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## **UNDERSTANDING NOTICE CLAUSES<sup>1</sup>**

The 1992 decision of the Court of Appeal for Ontario in *Ross v. T. Eaton Co* (1992), 11 O.R. (3d) 115 remains the leading Ontario case on the interpretation and application of a notice clause. The case involved notice of renewal of a lease. The *Ross* case considered and answered the following frequently arising notice questions:

**Q.1.** Is there a difference in legal effect between clauses which provide that notices may be given in a certain way, and clauses which provide that they *must* be given in that way?

**Answer:** Yes.

It is possible for a notice provision to be mandatory. That is, it may stipulate that a notice must be given in a certain way, and if it is not so given, the notice will be invalid, even if it is given in another way, unless the addressee of the notice by conduct or otherwise waives his right to insist on notice in the mandatory method. (See *Manchester Diocesan Council for Education v. Commercial & General Investments Ltd.*, [1970] 1 W.L.R. 241 at 246).

Alternatively, a notice provision may be directory. That is, it may stipulate that notices may be given in a certain way, but not exclude the right to give notice in another way. In this case, the courts have held that notice given in another way

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<sup>1</sup> By Barbara L. Grossman of Fraser Milner Casgrain LLP. This paper is based in large part on a 1994 memo titled "A Note on Notices" prepared by Jeremy Johnston for an internal firm education seminar.

that is no less advantageous to the recipient will be valid notice. For example, where acceptance was requested by return of post, it was held that did not mean exclusively by return of post. A reply by telegram, verbal message or any other means delivered not later than by return of post was sufficient. (*Tinn v Hoffman* (1873), 29 LT 271).

**Q.2.** Where a notice clause provides that notice shall be *sufficiently* given if given in a certain manner (in the *Ross* case by registered mail to a stated address, within a certain time), can notice properly be given in any other way?

**Answer:** Yes, but you cannot then rely on the clause to deem the notice sufficiently given. You must prove *actual* delivery by means no less advantageous to the recipient than the prescribed method.

**Q.3.** If a notice is given in a manner that is stipulated in an agreement, and the agreement provides that it is sufficiently given if done in that way, will the notice be upheld even if in fact the addressee never gets it in the time stipulated?

**Answer:** Yes

The operation of notice clauses - particularly in the context of notices exercising renewals - is viewed in the context of the rules for acceptance of offers and the formation of contracts. The offer is regarded as outstanding and open for acceptance by proper communication of the fact (i.e. the giving of a proper notice).

In essence, a directory notice clause that goes on to state that a notice given in accordance with the clause "shall be sufficiently given" provides a means of avoiding the common law requirement that an acceptance of an offer must be communicated to the offeror. The clause states that it will be sufficient if the notice or acceptance is given in accordance with the clause, and it is not necessary

to enquire further as to whether the notice or acceptance was in fact communicated.

However, for the person who gives the notice to rely on such a clause, he must strictly follow its terms. Thus, in *Ross v. Eaton*, where the clause required notice by registered mail to a given address, the party giving the notice could not claim it was "sufficiently" given where it sent the notice by courier. Nor could that party invoke the rule that the method chosen for delivery (courier) was no less advantageous than the prescribed method (registered mail) in seeking to take advantage of the clause deeming notice to be sufficiently given. The party giving the notice could invoke the "no less advantageous" rule but only where he also showed that the notice had *actually* been communicated.

**Q.4.** If a party gives an improper notice of a change of address, can that party subsequently object if notices continue to be sent to the original address?

**Answer:** Yes, if the provisions of the notice clause are not followed in other respects.

**Q.5.** If a notice (of renewal) is not properly given, in what circumstances can the party giving it claim relief from forfeiture in respect of the lost interest in land?

**Answer:** Relief from forfeiture is dependent on a tenant making diligent efforts to comply with the lease terms which are unavailing through no fault of the tenant. Failure to comply with a notice clause will show lack of diligence. In *Ross*, the majority of the Court of Appeal denied relief from forfeiture because the diligence condition was not met – the tenant could have but did not send the notice by registered mail or could, by more effort, have located the landlord's new address. (See also *120 Adelaide Leaseholds Inc. v. Oxford Properties Canada Ltd.*, [1993] O.J. No. 2801 ( Ont. C.A.)).

Another frequent notice issue that did not arise for consideration in the *Ross* case is how to count or compute time under a notice clause where the contract does not contain express instructions on this issue.

**Q.6.** To compute a notice period do you include or exclude the triggering event and the last day of the notice period?

**Answer:** Canadian jurisprudence has established that there is no hard and fast rule, however the general rule is that the day of the triggering event is *excluded* and the final day of the period is *included* ( *Smith and MacPherson (Re)* (1921), 51 O.L.R. 457 (C.A.)). For example, if a first right of refusal clause says that a tenant has 10 days from receiving notice of an offer to purchase to exercise its first right of refusal by delivering an exercise notice, and the triggering notice is served on day 1, the last day to serve the exercise notice is day 11.

### **A checklist for drafting a Notice clause.**

1. What notices are to be covered?

Commonly used phrases include:

- any notice, request, demand or consent required or permitted
- notice or demand required or permitted
- notice or request provided for or given hereunder.

2. Is use of the clause mandatory or directory (permissive)?

Example of a mandatory clause:

- Any demand or notice herein provided for shall be in writing and shall be given by delivery or by facsimile ....

Example of a directory clause:

- Any notice or request provided for or given hereunder if given by the Landlord to the Tenant shall be sufficiently given if mailed by prepaid registered post addressed to the Tenant at:

3. What is the means of delivery of the notice?

Sometimes the place from which the notice is sent is specified e.g. mailed in Canada

The place to which the notice is to be delivered must be specified.

The means of sending is usually specified as one or more of the following

- mailed by registered mail
- mailed by ordinary mail
- delivered by hand
- delivered by courier
- given by facsimile transmission.

Each means has its practical advantages and disadvantages.

4. When is the notice deemed to be received?

There must be a date specified on which the notice is deemed to be received. This will often vary depending on the means of delivery. The clause should deal expressly with the effective date of notices given after business hours or on non-business days (which may well arise where facsimile or email notices are permitted) and notice periods that expire on non business days – is the effective date of such notices or the expiry of such notice periods to be moved to the next business day ?

5. Change of Address

The clause should provide a means by which a prospective recipient of a notice can change the address or facsimile number to which the notice can be sent.

6. Consider that a statute might mandate the form or content of a notice and/or the method of service, and override any agreement to the contrary e.g. termination of a commercial lease for a non-monetary default must be preceded by a cure/compensation notice with prescribed content that allows the tenant a reasonable period of time to respond: s. 19 (2) of the *Commercial Tenancies Act*.

7. Also consider that certain notices must be given not only for the required length of time ( e.g. 30 days), but the expiry of the notice period must coincide with or precede the end of the initial term of the lease or other agreement. For example, termination of a year to year lease requires 6 months notice in advance of the *anniversary* date of the lease. Similarly, in *Hi-Tech Group Inc. v. Sears* (2001), 52 O.R. (3d) 97 ( C.A.) the issue was whether a clause providing for deemed automatic 1 year renewals of the 1 year agreement failing the giving a 120 day termination notice, permitted the 120 day termination notice to be given at any time or only 120 days preceding the commencement of the renewal term failing which the agreement would renew for a further 1 year term. The Court of Appeal for Ontario found the clause to be ambiguous on this point and extrinsic evidence was permitted to interpret it.