all cases. A landlord is responsible for all irregular acts committed by his bailiff or agent in making a distress, i.e. distraining excessively, not selling for the best price or selling without due notice or proper appraisalment.

- (8) **The entry to make a distress must be through the ordinary and natural means of entry to the leased premises.**

The landlord has no right of entry if such entry can only be achieved by breaking into the leased premises. The locks cannot be forced to gain entry.

- (9) **An actual seizure of goods is not necessary to constitute a distress.**

If it is necessary to seize all the goods on the premises and time does not allow for the removal of all the goods, it is sufficient to take hold of some article and say: "I distrain this in the name of all goods on the premises", or words to that effect. Any act or word expressive of a present intention to assume control of the goods will usually be sufficient.

(10) **All goods and chattels of the tenant in the demised premises may be distrained.**

In Ontario, the word "tenant" has been defined to include a subtenant, the assigns of the tenant and any person in actual occupation of the premises under or with the assent of the tenant during the currency of the lease.

Fixtures are exempt from distress whether they are irremovable ("landlord's fixtures") or severable by a tenant.

Generally speaking, a landlord's right of distress has priority over all secured creditors except a secured creditor who has a conditional sales contract or where the goods in the premises are on consignment.

(11) **The distress must be reasonable.**

While the landlord is not obliged to calculate precisely the value of the property seized, the excess of the value of such property above the arrears of rent must not be unreasonably large. A landlord who takes an excessive distress is liable in damages to the owner of the goods distrained.

(12) **During the course of seizure, the bailiff should immediately make an inventory of the goods, sufficiently full and complete to inform the tenant of the goods distrained.**

In Ontario, every person who levies any distress must give a statement in writing of the demand and of the costs and expenses of the distress to the person on whose goods the distress was made. The notice should be delivered to the tenant and posted in some conspicuous part of the premises.

(13) **Goods and chattels which are distrained should be impounded.**

We recommend that if there are vacant premises in the shopping centre, the goods and chattels which are distrained should be removed from the leased premises to such other vacant premises.

(14) After the expiration of five days from the date of delivery and posting of the notice, the person distraining **must** cause the goods and chattels so distrained to be appraised by two appraisers who must first be sworn to appraise the same truly, according to the best of their understanding, and a memorandum of the oath must be endorsed on the inventory. The appraisers must be reasonably competent but need not be professionals. The bailiff should not be one of the appraisers.

(15) The goods and chattels distrained for rent may, upon the expiration of five clear days after notice of distress has been given, be sold for the best price that can be obtained for them. The bailiff usually advertises the distress sale in a local newspaper.

(16) Where the landlord is exercising his right to distrain, the tenant is entitled to set-off against the rent due a debt due to him by the landlord.

(17) In the absence of a specific clause in the lease, the landlord may not buy at the distress sale, even at an open auction sale, and if he purports to do so no title passes.

(18) The proceeds of sale are applied in satisfaction of the rent arrears and the expenses of the distress, appraisal and sale. If there is a surplus, it must be remitted to the tenant.

(19) **Retail Sales Tax Liability**

Recent amendments to the Ontario *Retail Sales Tax Act* impose liability on a landlord which seizes assets of a tenant which owes provincial sales tax.

A landlord becomes personally liable for all unremitted provincial sales taxes, interest and penalties of the tenant, if the landlord has not obtained a tax clearance certificate from the Ministry of Finance.

The landlord's liability is **not** limited to the value of the property seized. The landlord is now exposed to liability for all of the tenant's unremitted provincial sales taxes.

The time period for completing a search of the tenant's tax account and obtaining a tax clearance certificate can be lengthy. This will defeat the primary purpose of the distraint, namely speedy landlord self-help.

We recommend that:

- (A) prior to commencing the distraint, negotiations with the Ministry of Finance be undertaken to determine the extent of the Ministry's claim for unpaid tax. It may be possible to negotiate the amount of the Ministry's claim and divide the costs of the distraint; and
- (B) prior to the sale of the distrained goods, a tax clearance certificate or written confirmation of the Ministry's position be obtained.

**SUMMARY OF STEPS TO BE FOLLOWED BY LANDLORD WHEN
DISTRAINING**

(1) If the landlord intends to distrain for 3 months' accelerated rent, the lease should be carefully reviewed to ensure that the landlord has a right to claim the accelerated rent and to ensure that there has been compliance with any notice requirements.

- (2) In Ontario, determine the position of the Ministry of Finance with respect to the tenant's unremitted provincial sales tax and attempt to negotiate a division of the costs and proceeds of the distress.
- (3) Prepare a notice of distress and call the bailiff and instruct him to distrain as soon as possible.
- (4) Have the bailiff deliver the notice of distress to the tenant.
- (5) Do not change the locks and do not allow the bailiff to change the locks.
- (6) Remove the goods and chattels of a value sufficient to cover the arrears and costs from the leased premises to other vacant premises.
- (7) An inventory of the goods and chattels should be prepared immediately. A copy of the inventory should be given to the tenant.
- (8) At the expiration of 5 days from the delivery of the notice of distress, cause the goods and chattels which were distrained to be appraised by two appraisers; the appraisers should first be sworn to appraise the goods and chattels truly according to the best of their understandings and a memorandum of the oath must be endorsed on the inventory.
- (9) After the appraisals have been obtained, sell the goods and chattels for the best price that can be obtained for them; the sale should be advertised; apply the proceeds of sale in satisfaction of the rent arrears for which they were distrained and the expenses of the distress, appraisal and sale.
- (10) Once the proceeds of sale are in hand, and if the proceeds are not sufficient to cover all arrears and costs, you can proceed to terminate the lease, change the locks and relet the premises.
- (11) A notice of termination of the lease should then be forwarded to the tenant.
- (12) In Ontario, obtain a tax clearance certificate or agreement in writing from the Ministry of Finance prior to distribution of the proceeds of sale.

Note:

As provided above, the Crown holds a super-priority (or a lien) with regards to un-remitted sales taxes. The Crown has a right in distrained goods up to the amount of any unpaid provincial sales tax. **Seizing and selling the goods without contacting the Crown will result in the landlord becoming liable for the full amount of un-remitted taxes – even if this amount is above what is owed to the landlord in rent.** A careful landlord should write to the Retail Sales Tax Branch at 5 Park Home Avenue, Suite 200, Toronto, Ontario, M2N 6W8, fax

number (416) 218-3738, telephone number (416) 222-3226 and obtain a clearance certificate to confirm that there are no arrears of retail sales tax or obtain a negotiated written agreement with the Ministry regarding the amount of the Ministry's claim.

STANDARD DEFAULT & REMEDIES CLAUSES

2. LANDLORD'S REMEDIES

E. LANDLORD MAY FOLLOW CHATTELS – SAMPLE CLAUSE

Removal by the Tenant of its goods outside the ordinary course of its business either during or after Shopping Centre hours shall be deemed to be a fraudulent or clandestine act thereby enabling the Landlord to avail itself of all remedies at law including, but not limited to, the Landlord's rights to follow the Tenant's goods and to recover twice the value of the goods so removed.

Commentary

This provision helps to protect the landlord's right of distress by ensuring that the landlord may follow goods and chattels the tenant may fraudulently remove from the leased premises. Tenants should be aware that section 50 of the *Commercial Tenancies Act* provides that if a tenant does fraudulently remove its goods or chattels, the landlord is entitled to double the value of such goods and chattels to be recovered by action in any court of competent jurisdiction. As the case of *Cowie Industrial Developments v. National Clearance Warehouse Ltd.* (1999), 119 O.A.C. 91, 23 R.P.R. (3d) 182 (C.A.) confirms, the penalty which may be imposed under section 50 is not restricted by the amount of the arrears at the time of removal of the goods.

STANDARD DEFAULT & REMEDIES CLAUSES

2. LANDLORD'S REMEDIES

F. LANDLORD MAY CURE TENANT'S DEFAULT – SAMPLE CLAUSE

If the Tenant defaults in the payment of money that it is required under this Lease to pay to a third party, the Landlord, after giving fifteen (15) days notice in writing to the tenant, may pay all or part of the amount payable. If the Tenant defaults under this Lease (except for a default in the payment of Rent or Sales Taxes), the Landlord may, after giving reasonable notice (it being agreed that forty-eight (48) hours is reasonable notice of a default of Section 10.01) or, without notice in the case of an emergency, perform or cause to be performed all or part of what the Tenant failed to Perform and may enter upon the Premises and do those things that it considers necessary for that purpose. The Tenant will pay to the Landlord on demand, the Landlord's expenses incurred under this Article XVI plus an amount equal to fifteen percent (15%) of those expenses for the Landlord's overhead. The Landlord will have no liability to the Tenant for loss or damages resulting from its action or entry upon the Premises.

Commentary

It is prudent for a commercial lease to contain a provision that allows the landlord to cure the defaults of a tenant without requiring that the lease be terminated.

From a tenant's perspective, it is important to seek to extend the notice period after which the landlord can cure the default itself (i.e. to at least 10 days). Furthermore, the tenant should attempt to ensure that language reflecting "reasonable expenses" is used. A prudent clause for the tenant to insert is a reciprocal clause whereby the tenant may cure any landlord default. Additionally, tenants should seek to modify the last sentence of this section to provide that the landlord will be liable for loss or damage due to any act, default, fault, breach or negligence of the landlord or those for whom the landlord is in law responsible.

STANDARD DEFAULT & REMEDIES CLAUSES

2. LANDLORD'S REMEDIES

G. APPLICATION OF MONEY – SAMPLE CLAUSE

The Landlord may, if the Tenant is in default at such time, apply money received from or due to the Tenant against money due and payable under this Lease. The Landlord may impute any payment made by or on behalf of the Tenant towards the payment of any amount due and owing by the Tenant at the date of such payment regardless of any designation or imputation by the Tenant.

Commentary

The application of monies as the landlord sees fit is an important landlord remedy. For example, if a tenant is obligated to pay taxes under the lease but is in a dispute about the amount of the year's taxes, same may remain unpaid. The above provision would allow a landlord to pay the outstanding taxes with rental monies received from the tenant and thus may prevent the arrears from being added to the tax roll. Obviously, the more discretion the landlord has as to how to apply monies received from the tenant the better. A tenant would want to limit this clause so that monies paid to the landlord are only to be used for the purpose specified by the tenant. If a tenant has a dispute about one month's operating expenses, it does not want the landlord to be able to pay them from the next month's rent.

