The Law Surrounding Estoppel Certificates

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Introduction

Commercial tenants are often expected to deliver signed estoppel certificates in connection with any sale or financing transaction involving the leased property. It is also not uncommon for tenants to request an estoppel certificate from a landlord when negotiating the transfer of their interest under a lease. Stemming from the principle of promissory estoppel, estoppel certificates are intended to "estop" a party who signs the certificate from thereafter asserting a fact inconsistent with what is set out in the certificate.[1] Should a signatory later attempt to make a claim based on facts contrary to what was stated in the estoppel certificate, the addressee may argue that it detrimentally relied on the signatory's acknowledgement of the accuracy of the statements therein and estop the signatory from enforcing those rights.

As requesting for and signing estoppel certificates have become a standard practice in many purchase, sale, and financing transactions, it is important to understand the current state of the law regarding such documents and analyzing whether the Courts actually treat such certificates for their intended purpose.

The Law and the Application of Estoppel Certificates

As noted above, estoppel certificates derive their efficacy from the doctrine of promissory estoppel. The courts apply a number of general principles to determine whether an estoppel certificate is enforceable as a document that "estops" another party from asserting facts inconsistent with what is set out in the certificate. The most important of these principles include:[2]

(a) The party signing the estoppel certificate made assurances that were intended to affect the legal relationship between it and the recipient (e.g. statements are made in the certificate that confirm and clarify certain terms of the lease as of the date of the certificate, which in turn may act as a waiver of some of the rights that were otherwise available to the signing party);

(b) The recipient of the certificate must rely upon the estoppel certificate; and

(c) Due to the reliance on the certificate, the recipient acted on it or in some way changed its position.

Where one or more of these factors is not present, it reduces the effectiveness of the estoppel certificate as a binding instrument.[3] Another factor that should be considered is the language of the terms of the estoppel certificate itself. For example, certain assurances a tenant makes in the estoppel certificate may be qualified to state that they are true "to the best of the tenant's knowledge and belief", rather than stating that "the tenant certifies" the list of statements that follow. Such amendments are relatively common and may be negotiated between the parties. In the case of the

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[1] See *Maple Leaf Casinos Inc. v 1071122 Ontario Inc.*, [1996] OJ No 4894 at para 6.
[2] *Maracle v Travelers Indemnity Co. of Canada*, [1991] 2 SCR 50 at para 13.
[3] B. Wilson & S. Ahmad, "Canada: Estoppel Certificates – Do They Work?", Blake, Cassels & Graydon LLP.

former, the added language limits the ability of the estoppel certificate to be relied upon as a completely accurate account of the relationship between landlord and tenant since it is only accurate to the extent that the signatory has actual knowledge of the matters addressed. Notwithstanding these caveats, estoppel certificates are very useful tools in commercial real estate transactions.

The functionality of the estoppel certificate is illustrated in *Willow Tree Holdings Ltd. v Sims*.[4] Despite the fact that the original landlord had fraudulently and negligently misrepresented some facts about the premises to the tenant upon entering into the lease, the Nova Scotia Supreme Court held that by not making her concerns known to the new landlord when she signed the estoppel certificate, the tenant, by her own actions, reaffirmed the lease and could not subsequently claim the issues subsequently raised.[5] While *Willow Tree* applies the principle as one would expect, some nuances have developed in the case law.

Willow Tree was most recently distinguished by the British Columbia Supreme Court in *Vancouver City Savings Credit Union v New Town Investments Inc.*[6] The main issue in this case was whether the tenant had previously exercised one of its three renewal options under the lease. After the original term of the lease expired, the parties entered into an amending agreement that "extended" the original term of the lease. The landlord subsequently obtained an estoppel certificate from the tenant where the tenant certified in the certificate that the then current term of the lease was the tenant's first renewal term. However, at the expiry of the term, the tenant stated that it had in fact not exercised one of its renewal options as the amending agreement "extended" the original term rather than "renewing" it. In effect, the tenant was making a statement that was contrary to what she had certified in the estoppel certificate.

