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Consultation Paper on Proposals for a New Commercial Tenancy Act

Prepared by the
Commercial Tenancy
Act Reform Project
Committee

September 2008

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Commercial Tenancy Act Reform Project Committee

The British Columbia Law Institute formed the *Commercial Tenancy Act* Reform Project Committee in August 2007. The committee's mandate is to study the law relating to commercial tenancies in British Columbia, to identify defects in the existing legislation governing commercial tenancies, to examine the leading options for reform, and to make recommendations for a new *Commercial Tenancy Act*. These recommendations will be contained in the final report of the committee. This final report is scheduled for publication in June 2009.

The members of the committee are:

Richard Olson—chair
(*associate counsel, McKechnie & Co.*)

Arthur L. Close, Q.C.
(*director, British Columbia Law Institute*)

Sandy Lloyd
(*former partner, Borden Ladner
Gervais LLP*)

Ann McLean
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Justice Mary V. Newbury
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Greg Umbach
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Kevin Zakreski (staff lawyer, British Columbia Law Institute) is the project manager.

**For more information, visit us on the World Wide Web at:
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Call for Responses

We are interested in your response to this consultation paper. It would be helpful if your response directly addressed the tentative recommendations set out in this consultation paper, but it is not necessary. We will also accept general comments on reform of the *Commercial Tenancy Act*.

The best way to submit a response is to use a response booklet. You may obtain a response booklet by contacting the British Columbia Law Institute or by downloading one at <<http://www.bcli.org/bclrg/projects/commercial-tenancy-act-reform-project>>. You do not have to use a response booklet to provide us with your response.

Responses may be sent to us in one of three ways—

by mail: British Columbia Law Institute
 1822 East Mall
 University of British Columbia
 Vancouver, BC V6T 1Z1

 Attention: Kevin Zakreski

by fax: (604) 822-0144

by email: cta@bcli.org

If you want your response to be considered by us as we prepare final report for the *Commercial Tenancy Act* Reform Project, then we must receive it by **31 March 2009**.

Your response will be used in connection with the *Commercial Tenancy Act* Reform Project. It may also be used as part of future law reform work by the British Columbia Law Institute or its internal divisions. All responses will be treated as public documents, unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name in the final report for the project, unless they expressly advise us to keep their name confidential. Any personal information that you send to us as part of your response will be dealt with in accordance with our privacy policy. Copies of our privacy policy may be downloaded from our website at: <<http://www.bcli.org/privacy>>.

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EXECUTIVE SUMMARY

INTRODUCTION

The *Commercial Tenancy Act* Reform Project is a major law reform project to consider reform of British Columbia's legislative framework for commercial leasing. The main statute in this framework is the *Commercial Tenancy Act*, an Act that has been sparingly amended since it first appeared in the late nineteenth century. Other relevant statutes include the *Rent Distress Act* and parts of the *Property Law Act*, the *Law and Equity Act*, the *Land Transfer Form Act*, and the *Land Title Act*.

The project began in July 2007 and will complete in June 2009. It is made up of two phases. The first phase involved study of the major legal issues arising in contemporary commercial leasing and consideration of the leading options for reform. The publication of this consultation paper marks the conclusion of this phase. The second phase of the project will focus on consultation with the public and on the preparation of the project's final report. The publication of the final report, which will include draft legislation and commentary, is due in June 2009.

The *Commercial Tenancy Act* Reform Project was made possible by project grants from the Real Estate Foundation of British Columbia and the Notary Foundation of British Columbia.

COMMERCIAL TENANCY ACT REFORM PROJECT COMMITTEE

A volunteer project committee is responsible for carrying out the *Commercial Tenancy Act* Reform Project. The project committee was formed shortly after the commencement of the project, and it has met regularly since September 2007. The members of the committee are:

Richard Olson—chair (associate counsel, McKechnie & Co.)	Arthur L. Close, Q.C. (director, British Columbia Law Institute)
Sandy Lloyd (former partner, Borden Ladner Gervais LLP)	Ann McLean (solicitor, Legal Services Branch, Ministry of Attorney General)
Justice Mary V. Newbury (Court of Appeal for British Columbia)	Greg Umbach (partner, Blake, Cassels & Graydon LLP)

Kevin Zakreski (staff lawyer, British Columbia Law Institute) is the project manager.

THE STRUCTURE OF THE CONSULTATION PAPER

The consultation paper is made up of two parts. Part One contains background material on commercial leasing. This part introduces the project and briefly traces the history of landlord–tenant law, noting a number of key terms used throughout the consultation paper. Then, it discusses the current legislative framework for commercial leasing in British Columbia and makes the case for reform of the law.

Part Two of the consultation paper contains the committee’s 58 tentative recommendations for reform. Each of these proposals is preceded by a brief discussion of the legal issues and options for reform that the committee considered in making its decisions.

PART ONE—BACKGROUND

Introduction

Part One begins by introducing the project. This introduction focuses on the method of working on the project through a committee and on the scope of the project. As its name suggests, the *Commercial Tenancy Act* Reform Project is concerned with legislation governing commercial tenancies in British Columbia. It does not address leases governed by the *Residential Tenancy Act*.

Historical Background and Key Terms

As some of the language used in commercial leasing can be strange and difficult, particularly for readers without legal training, Part One contains a short discussion of key leasing terms and concepts. These terms and concepts are discussed in relation to the historical context in which many of the fundamental rules of landlord–tenant law arose.

British Columbia Legislation Relating to Leasing

The consultation paper reviews the leading British Columbia statutes that apply to commercial leasing. The focus is on the *Commercial Tenancy Act*, a statute that was introduced to consolidate eighteenth and nineteenth century English legislation on leasing. This legislation was intended to remedy deficiencies in the common law. The consultation paper also discusses relevant provisions of the *Rent Distress Act*, the *Land Transfer Form Act*, the *Property Law Act*, and the *Law and Equity Act*.

The Case for Reform

Part One concludes by considering the case for reform of the legislative framework for commercial leasing. It advances two arguments. First, the major British Columbia

statute, the *Commercial Tenancy Act*, is badly out of date. Second, a number of issues have arisen in the commercial leasing sector since the appearance of the *Commercial Tenancy Act* which should be addressed by legislation.

PART TWO—TENTATIVE RECOMMENDATIONS

Introduction

Part Two of the consultation paper contains the committee's tentative recommendations. The committee makes one overarching tentative recommendation: to repeal the existing *Commercial Tenancy Act* and replace it with a new *Commercial Tenancy Act*. The rest of Part Two is focussed on specific tentative recommendations that are intended to spell out the policy goals of a new *Commercial Tenancy Act*. These tentative recommendations address fifteen groups of issues.

Formal and Registration Requirements

There are few formal requirements that have to be met in order to create a valid lease. The major formality involves writing. A lease must be in writing, unless its term is for three years or some shorter time. The committee's tentative recommendations in this area do not propose any fundamental changes to this rule. Rather, they involve harmonization with similar rules in the *Land Title Act*.

The committee is not proposing any changes to the current rules on registration of leases.

Tenants' Rights Before Possession

Before it takes physical possession of the leased premises, a tenant does not have an estate or interest in the land. Instead, the tenant merely has an *interesse termini*, which is an interest to take possession at the time stipulated in the lease. The committee proposes to do away with this ancient common law rule, which has been known to cause hardships for tenants in some cases.

Implied Terms

The common law implies two terms in every lease: a covenant from the landlord to respect the tenant's quiet enjoyment of the leased premises and a covenant from the tenant to treat the leased premises in a tenant-like manner. The committee proposes that a new *Commercial Tenancy Act* spell out the terms implied by law into a lease. These terms would address quiet enjoyment, non-derogation from grant, payment of rent, non-payment of rent or breach of other covenant, and repairs. The parties to a lease would be free to override the implied terms by express agreement.

Assignment and Subletting

The committee tentatively recommends bringing British Columbia law into line with the law in most of the other provinces and territories in Canada by implying a duty on landlords to act reasonably in considering a request from a tenant to assign its interest in the lease or to sublet the leased premises. The parties would be able to contract out of this implied duty. The duty would only apply to leases entered into after a new *Commercial Tenancy Act* is brought into force.

Merger and Surrender

The *Commercial Tenancy Act* and the *Property Law Act* contain provisions that override several complex and technical common law rules relating to merger and surrender. The committee proposes that these remedial provisions be retained and consolidated in a new *Commercial Tenancy Act*.

Apportionment

The *Commercial Tenancy Act* contains a number of sections that provide for the apportionment (in respect of time) of rent and other periodic payments. Since reforms to these provisions would have an impact outside the commercial leasing sector, the committee has decided to call for a dedicated law reform project to consider them. The committee also tentatively recommends ending the anomaly of locating these rules of general application in the *Commercial Tenancy Act*. It proposes relocating the apportionment sections to the *Law and Equity Act*.

Distress for Rent

Distress for rent is one of the most contentious subjects in commercial leasing law. Distress for rent is a special remedy for landlords that has deep roots in the common law. Unless the lease expressly disallows it, a landlord may distrain for outstanding arrears of rent—that is, a landlord may, without prior court authorization, seize and sell the tenant's goods that are located at the leased premises. The committee is seeking comment on two distinct approaches to reform. Under one approach, distress for rent would be abolished. Under the other approach, distress for rent would be maintained and modernized.

Contractual Principles

One of the fundamental challenges for commercial leasing law involves striking the appropriate balance between property-based and contract-based rules. The committee has confronted this challenge across a range of issues. Among its tentative recommendations, the committee proposes retaining existing statutory provisions on the doctrine of frustration. It tentatively recommends clarifying the application of

the contractual doctrine of fundamental breach to leases. As a consequence of this tentative recommendation, the committee proposes statutory rules relating to abatement of rent in the face of a fundamental breach by a landlord. The committee tentatively recommends that landlords be required to mitigate their losses incurred as a result of abandonment of the leased premises.

Summary Dispute Resolution

The committee tentatively recommends consolidating and expanding the scope of the existing summary dispute resolution procedures in the *Commercial Tenancy Act*.

Re-entry

The committee proposes retaining the self-help character of re-entry, with one significant modification. A landlord would be required to engage a qualified bailiff to effect re-entry. Disputes regarding re-entry would be subject, in the first instance, to the summary dispute resolution procedure.

Overholding Tenant

The committee proposes integrating disputes involving overholding tenants into a reformed summary dispute resolution procedure.

Relief from Forfeiture

The current rules governing relief from forfeiture of a lease are found in a series of sections in the *Law and Equity Act*. The committee notes that there may be aspects of these rules that call out for reform, but declined to propose reforms that could have an impact outside the commercial leasing sector.

Bankruptcy and Insolvency

The committee proposes retaining a section dealing with issues arising from a tenant's bankruptcy in a new *Commercial Tenancy Act*. The committee makes a series of tentative recommendations aimed at refining aspects of the current rules in this area, including trustee liability for payment of rent, the landlord's ability to terminate the lease after bankruptcy of the tenant, bankruptcy sales, and the landlord's preferred claim for rent.

Shopping Centre Leases

The committee canvassed the special issues that arise from leases of shopping centre premises, but declines to make any tentative recommendations in this area.

Obsolete Provisions

The committee proposes not to carry forward provisions in the existing *Commercial Tenancy Act* dealing with certain types of landlord–tenant relationships that are rarely, if ever, encountered in practice in contemporary British Columbia.

CONCLUSION AND CALL FOR RESPONSES

The committee is interested to hear the public’s views on its tentative recommendations. These comments will be considered in preparing the final report for the *Commercial Tenancy Act* Reform Project.

ABBREVIATIONS

1897 Act	<i>Landlord and Tenant Act</i> , R.S.B.C. 1897, c. 110
BIA	<i>Bankruptcy and Insolvency Act</i> , R.S.C. 1985, c. B-3
CTA	<i>Commercial Tenancy Act</i> , R.S.B.C. 1996, c. 57
LEA	<i>Law and Equity Act</i> , R.S.B.C. 1996, c. 253
LRCBC Report	Law Reform Commission of British Columbia, <i>Report on the Commercial Tenancy Act</i> (LRC 108) (Vancouver: The Commission, 1989)
LTA	<i>Land Title Act</i> , R.S.B.C. 1996, c. 250
LTFA	<i>Land Transfer Form Act</i> , R.S.B.C. 1996, c. 252
OLRC Report	Ontario Law Reform Commission, <i>Report on Landlord and Tenant Law</i> (Toronto: The Commission, 1976)
PLA	<i>Property Law Act</i> , R.S.B.C. 1996, c. 377
RDA	<i>Rent Distress Act</i> , R.S.B.C. 1996, c. 403
RTA	<i>Residential Tenancy Act</i> , S.B.C. 2002, c. 78

PART ONE—BACKGROUND

I. INTRODUCTION

A. General Background on Commercial Leasing

One of the most important decisions that a business can make is determining its physical location. Most businesses do not own the real estate on which they operate. Instead, they lease premises that are owned by another individual or business. This legal relationship is governed by a commercial lease.

Commercial leasing is a major component of British Columbia's economy. In 2006, the operating revenue for what Statistics Canada classifies as "non-residential leasing" in this province was in excess of 4.1 billion dollars.¹ Within this category of "non-residential leasing" are all sorts of arrangements involving large and small businesses. Commercial leases may be found among offices in a skyscraper, retail units in a shopping centre, factories in an industrial park, or freestanding shops on Main Street.

A significant facet of the British Columbia economy such as commercial leasing deserves a sophisticated legal framework. It is surprising, then, to encounter the *Commercial Tenancy Act*,² a statute that has changed little since its first appearance over 100 years ago, at the centre of British Columbia's legal framework for commercial leasing.

B. Introduction to the Project

The British Columbia Law Institute has long identified commercial leasing in general, and the CTA in particular, as areas in need of study and reform. The BCLI has recently published a report on a discrete problem in commercial leasing.³ In late 2006, an opportunity to pursue the topic in a more comprehensive manner arose, when the Real Estate Foundation of British Columbia and the Notary Foundation of British Columbia awarded the BCLI grants for this project.

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1. Statistics Canada, "Summary Table of Real Estate Rental and Leasing and Property Management, by Province and Territory (British Columbia)" (CANSIM 352-0003) (last modified 5 June 2008), online: Statistics Canada <<http://www40.statcan.ca/l01/cst01/serv04k.htm>>.
 2. R.S.B.C. 1996, c. 57 [CTA]. See, below, Appendix A for a copy of the CTA.
 3. *Report on Leases of Unsubdivided Land and the Top Line Case* (BCLI Rep. No. 38) (Vancouver: The Institute, 2005).
-

Initial planning on the project was carried out in spring and summer of 2007. It was determined that the project would be a major law reform effort, designed to culminate in the publication of a final report featuring draft legislation and commentary. The completion date for the project was set at 30 June 2009.

C. The Commercial Tenancy Act Reform Project Committee

To carry out work on the project, the BCLI formed the *Commercial Tenancy Act Reform Project Committee* in the summer of 2007. The chair of the committee is Richard Olson. For over 20 years, Mr. Olson was a lawyer with Fasken Martineau DuMoulin with a practice focussed on commercial litigation and banking law. He left that firm five-and-a-half years ago and has since been practising as associate counsel with McKechnie & Company, a small firm based in Yaletown. Mr. Olson is the author of a leading practice guide⁴ and numerous articles on commercial leases.⁵

The other members of the committee are Arthur L. Close, Q.C., Sandy Lloyd, Ann McLean, Madam Justice Mary V. Newbury, and Greg Umbach. Prior to his retirement in 2007, Mr. Close was the executive director of the British Columbia Law Institute. Before the incorporation of the BCLI, Mr. Close was with the Law Reform Commission of British Columbia for over 25 years, ultimately serving as its chairman. Among the many commission reports he was responsible for was the *Report on the Commercial Tenancy Act*.⁶ Ms. Lloyd originally qualified as a lawyer in New Zealand. Subsequently, she qualified as a lawyer in British Columbia and practised with Borden Ladner Gervais for 20 years before retiring in 2007. Her practice focussed exclusively on commercial leasing. Ms. McLean is a solicitor with the Legal Services Branch of the Ministry of Attorney General for British Columbia. She was on the board of directors for the BCLI from 1997 to 2007, serving as chair of the BCLI from 2004 to 2007. Prior to this, Ms. McLean was the Legislation and Law Reform Officer for the Canadian Bar Association (BC Branch). Madam Justice Newbury is a justice of the Court of Appeal for British Columbia. She is the judicial liaison from that court to the BCLI. Previously, Madam Justice Newbury was a commissioner with the Law Reform Commission of British Columbia. Mr. Umbach is a lawyer with Blake, Cassels & Graydon, where he is a member of the firm's commercial real estate group. He is also an adjunct professor with the Faculty of Law, University of British

4. *A Commercial Tenancy Handbook*, looseleaf (Toronto: Thomson Carswell, 2004).

5. See, e.g., "Commercial Leases and the 21st Century," in Catherine Gibson & Barbara Vanderburgh, eds., *Negotiating and Structuring Commercial Leases: Materials Prepared for the Continuing Legal Education Seminar, Negotiating and Structuring Commercial Leases, Held in Vancouver, B.C., on May 10, 2007* (Vancouver: The Continuing Legal Education Society of British Columbia, 2007) 1.1.

6. (LRC 108) (Vancouver: The Commission, 1989) [LRCBC Report].

Columbia, where he teaches real estate transactions. Kevin Zakreski, a staff lawyer with the BCLI, is the project manager.

From September 2007 to May 2008, the committee held eight meetings, which largely focussed on reviewing the current law of commercial leases, examining the provisions of the CTA, and considering the leading options for reform. The goal of these meetings was to produce a group of tentative recommendations for reform.

D. The Structure of this Consultation Paper

This consultation paper is made up of two parts. The second, and larger, part contains the committee's tentative recommendations for reform of the law. As will be seen, these tentative recommendations take the form of declarative statements. They are intended to articulate the committee's current thinking on the policies that should guide reform. Each tentative recommendation is preceded by a brief discussion that is intended to provide readers with the context surrounding the tentative recommendation.

Before considering proposals for reform of the law, this consultation paper begins by setting out some background material, which is intended to situate the project in a broader context. Part One of the consultation paper contains a brief discussion of the legal history of commercial leasing, a review of the British Columbia legislation that affects commercial leasing, and a discussion of the reasons why reform of the law is needed now.

II. HISTORICAL BACKGROUND AND KEY TERMS

A. Introduction

Some of the terminology⁷ used in discussion of legal issues involving commercial leases can be confusing and off-putting. In part, this quality can be attributed to the age of the governing legal rules. But this difficulty in language also reflects a deeper conceptual complexity. For example, anyone who makes even the most cursory study of the subject will encounter the basic proposition that "[t]he law of landlord and tenant is a composite of contract and property principles, for a lease can be both a contract and the basis of an estate in land."⁸ The implications of this fundamentally

7. The confusion inherent in the terms used in this area of the law extends even to its fundamental building blocks. Some people refer to leases as "tenancies," landlords as "lessors," tenants as "lessees," and subleases as "underleases." For the sake of clarity and accessibility, this consultation paper adopts consistent use of the lease/ landlord/ tenant/ sublease terminology, but sometimes other terms crop up in quotations.

8. Bruce Ziff, *Principles of Property Law*, 4th ed. (Toronto: Thomson Carswell, 2006) at 265.

dual nature⁹ of leases are profound and complex. These concepts evolved over a long period of time in the distant past. The best way to grasp them is to examine them in their historical context.¹⁰

B. Origins

Historically, there are four types of leases, which may be organized into two broad groups divided by the nature of the *term* of the lease (how long the tenant is entitled to remain in possession of the leased premises):¹¹

Firstly, there are tenancies for periods of more or less considerable duration; and, secondly, there are tenancies for periods of comparatively short duration, or of a wholly or almost precarious kind. Under the first group fall tenancies for life or lives, and tenancies for terms of years. Under the second, tenancies at will and at sufferance, and tenancies from year to year.

This consultation paper is largely concerned with one of these four types of leases: what the passage above calls “tenancies for terms of years” and what is often referred to as a “lease for years.” In this consultation paper, this type of lease will be referred to as a *lease for a fixed term*, reflecting the fact that this type of lease “... may last for any interval, however irregular or lengthy.”¹² This type of lease is one that contains a provision defining exactly when the term must end. The vast major-

9. One commentator aptly, if somewhat uncharitably, characterized this complex dual nature by referring to “... that remarkable hermaphrodite, the leasehold.” See John S. Grimes, “Caveat Lessee” (1968) 2 Val. U. L. Rev. 189 at 190.

10. The proceeding sections of the consultation paper are intended to provide a summary introduction to basic leasing terms and concepts for non-legally-trained readers. They are not offered as a comprehensive history of the long and tortuous development of leases in English law. Readers who are interested in pursuing this subject should consult the following textbooks and law review articles, which inform the discussion in the consultation paper: William Holdsworth, *A History of English Law*, 2d ed. (London: Methuen/ Sweet and Maxwell, 1937) [Holdsworth, *History*]; William Holdsworth, *An Historical Introduction to the Land Law* (London: Oxford University Press, 1927) [Holdsworth, *Land Law*]; Charles Harpum *et al.*, eds., *Megarry & Wade The Law of Real Property*, 6th ed. (London: Sweet & Maxwell, 2000) [Megarry & Wade]; Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2d ed. (London: Cambridge University Press, 1968); Grimes, *ibid.*; John Forrester Hicks, “The Contractual Nature of Real Property Leases” (1972) 24 Baylor L. Rev. 443; John A. Humbach, “The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants” (1983) 60 Wash. U. L. Q. 1213; Hiram H. Lesar, “The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?” (1961) 9 Kan. L. Rev. 367; William M. McGovern, “The Historical Conception of a Lease for Years” (1976) 23 U.C.L.A. L. Rev. 501; Stephen A. Siegel, “Is the Modern Lease a Contract or a Conveyance?—A Historical Inquiry” (1975) 52 J. Urban L. 649.

11. Holdsworth, *History*, *ibid.*, vol. 7 at 239–40.

12. Ziff, *supra* note 8 at 267.

ity of contemporary commercial leases in British Columbia fall into this category. So, when this consultation paper refers to a “lease,” it almost invariably is referring to a “lease for a fixed term.” The other three types of leases have historically risen and fallen in popularity; they are occasionally touched on in this consultation paper when the CTA makes explicit reference to a lease of one of these three types.¹³

In English law, the lease for a fixed term can be traced back to the late twelfth century.¹⁴ At this point in England’s history, the feudal system still prevailed. Feudalism had two distinct, but intertwined, aspects. These aspects are described in the following passage from a standard legal history textbook:¹⁵

“Feudalism” is a vague term. But I think that, in general terms, it can be described as comprising two things—a system of land tenure and a system of government. Land is held by tenants of lords; the relationship of lord over tenant gives the lord a certain jurisdiction over the tenant, and imposes upon the tenant the duty of attending upon the lord’s court; and thus governmental powers and duties are split up among the holders of the land.

Even though this passage uses words like “tenant” that are familiar from contemporary leasing, it is important to grasp that leases arose outside the feudal system.¹⁶ As a result, their early development was outside the mainstream of land law. Leases were infrequently used at this time in a manner familiar to contemporary readers as a device for one person to grant exclusive possession of a plot of land, called a *leased premises* (= “send or set before”—from the “opening part of a deed or conveyance, which gives the name of the grantor, the grantee, and details about the grant”),¹⁷ to

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13. In simple terms, the other types of leases may be described as follows: (1) a lease for life or lives is a lease in which the term is defined by reference to the life of a person or the lives of several people; (2) a lease at will is a lease with no defined term, continuing as long as the landlord or tenant want it to and a lease at sufferance is a lease in which the tenant remains in possession without the landlord’s permission (this situation often occurs when the tenant *overholds* or stays in possession after the conclusion of one of the other types of leases); and (3) a lease from year to year or a periodic lease is a lease with a term that continues for some defined period (such as year to year or month to month), until either the landlord or tenant gives the required notice of termination. See Holdsworth, *History*, *supra* note 10, vol. 7 at 240–42; Ziff, *ibid.* at 267–68.
14. See McGovern, *supra* note 10 at 501 (“... leases for years first appeared in English law at the end of the twelfth century ...”).
15. Holdsworth, *Land Law*, *supra* note 10 at 4.
16. See Megarry & Wade, *supra* note 10 at § 3-015 (“[Leases] always remained outside the feudal system of land-holding. ...”).
17. *The New Shorter Oxford English Dictionary*, 4th ed., s.v. “premise.”
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another person.¹⁸ But it was far more common for leases to be used as a sort of security device.¹⁹ A person would borrow money from another person and, as security for the loan, the borrower would grant a lease over a leased premises to the lender. The lease would have a fixed term. During this term, the lender would be entitled to the proceeds from the premises. In this way, the principal of the loan would be repaid and the lender would receive any additional proceeds as a form of interest.²⁰ This arrangement made sound business sense at a time when European trade and banking were in their infancy and agriculture and the products of land supplied the main form of wealth in society—and it also allowed the parties to sidestep strict laws against usury, which sharply curtailed the ability of a lender to charge interest on a loan.

As a result of this origin, the lease developed a flexible, economic character that it has retained to the present day. Some commentators have referred to this character as being “contractual” in nature. (It is necessary to be careful using that word to describe a relationship that developed before the modern law of contract existed.)²¹ It adds to the complexity of leases that they did not remain simply “contracts.”

C. Protection of the Tenant’s Right to Occupy

One of the main features of a lease is that a tenant is not required to share the leased premises with any other person. This quality is called *exclusive possession*, and it helps to distinguish leases from other legal arrangements, such as licences.

Originally, the tenant’s right to possession of the leased premises was comparatively unprotected. A tenant could be ejected from the leased premises by the landlord or a third party and had no recourse in the courts to regain possession. The reason for this turns on a fundamental division in the law of property between real property

18. See Pollock & Maitland, *supra* note 10, vol. 2 at 111 (“Still we can see enough both in England and on the continent to say that during the dark age leases for determinate periods were not very common. They seem to imply a pecuniary speculation, a computation of gain and loss, which is impossible where there is little commerce.”).

19. See Lesar, *supra* note 10 at 370 (“Prior to the thirteenth century leases for fixed terms, although they existed, were rare and more frequently used as devices to evade the laws against usury than for purposes of husbandry.” [footnote omitted]).

20. See Lesar, *ibid.* (“*L* would make a lease to *T* for years for a lump-sum consideration and *T* would expect to recoup the consideration and profit from the use of the land during the term.”)

21. See Humbach, *supra* note 10 at 1221 (“The modern law of contract—with the routine enforcement of promises that are intended to be binding—simply did not exist when, in the late fifteenth century, the need arose to reformulate the interpretative conceptualization of legal rights and duties existing between landlords and tenants.” [footnote omitted]).

and personal property. Real property is so named because in litigation a successful party could obtain the *res* (= “thing”) itself. In litigation over personal property, the successful party could only obtain compensation for the loss of the thing. Interests in land tend to fall into the real property category, with one noteworthy exception: the lease.

Legal historians have proposed a number of theories to explain why leases were classified as personal property. Some have speculated that it was a holdover from Roman law,²² others have claimed that it was a visceral reaction to the use of leases as a device to aid usury,²³ and still others have argued that it was a deliberate policy choice that was driven by concerns about exposing people to double liability.²⁴ It is difficult to establish which one of these explanations is correct and it is possible that all three may have contributed to the way the law treated leases.

But the law did not rest on this conclusion. As more and more people began to use leases to create agricultural tenancies and as leases were eclipsed by mortgages as security devices for loans, it became increasingly unacceptable to leave tenants unprotected against dispossession. The law ended up providing its protection not by reclassifying leases as real property, but rather by first extending existing court actions to cover leases and then by creating a special action for leases. This development took place incrementally over the course of 200 years. It can be said to have crystallized in 1499, with a decision in an important case.²⁵

So, by the sixteenth century, leases had come to be recognized as having the characteristics of an *estate*.²⁶ An estate is the quantum or amount of a person’s interest in land, measured in time. (This is a feudal idea; the word “estate” derives from “status.”) As a result of this development, landlords and tenants are in two legal relationships with one another, which are called *privity of contract* (the contractual relationship) and *privity of estate* (the property law relationship). There is a good deal of

22. See Pollock & Maitland, *supra* note 10 at 115 (?).

23. See Grimes, *supra* note 10 at 192 (“... the lowered status of the term for years was due to its use as a security device to avoid the church’s stigma on usury”).

24. See McGovern, *supra* note 10 at 501 (“The initial reluctance to allow lessees to sue third parties was due to fear that if both the lessee and lessor could sue, the third party would be exposed to double liability.”).

25. See Holdsworth, *History*, *supra* note 10, vol. 3 at 216.

26. See Megarry & Wade, *supra* note 10 at § 3-009 (“When [leases] became fully protected by the law of property they became estates, but it was too late for them to be classified with the others.” [footnote omitted]).

overlap between these two relationships, but there is also a fundamental distinction between them:²⁷

Unlike the rights and duties that make up the contractual relationship, arising out of the parties' privity of contract, the rights and duties arising out of privity of estate are more in the nature of tort. That is to say, they are law-imposed rights and duties, attaching to persons having the legal status of landlord and tenant. Unlike contractual rights and duties, which are essentially voluntary or consensually created and assumed, the specific rights and duties of privity of estate arise and are enforced whether or not they are voluntarily created or assumed.

This privity of estate is created by a *conveyance*, which is a document used to transfer an interest in land. The technical name for a lease-as-conveyance is a *demise* (= "dismiss"). Leases are now considered as hybrids of contract and conveyance.

The area where this development had the greatest impact is on the tenant's security of possession of the leased premises. The notion that the tenant should be able to occupy the leased premises without substantial interference has come to be known as *quiet enjoyment*. This expression continues to be used as a term of art in the law of leasing, even though it seldom fails to confuse people without legal training. Quiet enjoyment has little to nothing to do with noise. (In fact, one of the leading cases on the topic illustrates how difficult it would be to breach the tenant's right to quiet enjoyment by noise alone.)²⁸ The word "enjoyment" does not refer to the use the tenant intends to make of the leased premises.²⁹ Instead, quiet enjoyment is concerned with protecting the tenant's legal right to exclusive possession of the leased premises during the term of the lease.³⁰

D. No Guarantees as to Use of the Property

Although the law did evolve to protect the tenant's right to occupy the leased premises, it did not extend this concept to protect the tenant's intended use of the leased premises. The obligation fell solely on the tenant to make certain that the leased

27. Humbach, *supra* note 10 at 1218–19 [footnote omitted].

28. See *Southwark London Borough Council v. Mills*, [2001] 1 A.C. 1 (U.K.H.L.).

29. See *Kenny v. Preen*, [1963] 1 Q.B. 499 at 511 (Eng. C.A.), Pearson L.J. ("I think the word 'enjoy' used in this connection is a translation of the Latin word 'frui' and refers to the exercise and use of the right and having the full benefit of it, rather than deriving pleasure from it.").

30. See, below, Part Two, section V.B.1 for further discussion of quiet enjoyment and the committee's tentative recommendation for reform.

premises were fit for the intended use. Once again, the rationale for this rule is best comprehended in its historical context, as the following passage demonstrates:³¹

Leases, at least long term, were largely agricultural. The parties were on an equal bargaining level and conditions were visible. Actual tillers of the soil were either on a sharecropper basis of little political force or were agricultural laborers whose deplorable economic conditions were notorious but accepted. The dissatisfied lessee could always default. Thus the law saw no necessity of placing a protective cloak around the lessee either for economic or social reasons.

This concept is similar to the familiar idea from real estate law of *caveat emptor*—“buyer beware.”

E. Financial Compensation for the Landlord

The landlord is, of course, entitled to financial compensation from the tenant for the occupation and use of the leased premises. This compensation is called *rent*. Rent has its origins in this early period of the development of the lease, when land was primarily used for agriculture. Rent was seen as a property interest in the produce that issued out of the land.³² (The word “rent” has its origins in the concept “to render.”) As such, rent was not due until the end of the term of the lease.

Rent is not an essential element of a lease. It is possible for the landlord and tenant to agree on a rent-free lease. This, in effect, would result in the landlord making a gift of the lease. It is rare for this to occur.

F. Enforcement of the Landlord’s Right to Compensation

The landlord has a special remedy for the recovery of rent that has fallen into *ar-rears* (= “behind, overdue”). The name of this remedy is *distress for rent* (the verb of which is *to distrain*). Distress for rent is a species of the general remedy of distress. Distress involves the seizure of a debtor’s goods and chattels in order to enforce

31. Grimes, *supra* note 10 at 193.

32. See Humbach, *supra* note 10 at 126 (“The tenant’s obligation to pay rent is more difficult to explain under the conveyance theory, but this obligation can likewise be interpreted to result from a purely ‘property’ interest in the land, in this case a property interest held by the landlord. Unlike the tenant’s possessory property interest, the landlord’s property interest in the rent is not possessory, but rather an ‘incorporeal’ interest in the land, similar to an easement or a profit à prendre. These interests are referred to as ‘incorporeal’ because they do not carry a right to possession. Rent is a kind of incorporeal interest consisting of the right to a return rendered out of the benefits of possession, that is, out of the benefits which a possessor of land is deemed to get purely by virtue of possession.” [footnotes omitted]).

payment of a debt. (The word “distress” comes to us from a Latin word that literally means “to stretch apart.”)

For commercial leases, the key points about distress for rent are few in number. Distress for rent is a self-help remedy—that is, the landlord is not required to apply to court to use the remedy. The remedy may be used when rent falls into arrears, but not before. Originally, distress for rent only allowed the landlord to seize the tenant’s goods and chattels at the leased premises and hold them as security for payment of the outstanding rent. (Distress contemplates an ongoing landlord–tenant relationship; it cannot be used if the landlord has terminated the lease.) Subsequent legislation granted landlords a power to sell the seized property and apply the proceeds of that sale to the arrears of rent. A large number of statutes were enacted, beginning in the thirteenth century, to modify and qualify some of the basic rules of distress for rent and to control the procedure under which the remedy is exercised.³³

G. The Landlord’s Right to the Leased Premises

The landlord retains a residual property interest in the leased premises, which is called a *reversion* (= “revert, return”). The basic concept of a reversion is that the landlord will, at some point in the future, regain possession of the leased premises. For example, if the lease has a fixed term, then the landlord will be entitled to possession of the leased premises at the end of that term.

One consequence of the landlord’s continuing interest in the leased premises is that the tenant must not commit *waste*. In the context of leases, the word “waste” has a technical meaning that is not limited to everyday notions such as damaging or degrading the leased premises. Traditionally, waste embraced both “permissive waste” (which included acts and omissions that did harm the leased premises) and “meliorative waste” (which included any changes to the leased premises by the tenant—even changes that had the effect of raising the value of the leased premises).³⁴ This strict view persisted for hundreds of years, until the late seventeenth century.³⁵ After that time, the law of waste developed and grew immeasurably more complex.

33. See, below, Part Two, section IX for further discussion of distress for rent.

34. See Holdsworth, *Land Law*, *supra* note 10 at 241.

35. See *ibid.*

H. Summary

The basic legal rules governing leasing developed from the thirteenth through the fifteenth century. They have been summarized as follows:³⁶

The rules of law as developed by the English courts for leases were simple, consistent with the fact that after the development of the common law mortgage in the fifteenth century most leases in the formative period were of agricultural land. The lessee is the owner of a possessory estate and has all the rights which accompany ownership of such an interest. He may make any use of the premises not illegal, and not substantially injuring the reversion—that is, he has a duty not to commit waste. He may use the premises or not, as he sees fit, but there is no implied covenant that the premises are fit for his intended use. The lessee has a duty, growing out of his duty not to commit waste, to make minor repairs—to keep the premises windtight and watertight, preserving the property in substantially the same condition as at the commencement of the term, ordinary wear and tear excepted. His rights can be transferred. Rent is due at the end of the rent-paying period, and the lessor can enforce payment by the remedy of distress. Where no term is stated, the parties presumably intend a periodic tenancy, with the period determined by the way rent is paid but continuing until one of them gives notice of termination; and the tenant who holds over after a definite term with consent of the landlord likewise becomes a periodic tenant.

Even though these rules remain an important part of the legal framework for leases, there have of course been other developments over the many years since they first emerged.

III. BRITISH COLUMBIA LEGISLATION RELATING TO LEASING

A. Introduction: Building on the Basic Rules by Contract and by Statute

These simple original rules from the period between the foundation of leases to their incorporation into the law of property do not cover the whole of the law of commercial leasing. Rather, these property law rules are its base, upon which a massive superstructure has been erected.

An important part of this superstructure comes from contractual agreements between landlords and tenants. Since leases are contracts in addition to being conveyances, the parties to a lease may agree to include any provisions (usually called *covenants*) within the limits of what the law allows for contracts.³⁷ Some of these contractual agreements may effectively duplicate the basic lease rules. For example,

36. Hiram H. Lesar, “Landlord and Tenant Reform” (1960) 35 N.Y.U. L. Rev. 1279 at 1280 [footnotes omitted].

37. Contracts will not be enforced in cases of mistake, misrepresentation, unconscionability, or illegality.

it would be very unusual for a contemporary landlord to rely on the property right to rent that may issue out of the leased premises. A landlord would instead insist on having its right to rent spelled out in the lease. In other cases, agreements may be used to modify the basic rules. For example, a lease may contain express provisions relating to repairs that alter some of the basic common law rules. Finally, it is becoming increasingly common for landlords and tenants to include all sorts of provisions in their leases that address subjects that are completely untouched by the basic rules, such as environmental issues, insurance, insolvency, and the like.³⁸

The other source contributing to this superstructure is legislation. Statutes affecting aspects of leasing began to appear almost as soon as the lease made its first appearance. The Law Reform Commission of British Columbia has noted that the first English statute concerning leasing was enacted in 1266.³⁹ A vast number of statutes touching on discrete aspects of leasing were enacted from this time forward. These statutes were part of British Columbia's legal inheritance from England when this province was established as a colony in the mid nineteenth century. The focus of this consultation paper is on the need to reform this body of legislative law.

