

## Sub-tenant woes when a head lease disappears

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### Cases Considered:

[581834 Alberta Ltd. v. Alberta \(Gaming and Liquor Commission\), 2007 ABCA 332](#)

[581834 Alberta Ltd. v. Alberta \(Gaming and Liquor Commission\), 2006 ABQB 47](#)

This case illustrates the dangers for lawyers and their clients in changing the wording used in lawyers' old precedents. Instead of using the standard formula of "by, from, or under" in a landlord's covenant of quiet enjoyment, the innovative phrasing of "by, through, or under" was inserted. This allowed the lawyers for the tenant to make the first part of their argument in this appeal. It is cases such as this one that stymie the plain language movement in law.

The Alberta government, back in the days when it was in the retail sale of alcohol business, leased a liquor store at Londonderry Mall in Edmonton. Lehndorff Property Management Ltd. owned that mall and Gentra Canada Investments Inc. held a mortgage on the mall. Ten years later, in 1990, the Alberta government entered into a new lease for a term of 40 years for a different location in the same mall.

On September 2, 1993, the Alberta government announced the privatization of liquor retailing and distribution. That same year, it sold its retail liquor business in Londonderry Mall to 581834 Alberta Ltd. As part of that sale, the two entered into a sublease for a term of 37 years. The sublease contained a covenant for quiet enjoyment:

If and so long as the Subtenant [581834] performs each and every obligation of the Subtenant herein, the Subtenant shall quietly enjoy the Premises without hindrance or molestation by the Sublandlord [the Alberta government] or any other person claiming by, through or under the Sublandlord, subject to the terms and conditions of this Sublease [emphasis added].

Quiet enjoyment has nothing to do with noise. It is a promise by a landlord (or sub-landlord) to a tenant (or sub-tenant) that the tenant's exclusive possession of the leased premises will not be significantly interfered with by the landlord or by anyone else the landlord is responsible for in law. Two different types of interference are recognized by the law. The landlord's interference might be with the tenant's title or the tenant's physical possession. This case involved an interference with the sub-tenant's title, i.e., their legal right to occupy the premises.

The issue was whether the Alberta government's promise of non-interference with 581834's right to possess the liquor store extended to the foreclosure of the mortgage granted by Lehndorff to Gentra. Was the sub-landlord, the Alberta government, responsible for interference by the mortgagee? The trial judge found that it was not. The Court of Appeal agreed, despite a number of rather complex and ingenious arguments advanced by the lawyers for 581834.

Lehndorff had defaulted on the mortgage shortly after 581834 took over the Londonderry Mall premises. As a result, in December 1995 Gentra obtained an order for foreclosure on the mall and in April 1996 an order granting them possession of the mall, including possession of 581834's premises. The foreclosure by Gentra had the effect of extinguishing the sublease by the Alberta government because it extinguished the headlease by Lehndorff on which it relied. The interests that Lehndorff, the Alberta government and 581834 had in the mall were all extinguished. In order to remain in the leased premises, 581834 was forced to negotiate a new lease with Gentra at a greatly increased rent. 581834 carried on business from the Londonderry Mall premises until the end of 2000. The next year it sued the Alberta government for breach of the covenant of quiet enjoyment in the sublease.

The trial judge, Mr. Justice J.H. Langston, noted that the covenant did not protect 581834 from all interference with its possession of the premises, but only from interference by the Alberta government or any other person claiming "by, through or under" them. He held that the interference to 581834's right to possess the liquor store was caused by Lehndorff's default on the mortgage and Gentra's subsequent foreclosure. Lehndorff and Gentra did not claim "by, through, or under" the interest of the Alberta government. Lehndorff was the Alberta government's landlord and, consequently, was superior in title to the Alberta government. The covenant, as worded, protected only against the acts of persons who were successors in title to the Alberta government as sub-landlord or had authority from it to commit the interfering acts. The Alberta government was therefore not responsible for the interference with 581834's possession rights.

The covenant for quiet enjoyment in this case deviated slightly from the standard wording, as already noted. It is very similar to the sort of covenant that has been implied by the common law and considered by the courts for at least 200 years. Indeed, the authorities quoted by the Court of Appeal included several cases involving sub-landlords and sub-tenants that were decided in England in the 1800s. However, the common law formulation uses the phrasing "by, from or under", rather than "by, through or under." The lawyers for 581834 argued the slight change in wording made a difference. The Court of Appeal did agree with them that the word "through" meant "by means of or through the instrumentality of." Had the Alberta government defaulted on a mortgage and had their mortgagee foreclosed on the liquor store premises which they still held an interest in as sub-landlords, this would have been a claim "through" the Alberta government. It would have been a breach of the Alberta government's covenant for quiet enjoyment.

The lawyers for 581834 then asked the Court of Appeal to extend the Alberta government's responsibility one step further. In order to do so, they relied upon section 48 (1) of the Law of Property Act, R.S.A. 2000, c. L-7:

48(1) The effect of an order of foreclosure of a mortgage or encumbrance is to vest the title of the land affected by it in the mortgagee or encumbrancee free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer of any person claiming through or under the owner, mortgagor or encumbrancer subsequent to the mortgage or encumbrance [emphasis added].

The trial judge had held that this section meant that the foreclosing mortgagee takes clear title by exercising its own independent right and not by claiming through or under the owner, mortgagor or encumbrancer. The Court of Appeal agreed that Gentra's claim to the property was independent of the Alberta government's interest under the headlease with Lehndorff. Section 48(1) could not assist 581834 in extending the Alberta government's responsibility.