STANDARD DEFAULT & REMEDIES CLAUSES

2. LANDLORD'S REMEDIES

H. FAILURE OF THE TENANT TO CARRY ON BUSINESS – SAMPLE CLAUSE

- (a) *The Tenant will open the whole of the Premises for business on the Commencement Date, fully fixtured, stocked and staffed, and will throughout the Term, conduct its business continuously, diligently and actively in the whole of the Premises in accordance with and subject to this Lease.*
- (b) *If the Tenant fails to open or reopen the Premises for business or to carry on business at all times in accordance with this Lease, the Landlord shall be entitled to avail itself of any remedies for the Tenant's breach hereunder to which it is entitled pursuant to this Lease and at law.*

Commentary

A tenant should ensure that this clause is not applicable to:

- force majeure;
- inventory taking;
- renovation;
- repairs;
- any other legitimate business reason.

STANDARD DEFAULT & REMEDIES CLAUSES

2. LANDLORD'S REMEDIES

I. NON-ACCEPTANCE OF SURRENDER – SAMPLE CLAUSE

No acceptance of keys for the Premises by the Landlord and no other act of the Landlord will be considered as an acceptance by the Landlord (implied or otherwise) of a surrender of this Lease by the Tenant. Only a written acknowledgment or surrender agreement executed by two (2) authorized representatives of the Landlord will be effective as an acceptance by the Landlord as a surrender of this Lease.

Commentary

A tenant may approach the landlord and seek to have the landlord agree to end the lease. In most instances, a landlord will want to ensure that it may claim for future rent against the tenant pursuant to the decision in *Highway Properties Ltd. v. Kelly, Douglas and Co.*, [1971] S.C.R. 562. The landlord may decide to keep the lease in force, or if the Tenant is in default after appropriate notice, the landlord may terminate the lease with notice that the landlord is retaining its right to claim for future lost rent. The landlord must be diligent in providing proper notice or else the tenant may argue that the landlord has accepted a surrender of the tenant's lease (i.e. accept keys without providing proper notice). When surrender occurs, the landlord has lost its right to claim for future rent pursuant to *Highway Properties*. The foregoing clause is important to a landlord because it provides that although the landlord may accept keys for the purposes of retaking possession of the premises, the landlord is not accepting a surrender of the lease.

STANDARD DEFAULT & REMEDIES CLAUSES

2. LANDLORD'S REMEDIES

J. REMEDIES GENERALLY – SAMPLE CLAUSE

Mention in this Lease of any particular right, remedy or remedies of the Landlord in respect of any default by the Tenant shall not preclude the Landlord from, and the Landlord shall have, any and all other rights and remedies in respect thereof, whether available at law or in equity or by statute or expressly provided for herein. The remedies under this Lease are cumulative. No remedy is exclusive or dependent upon any other remedy. Any one or more remedies may be exercised generally or in combination. The specifying or use of a remedy under this Leased does not limit the right to use other remedies available at law generally.

Commentary

A tenant should always ask for notice (and a reasonable grace period) to cure any default by the tenant prior to the landlord exercising any of its rights. A landlord will insist that its remedies be cumulative.

FAST EFFECTIVE PAIN RELIEF...

**McLEAN & KERR LLP'S
UPDATE ON OVER-THE-COUNTER
COMMERCIAL LEASE REMEDIES**

PART 3 SPECIAL REMEDIES FOR SPECIAL PROMISES

SPECIAL REMEDIES FOR SPECIAL PROMISES

I. LANDLORD'S PROMISES

A. SUCCESSFUL SHOPPING CENTRE

**CO-TENANCY AND SALES LEVEL
PROVISION – SAMPLE CLAUSE**

*Notwithstanding anything else contained herein,
if:*

*(i) three Department Stores (or in lieu of any of them
a Suitable Replacement) are not open and
operational during the normal hours of operation
for each of them, respectively, for:*

*(1) a period of 12 consecutive months because
of a renovation or redevelopment involving
at least fifty percent (50%) of the Gross
Leaseable Area of rentable premises in the
Project, as permitted by this Lease; or*

*(2) a period of 24 consecutive months because
of substantial damage or destruction to the
Project; or*

*(3) a period of 12 consecutive months because
of any other reason; or*

*(ii) both 85% by number and 80% by Gross Leaseable
Area of the Conventional Retail Premises are not
open and operational during the Retail Hours for:*

*(1) a period of 12 consecutive months because
of a renovation or redevelopment involving
at least fifty percent (50%) of the Gross
Leaseable Area of rentable premises in the
Project, as permitted by this Lease; or*

*(2) a period of 24 consecutive months because
of substantial damage or destruction to the
Project; or*

- (3) *a period of 6 consecutive months because of any other reason;*
- (iii) *in each calendar year, the annual earnings of gross sales per square foot of the Gross Leaseable Area of all rentable premises in the Project does not equal or exceed the sum of \$500.00 per square foot;*
- (iv) *in any calendar year, the ratio of Tenants' total costs for all rent payable under the lease, to Gross Revenue, exceeds 15%;*

then during the period that such situation continues the following Tenant remedies shall apply:

- (a) *Tenant may elect to close the Store for business without reduction in Basic Rent and Additional Rent payable; or*
- (b) *Tenant may elect to remain open for business and pay a reduced rent equal to 4% of Gross Revenue and shall also pay Taxes, in lieu of Basic Rent, Percentage Rent and Additional Rent; and*
- (c) *at the expiry of a further 6 month period in which the above-noted thresholds have not been satisfied, Tenant shall have 90 days in which to notify Landlord in writing that Tenant has elected to terminate this lease (the "Termination Notice"). The Termination Notice shall specify the date upon which this lease shall terminate (the "Termination Date"), which shall be at least 30 days from the date that the Termination Notice is given. Once the Termination Notice has been given in accordance with this section, the effectiveness and validity of Tenant's termination shall not be affected or nullified by the fact that the above-noted thresholds are satisfied prior to the Termination Date.*

If the Tenant elects to terminate this Lease pursuant to this section 2.2.5, then the parties acknowledge and agree that effective on the Termination Date, Tenant shall deliver vacant possession of the Store to Landlord in accordance with all applicable provisions in this Lease and all rent shall be paid and adjusted as of such Termination Date and thereafter neither party shall have any further obligation or liability to the other under this Lease.

"Suitable Replacement" shall mean a single department store occupying a substantial part of the space formerly occupied by a Department Store (as distinguished from several occupants in such space which has been subdivided and/or sublet for such purpose), and which carries a merchandise assortment, in terms of breadth of selection and quality of said merchandise, which is equal to or better than that carried by the Department Store. For clarity, it is agreed that large single purpose stores such as (for example and not by way of limitation) furniture stores, toy stores or sporting goods stores, shall be considered "department stores" or "Suitable Replacements" regardless of such store's size or trade name and whether or not they carry merchandise of the same or better quality than was carried in one of the departments of the Department Store. "Conventional Retail Premises" as used in this section 2.2.5 shall mean the Retail Premises as defined herein and further excluding the following:

- (d) all Major Stores;*
- (e) the Store and all other stores in the Project leased by Tenant or a Related Corporation;
and*
- (f) all premises and space in the Project not at the same level as any Mall (e.g. basements and mezzanines).*

Furthermore, notwithstanding anything contained herein and whether or not the requirements set out in the foregoing paragraph are being met, in no event may the Retail Hours as determined by Landlord be such as to require Tenant:

- (A) (i) *to open later than 10:00 a.m. Monday through Saturday, or*
- (ii) *to remain open later than 10:00 p.m. Monday through Friday, 6:00 p.m. on Saturdays or 5:00 p.m. on Sundays (with the exception of Christmas hours established by Landlord for Retail Premises from time to time, acting reasonably), or*
- (iii) *to close earlier than 6:00 p.m. Monday through Saturday; or*
- (B) *to be open Easter Sunday, Thanksgiving day, Christmas day or New Years day; or*
- (C) *to be open when to do so would violate any law, criminal or civil, or subject Tenant or its employees to a fine or penalty, whether criminal or civil in nature.*

"Department Store" means each of the premises identified as "DS1, "DS2", "DS3" and "DS4" on Schedule 7.

The Landlord's promise of a successful shopping centre is fundamental to the Tenant's agreement to lease space. The rent the Tenant has agreed to pay, the space the Tenant has agreed to occupy, the length of term the Tenant has agreed to take, are all dependent on the Landlord's promise and assurance that the shopping centre is and will continue to be successful.

If the shopping centre loses an anchor store or has an increase in vacancy rate or a decrease in sales per square foot, the Tenant may wish to exercise certain non-traditional remedies.

Our sample clause gives the Tenant 3 remedies if any of the following occurs:

1. a Department Store is closed and not replaced, or
2. the vacancy rate for CRU tenants increases above 15% by number and 20% by Gross Leaseable Area, or
3. the annual average of gross sales per square foot for the Shopping Centre falls below a specific threshold, or
4. the ratio of tenant total costs for all rent payable to Gross Revenue exceeds 15%.

We suggest by way of example, that the Tenant would be entitled to exercise these remedies for a co-tenancy failure:

1. it may elect to close the Store for business, but continue to pay full rent;
2. it could remain open, but would pay a reduced rent, for example, a percentage of Gross Revenue; and
3. it would be given a termination right after the expiration of a period of time during which the co-tenancy failure had not been satisfied.

We also define what would be a "Suitable Replacement" for any Department Store and clearly identify "Department Store". In a multi-anchor shopping centre, there should be negotiation as to the number of anchor stores lost before any co-tenancy remedies become available.

A co-tenancy provision in a lease is very important when the lease form does not obligate the Landlord to keep the mall occupied.

In *Dentrix Inc. v. Prudential Assurance Co. (1999)*, 26 R.P.R. (3d) 314 (Man. Q.B.) the plaintiff leased space in a shopping mall from the defendants. The defendants failed to renew the leases of other tenants thereby emptying the mall. Plaintiff brought an action for fundamental breach. The court held that since the lease did not contain a covenant by the landlord to keep the mall occupied, the action was dismissed.

