

Publisher's Note

2018 — Release 1

Previous release was 2017-1

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Olson

A Commercial Tenancy Handbook

This release features updates to the case law and commentary in the following chapters: I (Leases and Related Uses of Land), II (Commercial Leases of Land: The Essential Terms), III (Express and Implied Terms of Leases), IV (Missing Terms, Representations, Collateral Agreements and Amendments), V (Exercise of Options to Renew), VI (Problems Encountered by Landlords), VII (Problems Encountered by Tenants), VIII (Remedies of Landlord and Tenant), XII (Possession of Premises without a Lease), and XIV (Special Issues Arising from Subleases). As well, this release includes updates to the Words & Phrases appendix.

Highlights

This release introduces the following new headings of commentary (appearing below in italics):

- **Express and Implied Terms of Leases — Provisions for the Payment of Rent — Payment of Operating Expenses — *Estimating and Reconciling Operating Costs*** — New commentary concentrates on convention of leases providing for the payment of operating costs by the tenant, and the common practice of periodic payment of amounts reflecting the landlord's estimate of such costs, coupled with the provision for reconciliation of differences between this estimate and the actual costs. Citing *1127776 Ontario Ltd. v. Deciem Inc.*, 2017 ONSC 862, 2017 CarswellOnt 1359 (Ont. S.C.J.), the author emphasizes the need for

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tenants to ensure that the clause providing for reconciliation requires it to take place within a reasonable time, with 'shall' in such a clause to be interpreted as mandatory.

- **Problems Encountered by Tenants — The Landlord Seeks to Evict the Tenant — *The Landlord Refuses to Permit Tenant's Fixtures being Removed*** — This new heading of commentary focuses primarily upon the decision, *2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 375445 Ontario Limited (Hydeaway Golf Club)*, 2017 ONCA 980, 2017 CarswellOnt 19616 (Ont. C.A.). In this decision, the court found the question of whether a fixture was 'a tenant's fixture' to be a question of mixed fact and law, in light of its highly fact-specific nature. According to the appellate court, the three issues to be determined are: (a) whether the asset was affixed to the property by the tenant; (b) whether the asset was used for the purposes of the tenant's business; and (c) whether the asset could be removed without material damage to the leased premises.