Finally, before considering the statute law in detail, it should be noted that the law articulated by judges in court cases has always played a leading role in defining commercial leases. The basic leasing principles were originally all set out in cases. After this burst of energy, the courts spent much of their time in this area filling in gaps by interpreting statutes and covenants in leases. But, much more recently, the courts in Canada have shown a willingness to get involved in the reconsideration and reform of the basic leasing rules.⁴⁰

B. The Commercial Tenancy Act

The main source of legislative rules governing commercial leases in British Columbia is the CTA.⁴¹ The CTA first appeared in 1897, in somewhat unusual circumstances. Usually, legislation is enacted to address perceived failings in the existing law or to

38. See, e.g., Humbach, *supra* note 10 at 1223, n. 44 ("Commercial leases, sometimes running to several dozen pages, demonstrate how far parties may seek by contract to secure advantages not accorded to them as incidents of privity of estate alone."), 1262 ("By contractual agreement, the basic landlord-tenant relation created in a conveyance can be shaped and molded to fit the requirements of virtually any imaginable exchange relation involving a temporary interest in real estate." [footnote omitted]).

39. LRCBC Report, *supra* note 6 at 2 (citing *Statute De Distractione Sacaccarii* (U.K.), 51 Hen. 3, c. 4).

40. See, esp., *Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.*, [1971] S.C.R. 562, 17 D.L.R. (3d) 710 [*Highway Properties* cited to S.C.R.].

41. *Supra* note 2.

respond to new or emerging social or economic conditions. A bill is prepared, and it is scrutinized by legislature in three separate readings. The CTA was not the result of this sort of process.

The CTA came into force as part of a comprehensive revision of British Columbia statutes in the late nineteenth century. This revision was much broader in scope than the revisions that have taken place more recently.⁴² Recent revisions have focussed on consolidating amendments to statutes, renumbering sections, and making small, technical changes in language, which are carried out by the Ministry of Attorney General's legal staff. In contrast, this earlier revision involved the composition of a committee of eminent judges who were authorized to make the same changes found in recent revisions as well as to incorporate applicable English statutes, to recommend substantive changes "... so as to give better effect to the spirit and meaning of the law, and to frame and draw new provisions and suggestions for the improvement of the law."⁴³

The first of this list of additional duties was the animating force behind the CTA. When British Columbia was organized as a colony, it adopted the law of England as it stood on 19 November 1858 as its law. This was a common expedient for English colonies. It provided the new colony with a comprehensive legal framework without the need to take the substantial amount of time to enact each law individually. The difficulty with this approach is that it left the law in a somewhat inaccessible state. The revision attempted to correct this problem by gathering together relevant English legislation provisions and placing them into British Columbia statutes.

This was the origin of the original CTA,⁴⁴ which in 1897 was given the title of the *Landlord and Tenant Act*.⁴⁵ The 1897 Act was included in the report of the commissioners, which was presented to the province's Lieutenant Governor. The 1897 Act was not considered as a separate bill by the Legislature. Instead, the 1897 Act came

42. The two most recent statute revisions took place in 1979 and 1996. See *Statute Revision Act*, R.S.B.C. 1996, c. 440.

43. *Revised Statutes Act, 1895*, S.B.C. 1895, c. 50, s. 3.

44. The CTA was (and remains) primarily a collection of five English statutes: *An act for the amendment of the law, and the better advancement of justice* (U.K.), 4 Anne, c. 16, ss. 9–10 (1705); *An act for the better security of rents, and to prevent frauds committed by tenants* (U.K.), 8 Anne, c. 14 (1709); *An act for the more effectual preventing frauds committed by tenants, and for the more easy recovery of rents, and renewal of leases* (U.K.), 4 Geo. 2, c. 28 (1731); *An act for the more effectual securing of the payment of rents, and preventing frauds by tenants* (U.K.), 11 Geo. 2, c. 19 (1738); *An Act to amend an Act of the Eleventh Year of King George the Second, respecting the Apportionment of Rents, Annuities, and other periodical Payments* (U.K.), 4 & 5 Will. 4, c. 22 (1834).

45. R.S.B.C. 1897, c. 110 [1897 Act].

into force when the whole of the Revised Statutes were brought into force by the Lieutenant Governor's proclamation in early 1898.⁴⁶ Shortly thereafter, the Legislature confirmed that the entire 1897 Revised Statutes had the force of law.⁴⁷ The reason for this confirmation was concern about a small group of statutes (which did not include the CTA) that contained changes to the law.⁴⁸

The CTA has remained largely static since 1897. To a great degree, the current CTA is the same as the 1897 Act, minus a set of provisions that have been hived off into a different statute and plus a couple of provisions enacted in the twentieth century.

C. The Residential Tenancy Act

For most of the twentieth century, the CTA was known as the *Landlord and Tenant Act* and it applied to all leases in British Columbia. By the 1970s, the inadequacy of this legislation for residential leases (that is, leases applicable to living accommodations for individuals, as opposed to leases for business purposes) created pressure for reform.⁴⁹ The Legislature responded to this pressure in two stages. First, in 1970, a new Part was added to the legislation to deal with residential leases.⁵⁰ Second, in 1974, this Part was split off to form what is now called the *Residential Tenancy Act*.⁵¹

There are three points about the RTA to bear in mind for the purposes of this project. First, this project respects the distinction that has grown up in British Columbia legislation between commercial and residential leases by focussing strictly on commercial leases. This consultation paper does not contain any tentative recommendations for reform of the RTA. Second, the RTA does not completely cover the field of residential leases. Some types of leases that could objectively be classified as "residential" have been deliberately excluded from the scope of the RTA.⁵² Of course,

46. See *Emerald Christmas Tree Co. v. Boel & Sons Enterprises Ltd.* (1979), 105 D.L.R. (3d) 75, 13 B.C.L.R. 122 at 128 (C.A.), Lambert J.A. (for the court) [*Emerald Christmas Tree* cited to B.C.L.R.].

47. *Statutes Revision Act, 1898*, S.B.C. 1898, c. 40.

48. See *Statutes Revision Act, 1898*, *ibid.*, preamble.

49. See Law Reform Commission of British Columbia, *Report on Landlord and Tenant Relationships: Residential Tenancies* (LRC 13) (Vancouver: The Commission, 1973).

50. See *Landlord and Tenant (Amendment) Act*, S.B.C. 1970, c. 18.

51. *Landlord and Tenant Act*, S.B.C. 1974, c. 45, now *Residential Tenancy Act*, S.B.C. 2002, c. 78 [RTA].

52. RTA, *ibid.*, s. 4 ("This Act does not apply to (a) living accommodation rented by a not for profit housing cooperative to a member of the cooperative, (b) living accommodation owned or operated by an educational institution and provided by that institution to its students or employees, (c) living accommodation in which the tenant shares bathroom or kitchen facilities with the

most of these exclusions could be better classified as licences, but some of them may be covered by the CTA and may be affected by reforms to the CTA. Third, the RTA is a modern statute that contains a comprehensive and sophisticated approach to many of the leasing issues that should be covered by a reformed CTA. As such it could be considered a leading model for reform of the CTA. But on this score great caution must be exercised. There are some enduring and fundamental differences between the residential leasing sector and the commercial leasing sector. As a result of these differences, provisions developed for residential tenancies are often inappropriate when applied to commercial tenancies. The committee has tended not to look to the RTA as a direct inspiration for its tentative recommendations for reform; rather, the RTA has occasionally been drawn upon to support proposals developed in the commercial leasing context.

D. The Rent Distress Act

Despite its title, the *Rent Distress Act*⁵³ does not actually contain a statutory restatement of a landlord's right to distrain for arrears of rent. Instead, the RDA is primarily concerned with managing the procedures used to carry out distress for rent and providing remedies that were unavailable under the common law.

The RDA is not the only source of this type of legislation. A few provisions touching on certain aspects of distress for rent also appear in the CTA. This anomaly is explained by the RDA's history. At one time, the CTA and the RDA formed one statute. Most of the provisions in the RDA can be traced back to the 1897 Act. In 1911, most of the sections of the 1897 Act that dealt with distress for rent were removed from the CTA to form the RDA.⁵⁴ For reasons that are not clear, a handful of sections that deal with aspects of distress for rent were left in the CTA. Like the CTA, the RDA has

owner of that accommodation, (d) living accommodation included with premises that (i) are primarily occupied for business purposes, and (ii) rented under a single agreement, (e) living accommodation occupied as vacation or travel accommodation, (f) living accommodation provided for emergency shelter or transitional housing, (g) living accommodation (i) in a community care facility under the *Community Care and Assisted Living Act*, (ii) in a continuing care facility under the *Continuing Care Act*, (iii) in a public or private hospital under the *Hospital Act*, (iv) if designated under the *Mental Health Act*, in a Provincial mental health facility, an observation unit or a psychiatric unit, (v) in a housing based health facility that provides hospitality support services and personal health care, or (vi) that is made available in the course of providing rehabilitative or therapeutic treatment or services, (h) living accommodation in a correctional institution, (i) living accommodation rented under a tenancy agreement that has a term longer than 20 years, (j) tenancy agreements to which the *Manufactured Home Park Tenancy Act* applies, or (k) prescribed tenancy agreements, rental units or residential property.”).

53. R.S.B.C. 1996, c. 403 [RDA].

54. See *Distress Act*, R.S.B.C. 1911, c. 65.

only been sparingly amended since its first appearance in the law of British Columbia.

E. Other Statutes

While the bulk of legislative provisions related to commercial leasing are in the CTA, and a significant portion of the law relating to distress for rent is found in the RDA, there are still a few provisions that have a bearing on commercial leasing which are located in statutes that are primarily concerned with other subjects. For the purposes of this consultation paper, the most relevant of these statutes are the *Land Transfer Form Act*,⁵⁵ the *Property Law Act*,⁵⁶ and the *Law and Equity Act*.⁵⁷

The LTFA was intended to streamline certain real estate transactions. By the nineteenth century, the language used in legal documents that involved land or an interest in land had become incredibly verbose. The LTFA sets out short forms of these lengthy clauses. These short forms are found in tables contained in schedules to the Act. The LTFA then declares that use of the short form is equivalent to use of the long form, if the parties decide to opt into the scheme of the Act. An intention to opt in is expressed by declaring in the document that it is made “pursuant to the LTFA,” or “pursuant to the *Short Form of Leases Act*” or “pursuant to the *Leaseholds Act*” (these are the former names of the legislation). Nowadays, the LTFA is not often relied on in practice. Lawyers who specialize in commercial leasing often find that its terms are ill suited to modern leases. The general public tends to be unaware of its existence. But, that said, references to the LTFA are still found in many stationers’ forms, which are often used by small landlords and some leasing agents. So, the LTFA does retain some relevance for the commercial leasing sector.

The PLA contains a series of substantive provisions relating to land and interests in land. Three of its sections touch on leases. These sections are of a more recent vintage than most of the CTA and they concern substantive legal issues. They will be discussed later in this consultation paper.

The LEA is a miscellany that is made up of a highly diverse range of provisions. It contains two sets of sections that have a bearing on leases in the course of articulating general rules for a broad range of instruments.

55. R.S.B.C. 1996, c. 252 [LTFA].

56. R.S.B.C. 1996, c. 377 [PLA].

57. R.S.B.C. 1996, c. 253 [LEA].

F. Summary

Statutes provide a significant part of the law governing commercial leasing in British Columbia. The reasons why the time is ripe for reform of this body of law are discussed in the next section of this consultation paper.

IV. THE CASE FOR REFORM

A. Introduction

This consultation paper proposes that the CTA⁵⁸ be repealed and replaced with a new statute governing commercial leases in this province. The specific details of this proposal are spelled out in Part Two. In general terms, there are two primary reasons for reform of the CTA. First, the CTA is out of step with contemporary leasing issues and practices. Second, there are issues in the contemporary commercial leasing sector that should be addressed through new legislation.

B. The Commercial Tenancy Act is Out of Date

It is immediately apparent to anyone who reads the CTA that the statute is badly out of date. It does not take much searching to find provisions that are completely impenetrable to the contemporary reader. For example, consider the following section:

Method of recovering rentseck

- 7 Every person shall and may have the like remedy by distress and by impounding and selling the same, in cases of rentseck, rents of assize, and chief rents, as in case of rents reserved on lease, any law or usage to the contrary notwithstanding.

Unlike most British Columbia statutes, the CTA has not been afforded the stylistic revisions that are a part of periodic revisions of the statutes of this province. As a result, this section retains the language that was used in the 1897 Act. (In fact, this section does not differ much from its seventeenth-century English predecessor.) Even though this section is short in comparison with other sections in the CTA, it contains more than its share of redundancies (“shall and may have”), obscure parallels (“any law or usage”), and overblown words (“notwithstanding”), all of which are avoided in modern legal drafting.

But the concerns with this section—and, by extension, with the whole CTA—go much deeper than drafting. Section 7 could be redrafted according to modern principles and it would still be baffling to contemporary readers. The key terms in this

58. *Supra* note 2.

section (“rentseck, rents of assize, and chief rents”) all refer to types of leases that were in use hundreds of years ago in England but that are not encountered in contemporary British Columbia. The distinguishing characteristic of these leases was that they prevented or made it practically very difficult for a landlord to employ distress for rent to enforce the tenant’s obligation to pay arrears of rent. The effect of this section is to override this distinguishing feature and make it possible for a landlord to use distress for rent in the same manner as under any other commercial lease.

So, in addition to being linguistically antiquated, the CTA is also conceptually more in tune with the needs of the seventeenth century than the twenty-first century. Further, much of the English legislation that makes up the CTA was passed to respond, in an ad hoc way, to practical needs of that time. The statute does not address commercial leasing in a comprehensive and systematic way, and the practical rationale for many of its provisions has disappeared over time.

C. Modern Commercial Tenancy Legislation is Needed

The first reason for reform leads naturally into the second reason for reform. Maintaining the CTA in a state of obsolescence squanders an important opportunity to benefit the commercial leasing sector. The legal issues at play in this sector are often complex. Sophisticated parties are able to manage this complexity by creating extremely detailed and comprehensive leases. But not all participants in the commercial leasing sector have the sophistication or the resources to follow this path.

The main statute in this area of the law should provide the public with a clear and consistent legal framework for commercial leasing, which is also flexible enough to allow sophisticated parties to craft their own solutions to many of the legal issues that will confront them over the course of the landlord–tenant relationship. Reforming the CTA also affords the opportunity to revisit the statute’s aging and cumbersome dispute resolution procedures.

D. Models for Reform

Three Canadian law reform agencies have published reports on commercial leasing. The most significant for this consultation paper is the 1989 report of the Law Reform Commission of British Columbia entitled *Report on the Commercial Tenancy Act*.⁵⁹ The LRCBC Report has usefully provided analysis of the major issues in the commercial leasing sector and the deficiencies of the CTA. It also contained draft leg-

59. *Supra* note 6.

islation for a new CTA. A bill based on this draft legislation was ultimately introduced in the Legislature, but it did not proceed beyond first reading.⁶⁰

The Law Reform Commission of British Columbia has also published a report on distress for rent.⁶¹ This report pursued that subject in detail and made proposals for reform of distress for rent generally and the RDA specifically.

Outside British Columbia, two other Canadian law reform agencies have done work on commercial tenancies. The Ontario Law Reform Commission has published an influential report on landlord-tenant law generally.⁶² The OLRC Report did not contain draft legislation, but it did set out a very thorough discussion of the major issues in landlord-tenant law. The Manitoba Law Reform Commission has issued a series of reports on discrete commercial leasing issues.⁶³

Further afield, the Law Reform Commission of Ireland,⁶⁴ the New Zealand Law Commission,⁶⁵ and the Law Commission of England and Wales⁶⁶ have all produced reports on aspects of commercial leasing. Given the differences between commercial leasing in Canada and these other countries, these reports must be approached with some caution. In most cases, the proposals of these other agencies should not be directly implemented in British Columbia. But these proposals may serve as helpful starting points for reforms crafted for British Columbia.

60. Bill 10, *Commercial Tenancy Act*, 2d Sess., 35th Parl., British Columbia, 1993.

61. *Report on Distress for Rent* (LRC 53) (Vancouver: The Commission, 1981).

62. *Report on Landlord and Tenant Law* (Toronto: The Commission, 1976) [OLRC Report].

63. *Report on Distress for Rent in Commercial Tenancies* (MLRC Rep. No. 81) (Winnipeg: The Commission, 1994); *Report on Covenants in Commercial Tenancies* (MLRC Rep. No. 86) (Winnipeg: The Commission, 1995); *Report on Fundamental Breach and Frustration in Commercial Tenancies* (MLRC Rep. No. 92) (Winnipeg: The Commission, 1996); *Report on Commercial Tenancies: Miscellaneous Issues* (MLRC Rep. No. 95) (Winnipeg: The Commission, 1996).

64. *Report on the Law of Landlord and Tenant* (LRC 85-2007) (Dublin: The Commission, 2007). See also *Consultation Paper on the General Law of Landlord and Tenant* (LRC CP 28-2003) (Dublin: The Commission, 2003); *Consultation Paper on Business Tenancies* (LRC CP 21-2003) (Dublin: The Commission, 2003).

65. *Report on a New Property Law Act* (NZLC Rep. No. 29) (Wellington: The Commission, 1994).

66. *Interim Report on Distress for Rent* (London: The Commission, 1966); *Report on Distress for Rent* (Law Com. No. 194) (London: The Commission, 1991).

E. Summary

One of the stated purposes of the BCLI is to propose reforms that have the effect of modernizing and simplifying the law. The CTA is ripe for this type of reform.

V. CONCLUSION TO PART ONE

The committee's tentative recommendations for reform are set out and discussed in detail in Part Two of this consultation paper. We encourage responses to them from all interested persons.

PART TWO—TENTATIVE RECOMMENDATIONS

I. INTRODUCTION

The tentative recommendations for reform contained in this Part are, for the most part, addressed to specific, discrete policy issues. The reason for this focus on detail is to ensure public comment on policy choices that will inform the creation of draft legislation for the final report for this project. That said, it is important not to overlook the basic question of whether new legislation is needed. This Part begins by asking for comment on that basic question.

II. A NEW COMMERCIAL TENANCY ACT

It is unlikely that anyone would defend the CTA on its merits, but an argument could be made that the best reform would be simply to repeal the CTA and replace it with nothing. This approach would have the merit of being simpler than attempting to forge agreement on what a new Act should contain. It would also be easier to implement. The doing away with obsolete provisions in the CTA would have the benefit of modernizing that law to a degree. And, finally, participants in the commercial leasing sector could deal with most remaining relevant issues by including appropriate provisions in their leases.

A response to this argument may be found, in part, in the discussion of the reasons for reform of the CTA in Part One.⁶⁷ Not all participants in the commercial leasing sector can be counted on to draft sophisticated leases. Leaving the CTA as is, or repealing it and replacing it with nothing, would not respond to their concerns, or to other issues in the commercial leasing sector. But there is another point to consider.

Most of the provisions in the CTA were enacted to correct defects in the common law. So, simply repealing the CTA runs the risk of swapping an old set of legislative rules for an even older set of common law rules. As a matter of first principle, the common law rule regarding the effect of the repeal of a statute is “... when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed.”⁶⁸ This common law rule has been modified by statute to an extent, but the relevant statutory modification in British Columbia only extends to the revival of enactments and does not address the revival of common

67. See, above, Part One, section IV.

68. *Surtees v. Ellison* (1829), 9 B. & C. 750, 109 E.R. 278 at 279 (K.B.), Lord Tenterden C.J.

law rules.⁶⁹ *Sullivan and Driedger*, the leading text on statutory interpretation in Canada, describes the effect of a repeal of a statute as follows:⁷⁰

When a repeal takes effect, the repealed legislation ceases to be law and ceases to be binding or to produce legal effects. This means that conduct that was formerly prohibited is now lawful. It also means that everything dependent on the repealed legislation for its existence ceases to exist or to produce effects.

Another textbook on statutory interpretation is even more explicit: "... repeal at common law entails the following consequences: ... iv) Legal rules, previously repealed by the statute are revived, because the statute is deemed to have never existed."⁷¹

If outdated common law rules could produce absurd results, then the likelihood is that the courts would not enforce them. But there would still be a period of uncertainty, before cases made their way into court. It would be desirable to avoid such uncertainty.

The committee tentatively recommends that:

1. The Commercial Tenancy Act should be repealed and replaced with a new Commercial Tenancy Act.

III. FORMAL AND REGISTRATION REQUIREMENTS FOR THE CREATION OF A LEASE

A. Introduction

At common law, there were no formal requirements that had to be met for the creation of a lease.⁷² A few requirements have been imposed by statute, but they are not particularly demanding. This section examines the main formal requirement in British Columbia, which provides that a lease with a term of greater than three years must be in writing. It also notes how leases are treated for registration purposes under the land title system.

69. See *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 35 (1) (a) ("If all or part of an enactment is repealed, the repeal does not revive an enactment or thing not in force or existing immediately before the time when the repeal takes place").

70. Ruth Sullivan, ed., *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, ON: Butterworths, 2002) at 527.

71. Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Toronto: Carswell, 2000) at 101.

72. See Ziff, *supra* note 8 at 269 ("The common law does not establish formal requirements for the creation of a lease.").

B. Requirement for Writing

The writing requirement first appeared in a seventeenth-century English statute called the *Statute of Frauds*.⁷³ The common law provinces and territories of Canada acquired this statute as part of their colonial inheritance. A number of provinces have gone on to re-enact the *Statute of Frauds*⁷⁴ as provincial legislation. Other provinces and territories rely on the original English Act as received legislation.⁷⁵

British Columbia re-enacted the *Statute of Frauds* in 1897.⁷⁶ Substantial revisions were made to the Act in 1958.⁷⁷ The current formal requirements, now found in the LEA, were enacted in 1985.⁷⁸ The heart of the current provision reads as follows:⁷⁹

A contract respecting land or a disposition of land is not enforceable unless

- (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
- (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
- (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

As this passage indicates, the writing requirement applies to more than leases, embracing all "contracts respecting land or dispositions of land." There is a special rule

73. (U.K.), 29 Car. 2, c. 3 (1677).

74. Ontario: *Statute of Frauds*, R.S.O. 1990, c. S.19; New Brunswick: *Statute of Frauds*, R.S.N.B. 1973, c. S-14; Nova Scotia: *Statute of Frauds*, R.S.N.S. 1989, c. 442.

75. Alberta, Saskatchewan, Yukon, Northwest Territories, and Nunavut make up this group. Prince Edward Island has re-enacted the *Statute of Frauds*, except for the provisions dealing with leases. See *Statute of Frauds*, R.S.P.E.I. 1988, c. S-6. This has been interpreted to mean that the English Act is in force in Prince Edward Island with respect to leases. See Christopher Bentley, John McNair, & Mavis Butkus, eds., *Williams & Rhodes Canadian Law of Landlord and Tenant*, looseleaf, 6th ed., vol. 1 (Toronto: Carswell, 1988) at § 2:1:1 [*Williams & Rhodes*].

76. *Statute of Frauds*, R.S.B.C. 1897, c. 85.

77. *Statute of Frauds*, 1958, S.B.C. 1958, c. 18.

78. *Law Reform Amendment Act*, 1985, S.B.C. 1985, c. 10, s. 7.

79. LEA, *supra* note 57, s. 59 (3).

that restricts the scope of the writing requirement for leases, which is the subject of the next section of this consultation paper.

The purpose of the *Statute of Frauds* when it was originally enacted in the seventeenth century was “[f]or Prevention of many fraudulent Practices, which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury.”⁸⁰ It is now widely conceded that the legislation no longer serves this original purpose.⁸¹ The latest revision of the legislation in British Columbia, which occurred in 1985 when the provisions were added to the LEA, was undertaken to implement a report of the Law Reform Commission of British Columbia.⁸² The reforms recommended by this report were aimed at the “more harsh and inequitable results” that had sprung up in applying the statute.⁸³ The BC Commission also discussed three broader, contemporary purposes that the legislation still serves: (1) ensuring that there is evidence of important transactions; (2) cautioning the parties that they are entering into a significant legal transaction; and (3) creating certainty about which relationships are legally enforceable and which are not.⁸⁴

The issue for reform is whether these policy reasons are still compelling. New legislation could remove the writing requirement for commercial leases. Manitoba has made this choice, repealing its *Statute of Frauds* in 1983.⁸⁵ In repealing the *Statute of Frauds* and thereby doing away with writing requirements for leases and other contracts respecting land or an interest in land, Manitoba was implementing the major recommendation contained in a report of the Manitoba Law Reform Commission.⁸⁶ The Manitoba Commission concluded that “[a]s a result of the

80. *Statute of Frauds*, *supra* note 73, preamble.

81. See Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (LRC 33) (Vancouver: The Commission, 1977) [LRCBC, *Report on the Statute of Frauds*] at 47 (“In 1677, when the statute was first enacted, essential evidence of oral transactions was often inadmissible in court, due to a principle of the law of evidence that any party who was ‘interested in the outcome of any litigation’ was incompetent to testify. This rule, of course, precluded the parties to an oral transaction from giving evidence of it. Moreover, highly questionable evidence was often admissible in litigation arising out of oral transactions because juries were still, in theory, ‘entitled to act on their own knowledge of the facts in dispute.’” [footnotes omitted]).

82. *Ibid.*

83. *Ibid.* at 5.

84. *Ibid.* at 50–53.

85. *An Act to Repeal the Statute of Frauds*, S.M. 1982–83–84, c. 34 (now R.S.M. 1987, c. F158, C.C.S.M. c. F158).

86. *Report on the Statute of Frauds* (MLRC Rep. No. 41) (Winnipeg: The Commission, 1980) [MLRC, *Report on the Statute of Frauds*]. In addition to this major recommendation, the Manitoba Law

sophisticated nature of our present commercial and judicial systems, the compelling circumstances that produced the statute 300 years ago are either non-existent or of no consequence today.”⁸⁷ Some commentators have also expressed concern over the potential for hardship, as non-compliance with the writing requirement may result in a lease being unenforceable.⁸⁸

It is true that the *Statute of Frauds* and its modern successor, section 59 of the LEA, have generated a vast amount of litigation, but a review of the leading cases decided over the past 20 years does not disclose any significant judgments that directly involve commercial leases. There are a number of cases dealing with when back and forth communications mature into a binding lease.⁸⁹ These cases indicate that the formalities required by section 59 are not particularly stringent. The writing requirement does promote certainty among the parties to a commercial lease, which may help to resolve or limit disputes down the road. There is some merit to the idea of treating all interests in land on the same footing when it comes to formal requirements, and not carving out a special position for commercial leases. Finally, concerns about the writing requirement causing hardships were addressed in the last round of amendments to the provision, which have dramatically reduced the possibility of the writing requirement operating in a manifestly unfair fashion.

The committee tentatively recommends that:

2. Commercial leases should continue to be subject to the requirement in section 59 of the Law and Equity Act that most leases be in writing.

Reform Commission also made several subsidiary recommendations, which would have re-imposed modified formalities of writing on commercial leases. These subsidiary recommendations were not implemented.

87. *Ibid.* at 1.

88. See Ziff, *supra* note 8 at 269 (“... the Statute itself ... can produce unfairness, because the absence of formal compliance can undermine a perfectly fair and otherwise unimpeachable contract”).

89. See, e.g., *Pacific Centre Ltd. v. Carrianna Chiu Chow Restaurant Ltd.*, [1990] B.C.J. No. 2310 (S.C.) (QL) (correspondence between parties and with strangers, executed form of lease found to constitute a lease); *Pitt Air Ltd. v. Pitt Meadows Airport Society*, 2006 BCSC 1230, [2006] B.C.J. No. 1870 (S.C.) (QL) (correspondence between parties and blank *pro forma* lease document found not to be a binding lease).

C. Scope of the Requirement for Writing

1. LEASES AND AGREEMENTS FOR LEASE WITH A TERM OF GREATER THAN THREE YEARS

Section 59 (2) of the LEA⁹⁰ states that the formalities of writing do not apply to (a) a contract to grant a lease of land for a term of 3 years or less or (b) a grant of a lease of land for a term of three years or less. This provision can be traced almost directly back to the seventeenth-century *Statute of Frauds*.⁹¹ There are two main differences between section 59 (2) and the original exception in the *Statute of Frauds*. First, section 59 (2) makes it clear that the three year period is measured from the start of the term of the lease,⁹² not from the date on which the agreement was made (as the older legislation implied). Second, section 59 (2) does not contain a condition relating to minimum amount of rent that must be charged in order to come within this exception.

The reasons for exempting certain leases and the significance of terms of three years or less appear to be lost to history.⁹³ The seemingly arbitrary nature of this exception has led some critics to question its current formulation. For instance, the OLRC Report recommended that the three year period be reduced to one year.⁹⁴ The rationale for reducing the length of the term was that it would promote certainty in commercial leasing.⁹⁵ British Columbia has moved even farther down this track for residential leases, requiring all of them that have been entered into after 1 January 2004 to be in writing.⁹⁶

On the other hand, this provision can be seen as reflecting the prevailing practices for short-term leasing arrangements. The Law Reform Commission of British Columbia concluded that the provision should be retained for two reasons. First, it "... reflects the accepted practice of entering into commonplace transactions with

90. *Supra* note 57.

91. *Supra* note 73, s. 2 ("Except nevertheless all Leases not exceeding the Term of three Years from the making thereof, whereupon the rent reserved to the Landlord, during such Term, shall amount unto two-thirds Parts at least of the full improved Value of the Thing demised.").

92. *But see Vern-View Investments Ltd. v. Ever-Krisp Wholesale Produce Ltd.*, [1989] B.C.J. No. 296, [1989] B.C.W.L.D. 1119 (S.C.) (QL) (section 59 not applying to oral agreement to assume remaining 33 1/2 months of a lease originally having a five year term).

93. *See* LRCBC, *Report on the Statute of Frauds*, *supra* note 81 at 58.

94. *Supra* note 62 at 14.

95. *Ibid.* The OLRC Report also noted that this recommendation would promote harmonization with "[m]ost American statutes."

96. RTA, *supra* note 51, s. 13 (1).

less formality than would normally surround permanent arrangements.”⁹⁷ Second, short-term leases are “... of relatively minor importance, and accordingly need not be encumbered by formalities. ...”⁹⁸ A third reason is that this provision is similar to registration requirements under the *Land Title Act*.⁹⁹

The committee tentatively recommends that:

3. The writing requirement for commercial leases and agreements for lease should continue to be subject to the exception for leases or agreements for lease with a term of three years or less.

2. EFFECT OF RENEWALS AND ACTUAL OCCUPATION UNDER THE LEASE

A related issue involves the effect of an option to renew a lease or an agreement for lease on the exemption from the writing requirement. Section 59 (2) of the LEA is silent on whether or not the ability to renew the term of a lease should be counted in order to determine whether the lease is within the three-year period set out in the exception to the writing requirement. The British Columbia courts have not squarely faced this issue, but it has been inconclusively touched on in one case before an administrative tribunal.¹⁰⁰

The Manitoba Law Reform Commission has noted that there is conflicting judicial authority in other provinces on this issue.¹⁰¹ In the Manitoba Commission’s view, this issue required statutory clarification, and they recommended that “... there should be included [in the statute] a clear stipulation that any option for renewal incorporated in a lease of which the term is less than three years should not operate as a requirement necessitating such a lease to be in writing.”¹⁰² But this solution may not be appropriate for British Columbia. In this province, the definition of “lease or agreement for lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement,” which is significant for registration under the LTA,¹⁰³ provides that “if an option or covenant for renewal is included in the lease or agree-

97. LRCBC, *Report on the Statute of Frauds*, *supra* note 81 at 59.

98. *Ibid.*

99. R.S.B.C. 1996, c. 250, s. 23 (2) (d) [LTA].

100. *K.J. Levant Ltd. v. British Columbia (Minister of Transportation and Highways)* (1995), 57 L.C.R. 271 (B.C. Exp. C.B.) (noting that the issue had not been canvassed by counsel).

101. MLRC, *Report on the Statute of Frauds*, *supra* note 86 at 17.

102. *Ibid.* at 18.

103. *Supra* note 99.

ment, the option or covenant must not extend the total lease periods beyond 3 years.”¹⁰⁴

Another matter raised by the wording of the LTA is actual occupation under the lease. This expression has been interpreted in the case law¹⁰⁵ as requiring something more than the right to possession of the leased premises.¹⁰⁶ As one case put it, “[o]f course, he [*i.e.*, the tenant] does not have to be there 24 hours a day, but there must be some concrete evidence of his presence.”¹⁰⁷ In the context of an agricultural lease, the following elements were cited as concrete examples of what “actual occupation” means:¹⁰⁸

... evidence that the tenant is working the land ... on a continuous basis. Perhaps the presence of the tenant’s machinery or signs erected by him will suffice, but these things remain to be decided as the circumstances arise. It seems reasonably clear that indications of tilling the soil, furrows and the like are insufficient proof of actual occupancy.

The rationale for this requirement is to provide some assurance that third parties will not be misled by the absence of a record of the lease on title to the property.

In the committee’s view, it would be desirable to amend section 59 (2) of the LEA to include these refinements, both for the sake of clarity and the sake of harmonization with the LTA.

The committee tentatively recommends that:

4. Section 59 (2) of the Law and Equity Act should be amended to provide that the exception to the formalities of writing only extend to leases or agreements for lease with a term of three years or less if (a) there is actual occupation under the lease and (b) any option or covenant to renew does not have the potential to extend the lease term beyond three years.

104. LTA, *ibid.*, s. 1 “lease or agreement to lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement.”

105. *See Vantrieght v. Munzel*, [1981] B.C.J. No. 117 (S.C.) (QL).

106. *See ibid.* at para. 31, Bouck J. (“... the authorities indicate that actual occupancy means something more than a right of possession.”).

107. *Ibid.* at para. 25. Note that the LTA does not stipulate the actual occupation by the *tenant* is required; instead, it refers to actual occupation *under the lease*.

108. *Ibid.* at 31.

D. Registration of Leases

The CTA does not address the issue of registration of leases, but other statutes do touch on this topic. Under section 23 (2) (d) of the LTA,¹⁰⁹ “a lease or agreement for lease for a term not exceeding three years if there is actual occupation under the lease or agreement”¹¹⁰ is an exception to the general rule that an unregistered instrument does not create any estate or interest in land which is effective against third parties without actual notice of the instrument. The corollary of this provision is that a lease with a term of three years or greater must be registered in order for the tenant to have the full protection of its interests under the land title system. A third party purchaser for value from the landlord without actual notice of an unregistered lease with term of three years or greater will take the land unencumbered by the unregistered lease. Section 5 (2) of the PLA provides that:¹¹¹

A person who, as landlord or intended landlord, makes a lease or agreement for a lease, other than a lease or agreement for a term not exceeding 3 years where there is actual occupation under the lease or agreement, must, unless the contrary is agreed in it, deliver an instrument creating the lease or agreement to the tenant or intended tenant in form registrable under the *Land Title Act*.

So, the default position under the legislation is that, if the lease is silent on the issue of registration, then it must be prepared in registrable form. But commercial leases are rarely silent on this issue, and it is important to take these practices into consideration when examining reform.

Registration of the lease is an issue that often polarizes landlords and tenants. One practice guide states that the following two factors tend to be determinative of whether or not a lease is registered:¹¹²

Whether or not the parties to a lease decide to register a lease depends largely upon:

- (1) the importance of the leasehold interest and the improvements made to the leased premises; and

109. *Supra* note 99.

110. This expression is defined in section 1 of the LTA. As noted in the previous section of this consultation paper, the statutory definition makes it clear that options to renew are counted in order to determine whether the lease or agreement to lease does or does not have a term exceeding three years.

111. *Supra* note 56.

112. Ashley Hilliard, Lynda Darling, & Linda Parsons *et al.*, eds., *Commercial Leasing: Annotated Precedents*, looseleaf (Vancouver: The Continuing Legal Education Society of British Columbia, 1996) at c. 20, § A [*Commercial Leasing: Annotated Precedents*].

- (2) the cost and degree of difficulty in registering the lease, particularly the preparation of an acceptable plan for registration purposes.

Other factors can come into play, particularly for the landlord. Landlords prefer to keep titles to their land as clear and uncluttered as possible. It can be difficult to remove a lease from title, even after the tenant no longer occupies the leased premises. In addition, many landlords wish to avoid the public disclosure of financial and other business terms in the lease, which invariably comes with registration in a public registry like the land title office.

The interests of landlords and tenants tend to be diametrically opposed on the issue of registration. So whether or not the lease is registered often comes down to the bargaining strength of the respective parties.

If the parties agree to register the lease (or if the lease is silent, and the tenant is entitled to registration by virtue of the default rule in the PLA), then the parties must follow the registration procedure set out in the LTA. This procedure has been described as requiring the following documents:¹¹³

If a lease is to be registered in the land title office, the party applying for registration (usually the tenant) must file:

- (1) two copies of the lease on 8-1/2 x 11 paper (see *Land Title (Transfer Forms) Regulation*, s. 3 (1));
- (2) the requisite copies of reference or explanatory plans, as required (see *Land Title Act*, ss. 99 (1) (k) and 99 (3));
- (3) Form 11 (a) Application for Deposit of a Reference or Explanatory Plan, if required;
- (4) one original Property Transfer Tax Return;
- (5) *Strata Property Act* Form F—Certificate of Payment, if the lease is for all or a portion of a strata lot; and
- (6) a copy of the title of the property for reference, if available.

A reference plan is "... based on a ground survey done by a British Columbia land surveyor and generally refers to a single parcel" of land.¹¹⁴ The expression "explanatory plan" is defined in section 1 of the LTA. In summary, an explanatory plan "is not

113. *Ibid.* at c. 20, § D.1.

