



PDF # 1-4

**Daoust Vukovich Baker-Sigal Banka LLP**  
BARRISTERS & SOLICITORS

## **"OPTIONS TO RENEW: TIPS FOR TENANTS"**

Prepared By: Jeanne Banka  
Shopping Centre Newsletter, Vol. 20, No. 2  
February 2000

## LEASING LAWS

## OPTIONS TO RENEW: TIPS FOR TENANTS

By Jeanne Banka, Daoust Vukovich Baker-Sigal Banka, Toronto

Landlords consider options to renew a necessary evil so long as tenants insist on hedging their bets with respect to a particular location. To assist tenants in avoiding the pitfalls associated with drafting and enforcing options to renew, here are some tips based on recent cases.

**Make It Enforceable.** An "agreement to agree" is not good enough. Don't fall into the trap that the tenant in *Canada Trustco Mortgage Co. v. 1098748 Ontario Ltd. (Ontario 1999)* did, where the option to renew was to be "on terms, conditions and at a minimum rent (such minimum rent not to be less than the rent payable under this lease and to be fair market rent for premises of comparable age, location and construction), as is mutually agreed upon between the landlord and the tenant".

While the clause did provide for a procedure in establishing the minimum rent rate, unfortunately, there was no means set up to determine the other terms and conditions. The tenant's option was thrown out.

**Objective vs. Subjective Rent Determination.** Decide which you want and give your arbitrators a break. In *NRI Manufacturing Inc. v. Gross (Ontario 1999)*, it was held that where an option to renew provides for rent to be determined based on market rent, an objective and not a subjective approach must be taken. The criteria for determining the market rent were the established principles of appraisal, rather than the rent that might be extracted from a tenant given the peculiar circumstances affecting the tenant at the time it exercised its option.

Conversely, use of the words "rent" or "worth" signify that a subjective approach be taken. In *Yonge-Eglinton Building Ltd. v. Toronto Transit Commission (Ontario 1997)*, the renewal rent was to be agreed upon, failing which arbitrators were to "meet to fix a fair and proper sum to be paid as yearly rent for the said demised parcels of land, exclusive of and without taking into consideration any buildings or other improvements ...".

The court held that in determining the yearly rent, the arbitrators were to use a subjective approach, which was the value of the land to the parties, as opposed to an objective approach, which was the market value of the land.

**Strategize The Timing Of Exercise.** In cases where the renewal rent is not a specific dollar amount and you have some discretion in deciding when to exercise your option, be aware of the reference date for the determination of rent and plan accordingly. In *Autotrol Technology (Canada) Ltd. (Alberta 1999)*, the tenant was required to give six months' notice prior to the end of the term to exercise the option. The new rate was to be negotiated and, failing agreement, was to be determined by arbitration.

The court held that the correct date for determining the renewal rate was the date when the tenant exercised its option, not the date on which the renewal period began. The implications in rollercoaster real estate markets are obvious.

**Comply With the Mechanics of Exercise.** The recent trend of courts is to insist less on matters of formality where no prejudice occurs. An otherwise enforceable option is not defeated if the letter purporting to exercise it is unsigned. Nevertheless, a tenant should ensure that its exercise of option to renew is express and unequivocal.

In *Leek and Associates v. 372363 British Columbia Ltd. (B.C. 1998)*, a tenant faxed a letter to its landlord stating "we wish to exercise the option to renew or lease ... we look forward to meeting with you to discuss our opportunities to continue as tenants . . ." The tenant later changed its mind and denied its exercise of the option.

The court construed the letter as a clear intention to renew, not just an expression of interest in negotiating the renewal lease. Giving notice by facsimile rather than by registered mail as required by the lease had no effect on the validity of the exercise of the option.