

## Assignments, Consents and Unreasonable Landlords

by Peter L. Collins, [pcollins@fieldlaw.com](mailto:pcollins@fieldlaw.com)  
Field Atkinson Perraton, Barristers & Solicitors [www.fieldlaw.com](http://www.fieldlaw.com)

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**Refusing consent to a lease assignment is fraught with risk. Landlords should carefully examine their rights before refusing consent.**

Most commercial leases prohibit assignments or subleases without the landlord's consent, and many state that such consent will "not be unreasonably withheld". There are many court cases ruling on what constitutes an unreasonable withholding. The court in each case will carefully analyze the wording of the lease. Lease provisions can expand the landlord's ability to refuse consent, but where there is ambiguity or conflict, the landlord's interpretation of its own drafting rarely prevails.

Consider the recent Calgary case of *Zurich Canadian Holdings Limited v. Questar Exploration Inc.* Zurich sublet office space to Kacee Exploration. The sublease incorporated by reference all the applicable provisions of the head lease and stated that the sublandlord could enforce against the subtenant all the rights of the head landlord. The head lease contained strict controls on assignment and subletting, and defined "Transfer" to include any change in control of a corporation.

Kacee went through several amalgamations and eventually sought consent to assign the sublease to Questar. Zurich responded by terminating the sublease, on the basis that the head lease permitted such a termination on a change in control. This was clearly the case under the head lease, and the sublease clearly incorporated the head lease rights, so Zurich thought itself on solid ground. The sublease to Kacee, however, also contained some specific provisions about consent to assignments and subleases, but did not include any provisions about the consequences of a change in corporate control.

The court applied a well-established rule of contractual interpretation: specific provisions override conflicting general provisions. The specific sublease provisions about assignments therefore applied, in place of the more restrictive provisions incorporated generally from the head lease. The court ruled that an amalgamation was not an assignment. As a result, Kacee hadn't breached the sublease, so Zurich was wrong to terminate the sublease. Moreover, this meant that Zurich's response to a legitimate request to consent to an assignment was to terminate the sublease for no (relevant) reason.

An unreasonable withholding of consent eliminates the need to obtain consent. Luckily, Zurich did not compound its error by actively evicting the occupants; instead, it sought a court declaration that the sublease was properly terminated. Zurich lost in court, and was ordered to pay the victors' legal costs.

### **What does this mean for landlords?**

- Carefully analyze your rights before taking any action.
- Consider only proper factors – there are several factors that courts consider improper (unless the lease specifically permits otherwise). Consult your legal counsel to ensure any proposed refusal is permissible.
- If consent is refused, give the tenant clear written reasons for the refusal decision. Failure to do so can itself be unreasonable.

- In face of tenant opposition to a refusal, be cautious about terminating the lease or evicting the tenant. If the refusal was wrongful, these steps compound your liability.
- Be careful out there!