SPECIAL REMEDIES FOR SPECIAL PROMISES

I. LANDLORD'S PROMISES

B. TIMELY DELIVERY OF STORE

LATE DELIVERY FEES – SAMPLE CLAUSE

Landlord may adjust the Delivery Date at any time up to and including [insert date] with no penalty to Landlord. Subject to Force Majeure, if the delivery or possession requirements are not satisfied by the Delivery Date, Landlord will pay Tenant a fee equal to 4 days of Basic Rent for each day of delay for the first 30 days, plus 5 days of Basic Rent for each day of delay for the next 30 days, plus 6 days of Basic Rent for each day of delay thereafter. Landlord or Tenant may terminate the Lease upon notice to the other if the Landlord's delay in delivering possession exceeds 6 months from the Delivery Date.

Often the time of delivery of a store to a Tenant is crucial in the Tenant's decision to lease. The Tenant may require to be open for a specific sales season, and will have to make commitments for staffing, merchandising and fixturing the store. The Tenant will often have to order and commit to purchase seasonal merchandise to stock the store.

Our sample clause provides for payment of a fee by the Landlord if the promised delivery date is not achieved.

The clause could be further modified to provide that the Tenant could delay opening the store without financial penalty or obligation until the next targeted sales season, and/or that the Landlord would be liable for the Tenant's direct damages caused by the delayed delivery of the store.

There may be an argument that a "late delivery fee" constitutes a "penalty" and may be unenforceable.

SPECIAL REMEDIES FOR SPECIAL PROMISES

1. LANDLORD'S PROMISES

C. GOOD ACCESS AND VISIBILITY FROM WITHIN THE SHOPPING CENTRE

NO BUILD ZONE – SAMPLE CLAUSE

Landlord agrees not to place or permit any kiosk, display or furniture, or, unless required to do so by a governmental or regulatory authority, any other obstruction or structure of any kind, whether temporary or permanent (the "Obstruction") (the Landlord having first used commercially reasonable efforts to have the governmental or regulatory authority approve placement of the Obstruction outside of the No Build Zone), within the area shown cross-hatched in black on Schedule 5 (the "No Build Zone") and except for:

- (a) any existing and replacement seating; and*
- (b) any existing or replacement plants or other landscaping and containers which at maturity will not exceed four (4) feet in height.*

Within 7 days of receipt of written notice from the Tenant, Landlord shall remove, or shall cause to be removed, any Obstruction within the No Build Zone in contravention of this section. If Landlord fails to do so within the permitted time period, then Tenant shall be entitled to a credit towards Basic Rent in the amount of \$750 per day until the Obstruction has been removed from the No Build Zone.

Access and visibility of the store from within the shopping centre can be as important as location of the store in the shopping centre. Generally, a tenant will want clean sightlines and unrestricted pedestrian access to and from its store.

A Landlord may have different, but equally legitimate ideas, as to the use of the common area in front of the store. It may be visually attractive for the benefit of the entire shopping centre that green space, large plants or some other monument be installed in the common area in front of the store. Pedestrian traffic patterns may make it desirable for

the Landlord to build a directory sign board, permanent seating or other obstruction in such common area.

Or the Landlord may simply wish to maximize its revenue from the shopping centre by permitting a kiosk, or mobile cart or temporary vendor to operate in front of the store.

Regulatory by-laws or construction codes may require the installation of obstructions in the common area, such as fire call boxes or circuit breakers, which are beyond the control of the Landlord.

Typically, a Landlord and Tenant will be able to agree on a specified, particular area within the common area in front of the store within which no permanent obstruction will be permitted, except obstructions required by the regulating by-laws (the "No-Build " area). A Landlord will normally agree that no kiosk or permanent vendor will be permitted within a specified distance from the lease line of the store (for example, 10 or 12 feet from the lease line of the store).

A Tenant should, at a minimum, require that any permitted kiosk or mobile vendor in the common area not sell products in competition with the Tenant.

Our sample clause incorporates the concept of penalty payments for breach by the Landlord. Please note that the exceptions to the "No-Build" area are limited to:

- (a) existing and replacement seating, plants and landscaping; and
- (b) government mandated obstructions.

SPECIAL REMEDIES FOR SPECIAL PROMISES

I. LANDLORD'S PROMISES

**D. GOOD ACCESS AND VISIBILITY FROM
OUTSIDE THE SHOPPING CENTRE**

**(i) MODIFIED CONTROL OF COMMON
FACILITIES – SAMPLE CLAUSE**

The rights of Landlord to control the operation of the Project shall be subject to the condition that no exercise of any such rights shall materially interfere with access to or visibility of the Store nor alter the physical dimensions thereof nor change its location or relative proximity to the Major Stores or otherwise materially interfere with the conduct of Tenant's business in the Store.

Our sample clause recognizes the fact that the Landlord's control of the shopping centre must be subject to the Tenant's rights of unfettered access to the store and unrestricted visibility of the store. The clause also provides that no change to the physical dimension of the store is permitted, nor is any change to the location or relative proximity of the store to any anchor store.

This clause modifies the Landlord's right to redevelop the common areas, both inside and outside the shopping centre, without the Tenant's consent.

In *Merger Restaurants v. D.M.E. Foods Ltd.*, [1990] 5 W.W.R. 489 (Man. C.A.) the lease designated parking areas as common areas for use of the plaintiff tenant, all other tenants and their invitees. Landlord allowed the defendant (a party from a neighbouring lot) to park in the plaintiff's parking area. The court granted injunctive relief to the plaintiff to protect its parking right. The lease did not permit the landlord to unilaterally affect the plaintiff's parking rights.

Another important consideration of a Tenant is whether to negotiate restrictions to a Landlord's generally broad relocation power.

In *C.T.R.E.F. Investment Ltd. v. V.H.G.O. Real Estate Ltd.*, [1993] O.J. No. 1194 (Ont. Gen. Div.), the landlord made an application for a determination as to whether a relocation clause permitted the landlord to relocate the tenant to one of a number of alternate locations proposed by the landlord and for an order requiring to relocate its premises to one of a number of alternate locations proposed units to be designated by the landlord. The tenant brought a counter application for an order that the relocation clause was void for uncertainty and for a declaration that the landlord did not have the right to relocate the tenant. The court upheld the relocation clause and found that the landlord

had acted reasonably and that there was no arbitrariness to the landlord's conduct. Instead the landlord acted for the betterment of the mall generally.

SPECIAL REMEDIES FOR SPECIAL PROMISES

I. LANDLORD'S PROMISES

**D. GOOD ACCESS AND VISIBILITY FROM
OUTSIDE THE SHOPPING CENTRE**

(ii) CRITICAL ENTRANCES – SAMPLE CLAUSE

*In addition, Landlord agrees that at least those entrances, stairways and elevators to and in the Project specifically circled in black and marked A through Q on Schedule A5" attached hereto (the **A**Critical Entrances[®]) shall, subject as hereinafter provided, always remain open and unobstructed and shall not be reduced to less than their current size, except during periods of temporary construction or repair work. In the event that Landlord decides to move or materially alter a Critical Entrance, it shall first obtain Tenant=s consent, such consent not to be unreasonably withheld.*

Notwithstanding the foregoing, Landlord shall have no obligation or liability to Tenant and shall not require Tenant=s consent in the event that Critical Entrances A, E, I, or O (each being a Mall entrance to a Major Store) is closed, moved or otherwise materially altered by such Major Tenant in contravention of its lease with Landlord or pursuant to any right of such Major Tenant; and if the Major Tenant has no right to close, move or otherwise materially alter any such Critical Entrance, Landlord shall not give its consent permitting such Critical Entrance to be closed, moved or otherwise materially altered except in accordance with this section 6.3.4. In the event that Critical Entrance A, E, I or O is:

- (i) permanently closed (it being agreed that closing for any period in excess of 6 months shall be conclusively deemed to be a permanent closing); and*
- (ii) no new comparable entrance is opened; and*
- (iii) customer traffic patterns to and from and by the Store are materially adversely affected,*

then Tenant shall have the right to terminate the lease upon at least 90 days prior written notice to Landlord.

It may be important to the Tenant that an entrance or entrances to and within the shopping centre remain open and unobstructed during the term. It may be critical for traffic flow to or from the store, that external and internal entranceways remain open.

Our sample clause reflects such a concern on the part of the Tenant. Please note that the clause distinguishes between:

- (a) stairways and entrances within common areas of the mall, both internal and external; and
- (b) entrances to and from a Major Store.

The clause recognizes that the Landlord often cannot control the closure of a critical entrance to a Major Store, if the Major Store goes dark in contravention of its lease.

SPECIAL REMEDIES FOR SPECIAL PROMISES

I. LANDLORD'S PROMISES

**D. GOOD ACCESS AND VISIBILITY FROM
OUTSIDE THE SHOPPING CENTRE**

**(iii) LANDLORD'S ALTERATIONS OF THE
SHOPPING CENTRE – SAMPLE CLAUSE**

Landlord may from time to time alter, expand, improve, diminish, maintain, operate, renovate, remerchandise and supervise any parts of the Shopping Centre including the Common Area, but excluding the Premises and the No-Build area, and may change the area, location and arrangement thereof and do and perform such other acts and things with respect thereto as Landlord determines to be advisable. Landlord may also from time to time alter or expand the Building in which the Premises are contained (but not the Premises), alter or construct other Shopping Centre Buildings and build adjoining to the same and make additions or subtractions, subject to the express provisions hereof. Landlord reserves the right to change the size and dimensions of the Shopping Centre Buildings, the number and locations of Shopping Centre Buildings, the size, location and layout of Common Areas including parking areas and malls and to change the store dimensions, identities, types and tenancies, excluding in each case the Premises and the No-Build Area. Notwithstanding anything else contained herein, if any interruption, suspension, or failure in the supply of any services or utilities serving the Premises continues for more than one business day, and whether or not such interruption, suspension or failure is Landlord's fault and whether or not Landlord is diligently acting to remedy such failure, if in the opinion of Tenant, acting reasonably, from the standpoint of prudent business management having reference to the particular business conducted by Tenant in the Premises, Tenant's business in the Premises is unreasonably interfered with by such interruption, suspension or failure, then all Rent shall abate from the end of the first business day of such interruption until the supply of services or utilities is fully resumed. Such abatement shall apply whether or not Tenant is open for business on the Premises during the whole or any part of the period of such interruption,

suspension or failure. Notwithstanding anything else contained herein, no exercise of Landlord's rights pursuant hereto shall (a) entitle Landlord to make any changes to the Premises, including the location, configuration or size thereof, without the prior written consent of Tenant, which may be withheld in Tenant's sole and unfettered discretion, nor (b) result in any increase in the percentage defined in "Tenant's Tax Share", nor (c) entitle Landlord to make any changes to the No-Build area.

