



# THE LAWRENCES®

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## LETTER

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News and information for clients and friends of Lawrence, Lawrence, Stevenson LLP

## Congratulations, Mr. President!



All at Lawrences are very proud to congratulate our partner and head of our Litigation Group, **Edwin G. Upenieks**, who was elected President of the Ontario Bar Association on August 16, 2015. Ed is the first Brampton resident to have been elected OBA president.

Ed has served on the OBA Board of Directors since 2010, most recently as Vice-President. He sees this professional involvement as an important part of giving back to the community, which is a lengthy tradition at Lawrences: "Over the course of my career, I have had several lawyers and judges who have mentored me

Canadian Bar Association's Board of Directors.

Lawrences' co-managing partner Heather Picken noted: "At Lawrences, we have a long history of professional and community involvement and we are very proud that one of our lawyers has been elected OBA President. Ed will be an excellent representative of the firm and the profession during his presidential year." Ed will continue his practice at Lawrences throughout his presidency.

Ed has practised litigation since his call to the Ontario Bar in 1983 and became certified as a specialist in civil litigation in 1998. He is also a graduate of the Harvard Mediation Program. He has several special areas of expertise, including estate litigation (for which he is ranked as repeatedly recommended in the Canadian Legal Lexpert Directory), commercial litigation, real estate litigation, and assessment of costs.

Established in 1907, the OBA is the largest voluntary legal association in Ontario, representing over 16,000 lawyers, judges, law professors, and law students. It exists to improve the administration of justice and the standards of the legal profession in Ontario and nationally, through the Canadian Bar Association. The OBA provides continuing professional development for lawyers and advocates for improvements to the law in the interests of the profession and public.

**"I am inviting the entire profession to join together and demonstrate the value lawyers provide to their communities."**

and encouraged me to become more involved in the profession and my community. Now, as OBA President, I want to pass that encouragement along. I am inviting the entire profession to join together and demonstrate the value lawyers provide to their communities." Ed will represent the OBA nationally as a member of the

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# Selling Your Business: 12 Mistakes to Avoid



## WILLIAM G. SIRDEVAN

Business owners who run their own companies make huge investments of time, money, and expertise to make their businesses successful and should be able to reap the maximum reward when they sell their businesses. In over 25 years advising owner-managed businesses, I have found that to do so, sellers of such businesses, both large and small, must avoid these mistakes:

1. **Not considering tax advantages.** There are significant tax advantages available to vendors of shares in certain types of incorporated businesses. The ability to multiply this preferential tax treatment by involving the owner-manager's family members should be explored and if appropriate, put in place years before a possible third-party sale. This may entail estate freezes, holding companies, and family trusts. The corporate records of the business should be kept current and accurate throughout these transactions.
2. **Not making goodwill an asset of the business before selling.** Goodwill, the intangible contribution of reputation, customer loyalty, business relationships, etc., is often vested solely in the owner-manager who is selling. When the owner-manager is gone, there is no goodwill to sell. The goodwill must be made an asset of the business and become part of its core infrastructure by putting in place formal processes such as business agreements and contracts that will have a value when the business is sold.
3. **Not looking at your business through a buyer's eyes.** Owner-managers focus on running their businesses. A buyer will look at a business to identify its soft spots and then use them to negotiate a reduction in the purchase price. Such soft spots should be identified well in advance of any possible sale by the owner-manager's legal, financial, tax, and accounting advisors and then addressed or minimized as much as possible.
4. **Not securing your business' intellectual property.** The business' brand, the names it trades under, and its logo should all be protected by trademark registrations so that they have value in the sale.

