

---

Presented November 23, 2015 (The Commons Institute: Advanced Sessions on Commercial Landlord and Tenant Law)

# Title and Teraview for Leasing Lawyers

Candace Cooper, Daoust Vukovich LLP

# Title and Teraview for Leasing Lawyers

*Candace Cooper, Associate, Daoust Vukovich  
LLP, Toronto*

Without access to Teraview, understanding what this software is capable of and the form that registered documents must take before being submitted for registration in the land registry office can be a mystery. There are some title and registration concerns that are unique to the leasing industry that a transactional lawyer is well acquainted with but which may be less familiar to leasing lawyers. The goal of this paper is to make readers more familiar with Teraview and other title matters important to the practice of leasing law.

## Teraview

### TITLE SEARCHING: PULLING A PARCEL REGISTER

---

The Teraview software allows for a quick search of title from a computer upon which the software is installed, rather than requiring a visit to the applicable land registry office. A parcel register is a printout showing the particulars of title. Note that many transactional real estate lawyers refer to a parcel register as a “PIN”, which stands for “property identification number.” A parcel register for a property can be retrieved by searching in a number of ways on Teraview. The most common search categories are listed below.

#### **Search by a PIN**

Searching by using the PIN is the most reliable way to search for a parcel register. Even where the PIN is no longer active due to a

change in legal description (e.g. resulting from a severance or a conveyance of a portion of the property for road widening purposes), the new PIN(s) will be identified on the inactive parcel register.

### **Search by Name**

Searching by registered owner's name will retrieve a list of all PINs owned under a particular name within that land registry office. All or part of a name can be used to conduct a search. This search can be unexplainably unreliable and the author has experienced circumstances where a name search has not returned any properties, although she was aware that a particular name was a registered owner of a property in a particular land registry office.

### **Search by Municipal Address**

Searching by municipal address can be unreliable and may return no results. This can be surprising to many of our clients and other lawyers. Searches by municipal address are hit-and-miss because there is no requirement to insert a municipal address into an instrument before it is registered. Only the applicable municipality need be inserted into an instrument prior to registration. It could then be the case that there are no municipal addresses associated with a particular PIN, and a search by the known municipal address will be fruitless. Further, municipal addresses may change from time to time.

### **Search by Instrument**

If you have, for example, a recent charge/mortgage or a previously registered transfer/deed in respect of the property you wish to review, searching by instrument number will return a list of all PINs within the land registry office upon which that instrument is registered.

## **Reporting on Title to your Client**

While reporting on title is primarily a tenant's solicitor's concern, landlords and their solicitors will want to keep an eye on title and other matters to ensure negotiations with tenants and other dealings with the

property are smooth. Landlords will want to keep title as clean as possible, and their corporate records up to date.

A prudent solicitor will report to its client anything on title that would interfere with the tenant's ability to enforce the promises made to it under the lease and anything that would interfere with the tenant's use of the premises.

### **Subsearching**

When a client or another lawyer asks for a search of title in the context of preparing a lease or an offer to lease, what is often being requested is a subsearch. Subsearching, as opposed to completing a full title search, is pulling and reviewing a parcel register. A full search of title is more common in a purchase and sale transaction, and involves such investigations as abutting lands searches and plotting boundaries of the property. A parcel register will reveal all instruments currently registered on title, including, for example, mortgages (referred to as "charges"), agreements, easements, restrictive covenants, and notices of lease.

A prudent solicitor will request a subsearch early in the progress of a file. This approach will ensure you have the correct registered owner for file opening purposes and conflict checks. A primary concern of leasing lawyers is to determine which entity is the correct landlord under a lease. Most often the landlord will be the registered owner of the property. A parcel register for a property will quickly reveal the registered owner's name. If the landlord's name is not the name shown on the parcel register as the registered owner, further investigations are necessary. Who is the correct landlord? Could the owner have designated a property manager as landlord pursuant to a management agreement? Could there be a ground lease? Could a corporate reorganization have changed the name of the landlord?

### **Other Title Concerns**

If there is an existing mortgage registered on title, and this is an important location to the tenant, does your tenant client need a non-disturbance agreement?

---

**OTHER  
NOTICES OF  
LEASE**

---

Are there other notices of lease? Can you make an early determination as to what other tenants are in the shopping centre? Are there any exclusives/restrictions revealed within the other notices of lease that could affect the tenant's business?

---

**CORPORATE SEARCHES**

---

There are other searches not exclusively related to title that a prudent solicitor should consider. Corporate profiles may be retrieved through several service providers.<sup>1</sup> The parties should ensure that they are entering into a contract with the correct party.