It is fundamental for a Landlord that it be able to control the development and redevelopment of the shopping centre. Over time, the Landlord may even wish to change the use of a shopping centre from a primarily retail to a mixed retail/office, or even retail/office with condominium or residential use.

Our sample clauses permit the Landlord to improve, expand, diminish or alter any part of the shopping centre, provided that its work excludes the Store and the No-Build Area.

The Tenant has been granted an abatement in the event its business is interrupted or suspended because of the Landlord's Work. In addition, it is agreed that the Landlord's Work will not affect calculation of "the Tenant's Tax Share" and intends to insulate the Tenant from increases in rent because of any alterations by the Landlord to the shopping centre.

SPECIAL REMEDIES FOR SPECIAL PROMISES

I. LANDLORD'S PROMISES

E. EXCLUSIVE USE

Subject as hereinafter provided, Landlord shall not lease or otherwise permit the use of any premises or space in the Project for the sale of [prohibited goods] as the principal use provided and notwithstanding the foregoing:

- (a) such restriction shall not apply to those rentable premises operating, as of January 1, 2001, under the trade names, The Bay and Sears and such premises may be operated as a store for the sale of [prohibited goods] and [prohibited goods] may otherwise be sold therein (as a principal or ancillary use), provided that if at any time after January 1, 2001, the then existing tenant (or any assignee, subtenant or other transferee of such tenant) of any of such rentable premises proposes to or actually operates a book store therein for the sale of [prohibited goods] as the principal use, then Landlord, at its cost, shall take all commercially reasonable steps, if any, under the then existing lease of such rentable premises to prevent and prohibit the operation of a store for the sale of [prohibited goods] as the principal use (but not as an ancillary use) therein including, without limitation, withholding its consent thereto if an to the extent Landlord is contractually and legally entitled to do so; and*
- (b) such restriction shall not apply with respect to one or more other rentable premises having as their principal use the sale of [prohibited goods] provided the aggregate Gross Leaseable Area of all such other rentable premises does not exceed 5,000 square feet;*
- (c) such restriction shall not apply to any existing tenants of the Project, or to an expansion or redevelopment of the Project; and*

- (d) *such restriction shall be null and void and of no further force or effect immediately upon the earliest of any of the following:*
- (i) *the effective date of any Transfer, other than a permitted Transfer;*
 - (ii) *the date which is 60 consecutive days after the Store first ceases to be continuously operated for the permitted and required use (other than Permitted Closures); and*
 - (iii) *the date upon which any Competing Business first opens or operates.*

If the use restriction under this section becomes null and void and of no further force or effect in accordance with the provisions of this section (d), then thereafter Landlord may lease or otherwise permit the use of any premises or space in the Project for the sale of books as the principal use without any restriction or limitation whatsoever.

The granting of an exclusive to a Tenant, is a promise by the Landlord to insulate the Tenant from competition within the shopping centre.

The language of an exclusive clause must be precisely drafted, so that there is no confusion between either party as to what is and is not permitted to be sold by other tenants in the shopping centre.

Please note the standard exceptions to the exclusive clause, which include:

- (a) Major Stores and specifically named department stores;
- (b) existing tenants of the shopping centre;
- (c) any expansion or redevelopment of the shopping centre; and
- (d) new tenants, provided their rentable premises do not exceed an agreed Gross Leaseable Area.

See *Prince Business Inc. v. Vancouver Trade Mart Inc. (1993) B.C.J. No. 1692* where the court allowed a tenant to terminate its lease in addition to suing for damages for breach of an exclusive (affirmed [1994] B.C.J. No. 2647 (C.A.)). See *MDS Health Group Ltd. v. King Street Medical Arts Centre Ltd. (1994), 12 B.L.R. (2d) 209 (Ont. Gen. Div.)* which illustrates the willingness of the judiciary to require parties to act in good faith (in this particular case the landlord was found to be acting in bad faith).

Any covenants which are a restraint of trade must be strictly construed against the party for whose benefit the clause has been granted: ***Russo v. Field (1973), 34 D.L.R. (3d) 704 (S.C.C.)***. Generally speaking, covenants in restraint of trade are void at common law however they may be included in leases where, among other things, a community of interests is created: ***Spike v. Rocca Group Ltd. (1979) 107 D.L.R. (3d) P.E.I.S.C.)***.

If the exclusive is ambiguous, the “contra proferentum” doctrine will permit the ambiguity to be interpreted in favour of the party who did not draft it and against the drafter of the exclusive: ***L&M Delicatessen Ltd. v. Taran Developments Inc. (Ont. S.C.) unreported Court No. RE1799/87 November 13, 1987***.

However, where the contract or a particular clause has been extensively negotiated such that the final document or clause has been significantly altered, the “contra proferentum” doctrine may have little or no impact.: ***K&L Higgins Ltd. v. Yonge-Eglinton Building Ltd. (1976) 12 D.L.R. (4th) 265 (Ont. C.A.)***.

SPECIAL REMEDIES FOR SPECIAL PROMISES

2. **TENANT'S PROMISES**

A. **ATTRACT CUSTOMERS TO THE SHOPPING CENTRE**

TERMINATION FOR LOW SALES – SAMPLE CLAUSE

Notwithstanding anything in this Lease contained to the contrary, if for the second and third full twelve-month lease years or any 2 consecutive lease years occurring thereafter no Percentage Rent shall have been paid under this lease, then Landlord, may, at its option, in addition to any other rights or remedies, terminate this lease upon giving Tenant 30 days notice. If this lease is so terminated, Tenant shall surrender the Store and deliver up vacant possession as of the expiration of such period and all amounts due and owing by Tenant pursuant to this lease shall be payable in full as of such date. The parties shall thereupon be discharged from their respective obligations under this lease, and Tenant shall have no recourse against Landlord or those for whom Landlord is in law responsible for damages or otherwise and shall not be entitled to any refund of, or credits for, any amounts paid by Tenant.

Just as a Landlord may make certain promises regarding the performance of the shopping centre to encourage a prospective tenant to lease space, a Tenant may also make certain promises to a Landlord. For example, a Tenant may hold itself out as an industry or market leader, whose very presence in the Shopping Centre will attract a volume of customers to its own store, with incidental benefit to other tenants in the Shopping Centre.

On the strength of such a promise, a Landlord may agree to:

- (a) a reduced rent deal with the Tenant, as compared to similar premises in the shopping centre;
- (b) pay the Tenant a significant tenant allowance or tenant inducement to encourage the Tenant to lease space;
- (c) relocate one or more existing tenants in order to assemble sufficient base to permit the new Tenant its desired location within the shopping centre.

Our sample clause provides that if the Tenant does not perform as promised, the Landlord shall be permitted to terminate the lease upon notice to the Tenant. This clause could be modified to provide for repayment by the Tenant of all or a portion of the tenant allowance if the lease is terminated for poor performance within an agreed number of years after commencement. In addition, the clause could be modified such that the Tenant could be required to reimburse the Landlord for its costs of relocating tenants and assembling space to permit the Tenant its preferred choice of location.

SPECIAL REMEDIES FOR SPECIAL PROMISES

2. TENANT'S PROMISES

B. NON-COMPETITION & RADIUS PROVISIONS

INJUNCTIVE RELIEF – SAMPLE CLAUSE

The Tenant covenants that it shall not directly or indirectly whether as an owner, partner, shareholder, principal, agent, employee or independent contractor or otherwise, engage in or participate in or be a holder of any security of any nature whatsoever of, or be a lender to or an owner of any debt or portion of a debt of, or furnish any financial aid or other support or assistance of any nature whatsoever to, any Competing Business.

If Tenant breaches the covenant herein contained, then in addition to the rights and remedies provided in Part 9 of this lease, from the date on which such Competing Business opens for business, the Basic Rent shall be increased in the same manner as is provided for in subsection 2.7.1(c)(ii) and Landlord may, at Landlord's election, exercise any one or more of the following rights,

- (a) terminate this lease by giving a Termination Notice to Tenant which specifies a date of termination of the lease which is at least 30 days after such Termination Notice is given,*
- (b) enjoin the operation of the Competing Business, or*
- (c) include all Gross Revenue generated by the Competing Business in calculating the Percentage Rent due under this lease. If the Landlord is unable to determine the actual Gross Revenue of the Competing business, Landlord may estimate such Gross Revenue, and Landlord's estimate shall be final and binding.*

To the intent that such acknowledgement may be pleaded as an estoppel to any defence which may be raised by Tenant with respect thereto, Tenant acknowledges that:

- 1. the provisions of this section are reasonable having regard to the nature of the business of Tenant and Landlord,*

2. *notwithstanding any other provisions of this lease or any statute or law to the contrary, damages are not an adequate remedy for Tenant's breach of its covenant set out herein and such damages would be incapable of calculation, and*
3. *the only effective method of enforcing the provisions of this section is the remedy of an injunction and Landlord shall be entitled to such remedy.*

"Competing Business" means any business or retailing activity located or carried on by any means within the Project other than the Store (but including any business located in any other store) and any business or retailing activity located or carried on within the Protected Area in which Tenant or a Related Corporation, directly or indirectly in any capacity, participates in, has an interest in, is involved in or carries on, including business or retailing activity carried on through e-commerce and by means of the Internet within such area and which business or retailing activity is competitive with the business carried on in the Store, other than any other store in operation and disclosed to Landlord before the Commencement Date, so long as such store is not thereafter expanded or relocated.

A Tenant may promise its Landlord that it will not open or operate a competing store within a defined geographical distance of the shopping centre.