The Court held that the language of the amending agreement was conclusive,[7] and the landlord's attempts to analogize *Willow Tree* to use the estoppel certificate to estop the tenant were rejected on two bases: (1) the tenant in *Willow Tree* did not raise the ongoing issues she had with the premises, a matter of which could not be known by reviewing the lease documents alone. In *New Town Investments*, the lease documents themselves were able to assist the parties in determining whether the amending agreement was an extension or a renewal; and (2) in *New Town Investments,* the dispute centred around the interpretation of the effect of the amending agreement by the landlord, which in the Court's view, was mischaracterizing the true nature of the document.[8] The Court stated that, in its view, an estoppel certificate cannot have the effect of altering the terms of the lease and further explained:[9]

> *The Estoppel Certificate is a confirmation of the existing Lease agreement… and [the Estoppel Certificate cannot be an amending agreement because] no consideration passed between New Town and Van City to support New Town's argument that Van City gave up a five-year lease renewal term when it signed the Estoppel Certificate.*[10]

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[4] [1991] 100 NSR (2d) 216, 15 RPR (2d) 277 [*Willow Tree*].
[5] *Ibid* at paras 49-50.
[6] 2008 BCSC 1617 [*New Town Investments*].
[7] *Ibid* at para 12-13.
[8] *Ibid* at paras 25-26.
[9] *Ibid* at para 25.
[10] *Ibid* at paras 29-30.

In support of this position, the Court cited a British Columbia Supreme Court decision, *Porte Development (Main) Ltd. v Janus Production Inc.,*[11] which held:

> *The [landlord] cannot rely on a misstatement of the legal effect of the renewal lease to breathe new life into a remedy for a breach that occurred during the term of the expired lease. The Estoppel Certificate does not restore the privity of contact that ended with the expiry of the term of the original lease. The representations made by [the tenant] in the Estoppel Certificate, therefore, apply only in relation to the renewal lease.*[12]

Despite the origin of this principle applying to a situation where the estoppel certificate was being used to resurrect a document that had since been amended, the British Columbia Supreme Court in *New Town Investments* came to a more general conclusion that:

> *A misstatement of legal effect of the Lease set out in the Estoppel Certificate cannot change the terms of the lease … Even if there were any ambiguity in the meaning of the words used in the [amending agreement], which I do not find to be the case, evidence of what one party thought the words meant is always inadmissible*.[13]

New Town Investments and its citing cases continue to stand for the principle that estoppel certificates cannot be used to amend the lease or its ancillary documents to contradict the terms of the lease. Any amendments to be made in a lease should always be made into a new permanent agreement as opposed to an added provision in an estoppel certificate.

In 2017, a further nuance was added when *New Town Investments* was distinguished by the Ontario Superior Court of Justice in *1960529 Ontario Inc. v 2077570 Ontario Inc.*[14] In this case, the tenant had a right of first refusal to purchase the premises in the lease. As part of this right, the landlord agreed to provide the tenant 24 hours to match any offer it received on the property. In 2016, the landlord entered into an agreement of purchase and sale with a third party and after telling the tenant that the property had been sold, presented an estoppel certificate to the tenant and required the tenant to complete it immediately to affect the assignment of the lease from the landlord to the third party. The estoppel certificate confirmed that there were no defaults under the lease, but it did not make any reference to the tenant's right of first refusal. The tenant only remembered that it had a right of first refusal until after it signed the estoppel certificate and after the property had been sold. At trial, the tenant's counsel attempted to use *New Town Investments* to argue that the third party and its lender were not entitled to rely on the estoppel certificate because before advancing any funds, they should have reviewed a copy of the lease and become satisfied with its terms. Further, if they did review the lease, they should have become aware of the tenant's right of first refusal and should have required an express representation from the tenant waiving such right, but they did not.[15] As a result, the tenant argued that because this error would have been easily