114. Land Title and Survey Authority, ed., *Land Title Practice Manual*, looseleaf, 3d ed. (Vancouver: The Continuing Legal Education Society of British Columbia, 2007) at § 7.487.

based on a survey but on existing descriptions, plans or records of the land title office.”¹¹⁵ The registrar generally prefers a reference plan to an explanatory plan.¹¹⁶

If the leased premises consists of all or part of a building, then the registrar may accept a sketch plan in place of the reference or explanatory plan. A “sketch plan” is defined in section 1 of the LTA as “an adequately dimensioned drawing of the area affected by a lease of all or part of a building located on land shown on a plan of survey deposited in the land title office.” An applicant for registration must make out a case of hardship or economic loss before the registrar will accept a sketch plan.¹¹⁷

Although a Property Transfer Tax Return must be filed as part of each application to register a lease, property transfer tax is only payable if the lease grants a right to occupy the leased premises for more than 30 years.¹¹⁸

The committee has examined both the basic question of registration of leases and the details of the registration process and has decided that the topic of registration of leases does not provide much fertile ground for reform within the scope of this project. The basic question of whether or not to register is left, by and large, to the parties to determine. Altering this balance to require registration would likely not be favoured by any constituency. The mechanics of registration are comprehensively addressed by the LTA and are fully integrated into the system created by that Act. Any flaws in this system would be better addressed by a project that had land title issues as its focus.

The committee tentatively recommends that:

5. A new Commercial Tenancy Act should not include a provision dealing with the registration of leases.

IV. TENANTS’ RIGHTS BEFORE TAKING POSSESSION OF THE LEASED PREMISES

Under the common law, a tenant does not have an estate in the leased premises until the tenant goes into possession. Before taking possession, the tenant only has a right to take possession of the leased premises at the time for possession stipulated in the lease. This interest is called an *interesse termini* (= “interest of term or end”).

115. LTA, *supra* note 99, s. 1 “explanatory plan.”

116. *Land Title Practice Manual*, *supra* note 114 at § 7.314.

117. LTA, *supra* note 99, s. 99 (3).

118. *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378, ss. 1 “taxable transaction,” 14 (4) (o).

Some tenants may simply delay taking possession, even though the lease entitles the tenant to take immediate possession. A more common fact pattern, though, involves the landlord and the tenant agreeing in the lease that the tenant will take possession at some future date. In both cases, the tenant merely has an *interesse termini*.¹¹⁹

The consequence of the tenant having this limited *interesse termini* instead of an estate in the leased premises is that the tenant's remedies are drastically limited if the tenant is subsequently prevented from taking possession of the leased premises. The tenant cannot enforce any of the covenants of the lease, including the covenant of quiet enjoyment. The tenant is also unable to sue in trespass, if another person is occupying the leased premises. The tenant's remedies in these circumstances are reduced to (1) an action in ejectment against any person in possession of the premises and (2) an action for damages against the landlord.¹²⁰ Damages against the landlord are calculated according to the following principles:¹²¹

If the lessor puts it out of his power to give possession because he leases to another, the measure of damages is the difference between the rent to be paid and the actual value of the premises at the time of the breach for the unexpired term. There can, however, be no recovery of prospective loss of profits from a business to be carried on upon the premises; nor is the landlord to be treated as trustee of the premises and so accountable for any increased rental he obtains by re-letting.

The purpose of this doctrine appears to be tied into old English common law rules regarding the importance of actual possession in the conveyance of estates in land.¹²²

Interesse termini is a common law rule, so it is important to track its development in the courts. Most of the case law in Canada involving *interesse termini* dates from the first half of the twentieth century and earlier. There are only two recent cases considering any legal issues that may flow from *interesse termini*. One case dealt with a fact pattern that is typical of cases involving *interesse termini*, but did not discuss the

119. *Williams & Rhodes*, *supra* note 75, vol. 1 at § 3:10.

120. *Ibid.*, vol. 1 at § 3:10:1.

121. *Ibid.*, vol. 1 at § 3:10:2 [citations omitted].

122. See Holdsworth, *Land Law*, *supra* note 10 at 288–89 (“... [T]he most essential part of a conveyance of corporeal hereditaments was the livery of seisin. Unless the feoffee was already in possession, an actual livery of seisin was required; and even in the case of some of these incorporeal things which lay in grant, something equivalent—such as attornment or actual user of the right granted—was required. A lease for a term of years created only an *interesse termini* till the lessee had entered.” [footnotes omitted]).

doctrine; another discussed the application of the doctrine to a novel situation. Neither case was decided in British Columbia.

In *1173253 Ontario Ltd. v. Ordanis*,¹²³ the court dismissed an application for possession of the leased premises from a tenant who had entered into a lease with a landlord with a term that was to commence two weeks after the lease was executed. In this intervening period, the landlord realized that the tenant intended to use the premises for "... the sale of adult lingerie, novelties, and pre-recorded video tapes."¹²⁴ This use had apparently been disclosed in handwritten changes on the lease, but the court accepted the landlord's testimony that, due to his weaknesses in reading English, the landlord only effectively learned of the intended use after the lease was signed.¹²⁵ The court did not mention *interesse termini* in coming to its decision; instead, the court framed its judgment as "... exercis[ing] its equitable jurisdiction in granting relief to the [landlord]. ..."¹²⁶

In *Sittuk Investments Ltd. v. A. Farber & Partners Inc.*,¹²⁷ the court touched on *interesse termini* in the course of a bankruptcy proceeding. The case involved an application from a trustee in bankruptcy to dispose of the bankrupt's property interest in several condominiums free of any interest held by persons who had time-share contracts for the condominiums. In the course of the judgment, the court made the following comments on *interesse termini*:¹²⁸

To determine the nature of the right of the time share tenant, it is necessary to address that right in terms of the circumstances that obtained when the business was still operating. In such circumstances, at a time when the tenant is properly out of possession by reason of the expiry of the tenant's designated week or weeks, how is the right of the tenant to be characterized? The tenant cannot be said to be in possession. Nor is the tenant entitled to possession except at a future time in accordance with the terms of the contract. This type of interest has traditionally been characterized in law as an *interesse termini*. What is important is not the label itself but the rights that have been held to apply to such an interest. According to the decision in *Wallis v. Hands*, this interest will support a claim by the tenant against the landlord for failure to put the tenant into possession but it will not support an action for trespass. That is, it will support a claim

123. (1997), 49 O.T.C. 235, 18 R.P.R. (3d) 59 (Gen. Div.).

124. *Ibid.* at para. 4.

125. *Ibid.* at paras. 6–7.

126. *Ibid.* at para. 14.

127. (2002), 61 O.R. (3d) 546, (*sub nom. Sittuk Investments Ltd. v. Aylen Estate*) 10 R.P.R. (4th) 204 (S.C.J.).

128. *Ibid.* at paras. 42–44 [citations omitted].

against the person who is the landlord but it will not support a claim against the property itself.

While the respondents are all persons who have previously been in possession, the particular periods for which they were entitled to be in possession expired and the respondents surrendered possession as they were required to do, and no basis has been shown to justify regarding them as being in a different position from the holder of an *interesse termini* who at the time of asserting the interest has not yet come into possession of the property. They share the common attribute that they are properly not yet in possession.

Based on the above considerations, the rights of the respondents are rights under an *interesse termini*. The interest is not of a kind granted by a lease which the tenant can assert against the property and therefore against third parties, such as the creditors of the estate.

Among Canadian provinces and territories, only Alberta has enacted legislation to abolish *interesse termini* for commercial tenancies.¹²⁹ Overseas, the doctrine was abolished in England in 1925.¹³⁰ It has also been abolished in Australia.¹³¹ In the United States, no legislation has been enacted to abolish the doctrine, but a number of courts have allowed tenants in these circumstances to maintain an action for breach of the covenant of quiet enjoyment, which effectively eliminates any problems caused by *interesse termini* for the tenant.¹³² All of the Canadian provinces and territories (except Nova Scotia) have abolished *interesse termini* for residential leases.¹³³

All of the Canadian law reform bodies that have studied the issue have recommended enacting legislation to abolish *interesse termini*. The rationales for this recommendation are that it would modernize and simplify the law. The OLRC Report concluded that "... such factors as the location and layout of the rented premises are of such importance to the commercial tenant as to make an enforceable right to possession a fundamental requirement."¹³⁴ The Law Reform Commission of British Columbia agreed with the views of the Ontario Law Reform Commission, concluding that "... in principle, the doctrine of *interesse termini* should not apply to commercial

129. *Law of Property Act*, R.S.A. 2000, c. L-7, s. 66 (1).

130. *Law of Property Act, 1925* (U.K.), 15 & 16 Geo. 5, c. 20, s. 149 (1).

131. See Adrian J. Bradbrook & Clyde E. Croft, *Commercial Tenancy Law in Australia* (Sydney: Butterworths, 1990) at § 1.10.

132. See 52A C.J.S. *Landlord and Tenant* § 741 (2003).

133. See, e.g., RTA, *supra* note 51, s. 16.

134. *Supra* note 62 at 61.

tenancies.”¹³⁵ The LRCBC Report went on to speculate that a provision of the PLA¹³⁶ may have the effect of abolishing *interesse termini*.¹³⁷ Nevertheless, the BC Commission recommended clarifying the law by enacting legislation specifically abolishing *interesse termini*.¹³⁸ Finally, the Manitoba Law Reform Commission, after a thorough study of the issues, concluded that it was “... convinced of the need to abolish this rule for commercial tenancies.”¹³⁹ The Manitoba Commission went on to describe the practical outcome of legislatively abolishing *interesse termini*:¹⁴⁰

The effect of abolition would be that a grant of a lease for a term to commence immediately or from a future date would vest in the tenant an estate in the land to take effect from the date fixed for the commencement of the term without actual entry by the tenant. After the date for commencement of the term, the tenant would be able to maintain an action for trespass or an action for a breach of a covenant without the necessity for entry. In addition, a tenant would be able to sue a landlord not only for damages but also for possession.

One group has spoken up in support of retaining at least some semblance of *interesse termini*. In their response to the proposals for reform that preceded the LRCBC Report, the Real Property Section of the Canadian Bar Association (BC Branch) stated that “... the proposals concerning *interesse termini* go too far.”¹⁴¹ In the section’s view, “[s]imply providing that a tenant can seek specific performance of a tenancy agreement should suffice.”¹⁴² The section based its recommendation on two arguments. First, it felt that the BC Commission’s proposal “... revert[ed] to bygone thinking of the uniqueness of all land. In many instances, and especially amongst commercial entities, damages for non-delivery of possession of leased premises would be a wholly adequate remedy.”¹⁴³ Second, the section argued that simply

135. *Supra* note 6 at 12.

136. *Supra* note 56, s. 15 (2) (“A transfer of land may pass the possession or right to possession without actual entry.”).

137. *Supra* note 6 at 12.

138. *Ibid.*

139. *Report on Commercial Tenancies: Miscellaneous Issues*, *supra* note 63 at 5.

140. *Ibid.* [footnote omitted].

141. Victoria Gray & Robert D. Holmes, *Comments upon the Law Reform Commission of British Columbia Working Paper No. 61 on the Commercial Tenancy Act Prepared for the Real Property Subsection of the B.C. Branch of the Canadian Bar Association* (Vancouver: Canadian Bar Association (BC Branch), 1988) at 4.

142. *Ibid.*

143. *Ibid.* at 4–5.

abolishing *interesse termini* would not give a court adequate guidance in dealing with practical situations such as the following:¹⁴⁴

- (a) a landlord leased to two tenants with overlapping terms or leased to a new tenant after purporting to determine the tenancy of the present, defaulting tenant;
- (b) a landlord sold to a third party without notice of the prospective tenancy; or
- (c) a landlord sold to a third party without knowledge of a prospective subtenancy of a subtenant of a tenant who had surrendered his own lease.

In the section's view, the court's established equitable jurisdiction would allow it to "... sort out these matters. A key factor would be whether damages would suffice as compensation for one party or another."¹⁴⁵

Having considered these points, the committee concluded that the views expressed in the LRCBC Report are still compelling and decided that *interesse termini* should be abolished. *Interesse termini* is out of step with contemporary real estate practices. Abolishing it may provide some protection to tenants, who could be caught off guard by this very old legal rule.

The committee tentatively recommends that:

6. *A new Commercial Tenancy Act should contain a provision abolishing interesse termini.*

V. IMPLIED TERMS FOR LEASES AND STANDARD LEASE TERMS

A. Introduction

Most commercial leases comprehensively document the terms agreed upon by the landlord and the tenant, but some do not. It is possible for parties to meet the minimal requirements¹⁴⁶ to enter into a lease and still leave certain key subjects unaddressed. For instance, parties may agree to enter into a lease of a specific premises under a form of lease to be determined later. Negotiations over the lease document may stall, but the tenant may still enter into possession and begin paying

144. *Ibid.* at 4.

145. *Ibid.*

146. See Olson, *supra* note 4 at § II.a ("A lease has five essential requirements: (1) the identity of the landlord and the tenant; (2) the description of the land subject to the lease; (3) the term of the lease; (4) the date the term begins; (5) the rent payable during the term, including basic or minimum rent, additional rent and percentage rent." [textual cross-references and footnote omitted]).

rent. In such circumstances, the landlord and the tenant may find themselves bound by terms implied by law.

The common law implies certain terms in every lease as an incident of the landlord-tenant relationship. The purpose of these implied terms is to fill in gaps in a lease that may result if the parties fail to turn their minds to certain key issues. There is a consensus that two terms are implied at common law in all leases: a covenant by the landlord to respect the tenant's right to quiet enjoyment of the leased premises and "... a covenant by the tenant to use the property in a proper and tenant-like manner..."¹⁴⁷ These two terms go back to the origins of landlord-tenant law, but this category is not closed. A term implied by common law will be displaced by an express term of the lease touching on the same subject.

There is a related, but distinct, situation where the common law also implies terms into a lease. This situation is when the parties agree in advance to enter into a lease on "the usual covenants" or "the standard covenants." The difference between the common law implied terms and the usual covenants is that the implied terms apply to every lease unless they are expressly displaced by the parties and the usual covenants only apply if the parties affirmatively opt into them. There is also a larger number of usual covenants than implied terms.

Finally, there is a British Columbia statute that has a bearing on this issue. The LTFA contains a schedule of important lease terms.¹⁴⁸ Like the usual covenants, the LTFA terms are standard terms that parties can opt into by indicating this intention in a specific way in their lease.¹⁴⁹

This section examines how a new *Commercial Tenancy Act* can modernize these implied or standard lease terms.

147. H. Scott MacDonald, "Repair, Restoration, and Remediation Issues," in H. Scott MacDonald *et al.*, eds., *Commercial Leasing Disputes: Materials Prepared for the Continuing Legal Education Seminar, Commercial Leasing Disputes, Held in Vancouver, B.C., on May 11, 2007* (Vancouver: The Continuing Legal Education Society of British Columbia, 2007) [*Commercial Leasing Disputes*] 4.1 at 4.1.6 [MacDonald, "Repair"].

148. *Supra* note 55, sch. 4.

149. This is done by including a representation in the lease that it is made under the *Land Transfer Form Act* or under the *Short Form of Leases Act* of the *Leaseholds Act* (the former names of the legislation). See LTFA, *ibid.*, s. 5. The lease must also contain one or more of the abbreviated clauses from column 1 of Schedule 4, which are given the meaning assigned to each in column 2 of Schedule 4.

B. Implied Terms

The first issue to consider in this section is whether a new *Commercial Tenancy Act* should contain a restatement of terms implied at common law. One response would be that no legislation is necessary. There are no complaints that the current state of the law is causing any difficulties. Among the two leading Canadian law reform reports on leasing law, the BCLRC Report did not recommend including any statutory terms in legislation and the OLRC Report only recommended including a statutory restatement of the covenant of quiet enjoyment.¹⁵⁰ But leaving this topic untouched may be a missed opportunity to improve the law. Restating the terms implied at common law would make the law more accessible and certain. It also creates an opportunity to address contemporary issues by including a broader range of implied terms.

There are two approaches that may be taken to the creation of statutory implied terms. The first approach is to abrogate all the existing common law terms and use the statute to create a complete code. This approach affords maximum clarity and certainty. But it is also an approach that is untried in practice, having only been recommended by one overseas law reform agency.¹⁵¹ There is a concern that this approach could prove to be inflexible. The second approach is to make no representations about abrogating the common law and simply to include in the statute the terms that it will imply. This approach is taken in the three other Western Canadian provinces.¹⁵² It provides a measure of certainty and accessibility and still leaves some space for common law developments. This latter point is important, as the common law currently appears to be going through a period of development.¹⁵³

The committee favours the latter approach. The specific terms to be implied in a new *Commercial Tenancy Act* are discussed in the sections that follow.

150. *Supra* note 62 at 99–100.

151. See New Zealand Law Commission, *supra* note 65.

152. Alberta: *Land Titles Act*, R.S.A. 2000, c. L-4, ss. 96–97; Saskatchewan: *The Land Titles Act*, 2000, S.S. 2000, c. L-5.1, ss. 145–46; Manitoba: *The Real Property Act*, R.S.M. 1987, c. R30, C.C.S.M. c. R30, ss. 92–93.

153. See *Darmac Credit Corp. v. Great Western Containers Inc.* (1994), 163 A.R. 10, 51 A.C.W.S. (3d) 1170 (Q.B.); *Progressive Enterprises Ltd. v. Cascade Lead Products Ltd.*, [1996] B.C.J. No. 2473 (S.C.) (Q.L.); *O'Connor v. Fleck*, 2000 BCSC 1147, 79 B.C.L.R. (3d) 280 (S.C.). See also MacDonald, “Repair,” *supra* note 147 at 4.1.6 (arguing that these three cases indicate that a third term will likely be implied by the common law—“... at the end of the term, the tenant will return the premises to the landlord uncontaminated”).

The committee tentatively recommends that:

7. A new Commercial Tenancy Act should not abrogate any existing terms implied at common law in commercial leases, but it should also contain certain terms implied by the statute.

1. QUIET ENJOYMENT

The covenant of quiet enjoyment is considered to embrace two distinct, but interrelated, policies:¹⁵⁴ (1) it guarantees the tenant's right to exclusive possession of the leased premises—implicit in this right is an assurance that the landlord has good title to the leased premises and will indemnify the tenant if the tenant's enjoyment of the leased premises is disturbed due to a defect in the landlord's title;¹⁵⁵ and (2) it guarantees the tenant's right to enjoy the leased premises. Enjoyment in this context is synonymous with using the leased premises in a lawful and normal manner.

The covenant of quiet enjoyment has had a long history of consideration in the courts. As the OLRC Report noted “[t]he relative importance of each of the two aspects of this right has changed over time . . .”¹⁵⁶ as a result of these court decisions. These shifts in the jurisprudence led the Ontario Commission to recommend adopting a statutory covenant of quiet enjoyment. The OLRC Report identified four “deficiencies” in the case law that supported this recommendation: (1) the courts have emphasized the first policy goal of the right (protection of the tenant's title and right to possession of the leased premises) at the expense of the second (protection of the tenant's right to use and enjoy the premises in an ordinary and lawful manner); (2) disturbances caused by “metaphysical” factors such as noise, odour, or vibration have not been taken seriously by the courts; (3) “the law governing the covenant for quiet enjoyment, because it limits the types of conduct which may give rise to a breach, has not sufficiently provided a basis for the assessment of damages

154. See *Williams & Rhodes*, *supra* note 75, vol. 1 at § 9:1; Robert V. Wickett, “Problems Encountered by Tenants: Occupation, Use, and Enjoyment of Premises,” in *Commercial Leasing Disputes*, *supra* note 147, 6.1; Robert D. Malen, “The Landlord's Covenant for Quiet Enjoyment,” in Harvey M. Haber, ed., *Tenant's Rights and Remedies in a Commercial Lease: A Practical Guide* (Aurora, ON: Canada Law Book, 1998) 121 at 121–22.

155. See Malen, *ibid.*

156. *Supra* note 62 at 89 (“The early jurisprudence appears, with some exceptions, to have emphasized the primary function of the covenant as being to protect the tenant from interference with title or possession, but later cases enlarged the extent of operation of the covenant, at least in principle, by holding that the covenant could also be breached by a substantial interference with the ‘ordinary use and enjoyment’ of the rented premises.”).

commensurate with the real harm suffered”; and (4) the case law has become convoluted and focussed on a number of arbitrary distinctions, which limits access to a remedy for breaches of the right.¹⁵⁷

An important question to consider is whether the case law has developed in the 30 years since the publication of the OLRC Report in such a way as to allay the Ontario Commission’s concerns. There are indications that disturbances to the right to enjoy the leased premises are taken seriously by the courts and are acknowledged to embrace “metaphysical” disturbances.¹⁵⁸ But there is another twist to the OLRC’s argument. The OLRC noted that many judgments (particularly those of higher-level courts) contained seemingly broad statements of the right to quiet enjoyment, but that these statements did not really filter down to the level of practice.¹⁵⁹ This pattern could still exist today.

157. *Ibid.* at 95–96.

158. See, e.g., *Watchcraft Shop Ltd. v. L & A Development (Canada) Ltd.* (1996), 8 O.T.C. 4, 49 C.P.C. (3d) 17 at para. 30 (Gen. Div.), Molloy J. (“Historically, the covenant of quiet enjoyment was interpreted as only extending to a physical and direct interference with the tenant’s title or possession. Later this concept was extended to include an interference with the tenant’s ability to enjoy the premises for the purposes intended. However, the requirement that the interference be direct and physical continued until fairly modern times. There are, therefore, a number of older cases to the effect that noise, odour, or mess could not constitute an interference with quiet enjoyment because they had no physical or direct impact on the leased premises. However, the more current view, and one with which I am in agreement, is that any act by a landlord which is an interference with the tenant’s ability to use the premises for the intended purpose, may constitute a breach of the right to quiet enjoyment.” [citation omitted]); *Mayfair Tennis Courts Ltd. v. Nautilus Fitness & Racquet Centre Inc.* (1999), 88 O.T.C. 137, 23 R.P.R. (3d) 271 at para. 31 (Gen. Div.), Juriansz J. (“In my view, because of the importance of members to the business of an athletic club, interference with a club’s membership is an interference with the club’s business. I find that the plaintiff breached the covenant . . . to ‘warrant and defend Tenant in the quiet enjoyment and possession of the premises during the term’ by substantially interfering with the defendant’s ability to use the premises for the intended use during the term of the lease.”).

159. See OLRC Report, *supra* note 62 at 90 (“In spite of the somewhat broad definition of the covenant for quiet enjoyment given in many of the cases, the criteria in fact applied by the vast majority of Canadian courts in order to ascertain whether there has been a breach of the covenant have been such as to result in a narrower scope being given to the covenant in practice than might have been expected. The criteria generally employed by the courts, such as the necessity of an intention by the landlord to evict, or the necessity for physical interference, have been more consistent with a concern for an interference with possession than an interference with enjoyment. The effect of applying these criteria has been to reduce or eliminate any meaningful distinction between the concepts of possession and enjoyment, the latter being subsumed in the former. This interpretation of the nature and scope of the covenant for quiet enjoyment has resulted in a greater degree of interference being required for it to be said that a breach has occurred than would otherwise be the case. Moreover, this narrow interpretation has also restricted the types of acts committed by the landlord which could be held to constitute a

The committee has decided that adopting a statutory term was warranted in this case. It would help to clarify the law and may serve to remedy some of its deficiencies. There are two subsidiary issues that flow from this decision.

The first issue is the nature of the statutory term. One approach would be to create a statutory right. This approach is used in the RTA.¹⁶⁰ Another approach, which was recommended by the OLRC Report, would be to imply a statutory term into commercial leases. In another context, the LRCBC Report has described the difference between the two approaches as "... depend[ing] on the view one takes of the consequences that should flow..." from a breach.¹⁶¹ A delinquent landlord's liability will either be contractual (under the OLRC Report's statutory covenant approach) or tortious (under the RTA's statutory right approach) in nature. In most cases, little will turn on this distinction, but there may be circumstances where it is significant. The committee favours the statutory covenant approach.

The second issue is the scope of the implied term. The covenant of quiet enjoyment may be either restricted or absolute. A restricted covenant protects the tenant against interference from the landlord and anyone lawfully claiming under the landlord. The implied common law covenant is restricted. The vast majority of commercial leases contain an express covenant. In agreeing upon an express covenant, the parties may choose to make it absolute.¹⁶² An absolute covenant "... is an assurance against interruption by those who have a *superior* covenant to that of the landlord."¹⁶³ Of course, the parties may also choose to make an express covenant even more limited in scope than the common law implied covenant. The committee favours implying a restricted covenant. The covenant in the LTFA, rephrased in modern language, serves as an adequate model for such a statutory term.¹⁶⁴

breach.").

160. *Supra* note 51, s. 28.

161. *Supra* note 6 at 39 (considering a requirement that landlords exercise good faith in giving or denying consent to assign or sublet the leased premises).

162. *See Williams & Rhodes, supra* note 75, vol. 1 at § 9.1 ("An express covenant may be restricted or absolute. If there is no express covenant, a restricted covenant for quiet enjoyment will be implied...").

163. Malen, *supra* note 154 at 123 [emphasis in original].

164. LTFA, *supra* note 55, sch. 4, cov. 15 ("And the lessor doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said lessee, his executors, administrators, and assigns that he and they, paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, *without any interruption or disturbance from the*

The committee tentatively recommends that:

8. A new Commercial Tenancy Act should imply a statutory covenant for quiet enjoyment modelled on the covenant currently found in the Land Transfer Form Act in commercial leases.

2. NON-DEROGATION FROM GRANT

There is a general principle of real estate law that a grantor is not to derogate from the grant, which means that "... he must not seek to take away with one hand what he gives with the other."¹⁶⁵ This concern arises when a grantor retains control of an adjoining property. For leases, this principle is most often applied in connection with the purposes for which the leased premises are used.¹⁶⁶ The landlord and tenant may agree that the leased premises are to be used for a specific purpose. The tenant may rely on an argument based on non-derogation from grant if the landlord does or proposes to do anything that will materially impair the use of the leased premises for the agreed-upon purpose.¹⁶⁷ This principle is not sweeping in scope. It will not apply to just any diminution of the tenant's enjoyment of the leased premises, but only to those that affect the fitness of the leased premises for their agreed-upon purpose.¹⁶⁸

There is a great deal of overlap between non-derogation from grant and the tenant's right to quiet enjoyment.¹⁶⁹ But the two concepts have historically been analytically

said lessor, his heirs, executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him, them, or any of them." [emphasis added]).

165. *Megarry & Wade*, *supra* note 10 at § 14-208.

166. But the principle may also be relevant in connection with other issues. *See, e.g., Williams & Rhodes*, *supra* note 75, vol. 1 at § 9:1:13 (discussing application of non-derogation from grant to easements enjoyed by tenants).

167. *See* OLRC Report, *supra* note 62 at 94 ("... if the agreement is made for a particular purpose, the landlord must abstain from doing anything on the land retained by him which would render the rented premises unfit or materially less fit for the particular purpose for which the agreement was made or he will be in derogation of his grant to the tenant" [footnote omitted]).

168. *See* OLRC Report, *ibid.* ("... for example, if a landlord has let the premises for a particular trade, he may let the adjoining premises for a similar trade without being in derogation of his grant, since the original premises are still fit for the use for which they were let even though the profits will be diminished" [footnote omitted]).

169. *See Megarry & Wade*, *supra* note 10 at § 14-208 ("... the covenant for quiet enjoyment will extend to many of the acts which might be construed as a derogation from the grant...").

distinct¹⁷⁰ and they have been argued and applied separately in recent Canadian cases.¹⁷¹ There are situations in which non-derogation from grant applies even though a breach of the covenant for quiet enjoyment has not occurred.¹⁷²

The committee tentatively recommends that:

9. A new Commercial Tenancy Act should contain an implied term requiring the landlord not to derogate from its grant of a lease.

3. PAYMENT OF RENT

Most leases contain an express covenant requiring a tenant to pay the rent as set out in the lease. In the rare cases where there is no express covenant, it is still possible for a landlord to argue that the lease contains an implied term based on the property law concept of a reservation of rent.¹⁷³

The proposal to add an implied statutory term requiring payment of rent is not intended to change this state of affairs. Rather, it is intended to make the law more accessible. Alberta, Saskatchewan, and Manitoba have similar legislation.¹⁷⁴

170. See *Williams & Rhodes*, *supra* note 75, vol. 1 at § 9:1:13.

171. See *Ostry v. Warehouse on Beatty Cabaret Ltd.* (1992), 21 R.P.R. (2d) 1 (B.C.S.C.); *Country Style Food Services Inc. v. 1304271 Ontario Ltd.*, [2003] O.T.C. 100, 7 R.P.R. (4th) 184 (S.C.J.), *aff'd* (2005), 200 O.A.C. 172, 33 R.P.R. (4th) 1 (C.A.).

172. See *Megarry & Wade*, *supra* note 10 at § 14-208 (“... acts not amounting to a breach of the covenant [of quiet enjoyment] or to a tort may nevertheless be restrained as being in derogation of the grant” [footnote omitted]).

173. See, above, Part One, section II.E.

174. Alberta: *Land Titles Act*, *supra* note 152, s. 96 (a) (“In every lease referred to in section 95 [i.e., a lease with a term greater than three years] other than a lease that is subject to the *Residential Tenancies Act* or the *Mobile Home Sites Tenancies Act*, there shall be implied the following covenants by the lessee, unless a contrary intention appears in the lease: (a) that the lessee will pay the rent reserved by the lease at the times mentioned in the lease. . . .”); Saskatchewan: *The Land Titles Act, 2000*, *supra* note 152, s. 145 (a) (“The following covenants are implied by the lessee in every lease: (a) that the lessee shall pay the rent reserved by the lease at the times mentioned in the lease.”); Manitoba: *The Real Property Act*, *supra* note 152, s. 92 (a) (“In the memorandum of lease, unless a contrary intention appears therein, there shall be implied the following covenants by the lessee, that is to say, (a) that he will pay the rent thereby reserved at the times therein mentioned.”).

The committee tentatively recommends that:

10. A new Commercial Tenancy Act should contain an implied term requiring the tenant to pay the rent payable under the lease when it comes due.

4. NON-PAYMENT OF RENT OR BREACH OF OTHER COVENANT

“Re-entry” is the technical term for a landlord reasserting its property rights under the reversion and resuming possession of the leased premises. Re-entry occurs when a tenant has breached a term of the lease and, as a result, the landlord wants to bring the landlord–tenant relationship to an end. The common law only provides very narrow rights to re-entry.

At common law, re-entry is not available for every breach of the lease. Re-entry can be a harsh remedy and as such is reserved for serious breaches. For this purpose the common law draws a distinction between terms of the lease that are *conditions* and terms that are *covenants*. Re-entry is available for a breach of a condition, but it is generally not available for a breach of a covenant unless the lease (or a statute) expressly makes it available. There is no bright line test for distinguishing a condition from a covenant, but conditions tend to be introduced by phrases like “provided that” or “on condition that.”¹⁷⁵ As a result of this rule, most commercial leases contain a term usually referred to as a “proviso for re-entry,” which authorizes the landlord to re-enter the leased premises if the tenant breaches a covenant of the lease.¹⁷⁶

175. See *Williams & Rhodes*, *supra* note 75, vol. 1 at § 12:7:1.

176. See, e.g., LTFA, *supra* note 55, sch. 4, cov. 14 (“Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for 15 days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or nonperformance of any of the covenants and agreements herein contained on the part of the said lessee, his executors, administrators, or assigns, then and in either of such cases it shall be lawful for the said lessor, his heirs, executors, administrators, or assigns, at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy as of his or their former estate, anything herein contained to the contrary notwithstanding.”). Most contemporary leases do not contain the 15-day waiting period found in this clause. See, e.g., *Commercial Leasing: Annotated Precedents*, *supra* note 112 at c. 4, s. 12.2 (“The Tenant further covenants with the Landlord that in the event of the breach, non-observance, or non-performance of any covenant, agreement, stipulation, proviso, condition, rule, or regulation required by the Tenant to be kept, performed, or observed under this Lease, and any such breach, non-observance, or non-performance continues for seven days after the written notice of it to the Tenant by the Landlord, or, notwithstanding the foregoing, if any payments of the Rent or any part of them, whether they are demanded or not, are not paid when they become due, or in case the Term will be taken in execution or attachment for any cause whatsoever, then and in any such case the Landlord, in addition to any other remedy now or hereafter provided, may re-

British Columbia does not provide a statutory right of re-entry to landlords. Its absence from the CTA is rather unusual in light of the legislation in force in other Canadian jurisdictions. As this list displays, most of the other provinces and territories have legislation that gives landlords a right of re-entry in certain circumstances:¹⁷⁷

1. in Alberta the *Land Titles Act* implies a right to terminate, in the absence of a contrary provision, if the rent is in arrears for two months;
2. in Saskatchewan the *Landlord and Tenant Act* implies a right to terminate, in the absence of a contrary provision, if the rent is in arrears for two calendar months;
3. in Manitoba the *Landlord and Tenant Act* provides a right to terminate, in the absence of a contrary provision, if the rent is in arrears for 15 days. However, the *Real Property Act* implies a right to terminate, in the absence of a contrary provision, if the rent is in arrears for two months;
4. in Ontario the *Commercial Tenancies Act* implies a right to terminate, in the absence of a contrary provision, if the rent is in arrears for 15 days;
5. in New Brunswick the *Landlord and Tenant Act* implies a right to terminate, in the absence of a contrary provision, if the rent is in arrears for 15 days;
6. in Prince Edward Island the *Landlord and Tenant Act* implies a right to terminate, unless it is otherwise agreed, if the rent is in arrears for 15 days;
7. in the Northwest Territories, the *Commercial Tenancies Act* implies a right to terminate, in the absence of a contrary provision, if the rent is in arrears for two calendar months;
8. in Nunavut, the *Commercial Tenancies Act* implies a right to terminate, in the absence of a contrary provision, if the rent is in arrears for two calendar months.

The LRCBC Report also recommended the enactment of a statutory right of re-entry for non-payment of rent.¹⁷⁸

It is worth bearing in mind that most professionally prepared leases will define the right of re-entry for landlords in much broader terms than is found in the legislation. So, this issue practically may only affect the subset of leases that are not professionally prepared. That said, the common law distinction between conditions and cove-

enter and take possession immediately of the Premises or any part of them in the name of the whole, and may use such reasonable force and assistance in making such removal as the Landlord may deem advisable to recover full and exclusive possession of the Premises . . . ; and such re-entry will not operate as a waiver or satisfaction in whole or in part of any right, claim, or demand arising out of or connected with any breach, non-observance, or non-performance of any covenant or agreement of the Tenant.” [footnote omitted]).

177. Olson, *supra* note 4 at § VIII.C.b [footnotes omitted].

178. *Supra* note 6 at 126.

nants is rather obscure and at least one law reform body has called for a statutory reversal of the default rule that holds that re-entry is not available for breach of a covenant.¹⁷⁹ For this reason, the committee favours framing this implied term in broader terms than simply non-payment of rent. As the effect of re-entry can be harsh, a 10-day notice period should be built into the implied term.

The procedure to be employed on re-entry is discussed later in this consultation paper.¹⁸⁰

The committee tentatively recommends that:

11. A new Commercial Tenancy Act should contain an implied term giving a landlord a right to terminate the lease and re-enter the leased premises if the rent is in arrears or if the tenant has breached any other covenant of the lease, if the landlord gives the tenant 10 days written notice at the leased premises of its right to terminate the lease and re-enter the leased premises and the tenant fails to pay the arrears of rent or remedy the breach.

5. REPAIRS

Many commercial leases contain intricate and detailed provisions regarding the tenant's obligations to make repairs of the leased premises.¹⁸¹ But some leases do not touch on this important area. An absence of rules regarding repairs can be a source of conflict.

179. See *Consultation Paper on the General Law of Landlord and Tenant*, *supra* note 64 at 167 ("It is rare nowadays to express obligations in a lease as 'conditions': usually they take the form of 'covenants' and so it is important to provide expressly that the landlord may forfeit the lease and re-enter for breach of covenant. It would be helpful to practitioners if the rule were the reverse, *ie*, that the right to forfeit and re-enter for breach of obligation applies to all tenancies (including oral ones) unless it is excluded by statute or an express provision in the particular lease or tenancy agreement." [footnotes omitted]).

180. See, below, Part Two, section XII.

181. See OLRC Report, *supra* note 62 at 133 ("... [C]onsiderations in the commercial sector generally create a much more staggering diversity of possible repair provisions, related to such disparate factors as the length of the term, the nature and use made of the premises, the physical aspects of the premises (age and location), the nature of the leasing arrangements (for example, sale and leaseback), provisions for renewal and options to purchase.").

The other Western Canadian provinces have legislation that sets out an implied term dealing with repairs.¹⁸² The OLRC Report also recommended that Ontario enact a provision implying a term to deal with repairs.¹⁸³

The committee is of the view that the legislation should imply a simple covenant dealing with repairs by the tenant. The covenant contained in the LTFA could serve as an example of such a covenant.¹⁸⁴ There is one issue that is not addressed in any of this legislation or proposals for reform. It is the impact of insurance on the tenant's obligation to repair. In the committee's view, the tenant's obligations should be subject to any insurance cover that the landlord has. This view is consistent with recent proposals for reform in other jurisdictions.¹⁸⁵

The committee tentatively recommends that:

12. A new Commercial Tenancy Act should contain an implied term requiring a tenant to use the premises responsibly during the term of the lease and to repair damage caused by the tenant, except where the landlord's insurance covers the damage.

182. Alberta: *Land Titles Act*, *supra* note 152, s. 96 (b) ("... there shall be implied the following covenants by the lessee, unless a contrary intention appears in the lease ... (b) that the lessee will at all times during the continuance of the lease keep and at the termination of the lease yield up the demised land in good and tenantable repair, accidents and damage to buildings from fire, storm and tempest or other casualty and reasonable wear and tear excepted."); Saskatchewan: *The Land Titles Act, 2000*, *supra* note 152, s. 145 (b) ("The following covenants are implied by the lessee in every lease ... that the lessee shall at all times during the continuance of the lease keep, and at the termination of the lease yield up, the leased land in good and tenantable repair, accidents and damage to buildings from fire, storm, tempest or other casualty and reasonable wear and tear excepted."); Manitoba: *The Real Property Act*, *supra* note 152, s. 92 (b) ("In the memorandum of lease, unless a contrary intention appears therein, there shall be implied the following covenants by the lessee, that is to say ... that he will at all times during the continuance of the lease keep, and at the termination thereof yield up, the demised property in good and tenantable repair, accidents and damage to buildings from fire, lightning, storm, and tempest, and reasonable wear and tear, excepted.").

