January 18, 2018

NEW YEAR, NEW LAWS – GET READY!

HNY! As if it's not enough to be staring down those ridiculously ambitious New Year's resolutions that you made in a hungover/bloated post-holiday-season state, this report outlines more challenges that have arisen recently in the world of commercial property leasing, for you to adjust to in the New Year. To borrow from yoga terminology, "in your practice", you might wish to "be mindful" of certain 2018 legislative developments impacting commercial property leases.

CANNABIS LEGALIZATION (CANADA)

Sometime this year, new federal legislation will decriminalize the possession and distribution of marijuana and permit the distribution and retailing of cannabis by the provinces and territories. It is not expected to change existing law regulating production, sale and consumption of medical marijuana.

Landlords and tenants will have to learn how to adjust to the emergence of recreational cannabis retailers (RCR) on the Canadian retail landscape.

Nuisance

Will aromas or consumer behaviours in connection with RCRs yield claims by other tenants that the shopping centre is not being managed in a first class manner? Given that RCRs will be lawful, how can anyone complain if an RCR operation is irritating? Nuisance is described as a type of harm suffered (not as a type of objectionable conduct). A party may cause a nuisance where it substantially interferes with an occupier's use and enjoyment of land, and where the interference is unreasonable in the circumstances. Interestingly, the courts have occasionally held perfectly lawful uses to constitute a nuisance at law. One of these cases pertained to excessive noise by a restaurant/night club. Another involved the operation of an automobile-racing amusement park ride on vacant land bounded on three sides by motel properties. Then there was the fish market in a shopping centre, where the landlord was held liable for damages suffered by an adjacent tenant due to odours permeating the area. And, in British Columbia, a queue of patrons outside leased premises was held to create a nuisance.

CONSTRUCTION LIEN AMENDMENT ACT, 2017 (ONTARIO)

Amendments to the existing *Construction Lien Act* (which will now be named the *Construction Act* upon proclamation of the amending legislation – expected soon in 2018) reflect steps taken by the Province of Ontario towards modernization, efficiency and improved competitiveness. For landlords and tenants, the implications of the new law pertain chiefly to liens.

Extended Lien Period

The new law extends the 45-day period for contractors and subcontractors to register a claim for lien after substantial performance, completion or abandonment of the work, to 60 days.

Expanded Lien Rights

The new law allows repairs that extend the useful economic life of a structure to be considered as "improvements" and therefore subject to liens.

Holdbacks required of landlords paying Allowances

The new law provides that if a landlord/owner agrees to pay for all or part of an improvement that a tenant makes in the leased premises, and the payment is accounted for under the lease or any other lease related document, then whether or not the landlord is a party to the construction contract, its interest in the property is subject to the lien to the extent of 10% of the amount of the payment. Although most well-written leasehold improvement allowance clauses typically call for at least a final 10% holdback pending clearance of applicable lien periods, under the existing legislation the necessity for this holdback on payment of an allowance was not entirely clear. There is now solid justification for a 10% holdback feature of an allowance clause. Unfortunately for all concerned, there is greater uncertainty as to the liability of the landlord for liens with respect to the remaining 90%. (In fairness, the existing legislation was not entirely clear in this respect but it provided a sequence that contractors and landlords could follow, to

establish that the landlord would not accept responsibility for any lien. That feature of the existing legislation has been eliminated.) Now, under the new law, there is fresh potential for landlords to be liable for liens arising from their tenant's failure to pay for improvements.

BUILDING BETTER COMMUNITIES AND CONSERVING WATERSHEDS ACT, 2017 (ONTARIO)

Better known as "Bill 139", this Act amends the Planning Act, repeals the Ontario Municipal Board Act (replacing it with the Local Planning Appeals Tribunal Act), and accomplishes various other significant changes to the property development/planning process. The Act has received Royal Assent and is expected to be proclaimed early in 2018.