5. **Not having written employment agreements with key employees.** The legal relationship of the business with its key employees should be documented in written employment agreements containing, where appropriate, enforceable provisions preventing departing employees from competing or soliciting clients of the business.
6. **Not completing due diligence on a would-be buyer.** A seller should always investigate would-be buyers, confirming that they are who they purport to be and that they have the financial wherewithal to complete the proposed transaction.
7. **Not having a confidentiality agreement in place before disclosing confidential information.** It is essential to enter into a legally enforceable confidentiality agreement with the potential buyer before disclosing any financial or other confidential information about the business. Without such an agreement in place, the potential buyer may be able to use the information to the disadvantage of the seller.
8. **Not signing a letter of intent before negotiating a formal sale agreement.** Once the confidentiality agreement is in place, the key business terms should be set out in a letter of intent or memorandum of understanding and signed by both parties. The letter of intent protects both parties and provides safeguards during the negotiation of a formal sale agreement.
9. **Not negotiating a non-refundable deposit.** The letter of intent should require a non-refundable deposit to cover the seller's expenses should the deal fall through, since the seller will likely be restricted from being able to pursue other sale opportunities while negotiating with one buyer. The deposit is sometimes known as a termination fee.
10. **Not taking adequate security for financing the purchase price.** A seller who finances a portion of the purchase price is making a loan to the buyer and must therefore think like a bank, which would consider obtaining personal guarantees, sworn net-worth statements, mortgages on real property, letters of credit and security on personal property from both the buyer and the individuals and entities with which it is affiliated.
11. **Not capping potential liability.** Things can go wrong in any transaction. Sellers should limit their possible exposure by ensuring that the sale agreement includes a cap on any potential liability the seller might face under the agreement.
12. **Not including a "deductible" provision in the sale agreement.** After closing, a buyer may bring a claim against the seller for compensation for damages the buyer may claim to have suffered on account of the seller's breach of a representation or warranty. To reduce the likelihood of a claim, the seller should negotiate a provision in the sale agreement requiring the buyer's loss to be over a certain minimum amount before any such claim can be brought against the seller.

Mistakes like these can be avoided by seeking and following professional advice well in advance of a sale and throughout the sale process. Lawrence's has decades of experience in providing this kind of advice.



Bill Sirdevan is co-managing partner and senior member of Lawrence's Business Law Group. He has over 25 years' experience advising clients on business sale and purchase transactions and corporate organizations and reorganizations. Bill can be reached at (905) 452-6871 or [wsirdevan@lawrences.com](mailto:wsirdevan@lawrences.com).

# Commercial Leases: Getting Rid of the Nightmare Tenant



## HEATHER M. PICKEN

A landlord's commercial tenant is habitually late with rent, makes partial payments, fails to make required repairs, and causes disruption to other tenants. How can the landlord get rid of the tenant?

In these circumstances, the landlord can terminate the tenancy without a court order, but must proceed carefully. One wrong move can forfeit the landlord's right to terminate the lease, or cost the landlord time, money, and frustration. BEFORE trying to evict defaulting tenants, commercial landlords should:

1. Determine the required notice for the breach. If the required notice is not specified in the lease, the Commercial Tenancies Act (Ontario) requires 15 days' notice for rental breaches. For other breaches, even if the lease says no notice is required, give reasonable notice and time to cure before trying to terminate the lease.
2. Ensure that the default is clear and provable, otherwise a court may not uphold the termination. For example, if the tenant challenges repair costs and the proper amount is unclear, a court application to decide the matter may be preferable to a unilateral termination notice, to avoid damages and costs being awarded in the tenant's favour.
3. Realize that you may not initially be able to get rid of the problem tenant who is prepared to pay, unless you have evidence of similar repeated breaches over time. A court will likely reinstate the lease by granting the tenant "relief from forfeiture" if the tenant pays up rental arrears or repair costs.
4. Refuse to accept late or partial payments of rent. If you have decided to terminate the lease, all of your actions must be consistent with that decision. If you have previously accepted late or partial payments, send a letter confirming when the rent is due each month and that you will no longer permit late or partial payments. Then stick by that policy.
5. Act quickly if you think the tenant is insolvent. If the tenant goes bankrupt, you will have to wait to deal with the bankruptcy trustee until a 90-day period has expired. The trustee may wish to control

the assignment of the lease to someone else, and could do so without your consent.