183. OLRC Report, *supra* note 62 at 134.

184. *Supra* note 55, sch. 4, cov. 3 ("and also will, during the said term, well and sufficiently repair, maintain, pave, empty, cleanse, amend, and keep the said demised premises, with the appurtenances, in good and substantial repair, and all fixtures, and things thereto belonging or which at any time during the said term shall be erected and made, when, where, and so often as need may be").

185. See New Zealand Law Commission, *supra* note 65 at 380–83.

C. Contracting Out

There are two opposed positions on contracting out of a statutory implied covenant: (1) emphasize freedom of contract and allow the landlord and the tenant maximum flexibility to vary or even exclude the implied covenant (this is the approach British Columbia law currently takes to terms implied at common law); or (2) emphasize the need for certain baseline protections for the party in the weaker position in negotiations and prevent the parties to a lease from varying or excluding the rules set out in the statute (this position has been adopted by the RTA).¹⁸⁶

The committee has decided that the first position is more appropriate for commercial leases. The consumer protection concerns that drive much of the RTA are not present to the same degree in the commercial leasing sector. The committee did have some concerns that embracing this principle could lead some parties to attempt completely to exclude these terms. Of particular concern would be an express agreement to exclude the tenant's right to quiet enjoyment of the premises. In the end, this concern has to be balanced against the basic principle that a tenant must receive exclusive possession of the leased premises in order for the relationship to constitute a lease. If the parties decided to make such an inroad on the tenant's rights, then they could be seen to be entering into a licence rather than a lease, and bearing all the legal consequences of this result.

The committee tentatively recommends that:

13. A new Commercial Tenancy Act should allow the statutory implied terms to be displaced by the express agreement of the parties.

D. Standard Lease Terms

As was noted above, sometimes the parties can agree on wanting to enter into a lease and on its basic terms, but they have not agreed or are unable to agree to anything further. At common law, these parties may enter into a lease and agree that the usual covenants will apply. There is some vagueness inherent in this expression, but one textbook has noted that "[t]he following covenants and conditions are always 'usual'":¹⁸⁷

- (a) On the part of the landlord—
 - a covenant for quiet enjoyment in the usual qualified form, *i.e.* extending only to the acts of the lessor or the rightful acts of anyone claiming from or under him.

186. *Supra* note 51, s. 5.

187. *Megarry & Wade*, *supra* note 10 at § 14-241 (2).

- (b) On the part of the tenant—
 - (i) a covenant to pay rent;
 - (ii) a covenant to pay tenant's rates and taxes, *i.e.* all rates and taxes except those which statute requires the landlord to bear;
 - (iii) a covenant to keep the premises in repair and deliver them up in repair at the end of the term;
 - (iv) (if the landlord has undertaken any obligation to repair) a covenant to permit the landlord to enter and view the state of repair;
 - (v) a condition of re-entry for non-payment of rent, but not for breach of any other covenant.

This class of covenants is not closed. The courts may develop new usual covenants, if the circumstances warrant it.

A standard form lease that is set out in a regulation to the new *Commercial Tenancy Act* could prove to be helpful for unsophisticated parties. By analogy, it could operate in a manner similar to the Table 1 articles for companies, though setting out less detail and requiring the express assent of the parties to apply. A standard form lease prescribed by regulation could also be seen as bringing the LTFA into the twenty-first century.

The committee has decided that the implied terms for leases discussed in the previous section of this consultation paper adequately cover this area. So, there is no need for a standard form lease as part of a new *Commercial Tenancy Act*.

The committee tentatively recommends that:

14. A new Commercial Tenancy Act should not prescribe a standard form lease by regulation, which parties could use by their express assent.

VI. ASSIGNMENT AND SUBLETTING

A. Introduction

There is a distinction between assignment and subletting. As a leading textbook put it, “[a] sub-letting must be carefully distinguished from an assignment”:¹⁸⁸

[An assignment] in effect substitutes the assignee in the place of and invests him with all the rights and liabilities of the lessee. On the other hand a sub-lessee has no rights or direct liabilities under the original lease, since there is no privity of contract or estate

188. *Williams & Rhodes*, *supra* note 75, vol. 1 at § 3:9:3.

between him and the original lessor. He is merely the tenant of the original lessee, between whom and himself the ordinary relationship of landlord and tenant exists.

One practical effect of this distinction is that a tenant who intends to grant a sublease must ensure that it retains some part of the term of the lease—at least one day, for instance. If the tenant grants the entire term then the intended “sublease” is legally an assignment.

Despite the legal and practical differences between assignment and subletting, this section discusses them together. This section focuses on issues related to landlords granting consent to an assignment or a subletting. Since these issues are the same for assignments and sublettings, they are discussed together to avoid repetition.

B. Duty to Act Reasonably

Control of assignment and subletting is a major point of contention in commercial leases. As one practice guide observed, “[w]hat most tenants don’t appreciate when negotiating a lease is that the assignment and subletting clauses could, in fact, be the most important provisions in the entire lease.”¹⁸⁹ The guide went to explain that assignment and subletting may be important if the tenant’s business is successful (and the tenant wants to take an opportunity to sell out at a high price) or if the tenant’s business is failing (and the tenant needs to move to more suitable premises to save the business). As a conclusion, the guide advised that “[i]t is important at the outset ... for a tenant to provide for generous rights of assignment and subletting.”¹⁹⁰

Most landlords do not have to be told about the importance of assignment and subletting. A landlord’s interests in this topic run counter to a tenant’s, so landlords in general are very reluctant to give generous rights of assignment and subletting. This reluctance derives from a variety of concerns, such as a desire to control the mix of tenants in a building or to ensure that the tenant has the financial strength to pay rent and meet its other obligations.

At common law, if a lease gives the tenant the right to assign or sublet the premises and is silent on the issue of obtaining the landlord’s consent, then the tenant is free to assign or sublet the premises to whomever it chooses and it does not need to obtain the landlord’s consent.¹⁹¹ Most landlords will balk at this result, so the almost

189. Harvey M. Haber, “Assignment and Subletting,” in Haber, *supra* note 154, 31 at 31.

190. *Ibid.*

191. See *Williams & Rhodes*, *supra* note 75, vol. 2 at § 15:4:1 (“The tenant’s right to dispose of the term may be controlled by the terms of his grant, but an express agreement is necessary.” [citation

universal practice is to include restrictions on the tenant's right to assign or sublet the term of the lease. Landlords also include other provisions to hamper or restrict the right such as requiring written consent, which can be arbitrarily withheld, to advertise or list the property for sublease or assignment.

Some jurisdictions have determined that simply leaving this important issue to the parties to a lease to resolve in their negotiations puts tenants at a significant disadvantage. These jurisdictions have enacted legislation that imports a reasonableness requirement when the landlord exercises its discretion to approve or disapprove a potential assignment or subletting. The rationale for this legislation is to provide tenants with some protection and to restore some balance to negotiations over rights to assignment and subletting. British Columbia's CTA is silent on this issue, but that silence is something of an anomaly. Eight Canadian common law jurisdictions have legislation limiting the ability of a landlord unreasonably to refuse consent for an assignment or subletting.¹⁹²

The LRCBC Report characterized the current position of British Columbia law on this issue as being "... badly out of step with that which prevails in the rest of Canada."¹⁹³ The BC Commission recommended enacting legislation that would be broadly similar at its core to the provisions in force in the other provinces and territories. The rationale for this recommendation was summarized as follows: "Where the consent requirement is not tempered by the need for reasonable behavior it can become an instrument for unfair and oppressive conduct of a kind that the law should not tolerate."¹⁹⁴

The notion of imposing a reasonableness requirement in general and the recommendation in the LRCBC Report in particular have attracted some criticism. The tenor of this criticism was that the proposal unduly restricted the parties' freedom to negotiate, that the power imbalance between landlords and tenants which, in part, forms the rationale of the legislation does not really exist, and that the proposal would cause landlords to lose control over their properties.

omitted]).

192. Saskatchewan: *The Landlord and Tenant Act*, R.S.S. 1978, c. L-6, s. 13; Manitoba: *The Landlord and Tenant Act*, R.S.M. 1987, c. L70, C.C.S.M. c. L70, s. 22 (1); Ontario: *Commercial Tenancies Act*, R.S.O. 1990, c. L.7, s. 23 (1); New Brunswick: *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1, s. 11 (1); Prince Edward Island: *Landlord and Tenant Act*, R.S.P.E.I. 1988, c. L-4, s. 12 (1); Yukon: *Landlord and Tenant Act*, R.S.Y. 2002, c. 131, s. 11 (1); Northwest Territories: *Commercial Tenancies Act*, R.S.N.W.T. 1988, c. C-10, s. 11 (1). The Northwest Territories legislation also applies in Nunavut by virtue of the *Nunavut Act*, S.C. 1993, c. 28, s. 29.

193. *Supra* note 6 at 38.

194. *Ibid.*

The committee has decided that introducing a reasonableness requirement would make the law in British Columbia more balanced and would bring it into line with the law of the rest of Canada.

The committee tentatively recommends that:

15. A new Commercial Tenancy Act should contain a provision imposing an obligation on a landlord to act reasonably in considering whether to grant or withhold consent to an assignment or a subletting of the lease.

C. Contracting Out

The issue under this heading is whether a requirement to act reasonably should be viewed as a baseline standard that the law should protect in each case or as a default position or starting point which the parties should be freely able to vary.

All of the current Canadian provisions¹⁹⁵ imposing a reasonableness requirement qualify that requirement with words like “unless the lease contains an express provision to the contrary.” The OLRC Report recommended retaining this principle in new commercial leasing legislation. This recommendation was based on a distinction between trends in residential and commercial leasing:¹⁹⁶

... a fundamental difference between residential and commercial tenancies [is] apparent. In the commercial sector, the changing nature of landlord and tenant relations has not been toward increasing impersonality. While there may be scant grounds for withholding consent to an assignment or subletting by a residential tenant where the assignee or subtenant is financially stable, of good character, and does not intend to alter the use to which the premises have previously been put, the basis for assessment in the case of a commercial lease is far more complex. Landlord and tenants of commercial premises who made their views known to the Commission generally felt that individual business judgment should not be subject to review by a judge, unless the parties have not contracted out of the [reasonableness requirement].

Examples of the mandatory approach, which does not allow contracting out, are more common in the residential leasing sector.¹⁹⁷ Among law reform agencies, the Law Reform Commission of Ireland, in a recent report,¹⁹⁸ recommended placing “an

195. *Supra* note 192.

196. *Supra* note 62 at 202.

197. *See, e.g.*, RTA, *supra* note 51, s. 34 (2).

198. *Report on the Law of Landlord and Tenant*, *supra* note 64.

overriding obligation” on a landlord “not to unreasonably withhold or delay giving consent.”¹⁹⁹ The Irish Commission’s recommendations would apply both to residential and to commercial leases.²⁰⁰ The rationale for this position appears to rest on a sense of the imbalance of bargaining power between landlords and tenants. The feeling is that the reform would be severely undercut if the parties were allowed to contract out of the statutory provision, because landlords would use their superior bargaining strength routinely to oust the reasonableness requirement.

The LRCBC Report sketched out a third position, midway between these two approaches. Its recommended provision would not allow contracting out of the reasonableness requirement, but would allow the parties to agree to the standards that would be used in determining whether or not a landlord’s conduct had been reasonable. The intent was to provide “... limited freedom of contract in this context.”²⁰¹

The committee favours the approach taken in the OLRC Report, and applied in legislation across Canada, allowing the parties to contract out of the reasonableness requirement.

The committee tentatively recommends that:

16. A new Commercial Tenancy Act should impose a default obligation on landlords to act reasonably in considering whether to grant or withhold consent to an assignment or a subletting, which may be varied or excluded by the express agreement of the parties.

The committee also considered another proposal in the LRCBC Report, whether the legislation should prevent leases from containing a prohibition on assignment and subletting. At present, the parties are free to decide whether or not to allow assignment and subletting. If the law is changed to impose a reasonableness requirement, there is a concern that landlords will routinely prohibit assignment and subletting as a way to avoid the reasonableness requirement. The LRCBC Report recommended enacting legislation to address this concern: “[t]his is an issue on which, we believe, that the *Commercial Tenancy Act* should speak clearly—any purported prohibition of this kind should be void and unenforceable.”²⁰² Although

199. *Ibid.* at 85.

200. *Ibid.* at 3.

201. *Supra* note 6 at 138.

202. *Ibid.* at 42[footnote omitted].

there is some anecdotal evidence that some landlords in other parts of Canada will insist on leases that prohibit assignment and subletting, a prohibition on assignment and subletting does not appear in the legislation of other provinces.

The committee is not convinced that there is a need for such a provision at this time. The committee also notes that the proposal in the LRCBC Report went hand in hand with a general limitation on contracting out. A limitation on prohibiting assignment and subletting is more in keeping with broader limitations on contracting out than with a general position that allows contracting out.

The committee tentatively recommends that:

17. A new Commercial Tenancy Act should not declare that any purported attempt to prohibit an assignment or a subletting of the term of a commercial lease is void and unenforceable.

D. Administrative Charges

In most cases, landlords will incur costs in order to determine whether to grant consent to an assignment or a subletting. Landlords will naturally seek to pass these costs along to the tenant. The LRCBC Report noted that this practice raises two concerns.²⁰³ First, a landlord could seek to obtain more than it was reasonably out-of-pocket. Second, and almost diametrically opposed to the first concern, enshrining the reasonableness standard in legislation could possibly result in all administrative charges imposed in these circumstances being characterized as unreasonable.

The LRCBC Report recommended spelling out in the legislation that landlords are entitled only to reimbursement of reasonable expenses.²⁰⁴ The legislation currently in force in the rest of Canada does not contain a similar provision. The problems that the proposed legislation would be intended to address are really only speculative. The committee has decided to follow the approach taken in the rest of Canada.

The committee tentatively recommends that:

18. A new Commercial Tenancy Act should not contain a provision allowing landlords only to claim reimbursement of reasonable expenses incurred in connection with considering a proposed assignment or subletting.

203. *Ibid.* at 41.

204. *Ibid.*

E. Transition

Transitional issues are often highly technical issues, but in this case transition to the new rule does have a bearing on the underlying policy that supports a legislated reasonableness requirement. The LRCBC Report's recommendations would have applied to leases made before or after the legislation implementing them came into force. As protection of the interests of tenants is part of the rationale for enacting a reasonableness requirement, a solid argument may be made that this requirement should apply to existing leases.

But, in general, legislation applies prospectively, as it is considered unfair to impose obligations or alter arrangements that were entered into at a time when the legislation was not in force and the parties could not have taken it into account in arranging their affairs. Although it may result in some fragmentation in the law, adhering to this principle is acceptable in this case to the committee.

The committee tentatively recommends that:

19. A new Commercial Tenancy Act should contain a requirement for landlords to act reasonably in considering whether to grant or withhold consent to an assignment or a subletting that only applies to leases entered into after the legislation comes into force.

VII. MERGER AND SURRENDER

A. Introduction

Merger and surrender are longstanding technical terms in the law of landlord and tenant. The OLRC Report contains a good discussion of the distinction between merger and surrender:²⁰⁵

A surrender arises where a tenant surrenders his tenancy agreement to his immediate landlord, who accepts the surrender. If, on the other hand, the tenant retains the term and acquires the reversion, there is a merger. In both instances the tenancy agreement is absorbed by the reversion and destroyed.

The two concepts are distinct, but, as the last sentence of the quotation makes clear, in practice they often lead to the same result—the destruction of the landlord-tenant relationship. This result is based on the real property foundations of commercial leasing law. When a merger or a surrender occurs, there is no longer privity of estate between the parties in a commercial leasing arrangement. This conclusion

205. *Supra* note 62 at 37 [footnote omitted].

has the most legal significance when there has previously been a subletting of a lease. The sections that follow focus on this situation.

B. Release of Subtenant from Obligations

As noted earlier, a merger or surrender of a lease destroys the privity of estate between the parties to the lease. This led to a curious series of results at common law:²⁰⁶

...the surrender of a head lease would—

- (i) extinguish that lease;
- (ii) leave the sub-lease in existence and binding on the freeholder; but
- (iii) render unenforceable all the covenants in the sub-lease.

So, on a merger or surrender, the common law effectively released the subtenant from all of its obligations under the sublease—including the obligation to pay rent. This obviously created a windfall for the subtenant. Legislation was passed in nineteenth-century England to reverse this result.²⁰⁷ This legislation was adopted in British Columbia as part of the PLA.²⁰⁸

Both the LRCBC Report²⁰⁹ and the OLRC Report²¹⁰ recommended retaining a provision like the one currently found in the PLA in a reformed commercial leasing statute. In fact, reverting to the common law position does not appear to have been taken seriously as an option for reform in any of the law reform reports published in the last 40 years. The only real policy issue appears to be the one identified by the Law Reform Commission of British Columbia—whether to retain the governing legislation in the PLA or to move it to a new *Commercial Tenancy Act*. Relocating the provision would help to unify commercial leasing law and thereby make it more accessible to the public.

206. *Megarry & Wade*, *supra* note 10 at § 15-055.

207. *Real Property Act, 1845* (U.K.), 8 & 9 Vict., c. 106, s. 9.

208. *Supra* note 56, s. 38 (1) (“If a reversion expectant on a lease is surrendered or merged, the interest which as against the lessee confers the next vested right to the land is deemed the reversion for the purposes of preserving the same incidents and obligations as would have affected the original reversion had it not been surrendered or merged.”).

209. *Supra* note 6 at 31–32.

210. *Supra* note 62 at 39.

The committee tentatively recommends that:

20. A new Commercial Tenancy Act should contain a provision that provides that any subtenant will continue to be bound by the sublease in the event a merger or surrender of the head lease.

C. Surrender for Renewal

Section 8 of the CTA²¹¹ addresses the related issue of a tenant surrendering a lease with a view to obtaining a new lease from the head landlord. At common law, this act would have the effect of releasing any subtenant from its obligations to the tenant. Section 8 is designed to ensure that these obligations will continue and that the new head lease will become the reversion, without the need for surrender of any sublease. Although section 8 has an antiquated feel to it, the section does correct an anomaly in the common law and should be preserved.²¹² Its language can be updated to conform to modern legislative drafting conventions.

The committee tentatively recommends that:

21. A new Commercial Tenancy Act should carry forward the policy of section 8 of the current Commercial Tenancy Act and provide that a subtenant will continue to be bound by its obligations in the event that the head lease is surrendered with a view to its renewal.

D. Effect of Termination of Head Lease

At common law, when a head lease is terminated, so are all the subleases. The LRCBC Report described the common law position in detail:²¹³

It was a curiosity of the common law that the subtenant was left in a highly favourable legal position if the head tenancy ceased to exist, through the operation of the law in relation to surrender or merger, and the intermediate tenancy disappeared. Equally curious was the position of the subtenant when the intermediate tenancy disappeared through a forfeiture under the head tenancy. Here the position was highly unfavourable. At common law the re-entry of the head landlord on a forfeiture caused the rights of the subtenant to disappear entirely.

211. *Supra* note 2.

212. See LRCBC Report, *supra* note 6 at 25; OLRC Report, *supra* note 62 at 31–32.

213. *Ibid.* at 31.

Several Canadian jurisdictions have legislation that overrides this common law rule.²¹⁴ The LRCBC Report recommended that British Columbia adopt a similar provision as part of a new *Commercial Tenancy Act*.²¹⁵

The committee is of the view that this type of provision is not needed in British Columbia. This risk is inherent in becoming a subtenant. If such legislation were adopted, it could have the effect of making it harder to obtain a landlord's consent to a sublease.

The committee tentatively recommends that:

22. A new Commercial Tenancy Act should not contain a provision that preserves the right and obligations of a subtenant when a superior landlord terminates a superior tenancy by re-entry or forfeiture.

VIII. APPORTIONMENT

A. Introduction

Apportionment means to divide into portions or pieces. It is relevant to commercial leases in connection with rent. There are two aspects of apportionment of rent: (1) apportionment in respect of estate; and (2) apportionment in respect of time.²¹⁶

214. See, e.g., Ontario: *Commercial Tenancies Act*, *supra* note 192, s. 21 ("Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso or stipulation in a lease, the court, on motion by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, in the lessor's action, if any, or in any action or application in the Superior Court of Justice brought by such person for that purpose, may make an order vesting for the whole term of the lease or any less term the property comprised in the lease, or any part thereof, in any person entitled as under-lessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rents, costs, expenses, damages, compensation, giving security or otherwise as the court in the circumstances of each case thinks fit; but in no case is any such under-lessee entitled to require a lease to be granted to him, her or it for any longer term than the under-lessee had under the original sub-lease.").

215. *Supra* note 6 at 31–32. The BC Commission had one concern with the Ontario legislation. It felt that this section did not make it clear "... whether the power of the court to grant relief is confined to the situation where the head landlord has commenced proceedings." *Ibid.* at 32. In the BC Commission's view, this power should not be so limited: "[i]t should be open to the subtenant to apply for relief at any time after the head landlord has asserted that the head tenancy is forfeited, whether or not a proceeding has been commenced." *Ibid.*

216. See *Williams & Rhodes*, *supra* note 75, vol. 1 at § 6:10.

Apportionment in respect of estate occurs "... where the landlord or the tenant assigns part only of the estate or interest held..."²¹⁷ The rent payable in these circumstances is apportioned between the various landlords or tenants. In British Columbia (and the rest of common law Canada), apportionment in respect of estate has always been governed by the common law.²¹⁸ This result appears to follow from the doctrine of privity of estate.²¹⁹

Apportionment in respect of time occurs when the landlord or the tenant ceases to hold an interest in the lease between the times when rent is payable. This usually happens in one of four ways: (1) due to the death of the landlord or the tenant; (2) due to an assignment or other devolution of interest; (3) due to re-entry by the landlord; or (4) due to surrender.

British Columbia has legislation relating to apportionment in respect of time. This subject, unlike apportionment in respect of estate, has also been commented upon in a number of law reform studies. So, this section begins by considering apportionment in respect of time and moves on to discuss apportionment in respect of estate.

B. Apportionment in Respect of Time

1. GENERAL BACKGROUND

Apportionment is an obscure subject for the contemporary reader. In order to grasp the current state of the law and the proposals for its reform it is necessary to know something about the history of apportionment.

Under common law rules, "rent neither accrued due nor was payable except on the day on which it was reserved..."²²⁰ This rule was especially troubling in earlier times, when agricultural leases set the standard for commercial leasing. These agricultural leases often required rent to be paid quarterly, or even annually. When rent was payable annually, for instance, a tenant could be in possession of the leased

217. *Consultation Paper on the General Law of Landlord and Tenant*, *supra* note 64 at 115.

218. See 49 AM. JUR. 2D *Landlord and Tenant* § 744 (2006) ("Apportionment of rent with respect to estate has always been recognized [by the common law], and when there is severance of the reversion the rent which is an incident thereof will be apportioned between the several owners of the reversion." [footnote omitted]).

219. See *Williams & Rhodes*, *supra* note 75, vol. 1 at § 6:10:1 ("Where there has been a severance of the term the lessor may sue the assignee of part of the premises for the rent due in respect of that part. He recovers against the assignee on the privity of estate, and the rent is apportionable, though in an action of debt between the lessor and the lessee it is not." [citations omitted]).

220. *Ibid.*, vol. 1 at § 6:10:4.

premises for one year less a day and, if an event occurred that terminated the lease, then, under the common law, the landlord would be entitled to nothing. Over time, this rule was seen as operating unfairly to give the tenant a windfall.

The first statute to deal with this problem was enacted in 1738.²²¹ This statute was narrowly focussed on a specific issue, which involved the death of a landlord or a tenant under a lease for life.²²² In legislation enacted nearly 100 years later,²²³ the Act of 1738 was expanded to apply to leases other than leases for lives and to situations other than those involving the death of the landlord or the tenant. The approach was to try to list the various types of payments that would be embraced by the legislation and to provide simply that “they shall be apportioned.” The Act of 1834 applied equally to rent and to other sorts of periodic payments (such as annuities).

Both the Act of 1738 and the Act of 1834 proved to be frustrating to apply in practice. They were repealed and replaced with a further Act, which was enacted in 1870.²²⁴ This Act drew on the fact that, at common law, interest has always been seen to be accruing from day to day. The 1870 Act required that other types of periodic payments be treated in the same manner as interest.²²⁵

Despite their repeal and replacement, the Acts of 1738 and 1834 form the basis of British Columbia’s apportionment legislation, which is found in sections 10–13 of the CTA.²²⁶ This puts British Columbia out of step with most of the rest of the

221. *An act for the more effectual securing of the payment of rents, and preventing frauds by tenants*, *supra* note 44, s. 15.

222. The scope of the legislation was spelled out in its preamble: “And whereas where any lessor or landlord, having only an estate for life in the lands, tenements, or hereditaments demised, happens to die before or on the day, on which any rent is reserved, or made payable, such rent, or any part thereof, is not by law recoverable by the executors or administrators of such lessor or landlord; nor is the person in reversion entitled thereto, any other than for the use and occupation of such lands, tenements, and hereditaments, from the death of the tenant for life; of which advantage hath often taken by the under-tenants, who thereby avoid paying any thing for the same. . . .”

223. *An Act to amend an Act of the Eleventh Year of King George the Second, respecting the Apportionment of Rents, Annuities, and other periodical Payments*, *supra* note 44.

224. *Apportionment Act, 1870* (U.K.), 33 & 34 Vict., c. 35.

225. *Apportionment Act, 1870*, *ibid.*, s. 2 (“From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved and made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered accruing from day to day, and shall be apportionable in respect of time accordingly.”).

226. *Supra* note 2.

provinces of Canada, which largely have re-enacted the Act of 1870.²²⁷ Alberta, Saskatchewan, and the territories have not re-enacted any of this English legislation. Saskatchewan appears to get by without statutory apportionment rules.²²⁸ Further afield, the majority of American states continue to adhere to the common law rule regarding apportionment in respect of time, but "... at least eighteen states have statutes, of varying scope, which provide for apportionment of rent."²²⁹ All of the states of Australia have apportionment legislation modelled on the English Act of 1870.²³⁰

Sections 10–13 of the CTA are both deficient in concept and convoluted in expression. These qualities make the sections obvious candidates for reform. But it should be emphasized that sections 10–13, in particular, and apportionment in respect of time, in general, appear to be causing few problems in practice. This result is due to contemporary leasing practices. Today, comparatively few leases require payment of rent at the end of a long period, such as annually or semi-annually. In fact, most leases require payment of rent in advance.

This project is concerned with comprehensive reform of the CTA, so it cannot simply ignore sections 10–13, even if they arise infrequently in practice. But the project can take into account the relative urgency of the need to reform an area of the law. Since the urgency is low in the case of apportionment in respect of time, the main issue to consider is whether this subject should be addressed as part of a new *Commercial Tenancy Act*.

227. Manitoba: *The Apportionment Act*, R.S.M. 1987, c. A100, C.C.S.M. c. A100; Ontario: *Apportionment Act*, R.S.O. 1990, c. A.23; New Brunswick: *Property Act*, R.S.N.B. 1973, c. P-19, ss. 4–8; Prince Edward Island: *Apportionment Act*, R.S.P.E.I. 1988, c. A-14; Nova Scotia: *Apportionment Act*, R.S.N.S. 1989, c. 16; Newfoundland and Labrador: *Apportionment Act*, R.S.N.L. 1990, c. A11.

228. See *Uglum v. Torkelson*, [1930] 4 D.L.R. 1022 at 1023, 25 Sask. L.R. 31 (K.B.), Taylor J. ("The Apportionment Act, 1870 (Imp.), c. 35, not having been passed until August 1, 1870, is not in force in Saskatchewan and there is no provision for apportionment of rental in this province."). The picture is less clear in Alberta and the territories; the Act of 1870 may apply in those jurisdictions.

229. David S. Hill, *Landlord and Tenant Law in a Nutshell*, 3d ed. (St. Paul: West, 1995) at 267.

230. Victoria: *Supreme Court Act 1986* (Vic.), ss. 53–56; New South Wales: *Conveyancing Act 1919* (N.S.W.), ss. 142, 144; Queensland: *Property Law Act 1974* (Qld.), ss. 231–33; South Australia: *Law of Property Act 1936* (S.A.), ss. 63–68; Western Australia: *Property Law Act 1969* (W.A.), ss. 130–34; Tasmania: *Apportionment Act 1871* (Tas.).

2. APPORTIONMENT IN RESPECT OF TIME IN A NEW COMMERCIAL TENANCY ACT

It is important to recall at this point that sections 10–13 of the CTA apply to more than payments of rent. It is understandable for historical reasons that they were placed in the CTA, but in the committee’s view it would not be wise for this anomaly to be perpetuated in a new *Commercial Tenancy Act*.

The committee tentatively recommends that:

23. A new Commercial Tenancy Act should not contain provisions governing apportionment in respect of time.

3. REFORM OF APPORTIONMENT IN RESPECT OF TIME

In the committee’s view, it would be more appropriate to place the legislation governing apportionment in respect of time in a statute of general application rather than in a statute dedicated to a specific subject such as commercial leasing. This legislation could be made into a short freestanding statute, as has been done in other provinces.²³¹ Or it could be incorporated into the LEA.²³²

Sections 10–13 have obvious deficiencies, so the question arises whether this project is the appropriate vehicle to consider reforms to them. There are a number of options available. Sections 10–13 could be replaced with legislation modelled on the 1870 Act. This reform would bring British Columbia into line with much of the rest of Canada. A second option would be simply to repeal sections 10–13. The law in Saskatchewan appears to function adequately without apportionment legislation.

In the end, the committee has decided to show restraint in this area. Since any recommendations that it would make would have an impact on areas outside commercial leasing, the committee has decided to forego making recommendations for the reform of apportionment in respect of time. In the committee’s view, this subject should be considered as part of a dedicated law reform project, which could hold consultations with the commercial leasing sector and other affected sectors.

The committee tentatively recommends that:

24. The existing general apportionment provisions in sections 10–13 of the Commercial Tenancy Act should be re-enacted in the Law and Equity Act and should form the basis of a future law reform project in their own right.

231. See *supra* note 227.

232. *Supra* note 57.

C. Apportionment in Respect of Estate

Apportionment in respect of estate has not attracted much attention, but the committee did have the benefit of a recent proposal for reform made by the Law Reform Commission of Ireland. The Irish Commission recommended restating the common law rules in a single statutory provision. It based this recommendation on its conclusion that the common law rules are obscure and not readily accessible.²³³

The Irish Commission believed that its restatement could usefully address the following situations:²³⁴

... if the landlord (X) assigns a 40% share of the reversionary interest to Y, Y becomes entitled to 40% of the rent and X remains entitled to 60% only. They can recover those respective proportions from the tenant, who becomes liable to pay those proportions only to X and Y respectively. If the tenant (A) assigns to B a part of the land comprising 30% of the total area originally let to A, B becomes liable to pay only 30% of the rent and to perform all other covenants in so far as they can apply to 30% of the land assigned. A remains liable to pay 70% only of the rent and to perform all other covenants, again in so far as they can relate to the land A has retained.

It is important to keep in mind that the proposed legislation would only apply in these situations as a default position. If, as may be expected in most cases, the parties expressly agreed to apportion their rights and obligations, then this agreement would prevail over the proposed legislation.

In the committee's view, this legislation is not needed. In those rare cases where the common law is called upon, it is performing adequately. Any advantages to be gained by restating the common law should be weighed against the general tenor of the committee's proposals, which tend to be remedial in nature and not directed at creating a complete code for commercial leasing law.

The committee tentatively recommends that:

25. A new Commercial Tenancy Act should not contain a provision addressing apportionment in respect of estate.

233. See *Report on the Law of Landlord and Tenant*, *supra* note 64 at 54 ("[The recommendation] aims to provide a clear set of 'default' provisions to operate, in the absence of provisions otherwise agreed to by the parties, where the landlord or tenant assigns part only of his or her interest or otherwise severs it, e.g. the tenant surrendering part of the land to the landlord.").

234. *Ibid.*

IX. DISTRESS FOR RENT

A. Introduction

As noted in Part One,²³⁵ distress for rent is a remedy that the landlord may employ to enforce the tenant's obligation to pay arrears of rent. Distress can be traced back to feudal times, as the Law Commission of England and Wales explained:²³⁶

The origin of distress is to be found in the nature of feudal society. The tenant of a demesne was bound by the ties of fealty to render to his lord many different kinds of services, and to pay to him various kinds of dues. If the tenant failed to render any of these services or to pay any of these dues his land became forfeit to the lord, who then became entitled to retake it and to hold it as a pledge to compel the tenant to fulfil his obligations to him.

Over time, seizing personal property, as opposed to land or interests in land, became the focus of distress.

A right to distrain against property arises in a number of specific circumstances. The right may find its origin in the common law, in a statute, or in an agreement between the parties. Statutory distress is not very common today, but it does appear in a handful of British Columbia statutes dealing with taxation.²³⁷ Agreements containing distress provisions appear to be even less common than statutes containing distress provisions. An example may be found in the clauses for mortgages contained in a schedule to the LTFA.²³⁸ By far the most important contemporary form of distress is distress for rent.

235. See, above, Part One, section II.F.

236. *Interim Report on Distress for Rent*, *supra* note 66 at 5.

237. See, e.g., *Community Charter*, S.B.C. 2003, c. 26, ss. 252 (recovery of taxes by the legal remedy of distress), 262 (recovery of penalty and costs by legal remedy of distress); *Insurance Premium Tax Act*, R.S.B.C. 1996, c. 232, s. 26.

238. *Supra* note 55, sch. 6, cov. 14 ("And it is further covenanted, declared, and agreed by and between the parties to these presents that if the said mortgagor, his heirs, executors, or administrators, shall make default in payment of any part of the said interest at any of the days or times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs or assigns, to distrain therefor upon the said land, tenements, hereditaments, and premises, or any part thereof, and by distress warrant to recover by way of rent reserved, as in the case of a demise of the said land, tenements, hereditaments, and premises, so much of such interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges, and expenses attending such levy or distress, as in like cases of distress for rent.").

A leading Canadian textbook on landlord and tenant law describes the elements of distress for rent as follows:²³⁹

Distress for rent (rent service) is a summary remedy allowed to a landlord or assignee of the reversion by common law during the term, or within six months after its determination, if the title of the landlord and the possession of the tenant continue. A landlord may not hold the goods of his tenant without a distress. The right of distress may be waived or postponed. It may be barred by the Statute of Limitations.

Two important points are briefly touched on in this paragraph. The first is that distress for rent remains, at its core, a “summary” or extrajudicial remedy. In other words, distress is a self-help remedy; it is not carried out under court supervision. This quality puts it at odds with most of this province’s other civil enforcement procedures, which require a creditor either to obtain a judgment before enforcement (for example, the writ of seizure and sale is only available to a judgment creditor) or to make an application to court (for example, obtaining a prejudgment garnishing order requires an application to court). The extrajudicial nature of distress for rent is faulted as a defect by the remedy’s opponents and praised as a strength by its supporters.

The second important point alluded to in the above quotation involves the role statutes play in distress for rent. The specific allusion is to the right existing for “six months after [the lease’s] determination,” which is a statutory extension of distress for rent.²⁴⁰ (At common law, a landlord could not distrain after the term of the lease had expired.) The common law nature of distress has been extended in places, modified in others, and restricted in still others by a large number of statutes. This series of enactments relating to distress stretches all the way back to thirteenth-century England.²⁴¹ Most of this legislation is procedural in nature, but some of it extends or limits the scope of the right itself. For example, at common law a landlord could not sell the property that it had distrained against. The property could only be held as a pledge for payment of the arrears of rent. Legislation has granted landlords the right to sell distrained property.²⁴² As a broader point these statutes, and the vast number of cases dealing with distress, make this area of the law very detailed and very complicated. Further, this legislation is not consolidated in one place. Most

239. *Williams & Rhodes*, *supra* note 75, vol. 1 at § 8:1.

240. *See CTA*, *supra* note 2, ss. 3–4.

241. *See Statute of Marlborough* (U.K.), 52 Hen. III, c. 4, s. 4 (1267).

242. *See RDA*, *supra* note 53, s. 7 (property distrained may be appraised and sold). This provision may be traced back to the *Distress for Rent Act* (U.K.), 2 Will. & Mary, c. 5, s. 1 (1689).

of it is found in the RDA,²⁴³ but a few sections in the CTA also address aspects of distress for rent.²⁴⁴

Distress for rent has proved to a controversial subject, which has attracted considerable attention from law reformers. Its difficult nature has divided this committee, which has generated two distinct proposals for reform of the law: option (a), which is to abolish distress for rent; and option (b), which is to retain distress for rent and modernize it.

B. Option (a): Abolish Distress for Rent

Many law reform bodies have addressed the subject of abolition of distress for rent. In general terms, the arguments in favour of abolition have emphasized that “distress is a relic of feudalism”²⁴⁵—that is, it is hopelessly complex, out of touch with contemporary social and legal norms, and prone to being exercised in an oppressive manner. The Law Commission of England and Wales has helpfully listed the following arguments in favour of abolition:²⁴⁶

- (1) The law is ancient and attempts at reform have been piecemeal. As a result the rules arise from a variety of different sources, are difficult to find and are subject to numerous exceptions. Age is not a problem in itself, but it is largely responsible for the obscurity and an approach towards debt enforcement which is alien to modern attitudes. . . .
- (2) Many of the rules are arbitrary and artificial. . . .
- (3) The opportunity for judicial considerations of the issues before distress takes place is primarily limited to cases where leave is required. A number of tenants are still unable to put forward a defence to the claim of non-payment of rent or cross-claim until after the distress has been levied. There is therefore little scope for the harshness of the arbitrary rules to be alleviated.
- (4) No one controls the action of the landlord when he is distraining in person and controls on bailiffs are limited. . . .
- (5) The rule that all goods on the tenanted premises are distrainable is subject to a multitude of exceptions. The rules of privilege are ambiguous, out of date and permit third party goods to be taken. . . .
- (6) There is only a short time for the tenant or third party to endeavour to stop a sale of the goods. . . .

