

# When Can a Landlord Withhold Consent?

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In the absence of a restriction in the Lease, a Tenant has the right to transfer the Lease or its rights under it. However, virtually all Leases contain a restriction on those transfer rights. A typical clause states:

Tenant shall not assign this Lease in whole or in part and shall not sublet or part with or share possession of all or part of the Premises and shall not grant any licences or other rights to others to use or share the use of any portion of the Premises without prior written consent of the Landlord in each instance, **which consent shall not be unreasonably withheld.**

Section 23(1) of the *Commercial Tenancies Act* deems “consent not to be unreasonably withheld”, absent contrary language in the Lease. If a Landlord wants to retain control to be able to unreasonably withhold consent, the Lease should expressly state this. Using other language such as “arbitrarily” may not be sufficient to contract out of the legislative deeming provision.

What is *objectively* reasonable is based on the circumstances of each case including the commercial realities of the market place and economic impact on the Landlord. Some additional principles that courts have followed include:

1. **Burden of Proof** – it’s the Tenant’s burden to demonstrate unreasonableness. There is deference to the business judgment of the Landlord.
2. **Information to be assessed** – only that which the Landlord had and the reasons given by the Landlord at the time of negotiations/refusal. This is a retrospective investigation. Further, speculative concerns do not justify withholding consent (e.g. cannot reject proposed transferee where there is no particular reason). However, sufficient information must be provided to the Landlord to make an informed decision.
3. **Amendments to the Lease** – typically not permitted and would not be considered to be a reasonable condition of consent if advantageous to the Landlord. Conversely, if consent diminishes the value of existing provisions, withholding consent may be found reasonable.
4. **Financial Position and Default Probability of the Assignee** – if it can be shown that assignee will probably default or is financially unstable, withholding consent may be reasonable.
5. **Good faith** – there is now an established duty of good faith in the performance of contractual obligations, which could apply in these situations. The Court has ruled that the good faith principles would not override clear contractual clause that permitted a Landlord to withhold its consent arbitrarily.

Examples of decisions finding the Landlord acted **reasonably** in withholding consent:

- **2197088 Ontario Limited v. Cadogan Corporation (2018; ONSC)** – Landlord agreed to provide consent to an assignment subject to reasonable security (effectively wanted 2 months deposit) further to a recommendation from its property manager. Court found that the Landlord acted reasonably and noted that the Landlord’s business judgment should be afforded deference, especially since it was derived from the property manager which was best placed to assess market conditions and risk.

# When Can a Landlord Withhold Consent (*cont'd*)

- ***Kenny Alwyn Whent Inc. v. Mao Dentistry Professional Corp. (2016; ONSC)*** – Several claims and counterclaims between the Landlord and dentist Tenant for breach of the Lease including claim by the Tenant that the Landlord unreasonably withheld consent to an assignment. Landlord felt that the highest and best use of the space was to continue leasing to a dentist. Landlord had zoning and parking concerns. Tenant made no contacts with prospective dentist assignees but contacted the Landlord with proposals to rent space to restaurant; play center; grocery store; and nightclub. No detailed proposals were provided to allow the Landlord to properly evaluate. Court found any reasonable person would have withheld consent.

Examples of decisions finding the Landlord acted **unreasonably** in withholding consent:

- ***RBC v. OMI Inc. (2019; ONSC)*** – Tenant in financial straits. Assets being sold which would include assignment of Leases for which consent was withheld by the Landlord. Court found the Landlord was unreasonable due to: (1) speculative concerns not supported by independent or credible evidence as to the transferee's (an investor) ability to own and operate a medical lab business and alleged lack of connection to the Waterloo or medical community; (2) the Landlord did not respond to the transferee's financial and operational capabilities piece provided to it. The court appears to have taken a dim view of the Landlord's emotive decision making, and the Landlord pre-determining the issue without sufficient information.
- ***Tradedge Inc v. Tri-Novo Group Inc. (2005; ONSC)*** – Financially distressed Tenant received offer to purchase. The Landlord insisted on new provisions to the Lease including increased rent purportedly to offset assignee's weak financial background, although \$100,000 was offered as security. Assignee would not agree and Landlord refused to negotiate. Application judge overruled by Court of Appeal and found that the Landlord's refusal was designed to achieve a collateral benefit which was not reasonable.

A Landlord may also wish to impose conditions as a requirement of consent. Ideally, these should be included in the Lease, but otherwise, the following are examples of some conditions may be found to be reasonable:

1. Requiring the transferee to enter into an assumption agreement with the Landlord.
2. Financial: e.g. to receive costs incurred for dealing with request to consent; to collect a security deposit; to increase the percentage rent if the transferee operates a lower volume higher profit business.

## Takeaways

- If the Lease provides clear bases upon which the Landlord can refuse consent, those will be more readily accepted even if subjective (e.g. general business reputation of the transferee; volume of sales).
- Credible and independent evidence is important to support positions if in Court. Get a credible third party "expert" to weigh in at the time of assignment negotiations.
- Demonstrating legitimate economic impact to the Landlord will bolster deference to business judgment of the Landlord. Conversely, demonstrating legitimate financial needs of the Tenant to transfer, may sharpen Court's focus and balance interests/risks.
- The record at the time of assignment negotiations is key as the contemporaneous evidence of what factors and information were being considered is relevant. The record should also show reasonableness!
- Delay may be a relevant consideration in remedies in the event consent is improperly withheld.
- There's a smell test; evidence of advantage to Landlord (i.e. seeking amendments) will draw Court's focus.

## Heading

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