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[11] *Porte Development (Main) Ltd. v Janus Production Inc.*, 2007 BCSC 670.
[12] *Ibid* at para 31.
[13] *New Town Investments, supra* note 6 at para 28.
[14] *1960529 Ontario Inc. v 2077570 Ontario Inc.*, 2017 ONSC 5254 [*1960529 Ontario Inc.*].
[15] *Ibid* at para 48.

determinable by the lease itself and could have been expressly addressed in the estoppel certificate, the landlord should not have the opportunity to take advantage of its own mistake.[16] The Court did not regard *New Town Investments* as authority that supported the tenant's conclusion and explained:

> *In [New Town Investments], the estoppel certificate contained an error that was apparent from the lease documents themselves. In this case, there is no apparent error in the Estoppel Certificate. The fact that the Lease contains the ROFR does not show that there is a conflict between the existence of the ROFR provision in the Lease and the statements made by [the tenant] in the Estoppel Certificate, or that there was an error in the Estoppel Certificate. [The Tenant] certified that there was no breach of the Lease, which includes the ROFR. There was no reason for [the lender] to question the statements made by [the tenant] in the Estoppel Certificate based upon a review of the contents of the Lease."*[17]

Instead of using the analysis in *New Town Investments*, the Court also focused on the fact that the estoppel certificate was devoid of language stating that a claim against the landlord for breach of the right of first refusal in the lease would be excluded from the comprehensive acknowledgments in the estoppel certificate.[18] In short, from the Court's analysis, the tenant had waived its right of first refusal by signing an estoppel certificate that confirmed that there was no default under the lease at the time the estoppel certificate was signed. As noted above, the Court distinguished the facts of this case from *New Town Investments* on the basis that the estoppel certificate in *New Town Investments* contained an error that was apparent from the lease documents,[19] whereas there was no error in the estoppel certificate in this case.[20] Thus, we learn from *1960529 Ontario Inc.* that where there is a discrepancy between the lease documents and the estoppel certificate, and that discrepancy is not based on an error (i.e., that the estoppel certificate is silent on the matter), an estoppel certificate may be used to bind a tenant to its acknowledgement of its terms.[21] The Court in *1960529 Ontario Inc.* highlighted the importance of estoppel certificates by explaining that if there had been no estoppel certificate when the original landlord sold the property to the new owner, the fact that the landlord disregarded the tenant's right of first refusal would have been relevant and the tenant would have succeeded in its action.[22]

This case is yet another reminder that before signing an estoppel certificate, parties must be cautious in reviewing the lease and all of its relevant documents to ensure that the estoppel certificate is correctly stating the terms of the lease and is not silent as to any defaults or other important rights as set out in the lease.

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[16] *Ibid*.
[17] *Ibid* at para 51.
[18] *Ibid* at para 52.
[19] *Ibid* at para 51.
[20] *Ibid*.
[21] For example, although a tenant may have had a right of first refusal in the lease that was not provided to them, by acknowledging that there have been no defaults under the lease or to identify that it has a right of first refusal in an estoppel certificate, based on the reasoning of the Court in *1960529 Ontario Inc.,* the tenant may be estopped from arguing that it ought to have been entitled to the right of first refusal.
[22] *1960529 Ontario Inc*., *supra* note 14 at para 64.

Estoppel Certificates and Landlords

While estoppel certificates are typically used to hold tenants to their acknowledgement of the terms of the certificate, the same principle may also apply to landlords.[23] In *2350894 Ontario Inc.,*[24] the tenant was leasing the premises to operate its restaurant business since 2001. As there was litigation between the tenant and the previous owner, with a view to ending all outstanding issues, the parties entered into a minutes of settlement in 2009 that extended and amended certain terms of the lease, including providing the tenant with a five year renewal option that would extend the term to 2026, and among other things, discontinued certain payments required of the tenant under the lease.[25] The previous owners of the premises respected the terms of the minutes of settlement. In 2012, the landlord purchased the premises from the previous owner and insisted on obtaining an estoppel certificate from the tenant.[26] In Exhibit "A" of the estoppel certificate, it stated that pursuant to the minutes of settlement, the tenant had the option to renew the lease for another five years. This was the only mention of the minutes of settlement in the estoppel certificate.[27] Further, Exhibits "D" and "E" of the minutes of settlement disclosed that the tenant was not making certain payments, which were consistent with the discontinued payments as set out in the minutes of settlement. The tenant executed the estoppel certificate and was satisfied that it had made references to the minutes of settlement and other financial statements that confirmed the application of the minutes of settlement to the lease.[28]