243. *Supra* note 53.

244. *See* CTA, *supra* note 2, ss. 1, 3–4.

245. *Interim Report on Distress for Rent*, *supra* note 66 at 6.

246. *Report on Distress for Rent*, *supra* note 66 at 8–9.

- (7) The tenant's remedies for wrongful distress are often available too late and are artificially restricted by the form of impropriety in the distress. Remedies other than retrieval of the goods do not always provide adequate compensation. There is little incentive for the tenant to replevy as he has to provide security for rent arrears before he commences proceedings even though he may not be at fault. The provisions for penal damages are out of place in our modern legal system. . . .

The committee took these general arguments into account. In its discussions, it came to focus increasingly on three points that have particular resonance in British Columbia.

The first point is that distress for rent confers an unjustified priority on landlords. Section 1 of the CTA gives landlords priority over the claims of execution creditors and limits its scope to the amount of one year's rent.²⁴⁷ The rationale for this priority appears to be historical. Section 1 can be traced back to an English law enacted in 1709.²⁴⁸ This priority was intended to be a fair balancing of the interests of landlords and other creditors in a pre-industrial economy.²⁴⁹ Further, distress for rent is not integrated into the province's personal property security regime.²⁵⁰ As a result, a distraining landlord's priority position vis-à-vis a typical *Personal Property Security Act*²⁵¹ secured creditor can be described as follows:²⁵²

In the case of general security interests, chattel mortgages and other non-title-retentive security interests, the landlord takes priority over the secured creditor if the landlord exercises its common law right to distrain along with its statutory right to sell under the [RDA] before the secured creditor can seize and dispose of the same goods. Usually, the priority battle is determined by a "race of the swift."

247. *Supra* note 2. See also *Report on Distress for Rent*, *ibid.* at 10.

248. *An act for the better security of rents, and to prevent frauds committed by tenants*, *supra* note 44, s. 1.

249. See *Report on Distress for Rent*, *supra* note 66 at 19 ("Distress emerged in an agriculture-based economy. . . . The evolution of a remedy of this kind is not surprising. In a feudal agricultural economy, it is the landlord who provides the most important item of capital that enables the tenant to conduct a farming operation. A law which recognizes the special position of the landlord in this context and provides a special remedy to assist him in the collection of rent seems a natural consequence.").

250. See RDA, *supra* note 53, s. 3 (4). See also *Commercial Credit Corp. Ltd. v. Harry D. Shields Ltd.* (1980), 29 O.R. (2d) 106, 112 D.L.R. (3d) 153 (H.C.J.), *aff'd* (1981), 32 O.R. (2d) 703, 122 D.L.R. (3d) 736 (C.A.).

251. R.S.B.C. 1996, c. 359.

252. Richard H. McLaren, *Secured Transactions in Personal Property in Canada*, looseleaf, 2d ed., vol. 2 (Toronto: Carswell, 1989) at § 5.05 (3) (a) [footnotes omitted].

The exception to this general position is a secured party with a purchase money security interest.²⁵³ One half of the committee considered this priority position to be based on a historical anomaly that should be brought to an end. Distress for rent does not reflect current social conditions or the state of the market. As such, it causes real harm to other creditors of tenants.

The second point is the potential for harm contained in the fact that distress for rent is carried out outside the control of the courts. Distress for rent is effected in a summary fashion, on the instructions of a landlord to a bailiff. One of the major problems with distress for rent, in the committee's view, is the low threshold that a person is required to meet to become a bailiff and the generally weak regulation of bailiffs. For one half of the committee, the potential for abuse inherent in the extra-judicial nature of distress for rent was another strong factor militating in favour of its abolition.

The third point concerns the relation of walking possession arrangements and distress for rent. A "walking possession" arrangement is a type of arrangement that may result after a creditor seizes a debtor's property. Under this arrangement, the creditor and the debtor agree to leave the seized property in the debtor's possession. A walking possession arrangement is as legally effective as a seizure that results in the removal of the seized property. But it has the potential to confuse third parties. So, the goods that are subject to a walking possession arrangement are supposed to be clearly marked as a way to give notice to third parties. It is common for distraining landlords to enter into walking possession arrangements with tenants. Despite efforts to limit confusion, these arrangements may give the impression to third parties that the tenant retains ownership of the goods, when this is not the case. It is easy to imagine how a financier could be deceived in these circumstances.

C. Option (b): Modernize Distress for Rent

The Ontario Law Reform Commission has usefully summarized the arguments in favour of retaining distress for rent for commercial leases by noting:²⁵⁴

- (a) that [a landlord] is in a worse position as a creditor than merchants;
- (b) that very few distress proceedings are in fact taken;

253. See RDA, *supra* note 53, s. 3 (4) ("A landlord's distress has priority over a security interest in the goods of the tenant other than a purchase money security interest in goods or proceeds of those goods that is perfected at the date of distress.").

254. *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies* (Toronto: The Commission, 1968) at 15–16.

- (c) that the landlord rarely has to go beyond issuing a distress warrant in order to obtain payment;
- (d) that even though they are engaging in self-help procedures bailiffs are concerned lest their actions subject them to loss of their certificate of qualification;
- (e) that without the availability of distress, a certain number of tenants would hide behind their execution-proof status;
- (f) implications of the loss of the right of distress proceedings would extend to the general attitude of that minority of tenants the landlord is concerned with. Breach of repair covenants, which can ordinarily be converted into rent arrears and are therefore capable of being distrained upon will cause further loss to landlords if distress is made illegal;
- (g) if distress is done away with as it has been in many Australian and American states, including New South Wales, Victoria, New York and California, what will replace it;
- (h) it is the “good” tenants who will suffer for the sins of the “bad” tenants if distress is done away with.

Fewer law reform bodies have recommended retaining and modernizing distress for rent as opposed to simply abolishing it. Those agencies that have followed this course, such as the Ontario Commission, have tended to emphasize the practical need for distress for rent within the jurisdiction.²⁵⁵

For half of the committee, pragmatic concerns in the British Columbia commercial leasing market also led to favouring retaining and modernizing distress for rent over abolishing it. In their view, a landlord is in a unique position among the tenant’s creditors. As a practical matter, distress for rent is only effective when used for one or two months’ arrears of rent. Anything beyond this amount is likely to be an indication of considerable financial difficulties, which have involved the failure to pay other creditors. Many of these other creditors will have liens that afford them a super-priority by virtue of statute. These statutory creditors will have priority over a distraining landlord. They have eroded the historic priority that landlords have en-

255. See OLRC Report, *supra* note 62 at 213 (“So far as non-residential tenancies are concerned, two factors have led us to the conclusion that a different approach is warranted from that which we took with respect to residential tenancies. In the first place, we could find no marked sentiment among either landlords or tenants of commercial premises favouring the abolition of the remedy of distress. . . . Secondly, landlords of commercial premises are, in one sense, more vulnerable than landlords of residential tenancies in that they ordinarily experience greater difficulties in reletting than do landlords of residential premises.”). See also *Report on Distress for Rent in Commercial Tenancies*, *supra* note 63 at 2 (“While valid arguments are to be found on both sides, the Commission is ultimately most persuaded by the consideration that distress is fundamentally a pragmatic, workable remedy that, whatever its faults, is nevertheless an important and entrenched part of modern commercial reality. We believe that the commercial setting is a crucial factor that should not be underestimated.”).

joyed. Integrating distress for rent within the personal property security system would further erode the landlord's position, as key financiers for the tenant would either obtain priority through earlier registration or insist on obtaining it through priority agreements. The existing priority structure is well known to secured creditors, who are unlikely to be taken by surprise if a landlord claims priority on the strength of distress for rent. Further, landlords are in a special position when compared to other creditors. In contrast to, for instance, a supplier of goods or services, a landlord cannot simply discontinue supply in the face of non-payment.

This part of the committee also questioned the view that distress for rent is a one-sided remedy. Abolishing distress for rent may have negative consequences for tenants, especially financially weak tenants. Landlords will likely be quicker to terminate leases after rent falls into arrears. Distress for rent can be used as a strategy to keep a lease going through a difficult period. In contrast to the supply of goods or services, once a lease is terminated, it is not easy to get it restarted again. Further, all tenants may find that if landlords are unable to rely on distress for rent, then they will insist on obtaining general security agreements. This may interfere with other financing arrangements that are important to the tenant's business. Landlords may also require larger security deposits and may insist on taking a security interest in the tenant's fixtures, which are currently not subject to distress for rent.

Modernizing distress for rent would require bringing it more directly under the supervision of the court, providing a summary method for challenging a distress, and reducing the likelihood of abuse at the hands of bailiffs. The broad outlines of such a proposal would be as follows:

- (1) a distress warrant would be issued by the court on an application (Requisition), with a supporting affidavit of rental arrears;
- (2) a distress warrant would have to be enforced by a bailiff;
- (3) the common law rules governing the following aspects of distress for rent would be replaced by clear statutory rules:
 - (a) seizure (time, method of entry, inventory),
 - (b) making a walking seizure,
 - (c) a filing of a notice in the personal property registry or posting in a conspicuous place at the leased premises (or both),
 - (d) an appraisal (or two appraisals), which would have to be filed in court,

- (e) the sale process, which would require advertising and public auction, unless the court orders otherwise,
 - (f) when the landlord may purchase the distrained goods,
 - (g) dealing with the proceeds of sale, and
 - (h) setting out an updated tariff of costs;
- (4) the distress warrant may be satisfied by payment of the amount outstanding and costs at any time before sale, and the tenant may apply to postpone the sale on proof of raising funds or to pay the funds into court or to provide security if there is a dispute over the amount due;
- (5) any dispute over costs would be determined by the (District) Registrar;
- (6) an application to set aside the distress warrant may be made on short notice if the tenant alleges that the rent is not in arrears.

In addition, under this proposal to modernize distress for rent, the RDA would be repealed and the new statutory rules would be consolidated in a new *Commercial Tenancy Act*.²⁵⁶

D. Summary

The committee asks for comment on the following two options for reform of the law relating to distress for rent:

26 (a). A new Commercial Tenancy Act should abolish distress for rent.

26 (b). A new Commercial Tenancy Act should contain a modernized version of distress for rent, consistent with the proposals made in this section.

X. THE APPLICATION OF CONTRACTUAL PRINCIPLES TO COMMERCIAL LEASES

A. Introduction

As was noted in Part One, commentators characterize the lease as being both a conveyance of an interest in property and a commercial contract. Commentators have also noted that, historically, the courts and legislatures have oscillated between these two poles in formulating the law that applies to leases. The 1971 decision of

256. The United Kingdom has recently completed a similar process of reform, which resulted in distress for rent being modernized and converted into a new remedy called commercial rent arrears recovery. See *Tribunals, Courts and Enforcement Act, 2007*, (U.K.), 2007, c. 15, ss. 71–87 (not in force).

the Supreme Court of Canada in the *Highway Properties* case²⁵⁷ marked a major swing in the direction of viewing leases as contracts. This decision was initially hailed as revolutionary, but later cases have appeared to roll back the changes it promised.²⁵⁸ One critic has argued that legal issues in this area can be analyzed by using the following five categories:²⁵⁹

1. A leasehold interest is a conveyance in the classical or traditional sense, totally distinct from contractual doctrines or principles;
2. A lease is a conveyance in the traditional sense, subject to the addition of *one* “contractual” remedy that permits the landlord to accept the tenant’s repudiation of the lease and, upon giving the appropriate notice, to sue the tenant for damages suffered as a result;
3. A lease is a conveyance, but the landlord can employ the full arsenal of contractual remedies to enforce its terms, either:
 - (a) in addition to the traditional remedies for enforcement of a lease, or
 - (b) in substitution for the traditional remedies;
4. A lease is a conveyance in the sense that it operates to create an interest in land, but is subject to all principles of contractual law, insofar as those contractual principles do not conflict with the basic interest in the land; or
5. A lease is purely a contract.

The commentator goes on to place most Canadian cases, decided before and after *Highway Properties*, in category (3), to place *Highway Properties* and a few subsequent Canadian cases (along with some Australian and English decisions) in category (4), and to place some American cases in category (5).²⁶⁰ It will be useful to recall these categories, as they assist in deciding on appropriate statutory reforms across a number of seemingly discrete and disconnected areas. But the place to begin is with the basic question of whether the landlord–tenant relationship should be restated on a purely contractual basis.

257. *Supra* note 40.

258. See Jason Brock & Jim Phillips, “The Commercial Lease: Property or Contract?” (2001) 38 Alta. L. Rev. 989 at 991 (“Perhaps surprisingly, that decision [*Highway Properties*] has not produced a major transition in the intervening years; the revolution it seemed to promise has not yet appeared.”).

259. Gordon Sustrik, “Highway Properties—Look Both Ways Before Crossing” (1986) 24 Alta. L. Rev. 477 at 481 [emphasis in original].

260. *Ibid.* at 493–94.

B. Contractual Basis of the Landlord–Tenant Relationship

Some commentators have argued that the simplest and most direct way to address several key issues in commercial leasing law would be to declare that leases are simply contracts, in effect moving the law to category (5).²⁶¹ Interestingly, Ireland’s legislation governing leases, which dates from 1860, contains just such a declaration:²⁶²

The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent.

Ontario has had a similar provision as part of its *Commercial Tenancies Act* since 1895.²⁶³

The policy of these provisions has been variously described. The Law Reform Commission of Ireland has noted the “apparently revolutionary language” of the section in *Deasy’s Act*.²⁶⁴ The revolutionary impact of the section would be to move commercial leasing law to category (5) (“a lease is purely a contract”), ending its involvement with real property law. On the other hand, the leading case on the Ontario provision²⁶⁵ interpreted it as simply providing for a much more modest change:²⁶⁶

Now the section in question does not abolish the relation of landlord and tenant, and make the bargain by which one lets land to another a mere contract, but alters the manner of creating a long existing and well-known relation; it is hereafter not to be a matter

261. See, e.g., Brock & Phillips, *supra* note 258 at 1025 (“... all aspects of lease law, not just the areas of abandonment and independence of covenants ... ought to be contractualized; partial contractualization should be expanded to complete contractualization”), 1039 (“... the complete assimilation of the lease within contract law is both desirable and, with a little imagination, possible”).

262. *Landlord and Tenant Law Amendment Act (Ireland), 1860* (U.K.), 23 & 24 Vict., c. 144, s. 3 (commonly called *Deasy’s Act*).

263. *Supra* note 192, s. 3 (“The relation of landlord and tenant does not depend on tenure, and a reversion in the lessor is not necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation; nor is it necessary, in order to give a landlord the right of distress, that there is an agreement for that purpose between the parties.”).

264. *Consultation Paper on the General Law of Landlord and Tenant*, *supra* note 64 at 11.

265. *Harpelle v. Carroll* (1896), 27 O.R. 240 (H.C.J. (Q.B.D.)).

266. *Ibid.* at 249. The quotation at the end of this passage is from the Ontario legislation, which formerly contained those words.

depending on tenure or service, as it was under the feudal law, nor is a reversion to be necessary to the relation, as it was after the statute *Quia Emptores*, but it is to be deemed to be founded on contract express or implied. It was always, I take it, necessary that in a certain sense the relation should be founded on contract, because there must have been an agreement express or implied by the tenant to hold, and as to the return to be made to the landlord; but it was also necessary that he under whom the tenant agreed to hold, should be either lord of the feud or owner of the reversion in order that the relation of landlord and tenant should be complete; and all that the section does is to render unnecessary hereafter the latter requisite, and to create the relation whenever, as it provides, there shall be an agreement to hold land from or under another “in consideration of any rent.”

In simple terms, the effect of the section would be to remove the requirement that a person must hold a reversionary interest in the leased premises in order to grant a lease.

Both the Law Reform Commission of Ireland²⁶⁷ and the Ontario Law Reform Commission²⁶⁸ have recommended retaining a version of this provision (restated in modern language) in their respective landlord-tenant statutes. Both commissions frame this recommendation as a modest step to retain a longstanding statutory provision. Both see their recommendations as playing a small part in the issue-by-issue development of commercial leasing law from property to contractual principles.²⁶⁹ In other words, both commissions see this provision as consistent with category (4) or even category (3).

In both Ireland and Ontario, this provision has not excited much interest in the courts.²⁷⁰ The situation might be different in British Columbia. If this provision were to appear as part of a modern enactment, with no judicial history behind it, then its impact could be much more dramatic. On the other hand, the provision could be framed in such a way as to be consistent with the limited interpretation that pre-

267. *Report on the Law of Landlord and Tenant*, *supra* note 64 at 34.

268. OLRC Report, *supra* 62 at 5–8.

269. See OLRC Report, *ibid.* at 6–7 (“... we do not recommend the outright repeal of section 3 and the wholesale endorsement of a purely, and exclusively, contractual landlord and tenant relationship, whereby the whole of the law of contract will of necessity apply. Suffice it to say that both the recommendations made and the specific legislation suggested in this Report derive from a desire to reform the tenets of landlord and tenant law where necessary. Such reform must be undertaken after an assessment of the substantive merits of each tenet, whatever the particular legal basis or historical antecedents.”); *Consultation Paper on the General Law of Landlord and Tenant*, *supra* note 64 at 14.

270. See *Consultation Paper on the General Law of Landlord and Tenant*, *ibid.* at 11–12 (“Indeed in the decades after its enactment there were numerous judicial statements emphasising its limited effect on the law.” [footnote omitted]).

vails in Ireland and Ontario. Such an interpretation would restrict the application of this provision to doing away with the requirement to hold a reversion in the land in order to grant a commercial lease, consistent with the approach taken in Ireland and Ontario. The Irish Commission, in particular, has touted the practical benefits of taking such an approach.²⁷¹ In that country, these benefits appear to involve facilitating certain types of agricultural leases.

The committee considered both interpretations of such a provision and decided that, in either case, it is not desirable for British Columbia. The broad interpretation would likely serve to take leases outside the land title system, which would create difficult transitional issues. The narrow interpretation addresses practical concerns that appear not to have arisen in British Columbia. It is preferable to address the application of contractual rules on an issue-by-issue basis.

The committee tentatively recommends that:

27. A new Commercial Tenancy Act should not contain a provision that declares that the relationship of landlord and tenant is founded on the contract between the parties and does not depend on tenure and that a reversion in the land is not necessary to create the relationship of landlord and tenant.

C. Frustration

Sometimes unforeseen circumstances arise after the parties enter into a contract and these circumstances render performance of the contract impossible. In certain cases where this occurs, the law has, since the nineteenth century, provided the contracting parties with a remedy.²⁷² This remedy flows from the doctrine of frustration, which a leading case has described in the following terms:²⁷³

Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expenses or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

271. *Ibid.* at 12–14.

272. *See Taylor v. Caldwell* (1863), 3 B. & S. 826, 122 E.R. 309 (Ex. Ch.).

273. *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, [1981] A.C. 675 at 700, [1981] 1 All E.R. 161 (U.K.H.L.), Lord Simon.

The traditional rule holds that the doctrine of frustration is not available in cases involving leases.²⁷⁴ The courts appear to be developing the common law in the direction of reversing the traditional rule,²⁷⁵ but at this point the question of whether the doctrine of frustration applies to a commercial lease is, in most common law jurisdictions, not free from doubt.²⁷⁶

This confusion over the applicability of the doctrine of frustration can be traced back to the dual nature of a lease as both a conveyance and a contract. But the uncertainty on this issue does not plague British Columbia. Clarity reigns in this jurisdiction as a result of a previous law reform effort. In a 1971 report,²⁷⁷ the Law Reform Commission of British Columbia recommended enacting legislation²⁷⁸ to dispel any confusion over whether British Columbia's *Frustrated Contract Act*²⁷⁹ applies to leases. This legislation was enacted in 1974.²⁸⁰ It is currently section 30 of the CTA,²⁸¹ and it remains the most recent addition to the CTA.

British Columbia is the only province or territory that has legislation expressly declaring that the doctrine of frustration applies to commercial leases.²⁸² The question for this consultation is whether that legislation should be carried forward into a new *Commercial Tenancy Act*. In the committee's view, this section should be carried forward. The common law has not yet developed to a point to render it superfluous. Although the doctrine of frustration is not commonly invoked, its availability is useful in preventing injustices. Further, by incorporating the *Frustrated Contract Act* by reference, a new *Commercial Tenancy Act* will also

274. See *Leightons Investment Trust Ltd. v. Cricklewood Property and Investment Trust Ltd.*, [1943] K.B. 493 at 496 (Eng. C.A.), MacKinnon L.J. ("The doctrine of frustration . . . has been applied to a variety of contracts, but it has never been applied to a demise of real property."), *aff'd on other grounds*, [1945] A.C. 221, [1945] 1 All E.R. 252 (U.K.H.L.).

275. See Joseph T. Robertson, "Frustrated Leases: 'No to Never—But Rarely if Ever'" (1982) 60 Can. Bar Rev. 619. See also LRCBC Report, *supra* note 6 at 26.

276. See *Williams & Rhodes*, *supra* note 75, vol. 1 at § 1:1:5.

277. Law Reform Commission of British Columbia, *Report on the Need for Frustrated Contracts Legislation in British Columbia* (LRC 3) (Vancouver: The Commission, 1971).

278. *Ibid.* at 16.

279. R.S.B.C. 1996, c. 166.

280. See *Landlord and Tenant Act*, *supra* note 51, s. 61 (1) (e).

281. *Supra* note 2.

282. See *Williams & Rhodes*, *supra* note 75, vol. 1 at § 1:1:5. On the other hand, most provinces *do* have legislation declaring that the doctrine of frustration applies to *residential* leases.

incorporate a set of rules for allocating losses that may result from a frustrated contract.²⁸³

The committee tentatively recommends that:

28. A new Commercial Tenancy Act should carry forward section 30 of the Commercial Tenancy Act, which provides for the application of the Frustrated Contract Act and the doctrine of frustration to leases.

D. Independence of Covenants and Fundamental Breach

Under traditional common law principles, the covenants²⁸⁴ of a lease are independent from one another. In simple terms, this means that a breach of a covenant by one party does not relieve the other party from performing its covenants under the lease. A party's obligations under a lease could only be brought to an end by a breach of a condition.²⁸⁵ Contractual doctrines, such as fundamental breach,²⁸⁶ historically had no application in disputes involving commercial leases.

283. See *Frustrated Contract Act*, *supra* note 279, ss. 5–8.

284. See *Report on Covenants in Commercial Tenancies*, *supra* note 63 at 2 (“Every lease contains promises which are made by a landlord to a tenant and tenant to a landlord. For instance, a landlord may promise to keep in good repair a building which is leased to a tenant, while a tenant may promise to pay the property taxes levied by the municipality on the lease property. Promises such as these are called covenants.”).

285. See *ibid.* (“A promise made by a landlord or tenant may be a condition rather than a covenant. The main difference between a covenant and a condition pertains to the consequences of a breach. If a tenant *covenants* to do something—for example, to repair the interior of the leased premises—and he or she does not do so, the landlord can sue the tenant for damages but cannot usually terminate the lease for this breach. On the other hand, if a lease is granted on the *condition* that the tenant repair the interior of the premises and the tenant does not comply, the landlord can end the lease.” [emphasis in original; footnote omitted]).

286. See Robert Flannigan, “*Hunter Engineering: The Judicial Regulation of Exculpatory Clauses*” (1990) 69 Can. Bar Rev. 514 at 514 (“A contract may be breached in different ways. The breach may be ordinary or it may be fundamental. The distinction between these types of breach is important. Judges have attached special consequences to a breach that is fundamental. One consequence is uncontroversial. Where a breach is fundamental, the innocent party becomes entitled to elect to terminate his or her further obligations under the contract. The second special consequence is, or was, highly controversial. The supposed consequence was that a party who committed a ‘fundamental’ breach could not rely on an exculpatory clause in the contract to reduce or eliminate liability. The controversy has now been resolved, in both Britain and Canada, in favour of the party protected by the clause.”).

As commentators have pointed out, the rationale for the historical rule has not been clearly articulated in the jurisprudence.²⁸⁷

It is rare to find in the cases explanations of the rule that lease covenants are independent. One circular justification sometimes cited is that the rule derives from the fact that the lease is primarily considered a conveyance. More convincingly, it is sometimes said that, as leases generally contain a variety of detailed provisions, the parties have the opportunity to provide for dependency if they so wish, by making the covenant a condition. The irony of this rationale, of course, is that it employs an essential attribute of contract law—that the parties' bargain should be honoured—to justify a refusal of the courts to apply an ancillary contract doctrine—that when one party significantly fails to honour the bargain, the other may elect to escape from it.

As the last sentence of this quotation indicates, the traditional approach to the independence of lease covenants is not held in high regard by academics. The courts have also begun to develop the law in this area by applying contractual principles, particularly the doctrine of fundamental breach. The leading British Columbia case is *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.*²⁸⁸ In *Lehndorff* the landlord was claiming unpaid rent from the tenant. The tenant had moved out of the leased premises prior to the expiry of the lease. The tenant sought to assign its interest in the lease to a third party (actually, the third party was the owner of the building that the tenant had moved into). The lease contained a covenant requiring the tenant to obtain the landlord's consent for an assignment, whose consent would not be unreasonably withheld. The landlord refused to consent to the assignment. The Court of Appeal held that, in addition to historical real property principles, contractual principles also applied to commercial leases.²⁸⁹ In this case, the landlord's unreasonable refusal to grant its consent to the assignment could be characterized as a fundamental breach.²⁹⁰ In the result, the landlord's claim for rent was dismissed. This decision represented the evolution of the rights of a tenant faced with an unreasonable refusal of a landlord to consent to an assignment. Originally, the only remedy was to assign without leave. Then, following *Highway Properties*, the courts concluded a claim in damages would lie. *Lehndorff* completes the evolution by concluding that a tenant may treat the refusal as a repudiation of the lease, the breach

287. Brock & Philips, *supra* note 258 at 1005 [footnote omitted].

288. (1989), 59 D.L.R. (4th) 1, 37 B.C.L.R. (2d) 306 (C.A.) [*Lehndorff* cited to D.L.R.].

289. *Ibid.* at 16, Carrothers J.A. ("Rather than construe the Burrard leases as demises of real property, I would prefer to construe them as commercial contracts."), 29, Locke J.A. ("It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract.").

290. *Ibid.* at 19, Carrothers J.A., 33, Locke J.A.

being fundamental. It should also be noted that the case reflects the importance of the independent covenant of the landlord not to withhold consent unreasonably.

Lehndorff has been followed in a number of subsequent British Columbia cases.²⁹¹ The law in British Columbia regarding this issue has been characterized as "... a hybrid of property and contract principles."²⁹² The new contractual principles have been added to the existing property remedies, which have been preserved rather than discarded. The position in British Columbia on this point would appear to be consistent with either category (3) or category (4).²⁹³

Writing before *Lehndorff*, the Law Reform Commission of British Columbia recommended enacting legislation that would expressly declare that contractual principles apply to the interdependence of covenants and fundamental breach. The BC Commission's proposed legislation was framed in broad, general terms.²⁹⁴ The Manitoba Law Reform Commission agreed with this recommendation, proposing legislation drafted in similar terms.²⁹⁵

The committee tentatively recommends that:

29. A new Commercial Tenancy Act should contain a provision declaring that contractual principles apply to a party's right to relief for breach of a covenant and obligations to perform covenants under a commercial lease.

E. Rent Abatement or Diversion

This topic flows from the previous discussion of the independence of covenants. The policy underlying rent abatement or diversion is to give the tenant an additional remedy in the face of a breach of a material covenant of the lease. Instead of treating the breach as a repudiation of the lease (in accordance with contractual principles),

291. See, e.g., *Jens Hans Investments Co. Ltd. v. Bridger*, 2004 BCCA 340, 29 B.C.L.R. (4th) 1; *Ross v. Whitson*, 2001 BCSC 941, 43 R.P.R. (3d) 101.

292. See *Brock & Philips*, *supra* note 258 at 1006.

293. On its face, *Lehndorff* appears consistent with category (3), but in practice the relevant property remedy—constructive eviction—appears to be wholly overtaken by the contractual doctrine of fundamental breach. So, in effect, *Lehndorff* may have moved the law on this point in British Columbia into category (4).

294. See LRCBC Report, *supra* note 6 at 131 ("Where a landlord or tenant breaches a material provision of a tenancy agreement, the other party may elect to treat the agreement as terminated, but the agreement is not terminated until the other party is advised of the election.").

295. See *Report on Fundamental Breach and Frustration in Commercial Tenancies*, *supra* note 63 at 36–38.

the tenant would be authorized to remain in possession of the leased premises and withhold rent payments. The rationale for such a rule is to restore some balance to the respective positions of the landlord and the tenant. A subsidiary goal is that such a remedy could have the effect of keeping leases alive as the parties work out their problems.

Three Canadian law reform agencies have examined this issue. The OLRC Report recommended that legislation be enacted that would allow the tenant to withhold rent. The Ontario Commission's proposals were framed as general principles (rather than as draft legislation) and were intended to address comprehensively this issue and the issues of independence of covenants.²⁹⁶

The LRCBC Report generally endorsed the position of the Ontario Law Reform Commission, with one exception. The BC Commission recommended that the legislation do away with any suggestion that "... the tenant should, in 'appropriate cases,' be able to withhold rent on a purely self-help basis."²⁹⁷ The BC Commission's specific recommendations for rent abatement or diversion, framed as draft legislation, were as follows:²⁹⁸

Rent abatement or diversion

- 10** (1) Notwithstanding section 4 (1) [*application of contractual rules*], a tenant shall not refuse to pay rent by reason only of a breach by the landlord of a material provision of the tenancy agreement.
- (2) Nothing in subsection (1) affects the right of a tenant
- (a) to deduct from rent otherwise payable, an amount in respect of
 - (i) a judgment against the landlord for damages or compensation for a breach of the tenancy agreement, or
 - (ii) any obligation that arises independently of the landlord and tenant relationship, or
 - (b) to cease paying rent on electing to terminate the tenancy agreement under section 4 (2) [*application of contractual rules*].
- (3) Where a landlord breaches a material provision of the tenancy agreement and the tenant does not wish to elect to terminate the

296. *Supra* note 62 at 127–28.

297. *Supra* note 6 at 25.

298. *Ibid.* at 140–42.

agreement under section 4 (2) [*application of contractual rules*], then the tenant may apply to the court for an order that the rent payable under the tenancy agreement

- (a) be abated
 - (i) by an amount equal to the diminution in value of the premises to the tenant owing to the breach, or
 - (ii) by an amount sufficient to compensate the tenant for expenses incurred in repairing the breach, or
 - (b) be diverted in whole or part to any person by or through whom the tenancy agreement can be restored to, and maintained in, good standing.
- (4) An order under subsection (3) may be made subject to any conditions that are fair and equitable in the circumstances.

The Manitoba Law Reform Commission has published the most recent study of this issue. The Manitoba Commission also generally concurred with the Ontario Commission's proposals, but it shared the concerns of the BC Commission over the frivolous or unjustified withholding of rent.²⁹⁹ The Manitoba Commission's proposals took the form of draft legislation too. They were as follows:³⁰⁰

Interim diversion of rent

- 17.7**
- (1) Upon motion, a court may order that, until an action for a declaration of fundamental breach is determined, a tenant shall pay into court, on such terms and conditions as the court considers just, any rent or any specific part of the rent due under the lease.
 - (2) An order under subsection (1) takes precedence over any attachment or assignment of rent in respect of the premises.

The committee also considered expanding these provisions to embrace situations where the tenant has to take some action and asks the court to ratify it. For example, after a snowstorm, a tenant could need to have the parking lot and other common areas (as appropriate) cleared of snow if the landlord fails to do it. Should the tenant be able to deduct the cost of this type of action from rent? Does it make a difference if there is a single tenant or if it is a multi-tenant property? Is it significant if the action is taken on the leased premises or on the common areas?

299. *Report on Fundamental Breach and Frustration in Commercial Tenancies*, *supra* note 63 at 16.

300. *Ibid.* at 38–39.

The committee tentatively recommends that:

30. A new Commercial Tenancy Act should contain a provision allowing a tenant to apply to court for an order for abatement of rent or payment of rent into court if the landlord has breached a material provision of the lease.

F. Enforceability of Covenants on Assignment

As a result of a lease being conceived of as both a conveyance of property and a commercial contract, landlords and tenants are bound by both privity of estate and privity of contract.³⁰¹ This dual relationship undergoes some complex changes when a landlord or a tenant assigns its interest in a lease.

Under the traditional rules, a landlord and a tenant retain their privity of contract until the lease is terminated, even if one or the other assigns its interest in the lease.³⁰² But an assignment destroys the privity of estate between the landlord and the tenant. After the assignment, the remaining landlord or tenant only has privity of estate with the assignee.³⁰³ Further, the assignment (which is itself a type of contract) may create privity of contract between the assignee and the remaining landlord or tenant, but it is not necessary for this to occur.

As noted in the LRCBC Report, these rules have caused problems regarding enforceability in practice:³⁰⁴

It is a curiosity of the law that the range of covenants that are enforceable by and against persons between whom there is only privity of estate is much narrower than the range of covenants that may be enforced where both privity of estate and privity of con-

301. See, above, Part One, section II.C.

302. See *Report on Covenants in Commercial Tenancies*, *supra* note 63 at 3 (“Since every lease is a contract, every landlord and tenant who enter into a lease together are in privity of contract with one another. The privity of contract relationship between a landlord and tenant continues until the end of the term of the lease, even if the landlord or tenant or both assigns his or her interest in the lease property.” [footnote omitted]).

303. See *Report on Covenants in Commercial Tenancies*, *ibid.* at 5 (“Privity of estate is a relationship which exists between every landlord and tenant. The relationship continues for so long as the parties remain landlord and tenant and ends when either the landlord or tenant assigns his or her lease interest to another person. After an assignment, the assignee of the landlord or tenant steps into the shoes of the person who made the assignment; then, he or she is in privity of estate with the other party to the lease, whether that be the original party who had entered into the lease or an assignee of that party.”).

304. *Supra* note 6 at 43.

tract exists. The true position of the parties can only be determined with reference to a confusing web of statutory, common law and equitable rules.

This “confusing web” may be summarized in the following points:³⁰⁵

- Traditionally, an assignment of the landlord’s interest in a lease was referred to as “an assignment of the reversion” and an assignment of the tenant’s interest as “an assignment of the land.” At common law, there is a distinction between covenants that run with the reversion and covenants that run with the land. Only covenants that run with the land are enforceable after assignment.
- In the sixteenth century, a statute³⁰⁶ was enacted in England that attempted to ameliorate the practical difficulties that resulted from the common law. This statute did not take the direct route of converting all covenants into enforceable covenants that ran with the land.
- There were further developments in the courts. The most important was the formulation and refinement of a test for determining whether or not a covenant will be enforceable. If the covenant “touches and concerns the land” then it is enforceable on an assignment. A further refinement holds that covenants that relate to a subject matter in existence on assignment will be enforceable. Finally, the equitable courts provided some relief in the rare cases where the first condition (that the covenant touch and concern the land) was met but there was neither privity of contract nor privity of estate.

The LRCBC Report recommended enacting legislation that would make lease covenants enforceable against an assignee of the tenant or of the landlord. The BC Commission gave the following reasons for recommending this change:³⁰⁷

Three important points can be made in support of such a change. The first is that its simplicity would make the law more easily intelligible to landlords and tenants and to their legal advisors. Second, if two parties arrive at an agreement as to the terms of a commercial tenancy, it is reasonable to presume that they consider those terms fair, and that each party is prepared to fulfill his or her obligations. There is no obvious reason why some of those obligations should cease to be enforceable, simply because the tenancy or the reversion has been assigned to another party. Finally, such a reform measure is consistent with the broader evolution of the commercial tenancy from being a creature dominated by concepts of land-law, to one which incorporates a greater measure of modern contract law theory.

305. See LRCBC Report, *ibid.* at 43–48.

306. *Grantees of Reversions Act, 1540* (U.K.), 8 Hen. VIII, c. 34.

307. *Supra* note 6 at 48.

Both the Ontario Law Reform Commission³⁰⁸ and the Manitoba Law Reform Commission³⁰⁹ have made substantially similar recommendations. Adopting such a provision would modernize and simplify the law.

The committee tentatively recommends that:

31. A new Commercial Tenancy Act should provide that a person who takes an assignment of the interest of a landlord or tenant has all the rights, and is subject to all the obligations, of the assignor arising under a commercial lease, unless the parties agree otherwise.

G. Future Rent

Future rent arises as an issue when a tenant abandons the leased premises before the end of the lease's term. Traditionally, the landlord had three remedies in these circumstances: (1) the landlord could keep the lease alive and sue the tenant each time the rent comes due; (2) the landlord could accept the tenant's surrender of the lease, bringing the lease to an end; or (3) the landlord could keep the lease alive and seek to re-let the premises to a subtenant on the tenant's behalf. These remedies derived from property-law principles. These remedies did not admit a contract-law remedy analogous to accepting the tenant's repudiation of the lease and suing for damages flowing from that breach of contract.

This picture changed with the Supreme Court of Canada's landmark decision in *Highway Properties*.³¹⁰ In *Highway Properties*, the tenant was an anchor tenant of a shopping centre. The shopping centre began to fail, as other tenants moved out. Ultimately, the tenant supermarket shut down, in breach of a covenant in the lease requiring it continuously to operate its business during the lease's term. The landlord claimed to accept the tenant's repudiation of the lease and sought damages in the form of future rent owing for the remainder of the lease's term. The Supreme Court of Canada accepted the landlord's claim. It did not do away with the three traditional remedies; instead, it added a fourth remedy, based on contractual principles, to the traditional property-law-based remedies.

