



LAPOINTE ROSENSTEIN
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DRAFT DODGING - Avoiding Interpretation Pitfalls in a Commercial Lease

**Presented by
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Importance of Drafting

➤ **GOOD DRAFTING LEADS TO :**

- Certainty of contracts
- Consistency of agreements
- Less litigation
- Less costs
- Better business relationships



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What is “Good Drafting”?

- **Be consistent**
- **Be precise**
- **Be specific**
- **Be meticulous**
- **Review your work**
- **Avoid repetition**
- **Pay attention to everything, even punctuation**



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“Comma” Case

- **“Support Structure Agreement” between Rogers Cable Communications Inc. and Aliant Telecom Inc.**
- **Five year term with option to renew.**
- **CRTC must decide whether Aliant may terminate at any time with one year notice or must wait until renewal.**



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“Comma” Case

➤ **Clause of confusion:**

Subject to the termination provisions of [the SSA], [the SSA] shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms , unless and until terminated by one year prior notice in writing by either party.



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“Comma” Case

- **Rogers submitted that the plain and ordinary meaning of section 8.1 of the SSA was that the agreement could only be terminated at the end of the five-year current or renewal term, provided prior notice of at least one (1) year is given.**
- **Aliant submitted that given the presence of the comma closing the clause “and thereafter for successive five (5) year terms” the one year termination option applies to the entire term of the agreement, and not only to the renewal for another five years.**



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“Comma” Case

- **The CRTC agreed with Aliant based on the grammatical argument of the comma, and also based on the fact that had the intention been to limit the right to terminate to the end of the current and any renewal term, clear wording would have been included specifying by what date the notice was required.**



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“Comma” Case

➤ **LESSONS:**

- Be specific
- Be meticulous, even with respect to punctuation
- Re-read



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“Comma” Case

➤ All that said...

- On the basis of the divergence in drafting between the English and French versions of the SSA as an indication of regulatory intent, the CRTC later reversed its decision in the Rogers / Aliant case.



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How Courts have Affected the Drafting of Essential Clauses

- **Exclusivity**
- **Continuous occupancy**
- **Landlord and Tenant costs**



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ESSENTIAL CLAUSES

EXCLUSIVITY



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Exclusivity

- **3670571 Canada inc. v. 9084-9837 Québec inc.**
 - Tenant operating a SuperClub Videotron is seeking an interlocutory injunction against the Landlord and another tenant, Twist Laser, enjoining the latter to stop selling DVDs and VHS tapes.



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Exclusivity

- ***3670571 Canada inc. v. 9084-9837 Québec inc.***
 - Superior Court must decide whether or not Twist Laser is impeding on the exclusivity rights granted to the tenant operating a SuperClub Videotron.



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Exclusivity

➤ **3670571 Canada inc. v. 9084-9837 Québec inc.**

- Clauses of confusion:

5. UTILISATION: *Le Locataire ne doit utiliser le Magasin que pour les fins d'une boutique de vente/location au détail de revues, livres, journaux, vidéocassettes, cassettes audio, jeux électroniques, disques compacts, service de développement de photos, location d'équipement électronique, service de télédistribution et de télécommunication et autres accessoires connexes, sous la bannière « Le SuperClub Vidéotron ».*



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Exclusivity

➤ 3670571 Canada inc. v. 9084-9837 Québec inc.

- Clauses of confusion:

Exclusivité

À la demande du locataire, et en autant que celui-ci ne soit pas en défaut de respecter ses obligations en vertu du présent bail, le Bailleur convient que pour la durée du bail, il ne permettra à aucun local commercial du Projet (mis à part le magasin) d'être utilisé pour les fins d'exploitation d'un commerce pour les fins décrites au numéro 5 de l'appendice 1, comme utilisation principale, à l'exception des ventes d'équipement électronique [...].



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Exclusivity

- **3670571 Canada inc. v. 9084-9837 Québec inc.**
 - Superior Court decides that although Twist Laser's Lease defines its business as one of "vente de disques et cassettes", it is not its principal activity, since it only accounts for 11.7% of sales.



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Exclusivity

- ***3670571 Canada inc. v. 9084-9837 Québec inc.***
 - LESSONS:
 - When restricting scope of exclusivity clause, be sure to properly delineate such restrictions (i.e. Define “principal activity”)



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Exclusivity

- *Metro Richelieu inc. v. Corporation First Capital Wilderton inc.*
 - Tenant, Metro Richelieu, seeking permanent injunction against Landlord and another Tenant, Pharmaprix, enjoining the latter to stop selling food products in breach of its exclusivity rights.