Please note that our sample clause gives the Landlord a variety of options should the Tenant break its promise. The Landlord is entitled to:

- (a) terminate the lease upon notice;
- (b) obtain an injunction to shut down the competing business; or
- (c) include all Gross Revenue generated by the competing business in calculating percentage rent due under the lease.

The Landlord should ensure the radius provision is reasonable in terms of the time period and radius covered and the scope of merchandise or activity prohibited as radius clauses are prima facie void as being in restraint of trade and enforceable only if reasonable in the interests of the parties and not unreasonable with respect to the public interest: *Ernest's Char Pit Ltd. v. Demedieros (1970), 15 D.L.R. (3d) 663 (Ont. H.C.J.)*.

In *B.A.C.M. Limited v. Kowall Holdings Ltd.*, [1972] 5 W.W.R. 297 (Man. Q.B.), the court refused to enforce a radius covenant on the grounds that it restricted competition, and that the covenant was neither reasonable nor in the public interest.

In *Lehndorf Property Mgmt Ltd. v. Haircutters Ltd.* (1978), 34 N.S.R. (2d) 408 (T.D.) the covenant restricted the tenant from operating a similar business of haircutting within a one mile radius. The tenant opened a similar business within one mile under a different name. The court held that the covenant was reasonable considering the nature of the business and that the covenant was not contrary to the interests of the public. The court granted an injunction and damages.

In *Spike v. Rocca Group* (1980), 109 D.L.R. (3d) 89 (P.E.I.S.C.), a barber covenanted not to compete within two miles. The two-mile radius comprised the whole of the business area of Charlottetown, the provincial capital. The Prince Edward Island Supreme Court held that the covenant was void as a restraint of trade.

SPECIAL REMEDIES FOR SPECIAL PROMISES

3. OPERATING COVENANTS

The House of Lords has virtually foreclosed any future hope of enforcing operating covenants by specific performance: *Co-Operative Insurance Society Ltd. v. Aygll Stores (Holdings) Ltd.*, [1997] 3 All E.R. 297 (H.L.).

In *Lackner Centre Developments Inc. v. Toronto-Dominion Bank (1993)*, 32 R.P.R. (2d) 204 (Ont. Gen. Div.) the court refused to grant an injunction to a bank that intended to cease its operations in a mall in breach of an operating covenant.

In *Islington Village Inc. v. Citibank Canada (1992)*, 27 R.P.R. (2d) 100 (Ont. Gen. Div.) a landlord of a shopping mall was denied an injunction to prevent the tenant bank from relocating in breach of its obligations under the lease. The court held that the landlord did not prove that it would suffer irreparable harm that could not be compensated in damages. Moreover, the specific wording of the covenant stipulated that business would be carried on in a reputable manner. Such a clause would be difficult to supervise or enforce, given its vague terms.

In *Village Square (Burlington) Ltd. v. National Bank of Canada (November 3, 1997)*, Doc. 97-CV-127523 (Ont. Gen. Div.), a bank and a landlord entered into an agreement under which the bank covenanted to continuously occupy premises solely for the purposes of conducting business of a financial institution. Several years into the lease, the bank reduced its operations and hours and ultimately ceased all cash services. The landlord brought an application for the determination of its rights under the lease agreement. The court held that the bank breached its obligation to maintain adequate staff to properly serve customers. The court did not order that the bank continue to operate its business. It left the issue of damages to be considered by another court.

We note that in the host of CCAA proceedings that occurred throughout the 1990's, nothing remotely close to full compensation was paid to Landlords for Tenant breaches as of operating covenants and store closures.

SPECIAL REMEDIES FOR SPECIAL PROMISES

4. DYNAMICS OF CHANGE

A. USE CLAUSE

NARROW USE CLAUSE – SAMPLE CLAUSE

The Tenant shall use the Store for the retail sale of ladies footwear and for no other purpose.

WIDE USE CLAUSE - SAMPLE CLAUSE

The Tenant shall use the Store principally for the retail sale of wearing apparel and related accessories, including at Tenant=s option, footwear; and the Store may also be used as an ancillary permitted use for the retail sale of the following (which are collectively called the AAncillary Products®): luggage; umbrellas; sunglasses; watches; pins; infants=, toddlers= and childrens= items such as baby strollers, stuffed animals, toys and games and furniture; cosmetics and other personal care items; domestic products, including without limitation, candles, sundries, kitchenware, bedding, bath items and furniture and accents for the home.

The Store may also be used for the retail sale of pre-packaged foods and candies as non-Ancillary Products, and preparation and sale of ready-to-eat foods and non-alcoholic beverages, provided that the total sales and display area within the Store devoted and used for the sale of pre-packaged foods and candies and for the preparation and sale of ready-to-eat foods and non-alcoholic beverages shall not exceed 2% of the Gross Leaseable Area of the Store.

In addition, the Store may be used for the sale as non-Ancillary Products of such other merchandise and services as are found in any of Tenant=s other stores in Canada (excluding such merchandise and services which, at the time of display in the Stores, are sold only in

Tenant=s outlet or discount stores) operating under the same trade names as are used by Tenant at the Store, provided that the sales and display area devoted and used in connection and sale of such merchandise and services does not exceed 10% the Gross Leaseable Area of the Store.

The Landlord's position is that its complete control of the merchandising mix within any shopping centre is vital to the success of that shopping centre.

A Tenant's position is that in this era of fast-paced change, it must have wide discretion to determine the products it will sell and the method in which those products will be sold. That is the Tenant's expertise. A careful Tenant will strive for flexibility in its permitted use clause.

A sophisticated Landlord will insist on a tightly focused use clause that will permit the Landlord to market and merchandise its Shopping Centre as it sees fit.

We have provided 2 example clauses. The first clause is a specific use clause for the sale of women's shoes.

The other clause is a more broadly written Tenant form of use clause which permits the Tenant great flexibility in the type of products it is permitted to sell. This clause permits some control by the Landlord through limitation on the square footage within the Store from which the Tenant is permitted sell various identified and specified items.

The Landlord must be very cautious of any exclusive clauses which exist in the shopping centre, if it is agreeable to granting a broader use clause for any new tenant.

See *806402 Ontario Ltd. v. Gasrite International Corp. (1992), 21 R.P.R. (2d) 33 (Ont. Gen. Div.)* for analysis of "related products".

See *R.A. Keane Enterprises Ltd. v. Drago's Place Ltd., [1990] O.J. No. 673 (Ont. Dist. Ct.)* for analysis of "other similar products."

See *Pam-Cor Investments Ltd. v. Friends and Neighbours Family Restaurant Ltd., [1987] 4 W.W.R. 532 (B.C.C.A.)* regarding the termination of lease for failure to use the required name.

However, see *Oshawa Group Inc. v. 1113443 Ontario Inc. [1998] O.J. No. 5286 (Ont. Ct.)* where the tenant, a retail grocer, proposed to change its name and shift to more of a discount operation. The landlord objected to the proposed name change because a discount operation would be in conflict with the landlord's proposed redevelopment plan for the shopping centre. The court was of the view that even as a discount operation following the proposed change of name, the tenant would still be carrying on the business of a supermarket and therefore, the tenant would still continue to be in compliance with the use provision in the lease.

SPECIAL REMEDIES FOR SPECIAL PROMISES

4. DYNAMICS OF CHANGE

B. TRANSFERS AND FINANCING

(i) STANDARD TRANSFER CLAUSE

1. *Tenant covenants that no Transfer affecting Tenant, this lease, the Store or the business of Tenant at the Store shall be permitted or effective until Landlord's written consent to the Transfer is delivered to Tenant. Landlord may withhold consent to a proposed Transfer on the basis provided in this section or on any reasonable basis. Tenant shall deliver to Landlord its written request for consent to such Transfer together with copies of the proposed Transfer documents and shall provide Landlord with full particulars of the proposed Transfer and the business and financial responsibility and standing of the proposed transferee. Tenant acknowledges that Landlord agreed to enter into this lease with the original Tenant after the exercise of Landlord's own judgment and expertise in determining that the original Tenant was a suitable tenant for the Project having regard to the size and nature of the Project, Landlord's substantial investment in the Project, and the business and personal characteristics of the original Tenant. If a Transfer is proposed, Landlord will similarly be entitled to exercise its own judgment and expertise in determining whether the proposed transferee is suitable to Landlord and for the Project.*

2. *In considering whether to grant or withhold its consent to any Transfer it shall be deemed reasonable for Landlord to take into account and to base its decision upon satisfaction of the requirements and criteria provided for in section 2.7.1 and in law, and upon:*

(a) *whether the proposed transferee has agreed with Landlord in writing and*

on Landlord's form, to assume and perform each of the covenants, obligations and agreements of Tenant in this lease, and

- (b) *whether such Transfer will result in a replacement tenant who is suitable to Landlord on the basis of the proposed transferee's business and personal characteristics, including its financial capability, and its business history, experience, responsibility and standing and ability to operate the business required to be operated under this lease.*

The determination of whether the foregoing requirements and criteria have been satisfied for any proposed Transfer shall be made by Landlord in accordance with this section 2.7, within a reasonable time, but not less than 30 days from receipt of Tenant's request and particulars.

3. *If the annual average of the aggregate of Basic Rent and Percentage Rent payable by Tenant during the 2 years preceding the Transfer, or if less than 2 years of the Term have then elapsed, if the aggregate of Basic Rent and Percentage Rent payable by Tenant during the elapsed period, adjusted to represent an annual amount, is greater than the amount of Basic Rent then payable under section 3.1, then effective from and after the date of completion of any Transfer, the Basic Rent shall be increased to equal such greater amount.*

4. *No Transfer or other disposition by Tenant of this lease or of any interest under this lease, shall release Tenant from the performance of any of its covenants under this lease and Tenant shall continue to be bound by this lease. If this lease is disclaimed or terminated by any trustee in bankruptcy of any transferee of this lease, the original Tenant named in this lease, upon notice from Landlord given within 60 days of such*

disclaimer or termination shall enter into a lease with Landlord upon the same terms and conditions as contained herein except for the duration of the term, which shall expire on the date this lease would have expired save for such disclaimer or termination.