The basic principle articulated in *Highway Properties* regarding a landlord's claim for future rent has been broadly accepted by the courts, but there has been some confu-

308. See OLRC Report, *supra* note 62 at 33–35.

309. See *Report on Covenants in Commercial Tenancies*, *supra* note 63.

310. *Supra* note 40.

sion over working out the details of future rent claims.³¹¹ The issue in this section is whether legislation is needed to overcome this confusion.

The LRCBC Report recommended restating the law governing future rent claims in a new *Commercial Tenancy Act*. The BC Commission rested its case for this restatement on the need to clarify a difficult and “fluid”³¹² area of the law. This characterization does not appear to have changed in the time since the publication of the BC Commission’s report. Recent commentators have noted that this area of the law has complexities that are not found in ordinary contractual claims.³¹³

The committee considered these points and decided that the complexity of the legislation required undercut its practical value.

The committee tentatively recommends that:

32. A new Commercial Tenancy Act should not contain a restatement of the law governing a landlord’s claim for future rent from a tenant who has abandoned the leased premises.

H. Acceleration Clauses

An acceleration clause is a provision of a lease that provides that, on a default by the tenant, all of the rent payable under the lease becomes due. As the LRCBC Report put it “[r]ent which becomes payable through the operation of an acceleration clause is simply a form of future rent.”³¹⁴ The concern raised by acceleration clauses involves cases outside the scope of the current law on future rent. A defaulting tenant could remain in possession of the leased premises and face the “full rigor” of an acceleration clause.³¹⁵

There is legislation that protects certain parties against the full rigour of acceleration clauses. Section 25 of the LEA³¹⁶ gives the court jurisdiction to order relief from the operation of an acceleration clause, but this provision only applies to mortgages

311. See Brock & Philips, *supra* note 258 at 995–98.

312. *Supra* note 6 at 64.

313. See Brock & Philips, *supra* note 258 at 996 (observing that a “notice requirement [which has been emphasized in cases since *Highway Properties*] is a unique and somewhat perplexing addition to the law”).

314. *Supra* note 6 at 66.

315. *Ibid.*

316. *Supra* note 57.

and agreements for the sale of land. The LRCBC Report recommended amending section 25 of the LEA to add commercial leases to the types of agreements it already covers.³¹⁷ Section 25 was enacted in response to a case³¹⁸ that held that acceleration clauses are not penalties and, therefore, do not come within the court's jurisdiction to relieve against penalties.

As the LRCBC Report pointed out "[t]his provision, essentially, creates a right of reinstatement. . . The supervision of the court should minimize or eliminate abuse." The tenant who is chronically in default is unlikely to get a sympathetic hearing."³¹⁹

The committee tentatively recommends that:

33. Section 25 of the Law and Equity Act should be amended to include commercial leases.

I. Mitigation

The concept of mitigation of damages is described in this passage from a contract-law textbook:³²⁰

The basic principle that a wronged party will be compensated for all pecuniary losses naturally flowing from a breach of contract is subject to the qualification that the innocent party must take all reasonable steps to prevent further losses once aware of the breach. The defendant cannot be called upon to compensate the plaintiff for losses which the parties might have prevented. Thus, the law imposes upon the plaintiff an obligation to "mitigate," or limit losses.

There are two reasons for this rule: "... one of causation, that the defendant's breach does not cause losses that were reasonably avoidable, the other of the desirability of avoiding economic waste."³²¹

The traditional position is that a landlord is not required to mitigate its losses if a tenant abandons the leased premises. This position rested on the conception of a

317. *Supra* note 6 at 67–68.

318. *Emerald Christmas Tree*, *supra* note 46.

319. *Supra* note 6 at 68.

320. Harmin D. Pitch & Ronald M. Snyder, *Damages for Breach of Contract*, looseleaf, 2d ed. (Toronto: Carswell, 1989) at 8§1.

321. S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005) at 543–44 [footnote omitted].

lease as a conveyance. A contract-law principle like mitigation does not apply to a property-law transaction like a conveyance.

Mitigation comes to the fore in cases where a landlord claims future rent from a tenant who has abandoned the leased premises. Mitigation in these circumstances would amount to an obligation on the landlord to seek out a new tenant for the abandoned premises. *Highway Properties* was silent on the issue of mitigation. Later cases, both in British Columbia³²² and elsewhere,³²³ have made it clear that a landlord still does not have a duty to mitigate its damages in these circumstances.

Many commentators have argued that the traditional approach to mitigation in commercial leasing law is anomalous and that landlords should have to mitigate their losses when they claim future rent. For instance, the LRCBC Report recommended that legislation be enacted to impose a duty to mitigate on a landlord who makes a claim for future rent as a result of a tenant's abandonment of the leased premises. The BC Commission provided the following reasons for this recommendation:³²⁴

In most cases, a tenant who abandons premises does so as a result of financial difficulties. To subject a tenant to continued liability for future rent while permitting the landlord to allow the premises to sit vacant and do nothing to ameliorate the situation strikes us as unfair. Beyond the question of fairness is one of economic waste. Where premises sit idle when they could be productively employed an indirect loss is imposed on all of society. A rule of law which encourages economic waste is *per se* suspect.

The OLRC Report contained a similar proposal.³²⁵ In addition, recent academic opinion favours this approach.³²⁶

On the other hand, other groups have argued that commercial leasing has unique features that justify taking a different approach to mitigation. For example, the Real Property Section of the Canadian Bar Association (BC Branch) was strongly opposed

322. See *Transco Mills Ltd. v. Percan Enterprises Ltd.* (1993), 100 D.L.R. (4th) 359, 76 B.C.L.R. (2d) 129 (C.A.).

323. See *607190 Ontario Ltd. v. First Consolidated Holdings Corp.* (1992), 26 R.P.R. (2d) 298 (Ont. Div. Ct.).

324. *Supra* note 6 at 61.

325. *Supra* note 62 at 130–31.

326. See Brock & Philips, *supra* note 258 at 999 (“The failure to impose a duty to mitigate, in order to balance the benefits given to a landlord who may now sue for the whole benefit of the lease, is strikingly inconsistent with the apparently general principle of treating the lease as contract and as conveyance as enunciated in *Highway Properties*.”).

to the BC Commission's proposal. The section described the BC Commission's proposal as "... an unqualified right [for tenants] unilaterally to terminate tenancy agreements."³²⁷ The section's argument was that the proposed legislation would be unfair to landlords and would rest on a mischaracterization of a claim in debt as a claim for damages:³²⁸

Consider the example of a case involving a solvent tenant with a substantial term left on its lease. Why should the law come to its aid and burden the landlord with the obligation to relet[?] If the landlord affirms, there are no damages. There is only the accumulation of debt claims as each month passes by and the tenant fails to pay the rent. The distinction is critically important. No duty of mitigation arises in a debt action.

The committee carefully considered these starkly contrasting arguments and decided that, on balance, the law should be reformed to provide for mitigation. As the LRCBC Report concluded, this duty to mitigate should not extend so far as to require a landlord to lease the abandoned leased premises on terms that would undercut other similar premises owned by the landlord.³²⁹

The committee tentatively recommends that:

34. A new Commercial Tenancy Act should contain a provision requiring a landlord to mitigate its losses claimed as future rent, but this duty to mitigate does not require a landlord to prefer re-letting the abandoned leased premises over other premises owned by the landlord.

J. Security of Tenure

The issue of security of tenure for tenants has less to do with problems in the current law and more to do with potential issues that may arise if reforms swing too far in the direction of viewing leases as contracts with no property-law components. The issue is described in the following passage from a law review article:³³⁰

One of the principal incidents of the traditional property conceptualization of the lease is security of tenure for the tenant for the term of the lease. The tenant possesses an estate, and the landlord cannot recover that estate except on the happening of certain events, the most common of which is a forfeiture action for breach of condition. The

327. Gray & Holmes, *supra* note 141 at 5.

328. *Ibid.* at 6–7.

329. *Supra* note 6 at 64 ("We do, however, believe that reforming legislation should make it clear that the landlord's duty to mitigate does not require him to re-let abandoned premises in preference to letting vacant premises of his own.").

330. Brock & Philips, *supra* note 258 at 1030 [footnote omitted].

landlord cannot simply “breach” the lease, recover possession, and pay damages. Indeed, the law has gone further to protect tenure: construing forfeiture clauses strictly, allowing for implied waiver of rights of forfeiture, and permitting tenants to apply for relief in appropriate circumstances, even where a condition has been breached. Security of tenure, of course, is only available because the law views the lease as an executed contract conveying an estate to the tenant.

This passage suggests that security of tenure only would arise as a pressing issue if the law of leases developed all the way to category (5) (leases are purely contracts). But after this article was published, a case was decided that cast some doubt on the notion that security of tenure could not arise as an issue if the law expressly preserves traditional property-based conceptions of the lease. In *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*,³³¹ a landlord wished to redevelop a building. One holdout tenant refused to vacate. The lease contained no provision allowing the landlord to re-enter and demolish the building for redevelopment. Nevertheless, the landlord proposed to do just that. The tenant characterized this threatened action as a breach of its covenant of quiet enjoyment, and obtained an injunction to restrain it. The Court of Appeal set this injunction aside. In coming to this conclusion, the court relied on the developing conception of the lease as a contract³³² and on an earlier Supreme Court of Canada judgment in *Semelhago v. Paramadevan*,³³³ which dealt with the sale of land. *Semelhago* had stated that specific performance should not ineluctably be granted in cases dealing with land on the theory that land is always unique and, as a result, a loss of a right to occupy a certain piece of land cannot be compensated by awarding damages. The key passage from the Court of Appeal decision reads as follows:³³⁴

In my view, before determining the appropriate remedy, the chambers judge should have considered the equities between the parties, including any factors relating to the “uniqueness” of the property demised and the relative hardship, if any, of holding the landlord to the strict terms of the lease. There was an abundance of evidence before him in that regard. What he did instead was to reject damages out of hand and to impose injunctive relief tantamount to an award of specific performance. In adopting that approach, he erred.

There is a major difference between the lease that was at issue in that case and the contract of purchase and sale that was at issue in the *Semelhago* decision, which the

331. 2005 BCCA 583, 262 D.L.R. (4th) 169, 50 B.C.L.R. (4th) 250 [*IBI Leaseholds* cited to D.L.R.].

332. *Ibid.* at paras. 24–31.

333. [1996] 2 S.C.R. 415, 136 D.L.R. (4th) 1 [*Semelhago* cited to S.C.R.].

334. *Supra* note 331 at para. 32. *See also* Olson, *supra* note 4 at COM-9 (commenting on the decision and noting that many issues relevant to the broader topic of security of tenure were not addressed in this case).

Court of Appeal relied on in coming to its decision in *IBI Leaseholds*. A contract of purchase and sale is an executory contract, but the contract in *IBI Leaseholds* was a lease (not an offer to lease) with the tenant in possession of the leased premises. It is not clear how the jurisprudence will develop after *IBI Leaseholds*. Future cases may build on it or may treat it as a unique decision arising out of a particular set of facts. The question for this consultation paper is whether legislative intervention to address this issue is required or desirable at this time.

Previous law reform efforts have not tackled this question. There is a wide range of possibilities. At one end of the spectrum is the approach used in residential tenancies. Residential leasing law has largely left the traditional, property-law-based concepts involving leases behind. In their place, the RTA substitutes a complete code for a landlord that wants to recover possession from the tenant.³³⁵ Adopting this level of security for commercial tenants is likely inappropriate, but analogous statutory protections could be considered. At the other end of the spectrum is simply to recommend no statutory reforms and to leave this issue to the courts. It has been suggested that, if contract law caused this problem, then contract law supplies a solution. One article pointed to the following contractual principles that may assist a tenant in these circumstances: specific performance (which is not taken away by the leading cases, but is made harder to obtain); promissory estoppel (based on detrimental reliance); or, simply bargaining for appropriate protections in the lease.³³⁶

The committee has decided that it is premature to adopt legislation addressing this issue. The concept of security of tenure rests on keeping a tenant in place. The jurisprudence in relation to specific performance of contracts respecting land appears to be moving in the opposite direction. Not all tenants deserve the right to stay in place and it would be troublesome for the legislation to extend them this right.

The committee tentatively recommends that:

35. A new Commercial Tenancy Act should not contain provisions providing tenants with security of tenure.

335. *Supra* note 51, ss. 44–57.

336. *See* Brock & Philips, *supra* note 258 at 1031–35. *See also* Olson, *supra* note 4 at COM-10 (also noting the basic principle that the courts will not assist a wrongdoer and pointing to the tenant's right of election as other issues to consider).

XI. SUMMARY DISPUTE RESOLUTION

A. Introduction

1. EXISTING DISPUTE RESOLUTION PROCEDURES

Any landlord–tenant relationship contains the potential for dispute. The fact situations that may produce a dispute are almost limitless. Commercial leasing law has evolved a sizable number of dispute resolution procedures. These procedures differ both in their scope (that is, in the types of disputes to which they apply) and in the process to be followed in employing them. But, more fundamentally, these procedures have key differences in their essential natures. In fact, it is important to appreciate that the word “procedure” must be understood in its broadest sense in this discussion. These procedures are not necessarily court procedures. Some of them are self-help procedures, others are statutory summary procedures, still others are full-blown court procedures.

The following table contains a list of dispute resolution procedures, in the broad sense of the term, that may be used to resolve a landlord–tenant dispute.

Procedure	CTA Sections	Scope of Application	Nature of Process	Further Information
re-entry	n/a	may be used by a landlord if a tenant breaches: <ul style="list-style-type: none"> • a condition of the lease; or • a covenant of the lease, <i>if the parties agree that a breach of the covenant may lead to re-entry</i> 	self-help	<i>see, below, Part Two, section XII</i>
distress for rent	1, 3–4	<ul style="list-style-type: none"> • may be used by a landlord if a tenant is in arrears of rent, unless the lease provides to the contrary 	self-help; procedure regulated by the RDA	<i>see, above, Part Two, section IX</i>

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Procedure	CTA Sections	Scope of Application	Nature of Process	Further Information
summary application for recovery of possession (Supreme Court)	18–24	<ul style="list-style-type: none"> may be used by a landlord if a tenant remains in possession after a lease has expired or has been determined; the landlord must follow an intricate set of preconditions 	summary court process established by statute	<i>see, below, Part Two, section XI.A.2</i>
summary application for recovery of possession (registrar of Supreme Court)	25–28	<p>may be used by a landlord if a tenant:</p> <ul style="list-style-type: none"> fails to pay rent within 7 days of time agreed; <i>or</i> makes default in observing any covenant, term, or condition of the lease; <i>and</i> wrongfully refuses or neglects, after receiving a demand in writing, to remedy the non-payment of rent or other default 	summary process before a registrar of the court established by statute	<i>see, below, Part Two, section XI.A.3</i>

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Procedure	CTA Sections	Scope of Application	Nature of Process	Further Information
summary application for recovery of possession (Justice of the Peace)	5–6	may be used by a landlord if a tenant: <ul style="list-style-type: none"> is holding the lease at a rack-rent (<i>i.e.</i>, the rent payable is very high, tantamount to extortion); and the tenant has deserted the premises 	summary process conducted by two Justices of the Peace	<i>see</i> , below, Part Two, section XIV.C
overholding tenants	15–16	may be used by a landlord if a tenant: <ul style="list-style-type: none"> wilfully holds over after determination of the lease and after demand and notice in writing (s. 15); or gives notice of intention to quit the premises but fails to do so by the time mentioned in the notice (s. 16) 	penal—self-help (<i>i.e.</i> , landlord assesses double rent payable at the time rent was ordinarily payable under the lease; no further authorization is required)	<i>see</i> , below, Part Two, section XII
action for recovery of land	n/a	available for use by a landlord	court procedure governed by the Rules of Court	not within the scope of the project
court action	n/a	available for use by a landlord or a tenant	general court procedure governed by the Rules of Court	not within the scope of the project

British Columbia is far from unique in having overlapping procedures for dispute resolution.³³⁷ Consolidating and modernizing these procedures has been an important part of previous law reform studies and is a key goal of this project. Before considering reform of the law, it is useful to set out some background information on the two main summary procedures in the CTA: sections 18–24; and sections 25–28.

2. SECTIONS 18–24 OF THE COMMERCIAL TENANCY ACT

Sections 18–24 of the CTA³³⁸ establish a summary procedure that a landlord may use to regain possession of the leased premises from an overholding tenant. A landlord may use the summary procedure if (1) the lease “has expired, or been determined” (a lease may “determine” by a breach of a provision of the lease by the tenant, such as the non-payment of rent) and (2) the tenant “wrongfully refuses” to restore possession of the leased premises to the landlord after the landlord has made a written demand.³³⁹ Sections 18–24 were enacted in the nineteenth century³⁴⁰ and were closely modelled on nineteenth-century English legislation.³⁴¹ This English legislation was enacted to address procedural problems and technicalities that had impeded the use of the common law action of ejectment.

The steps required to regain possession from an overholding tenant are somewhat complex, but they must be followed very closely. The following are “preconditions to a landlord’s claim for relief”:³⁴²

1. where the default is the non-payment of rent or some other default, determination of the lease requires a demand for payment;
2. the lease has been determined by:
 - a. a notice to quit,
 - b. a notice under the lease, or

337. See, e.g., *Consultation Paper on the General Law of Landlord and Tenant*, *supra* note 64 at 179 (arguing that “the case for rationalization is clear” in Ireland).

338. *Supra* note 2.

339. CTA, *ibid.*, s. 18 (1). See also Olson, *supra* note 4 at § APP.D.A.

340. See *Over-holding Tenants Act*, 1895, S.B.C. 1895, c. 53. Both summary procedures in the CTA—sections 18–24 and sections 25–28—can be traced back to the *Over-holding Tenants Act*. These provisions were consolidated with the CTA in 1911. See *Landlord and Tenant Act*, R.S.B.C. 1911, c. 126.

341. *Common Law Procedure Act*, 1852 (U.K.), 15 & 16 Vict., c. 76, ss. 211, 213–18.

342. Olson, *supra* note 4 at § APP.D.A.2.

- c. some other act terminating the tenancy;
- 3. a written demand for possession has been delivered to the tenant subsequent to the termination of the lease;
- 4. the tenant wrongfully refuses to comply with the demand for possession.

Once the preconditions are met and the claim gets into court, the procedure set out in sections 18–24 boils down to two steps. As a first step, the landlord must show that it is *prima facie* entitled to an order for possession. This is done by entering affidavit evidence about the lease, the demand for possession, and any explanation for the tenant's refusal to comply with the demand for possession.³⁴³ This initial application used to be *ex parte*, but a recent decision³⁴⁴ held that it must be brought on notice to the tenant. If the landlord makes out this *prima facie* case, then a court date is set and the tenant must be notified of it. The second step in the process is a summary court hearing on the landlord's entitlement to the order for possession.

3. SECTIONS 25–28 OF THE COMMERCIAL TENANCY ACT

Like sections 18–24, sections 25–28 were adapted from eighteenth- and nineteenth-century legislation that was intended to give the landlord a summary procedure to reacquire possession of the leased premise. Sections 25–28 apply to cases in which the tenant (1) fails to pay rent within seven days of the agreed upon time or (2) commits a serious breach of the lease.

Section 25 sets out a procedure that must be strictly followed: (1) the tenant must either have failed to pay rent for seven days after it was due or be in default of a covenant, term, or condition of the lease in such a way that the default entitles the landlord to terminate the lease; (2) the landlord must serve a written demand on the tenant; (3) if the tenant “wrongfully refuses or neglects” to pay the rent or deliver possession of the leased premises, then the landlord may apply to a registrar of the Supreme Court and provide an affidavit including the material required by section 25; (4) on filing of the affidavit, the registrar must issue a summons to the tenant; (5) three days after service of the summons, the tenant must attend and show cause why an order for possession should not be made.

B. The Need for a Summary Dispute Resolution Procedure

The current dispute resolution procedures in the CTA are generally acknowledged to be out of date and cumbersome to use. The LRCBC Report referred to them as “ar-

343. CTA, *supra* note 2, s. 18.

344. *AMO Trust (Trustee of) v. Sabir Spring Farm*, 2002 BCSC 839, 114 A.C.W.S. (3d) 941.

chaic” and made the following case against carrying them forward as part of a new *Commercial Tenancy Act*:³⁴⁵

When they were enacted, the summary procedures undoubtedly represented a significant enhancement of the legal position of the landlord who wished to recover the possession of premises. Today they are an anachronism. They are based on a historical view of the tenancy that is increasingly being called into question. They are much more technical and more complex than the general rules of civil procedure that govern other kinds of claims. Finally, the language of some of the provisions is woefully out of date. In short, the summary procedures no longer seem to accomplish their original purpose.

Sections 25–28 are “. . . rarely used because [they have] one key disadvantage”:³⁴⁶

Even if the landlord incurs the time and expense of bringing an application pursuant to ss. 25 to 28 of the *CTA*, the process can be reversed at any [time] prior to the eviction by payment of the rent arrears and costs by the tenant: s. 26(3) of the *CTA*.

On the other hand, the summary procedure in sections 18–24 is used fairly often in practice.³⁴⁷ And this procedure may have some advantages over other existing procedures.³⁴⁸ But sections 18–24 have only a limited reach. It would be challenging to make a case for this procedure as the state of the art in dispute resolution.

The policy underlying consolidating various dispute resolution procedures into one procedure is that it rationalizes and simplifies the law. Currently, the *CTA* and judge-made law offer a number of overlapping procedures that apply in different circumstances and require different procedural steps. A single dispute resolution procedure that is simple and clear also holds out the prospect of being speedier than the current mix of procedures.

The committee has considered arguments against creating a new summary dispute resolution procedure. It may be very difficult to harmonize a disparate set of procedures that have evolved to apply to very focussed fact situations. Increasing the number of disputes that are subject to resolution by summary procedure may be felt as unfairly depriving parties of needed procedural protections. And, finally, there is the potential for a new *Commercial Tenancy Act* procedure to be at odds with gov-

345. *Supra* note 6 at 120 [footnote omitted].

346. H. Scott MacDonald, “Non-Payment of Rent: A Defaulting Tenant Under a Commercial Lease,” in *Commercial Leasing Disputes*, *supra* note 147, 2.1 at 2.1.17 [MacDonald, “Non-Payment”].

347. *See* MacDonald, “Non-Payment,” *ibid.* at 2.1.17 (“Sections 18 to 21 of the *CTA* provide the procedure most commonly used to obtain possession.”).

348. *See* Olson, *supra* note 4 at § APP.D.

ernment reforms for the civil justice system.³⁴⁹ Nevertheless, the committee has decided that the advantages of proceeding with a proposal to create a new summary dispute resolution procedure outweigh the disadvantages.

The committee tentatively recommends that:

36. A new Commercial Tenancy Act should provide for a comprehensive and consolidated summary dispute resolution procedure.

C. Location of Summary Dispute Resolution Procedure

The second threshold question regarding a summary dispute resolution procedure involves the legislative distribution of the relevant provisions. The procedure could be set out in the statute itself. This approach would be analogous to the current approach of the CTA, which contains two summary dispute resolution procedures in sections 18–24 and 25–28. Alternatively, the legislation could contain a simple enabling statement and the bulk of the relevant procedural provisions could be located in the Rules of Court.³⁵⁰ A third approach would be similar to the second, but the procedural provisions would be located in a regulation.

Spelling out the procedure in detail in a new *Commercial Tenancy Act* was seen by one part of the committee as having a number of advantages. This approach would make the rules governing disputes more accessible, particularly to members of the public who do not have legal training. The Act could serve as something of a code on this point, doing away with the need to consult other statutes, regulations, or rules. Setting out the procedure in the Rules of Court would require an extensive review of those rules, in order to ensure that the new commercial leasing procedure is in accord with the other rules and to determine which general rules should apply to the summary procedure and which should not. Finally, placing the summary dispute resolution procedure in the statute should lessen the possibility of conflict between this procedure and any general procedural changes that another law reform body may recommend for the Rules of Court.

On the other hand, while the procedure could be spelled out in the legislation itself, this approach appears to be losing favour with the provincial government. It is comparatively difficult to amend legislation and, as a result, procedural rules set out in

349. See British Columbia, Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November, 2006), online: BC Justice Review Task Force <http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf>.

350. *Supreme Court Rules*, B.C. Reg. 221/90 [Rules of Court].

legislation tend to get out of date. The procedures currently in the CTA are a good example of this tendency. They have not been amended in any significant way since their first appearance in the nineteenth century. The contemporary approach is to locate procedural rules in a regulation or in the Rules of Court.

As the ongoing civil justice reform project has placed the Rules of Court into a state of flux, the committee favours pressing ahead with a summary procedure located in a regulation to a new *Commercial Tenancy Act*. The regulation may be drafted with an eye to its ultimate incorporation within a reformed Rules of Court.

The committee tentatively recommends that:

37. A new Commercial Tenancy Act should contain a short enabling statement for a summary dispute resolution procedure that emphasizes expeditious proceedings and should leave procedural details to a regulation, which may in the future be incorporated into the Rules of Court.

D. Scope of Summary Dispute Resolution Procedure

The committee has decided that the summary dispute resolution procedure contained in or authorized by a new *Commercial Tenancy Act* should be broader in scope than the various procedures currently found in the CTA. Speed in hearing and resolving commercial leasing disputes is of paramount importance in this area of the law. It justifies expanding the scope of the summary procedure.

The committee's starting place in examining the types of disputes to be subject to the summary dispute resolution procedure is the recommendation of the LRCBC Report on this subject. The LRCBC Report set out its recommendation in the form of a provision in its draft legislation:³⁵¹

Remedies

- 14** (1) The court may, on application, make one or more of the following orders:
- (a) an order that the landlord or the tenant recover
 - (i) possession of the premises,
 - (ii) damages or other relief resulting from a breach of the tenancy agreement or a breach of this Act;
 - (b) an order that the landlord recover

351. *Supra* note 6 at 148–49.

- (i) arrears of rent,
 - (ii) compensation for use and occupation under section 12 (a) [*overholding tenant*],
 - (iii) indemnity under section 12 (b) [*overholding tenant*],
 - (iv) compensation under section 11 (3) [*future rent*];
- (c) an order
 - (i) declaring that the landlord's consent to an assignment or the creation of a subtenancy has been unreasonably withheld,
 - (ii) declaring that a tenancy has been validly determined under section 4 (2) [*breach of material provision*],
 - (iii) for the diversion or abatement of rent under section 10 [*diversion or abatement of rent*],
 - (iv) for the relief of a subtenant under section 8 (3) [*principal agreement forfeited*],
 - (v) for the relief of a tenant under section 21 or section 22 of the *Law and Equity Act* [*relief from forfeiture*].
- (2) A party may apply by petition for the relief set out in subsection (1).
- (3) Nothing in this section affects the jurisdiction of the Provincial Court to hear any claim, otherwise within its jurisdiction, for the payment of rent or damages.

The reference in subsection (1) (c) (iv) to a subtenant's right to reinstate a lease after a default of the tenant should be deleted,³⁵² as should the reference in subsection (1) (b) (iv) to statutory authority for an award of future rent.³⁵³ The committee was also concerned that the wording of subsection (1) (a) (ii) is too broad. It should be clearly restricted to disputes going to the root of the landlord-tenant relationship.

Other subjects referred to in this provision are discussed in detail elsewhere in this consultation paper.³⁵⁴ The inclusion of a remedy analogous to distress for rent in this summary procedure turns on the outcome of the consultation on that subject.³⁵⁵

352. See, above, Part Two, section VII.D.

353. See, above, Part Two, section X.F.

354. See, above, Part Two, sections VI (assignment and subletting), X.D (independence of covenants and fundamental breach). See, below, Part Two, section XIII (overholding tenant).

355. See, above, Part Two, section IX.

The committee also reviewed a number of commonly occurring disputes in the contemporary commercial leasing sector and considered whether they should be included within the scope of the summary dispute resolution procedure. These disputes were helpfully summarized in the following passage from a commercial leasing textbook:³⁵⁶

The most common problems [for landlords] that can arise are:

1. the tenant fails to pay rent or other amounts due under the lease;
2. the tenant abandons the premises or attempts to surrender the lease and, sometimes, leaves goods behind;
3. the tenant assigns or sublets without consent;
4. the tenant ceases carrying on business but continues to pay rent;
5. the tenant fails to repair or maintain the leased premises;
6. the tenant carries on a business that is not permitted or is illegal;
7. the tenant carries on a business that breaches a restrictive covenant in favour of another tenant;
8. the tenant damages the premises or removes natural resources;
9. another creditor of the tenant seeks to enforce a judgment against the tenant;
10. the tenant goes bankrupt or makes a proposal under the *Bankruptcy and Insolvency Act*;
11. the tenant seeks concessions on the terms of the lease;
12. the tenant terminates the lease as a result of a default of the landlord;
13. the tenant refuses to give up possession after the lease has ended;
14. the tenant refuses to permit access to the leased premises to carry out repairs or maintenance;
15. the tenant's business causes a nuisance to third parties.

Many problems tenants face result in interference with the tenant's business. Among the more common problems are:

1. the landlord refuses to grant the tenant possession at the commencement of the term or to honour a renewal term arising from an option to renew;
2. the landlord refuses or fails to deliver a lease to be executed;

356. Olson, *supra* note 4 at §§ VI, VII. [footnote omitted].

3. a subsequent purchaser refuses to recognize the lease;
4. the landlord distrains when there is no rent in arrears or claims an amount greater than that due;
5. there is a physical interference with the tenant's business such as:
 - a. entering the premises, denying the tenant access or turning off the utilities;
 - b. blocked, reduced or changed access;
 - c. noise, vibration, dust or smells from neighbours;
 - d. a change in the type of business in the area (such as leasing to a school in an office building or a shopping centre); or
 - e. the premises are unusable due to damage;
6. a competing business is set up in breach of a restrictive covenant;
7. there is a failure to repair or maintain the building or premises;
8. there is a failure to complete promised renovations, redevelopment, rezoning or leasing to specific tenants (or type of tenants);
9. the landlord claims payment of rent after agreeing to a rent reduction or rent abatement;
10. the landlord has evicted, or seeks to evict, the tenant for an alleged breach of the lease;
11. an assignee tenant has defaulted under the lease;
12. the landlord refuses to consent to an assignment of the lease or a sublease;
13. the landlord claims payment of amounts from prior periods; or
14. in a shopping centre or other multitenant building or development, the landlord begins to leave premises vacant in order to re-develop the building or development.

Many of these disputes are already covered off by the language of the LRCBC Report's proposed section 14. But a few of them are not, and the committee considered whether or not they should be added to the summary dispute resolution procedure.

For example, item (2) in the second list refers to a landlord failing to deliver a lease for execution. This issue arises from time to time and causes problems in practice. The PLA contains a provision requiring a landlord to deliver a lease in registrable form, unless the parties agree otherwise.³⁵⁷ This provision does not quite address the problem at issue. The committee decided that this type of dispute should be included within the summary dispute resolution procedure.

357. *Supra* note 56, s. 5 (2).

Another issue is immediate access to the property to effect repairs. This issue is appropriately included, but the line should be drawn at long-term redevelopment of the property.

The committee tentatively recommends that:

38. The summary dispute resolution procedure contained in or authorized by a new Commercial Tenancy Act should be modelled on section 14 of the draft legislation included in the LRCBC Report, with the modifications proposed in the foregoing discussion.

XII. RE-ENTRY

A. Introduction

One commentator has described the right of re-entry as follows:³⁵⁸

The right of re-entry is a self-help remedy given to a landlord, in specific circumstances, which allows it to re-enter and retake possession of the premises before the term of the lease has expired. It is a right which arises upon a default which is considered to be so serious, that it gives the landlord the option to bring an end to the lease agreement.

The substantive aspects of re-entry were considered earlier in this consultation paper.³⁵⁹ The discussion that follows considers issues related to the procedure for effecting re-entry.

B. Procedure for Re-entry

1. SELF-HELP NATURE

Many of the concerns about re-entry stem from the self-help nature of the remedy. On the one hand, this nature makes re-entry a highly suitable remedy in many circumstances because it can be deployed in a rapid and inexpensive manner.³⁶⁰ On the other hand, the absence of judicial oversight creates some significant risks for a landlord who re-enters the leased premises. If that landlord miscalculates, then the

358. MacDonald, “Non-Payment,” *supra* note 346 at 2.1.17.

359. *See, above*, Part Two, section V.B.4.

360. *See* LRCBC Report, *supra* note 6 at 114 (“In some ways, re-entry is the ideal remedy for the landlord whose tenant fails to pay rent or refuses to vacate the premises after the tenancy has terminated. It has the virtue of being relatively fast and cheap.” [footnote omitted]).

result may be liability for trespass, consequential damages for economic loss,³⁶¹ or even a criminal prosecution.³⁶² These risks have led some lawyers to question the utility of re-entry as a remedy and to counsel, in some circumstances, taking the more cautious course of obtaining a court order for possession.³⁶³

There is a division of opinion among Canadian law reform bodies on this issue. The OLRC Report recommended doing away with the self-help basis of re-entry as a means of redressing what it saw as the inherent unfairness of the current remedy:³⁶⁴

Direct supervision by the courts, whether by means of a summary hearing or a more elaborate procedure, represents a salutary change in the case of recovery of possession, because unsupervised procedures often lead to violence or to the resort to other illegal means for the purpose of gaining re-entry. At the same time, however, if resort to the courts is to be made mandatory, it is important that the judicial process operate as expeditiously as possible.

The Ontario proposals for reform are detailed to the point that they elude easy summary. The noteworthy general feature of them is that they adopt provisions developed in the residential leasing³⁶⁵ area to commercial leases. Selected details of the Ontario proposals include: (1) use of the court procedure would be mandatory; (2) the summary procedure would be available for seeking orders for termination of the lease and possession of the leased premises; (3) claims for arrears of rent, compensation for use and occupation, damages for breach of covenant, or injunctive relief could be included in the application for termination and possession; (4) the judge hearing the application would be empowered to hear any matter raised by the tenant in dispute of the landlord's claim; and (5) a tenant would be permitted to use the summary procedure if at least one of the tenant's claims is for an order terminating the lease. Item (3) of this list is of particular interest because it addresses an anomaly in the current procedure for recovery of possession, which is the division of re-entry from other claims that the landlord may have. A landlord who re-enters

361. *See ibid.* ("If a landlord misperceives the facts and he has no right to re-enter, he may be liable for damages for trespass and possibly for consequential losses if the re-entry disturbs the tenant's business.").

362. *See Criminal Code*, R.S.C. 1985, c. C-46, ss. 72-73 (offences of forcible entry and forcible detainer). Unlike the civil law consequences mentioned at the start of the sentence in the text (which go to right to re-enter), these criminal offences go to the carrying out of the re-entry and they apply even to cases in which the landlord had a legal right to re-enter the leased premises.

363. *See, e.g., MacDonald, "Non-Payment," supra* note 346 at 2.1.17.

364. *Supra* note 62 at 168.

365. *See, e.g., RTA, supra* note 51, ss. 44-57.

terminates the lease. Remedies for other claims currently have to be framed in terms of other (court-based) actions.

The LRCBC Report took a different approach. It did not recommend enacting a statutory procedure for re-entry. This appears in part to be due to a desire to preserve the self-help basis of the remedy and in part due to a sense that "... the *Rules of Court* already provide an entirely adequate procedural framework for the resolution of landlord and tenant disputes."³⁶⁶

The committee tentatively recommends that:

39. A new Commercial Tenancy Act should continue to treat re-entry as a self-help remedy.

2. BAILIFFS

The one area in which the committee is proposing a change is in the actual carrying out of a re-entry. Despite the risks involved, a landlord may effect re-entry directly, without the engagement of agents. This approach is not recommended in leading practice guides on the subject.³⁶⁷

The committee believes that a good deal of the harshness and potential for abuse in re-entry can be tempered by requiring landlords to engage qualified bailiffs to carry it out. Such a practice would also provide some protection for landlords. The committee notes that there are some weaknesses in the training and regulation of bailiffs that should be overcome in order to make this proposal as effective as possible.

The committee tentatively recommends that:

40. A new Commercial Tenancy Act should require landlords to engage a bailiff to effect re-entry.

XIII. THE OVERHOLDING TENANT

A. Introduction

A landlord has a range of options for regaining possession of the leased premises from a tenant that has remained in possession after the lease has expired or been

366. *Supra* note 6 at 123.

367. *See* Olson, *supra* note 4 at § VIII.C.e ("While a landlord may terminate a lease directly, it is usually prudent to engage a qualified bailiff to carry out the re-entry.").

terminated. *Williams & Rhodes*, a leading Canadian textbook on landlord and tenant law, contains a helpful list of these options.³⁶⁸

Subject to limitations imposed by statute in some provinces, where a tenant holds over after the expiration of his lease, the landlord may enter peaceably or forcibly into possession of the demised premises and eject the tenant as gently as possible; or maintain an action for possession of the premises in which he can obtain mesne profits, double rent, arrears of rent or other relief; or eject the tenant in the summary manner permitted by the relevant statutes in some provinces, whereby possession only can be obtained.

This passage indicates that a landlord under a commercial lease in British Columbia would have three distinct methods of recovering possession: (1) re-entry³⁶⁹ (what *Williams & Rhodes* calls “peaceable and forcible entry”); (2) action for possession in which other remedies such as occupation rent, double rent,³⁷⁰ rent paid at double the value of the land,³⁷¹ or arrears of rent; (3) action for possession alone.³⁷²

The focus of this section is on (2) action for possession, as defined by the CTA. As discussed above,³⁷³ the CTA contains two main procedures that may be employed against an overholding tenant.³⁷⁴ These procedures are found in sections 18–24 and sections 25–28. This section discusses the consequences that flow from creation of a summary dispute resolution procedure for a landlord’s remedies against an overholding tenant.

B. Inclusion in Summary Dispute Resolution Procedure

As discussed above,³⁷⁵ the current dispute resolution procedures provide a cumbersome means of regaining possession of the leased premises. The committee confirms its view that its one-step summary procedure would be a better mechanism for resolving this issue.

368. *Supra* note 75, vol. 2 at § 13:7.

