

October 1, 2018

## CONSENT TO CHANGE OF USE

Lease use clauses are very important to both landlords and tenants, especially in the context of shopping centres and other retail properties. Landlords prefer narrow use clauses that give them control over the merchandising mix in order to ensure that customers, as well as new retailers, are attracted to a property for its diverse array of merchants. Tenants prefer broad use clauses that give them freedom to adapt to changes in the marketplace and allow them to evolve in their product/service offering. Broad use clauses also make it easier for tenants to transfer their interest in the lease to another party. Tenants exit shopping centres for a myriad of reasons; they want maximum flexibility to unload their rent and other obligations for space they no longer wish to use.

In fact, when use clauses are litigated, it is often in situations where a tenant seeks to broaden or change its use in the face of landlord opposition. Some use clauses allow changes subject to the reasonable approval of the landlord. If a landlord withholds its approval, the dispute may find its way to the Courts for a ruling on whether the landlord was acting reasonably in the situation.

### **REASONABLENESS DEFINED**

What exactly does “reasonable” mean? The Courts have considered a variety of tests to define reasonableness in the context of use clause change requests. They have consistently held that the onus is on the tenant to show that the landlord’s refusal was unreasonable.

### **Factual Matrix**

There are no rigid rules that govern which factors the Courts may consider when deciding if a landlord has acted reasonably. The Courts have held that no matter what factors are chosen, they must look at the entire picture related to the specific situation, commercial realities and the economic impact that changing the

use will have on the property. This matrix is then evaluated on a “reasonable person” basis.

### **Reasonable Person**

The tenant must show the Court that a reasonable person would have granted consent to the tenant’s requested change of use (and that, as a corollary, it was unreasonable for the landlord to have withheld consent).

For example, in *Zellers Inc. v. Brad-Jay Investments Ltd.*, Zellers chose to take advantage of a “go dark” provision in its lease and stopped operating. Zellers wanted to assign its interest in the lease to a “Close-Out King” retail store and sought consent to change the use, which the lease allowed with the landlord’s consent, not to be unreasonably withheld. The landlord withheld its consent. The Court concluded that the landlord acted reasonably because a reasonable person in the landlord’s position would have reached the same conclusion. The landlord had hired several consultants, each of which cautioned the landlord that the operation of a Close-Out King retail store in place of a Zellers store would detrimentally affect the shopping centre. The Court concluded that any reasonable person would withhold consent in order to uphold the character and integrity of its shopping centre.

### **Impact on Other Tenants**

The Courts will look at the impact that changing the use will have on other tenants. The Courts have held that the landlord is permitted to take a realistic look at its shopping centre and consider whether the proposed use is offensive, or would hurt other tenants.

This is illustrated in *Mission City Holdings Ltd. v. Jim Pattison Industries Ltd.*, where an anchor tenant operated a “Save-On-Foods” for years, but had closed down two-thirds of its floor space to begin the operation of a business called “Why Pay More

Liquidators”. The landlord alleged that the tenant breached the lease by changing the use of the premises. The use clause stated that the tenant would operate a grocery store and supermarket business. After the tenant failed to cure the alleged default, the landlord terminated the lease. The Court agreed with the landlord. It held that the new format was not what was commonly understood to be a grocery store or supermarket. It also held that the landlord was acting reasonably, because it was responding to complaints from other tenants of significant drops in business volume after the change.

The Courts will also consider exclusive covenants granted to other tenants and whether a change of use would infringe on those exclusive rights.

In *Ayre’s Ltd. v. Atlantic Shopping Centres Ltd.*, the landlord refused to allow the tenant to sublet part of its department store premises to a beauty parlour. The landlord withheld its consent because it had entered into a subsequent lease with another tenant in which it agreed that there would be no other beauty parlour in the shopping centre. The Court held that the landlord reasonably withheld consent in this case, stating that a landlord is entitled to consider the total picture of the shopping centre, which includes its legal obligations to other tenants.

## UNREASONABLENESS DEFINED

The Courts have also considered a variety of tests to define "unreasonableness".

### General Nature of the Business

The Courts have looked at the general nature of the business operating under the existing use clause and compared it to the general nature of the business that would operate under the proposed use clause. The Courts may be more likely to find that the landlord is unreasonably withholding

consent if the general nature of each business is the same.