In reviewing a corporate profile, ensure that the landlord's or tenant's name is correct. Common errors include the full spelling of Limited vs. the abbreviation Ltd. or similarly, Incorporated vs. Inc. You can also verify whether the named signing officers who are signing your lease are the same ones named in the corporate profile, and determine the applicable address for service of the corporation.

Also ensure that the corporation is active (especially in the circumstance of a landlord, as property can escheat to the Crown where a corporation holding title is no longer in existence).

As a final cross-check, compare the corporate profile to your parcel register. Is the name the same one registered on title? If not, could the landlord have amalgamated or gone through other corporate reorganization? If so, a notice of name change should be registered on title if the name has changed. This additional step will be necessary if you are registering a two-party notice of lease document on title and therefore the landlord is being named in your e-reg document.

---

<sup>1</sup> Options include Cyberbahn, a division of Thomson Reuters Canada Limited ([www.carswellegalsolutions.com](http://www.carswellegalsolutions.com)), OnCorp Direct Inc. ([www.oncorp.com](http://www.oncorp.com)) and ESC Corporate Services Ltd. ([www.eservicecorp.ca](http://www.eservicecorp.ca)).

## OFF-TITLE SEARCHES

---

Real estate lawyers involved in transactions of purchase and sale will be familiar with the array of off-title searches available by request to the applicable governmental entity. In the course of a purchase transaction, a purchaser's solicitor will order various searches with the applicable authorities.

A solicitor can write to the building department of a municipality to request a building and zoning report. A search will reveal such items as open building permits, work orders, and the applicable zoning of the property.

If your client is undertaking construction, consider determining whether the building is designated under the *Heritage Act* (Ontario), or whether the local conservation authority regulates development on the property. The local fire department can be requested to perform an inspection of the premises, and the Technical Safety and Standards Authority can advise as to any ongoing issues with elevators, boilers and pressure vessels, fuel storage tanks, or other issues relating to public safety. The Electrical Safety Authority can also provide historical file information or inspect the premises.

There will be nominal fees associated with each off-title search, which vary by municipality.

The foregoing list of available off-title searches is not exhaustive. Solicitors can consult the annually published "The Ontario Municipal Service Directory: A Comprehensive Guide for Real Estate Professionals" for contact details of the appropriate departments on a municipality-by-municipality basis.<sup>2</sup>

---

<sup>2</sup> Michael L. Young, *The Ontario Municipal Service Directory: A Comprehensive Guide for Real Estate Professionals*, 2015 ed. (Aurora: Canada Law Book, 2015).

## Registration of Leasehold Interests on Title

### REGISTRATION AS THE ESTABLISHMENT OF PRIORITY

---

Now that your client has instructed you to prepare a notice of lease, consider the effect registration. What will be its priority? Priority will be determined at the moment of registration, in accordance with Subsection 78(5) of the *Land Titles Act* (Ontario).<sup>3</sup>

#### **78(5) of the *Land Titles Act* (Ontario)**

##### Priorities

(5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, despite any express, implied or constructive notice, are entitled to priority according to the time of registration.

Privity of estate, subordination and attornment are beyond the scope of this paper, however, the effect of the foregoing section of the *Land Titles Act* (Ontario), together with leasing and priority issues, were examined in the case *DeGasperis Muzzo Corp v. 951865 Ontario Inc.*<sup>4</sup>

The Ontario Court of Appeal in this case upheld a lower court decision holding that registration of an interest will determine its priority, even in the face of actual notice. The DeGasperis Muzzo Corporation was a tenant of a “Skybox” in stadium formerly known as the Skydome. The parties agreed that notice of this lease would not be registered until after the occurrence of certain events, including the registration of a mortgage.

The lender of the mortgage was fully aware of the tenancy prior to the registration of the mortgage and the registration of the notice of lease. The Skybox notice of lease was registered two months after registration of the mortgage. When faced with the question of whether actual notice should determine priority of the lease as between the lender and DeGasperis, the court held that to preserve “commercial sense”, and in accordance with subsection 78(5) of the *Land Titles Act* (Ontario), registration order will govern the ultimate determination of priority.

---

<sup>3</sup> *Land Titles Act*, R.S.O. 1990, c. L.5, s. 78 (5) [**Land Titles Act**].

<sup>4</sup> *DeGasperis Muzzo Corp. v. 951865 Ontario Inc.*, [2000] O.J. No. 3218 (S.C.J.), aff'd by [2001] O.J. No. 2583 (C.A.).

## NOTICE OF LEASE

---

A landlord or tenant wishing to preserve priority of the lease or otherwise establish notice of the tenancy may register notice of the interest in the lease on title to the property.

A landlord may, at any time, register a notice of lease. Depending on the terms of the lease, a tenant may also register a notice of lease.