The dispute began when the landlord later claimed arrears from the tenant that were calculated pursuant to the original lease as opposed to the terms as amended by the minutes of settlement.[29] The landlord claimed to have no knowledge of the minutes of settlement and insisted that none of its terms were operative,[30] and subsequently delivered several notices of defaults to the tenant. The tenant commenced an action to restrain the landlord from taking any action that would essentially terminate the lease and lock the tenants out of the premises.

At trial, the tenant, among other things, argued that an estoppel certificate cannot operate to alter valid terms of a lease since these documents are not contracts and also that estoppel certificates cannot replace the landlord's due diligence obligations when it purchased the property.[31] The tenant pointed to the fact that the agreement of purchase and sale between the properties contained substantial disclosure requirements and an indemnity clause that gave the landlord a remedy against the vendor in the event of a misrepresentation or where full disclosure was not made.[32] In short, the tenant took the position that because since the landlord knew or ought to have known about the minutes of settlement from the estoppel certificate, the fact that it had not decided to obtain and review a copy of the agreement or to bring any action against the vendor cannot now be used against the tenant to undermine a validly amended lease.[33]

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[23] See *6056628 Canada Inc. v 2350894 Ontario Inc.*, 2019 ONSC 4523 [*6056628 Ontario Inc.*]
[24] *6056628 Canada Inc. v 2350894 Ontario Inc.,* 2019 ONSC 1329.
[25] *Ibid* at para 11.
[26] *6056628 Ontario Inc., supra* note 23 at paras 9-12.
[27] *Ibid*.
[28] *Ibid* at para 22.
[29] *Ibid* at para 28.
[30] *Ibid* at para 27.
[31] *Ibid* at paras 39, 41-43.
[32] *Ibid at* para 41.
[33] *Ibid* at para 44.

Conversely, the landlord argued that there are insufficient grounds to find that it should have known that the minutes of settlement amended the lease due to:

> *the location of the reference to the Minutes of Settlement, the absence of a proper reference in the list of agreements describing the Lease, the contradictions between the stated terms of the Lease and important differences in the terms of the alleged Minutes of Settlement*.[34]

In coming to its decision, the Court found that the minutes of settlement made valid amendments to the lease and that an estoppel certificate does not amend a contract. [35] Further, the Court stated that "*a tenant who signs an estoppel certificate may be prevented from relying on an amendment to a contract where the tenant's estoppel certificate is completely silent about an amending document"*.[36] However in this case, the landlord had knowledge of the minutes of settlement as per the estoppel certificate and could have obtained a copy of it as part of its due diligence process. These factors led the Court to conclude that the landlord had failed to establish that it relied on the estoppel certificate to its detriment.[37]

This case serves as a reminder that while an estoppel certificate will not typically amend a lease, parties must ensure that all the statements in the estoppel certificate are correct before signing it. This may be achieved by carefully reviewing the lease and its amending documents, and cross referencing them against the estoppel certificate as part of a thorough due diligence review.

