

**UNDERSTANDING THE COMMERCIAL AGREEMENT TO LEASE** by Harvey M. Haber, Q.C. (Aurora, Canada Law Book Inc., 1990) xii and 272

*Understanding the Commercial Agreement to Lease* is the second book by Harvey M. Haber, Q.C., a practicing lawyer with over twenty-five years of experience in the field of commercial leasing. Mr. Haber was the editor-in-chief of *Shopping Centre Leases*, Volumes 1 and 2, which were published by Canada Law Book Inc. in 1976 and 1982, respectively. He has written a number of important articles, and for over three years wrote a column which appeared in "The Shopping Centre Newsletter". In 1984, he prepared a checklist for a net commercial lease for the Canadian Bar Association. He is also the author of *The Commercial Lease: A Practical Guide* which was published by Canada Law Book Inc. in 1989.

The subject of Mr. Haber's second book is the commercial agreement to lease. The agreement to lease begins as a written proposal of terms which is usually (but not necessarily) presented by the landlord to a prospective tenant or to an existing tenant contemplating the possibility of another term. It is in the form of an unsigned agreement. If the prospective or continuing tenant signs the agreement in its original or an amended condition and returns it to the landlord, it becomes his offer to the landlord, and it will ripen into a contract, binding on both of the parties even before the execution of the formal lease for which it almost always calls, if it is also signed by the landlord.

Mr. Haber is concerned that the parties do not always pay sufficient attention to the agreement to lease. Often some of the terms in the agreement are unenforceable, ambiguous or incomprehensible; and often, too, a tenant will sign an agreement in the form in which it was presented to him with the naive expectation that he will be able to obtain the concessions that he wants from the landlord at the lease stage. He will almost always be disappointed. As Mr. Haber says in the Preface at page ix:

It is at the agreement to lease stage that a landlord is prepared to make concessions to a Tenant in order to "make the deal". A Tenant should therefore ask for what it wants at that stage, and not leave its request to be dealt with at the lease stage, because then it's *too late*. As well, usually different people negotiate the agreement and the lease on behalf of the Landlord. How many times have you been involved in the negotiation of a lease when someone asks, "What is in the agreement to lease?" What's there counts: The bottom line for a Tenant is "Don't take anything for granted. Ask for it: Negotiate it: Fight for it."

In isolation, this quotation might suggest that Mr. Haber is concerned only with the rights and interests of tenants. His purpose in writing the book, however, was to assist both landlords and tenants and their representatives to obtain the best agreements to lease that are possible in the circumstances. As Mr. Haber says, again in the Preface at page ix:

A Landlord should ensure that whoever drafts its agreement to lease is not only an excellent drafter but also understands the "deal", and similarly, the tenant should also ensure that whoever drafts the wording for the Tenant's provisions not only is an excellent drafter but also understands the "deal". There's just too much money at stake to find out later that certain provisions are unenforceable, ambiguous, unclear or, in some cases, incomprehensible.

There are two distinct parts to Mr. Haber's book, although the parts are related and essential to each other. In the last part, on pages 179 to 253, inclusive, Mr. Haber has reproduced a commercial agreement to lease which contains the schedules and appendices that usually appear in such agreements. For discussion purposes, he has deliberately weighted the agreement heavily in favour of the landlord, but (because landlords are often the ones with the most negotiating clout) the sample agreement is not much different in kind or content from many such agreements. In the first part of the book, on pages 1 to 177, inclusive, Mr. Haber reviews and analyzes in great detail each of the 44 clauses in the sample agreement and the clauses and materials contained in the various schedules and appendices.

The sample form is written in "legalese"; the review and analysis, in "laymanese". The reviewer has adopted the terms used by the author to describe the two parts of his book, and it is obvious from the author's use of "laymanese" in the most important part of his book that he has sought to make the book relevant and appealing to all persons interested in agreements to lease and not merely to their legal advisers. It is for this reason as well that Mr. Haber has deliberately made few references to case law.

Mr. Haber usually begins his discussion of a clause in the sample agreement with a very clear statement of what the clause means. He then states the positions that he believes that each of the parties should take with respect to the contents of the clause and the reasons in support of each opinion and ends the section with a suggestion for a compromise, if compromise is a realistic possibility, or with a suggestion that will help both of the parties in the course of their negotiations. Because Mr. Haber seems an eminently practical man, he recognizes that what is contained in the agreement will almost always depend on the relative strengths and weaknesses of the parties. The approach that he takes is nevertheless useful, for at the very least it will give the parties greater insight into each other's problems and concerns and, hopefully, make the relations between them more amicable.