There are two primary methods of registering the notice of lease. A notice of lease can either (a) incorporate a complete copy of the lease or the agreement creating the leasehold interest in the land, or (b) constitute a simpler form of notice, with or without a schedule to the electronic registration (“e-reg”) document.

### **E-Reg Notice With or Without a Schedule**

A party may register a simple e-reg form of notice of lease, which must contain, at minimum, the term and expiry date of the lease or the agreement creating the leasehold interest.<sup>5</sup> There is one further required statement which may cause apprehension. The e-reg form must also include a statement that the applicant:

- “within 14 days of receiving a request will produce the lease or the document creating the interest for inspection purposes” and
- “consents to the cancellation of the notice on presentation of proof satisfactory to the land registrar that the applicant, on request, failed to produce the lease or document creating the lease.”<sup>6</sup>

The obligation of an applicant to disclose the complete lease document upon request can be a controversial matter. Due to sensitive financial information or other rights granted to the parties under the lease, the parties may not want to disclose the complete lease. Failure to comply with the disclosure obligations can cause a loss in priority of the notice of lease upon its cancellation.

---

<sup>5</sup> Guide at 113-114 (version 10, June 2014).

<sup>6</sup> Guide at 114 (version 10, June 2014).



A tenant will often choose to prepare and import an additional schedule to the e-reg notice which may set out additional important provisions, such as a list of exclusive rights granted to the tenant. It is not mandatory to do so, nor does the importation of a schedule avoid the disclosure obligations described above.

### **Complete Copy of the Lease**

The other alternative to registration of a notice of a lease is to register an e-reg notice, paired with a complete copy of the lease. Prior to the advent of the land titles system, it was common for parties to deposit a complete copy of a lease on title. However, this approach is not ideal for confidentiality concerns, as all of the terms of the lease, including the amount of rent, is disclosed within the registration.

A better approach for confidentiality's sake is for the parties to prepare a short form of lease<sup>7</sup>, which is an abbreviated form of a lease (not to be confused with a lease prepared under the *Short Form of Leases Act*). This approach was confirmed to be acceptable to the Director of Titles by the author to meet the disclosure obligations under registration of a notice of lease, so long as the short form of lease is in existence at the time that the instrument is submitted to the land registry office for registration. A short form of lease created at a later time as a result of an inspection request would be a fraud as it could not be the lease in respect of which the notice was registered (as it would not have existed at the time of registration of the notice of lease).

Under this approach the short form of lease may be registered in its entirety as representing the complete copy of the Lease.

## **ASSIGNMENT OF AN INTEREST IN A LEASE**

---

A landlord or a tenant may register notice that they have transferred away or otherwise dealt with their interest in a lease. Teraview allows the following types of registrations in this regard:

---

<sup>7</sup> Note that this is not to be confused with leases prepared under the *Short Forms of Leases Act*, R.S.O. 1990, c. S.11.

<sup>8</sup> R.S.O. 1990, c. S11.

- Assignment of Lessee’s Interest in a Lease
- Assignment of Lessor’s Interest in a Lease
- Notice of Sublease

Note, however, that each of the foregoing registrations requires that the registering party/applicant agrees to produce the document dealing with the interest within fourteen (14) days of request of same, failing which, the land registrar may delete the registration.

#### **AMENDING A LEASE**

---

A notice of lease may be amended at any time by registering an “application general” form of e-reg document, which will refer back to the original notice of lease by incorporating the appropriate statement in the e-reg notice to associate the two documents with each other. Common examples of circumstances where an amendment is appropriate include renewals, expansions, and other similar amendments. Again, this type of registration will also require a statement that the registering party/applicant agrees to produce the document dealing with the interest within fourteen (14) days of request of the same, failing which, the land registrar may delete the registration.

#### **DETERMINATION/SURRENDER/DELETION OF A LEASE**

---

Once a lease is registered, a separate registration must be prepared and registered to delete or otherwise remove the notice of lease from title. The land registry office has combined both a determination and surrender of lease into one e-reg form of document. There are several different statements that may be selected by the registering party depending on the circumstances of the termination.

In addition, the registered owner of a property may, at any time where a lease has been determined and there is no occupation under it, prepare an “application general” to request that the land registrar delete the notice of lease and any related documents. Section 75 of the *Land Titles Act*

(Ontario)<sup>9</sup> allows the registered owner to apply to the land registrar to amend title in light of, among other things, changes in fact, such as the end of a tenancy.

## LEASEHOLD PIN

---

A somewhat infrequently used tool for long term tenants is the creation of a leasehold PIN. Where the term of an unexpired lease is over twenty-one years, the tenant is entitled to apply to the land registrar to create a separate leasehold parcel/PIN in respect of the property. The PIN will indicate under the Estate/Qualifier heading that the land is “leasehold” (rather than the usual “fee simple” notation).