369. *See*, above, Part Two, section XII.

370. *See*, below, Part Two, section XVII.F.

371. *See*, below, Part Two, section XVII.F.

372. Reform of purely court-based actions (that is, those methods of proceeding that are not set out in or governed by the CTA) is a topic that is outside the scope of this consultation paper.

373. *See*, above, Part Two, sections XII.A.1–2.

374. *See also*, Part Two, section XVII.C (third CTA procedure for recovery of possession—now obsolete).

375. *See*, above, Part Two, section XI.

The committee tentatively recommends that:

41. A new Commercial Tenancy Act should adopt a new one-stage summary procedure for recovery of possession of the leased premises from an overholding tenant.

C. Other Orders

Section 21 (1) of the CTA³⁷⁶ authorizes the court to issue a writ of possession as the outcome of this statutory procedure. Section 22 makes it clear that use of the statutory procedure is without prejudice to “any other right or right of action or remedy that landlords may possess.” But these other remedies may only be obtained as part of a separate proceeding. The exceptional—or out of the ordinary—nature of the procedure set out in sections 18–24 provide the justification for limiting the range of orders that a court may grant to one—an order for possession.

This approach has some obvious flaws. For example, sections 18–24 do not authorize a landlord to obtain occupation rent for the period that the overholding tenant remains in possession. The LRCBC Report noted that the narrow scope of the summary procedure under sections 18–24 raises further problems:³⁷⁷

The court has no jurisdiction to hear an application under any of the summary provisions of the Act unless all procedural requirements have been satisfied. Where an irregularity occurs, it cannot be corrected. The landlord must bring a new application. At the hearing of a summary application for possession, the court can only decide which party has the immediate right to the rented premises. Where complicated matters of fact or law arise, the parties must commence an ordinary action. The court cannot refer an application under one of the summary procedure provisions to the trial list, or make any of the other orders usually available in Chambers.

The BC Commission concluded that the narrow scope of the summary procedure scheme “flies in the face” of a well-established policy opposing multiplicity of proceedings.³⁷⁸

The committee considered whether expanding the number of orders available might undercut the speed of a summary procedure. It also considered adding only one more order to the court’s armoury in these circumstances: an order for the payment

376. *Supra* note 2.

377. *Supra* note 6 at 122 [footnotes omitted].

378. *Ibid.* See LEA, *supra* note 57, s. 10 (avoidance of multiplicity of proceedings).

of occupation rent. In the end, the committee rejected these approaches. A new summary procedure should accord with the policy of avoiding a multiplicity of proceedings and grant the court greater flexibility in making orders with respect to an overholding tenant.

The committee tentatively recommends that:

42. A new Commercial Tenancy Act should authorize the court to make any order, as appropriate, as part of the summary procedure to recover possession from an overholding tenant.

D. Deemed Term on Payment of Rent

If a landlord accepts rent from a tenant after the expiry of a lease, then a new lease is deemed to be created. A leading textbook on landlord and tenant law explains the implications of this deemed lease:³⁷⁹

A periodic tenancy may be created by agreement on the expiration of [a] lease. In the absence of a contrary agreement, if a landlord accepts rent from a tenant after the expiration of a lease, a new tenancy is deemed to have been created. If the original tenancy was a tenancy of years (that is, for more than a year), a tenancy from year to year is created. If the tenancy was for a lesser term, a tenancy of month to month is created.

The vast majority of professionally prepared leases will address this aspect of overholding.³⁸⁰ Most of these leases will override the common law rule and deem the lease created by overholding to be a month-to-month lease. This is because a month-to-month lease may be terminated on reasonable notice, whereas a year-to-year lease requires at least six months notice of termination.³⁸¹ Leases prepared without professional advice, however, may leave a landlord open to this problem.

379. Olson, *supra* note 4 at § XII.C.

380. See, e.g., *Commercial Leasing: Annotated Precedents*, *supra* note 112 at c. 4, s. 16.6 (“If the Tenant holds over with the Landlord’s consent after the expiration of the Term or any renewal of it, the new tenancy thereby created will be deemed to be a monthly tenancy and not a yearly tenancy and will be subject to the covenants and conditions in this Lease insofar as they are applicable to a tenancy from month to month, except that if the Tenant remains in possession without the Landlord’s written consent, the monthly instalments of Annual Basic Rent will be two times the monthly instalments of Annual Basic Rent payable for the last month of the later of the Term or any renewal of it, pro-rated on a daily basis for each day that the Tenant remains in possession, and in addition the Tenant will be liable for all costs, expenses, losses, and damages resulting from the failure of the Tenant to deliver up possession of the Premises to the Landlord.”).

381. See *ibid.* at c. 4, s. 16.6, n. 16.

The committee considered whether the legislation should provide a rule in these circumstances. The legislation could assist in those cases where the parties have failed to address this issue by imposing a rule that is more in keeping with contemporary expectations. Such a rule could be a default rule, which the parties could choose to override.

In the end, the committee decided against adding such a rule to the legislation. There is a wide variety of leases in force in the province. Some, such as agricultural leases, may implicitly intend to operate on a long-term basis. The committee had concerns that changing the existing common law rule could upset such implicit understandings.

The committee tentatively recommends that:

43. A new Commercial Tenancy Act should not contain a provision that, in the absence of an agreement of the parties to the contrary, deems a tenant that remains in possession after the expiration of a lease to be a tenant under a month-to-month lease.

XIV. RELIEF FROM FORFEITURE

A. Introduction

A forfeiture may be defined as being "... in the nature of a penalty for doing or failing to do a particular thing, and result[ing] from a failure to keep an obligation."³⁸² As the concept of forfeiture is relevant to a number of areas of the law, this is a general definition. In the commercial leasing context, a breach of a provision of a lease will not automatically lead to the termination (forfeiture) of the lease. As the LRCBC Report explained, only breaches of certain provisions result in forfeiture;³⁸³

When a tenant breaches a provision of a lease he may forfeit his right to the tenancy and give the landlord a right of re-entry. This will not occur on the breach of any provision. The landlord will have a right of re-entry in only three cases: where the provision that is breached is a condition; where a right of re-entry is clearly attached to a provision; and where a right of re-entry is conferred by statute.

382. 52 C.J.S. *Landlord and Tenant* § 165 (2003).

383. *Supra* note 6 at 97 [footnotes omitted].

As this quotation implies, forfeiture is usually a concern for the tenant, but it is possible for a landlord to be subject to forfeiture if, for example, a lease provides the tenant with that remedy for the breach of a provision.³⁸⁴

As forfeiture can be a very harsh and even unjust result, the law has a long record of softening its blunt force. Historically, the English Court of Chancery had a longstanding jurisdiction to relieve against forfeitures. Originally, this jurisdiction conferred a very wide discretion on the court. Over the years, the court narrowed its discretion to the point where it will only act in the following types of cases:³⁸⁵

... the court laid down for its guidance the principles that, in general, it would relieve only (1) where the forfeiture in substance was merely security for payment of a monetary sum, *e.g.*, rent or taxes; (2) in cases of fraud, accident, surprise or mistake.

Beginning in the nineteenth century, legislation began to be passed in relation to relief from forfeiture. Three statutes are particularly important because they are the sources of all contemporary Canadian legislation on relief from forfeiture.

The first provision was found in the *Law of Property Amendment Act, 1859*, which is commonly called *Lord St. Leonard's Act*.³⁸⁶ This legislation was focussed on a specific subject: breach of a covenant to maintain fire insurance on the premises. The legislation authorized the court to relieve against forfeiture as a result of this breach. In British Columbia, the provisions from *Lord St. Leonard's Act* are found in sections 26–28 of the LEA.³⁸⁷ Alberta and Saskatchewan also have this legislation.³⁸⁸

The second provision was originally enacted in an 1886 Ontario statute.³⁸⁹ This provision, which has no equivalent in the law of England, gives the court a seemingly³⁹⁰ wide-ranging jurisdiction to “relieve against all penalties and forfei-

384. See *Altius Centre Ltd. v. BMP Energy Systems Ltd.* (1996), 43 Alta. L.R. (3d) 209, 4 R.P.R. (3d) 209 (Q.B.) (landlord granted relief from forfeiture after tenant terminated the lease over late payment of cash bonus that tenant was entitled to under the lease).

385. *Williams & Rhodes*, *supra* note 75, vol. 1 at § 12:11:2.

386. (U.K.), 22 & 23 Vict., c. 35, ss. 4–6.

387. *Supra* note 57.

388. Alberta: *Law of Property Act*, *supra* note 129, s. 77; Saskatchewan: *Queen's Bench Act, 1988*, S.S. 1988, c. Q-1.01, s. 49.

389. *Judicature Act*, S.O. 1886, c. 16, s. 38.

390. Some courts have held that this legislation does not expand the court's original equitable jurisdiction and must be applied only in cases fraud, accident, surprise, or mistake. See *Emerald Christmas Tree*, *supra* note 46 at 127–29.

tures.” In British Columbia, this provision is found in section 24 of the LEA. Eight other Canadian jurisdictions have similar legislation.³⁹¹

The third provision can be traced back to the English *Conveyancing and Law of Property Act, 1881*.³⁹² This provision contains extensive rules for relief from forfeiture or re-entry by the landlord. British Columbia has not enacted this legislation, but it is found in the commercial leasing statutes of eight other Canadian jurisdictions.³⁹³ Some of these jurisdictions have the second provision as well, and this has led to some confusion in the courts over whether the third provision operates as a complete code for relief of forfeiture in commercial leasing cases or whether the second general provision still has some space in which to operate.³⁹⁴

The Law Reform Commission concluded that the second provision (found in section 24 of the LEA) was not in need of reform.

So, the focus in the rest of this section of the consultation paper is on the only live issue on this topic in this province: the need to retain the first provision (found in sections 26–28 of the LEA) in force in British Columbia.

B. Reform of the Relief from Forfeiture Provisions of the Law and Equity Act

Sections 24 and 26–28 of the LEA have been the subject of some comment in previous law reform efforts. As noted earlier, the LRCBC Report concluded that section 24 was not in need of reform.³⁹⁵ This conclusion appears to have stood the test of time. In fact, a longstanding criticism of the case law was recently addressed by the Court

391. Alberta: *Judicature Act*, R.S.A. 2000, c. J-2, s. 10; Manitoba: *The Court of Queen's Bench Act*, S.M. 1988–89, c. 4, C.C.S.M. c. C280, s. 35; Ontario: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 98; New Brunswick: *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 26 (3); Prince Edward Island: *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10, s. 31; Yukon: *Judicature Act*, R.S.Y. 2002, c. 128, s. 13; Northwest Territories: *Judicature Act*, R.S.N.W.T. 1988, c. J-1, s. 28. The Northwest Territories provision is duplicated for Nunavut by s. 29 of the *Nunavut Act*, S.C. 1993, c. 28.

392. (U.K.), 44 & 45 Vict., c. 41, s. 14.

393. Saskatchewan: *The Landlord and Tenant Act*, *supra* note 192, s. 10 (3)–(8); Manitoba: *The Landlord and Tenant Act*, *supra* note 192, s. 19; Ontario: *Commercial Tenancies Act*, *supra* note 192, s. 20; New Brunswick: *Landlord and Tenant Act*, *supra* note 192, s. 14 (2)–(10); Prince Edward Island: *Landlord and Tenant Act*, *supra* note 192, s. 15 (2)–(9); Yukon: *Landlord and Tenant Act*, *supra* note 192, s. 57 (2)–(9); Northwest Territories and Nunavut: *Commercial Tenancies Act*, *supra* note 192, s. 45 (3)–(9).

394. See *Williams & Rhodes*, *supra* note 75, vol. 1 at § 12:11:7 (discussing the Ontario decisions on this point).

395. *Supra* note 6 at 101 (“As far as we are aware section [24] is working well and we have no suggestions for any improvements in substance.”).

of Appeal in *Clark Auto Body Ltd. v. Integra Custom Collision Ltd.*³⁹⁶ In this case, the court resolved conflicting decisions over whether a failure to comply with a condition precedent to renewal could be the subject of relief under section 24:³⁹⁷

... it is essential to distinguish between the court's equitable jurisdiction to grant relief from forfeiture for the non-observance of covenants in an existing lease and from the failure to comply with conditions precedent to the exercise of an option to renew a lease. In the former, equity recognizes that a tenant may be permitted to cure its default and be relieved from forfeiture to allow it to retain the balance of the term of the lease. In the latter, there is no compulsion on the tenant to exercise the renewal option, but if it does so, the tenant must comply with the conditions precedent. If the tenant fails to comply, it does not suffer a penalty or forfeiture of an existing tenancy. Equity will not intervene.

Sections 26–28, on the other hand, have been the subjects of some criticism. The LRCBC Report came to the following conclusion about repealing section 26:³⁹⁸

Given the breadth of the court's powers under [section 24], it could probably be repealed without harm. However, equally little harm is done by retaining it and we believe that is the appropriate course.

The BC Commission further noted that there appears to be a drafting error in section 28.³⁹⁹ The section refers to the court not having the power “under this Act” to relieve a person more than once. The English original referred to “under this section.” By making this change, the British Columbia Legislature effectively expanded the scope of section 28 to take in and restrict the operation of section 24, which applies to all types of applications for relief from forfeiture. (The effect of the change from “this section” to “this Act” would not have been apparent in 1881 when the forerunner of section 28 was first enacted, as the general provision now found in section 24 would not appear in British Columbia for another seventeen years.)⁴⁰⁰ As a consequence of the reference to “this Act,” the restriction in section 28 could apply to cases from outside the commercial leasing sector.

396. 2007 BCCA 24, 277 D.L.R. (4th) 201, 62 B.C.L.R. (4th) 315.

397. *Ibid.* at para. 30. See also Olson, *supra* note 4 at COM-22; Simon R. Coval, “Everyone Deserves a Second Chance: Relief from Forfeiture,” in *Commercial Leasing Disputes*, *supra* note 147, 7.1 at 7.1.4–7.1.5.

398. *Supra* note 6 at 101.

399. *Ibid.* at 100.

400. See *Supreme Court Act*, R.S.B.C. 1897, c. 56, s. 16 (7).

The LRCBC Report recommended repealing sections 27 and 28 for the following reasons:⁴⁰¹

Our conclusion is that section [28] should be repealed. In theory it is an unjustified limitation on the power of the courts. In practice, it seems to be a dead letter. While its application does transcend landlord and tenant matters, we believe this is as appropriate a context as any to put forward a recommendation to this effect.

If section [28] is to disappear, so must section [27]. The only purpose of recording the fact that relief was granted is to enforce the limitation imposed by section [28]. Moreover, the requirement that it be recorded on the face of the instrument is difficult to apply in a jurisdiction whose land title system does not always leave such instruments in the possession of the parties.

The committee has considered these arguments, but has decided against recommending reform of these provisions for now. Although these sections of the LEA are often invoked in commercial leasing disputes, their scope is much broader. The committee has decided that it would not be appropriate for a project that is focussed on commercial leasing to recommend reforms that will have an impact on other areas of the law. That said, the case for reform of these provisions is compelling. But it should be carried out as part of a separate project, which may canvass all concerned sectors.

The committee tentatively recommends that:

44. The provisions of the Law and Equity Act dealing with relief against forfeiture should form the subject of a separate law reform project.

XV. BANKRUPTCY AND INSOLVENCY

A. Introduction

It seems a little anomalous for the CTA⁴⁰² squarely to address issues related to the tenant's bankruptcy, as it does in section 29. After all, under the *Constitution Act, 1867*,⁴⁰³ the federal government has exclusive legislative jurisdiction over bankruptcy and insolvency,⁴⁰⁴ which it has exercised by enacting the *Bankruptcy and In-*

401. *Supra* note 6 at 100.

402. *Supra* note 2.

403. (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 195, App. II, No. 5.

404. *Constitution Act, 1867*, *ibid.*, s. 91 (21).

solvency Act.⁴⁰⁵ This anomaly can only be explained by looking at the historical circumstances surrounding section 29's enactment.

Early in the twentieth century, the federal *Bankruptcy Act* did comprehensively address the legal issues that may arise when a tenant goes bankrupt.⁴⁰⁶ In 1923, some provisions of this section were struck down by the Québec Superior Court, on the basis that they unconstitutionally extended into areas where the provinces have exclusive legislative authority.⁴⁰⁷ Parliament responded to this judgment by repealing the whole of this section and replacing it with a section that simply declared that all issues regarding the rights and obligations of a landlord on a tenant's bankruptcy were to be determined by the law of the province in which the leased premises were located.⁴⁰⁸

Almost immediately, the provinces stepped into this opening by enacting legislation that was similar in concept to the repealed section from the federal *Bankruptcy Act*. British Columbia first enacted legislation dealing with the effect of bankruptcy on commercial leasing in 1923.⁴⁰⁹ This legislation was amended in 1924.⁴¹⁰ Since 1924, there have been a few minor wording changes to the provision, but it remains substantially as it was in 1924. Most of the other provinces and territories have similar legislation, located either in the main commercial leasing statute or in a freestanding Act.⁴¹¹ All of this legislation is related in general concept, but there are significant differences in detail from statute to statute.⁴¹²

405. R.S.C. 1985, c. B-3 [BIA].

406. *Bankruptcy Act*, S.C. 1919, c. 36, s. 52.

407. *Re Stober* (1923), 4 C.B.R. 34 (Qc. S.C.).

408. *Bankruptcy Act*, S.C. 1923, c. 31, s. 31.

409. *Landlord and Tenant Act Amendment Act, 1923*, S.B.C. 1923, c. 30, s. 2.

410. *Landlord and Tenant Act Amendment Act, 1924*, S.B.C. 1924, c. 27, s. 2.

411. Alberta: *Landlord's Rights on Bankruptcy Act*, R.S.A. 2000, c. L-5; Saskatchewan: *The Landlord and Tenant Act*, *supra* note 192, ss. 42–49; Manitoba: *The Landlord and Tenant Act*, *supra* note 192, ss. 46–47; Ontario: *Commercial Tenancies Act*, *supra* note 192, ss. 38–39; New Brunswick: *Landlord and Tenant Act*, *supra* note 192, ss. 43–44; Prince Edward Island: *Landlord and Tenant Act*, *supra* note 192, ss. 73–75; Nova Scotia: *Tenancies and Distress for Rent Act*, R.S.N.S. 1989, c. 464, s. 20; Yukon: *Landlord and Tenant Act*, *supra* note 192, ss. 36–37; Northwest Territories and Nunavut: *Commercial Tenancies Act*, *supra* note 192, ss. 24–25.

412. See Douglas B. Hyndman, "Trustee v. Landlord: The British Columbia Experience" (1986) 57 C.B.R. (N.S.) 93 at 95 ("Although each province has sections similar to the above British Columbia section, those sections are generally sufficiently different in wording so as to make any case interpreting those sections distinguishable in attempting to interpret the British Columbia section.").

This period of sole provincial authority over bankruptcy and commercial leasing issues lasted until 1949. In that year, Parliament re-asserted its legislative authority over two issues that commonly arise when a tenant goes bankrupt. First, the Act established a requirement for a landlord to release any property under seizure due to distress for rent to the trustee in bankruptcy.⁴¹³ Second, the Act established a landlord's position in the priority structure for the bankrupt tenant's creditors.⁴¹⁴ These provisions remain in the current BIA, meaning that this area is governed by a mix of federal and provincial (or territorial) laws. The overriding purpose of this legislation is to balance the interests of the landlord and the trustee (who acts on behalf of the interests of the bankrupt tenant's creditors) in a number of practical situations.

The bankruptcy of a tenant creates a number of practical problems, as a leading bankruptcy textbook explains:⁴¹⁵

Among the most difficult problems faced by trustees in bankruptcy is that involving landlords and bankrupt tenants. As in the case of secured creditors, substantial interests come into conflict. On the one hand, there is the interest of the trustee (a) in having the fullest possible use of the leased premises as a location for disposing of the assets of the bankrupt and (b) in being able to sell the lease as an asset of the bankrupt estate with a minimum of trouble and expense. On the other hand, there is the interest of the landlord (a) in having his rights as landlord disturbed as little as possible, (b) in receiving the maximum compensation, legally permissible, for the disruption caused by the bankruptcy and (c) in having the maximum possible freedom in selecting a new tenant.

A typical sequence of events occurs when a tenant goes bankrupt, as noted in this passage from a commercial leasing textbook:⁴¹⁶

1. all proceedings against the tenant are stayed, including any distress against the tenant's goods, but the landlord may distrain against the goods of third parties where permitted either under legislation or at common law;
2. the trustee in bankruptcy is entitled to hold and retain the premises of the tenant for the purposes of administering the estate for a period determined under provincial law;
3. in most provinces the Trustee may disclaim the lease during the period prescribed by provincial law or assign the lease under certain conditions;

413. BIA, *supra* note 405, s. 73 (4).

414. BIA, *ibid.*, s. 136 (1) (f).

415. Lloyd W. Houlden, Geoffrey B. Morawetz, & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, looseleaf, 3d ed., vol. 2 (Toronto: Thomson Carswell, 2005) at G\$78 [*Houlden & Morawetz*].

416. *Supra* note 4 at § VI.J.d [footnotes omitted].

4. a landlord may claim as a preferred creditor for three months' rent in arrears and for three months accelerated rent.

It should also be borne in mind that the BIA is not the only federal statute that may apply to an insolvent tenant. If the tenant is a corporation and the claims against it exceed five million dollars in value, then proceedings may be carried on under the *Companies Creditors' Arrangement Act*.⁴¹⁷ Unlike the BIA, this Act does not contain any provisions incorporating provincial law for issues involving commercial leases. In addition, as an alternative to going bankrupt, a tenant could file a proposal under the BIA.⁴¹⁸ This procedure is also governed entirely by federal legislation. So, the focus in the proceeding sections of the consultation paper will be on considering whether the current interplay between the CTA and bankruptcy under the BIA should be reformed.

B. The Need for a Bankruptcy Provision in a New Commercial Tenancy Act

Given the unusual historical circumstances that led to the enactment of section 29 of the CTA,⁴¹⁹ it is worthwhile to ask the basic question whether this section is still needed. As the LRCBC Report observed:⁴²⁰

[Section 29's] very presence in the current [CTA] must puzzle many people who regard bankruptcy, and the rights attendant thereon, to be a federal matter. It was enacted to fill what was then perceived to be a gap in the power of Parliament to legislate with respect to bankruptcy. The filling of such gaps was a familiar exercise for provincial legislatures early in this century.

At present, nothing in the law compels the repeal of section 29. Alberta's legislation,⁴²¹ which is very similar to section 29, was recently held to be constitutionally valid provincial legislation.⁴²² The court found that the legislation was "... 'intra vires' the provincial legislature as 'property and civil rights in the Province,' despite the fact that the legislation impacts or has an effect upon bankruptcy."⁴²³ Further, the legislation was not in operational conflict with federal bankruptcy legislation,

417. R.S.C. 1985, c. C-36.

418. BIA, *supra* note 405, ss. 50–66.

419. *Supra* note 2.

420. *Supra* note 6 at 77.

421. *Landlord's Rights on Bankruptcy Act*, *supra* note 411.

422. See *Principal Plaza Leaseholds Ltd. v. Principal Group Ltd. (Trustee of)*, [1996] 9 W.W.R. 539, 41 Alta. L.R. (3d) 248 (Q.B.) at paras. 201–04 [*Principal Plaza* cited to W.W.R.].

423. *Ibid.* at para. 202.

except for one provision.⁴²⁴ The argument is that the law would be clearer and more rational if all relevant bankruptcy provisions were located in federal legislation.

The LRCBC Report noted that it was "... not without sympathy for the view that [section 29] should simply be repealed," but, in the end, the BC Commission was "reluctant to make such a recommendation":⁴²⁵

Trustees [in bankruptcy] need special powers to deal with tenant bankruptcies and in the final analysis it matters little to those directly involved what the source of those powers are. A gap in the law is no more desirable now than it was in 1923 and it is profitless to debate about the responsibility for its repair. If trustees are not able to deal effectively with the bankrupt's estate, creditors suffer and this cannot be justified.

The OLRC Report also recommended retaining similar provisions dealing with the bankruptcy of a tenant in the Ontario commercial leasing statute.⁴²⁶

There is no guarantee that the federal government would act if section 29 were repealed. In the committee's view, the potential for uncertainty is too great to risk repealing section 29.

The committee tentatively recommends that:

45. A new Commercial Tenancy Act should contain provisions dealing with the rights and obligations of a trustee in bankruptcy and a landlord upon the bankruptcy of a tenant.

C. The Trustee's Liability for Payment of Occupation Rent

Section 136 (1) (f) of the BIA⁴²⁷ contemplates the payment of occupation rent, but section 146 makes it clear that this matter is governed by the laws of the province in which the leased premises are located.

Two provisions of section 29 of the CTA are relevant to the trustee's liability for payment of occupation rent. Section 29 (7) requires the trustee to "pay to the landlord for the period during which the trustee or the custodian actually occupies the premises from and after the date of the receiving order or assignment a rental calculated on the basis of the lease and payable in accordance with its terms." Sec-

424. *Ibid.* at paras. 204, 215. *See*, below, Part Two, section XV.F.

425. *Supra* note 6 at 77.

426. *Supra* note 62 at 65–74.

427. *Supra* note 405.

tion 29 (9) provides that the trustee is only personally liable to the extent of the bankrupt tenant's assets that the trustee has in hand.

The LRCBC Report gave a good statement of the policy of these provisions:⁴²⁸

The trustee who is personally liable is unlikely to exercise his right to possession capriciously or to retain possession longer than is absolutely necessary. In this way, the interests of the landlord are safeguarded.

Section 29 effectively caps the personal liability of the trustee at the assets of the bankrupt tenant that make it into the trustee's hands. At common law, "... the use and occupation of property raises a presumption in favour of the landlord from which the law implies a contract that the person occupying the property will pay reasonable compensation."⁴²⁹ Most of the provinces have enacted legislation relating to this issue. This legislation is not uniform. The main issue over which the legislation differs is the personal liability of the trustee. British Columbia is alone among the provinces in expressly capping the personal liability of the trustee,⁴³⁰ but the legislation and case law of the majority of the other provinces and territories also achieves this result of effectively limiting the landlord to "... claim[ing] occupation rent only from the estate of the bankrupt."⁴³¹

The issue for reform is whether to continue the current policy or to adopt a new one. There are two noteworthy models for a new approach.

The first approach is to enact legislation that leaves the trustee personally liable for occupation rent to the extent that such rent exceeds the bankrupt's assets. Alberta,⁴³² Saskatchewan,⁴³³ and Prince Edward Island⁴³⁴ have such legislation. This approach would offer greater protection for landlords, but it could inhibit trustees from taking possession of the leased premises.

428. *Supra* note 6 at 83.

429. *Houlden & Morawetz*, *supra* note 415, vol. 1 at G§79 (5).

430. See William A.C. Rowe, "The Trustee in Bankruptcy's Liability for Occupation Rent" (1985) 51 C.B.R. (N.S.) 206 at 209.

431. Rowe, *ibid.* at 211.

432. *Landlord's Rights on Bankruptcy Act*, *supra* note 411, s. 5 (2).

433. *The Landlord and Tenant Act*, *supra* note 192, s. 45.

434. *Landlord and Tenant Act*, *supra* note 192, s. 73 (3).

The second approach is to limit the trustee's liability for the first month of occupation, and then make it unlimited thereafter. This approach was recommended in the LRCBC Report.⁴³⁵ The BC Commission criticized the current provisions of the CTA: "[b]y restricting the trustee's personal liability to the value of the debtor's assets, subsection (9) nullifies the effect of the earlier provisions."⁴³⁶ In the BC Commission's view, the vulnerability of the landlord as a creditor justified imposing personal liability on the trustee.⁴³⁷

[Section 29] of the *Commercial Tenancy Act* places the landlord in a legal position which is much less favourable than that accorded other potential trade creditors who deal with the bankrupt estate. Unlike the latter group, the landlord is essentially a captive creditor. He has no option but to deal with the trustee and allow him to occupy the premises. The landlord's search for a new tenant may be set back by up to three months, perhaps to his loss in a volatile real estate market.

In the committee's view, the proposal contained in the LRCBC Report strikes the fairest balance between the interests of the parties.

The committee tentatively recommends that:

46. A new Commercial Tenancy Act should contain a provision that holds a trustee in bankruptcy of a bankrupt tenant personally liable for any rent payable, subject to a one-month grace period from personal liability.

D. The Landlord's Ability to Terminate the Lease at Its Option

Section 29 (3) of the CTA⁴³⁸ provides that "[i]f the lessee is a tenant of premises the tenancy of which is not determined" at the time of the bankruptcy of a tenant, then the tenant's trustee in bankruptcy may surrender possession of the leased premises or elect to retain possession. The trustee's rights under this section override any provision in the lease that purports to give a landlord an option to terminate the lease on the tenant's bankruptcy.

The policy of section 29 (3) was described in the following terms by a court that interpreted the provision:⁴³⁹

435. *Supra* note 6 at 83–84.

436. *Ibid.* at 83.

437. *Ibid.* at 82.

438. *Supra* note 2.

439. *Raymond, Chabot, Fafard, Gagnon Inc. v. Hyatt Construction Corp.* (1983), 47 C.B.R. (N.S.) 179 at 186–87, [1983] B.C.J. No. 1740 (S.C.), *Spencer J., rev'd on other grounds* (1984), 51 B.C.L.R. 129,

The intention of the legislation appears to be to put the trustee in the shoes of the tenant as he stood . . . before notice to terminate the lease was given. . . . The intent of this legislation and of the Bankruptcy Act, taken together, appears to be to enable the trustee to dispose of the lease as an asset of the bankrupt estate for the benefit of all creditors, provided it was an existing assets on the date of commencement of the bankruptcy.

The question for reform is whether this policy of benefiting the tenant's other creditors at the expense of rights that the landlord has acquired through the lease should be sustained. In the committee's view, the general principle that parties should be bound by their bargains should prevail. Section 29 (3) appears to rest on the notion that the lease is often the most valuable asset in the bankrupt tenant's estate. It is hard to think of another supplier of goods or services who is treated in the same way. But if there is a realistic prospect for some benefit to flow to the tenant's creditors by keeping the lease alive, then the trustee should have a mechanism to take this opportunity. This may be done by persuading a court that maintaining the lease in force is integral to the disposition of the bankrupt tenant's business as a going concern.

The committee tentatively recommends that:

47. A new Commercial Tenancy Act should contain a provision that allows a landlord to terminate a lease at its option, if the lease permits it, on the tenant's bankruptcy, but this provision should be subject to the right of the trustee to apply to court for an order to maintain the lease if it is integral to the disposition of the bankrupt tenant's business as a going concern.

E. The Trustee's Use of the Leased Premises

Section 29 (2) gives the trustee "... the right to hold and retain the leased premises for a period not exceeding 3 months from the date of the receiving order or assignment, or until the expiration of the tenancy, whichever happens first, on the same terms and conditions as the lessee might have held the premises had no receiving order or assignment been made." The general policy of this provision was explained in a leading case:⁴⁴⁰

It is my considered view that the legislature intended by [section 29] to maintain the status quo respecting a bankrupt tenant's tenancy for a limited period of three months

(*sub nom. Re Security Group N.A.C. Inc.; Raymond, Chabot, Fafard, Gagnon Inc. v. Hyatt Construction Corp.*) 50 C.B.R. (N.S.) 225 (C.A.).

440. *Davis, Daignault, Schick & Co. v. K & H Holdings Ltd.* (1986), 28 D.L.R. (4th) 250, 3 B.C.L.R. (2d) 275 at 282-83 (C.A.), Carrothers J.A. (for the court).

only so as not to unduly prejudice the landlord but at the same time to give the trustee ample opportunity to investigate the matter before making its decision as to what action, if any, ought to be taken by the trustee respecting entitlement to or other disposition of the remainder of the tenancy.

The main issue with respect the trustee's use of the leased premises involves bankruptcy sales. These sales are usually highly publicized. They attract large numbers of people seeking cut-rate merchandise. As the LRCBC Report pointed out, "[a]s a general rule, such sales are regarded as consistent with the trustee's right to occupy the premises for the benefit of the trust estate."⁴⁴¹ Many landlords object to tenants holding bankruptcy sales. (This is especially true for landlords of retail premises in shopping centres.) It is common for commercial leases to contain a provision disallowing these types of sales.⁴⁴²

It is not entirely certain that a trustee in British Columbia would be able to conduct a bankruptcy sale in the face of a contrary provision in the lease. Nevertheless, the LRCBC Report recommended that this issue should be clarified and recommended that legislation be enacted confirming that lease provisions prohibiting bankruptcy sales are binding on a tenant's trustee in bankruptcy.⁴⁴³ The OLRC Report reached a similar conclusion.⁴⁴⁴

The committee agrees with this approach. It strikes a better balance between the landlord's interests and the trustee's.

The committee tentatively recommends that:

48. A new Commercial Tenancy Act should contain a provision confirming that lease provisions prohibiting bankruptcy sales are binding on a tenant's trustee in bankruptcy.

F. The Landlord's Preferred Claim for Rent

Section 29 (5) of the *Commercial Tenancy Act* provides that the landlord has "a preferred claim against the estate of the lessee for arrears of rent not exceeding 3 months' rent accrued due prior to the date of the receiving order or assignment."

441. *Supra* note 6 at 84 [footnote omitted].

442. *See, e.g., Commercial Leasing: Annotated Precedents*, *supra* note 112, c. 4, s. 15.10 ("The Tenant will not permit any sale by auction or any fire sale, bankruptcy sale, moving sale, going-out-of-business sale, or bulk sale to be held upon the Premises or the Land or any part of them.").

443. *Supra* note 6 at 84–85.

444. *Supra* note 62 at 67.

Section 29 (6) provides that the landlord may “prove as a general creditor” for (a) any “surplus” rent accrued up to the date of the receiving order and (b) any accelerated rent that the landlord is entitled to (up to an amount not exceeding three months rent).

The landlord’s unique position as a creditor underlies the preference granted by subsection (5). Subsection (6) “purports to abridge rather than enlarge upon a landlord’s rights”⁴⁴⁵ by limiting the extent of this preference.

The difficulty posed by these two subsections is that they are in conflict with federal bankruptcy legislation. The LRCBC Report explained the nature of this conflict:⁴⁴⁶

These provisions must be read in conjunction with section 136 (1) of the [BIA] which . . . sets out the priority of claims of preferred creditors. A landlord’s preferred claim ranks sixth in the distribution of the proceeds from the bankrupt’s estate. Paragraph (f) states that the amount payable against the landlord’s claim is three months’ rental arrears and three months’ accelerated rent if this is provided for in the tenancy agreement.

The courts in British Columbia have tended to resolve this conflict by applying the BIA provision and disregarding the CTA provisions. For example, in *Sawridge Manor Ltd. v. Western Canadian Beverage Corp.*⁴⁴⁷ the court concluded that:⁴⁴⁸

There is in my view no reason for applying the strained construction contended for where the result would be to give pre-eminence to provincial law in an area in which Parliament could properly be expected to assert its legislative jurisdiction, and appears quite distinctly to have sought so to do.

The Alberta Court of Queen’s Bench has gone even further than the British Columbia courts. In the *Principal Plaza* case,⁴⁴⁹ the court struck down Alberta’s equivalent to section 29 (5) of the CTA for the following reasons:⁴⁵⁰

1. It is in “pith and substance” bankruptcy and insolvency as it directly deals with priorities and ranking, and

445. LRCBC Report, *supra* note 6 at 79.

446. *Ibid.* at 73–74.

447. (1995), 61 B.C.A.C. 32, 33 C.B.R. (3d) 249 (C.A.).

448. *Ibid.* at para. 25, Taylor J.A. (for the court) [citation omitted].

449. *Supra* note 422.

450. *Ibid.* at para. 215.

2. It is in “operational conflict” with Section 136 of B.I.A. which gives sixth ranking to a landlord of a bankrupt tenant, whereas Section 2 (b) purports to give that same landlord priority “to all other debts.”

There are two qualifiers to this decision that should be taken into account. First, the wording of section 2 (b) of Alberta’s *Landlord’s Rights on Bankruptcy Act*⁴⁵¹ differs from that of section 29 (5) of the CTA. The Alberta provision, as noted in the above quotation, gives a landlord priority “to all other debts”; the British Columbia provision, somewhat less emphatically, says that a landlord “has a preferred claim.” Second, the issue of the constitutionality of Alberta’s section 2 (b) was not squarely raised in *Principal Plaza*. The court was instead “asked for an opinion” by counsel and conceded that its remarks were “hypothetical.”⁴⁵²

Despite these qualifiers, the issue for reform is whether the landlord’s preferred claim for rent is still justified. The priority did not garner much support in past law reform studies. The LRCBC Report concluded that section 29 (5) and (6) “... no longer serve any useful purpose ...” and recommended that they “... not be carried forward into new legislation.”⁴⁵³ The OLRC Report similarly recommended that Ontario’s provisions be repealed where they come into conflict with federal bankruptcy legislation.⁴⁵⁴

In the committee’s view, these recommendations are persuasive. A new *Commercial Tenancy Act* should not address issues that are already addressed in the BIA.

The committee tentatively recommends that:

49. A new Commercial Tenancy Act should not give landlords a preferred claim for three months’ rent and should not address the mechanics of making a claim for surplus rent or accelerated rent.

451. *Supra* note 411.

452. *Supra* note 422 at para. 216. The court’s concession aside, the discussion in the judgment of the constitutional issue was far from cursory. In fact, it takes up 185 paragraphs.

453. *Supra* note 6 at 79–80.

454. *Supra* note 62 at 66. The Ontario Commission favoured retaining the landlord’s preferred claim in its current form for cases governed by provincial insolvency legislation.

