



In one scene in the science fiction classic, The Andromeda Strain, actress Kate Reid, playing a leading genetic scientist, has to visually review thousands of Petri dishes passing by her in conveyor-belt-like sequence, all to the monotonous rhythm of a red strobe light, looking for the one Petri dish that would save the world from alien invasion. She sees so many of these Petri dishes in a row that she falls into an epileptic trance, and actually ends up missing the one needle-in-a-haystack Petri dish that would have saved the world.

The

Andromeda strain:

Blacklining charts

by Jeff Lem

The typical modern commercial lease has much in common with that monotonous, never-ending stream of bacterial test cultures in *The Andromeda Strain*: Many leases run upwards of 100 legal-sized pages, often in non-serif fonts measured in single-digit points. Blacklining leases so the client sees what changes have resulted (or could result) from ongoing negotiation makes an already long document even longer. And the “deal fatigue” that comes with a steady procession of increasingly bigger, blacklined leases only adds to the *Andromeda Strain* effect.

So what's a practitioner to do? We know that in commercial leasing, perhaps more so than in any other type of commercial transaction, the devil really is in the details: Subtle changes in the text that can have huge commercial consequences are introduced to or removed from the lease at almost every turn.

How can we ensure that clients actually review and approve all of the many dozens of seemingly minor changes being implemented in every turn of the lease?

I have a technique that I often use to help my clients avoid the *Andromeda Strain* affect:

- Start with the usual blacklined document (with "strike-out" being used to show deletions of text).
- Create a three-column chart (in "landscape" format), with columns labelled A, B and C, from left to right.
- Cut the amended provisions out of the blackline (so that they retain all of their markings) and paste these into Column B.
- Cut the corresponding pre-amendment provision from the penultimate version of the lease and paste these into Column A.

Columns A and B, respectively, are then labelled as "Provision as it was in Version X" and "Provision as amended in Version X+1." Even with many changes to the lease, the resulting chart is almost always shorter than the lease, since the chart reflects only those provisions that have in fact been changed.

The result is a much shorter document for your clients to review and approve (thus hopefully taking some of the dread out of reading yet another draft of the lease). Moreover, by setting out the changes side-by-side, the true impact of the changes are all the more obvious to clients.

My assistant will prepare Columns A and B, but it is my job as the solicitor to ensure that all amendments have been included. This is an easy task and I rarely find any problems because no discretion is involved (although I will occasionally add more text before and after a given amendment to help with context or to remove some of that text where it is not needed).

The third column of the chart, Column C, titled "Proposed Response," is left blank and reserved for me to complete. In Column C, I usually add a combined editorial comment and legal analysis, together with a prospective course of action. For example, I might say something like, "This clause is not market, totally unfair, in contravention of both statute and case law, and utterly ridiculous. I propose deleting this clause." In my cover letter or covering e-mail, I will often explain that "my observations are set forth in Column C, together with my proposed responses

thereto. Unless you instruct me otherwise, I will turn a draft of the lease incorporating these proposed responses and return same to the landlord/tenant."

This form of chart is actually very easy to do. An experienced assistant can easily complete Columns A and B, and can even give you a running start on Column C if he or she is familiar with your standard responses to standard lease provisions (so, if your assistant knows that you always reject/insist on capital tax recoveries, he or she can set forth your typical response to attempts to include/reject same).

The result is a chart that is: not that difficult to prepare; generally reader-friendly (well, as reader-friendly as anything in commercial leasing can be); isolates issues very clearly for you and your clients; and, in effect, presents a timely reporting package on each turn of the lease.

In the end, Kate Reid's oversight in *The Andromeda Strain* did not end up destroying the world. But those of us practising commercial leasing law are not always as lucky: The consequences of a similar oversight in reviewing complicated commercial leases are often far less forgiving. Hopefully, this way of using blacklining software will help to ameliorate some of that risk.

Jeff Lem practises with Davies Ward Phillips & Vineberg LLP in Toronto.

ACME CO LEASE

SEC. NO.	PROVISION AS IT WAS IN VERSION 2	PROVISION AS AMENDED IN VERSION 3	COMMENTS AND PROPOSED RESPONSE
1.1	... or (ii) then fair market Gross Rent for the Leased Premises based on comparable fair market Gross Rent for similar premises (as they then exist) at the commencement of each Renewal Term, respectively, as established by the mutual agreement of the Landlord and the Tenant.	... or (ii) then fair market Gross Rent for the Leased Premises based on comparable fair market Gross Rent for similar <u>unimproved</u> premises (as they then exist) at the commencement of each Renewal Term... <u>"Unimproved premises" shall mean the Leased Premises, exclusive of the improvements constructed by or at the expense of the Tenant. If the parties are unable to agree as to the Gross Rent for any Renewal Term, then the same shall be determined in accordance with Section 2.4(b) hereof.</u>	Renewal rent based on "unimproved premises" (i.e. base building condition) will always be significantly lower than the improved, ready-to-operate premises. We should revert to the previous definition to ensure that the renewal rent reflects what would be a market rent for those premises as they then are.
2.3	"Habitual Default" means: (i) any two (2) failures, in the immediately preceding rolling twenty-four (24) month period, for any reason whatsoever, to punctually pay all of the Rent then due; and/or (ii) any two non-Rent defaults for substantially the same breach, in the preceding rolling twenty-four (24) month period.	"Habitual Default" means: (i) any two (2) failures, in the immediately preceding rolling twenty-four (24) month period, for any reason whatsoever, to punctually pay all of the Rent then due; and/or (ii) any two non-Rent defaults for substantially the same breach, in the preceding rolling twenty-four (24) month period.	Definition was deleted in its entirety. The Tenant wants notice provisions on default of rent before the Landlord can have the right to terminate. This can be abused by making the Landlord, in effect, have to issue invoices monthly. The introduction of an "Habitual Default" clause was intended to be a compromise. The Tenant gets notice unless the default becomes habitual, in which case the Landlord no longer needs to give notice for subsequent, chronic defaults. We should reinsert the "Habitual Default" concept or delete notice on non-payment of rent.
16.1	"Rules and Regulations" means such rules, regulations, policies and operational guidelines, that may be promulgated by the Landlord from time to time governing the operation of the Property generally.	"Rules and Regulations" means ...governing the operation of the Property generally, <u>provided same do not conflict with this Lease or adversely affect the Tenant's rights or obligations hereunder.</u>	All rules and regulations "adversely affect the Tenant's rights or obligations" to some degree. There really should be some sort of materiality threshold inserted here. We could also add that the Rules and Regulations are enforced uniformly against all tenants.

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