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Exclusivity

- *Metro Richelieu inc. v. Corporation First Capital Wilderton inc.*
 - The Superior Court must decide whether or not Pharmaprix is using more than 6% of its store area to sell food products.



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Exclusivity

➤ ***Metro Richelieu inc. v. Corporation First Capital Wilderton inc.***

- Clauses of confusion:

12 (2) L'une des conditions essentielles du présent bail est que, pendant toute la Durée du bail, le Bailleur s'abstienne d'utiliser ou de permettre l'utilisation de toute partie du Centre Commercial, à l'exclusion des Locaux loués, pour la vente ou la distribution d'aliments ou de produits alimentaires, ou comme stationnement pour tout établissement de ce genre.



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Exclusivity

➤ **Metro Richelieu inc. v. Corporation First Capital Wilderton inc.**

Toutefois, le présent paragraphe 12 (2) ne s'applique pas:

(...)

c) à la vente d'aliments ou de produits alimentaires dans les locaux d'une pharmacie ou d'un Grand magasin pourvu que, dans chaque cas, la portion de ces locaux affectée à l'entreposage, l'étalage et la vente d'aliments et de produits alimentaires n'excède pas 6% de la superficie locative brute de ces locaux;



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Exclusivity

➤ *Metro Richelieu inc. v. Corporation First Capital Wilderton inc.*

- The Superior Court defined food products very broadly, encompassing any food, whether liquid or solid, and including candies, snacks, and drinks.
- The Court also used gross square footage to determine whether Pharmaprix infringed on Metro's exclusivity rights, including aisles in which food products were on display as well as shelf space.



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Exclusivity

- *Metro Richelieu inc. v. Corporation First Capital Wilderton inc.*
 - LESSONS:
 - Be specific about general terms such as food products in exclusivity clauses.
 - Provide specific parameters for calculating areas in exclusivity clauses.



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Exclusivity

- *Indigo Books & Music Inc. v. Immeubles Régime XV Inc. et al. (under appeal)*
 - Tenant, Indigo, seeks to enforce an exclusivity protecting it against other tenants “whose principal use is the sale of books”.
 - The landlord was trying to lease premises in an adjacent complex to Archambault.



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Exclusivity

➤ **Indigo Books & Music Inc. v. Immeubles
Régime XV Inc. et al. (under appeal)**

- Decision ultimately turned on evidence adduced to the effect that the intent of the parties was, *inter alia*, to preclude Archambault specifically from leasing premises in the complex or any adjacent complex.
- Case is interesting as it enumerates a list of ways in which “principal use” can be determined:

« a) *en fonction de la superficie du magasin consacrée aux livres ?*



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Exclusivity

➤ **Indigo Books & Music Inc. v. Immeubles
Régime XV Inc. et al. (under appeal)**

b) en fonction de la façon dont le commerce s'affiche au public ? (prédominance ou importance des termes « vente de livres » sur une enseigne ou dans la publicité)

c) en fonction du pourcentage du volume de ventes brutes de livres ?

d) pourcentage des profits nets ?

e) l'ensemble de ces facteurs ?



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Exclusivity

➤ **Indigo Books & Music Inc. v. Immeubles
Régime XV Inc. et al. (under appeal)**

f) doit-on aussi tenir compte des ventes de livres par internet ?

g) quel pourcentage doit-on retenir pour déterminer ce qu'est l'activité principale ?

h) le pourcentage d'inventaire de livres se calcule-t-il en rapport avec tous les livres vendus ou simplement les livres francophones ? »



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Exclusivity

- *Indigo Books & Music Inc. v. Immeubles Régime XV Inc. et al. (under appeal)*
 - LESSONS:
 - Explicitly include the various ways in which “principal use” can be calculated when drafting exclusivity clauses that make reference to “principal use”.



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ESSENTIAL CLAUSES

CONTINUOUS OCCUPANCY



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Continuous Occupancy Clauses

➤ ***126232 Canada Inc. v. 2957-8705 Québec Inc.***

- Tenant (Dollar Store) pursuing Landlord because it allowed another Tenant, Super C to cease operating.
- Superior Court must decide whether or not Landlord could have prevented Super C from “going dark”.



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Continuous Occupancy Clauses

➤ **126232 Canada Inc. v. 2957-8705 Québec Inc.**

- Clause of confusion:

During the first four years of the Term of the Lease, the Lessee shall continuously and actively use the leased premises for the purpose of operating a Super Carnaval food supermarket and thereafter the Lessee shall not use the leased premises for any purpose other than the purpose of its business of the operation of a full line food supermarket.