5. Prior to Landlord delivering any requested consent, Tenant shall pay to Landlord a processing fee of \$500.00 for each request by Tenant for consent to Transfer.

Our sample clause is a standard Landlord's form which prohibits an assignment or sublet or other transfer of the Store without Landlord's approval and payment of a processing fee.

This standard clause is typical in a Landlord lease. From the Landlord's point of view, the lease should be personal to the specific tenant and any change of tenant should serve to reopen the terms of the lease.

However, in today's era of change, a careful Tenant will insist on some flexibility on the part of the Landlord in the Tenant's ability to deal with the lease in the context of the Tenant's business.

A Tenant's store location and lease may be a vital part of its business value.

SPECIAL REMEDIES FOR SPECIAL PROMISES

4. DYNAMICS OF CHANGE

B. TRANSFERS AND FINANCING

**(ii) FRANCHISE THE BUSINESS – SAMPLE
CLAUSE**

Landlord shall provide its written consent to a sublease of the whole of the Store to a bona fide duly qualified franchisee of Tenant, provided that:

- (a) the lease is in good standing;*
- (b) Tenant has paid Landlord's processing fee of \$500.00 plus applicable GST;*
- (c) Tenant delivers to Landlord an executed copy of the sublease together with Tenant's written request for Landlord's consent;*
- (d) such sublease by its terms provides that all of Tenant's covenants, obligations and agreements under the lease shall apply to the subtenant and the subtenancy;*
- (e) the subtenant covenants directly with Landlord to observe and perform each of the covenants, obligations and agreements of Tenant under the lease;*
- (f) Tenant delivers to Landlord such evidence of the franchise agreement, of the capability of the franchisee to properly operate Tenant's business in the Store and of the financial standing and credit worthiness of the franchisee as Landlord may reasonably require; and*
- (g) such sublease and related consent shall be deemed to have been revoked and rescinded upon the day immediately preceding the date upon which such subtenant ceases to be a franchisee of Tenant and in such event Tenant shall resume possession of the Store and shall directly operate the business required to be carried on in the Store.*

Our sample clause provides that the Landlord will consent to a sublease of the Store to a franchisee of the Tenant on certain conditions, including:

1. there is no default under the lease; and
2. the subtenant covenants directly with the Landlord to observe and perform the Tenant's obligations under the lease; and
3. the franchise agreement must remain in good standing.

SPECIAL REMEDIES FOR SPECIAL PROMISES

4. DYNAMICS OF CHANGE

B. TRANSFERS AND FINANCING

**(iii) TRANSFER TO RELATED CORPORATION –
SAMPLE CLAUSE**

Notwithstanding anything to the contrary, Landlord shall provide its written consent to an assignment of this lease or a sublease of the whole of the Store to a Related Corporation, provided that:

- (a) Tenant delivers to Landlord an executed copy of the assignment or sublease together with Tenant's written request for Landlord's consent;*
- (b) Tenant has paid Landlord's processing fee of \$500.00 plus applicable GST;*
- (c) such assignment or sublease by its terms provides that all of Tenant's covenants, obligations and agreements under this lease shall apply to the assignee or subtenant and the subtenancy;*
- (d) the assignee or subtenant covenants directly with Landlord to observe and perform each of the covenants, obligations and agreements of Tenant under this lease;*
- (e) Tenant delivers to Landlord the certificate of a senior officer of Tenant confirming that the proposed assignee or subtenant is a Related Corporation;*
- (f) the lease is in good standing; and*
- (g) such assignment or sublease and related consent shall be deemed to have been revoked and rescinded upon the day immediately preceding the date upon which such assignee or subtenant ceases to be a Related Corporation and in such event Tenant shall resume possession of the Store*

and shall directly operate the business required to be carried on in the Store.

"Related Corporation" means a holding corporation, subsidiary corporation or affiliate of Tenant, as each of those terms is defined in the Business Corporations Act or similar statute of the Province in which the Project is located.

Throughout its business cycle, the Tenant may desire to reorganize its business affairs, for tax purposes or some other bona fide reason. The sample clause provides that the Landlord will consent to an assignment of the lease or a sublease of the Store to a Related Corporation of the Tenant. Related Corporation is further defined as a holding corporation, subsidiary or affiliate of the Tenant.

This modification gives the Tenant flexibility to organize its corporate affairs.

The original Tenant is not released from its obligations under the lease upon an assignment or sublet to a Related Corporation. The permitted transfer is revoked if the related status is not maintained.

SPECIAL REMEDIES FOR SPECIAL PROMISES

4. DYNAMICS OF CHANGE

B. TRANSFERS AND FINANCING

(iv) SALE OF A CHAIN – SAMPLE CLAUSE

Notwithstanding anything to the contrary though subject to section 2.7.3 of the lease, Landlord shall provide its written consent to an assignment which forms part of a single business transaction in which a single buyer will acquire, as a going concern, the assets and business of 100% of the operating stores of Tenant provided that:

- (a) this lease is in good standing;*
- (b) Tenant has paid Landlord's processing fee of \$500.00 plus applicable GST;*
- (c) Tenant delivers to Landlord an executed copy of the document or instrument effecting the assignment together with Tenant's written request for Landlord's consent;*
- (d) Tenant delivers to Landlord the certificate of a senior officer of Tenant certifying that the assignment forms part of a single business transaction in which a single buyer will acquire, as a going concern, the assets and business of 100% of the operating stores of Tenant; and*
- (e) the assignee covenants directly with the Landlord in writing to perform and observe such of the covenants, obligations and agreements of Tenant under the lease as Landlord requires.*

Notwithstanding anything to the contrary, nothing in this section permits or authorizes Tenant to mortgage, charge or otherwise encumber this lease or the Store (whether by way of an assignment, sublease, specific or floating charge or any other Transfer) as security for any indebtedness or other obligation.

Our sample clause provides that the Landlord will provide its consent to an assignment of the lease to the buyer of chain of Tenant's stores.

A Landlord may agree to relax this provision further, by providing its consent to the purchase of a specific number of stores (for example, ten stores in Ontario) or upon the sale of one of the Tenant's operating divisions (if the Tenant operates different stores under different trade names).

SPECIAL REMEDIES FOR SPECIAL PROMISES

4. DYNAMICS OF CHANGE

B. TRANSFERS AND FINANCING

(v) FINANCE THE LEASE – SAMPLE CLAUSE

Notwithstanding anything to the contrary, Tenant shall be entitled, to the extent usual and reasonable in the conduct of its business, to give or create security interest agreements, including conditional sales contracts or chattel mortgages, to secure part of the purchase price of its trade fixtures and to create security upon its stock-in-trade or other personal property for the purpose of carrying on its business operations in the Store, provided that the foregoing shall in no way prejudice or affect Landlord's rights to priorities or Tenant's obligations. Nothing in this section permits any Transfer or enlarges any of Tenant's rights except as expressly set forth herein, and nothing in this section permits or authorizes Tenant or any other person to create a security interest, mortgage, charge or encumbrance with respect to the Leasehold Improvements or to pledge or encumber this lease or Tenant's interest therein.

A careful Tenant will reserve the right to finance its business, trade fixtures and merchandise.

Our sample clause does not permit the Tenant to grant security in the lease or the leasehold improvements.

FAST EFFECTIVE PAIN RELIEF...

**McLEAN & KERR LLP'S
UPDATE ON OVER-THE-COUNTER
COMMERCIAL LEASE REMEDIES**

PART 4 ARBITRATION AND SELF-HELP

1. **ARBITRATION**

**ARBITRATION – RENEWAL RENT - SAMPLE
CLAUSE**

***Section X** Landlord and Tenant shall negotiate and attempt to agree upon the annual Basic Rent (the "Renewal Rent") for the Renewal Term as provided under and in accordance with section _____. If the parties are unable or otherwise fail to reach agreement concerning the Renewal Rent at least 3 months prior to expiry of the Term, then the Renewal Rent shall be determined by arbitration in accordance with and subject to the following provisions:*

***1.** Either party may commence the arbitration by giving notice to the other party stating:*

- (a)** its intention to submit the determination of the Renewal Rent to arbitration; and*
- (b)** its intention to participate in the appointment of an arbitrator.*

***2.** Within 20 days after the notice under section X.1 is given (the "Selection Period") the parties shall select a single arbitrator to determine the Renewal Rent. If the parties are unable or otherwise fail to select the single arbitrator within the Selection Period, then either party may apply to court to have the court appoint the single arbitrator. Unless otherwise agreed by the parties, the single arbitrator shall be a solicitor who practices law in the province in which the Project is located and is recognized as an expert or specialist in commercial leasing law.*

***3.** Within 45 days after the arbitrator is selected or appointed (the "Preparation Period"), as the case may be, each party shall give to the arbitrator and to the other party the following:*

- (a) *a statement signed by the party giving such statement setting out the Renewal Rent which such party believes is appropriate and the reasons and evidence in support thereof; and*
- (b) *copies of any expert's reports or other expert evidence such party is relying upon.*

4. *The arbitrator may appoint an expert to report to it on specific issues relating to the arbitration provided the arbitrator may not appoint any expert used or retained by either party in connection with the arbitration. Furthermore, the arbitrator shall give 7 days' prior written notice to each party of its intention to appoint an expert.*

5. *The arbitrator may conduct the arbitration on the basis of the statements, evidence and other materials given under section X.3 and on the basis of the report of any expert appointed under section X.4 and, in addition thereto, may hold a hearing for the presentation of evidence and for oral argument, provided that the arbitrator shall hold a hearing at the request of either party where the request is given to the arbitrator and the other party before the end of the Preparation Period.*

6. *If a hearing is to be held, such hearing, unless otherwise agreed by the parties, shall be held within 30 days after the earlier of:*

- (a) *the day the last of the parties complied with section X.3; and*
- (b) *the last day of the Preparation Period.*

Subject to this section X.6 and section X.7 and unless otherwise agreed by the parties, the time and place of the hearing shall be determined by the arbitrator and the arbitrator shall give written notice of same to each party at least 7 days prior to the date of the hearing.