## LONG TERM LEASES

When registering a long term lease, there are two threshold term lengths to be mindful of: 21 years and 50 years.

When calculating the term of a lease, the term plus all potential renewals must be considered. Both a 25 year lease, and a 15 year lease with two rights to renew for five years each, are both contrary to the *Planning Act* (Ontario)<sup>10</sup> and must fall within a statutory exception to constitute a valid lease.

---

<sup>9</sup> Land Titles Act, supra, note 4.

<sup>10</sup> R.S.O. 1990, c. P.13.

## LEASES OVER 21 YEARS

---

A lease with a term over 21 years must fall within one of several exceptions to the subdivision control requirements of the *Planning Act* (Ontario). There are six primary exceptions to the subdivision control requirements of the *Planning Act* (Ontario) applicable to leases:

1. The landlord must not own any lands abutting the lands being demised; or
2. The premises must be a whole of a lot or block on a registered plan of subdivision; or
3. The tenant is a governmental entity (a Ministry or a municipality); or
4. A part lot exemption by-law applies to the premises; or
5. The premises are part of a building or structure; or
6. A consent to the “subdivision” has been given by the committee of adjustment/land division committee.

## **Planning Act Exception: Part of a Building**

### ***Sears Canada v. Scarborough Town Centre***

Sears was an anchor tenant under five leases, with terms in excess of 50 years. Sears, trying to cancel its leases, argued that their anchor stores were separate buildings on the mall property, rather than forming part of the main mall building, thus a violation of the *Planning Act* (Ontario). Although under the leases, the tenants were to construct the building which would form the premises, the Sears stores could be accessed through the mall building. The court held that the Sears premises were within the “skin of the mall building” and therefore not contrary to the *Planning Act* (Ontario).

One *Planning Act* exception worth a closer look is the exception for premises which are part of a building. Section 50(9) of the *Planning Act* (Ontario) states that nothing in the subdivision control subsections 50(3) and (5) prohibit the entering into of an agreement that has the effect of granting the use or right in a part of a building or structure for any period of years.

The case *Sears Canada v. Scarborough Town Centre*<sup>11</sup> examined the meaning behind Subsection 50(9) of the *Planning Act* (Ontario). A demised premises will be considered part of a building if it is within the “skin” of the building.

### **Planning Exception: Consent Certificate**

If your lease does not fall within any other exception, such that a consent certificate will be required from the applicable committee of adjustments in respect of the long-term lease, be mindful that each municipality is a little

different in its requirements. Consult the applicable municipal contact early to discuss the appropriate approach and timeline. A reference plan is often required in order to be able to legally describe the extent of the premises.

Upon successful completion of the consent process, you will receive a consent certificate from the committee of adjustments, which must be then registered on title. In practice, the consent certificate is registered by importing it into the e-reg notice of lease, or if the notice of lease is already registered, by attaching the certificate of consent to a “notice” form of e-reg document and referring to the previously registered notice of lease as a related instrument.

---

<sup>11</sup> *Sears Canada Limited and Scarborough Town Centre Holdings Inc.* (1996), 45 O.R. (3d) 474 (Gen Div).

## LEASES OVER 50 YEARS

---

Section 3(1): a disposition of a beneficial interest in land does not include:

...

f. a lease of land or a transfer of the interest of a lessee (assignments)... which cannot exceed 50 years, including renewals, extensions, separate option to lease, or other document entered into as part of the arrangement relating to the lease (whether or not the lessee and the optionee or person named in the document are the same persons)<sup>12</sup>

A lease with an unexpired term over 50 years is considered a disposition of a beneficial interest in land by the Ministry of Finance, and therefore the transaction attracts Land Transfer Tax (“**LTT**”) as set out in Section 3(1) of the *Land Transfer Tax Act* (Ontario).<sup>13</sup>

LTT is payable on the fair market value (“**FMV**”), determined at the time of registration, on the land to which the lease extends or of a smaller portion of land if only such smaller portion is conveyed. In effect, the FMV of the premises must be determined, including the land, the building and any fixtures.

To determine the FMV, the best evidence is an appraisal completed by an accredited appraiser. While the FMV determination may also be an estimation based on the best available information, the Ministry reserves the right to challenge the determination of FMV. However, the Ministry advised the author that it would not challenge a proper appraisal.

While LTT on a lease over 50 years will be payable with the submission of the e-reg notice of lease for registration, the tenant does not need to register a notice of the lease in order to attract the tax. Where the lease is unregistered, the FMV is determined at the time of the disposition (i.e. the commencement of the term of the lease).

---

<sup>12</sup> R.S.O. 1990, c. L.6, s.3.

<sup>13</sup> *Ibid*, at s.3.