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Continuous Occupancy Clauses

➤ ***126232 Canada Inc. v. 2957-8705 Québec Inc.***

- Landlord submits that obligation to remain open only exists for first four years of term.
- Dollar Store submits that obligation to remain open endures throughout Lease.



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Continuous Occupancy Clauses

➤ **126232 Canada Inc. v. 2957-8705 Québec Inc.**

- The Court decided that the clause provided that during the first four years of the Lease the tenant had to operate under the banner Super C, and that thereafter it still had to operate a full line supermarket, but under whatever banner it chose.
- It did in fact have the obligation to continue operating, and the Landlord failed to enforce said obligation.



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Continuous Occupancy Clauses

➤ **126232 Canada Inc. v. 2957-8705 Québec Inc.**

- LESSONS:
 - When a clause provides for modification of a right or obligation, be specific with respect to when the right/obligation changes and how it changes.
 - New right/obligation should be contrasted with old obligation.



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Continuous Occupancy Clauses

- *Investissements 299 Sir Wilfrid Laurier limitée v. Trust Général du Canada et Banque nationale du Canada*
 - Landlord pursuing Tenant for failing to perform activities specified in Lease.
 - Court of Appeal must decide whether Bank must perform all activities of a Trust Company or just some of said activities.



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Continuous Occupancy Clauses

➤ *Investissements 299 Sir Wilfrid Laurier limitée v. Trust Général du Canada et Banque nationale du Canada*

- Clauses of confusion:

3. Clause exclusive :

Le Locataire et/ou une Société du même groupe auront le droit exclusif d'opérer une institution financière offrant au public des services analogues à ceux offerts par le Locataire et toute Société du même groupe, à l'exclusion de tout service offert par une compagnie de courtage immobilier tant et aussi longtemps que Services Immobiliers Royal LePage Ltée, sera locataire du Centre commercial.



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Continuous Occupancy Clauses

➤ *Investissements 299 Sir Wilfrid Laurier limitée v. Trust Général du Canada et Banque nationale du Canada*

- Clauses of confusion:

6.2 Utilisation requise et utilisation prohibée

Le Locataire ne doit utiliser et occuper les Locaux loués qu'aux fins d'y exploiter un commerce en conformité avec l'utilisation permise et requise qui est précisée à l'alinéa (n) des Données principales; il ne doit exploiter aucun autre commerce dans les Locaux loués et, sous réserve des restrictions législatives et réglementaires applicables au Locataire et aux heures



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Continuous Occupancy Clauses

➤ *Investissements 299 Sir Wilfrid Laurier limitée v. Trust Général du Canada et Banque nationale du Canada*

d'ouverture normalement reconnues pour une institution financière, doit y exercer activement les activités requises et permises durant toutes les Heures d'ouverture des commerce au détail. [...]



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Continuous Occupancy Clauses

➤ *Investissements 299 Sir Wilfrid Laurier limitée v. Trust Général du Canada et Banque nationale du Canada*

- Clauses of confusion:

Données Principales

(n) Utilisation permise et requise : Les opérations normalement effectuées par une compagnie de fiducie, à l'exception expresse des opérations de courtage immobilier. L'exclusion des opérations de courtage immobilier est en vigueur tant et aussi longtemps que Services Immobiliers Royal LePage Ltée sera locataire du centre commercial. [...]



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Continuous Occupancy Clauses

- *Investissements 299 Sir Wilfrid Laurier limitée v. Trust Général du Canada et Banque nationale du Canada*
 - Landlord submits that Bank must provide ALL services normally provided by Trust Company.
 - Bank submits that it needs only provide some of those activities.



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Continuous Occupancy Clauses

- *Investissements 299 Sir Wilfrid Laurier limitée v. Trust Général du Canada et Banque nationale du Canada*
 - In a 2-1 decision, Court of Appeal reconciles the different provisions throughout the Lease by saying that the Bank must provide services from the same category as a Trust Company, but only those it chooses to.



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Continuous Occupancy Clauses

- *Investissements 299 Sir Wilfrid Laurier limitée v. Trust Général du Canada et Banque nationale du Canada*
 - LESSONS:
 - Be specific about which activities must be performed on the Premises.
 - Avoid creating provisions regarding the same obligations in different clauses throughout the Lease.