7. *Unless otherwise agreed by the parties, the arbitration and any hearing conducted pursuant to it shall be conducted in the city in which the*

arbitrator practices law (or if someone other than a solicitor is selected by the parties, then in the city in which the arbitrator carries on business), provided that if the Project is located in Ontario, then the arbitration and any hearing pursuant to it shall be conducted in the Municipality of Metropolitan Toronto.

8. *The decision and award (together with the reasons) of the arbitrator shall be made and notice thereof given to each party within 30 days after:*

- (a) *where a hearing is held, the date the hearing is completed; or*
- (b) *where no hearing is held, the earlier of:*
 - (i) *the day the last of the parties complied with section X.3; and*
 - (ii) *the last day of the Preparation Period.*

9. *The decision and award of the arbitrator shall be final and binding upon the parties and neither party shall have any right of appeal (including any right to apply to set aside the decision or the award) whether based upon a question of law, a question of fact or a question of mixed fact and law.*

10. *In the event that the Renewal Rent has not been determined by the commencement of the Renewal Term, then, as of the commencement of the Renewal Term and until the arbitrator's decision and award is made, Tenant shall pay on account of the Renewal Rent the greater of:*

- (a) *the annual Basic Rent payable immediately prior to the commencement of the Renewal Term; and*
- (b) *if the Renewal Rent cannot be less than a minimum amount of rent that is capable of being determined, then such minimum amount of rent.*

Within 10 days after the decision and award of the arbitrator is made with respect to the Renewal Rent, the parties shall make all appropriate rental adjustments and Tenant shall pay to Landlord such further rent as necessary on the basis that the Renewal Rent as determined by the arbitrator was payable from and after the commencement of the Renewal Term.

11. Unless otherwise awarded by the arbitrator, each party shall bear its own cost and expenses (including legal costs and expenses) in connection with the arbitration and 50% of the costs of the arbitrator any other expenses related to the arbitration. If one of the parties makes an offer to the other party (the "Second Party") to settle the dispute, such offer is not accepted and the arbitrator's award is no more favourable to the Second Party than was the offer, then the arbitrator may take such fact into account in awarding costs in respect of the period from the making of the offer to the making of the award. The fact that an offer to settle has been made shall not be communicated to the arbitrator until the decision and award with respect to the Renewal Rent (other than costs) has been made.

12. Unless otherwise agreed by the parties, any notice, statement or other materials required or permitted to be given under this section shall be effectively given if given in accordance with section of this lease.

13. Except as provided in this section (either expressly or by implication), the arbitration and any hearing conducted pursuant to it shall be governed by and conducted in accordance with the Arbitrations Act (or similar statute) of the province in which the Project is located.

Arbitration can be a useful tool in a landlord-tenant relationship; and it can also be a pain-in-the-neck. (See for example: Halper, Emanuel B., Shopping Centre and Store Leases, (Law Journal Seminars - Press, 1990, New York) at 19.03.)

Arbitration clauses are becoming more common in many commercial leases. It is often selected as the method for resolving a dispute concerning the renewal rent under the lease as it is perceived to be less expensive and can be completed more quickly than litigation. However, this perception may not always be reality especially where the arbitration provision or agreement does not adequately detail the arbitration procedure.

Arbitration clauses generally favour the party having the largest number of positive lease obligations. In the commercial lease context this party is usually the tenant. Positive lease obligations of the tenant usually include the obligation to pay rent, the obligation to repair and maintain the store and the obligation to operate its business in the store to specific standards. If a dispute arises concerning any of the tenant's positive lease obligations, then, if an arbitration clause exists, the tenant can submit the matter to arbitration to prevent the landlord from terminating the lease or exercising its other self help remedies.

ADVANTAGES OF ARBITRATION CLAUSES

The advantages of arbitration, as compared to litigation, are generally as follows:

1. Speed of process.
2. Certainty of process, provided the agreement is properly drafted to provide sufficient detail of the arbitration procedure.
3. Certainty of result.
4. Flexibility of procedure.
5. Cost.
6. Protection of privacy interests.
7. Arbitrator can have expertise in a particular area.
8. Maintain goodwill between the parties.

DISADVANTAGES OF ARBITRATION CLAUSES

The disadvantages of arbitration, however, are generally as follows:

1. May not be as certain in process if the arbitration clause is poorly drafted.
2. Arbitration is not as flexible as other forms of Alternate Dispute Resolution.
3. The advantage of arbitration being cheaper than litigation is not guaranteed.

RECOMMENDATIONS IN DRAFTING AN ARBITRATION CLAUSE

The common law principles regarding interpretation and enforceability of contracts generally will apply to the interpretation and enforcement of an agreement to arbitrate. Therefore, basic contract principles such as fraud, mistake, duress, certainty and misrepresentation apply to arbitration clauses as well. In this regard, the following recommendations are submitted in order to preserve the parties intention to arbitrate a particular provision of a lease and ensure that the arbitration process is sufficiently defined.

1. Scott v. Avery Clauses

Scott v. Avery clauses are often included in arbitration agreements and provide that arbitration is a condition precedent to litigation. In fact, subsection 7(1) of the *Arbitrations Act, R.S.O. 1991, C.17 1991* (the “Act”) contemplates this:

7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

However, if the matter for which a stay is pursued under subsection 7(1) falls outside the confines of the arbitration clause the court will refuse to stay the action.

2. Particularity Of Arbitration Matter

It is essential that the arbitration clause adequately define the matters for which arbitration is to be available so that the arbitrator can interpret the extent of their jurisdiction. Further, as the certainty of the availability of arbitration is desirable, the language should be mandatory and not permissive: “shall” is better than “may”.

3. Particularity Of Procedure

The specifics of the arbitration procedure should be dealt with in the arbitration clause. In particular the following concepts should be included or specifically excluded from an arbitration clause:

1. Production of documents.
2. Ability to amend a parties submission.

3. Costs and deposits, if any, to be applied against the costs of the arbitration.
4. Appeal of the arbitrators decision (see 7 below).
5. Ability of arbitrator to award costs and interest (see 9 below).
6. Confidentiality of dispute and party's material.
7. Location of arbitration.
8. How the arbitrator deals with witnesses.
9. Written reasons.

4. One Arbitrator

The use of one arbitrator rather than three arbitrators is preferable. The use of one arbitrator should help keep costs to a minimum. In most situations involving the determination of a lease provision, the use of three arbitrators will add significant expense to the process without any corresponding benefit.

5. Arbitrator Should Be An Expert In Commercial Leasing Law

An arbitration clause should provide that the single arbitrator shall be a solicitor who practices law in the province which the project is located and is recognised as an expert or specialist in commercial leasing law. This requirement should help ensure that the arbitration is conducted fairly and in accordance with the procedure set out in the arbitration provision. Furthermore, where the language used in the arbitration provision requires legal interpretation, the judgment and expertise of a lawyer would be appropriate.

6. Short Time Frames

The time frames throughout the arbitration provision should be relatively short. From a business standpoint, the time limits contained in an arbitration clause should allow a party sufficient time to prepare their case for arbitration. With shorter time frames in the arbitration clause, there is a greater ability of the parties to conclude the process in an efficient and cost-effective manner.

7. Binding Decision Of Arbitrator

As the parties are agreeing to settle their dispute through arbitration, it makes sense to provide that the decision of the arbitrator be final. If a right of appeal

were to exist then some of the benefits of the arbitration (i.e. fast process with less expense) might be lost.

It should also be noted that, in Ontario, by virtue of section 3.3 of the Act, the parties are not able to contract out of section 46 which, in certain circumstances, permits a court to set aside an arbitrator's award:

46 (1) On a party's application, the court may set aside an award on any of the following grounds:

- 1. A party entered into the arbitration agreement while under a legal incapacity.*
- 2. The arbitration agreement is invalid or has ceased to exist*
- 3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement*
- 4. The composition of the tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with this Act.*
- 5. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.*
- 6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.*
- 7. The procedures followed in the arbitration did not comply with this Act.*
- 8. An arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.*
- 9. The award was obtained by fraud.*
- ...*
- (7) When the court sets aside an award, it may remove the arbitral tribunal or an arbitrator and may give directions about the conduct of the arbitration.*

- (8) *Instead of setting aside an award, the court may remit it to the arbitral tribunal and give directions about the conduct of the arbitration.*

8. Fairness And Equality Provisions

Section 3 of the Act sets out several provisions in the Act that the parties cannot contract out of. The relevant provisions are “motherhood” type provisions and their continued existence is appropriate. Essentially, they are intended to ensure fairness and equality in the process and to provide a remedy to either party where there has been an abuse in the arbitration process or it has been conducted unfairly.

3. *The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following:*
1. *Subsection 5(4) (“Scott v. Avery” clauses).*
 2. *Section 19 (equality and fairness).*
 3. *Section 39 (extension of time limits).*
 4. *Section 46 (setting aside award).*
 5. *Section 48 (declaration of invalidity of arbitration).*
 6. *Section 50 (enforcement of award).*

9. Costs Of Arbitration And Settlement Offers

If a settlement offer is made, but not accepted and the award of the arbitrator is not more favourable than the settlement offer, then this fact can be taken into account by the arbitrator in awarding costs of the arbitration. The purpose of this provision is to encourage settlement and to deter both parties from proposing and advocating an unrealistic position with respect to the particular lease dispute.

One should also consider the “baseball” approach to arbitration. This process involves each party submitting its proposal to resolve the dispute and then having the arbitrator select only one of the proposals, namely, the proposal that the arbitrator believes is closest to the true intent of the parties based upon the language of the lease provision and the evidence provided during the arbitration. A “baseball” arbitration provision will encourage settlement and deter both parties from proposing an unrealistic position. The downside with this approach is that it necessarily involves more risk and the party that loses the arbitration may bear a greater financial loss than would otherwise be the case under the standard arbitration process.

ARBITRATION OF SERIOUS MATTERS - SAMPLE CLAUSE

Notwithstanding the provisions of section _____ at any time after the giving of notice to submit a dispute to arbitration but prior to the commencement of the hearing of any dispute by the arbitrator appointed as aforesaid, either party may initiate proceedings in a court of competent jurisdiction to adjudicate such dispute, in which event the arbitration proceedings shall immediately cease and determine and the cost of the arbitration proceedings, if any, shall be borne by the party initiating the court proceedings unless the court otherwise determines.