Estoppel certificates and Rights of Set-Off

The case of *Toronto Kosher v Windward Drive Holdings*[38] highlights the importance of obtaining estoppel certificates for purchasers to ensure that tenants have no right of set-off against the landlord/vendor. In *Toronto Kosher,* the tenant operated a butcher shop from leased premises in a building on Bathurst Street in Toronto. Deliveries were made to the back of the building accessible by laneway or an adjacent vacant lot. When the tenant first leased the premises, the vacant lot was owned by a corporation related to the landlord and the lease required that the landlord enter into an agreement with a related company to give the tenant access to the vacant lot until it was granted a right-of-way over the laneway. The access agreement also granted the tenant the option to purchase the vacant lot if its access was ever denied or extinguished, unless an easement over the laneway was granted. As the laneway was blocked, the tenant solely used the vacant lot for access until April 2007, when the landlord eventually sold the vacant lot without informing the tenant. Although this sale did not interrupt the tenant's access to the vacant lot, the tenant commenced an action against the landlord for breaching its option to purchase. While this action was proceeding, a new landlord purchased the building without obtaining an estoppel certificate from the tenant.

Shortly thereafter, the tenant obtained a judgment against the previous landlord and then took the position that it was entitled to set off any amounts owing under the default judgment against rents owing to the new landlord. This was made possible because the new landlord did not sign an estoppel certificate releasing it from the debts potentially owing to the tenant by the previous

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[34] *Ibid* at para 48.
[35] *Ibid* at para 67.
[36] *Ibid* at para 68.
[37] *Ibid* at para 73.
[38] *Toronto Kosher Inc. v Windward Drive Holdings Inc.*, 2011 ONSC 4398.

landlord.[39] The Court held that because the sale of the vacant lot had not interrupted the tenant's access to the leased premises, it would be unjust to allow the tenant "*through the happenstance of default judgment to recover what is in essence a windfall damage award for losses that were never sustained"* and declined to permit the equitable set-off.[40]

This case serves as reminder that estoppel certificates should be used to ensure that a purchaser does not unnecessarily take on risks carried over from previous landlord tenant relationships. However, although it is helpful, an estoppel certificate should not be used as a substitute for due diligence.

Estoppel certificates and the Duty of Good Faith

The Ontario Court of Appeal's recent decision in *Subway Franchise Restaurants of Canada Ltd. v BMO Life Assurance Company* [41] provides insight into the interplay between estoppel certificates and good faith in contracts. This issue in this case was whether the tenant, Subway, renewed its commercial lease with the landlord, BMO, within the timeframe required in the lease. When BMO acquired the property, Subway executed an estoppel certificate certifying that its lease expired on August 23, 2018.[42] The estoppel certificate was the only document that contained the termination date for the lease, and both parties had a copy of it.[43] The lease stipulated that in order for the tenant to renew the term, it had to provide the landlord with prior written at least 9 months and not more than 12 months in advance prior to the expiration of the term. However, Subway had improperly recorded the expiry date of the lease in its own database, so it was under the assumption that the lease would terminate at a date was that was not the actual expiry date. This lead Subway to providing its notice of intention to exercise its renewal option outside of the required notice period.[44] Although the correspondence between the parties asked BMO to confirm the termination date of the lease and the window for renewal, BMO did not respond to clarify the expiry date.[45]

Subway commenced an action arguing that BMO's conduct in ignoring its letters amounted to failing to perform contractual terms of the lease in good faith. However, the application judge rejected this argument by relying on the Ontario Court of Appeal's decision in *CM Callow Inc. v Zollinger.*[46] However, because this decision was reversed by the Supreme Court of Canada shortly thereafter, Subway appealed the decision of the application judge.

After assessing the Supreme Court's reasoning, the Ontario Court of Appeal found that *CM Callow Inc. v Zollinger* [47] did not disturb the application judge's ruling that BMO did not fail to perform the contract in good faith.[48] A key aspect in the application judge's decision was that Subway had a copy of the estoppel certificate and yet failed to take diligent efforts to comply with the terms of the lease referred therein.[49] Further, the application judge found that BMO did not intend to