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ESSENTIAL CLAUSES

ASSUMPTION OF COSTS



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Landlord and Tenant Costs

- *Hassine Benjannet et Suzanne Bernard v. Au petit bar des Frangines, Gina Chaput et Francine Giroux*
 - Landlord pursues Tenant for increased insurance costs with respect to the building. Tenant operates a bar, which led to an increase in premiums.
 - Court of Appeal must decide whether Tenant is only responsible for increases in insurance that occur during the Term of the Lease, or for increases that occur as a result of the Lease.



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Landlord and Tenant Costs

➤ *Hassine Benjannet et Suzanne Bernard v. Au petit bar des Frangines, Gina Chaput et Francine Giroux*

- Clause of confusion:

Si le taux des primes d'assurance du locateur pour l'une ou l'autre des polices couvrant ou se rapportant à l'immeuble augmente, par suite de toute violation des dispositions du bail par le locataire ou en raison de la nature des affaires du locataire dans les lieux loués, le locataire devra rembourser ce montant au locateur [...]



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Landlord and Tenant Costs

- *Hassine Benjannet et Suzanne Bernard v. Au petit bar des Frangines, Gina Chaput et Francine Giroux*
 - In first instance the court decided that because the clause refers to an increase (“augmentation”) in premiums, it can only apply to such an increase that occurs after the commencement date, during the term of the Lease.



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Landlord and Tenant Costs

- *Hassine Benjannet et Suzanne Bernard v. Au petit bar des Frangines, Gina Chaput et Francine Giroux*
 - Since the premiums were increased at the outset of the Lease and not throughout the term, they should be borne by Landlord.
 - The Court of Appeal overturned the decision, citing that the clause was clear.



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Landlord and Tenant Costs

- *Hassine Benjannet et Suzanne Bernard v. Au petit bar des Frangines, Gina Chaput et Francine Giroux*
 - LESSONS:
 - Be careful not to limit the scope of a clause when providing for assumption of increases in costs.



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Landlord and Tenant Costs

- **Cinegrand Montreal Inc. v. Forum Entertainment Centre Company**
 - The Landlord, FECC is pursuing the Tenant, Cinegrand, for, amongst other things, operating expenses incurred with respect to the Premises.
 - The Court of Appeal must decide if the Lease provides that such costs are to be paid by the Tenant where they are incurred by the Landlord's parent company.



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Landlord and Tenant Costs

➤ *Cinegrand Montreal Inc. v. Forum
Entertainment Centre Company*

- Clauses of confusion:

2.2.1 It is the intention of the parties that the lease of the Premises to Tenant pursuant to this Lease and the rentals payable by the Tenant hereunder shall be on an absolutely net net net basis to Landlord, free and clear of all taxes, costs and charges arising from or relating to the Premises and the Tenant shall pay all costs, charges and expenses of every kind and nature



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Landlord and Tenant Costs

➤ **Cinegrand Montreal Inc. v. Forum
Entertainment Centre Company**

regarding the Premises, Tenant's operations therein and the Project, including without limitation, Tenant's Proportionate Share of (i) Taxes; (ii) Operating Expenses; (iii) Tax on Capital; and other items of Additional Rent provided herein.



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Landlord and Tenant Costs

➤ *Cinegrand Montreal Inc. v. Forum Entertainment Centre Company*

- Clauses of confusion:

3.23 "Operating Expenses" means the Landlord's direct costs and expenses incurred for the operation, insurance, maintenance, repair, replacement, supervision, management and administration of the Project.

3.18 "Landlord" means the party first hereinabove described and includes its successors and assigns. Where the context permits, Landlord will include all persons under Landlord's control.



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Landlord and Tenant Costs

- **Cinegrand Montreal Inc. v. Forum Entertainment Centre Company**
 - Tenant submits that since the Landlord's parent company incurred the costs relating to operating expenses, it is not responsible for said expenses.
 - Court of Appeal decides that since the Lease does not define "Landlord" as including FECC's parent company, the costs incurred by said parent company should not be paid by Tenant.



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Landlord and Tenant Costs

- *Cinegrand Montreal Inc. v. Forum Entertainment Centre Company*
 - LESSONS:
 - Define Landlord as broadly as possible.



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Landlord and Tenant Costs

- *GE Capital Realty Management Inc. v. Zellers Inc.*
 - The Landlord seeks a declaratory judgement against the Tenant for responsibility of payment of capital tax.
 - The Court of Appeal must decide whether or not the Lease validly assigns responsibility for payment of capital taxes to the Tenant.



