

# Just Give Me a Reason: New Guidance on (Un)Reasonably Withholding Consent to Commercial Lease Transfers

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Most commercial leases contain a provision which requires the tenant to seek consent from its landlord if the tenant wishes to assign the lease, sublet the leased premises or effect a change in control of the corporate tenant entity (a “Transfer”), but this provision often specifies that the landlord may not unreasonably withhold its consent to such Transfer. However, even without such a clause, unless the lease expressly states that the landlord may unreasonably withhold consent, in many circumstances section 23 of Ontario’s *Commercial Tenancies Act* will prohibit the landlord from doing so.

If a tenant believes that its landlord has unreasonably withheld consent to a Transfer, it may apply to a court to determine whether consent was unreasonably withheld. If it was, the judge may make an order permitting the Transfer to proceed. It is therefore important for commercial tenants and landlords to understand what constitutes an unreasonable refusal by a landlord to consent to a Transfer.

## What factors can a landlord consider in granting or refusing consent?

There is no fixed list of factors that a landlord may consider when asked to provide consent to a Transfer by a tenant – unless the lease specifies otherwise. For example, a lease may indicate that a landlord can only consider the financial position and business experience of a proposed transferee. More often though, the lease will not specify what factors a landlord can consider, but rather leave it to the landlord’s discretion, (though a few specific factors may be indicated). In these cases, courts have generally held that landlords may consider a variety of factors in determining whether or not to consent to a Transfer, including:

- the surrounding circumstances;
- the commercial realities of the marketplace; and
- and the economic impact of the Transfer.<sup>[1]</sup>

Therefore, the specific factors relevant to a landlord’s decision to provide or withhold consent will depend heavily on the context of the Transfer but will generally include items such as the financial position of the proposed transferee and the probability of a default by the transferee. The idea here is that since landlords get to choose their initial tenants, they should have *some* control when it comes to changing the party with whom they’re dealing through a Transfer.

In order to assess the factors relevant to the situation, landlords may ask for reasonable backup documents such as background information on a proposed transferee or financial statements if the transferee is a corporation. However, landlords should take care not to overreach in their requests. For example, a court recently criticized one landlord’s request for, amongst numerous other documents, financial statements from a corporation that had yet to be incorporated, since this request made no sense.<sup>[2]</sup>

## When is a refusal to provide consent considered unreasonable?

In general, a landlord is not considered to be acting reasonably if it refuses to provide consent to a Transfer for capricious or arbitrary reasons. A landlord will also likely not be acting reasonably if its grounds for refusal are seen to simply be opportunistic. For example, a refusal to consent to a Transfer cannot be used to secure a collateral or ulterior purpose or a new advantage such as higher rents or the inclusion of a demolition provision.<sup>[3]</sup>

Nevertheless, parties are still free to negotiate the terms of Transfers (and the landlord's consent thereto), and simply seeking to negotiate better terms does not constitute a *prima facie* refusal of consent. For example, a court recently found that a landlord did not unreasonably refuse to provide consent to a Transfer when it *indicated* that it would consent to an assignment of the lease only if the lease was modified to include a demolition clause, as this was found to be simply a *proposal*, not a *refusal* of consent.<sup>[4]</sup> If, after the tenant indicated it was not interested in agreeing to a demolition clause, the landlord refused to provide consent to the assignment on this ground, the refusal likely would have been unreasonable. However, simply attempting to negotiate with a tenant is not in itself considered to be a refusal. It may seem like splitting hairs, but the case law seems to suggest that this is a distinction with a real difference.

It is also important to note that when determining the reasonableness of a landlord's refusal to consent, what is relevant is the information available to and the reasons given by the landlord at the time of the refusal.<sup>[5]</sup> As a result, when communicating a decision to withhold consent to a Transfer to a tenant, landlords should clearly articulate the reasons for their decision and the facts that support this decision. If a tenant disagrees with the landlord's decision and applies to a court for a determination of whether the landlord's decision was reasonable, the landlord's initial reasoning will be critical in the court's determination.

#### **What if more than one reason is given for a refusal to provide consent?**

Where a landlord provides a tenant with more than one reason for its refusal to provide consent to a Transfer, a refusal to consent may be held to be reasonable even if the landlord provides unreasonable reasons for withholding consent along with reasonable ones. In these cases, a court examining the landlord's decision for reasonableness must consider the origins and weights of the competing factors.<sup>[6]</sup>

For example, where a landlord withheld consent to an assignment of a lease because: (1) the tenant had not properly restored a property to the condition required by the lease; and (2) the tenant had not dropped a separate litigation matter it had started against the landlord, the court found that while the first factor was a reasonable ground to refuse consent to the assignment, the second one was not. However, since the court found that the landlord's first ground for refusal was its primary reason for doing so, overall, the landlord's refusal to consent to the assignment was not unreasonable.<sup>[7]</sup> As such, landlords should take care to clearly explain the reasons for a decision to withhold consent to a Transfer so that the decision can be properly assessed if it ends up before a court. In fact, clearly reasoned positions can actually help deter tenants from pressing a claim in court by further strengthening the landlord's position.

Overall, whether a refusal to consent to a Transfer is unreasonable will depend on the language of the lease as well as the circumstances surrounding the refusal.

*Should you have any questions about consent to lease transfers or if you would like to discuss how we can help you with your commercial leasing needs, please reach out to Robert Eisenberg at [reisenberg@weirfoulds.com](mailto:reisenberg@weirfoulds.com) or by telephone at 416-619-6287.*

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

<sup>[1]</sup> *Rabin v 2490918 Ontario Inc.*, 2021 ONSC 2388 [*Rabin*] at para 7; *Tabriz Persian Cuisine Inc. v Highrise Property Group Inc.*,

2022 ONCA 272 [*Tabriz*] at para 20.

[2] *Rabin*, *supra* note 1 at para 62.

[3] *Ibid* at paras 14-16; *Tabriz*, *supra* note 1 at para 20.

[4] *Rabin*, *supra* note 1 at para 49.

[5] *Ibid* at para 67; *Tabriz*, *supra* note 1 at para 20.

[6] *Tabriz*, *supra* note 1 at para 30.

[7] *Ibid* at para 28.

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