The Court used this test in *Oshawa Group Ltd. v. 1113443 Ontario Inc.*, where the tenant operated a retail food store in its premises under the name “Food City”. The tenant sought the landlord’s consent to operate under the name “Price Chopper”. The landlord withheld its consent to the name change, arguing that it amounted to an unauthorized change of use. The use clause required that the tenant use the premises “for the purpose of its business of general retail merchandising as carried on by the [tenant] in the majority of its other stores, provided that in all cases, the name "Food City" shall form at least part of the name under which the Lessee conducts its operation in the leased premises”. The Court held that the landlord was unreasonable in withholding its consent to the name change because both “Food City” and “Price Chopper” were general food supermarkets. The Court did not agree with the landlord’s claim that a “Price Chopper” would downgrade the image of the center.

## CONCLUSION

“Reasonableness” does not have a single definition. If a use clause comes before the Courts because a tenant seeks to broaden or change it in the face of landlord refusal, the Courts will look at the specific situation at hand and determine how a reasonable person would act in the circumstances.

To offer any conclusive guidance on the meaning of “reasonableness” or “unreasonableness” is next to impossible. We know that the Courts are trying to be objective and that they are willing to consider expert evidence. However, we do not have a solid set of parameters to live by. As a result, it may very well be that a simple reference to reasonableness will create a perfect tension that compels disputing parties to make peace.

*This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.*



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients’ needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

Often a deal will change complexion in mid-stage. At this critical juncture, you will find us responsive, flexible and able to adjust to the changing situation very quickly and creatively. We turn a problem into an opportunity. That is because we are business minded lawyers who move deals forward.

The energy our lawyers invest in the deal is palpable; it makes our clients’ experience of the law invigorating.

MARY ANN BADON  
416-598-7056  
[mbadon@dv-law.com](mailto:mbadon@dv-law.com)

FRANCINE BAKER-SIGAL  
416-597-8755  
[francine@dv-law.com](mailto:francine@dv-law.com)

JEANNE BANKA  
416-597-0830  
[jbanka@dv-law.com](mailto:jbanka@dv-law.com)

CANDACE COOPER  
416-597-8578  
[ccooper@dv-law.com](mailto:ccooper@dv-law.com)

DENNIS DAFOUST  
416-597-9339  
[ddaoust@dv-law.com](mailto:ddaoust@dv-law.com)

BITALI FU  
416-598-7053  
[bitalif@dv-law.com](mailto:bitalif@dv-law.com)

GASPER GALATI  
416-598-7050  
[ggalati@dv-law.com](mailto:ggalati@dv-law.com)

S. RONALD HABER  
416-597-6824  
[rhaber@dv-law.com](mailto:rhaber@dv-law.com)

PAETRA KAUFMANN  
416-479-4357  
[pkaufmann@dv-law.com](mailto:pkaufmann@dv-law.com)

WOLFGANG KAUFMANN  
416-597-3952  
[wolfgang@dv-law.com](mailto:wolfgang@dv-law.com)

LYNN LARMAN  
416-598-7058  
[llarman@dv-law.com](mailto:llarman@dv-law.com)

MIMI LIN  
416-597-8493  
[mimil@dv-law.com](mailto:mimil@dv-law.com)

MELISSA M. MCBAIN  
416-598-7038  
[mmcbain@dv-law.com](mailto:mmcbain@dv-law.com)

PORTIA PANG  
416-597-9384  
[ppang@dv-law.com](mailto:ppang@dv-law.com)

JAMIE PAQUIN  
416-598-7059  
[jpaquin@dv-law.com](mailto:jpaquin@dv-law.com)

BRIAN PARKER  
416-591-3036  
[bparker@dv-law.com](mailto:bparker@dv-law.com)

DINA PEAT  
416-598-7055  
[dpeat@dv-law.com](mailto:dpeat@dv-law.com)

KEN PIMENTEL  
416-598-7049  
[kpimentel@dv-law.com](mailto:kpimentel@dv-law.com)

CLAIRE RENNEY-DODDS  
416-488-3568  
[crenney-dodds@dv-law.com](mailto:crenney-dodds@dv-law.com)

LUCIA TEDESCO  
416-597-8668  
[ltedesco@dv-law.com](mailto:ltedesco@dv-law.com)

NATALIE VUKOVICH  
416-597-8911  
[nvukovich@dv-law.com](mailto:nvukovich@dv-law.com)

DANIEL WALDMAN  
416-597-9306  
[dwaldman@dv-law.com](mailto:dwaldman@dv-law.com)

DEBORAH A. WATKINS  
416-598-7042  
[dwatkins@dv-law.com](mailto:dwatkins@dv-law.com)

DANIEL WIENER  
416-479-9662  
[dwiener@dv-law.com](mailto:dwiener@dv-law.com)