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Landlord and Tenant Costs

➤ *GE Capital Realty Management Inc. v. Zellers Inc.*

- Clause of confusion:

7. PAYMENT OF TAXES, ASSESSMENTS, ETC.

Without limiting the generality of the foregoing paragraph 6, Tenant shall, throughout the Term and any renewal thereof, be responsible and pay to the complete exoneration of Landlord the following taxes, costs and expenses :



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Landlord and Tenant Costs

➤ *GE Capital Realty Management Inc. v. Zellers Inc.*

(b) All taxes, property taxes, municipal taxes, tax on capital, school taxes, ecclesiastical taxes, Montreal Urban Community taxes, rate including local improvement rates, duties and assessments that may be levied, rated charged or assessed against the Property and/or all equipment and facilities thereon or therein, and/or any property on or in the Property owned or brought thereon or therein by Landlord, and any and every of its assignees or subtenants and it and their respective officers, agents, employees, servants,



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Landlord and Tenant Costs

➤ **GE Capital Realty Management Inc. v. Zellers Inc.**

visitors, or licensees and/or against Landlord or Tenant in respect thereof, whether such taxes, rates, duties or assessments are charged by a municipal, parliamentary, school, or any other body of competent jurisdiction.



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Landlord and Tenant Costs

- *GE Capital Realty Management Inc. v. Zellers Inc.*
 - In a unanimous decision, the Court of Appeal decided that tax on capital may not be claimed unless the Lease is both precise and complete since such amounts may vary independently of Tenant.
 - The Tenant must be in a position to ascertain the amount it will have to pay, which is not the case here.



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Landlord and Tenant Costs

- *GE Capital Realty Management Inc. v. Zellers Inc.*
 - LESSONS:
 - Stipulate specific amount to be paid for capital tax, or provide a calculation mechanism.



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INTERPRETATION

INTENTION OF PARTIES



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Interpretation

➤ Rogers Case

- A lot of weight given to the wording of the clause.
- Because the wording of the clause is clear, no need for interpretation.
- Begs the question of whether the clarity of the clause or that of the intention of the parties is most important.



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Interpretation

- ***126232 Canada Inc. v. 2957-8705 Québec Inc.***
 - Use of other clauses in the Lease to determine whether synergy played a role in the parties' intention to lease.



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Interpretation

➤ *Investissements 299 Sir Wilfrid Laurier limitée v. Trust Général du Canada et Banque nationale du Canada*

- Behaviour of parties, and Landlord's failure to object to Tenant's activities throughout Lease were used to establish intention of parties.



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Interpretation

- *Hassine Benjannet et Suzanne Bernard v. Au petit bar des Frangines, Gina Chaput et Francine Giroux*
 - Clause stipulated by Landlord, so interpreted in favour of Tenant.
 - Used precarious financial situation of Tenant to determine intention of parties.
 - Court of Appeal takes a different approach. They decide that clause is clear and coherent and support their decision citing case law.



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Interpretation

- *Centre commercial Rockland inc. v. Harry Rosen inc.*
 - Tenant drafted the Offer to Lease agreement, interpreted in favour of Landlord.
 - Tenant's behaviour in accepting to pay amounts billed by Landlord used in determining intention of parties.



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Closing Remarks



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Closing Remarks

- **Newspaper article in National Post reads in part:**

“... including one accident in which a hunter accidentally shot another hunter he mistook for a deer just after he stepped out of his pickup truck.”



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Closing Remarks

- **Paul Ritchie of Airdrie, Alberta discerns four possible interpretations:**
 1. Hunter A shot hunter B after hunter B had alighted from a pickup truck. Hunter A had mistaken hunter B for a deer.



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Closing Remarks

2. Hunter A shot hunter B after hunter B had alighted from a pickup truck. Hunter A had mistaken hunter B for a deer. Hunter B had mistaken hunter A for a deer.



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Closing Remarks

3. Hunter A alighted from a pickup truck, then shot hunter B. Hunter A had mistaken hunter B for a deer.



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Closing Remarks

4. Hunter A alighted from a pickup truck, then shot hunter B. Hunter B had mistaken hunter A for a deer.



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Closing Remarks

- **Paul Ritchie then suggests that in order to determine what surely happened, we question the deer.**



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Questions





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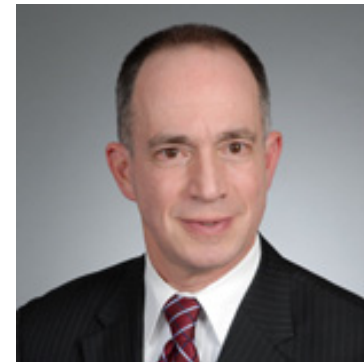
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