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[39] *Ibid* at para 33.
[40] *Ibid* at paras 46-50.
[41] *Subway Franchise Restaurants of Canada Ltd v BMO Life Assurance Company*, 2021 ONCA 349 [*Subway*].
[42] *Ibid* at para 4.
[43] *Ibid.*
[44] *Ibid* at para 9.
[45] *Ibid* at para 10.
[46] 2018 ONCA 896.
[47] 2020 SCC 45 [*Callow*].
[48] *Subway, supra* note 41 at para 11
[49] *Ibid* at para 11.

obscure anything from Subway, and that it was not BMO's responsibility to ensure that Subway complied with its own obligations under the lease.[50]

In its analysis, the Ontario Court of Appeal distinguished this case from the Supreme Court's decision in *Callow* based on the circumstances of each case.[51] The Court of Appeal stated that in *Callow,* the trial judge had found deception on the part of the defendant that was directly linked to the contract, and the breach of the duty of good faith was premised on that deception.[52] Further, in *Callow*, one party had lied or knowingly contributed to a misapprehension that could have only been corrected through its own actions.[53] However, the Court said that same could not be said for BMO's actions in *Subway*. The Court found that BMO's silence was not intended to obscure the terms from Subway, and despite the error made by Subway, the Court found no evidence to suggest that BMO knowingly mislead, created a false impression, or actively contributed to Subway's misapprehension. Therefore, just as the Supreme Court held in *Callow* that "*a contracting party is not required to correct a misapprehension to which it has not contributed*",[54] the Court of Appeal also held that BMO should not have to account for Subway's own misunderstanding as to the terms of a lease that it should have reviewed more diligently.

Subway suggests that indications of a signatory's attempt to comply with the terms of the lease may be relevant to the Court when determining whether it acted diligently in exercising its rights under the lease. The result in *Subway* is particularly interesting given the fact that the doctrine of promissory estoppel is rooted in equity. Given these roots, one would expect that the principles of good faith and a party's "clean hands" would be critical to the outcome of a case. That is, where a party knowingly relies on the mistake of another to obtain an advantage, equity will typically not intervene to uphold these representations.[55] Given the application of the doctrine of good faith, the Ontario Court of Appeal focused its analysis on the lack of evidence establishing that BMO had lied, knowingly misled, or created a false impression through its own actions to mislead Subway, as opposed to assessing whether BMO knew that Subway had committed an error. Nevertheless, the holding in *Subway* is yet another testament to the Court's propensity to hold parties to the terms of the lease where there are discrepancies between the lease and the estoppel certificate and is another reminder for parties to conduct a rigorous comparison of the lease documents against the estoppel certificate as part of their due diligence.

Conclusion

Parties to a lease agreement should be cautious before using estoppel certificates to either amend the lease documents or attempt to add or define language within them. The case law is clear that estoppel certificates cannot create contractual rights which otherwise do not exist at law or in the lease itself. It is also clear that parties cannot take advantage of errors or misstatements in an estoppel certificate vis-à-vis the lease documents, especially where the errors or misstatements refer to matters that are clearly discoverable by reference to the lease itself.

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[50] *Ibid* at para 12.
[51] *Callow, supra* note 47.
[52] *Subway, supra* note 41 at para 13.
[53] *Ibid* at para 13.
[54] *Ibid* at para 14, citing *Callow* supra note 47 at para 133.
[55] See *Meadowvale Industrial Mall Ltd v Becquerel Laboratories Inc.*, [1999] OJ No 5199, 35 RPR (3d) 112.

Despite the nuances existing at law, estoppel certificates continue to be useful for purchasers and lenders in commercial real estate transactions to obtain the most current information about the landlord/tenant relationship. Before relying on the estoppel certificate, it is essential for such parties to be diligent and reconcile it against the lease documents to ensure the information set out in the certificate is correct.

For tenants, it is particularly important to ensure that the certificates they sign are consistent with the term of the lease and sufficiently address any existing disputes or discrepancies. Failing to do so, especially where the estoppel certificate is silent as to certain rights, could force a tenant to either waive its rights set out in the lease or even compensate any party that detrimentally relied on the contents of the estoppel certificate.