6. Use a bailiff who can properly post the notice of termination, change the locks and re-enter when the tenant is not on the premises. If the tenant is on the premises and is uncooperative, the bailiff should leave and try the termination later. If the tenant breaks back in, apply for a court-ordered writ of possession and enforce it through the bailiff.
7. If you want to terminate the lease, do not keep the tenant's property. The posted termination notice should confirm that the tenant may arrange to retrieve its property by a certain date, after which the landlord can dispose of it. However, even if the lease permits that, you are still obliged to store the tenant's property and could be liable for not doing so.

## Ensure that the default is clear and provable

8. In the notice of termination, reserve your right to claim damages for loss of rent for the remainder of the lease. However, if you find a new tenant promptly, you cannot recover damages, because you did not suffer any. To claim damages after leasing the premises again, you would have to sue the tenant.

When dealing with tenants who know how to "play the system," the wrong move can cost landlords time and money. Lawrence's commercial leasing lawyers and litigators can help landlords terminate nightmare commercial tenants promptly.



Heather Picken is co-managing partner and head of Lawrence's Real Estate Group. Heather can be reached at (905) 452-6891 or [hpicken@lawrences.com](mailto:hpicken@lawrences.com).

# The New Online Source of Legal Information: [www.lawrences.com](http://www.lawrences.com)



The screenshot shows the top portion of the Lawrence's Lawyers website. On the left is the logo with the text "LAWRENCES®" and "LAWYERS" below it, and "Serving clients since 1924" in smaller text. To the right of the logo is the phone number "p 905 451 3040", a LinkedIn icon, and a search box with the word "Search" and a magnifying glass icon. Below the logo and contact information is a horizontal navigation menu with the following items: HOME, FIRM, LAWYERS, CLIENT SERVICES, REFERRALS, BLOG, RESOURCES, CAREERS, CONTACT US. Below the navigation menu is a large image of the word "LAWRENCES" in a stylized, white, serif font, set against a blurred background of what appears to be a modern office interior with warm lighting.

## WHEN YOU HAVE A LEGAL ISSUE...

Lawrences can help. Strategically situated in the heart of Ontario's Peel Region, Lawrences provides exceptional legal services to businesses and individuals. We mobilize our resources to serve our clients' legal needs.

...choose Lawrences

What is a tax rollover? How do I challenge a will? How is land transfer tax calculated? And where can I find the answers to these questions—all in one place?

At [www.lawrences.com](http://www.lawrences.com), that's where.

In keeping with our philosophy of giving back to the community, we wanted our new website to be a goldmine of legal information, a place that anyone can visit to find answers to questions about legal topics. So, in addition to profiles of our lawyers and descriptions of our Business, Litigation, Real Estate, and Wills, Trusts, & Estates practices, we've included Frequently Asked Questions (FAQs), case studies, and numerous articles. These materials are intended to be informative general descriptions of common legal situations, not legal advice. Our lawyers are always ready to advise on your particular situation and their contact information is clearly displayed on the website.

"We recognize that clients today expect to find information fast, before they even think of calling a lawyer," noted Heather Picken, Lawrences' co-managing partner and leader of the website project. "We would much rather that they use a reliable source to obtain information that helps them understand their situation as they prepare to call a lawyer. We decided to be that reliable source, so we've provided FAQs, Case Studies, and articles for every area of law we practise."

So, anyone wanting to know what a tax rollover is can either enter 'tax rollover' in the search box in the top right corner of the website, or click on the Resources tab and look under Frequently Asked Questions. Alternatively, clicking on the Client Services tab and looking under Business Law will bring up tabs for all the FAQs and Case Studies applicable to Business Law.

Heather is particularly pleased with the response from clients who provided testimonials for the website. "It's always helpful for people

trying to find the right law firm to have access to the opinions of those who have already entrusted their legal matters to that firm. We were delighted and humbled to receive detailed comments from clients outlining exactly how our services had helped them." Testimonials can be found under the Resources tab.

We invite anyone with questions or comments about our new website to email us at [lls@lawrences.com](mailto:lls@lawrences.com).



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