A concern regarding an arbitration provision is where the dispute is concerning a serious matter to the lease. It may not be appropriate to have a serious dispute settled by a single arbitrator. The sample arbitration provision in the context of rent renewal is adequate without such a clause. However, if the issue at stake is critical, both parties should have the right to have the dispute settled by the courts rather than by arbitration.

2. SELF HELP

TENANT'S GENERAL SELF HELP RIGHT – SAMPLE
CLAUSE

If Landlord shall be in default of any of its covenants, obligations or agreements under this Lease and such default shall have continued for a period of thirty (30) consecutive days (ten (10) days in the case of monetary obligations owed by Landlord to Tenant), or such longer period as may be reasonably required in the circumstances to cure such default, after written notice from the Tenant specifying with reasonable particularity the nature of such default and requiring the same to be remedied, or if such default shall create any emergency, the Tenant, without prejudice to any other rights which it may have with respect to such default, may remedy such default at the cost of the Landlord and offset set costs, together with interest at the rate of X%, against rent.

The above sample clause provides a Tenant with a mechanism to cure a default of the Landlord (i.e. failure to repair the project) and be compensated for any expenses incurred through a set-off of the Tenant's rent. The effectiveness of such a provision, however, is limited only to the positive obligations imposed upon the Landlord which are contained within the lease. Such a clause will not allow a Tenant to set-off rent for any expense it incurs which is not stipulated to be a Landlord obligation in the lease. A Landlord will want to maximize the notice period and minimize the types of Landlord's defaults for which the Tenant may exercise such self help remedy.

**SELF HELP: LANDLORD'S WORK – SAMPLE
CLAUSE**

(a) **Construction Period**

“Landlord’s Work” means the work to be completed by Landlord at Landlord’s cost in accordance with Article 9, including without limitation, the stipulated construction and development of the Building and the Premises. Landlord represents and warrants that Landlord’s Work has commenced as of the date of this Lease and shall be substantially performed by November 30, 2001 (the “Construction Period”) subject to force majeure and Tenant delays. During the Construction Period, Tenant will not be responsible for payment of Minimum Rent, Operating Costs, taxes, utilities or any other form of rent or Additional Rent.

(b) **Fixturing Period**

“Tenant’s Work” means the work to be completed by Tenant at Tenant’s cost in accordance with Article 9, including, without limitation, the installation of a racking system and stocking of Tenant’s products. Tenant shall complete Tenant’s Work during the 8 week period (the “Fixturing Period”), which shall commence on that date which is 7 days after receipt of notice from Landlord that Landlord’s Work has been substantially performed. Tenant acknowledges that Landlord will be completing Landlord’s Work during the Fixturing Period.

If any of items numbered 1 through 28 inclusive and item numbered 30 of Part 8, Schedule C are not completed by October 30, 2001, the Fixturing Period shall be automatically extended for each day that any such item remains incomplete. If the Landlord’s Work has not been completed by November 30, the Tenant shall refer the issue of non-completion and whether the cause of such non-completion is either Tenant delay or force majeure, to the Engineer for determination in accordance with the provisions of section 9.1 (a) (2). If the Engineer determines that Landlord’s Work has not been completed and that the cause of such incompleteness is other than Tenant delay or force majeure, Tenant shall be entitled to

complete, or cause to be completed, Landlord's Work and to offset the cost from Minimum and Additional Rent payable under this Lease.

In our example, the Tenant negotiated for the inclusion of a set-off mechanism which would allow the Tenant to set-off any expenses incurred in connection with completing any of the Landlord's Work, if the Landlord failed or refused to do so within the stipulated time periods.

**TENANT'S SELF HELP IN DISPUTE RESOLUTION –
SAMPLE CLAUSE**

If there is any disagreement between the Landlord and Tenant concerning any of the following:

- (1) modifications to the Approved Plans and Specifications required by Tenant; or*
- (2) Landlord's Work; or*
- (3) the cost of any item which is the subject of Landlord's Work; or*
- (4) latent defects of a structural nature; or*
- (5) any matter for which Tenant is entitled to a right of offset under this Lease, than Tenant shall be entitled to refer the matter for determination by a reputable and qualified engineer acceptable to Tenant, in its sole discretion (the "Engineer"). It is intended, without limitation, that any disagreement with respect to such modifications:*
 - (i) concerning the refrigeration, plant and equipment shall be referred to PB Engineering (or its successors), and*
 - (ii) concerning the Building and Premises and any other matters shall be referred to Cole Sherman (or its successors).*

Tenant shall notify Landlord of Tenant's decision to refer any such matter to the Engineer. Landlord and Tenant shall each have 7 business days from the date of Tenant's notice to Landlord (the "Evidentiary Period") to provide the Engineer with such supporting documentation for its position as each party deems reasonable. The Engineer shall not accept any supporting documentation from either party after the expiry of the Evidentiary Period.

The Engineer shall render its decision not later than 7 business days following the expiry of the Evidentiary Period. If the Engineer fails to make its decision within such period, the parties shall grant whatever reasonable extension of time is requested by the Engineer for it to render its decision. If the Engineer again fails to render its decision within such period or if the parties cannot agree on a reasonable extension period, the parties shall reasonably choose a mutually acceptable replacement engineer and shall resubmit supporting documents in the time period and manner provided above. The Engineer's decision shall be final and binding upon the parties and shall not be subject to review, appeal or arbitration.

Tenant and Landlord shall equally share the costs associated with the Engineer. If the Landlord fails to pay its portion of the costs of the Engineer upon demand by Tenant, Tenant shall be entitled to pay the Engineer the full amount and offset the costs against Minimum and Additional Rent.

Our example allows a Tenant to refer any of the enumerated matters for the determination of a qualified engineer, including the Tenant's right under any other provision in the lease which allows the Tenant to claim a set-off in rent. This clause states that all costs associated with the engineer are to be borne by the Tenant and the Landlord equally. Should the Landlord fail to pay its share of the engineer's costs the Tenant can pay such costs on behalf of the Landlord and set-off those costs from the Tenant's rent.

TENANT'S SELF HELP IN PERFORM COVENANTS
- SAMPLE CLAUSE

(a) If it is found by the Engineer pursuant to the provisions of section 9.1 (a) (2) that either the Landlord or the Tenant has failed to perform any of its covenants or obligations under or in respect of this Lease, the other party may, upon twenty (20) days notice after the Engineer's decision, perform or cause to be performed any of such covenants or obligations, or any part thereof, and for such purpose may do such things upon or in respect of the Premises or Project or any part thereof as may be requisite or necessary. Tenant agrees that, when acting in accordance with this section, it will comply with the provisions of those applicable warranties which have been provided to Tenant.

(b) All expenses incurred and expenditures made by or on behalf of the Landlord or the Tenant under this Section shall be forthwith paid by the Tenant or the Landlord as the case may be. If the Tenant fails to pay the same, the Landlord may add the same to the Additional Rent and recover the same by all remedies available to the Landlord for the recovery of rent in arrears. If the Landlord fails to pay the same within twenty (20) days of written demand, the Tenant shall be entitled to deduct such amount from the next ensuing payment(s) of Minimum Rent and Additional Rent.

The effect of this clause is to allow the Tenant, after notice of the engineer's decision under the "Dispute Resolution" clause referred to above, to perform any of the covenants or obligations which the engineer has decided the Landlord is liable to perform and to deduct such amounts from the Tenant's rent.

Please note that the clause is mutual, and the Landlord is entitled to add its costs to rent.

**TENANT'S SELF HELP IN RADIUS RESTRICTION –
SAMPLE CLAUSE**

Landlord expressly covenants as a fundamental term of this Lease, and as an inducement for Tenant to enter into this Lease, that Landlord shall not knowingly permit or suffer any property owned or controlled by Landlord or a Related Corporation (as defined in section 14.1) within a 1/2mile radius of the Building to be used in a way that produces noxious emissions or as a metal foundry or petrochemical refinery (collectively, the "Offending Use"). Landlord shall take all necessary steps to stop the Offending Use within the radius immediately upon written notification from Tenant. If Landlord fails to do so, Tenant shall be entitled to, and shall offset all costs, charges and expenses in so acting from Minimum Rent. Further, Landlord agrees that, in respect of any property within a 1/2mile radius of the Landlord which is not owned or controlled by Landlord, it will not consent to such property being used as an Offending Use and it will assist and co-operate with the Tenant and Tenant's efforts in causing the cessation of the Offending Use.

In negotiating our example, the Tenant was able to include a self help mechanism in the event that the Landlord violated a 1/2mile radius covenant. If the Landlord, or a related company of the Landlord, knowingly permitted any property within a 1/2mile radius of the Tenant's property to produce noxious emissions or be used as a metal foundry or petrochemical plant, the Tenant will be allowed, by virtue of this provision, to take all necessary steps to stop the noxious emissions or use and set-off all of the Tenant's costs from rent.

**LIMITATION OF LANDLORD'S SELF HELP –
SAMPLE CLAUSE**

Remedies of Landlord

Upon an Event of Default, Landlord may by written notice to Tenant:

...

(d) pursuant to a court order, terminate this lease and thereafter re-enter and recover possession of the Premises, and claim all damages to which Landlord may be entitled at law arising from such termination as a result of Tenant's default, including without limitation damages for loss or diminution of rent otherwise payable by Tenant over what would have been the balance of the then current Term but for such termination, subject to Landlord's obligation at law to mitigate its damages.

Our example puts a different emphasis on the use of self help. The effect of our example is not to allow a Landlord to resort to self help upon Tenant defaults. Instead, our example limits the availability of self help to a Landlord's upon an event of default by the Tenant. Ordinarily upon a Tenant's default of a lease provision, a Landlord would be legally entitled to terminate a Tenant's lease, and re-enter the store. Once the Landlord was in repossession of the premises, it would be entitled to a number of other remedies against the Tenant. This self help right is effectively abrogated in our example, as the Landlord would now be required to obtain the appropriate court order if it chose to terminate the lease and re-enter a Tenant's premises upon a Tenant's default.

FAST EFFECTIVE PAIN RELIEF...

**McLEAN & KERR LLP'S
UPDATE ON OVER-THE-COUNTER
COMMERCIAL LEASE REMEDIES**

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