New Tribunal

The Ontario Municipal Board (OMB) is soon to be a thing of the past, replaced by the Local Planning Appeal Tribunal (LPAT). The LPAT may receive less traffic than the OMB, although it remains to be seen whether creative challenges against municipal councils' interpretation of Official Plans or Official Plan Amendments or Zoning By-laws or Zoning By-law Amendments will become the new norm. Theoretically at least, the LPAT should be more deferential to city councils. However, the standard of review is unchanged. We will have to wait for a few appeal rulings to be issued by the LPAT in order to gain a feel for whether the LPAT will actually behave more deferentially to local decision-makers and whether developers will adopt new approaches to the pursuit of approvals.

Hearings before LPAT

The only evidence permitted to be considered by the LPAT will be the record that was before city council. Case management conferences will ensure that hearings are organized well in advance. Greater efficiency is predicted, with time limits for oral submissions.

Tests to be evaluated by the LPAT

If on the first appeal, the LPAT does not find that certain threshold tests (that the relevant part of an Official Plan or Official Plan Amendment was inconsistent with a provincial policy statement, or conflicted with a provincial plan, or failed to conform with the upper-tier Official Plan, or that the existing policies or regulations of the Official Plan sought to be amended for a development do not comply with provincial policies or a provincial plan), the appeal is to be dismissed outright.

Potential for reconsideration by City

The process of review by the LPAT is significantly different than that of the OMB. On appeal to the LPAT, it must assess the threshold tests described above. If they are not met, the appeal is dismissed. However, if the tests are met, the LPAT is to send the matter back to the municipality for reconsideration.

Second appeal to LPAT

Following the municipality's reconsideration, if an appellant wishes to again take an unfavourable outcome to the LPAT, the second appeal is to yield a final yay or nay.

Implications for Leases

Many landlords and tenants enter into leases of property that do not have the necessary entitlements to allow the lease to proceed. They express conditions on the leases, to allow for a period in which the necessary zoning variances or development approvals are to be obtained. They often start with the assumption that if the city is not going to cooperate, the matter will be referred to the OMB where the process is likely to be more favourable to the developer.

Bill 139 places considerable uncertainty on the approval process. This scenario is likely to yield a lack of clarity around lease condition timelines.

The times, they are a'changing!

MARY ANN BADON
416-598-7056
mbadon@dv-law.com

FRANCINE BAKER-SIGAL
416-597-8755
francine@dv-law.com

JEANNE BANKA
416-597-0830
jbanka@dv-law.com

CANDACE COOPER
416-597-8578
ccooper@dv-law.com

DENNIS DAOUST
416-597-9339
ddaoust@dv-law.com

BITALI FU
416-598-7053
bitalif@dv-law.com

GASPER GALATI
416-598-7050
ggalati@dv-law.com

S. RONALD HABER
416-597-6824
rhaber@dv-law.com

PAETRA KAUFMANN
416-479-4357
pkaufmann@dv-law.com

WOLFGANG KAUFMANN
416-597-3952
wolfgang@dv-law.com

LYNN LARMAN
416-598-7058
llarman@dv-law.com

MIMI LIN
416-597-8493
mimil@dv-law.com

MELISSA M. MCBAIN
416-598-7038
mmcbain@dv-law.com

JENNA MORLEY
416-597-9225
jmorley@dv-law.com

PORTIA PANG
416-597-9384
ppang@dv-law.com

JAMIE PAQUIN
416-598-7059
jpaquin@dv-law.com

BRIAN PARKER
416-591-3036
bparker@dv-law.com

DINA PEAT
416-598-7055
dpeat@dv-law.com

ALICE PERALTA
416-597-1536
aperalta@dv-law.com

KEN PIMENTEL
416-598-7049
kpimentel@dv-law.com

LUCIA TEDESCO
416-597-8668
ltedesco@dv-law.com

NATALIE VUKOVICH
416-597-8911
nvukovich@dv-law.com

DANIEL WALDMAN
416-597-9306
dwaldman@dv-law.com

DEBORAH A. WATKINS
416-598-7042
dwatkins@dv-law.com