The comment in respect of each clause in the sample agreement is given the same number as the clause. Thus, there is no difficulty at all in going from clause to comment or from comment to clause. This feature should be of particular use to a reader who has a problem with a clause in an agreement with which he is concerned. He can match the problem clause to a clause in the sample agreement, readily find and read the commentary about the clause, and perhaps receive the assistance that he requires to solve his problem.

Mr. Haber's writing is enlivened by the very effective use of rhetorical questions. This characteristic can be illustrated by his discussion of agreement or offer on pages 2 and 3 and by his discussion of the net lease on page 21:

#### AGREEMENT OR OFFER

Why is it called an agreement to lease as opposed to an offer to lease? No particular reason. In my opinion, they mean the same thing. Some have indicated that an offer to lease becomes an agreement upon signing by all of the parties to the agreement. Whatever term is used, be consistent in its use throughout the documentation.

## NET LEASE

How many times have you run across the expression "this lease is a net lease" or "a net, net Lease", or a "net, net, net lease"? (Some tenants would say that it is a "nyet" lease.) What's the difference? In my opinion, none. It is my understanding that the term "net", whether used once, twice or three times, means that the Tenant pays its own repairs, taxes and insurance. What the Landlord is attempting to make clear is that it is not responsible for any expenses under the lease...

Of course, Mr. Haber goes on to give a further explanation about the nature of the net lease. What is important here, however, is that he asks the kind of questions that involved readers ache to ask, asks them at the right time, and gives answers that are both understandable and useful.

Mr. Haber generally gives a great number of examples to illustrate his points. His use of examples is nowhere better shown than in the relatively lengthy section on the use of premises by tenants. On pages 30 to 45, inclusive, he considers no less than 37 different types of use clause with a view to indicating some of the problems inherent in the drafting of such clauses. Here are only a few of the matters that he would have one consider before accepting or drafting a use clause with respect to a tenant who wished to operate a restaurant:

If the Tenant wants to operate a "restaurant", the Landlord has to put its mind to the following considerations: Is it intended to be a family restaurant serving all ages? Is it a specialty restaurant with a particular main menu item, for example, hamburgers? Is it a fast food outlet? Is it a cafeteria? A coffee shop? Will there be tables, table service, tablecloths, waiters, waitresses? Will it be a self-serve? Will it be a stand-up with no seating accommodation? What items of food are intended to be sold? Is the menu to be attached? The Landlord must carefully examine any restrictions it has given to any Tenant in the Centre when drafting the use clause and if necessary expressly prohibit the sale of certain food items in the lease.

Mr. Haber then proceeds for almost another full page to discuss further considerations. In the reviewer's opinion, the section on the use of premises alone would justify the expenditure by a practitioner of the \$59.00 which it would have cost to purchase a hardcover edition of the book in September, 1990, before the imposition of the Goods and Services Tax.

A Canadian reader must always consider the "transferability" of a book written by a lawyer in a different province in accord with the laws in effect in that province. In the introduction to his book, at page 1, Mr. Haber has addressed the problem insofar as it relates to the sample agreement:

As a general note, although this agreement is prepared on the basis of the laws of Ontario, the concepts (subject to statutory requirements) generally prevail throughout all of the common law provinces of Canada and all the states of the United States, with the exception of Quebec and Louisiana which are under the Napoleonic Code. But, even in Quebec (or Louisiana) the basic principles of minimum rent, percentage rent, hold harmless clauses and the like will still generally prevail. However, in the event of

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a default under the agreement and under the lease, the laws between the common law provinces and the Province of Quebec are quite different.

In the course of studying the book, the reviewer noticed nothing that would make the book significantly more useful in Ontario than in Alberta or the other common law provinces of Canada. In fact, since Mr. Haber discusses the importance of sales tax and personal property security legislation for those drafting agreements to lease, the book will be especially useful in a province like Alberta which did not have a sales tax until the introduction of the Goods and Services Tax and only recently enacted the *Personal Property Security Act*.

The general reader will encounter a few problems with the book. It is simply too much to expect that the general reader will be able to remember what is in the lengthy sample agreement which Mr. Haber recommends should be read first, while reading the review and analysis of the clauses in that agreement, and it is both inconvenient and frustrating to keep flipping from the front of the book to the back. While it might have been possible for the author to combine the two parts of the book and to have had each of the clauses printed directly above the discussion relating to it, this would have created other problems and detracted from the use of the book as a reference for readers with problems. In any event, the reviewer suspects that this book — like many books of a practical "how to" nature — will be used more as a reference book to be consulted from time to time than as a book to be read at a single sitting.

Such minor criticisms apart, the reviewer is pleased to recommend Mr. Haber's second book to anyone interested or involved in the negotiation of commercial agreements to lease. It is certainly one book that the reviewer will keep in his library for personal use.

Ronald G. Hopp  
Associate Professor of Law  
University of Alberta