G. Insolvency of the Tenant

Section 29 of the CTA⁴⁵⁵ only comes into play when the formal machinery of bankruptcy law is invoked, by a receiving order or an assignment made against or by a tenant under the BIA.⁴⁵⁶ Similar legislation in other provinces applies more broadly. For example, Manitoba's and Ontario's legislation apply "[i]n case of an assignment for the general benefit of creditors, or an order being made for the winding-up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant."⁴⁵⁷ The rationale for expanding the scope of this legislation to cover areas not governed by the bankruptcy system is that it would provide a more orderly and balanced approach to regulating the competing interests of the landlord and the tenant's other creditors.

On the other hand, it could be argued that bankruptcy is sufficiently different from these other situations to justify limiting this legislation to bankruptcy. In the bankruptcy process, the bankrupt's property is vested in the trustee in bankruptcy. Further, it could be argued that "... it should not matter to the landlord whether the tenant is insolvent or not as long it continues to perform its obligations under the lease."⁴⁵⁸

A related, but much broader issue, concerns proposals under the BIA or orders under the *Companies Creditors Arrangement Act*. Insolvent persons go this route to avoid the full rigours of bankruptcy law, especially the transfer of assets to a trustee in bankruptcy. They also fall outside section 29 as it is currently drafted. These proposals or orders can create hardships for landlords, because they often prevent landlords from enforcing prior defaults under leases, while requiring tenants to pay ongoing rent. A common fact pattern involves a national retail chain that is proceeding under either the BIA (by proposal) or the *Companies Creditors Arrangement Act* in Ontario. Small British Columbia-based landlords are put in a difficult position, because they would have to appear in the Ontario proceedings to deal with the failure of the tenant (or its receiver or monitor) to comply with the lease.

455. *Supra* note 2.

456. *Supra* note 405.

457. Manitoba: *The Landlord and Tenant Act*, *supra* note 192, s. 46 (1); Ontario: *Commercial Tenancies Act*, *supra* note 192, s. 38 (1). *See also* New Brunswick: *Landlord and Tenant Act*, *supra* note 192, s. 43 (1); Prince Edward Island: *Landlord and Tenant Act*, *supra* note 192, s. 73 (1); Yukon: *Landlord and Tenant Act*, *supra* note 192, s. 36 (1); Northwest Territories and Nunavut: *Commercial Tenancies Act*, *supra* note 192, s. 24 (1).

458. *Commercial Leasing: Annotated Precedents*, *supra* note 112 at c. 2, s. 17.2, n. 39.

The committee recognizes these issues as real concerns, but it is not persuaded that expanding the scope of the bankruptcy provisions in a new *Commercial Tenancy Act* is the best way to deal with them.

The committee tentatively recommends that:

50. A new Commercial Tenancy Act should not extend its provisions on bankruptcy of the tenant to cover insolvency of the tenant.

H. Bankruptcy or Insolvency of the Landlord

Section 29 of the CTA⁴⁵⁹ only addresses issues that arise from the bankruptcy of the tenant. It could be asked whether the legislation should be extended to cover the bankruptcy or insolvency of the landlord. The rationale for legislation governing the bankruptcy or insolvency of a landlord would be similar to the rationale for legislation applying to a bankrupt tenant: the legislation is justified if it strikes a better balance among the landlord's creditors and the tenant than the current law.

Currently, no Canadian commercial leasing legislation contains bankruptcy provisions for landlords. There are some problems to face in taking on these issues in commercial leasing legislation. When a landlord goes bankrupt, title to the leased premises vests in the trustee subject to the lease.⁴⁶⁰ So, bankruptcy of the landlord is usually not seen as posing legal issues in the same way as bankruptcy of the tenant.⁴⁶¹ It is difficult to see what further protection a tenant would need beyond the assurance that the lease would remain in force.

There is a further difficulty to expanding the scope of the *Commercial Tenancy Act* to embrace bankruptcy of landlords. The federal BIA expressly opens a space for provincial law to operate when a tenant goes bankrupt, but the relevant provision has nothing to say about landlords.⁴⁶² So, any provisions that were added to a new *Commercial Tenancy Act* to deal with the bankruptcy of landlords would be vulnerable to challenge on constitutional grounds. Provisions dealing with the insolvency of landlords would not be vulnerable to this challenge, but it would undercut their

459. *Supra* note 2.

460. *See Houlden & Morawetz, supra* note 415, vol. 1 at G§101A.

461. *See* L.W. Houlden, "Bankruptcy of the Landlord or Tenant" (1965) 7 C.B.R. (N.S.) 113 at 133 ("If a bankrupt is the owner of property which has been leased to tenants there is usually no difficulty. The trustee will sell the property subject to the tenancies.").

462. BIA, *supra* note 405, s. 146.

rationale, as such provisions are usually enacted to harmonize the laws affecting an insolvent person with the laws affecting a bankrupt person.

The committee tentatively recommends that:

51. A new Commercial Tenancy Act should not contain a provision addressing legal issues arising from the bankruptcy or insolvency of a landlord.

XVI. SPECIAL PROVISIONS FOR SHOPPING CENTRE LEASES

A. Introduction

The first question one might reasonably ask when considering this topic is: Why have shopping centre leases been singled out for special consideration? What distinguishes this type of lease from, say, a lease of premises in an office block? The answer lies in the nature and characteristics of a shopping centre: the presence of a large number of retail outlets in one building owned by one landlord, adds a layer of complexity onto commercial leases because the obligations and expectations of a tenant and landlord extend beyond the premises that are the focus of the lease. In negotiating a shopping centre lease, the interests of the tenant and the landlord often come into conflict with respect to the type of merchandise the tenant may sell. This conflict is highlighted in the following passage found in a leading practice guide:⁴⁶³

I cannot stress enough how important the use of the Premises is to both the Landlord and the Tenant. The Tenant wants to sell the broadest possible scope of merchandise which is now or will (in the Tenant's opinion) in the future be in vogue, in order to carry on its business. The Landlord, however, wants the use clause specifically limited, not only to avoid any overlap of use among the tenants in its shopping centre, but also to avoid breaching any restrictive covenants . . . given to any other Tenant.

The issue that has attracted the most attention in this area is whether a tenant in a shopping centre should be allowed to enforce an exclusive right to carry on certain businesses or provide certain services or products in its lease directly against another tenant in the shopping centre.

This area has become even more complex over recent years as the retail environment has evolved with changing commercial realities. Stores have sought to broaden the variety of goods that they sell, making it increasingly difficult to regulate economic activity within a shopping centre. As a commentator recently noted, "[w]ho

463. Harvey M. Haber, *The Commercial Lease: A Practical Guide*, 3d ed. (Aurora, ON: Canada Law Book, 1999) at 139.

would have thought, a few years ago, that one would be able to purchase a computer or a television set in a drug store.”⁴⁶⁴

B. Enforcing Exclusive Use Clauses and Restrictive Covenants in Shopping Centre Leases

This topic arises out of the traditional property rules and contractual principles for leases.⁴⁶⁵ A lease is both a conveyance of property and a commercial contract and as such, landlords and tenants are considered to be bound by privity of estate and privity of contract. The general rule is therefore that a tenant cannot enforce a restrictive covenant directly against another tenant, as there is no privity of estate and no contractual relationship between them.

In the context of shopping centre leases and exclusive use clauses, the courts have, however, developed an exception to these common law rules and in certain circumstances have been willing to imply the existence of “building schemes,” also referred to as “communities of interest,” in order to circumvent the lack of privity. The result of this has been to allow a tenant to enforce a restrictive covenant directly against another tenant even though there is no direct contractual relationship between them.

A building scheme is defined in section 1 of the LTA⁴⁶⁶ as follows:

“building scheme” means a scheme of development that comes into existence where defined land is laid out in parcels and intended to be sold to different purchasers or leased or subleased to different lessees, each of whom enters into a restrictive covenant with the common vendor or lessor agreeing that his or her particular parcel is subject to certain restrictions as to use, the restrictive covenants constituting a special local law applicable to the defined land and the benefit and burden of the covenants passing to, as the case may be, the purchaser, lessee or sublessee of the parcel and his or her successors in title.

The building scheme is a useful vehicle when a landowner subdivides land into several parcels and sells or leases the parcels to several owners. The seller can impose mutual restrictive covenants on all of the purchasers or tenants, which will then be binding on all subsequent purchasers and will enable the purchasers or tenants to

464. Alan Schapiro & Michael Urbani, “Retail Leases: Commonly Included Clauses,” in Alan Schapiro *et al.*, eds., *Commercial Leases—1995 Update: Materials Prepared for a Continuing Legal Education Seminar Held in Vancouver, B.C. on September 22, 1995* (Vancouver: The Continuing Legal Education Society of British Columbia, 1995) 1.1 at 1.1.01.

465. *See*, above, Part One, sections II.B, II.C; Part Two, section X.

466. *Supra* note 99.

enforce the covenants directly between themselves where a breach occurs. In order to qualify as a valid statutory building scheme, a number of conditions must be met, including the requirement for the landowner to file a “Declaration of Creation of Building Scheme” in the land title office.

An examination of the case law reveals variations in the willingness of the courts to extend the building scheme/ community of interest doctrine to shopping centre leases. The foundational case establishing the proposition is *Scharf v. Mac’s Milk Ltd.*⁴⁶⁷ The existence of an implied building scheme in this case enabled the plaintiff to obtain an injunction directly against Mac’s Milk restraining competition even though there was no contractual relationship between them. The court adopted the requirements in *Ellison v. Reacher*,⁴⁶⁸ which can be summarized as follows:

1. there must be a common vendor;
2. before the lands were sold there was a scheme relating to a defined area for sale in lots containing restrictions which were imposed on all lots and which, though varying in details as to particular lots, were consistent only with some general development;
3. the restrictions were intended by the vendor to be and were for the benefit of all lots;
4. the original purchasers bought on the understanding that the restrictions were to enure for the benefit of the other lots included in the general scheme.

The principle from *Scharf* has been applied in numerous subsequent cases. In *Re Spike and Rocca Group*,⁴⁶⁹ the court applied the requirements from *Scharf* in deciding that the defendant tenant was infringing a restrictive covenant in favour of the plaintiff lessee. The case is of particular note as the leases were not registered and the defendant tenant did not have actual notice of the covenant. Despite these considerations, the court said that notice could be implied because the existence of restrictive covenants within shopping centres is “notorious.” In addition, the court made the point that the defendant knew that his own lease contained a restrictive covenant, which provided constructive notice that the other leases in the centre would have the benefit of similar covenants.

The case law also demonstrates, however, that the courts have imposed limitations on when a building scheme may be implied. The BC Court of Appeal refused to imply the existence of a building scheme or community of interest in *Salmon Arm Phar-*

467. [1965] 2 O.R. 640, 51 D.L.R. (2d) 565 (C.A.) [*Scharf* cited to O.R.].

468. [1908] 2 Ch. 374 (Eng. Ch.).

469. (1979), 107 D.L.R. (3d) 62, 23 Nfld. & P.E.I.R. 493 (P.E.I.S.C.).

*macy Ltd. v. R.P. Johnson Construction Ltd.*⁴⁷⁰ In *Salmon Arm*, T2's lease predated T1's lease. T2's lease did not contain any restrictions as to the type of business it could conduct. But T1 was granted a restrictive covenant by which the landlord covenanted not to allow any other tenant to carry on a pharmacy business. The court held that T1 could not enforce its restrictive covenant against T2. The absence of any use restrictions on T2 was fatal to T1's attempt to imply a community of interest. The Court of Appeal also laid down three requirements needed to imply the existence of a community of interest:⁴⁷¹

- (1) one tenant seeks to enforce a contractual obligation owed by another tenant to the landlord;
- (b) both tenants have restrictive covenants in their leases which limit the use to which the tenants can put their premises; and
- (c) both tenants have the benefit of restrictive covenants by which the landlord promises not to allow the use of any portion of the shopping centre for a purpose which competes with that of another tenant.

The Alberta Court of Queen's Bench applied the three requirements from *Salmon Arm* in *Liquor Depot at Riverbend Square Ltd. v. Time for Wine Ltd.*⁴⁷² The court held that no community of interest could be implied in a situation where, while T1 had the benefit of a restrictive covenant and T2's lease contained a use restriction that corresponded with T1's restrictive covenant, T2 did not have the benefit of a restrictive covenant in its favour. In other words, T2 could not meet the third requirement laid down in *Salmon Arm*. The court held that the lack of a restrictive covenant in favour of T2 preventing competition against it in the centre meant that it was not clear that the restrictions on use imposed by the landlord were intended to be for the benefit of all tenants rather than just the landlord.

The requirements for implying a building scheme or community of interest as set out in *Salmon Arm* are clearly more restrictive than the test applied in *Scharf*. *Salmon Arm* would appear to require that in order for T1 to enforce a restrictive covenant granted to it by the landlord, T2 (the party allegedly in breach) must also have the benefit of a covenant restricting competition within the centre. In other words, it may not be sufficient for T2 to be restricted by an exclusive use clause unless T2 also has the benefit of a restrictive covenant preventing competition within the shopping centre. This could perhaps be seen as being particularly harsh on T1 in circum-

470. [1994] 9 W.W.R. 214, 94 B.C.L.R. (2d) 269 (C.A.) [*Salmon Arm* cited to B.C.L.R.].

471. *Ibid.* at para. 24, Finch J.A. (for the court).

472. [1997] 8 W.W.R. 656, 52 Alta. L.R. (3d) 84 (Q.B.).

stances where T1 has the benefit of a restrictive covenant from the landlord in its lease and there is a corresponding exclusive use clause in T2's lease.

It is interesting to note that while *Salmon Arm* is frequently cited in academic literature in connection with the doctrine of community of interest, the case has not been considered in British Columbia since the ruling in 1994. In fact, there are very few cases from any province considering the issue of an implied building scheme or community of interest in the context of shopping centres. There are several possible reasons for this lack of litigation.

First, landlords will often seek to make any restrictive covenants subject to existing uses and leases within a shopping centre. A limitation of this type would obviously preclude a tenant from suing another tenant in many cases.

Second, large anchor tenants usually have such a strong bargaining position that they will more often than not be excluded from this type of restrictive covenant. Most anchor tenants will ensure that their leases allow them to change the nature of the products and services they offer over time. The exclusion of anchor tenants from restrictive covenants is therefore also likely to reduce the scope for litigating restrictive covenants.

Third, commercial realities dictate that many landlords are likely to be in a very strong bargaining position with non-anchor tenants such that they do not need to grant restrictive covenants to tenants or, if they do, they only grant limited covenants. As has been noted in a practice guide:⁴⁷³

A landlord should not lightly agree to grant[ing restrictive covenants]. If it does so, it should do so with express limitations (for example, exclude existing tenants, exempt reletting by existing tenants, restrict exclusive use to tenant's primary use, exempt transferees of existing tenants, exempt small tenants, exempt anchor tenants, or exempt incidental uses.

This suggests strong, pro-tenant restrictive covenants may perhaps be the exception rather than the rule. It is interesting to note that the more recent cases where tenants have sued to enforce restrictive covenants involved McDonald's, London Drugs, Safeway, and Shopper's Drug Mart—all tenants with bargaining power that was likely stronger than average.

Fourth, it may well be the case that the ruling of the Court of Appeal in *Salmon Arm* has restricted the application of the community of interest doctrine. The require-

473. *Commercial Leasing: Annotated Precedents*, *supra* note 112 at c. 2A, s. 7.3, n. 17.

ment for both tenants to have restrictive covenants in their favour coupled with the refusal of the court to imply the existence of restrictive covenants has limited the scope of the doctrine and the possibility for litigation.

The uncertainty that currently exists as to when a court will apply the community of interest/ building scheme doctrine in shopping centre leases and the rather narrow interpretation laid down in *Salmon Arm* leads to the major law reform issue in this area: should there be a statutory right to sue despite the lack of privity? This statutory right could be similar to the statutory building scheme mentioned previously, which creates enforceable rights and obligations between tenants as well as between the landlord and tenant. Such a statutory right could overcome the uncertainty and narrowness that characterize the case law. But it is not clear that there is a strong desire to enact statutory reforms.

In the committee's view, these issues are best addressed by the evolution of the common law.

The committee tentatively recommends that:

52. A new Commercial Tenancy Act should not contain provisions that allow a shopping centre tenant to enforce an exclusive use clause/ restrictive covenant directly against another tenant, despite the fact that there is no contractual relationship between them.

C. Remedies for a Tenant if a Landlord of a Shopping Centre or Other Multi-Tenant Building Leaves the Premises Vacant

As noted in a leading textbook:⁴⁷⁴

A landlord may decide, as a result of changing economic factors or the age of a development to simply demolish the entire development and build something new. If a landlord has not anticipated this possibility, some tenants may not be willing to surrender their leases and will have rights to continue to occupy their premises.

This issue came to the fore in the context of shopping centres in a recent case from Manitoba. In *Michael Santarsieri Inc. v. Unicity Mall Ltd.*,⁴⁷⁵ the owner of a shopping mall made a decision to redevelop a large, traditional shopping centre into a development featuring a few large, freestanding stores and a small strip mall.⁴⁷⁶ Most of

474. Olson, *supra* note 4 at § VII.N.

475. (1999), 26 R.P.R. (3d) 98 (Man. Q.B.).

476. *Ibid.* at paras. 5–6.

the smaller tenants of the shopping centre agreed with the landlord to terminate their leases, but two tenants wanted to carry on.⁴⁷⁷ They argued that the proposed redevelopment would harm their businesses and would be in breach of their leases and sought an injunction to prevent it.⁴⁷⁸ The court granted the injunction on the basis that the proposed redevelopment would be in breach of the covenant of quiet enjoyment in both leases.⁴⁷⁹

This decision was reversed on appeal.⁴⁸⁰ The court noted some confusion in argument in the court below and re-characterized the injunction as being granted on the basis of enforcing the landlord's "... obligation to operate the mall as a 'first class shopping centre' ..." in accordance with the lease.⁴⁸¹ Given the deteriorating conditions in the shopping centre (which was almost entirely vacant by this point), the court concluded that the injunction served no proper purpose.⁴⁸²

Given the frequency of these types of disputes, the committee has decided that it should be made clear that they fall within the scope of the proposed summary dispute resolution procedure.

The committee tentatively recommends that:

53. A new Commercial Tenancy Act should include within its summary dispute resolution procedure provisions accommodating disputes in a shopping centre or other multi-tenant building where a landlord does not fill vacancies as a means to effect a redevelopment.

XVII. OBSOLETE PROVISIONS OF THE COMMERCIAL TENANCY ACT

A. Introduction

Many of the provisions of the CTA⁴⁸³ address relevant ideas in an out of date fashion. For example, the CTA contains sections establishing a summary dispute resolution

477. *Ibid.* at para. 7.

478. *Ibid.* at para. 1.

479. *Ibid.* at para. 46.

480. *Rivard Ultracuts Ltd. v. Unicity Mall Ltd.* (1999), 181 D.L.R. (4th) 136, (*sub nom. Michael Santarsieri Inc. v. Unicity Mall Ltd.*) 28 R.P.R. (3d) 298 (Man. C.A.) [*Unicity Mall* cited to R.P.R.].

481. *Ibid.* at para. 17.

482. *Ibid.* at paras. 26–28.

483. *Supra* note 2.

procedure for certain disputes. This idea retains its relevance for commercial leasing law, even if the execution of it in the CTA is cumbersome and in need of reform.

This section of the consultation paper is concerned with those provisions of the CTA that are obsolete both in expression and conception. The issue for reform is whether a given provision can be excluded entirely from a new *Commercial Tenancy Act* because it deals with a subject that is no longer relevant to the contemporary commercial leasing sector.

Addressing this issue requires a fair amount of exposition, primarily delving into the historical rationale for the CTA provision under consideration. These sections can be so remote from modern practices that the only way to understand them is in their historical context.

B. Action Against Tenant for Life for Rent

Section 2 of the CTA provides that a landlord may sue a tenant occupying the leased premises under a lease for life⁴⁸⁴ if the tenant is in arrears of rent. Section 2 was first enacted as part of the original 1897 Act and it has not been amended in any substantive way.

Section 2 re-enacts an eighteenth-century English provision.⁴⁸⁵ This provision was aimed at correcting a flaw in the common law. The flaw is described in the preamble to the English legislation: “And whereas no action of debt lies against a tenant for life or lives, for any arrears of rent, during the continuance of such estate for life or lives. . . .”

For reasons related to historical conveyancing practices, it was once very common in England to express the term of a lease not as a number of years but rather as being for the life of a person. This practice fell out of favour during the nineteenth century.⁴⁸⁶ In contemporary British Columbia, it is extremely rare for the term of a lease to be expressed as being for a person’s life. The only province, other than British Columbia, that has this provision in its commercial leasing legislation is Nova Scotia.⁴⁸⁷ In the committee’s view, this section is obsolete and this concept should not be addressed in a new *Commercial Tenancy Act*.

484. See, above, Part One, section II.B, footnote 13.

485. *An act for the better security of rents, and to prevent frauds committed by tenants*, *supra* note 44, s. 4.

486. See *Megarry & Wade*, *supra* note 10 at § 14-006.

487. See *Tenancies and Distress for Rent Act*, *supra* note 411, s. 21.

The committee tentatively recommends that:

54. A new Commercial Tenancy Act should not include a specific provision authorizing actions for rent against a tenant for life.

C. Provision for Landlords Where Tenants Desert Premises

Sections 5–6 of the CTA contain a summary procedure for a landlord to recover possession of the leased premises from a tenant who has abandoned it. Sections 5–6 were enacted as part of the original 1897 Act. They have not been substantially amended.

Sections 5–6 can actually be traced back beyond the nineteenth century. They were originally enacted in England to address a deficiency in the common law. At common law it was difficult for a landlord to recover possession of the leased premises in the face of breaches by the tenant. Eventually, legislation was passed to remedy the most troubling aspects of the common law. The LRCBC Report sets out the background and policy to this legislation:⁴⁸⁸

From the landlord’s perspective, the law concerning the recovery of possession was deficient in a number of ways. The tenant’s non-payment of rent or breach of other terms of the tenancy agreement did not automatically lead to a right to repossess the property. Even where the right existed, or the tenant was wrongfully overholding, the remedies for enforcement were unsatisfactory. A number of developments took place in the 18th and 19th centuries to improve the landlord’s position.

Sections 5–6 are direct descendents of this eighteenth-century legislation.⁴⁸⁹ Section 5 provides a summary procedure for a landlord to recover possession of the leased premises; section 6 gives the tenant the right to have a decision in favour of a landlord under this summary procedure reviewed by the Supreme Court.

The problem with sections 5–6 is that they have an extremely narrow focus. The summary procedure in section 5 can only be employed if its three conditions are met: (1) the tenant must hold the land at a rack-rent or the rent reserved under the lease must be a “full three-fourth of the yearly value of the demised premises”; (2) the tenant must be in arrear for at least one year’s rent; and (3) the tenant must

488. *Supra* note 6 at 115.

489. *An act for the more effectual securing of the payment of rents, and preventing frauds by tenants*, *supra* note 44, ss. 16–17.

have deserted the premises and not left behind “sufficient distress” to “countervail the arrears of rent.”

These conditions will rarely be met in practice. A “rack-rent” is “a very high, excessive, or extortionate rent; a rent (nearly) equal to the annual income obtainable by the tenant from the property.”⁴⁹⁰ So, in order to come within the scope of the section, a landlord must first drive a hard bargain and lease the premises at an “extortionate” rent (at least 3/4 of the annual income that the tenant may expect from the property) and then go soft and allow the tenant to remain in arrears of rent for at least one year.

British Columbia is the only province or territory to have re-enacted this English legislation as part of its commercial leasing statute. It is clearly a historical relic in the twenty-first century.

The committee tentatively recommends that:

55. A new Commercial Tenancy Act should not include a provision allowing a landlord summarily to recover possession of the leased premises when the conditions currently set out in section 5 of the Commercial Tenancy Act are met.

D. Method of Recovering Rentseck

Section 7 of the CTA allows a landlord to employ distress to recover arrears “in cases of rentseck, rents of assize, and chief rents.” This section also made its first appearance in the 1897 Act and has not been amended since then.

A textbook on landlord–tenant law defines “rentseck” as follows:⁴⁹¹

Rent seck or barren rent is in effect nothing more than a rent reserved by deed or will, but without any clause of distress; it differs only from a rent charge in being reserved without a clause of distress.

(“Rent charge,” in the above passage, refers to a distinction between rentcharges and rent services. A “rent service” is rent payable by virtue of a relationship between a tenant and a lord. If this feudal relationship is lacking, then the rent payable is a “rentcharge.”)⁴⁹²

490. *The New Shorter Oxford English Dictionary*, 4th ed. s.v. “rack-rent.”

491. *Williams & Rhodes, supra* note 75, vol. 1 at § 6:1:2 [citation omitted].

492. *See Megarry & Wade, supra* note 10 at § 14-006.

“Rents of assize” is a term applied to chief rents and quit rents.⁴⁹³ “Chief rent” was “... the rent reserved on the subinfeudation of freehold land in fee simple.”⁴⁹⁴ “Quit rent” was “... a rent service payable by a copyholder to his lord, whereby he went quit of his obligation to perform agricultural services...”⁴⁹⁵ Any examples of these types of rent that may still exist in England would be connected with the preservation of manorial titles.⁴⁹⁶

England enacted legislation in the eighteenth century to extend the right of distress to these types of rent to overcome problems in practice.⁴⁹⁷ British Columbia is not alone in re-enacting this provision. Four other provinces have it in their commercial leasing statutes.⁴⁹⁸ That said, this type of legislation is of little practical utility today. As the LRCBC Report concluded:⁴⁹⁹

There is no need to retain section 7 so far as it concerns chief rents and rents of assize. They have no relevance to any past or present system of land tenure in British Columbia. Nor does rentseck play any role in contemporary commercial tenancies. It is our conclusion that a provision similar to section 7 need not be carried forward into new legislation.

The committee tentatively recommends that:

56. A new Commercial Tenancy Act should not include a provision extending the right of distress to cases of rentseck, chief rents, or rents of assize.

E. Recovery of Rent When a Lease Is not Made by a Deed

Section 9 of the CTA provides that a landlord may recover rent from a tenant even if the lease is not in the form of a deed. Section 9 was brought into force as part of the 1897 Act and has not been amended since then.

493. Robert Megarry & H.W.R. Wade, *The Law of Real Property*, 4th ed. (London: Stevens & Sons, 1975) at 800.

494. *Ibid.*

495. *Ibid.*

496. *Ibid.* at 793.

497. *An act for the more effectual preventing frauds committed by tenants, and for the more easy recovery of rents, and renewal of leases*, *supra* note 44, s. 5 (“the remedy for recovering rents seck, rents of assize and chief rents are [*sic*] tedious and difficult”).

498. See Saskatchewan: *The Landlord and Tenant Act*, *supra* note 192, s. 19; Manitoba: *The Landlord and Tenant Act*, *supra* note 192, s. 29 (3); Ontario: *Commercial Tenancies Act*, *supra* note 192, s. 40; Prince Edward Island: *Landlord and Tenant Act*, *supra* note 192, s. 19.

499. *Supra* note 6 at 91.

Section 9 re-enacts an old English provision that was intended “to obviate some difficulties that many times occur in the recovery of rents, where the demises are not by deed. . . .”⁵⁰⁰ The significance of providing a lease in the form of a deed can only be explained by reference to historical circumstances. Sections 1–2 of the *Statute of Frauds*⁵⁰¹ required a lease to be in writing, unless the term of the lease was for three years or some lesser period. A subsequent English statute⁵⁰² provided that any lease required to be in writing must be in the form of a deed. A “deed” is “any written instrument that is signed, sealed, and delivered and that conveys some interest in property.”⁵⁰³ Section 16 of the PLA⁵⁰⁴ provides that “[a]n instrument purporting to transfer, charge or otherwise deal with land or to transfer, release or otherwise deal with a charge need not be executed under seal.”

The LRCBC Report reviewed these provisions and concluded that “[b]ecause a deed is no longer essential to the creation of a tenancy, its absence no longer bars a landlord’s claim for rent and section 9 has become redundant.”⁵⁰⁵ It is noteworthy that none of the other provinces or territories have re-enacted this provision.

The committee tentatively recommends that:

57. A new Commercial Tenancy Act should not include a provision allowing a landlord to recover rent by an action in the courts in cases where the lease is not in the form of a deed.

F. Penal Sanctions for Overholding Tenants

Sections 15–16 are penal provisions.⁵⁰⁶ They first appeared as part of the 1897 Act and neither section has been amended since that date. The sections are re-enactments of earlier English statutes that were intended to punish overholding

500. *An act for the more effectual securing of the payment of rents, and preventing frauds by tenants*, *supra* note 44, s. 14.

501. *Supra* note 73.

502. *Real Property Act, 1845*, 8 & 9 Vict., c. 106, s. 3.

503. *Black’s Law Dictionary*, 8th ed., s.v. “deed.”

504. *Supra* note 56.

505. *Supra* note 6 at 10.

506. See *Sami’s Restaurant Corp. v. W. Hanley & Co.*, 2003 BCSC 1181, [2003] B.C.J. No. 1790 at para. 19 (QL), Loo J. [*Sami’s Restaurant*], *aff’d*, 2004 BCCA 157, 36 R.P.R. (4th) 308.

tenants because their actions were viewed as “frauds”⁵⁰⁷ or as causing “great inconveniences.”⁵⁰⁸ Section 15 applies to leases with terms of life, lives, or years, and penalizes the overholding tenant by requiring the payment of rent “at the rate of double the yearly value of the land.” Section 16 applies when the lease gives the tenant the power to determine when the lease will terminate. If the tenant gives notice of termination and then fails to deliver possession to the landlord, then the tenant “shall thenceforth pay to the landlord double the rent or sum which he or she shall otherwise have paid.”

Most of the other provinces and territories have re-enacted these penal provisions as part of their commercial leasing legislation.⁵⁰⁹ Saskatchewan, however, has repealed these provisions.⁵¹⁰ Many modern commercial leases have overholding clauses, some of which provide for payment of double rent.⁵¹¹

Since sections 15–16 are penal provisions the courts have interpreted them strictly. The conditions set out in the sections as to notice must be satisfied before the court will consider applying the penalty. Further, the term of the lease must be a term of life, lives, or years (section 15) or one where the tenant has the power to determine its end (section 16) or the penalty will not apply.⁵¹² Finally, the tenant must be wilful—or abusive—in holding over; if the tenant is acting in good faith, or under a

507. *An act for the more effectual preventing frauds committed by tenants, and for the more easy recovery of rents, and renewal of leases*, *supra* note 44, s. 1 (“For securing to lessor and land owners their just rights, and to prevent frauds frequently committed by tenants. . .”). This provision is the forerunner of section 15.

508. *An act for the more effectual securing of the payment of rents, and preventing frauds by tenants*, *supra* note 44, s. 18 (“And whereas great inconveniences have happened, and may happen to landlords, whose tenants have power to determine their leases, by giving notice to quit the premises by them holden, and yet refusing to deliver up the possession, when the landlord hath agreed with another tenant for the same. . .”). This provision is the forerunner of section 16.

509. See Manitoba: *The Landlord and Tenant Act*, *supra* note 192, ss. 52–53; Ontario: *Commercial Tenancies Act*, *supra* note 192, ss. 58–59; New Brunswick: *Landlord and Tenant Act*, *supra* note 192, ss. 55–57; Prince Edward Island: *Landlord and Tenant Act*, *supra* note 192, ss. 76–77; Yukon: *Landlord and Tenant Act*, *supra* note 192, ss. 42–43; Northwest Territories and Nunavut: *Commercial Tenancies Act*, *supra* note 192, ss. 31–32.

510. *An Act to amend The Landlord and Tenant Act*, S.S. 1947, c. 81.

511. See also LTFA, *supra* note 55, sch. 4, cov. 13.

512. See *Sami’s Restaurant*, *supra* note 506 at paras. 21–22 (lease providing that overholding by tenant to be deemed a month to month tenancy—court ruling that a month to month tenancy not a tenancy for life, lives, or years, therefore penalty of double rent not available).

“sincere, albeit mistaken, belief”⁵¹³ with respect to its rights, then the penalty will not be applied.

The LRCBC Report recommended that sections 15–16 not be retained as a part of modern commercial leasing legislation.⁵¹⁴ It is one thing if landlords and tenants agree to include such provisions in a lease, but it is inappropriate for legislation to apply such a penalty across the board. Further, the strictness with which the courts apply these provisions robs them of nearly any utility.

The committee tentatively recommends that:

58. A new Commercial Tenancy Act should not include penal provisions requiring an overholding tenant to pay double rent or rent at double the yearly value of the land.

XVIII. CONCLUSION

The goal of the *Commercial Tenancy Act* Reform Project is to produce draft legislation that may be implemented as a new *Commercial Tenancy Act*. The production of this draft legislation will be guided by the tentative recommendations set out in this consultation paper and by the responses that the committee receives to this consultation paper. The committee encourages all interested persons to provide it with their views on the committee’s proposals for reform.

513. *Amadon Properties Ltd. v. Pacific Apparel Inc.* (1990), 13 R.P.R. (2d) 186 at para. 425, 23 A.C.W.S. (3d) 76 (B.C.S.C.), Cashman J.

514. *Supra* note 6 at 93–94.

APPENDIX A

Commercial Tenancy Act

Payment by execution creditor of rent before removal of chattels taken in execution

- 1 No chattels being in or on any land that is or shall be leased for life or lives, term of years, or at will, or otherwise, are liable to be taken by virtue of any execution, unless the party at whose suit the said execution is sued out, before the removal of such chattels from the premises, by virtue of such execution or extent, pays to the landlord of the premises or the landlord's bailiff such sum of money as is due for rent for the premises at the time of the taking of the chattels by virtue of the execution, if the arrears of rent do not amount to more than one year's rent; and in case the said arrears exceed one year's rent, then the party at whose suit such execution is sued out, paying the said landlord or bailiff one year's rent, may proceed to execute his or her judgment, as he or she might have done heretofore; and the sheriff or other officer is empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money.

Action against tenant for life for rent

- 2 Any person having any rent in arrear or due on any lease or demise for life or lives may recover such arrears of rent by action as if such rent were due and reserved on a lease for years.

Rent in arrear on a lease expired may be distrained for after determination of lease

- 3 Any person having any rent in arrear or due on any lease for life or lives, or for years, or at will, ended or determined, may distrain for such arrears, after the determination of the said respective leases, in the same manner as he or she might have done if such lease or leases had not been ended or determined.

Provided distress be made within 6 months after determination of lease

- 4 Distress under section 3 shall be made within the space of 6 calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due.

Provision for landlords where tenants desert premises

- 5 And whereas landlords are often sufferers by tenants running away in arrear, and not only suffering the demised premises to lie uncultivated without any distress thereon, whereby their landlords might be satisfied for the rent-arrear, but also refusing to deliver up the possession of the demised premises, whereby the landlords are put to the expense and delay of recovering in ejectment: Be it enacted — That if any tenant holding any land at a rack-rent, or where the rent reserved is full three-fourths of the yearly value of the demised premises, who is in arrear for one year's rent, deserts the demised premises and leaves the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it is lawful for 2 or more Justices of the Peace of the county, district or place, at the request of the landlord or the landlord's bailiff or agent, to go on and view the same, and to affix, or cause to be affixed on the most conspicuous part of the premises notice in writing what day (not less than 14 days thereafter) they will return to take a second view thereof; and if on such second view the tenant, or some person on the tenant's behalf, does not appear, and pay the rent in arrear, or there is not sufficient distress on the premises, then the said justices may put the landlord into the possession of the said demised premises, and the lease thereof to such tenant, as to any demise therein contained only, shall from thenceforth become void.

Tenants may appeal from justices

- 6 Proceedings under section 5 are subject to review in a summary way by any judge of the Supreme Court, who may order restitution to be made to the tenant together with his or her expenses and costs, to be paid by the landlord, or to make such order as the judge shall think fit; and in case the judge affirms the act of the justices, the judge may award such costs of appeal in favour of the landlord as may seem just.

Method of recovering rentseck

- 7 Every person shall and may have the like remedy by distress and by impounding and selling the same, in cases of rentseck, rents of assize, and chief rents, as in case of rents reserved on lease, any law or usage to the contrary notwithstanding.

Chief leases may be renewed without surrendering all underleases

- 8 (1) In case any lease is duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord, the same new

lease is, without a surrender of any of the underleases, as valid as if all the underleases derived from it had been likewise surrendered at or before the taking of such new lease.

- (2) Every person in whom any estate for life or lives, or for years, is from time to time vested by virtue of the new lease, and his or her personal representatives, are entitled to the rents, covenants and duties, and shall have like remedy for recovery thereof, and underlessees shall hold and enjoy the land in the respective underleases comprised as if the original leases out of which the respective underleases are derived had been still kept on foot and continued.
- (3) The chief landlord shall have and is entitled to such and the same remedy, by distress or entry in and on the land comprised in the underlease, for the rents and duties reserved by the new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such underlease was derived, as the chief landlord would have had in case the former lease had been still continued, or as the chief landlord would have had in case the respective underlease had been renewed under the new principal lease.

Rents, how to be recovered where demises are not by deed

- 9 (1) It is lawful for the landlord, where the agreement is not by deed, to recover by action in any court of competent jurisdiction a reasonable satisfaction for the land held, used or occupied by the defendant for the use and occupation thereof.
- (2) If at the trial of the action it appears that any rent has been reserved by a parol, demise, or any agreement (not being by deed), such rent may be the measure of the damages to be recovered by the plaintiff.

Rents recoverable from undertenant where tenants for life die before rent is payable

- 10 Where any tenant for life dies before or on the day on which any rent was reserved or made payable on any demise or lease of any land which determined on the death of the tenant for life, the personal representatives of the tenant for life shall and may recover from any undertenant or undertenants of the land if the tenant for life dies on the day on which the same was made payable, the whole, or if before such day then a proportion, of the rent according to the time the tenant for life lived, of the last year or quarter of a year, or other time in which the rent was growing due as aforesaid, making all just allowances or a proportionable part thereof respectively.

Certain other rents to be considered as within provisions of section 10

- 11** Rents reserved and made payable on any demise or lease of land determinable on the death of the person making the same (although such person was not strictly tenant for life thereof) or on the death of the life or lives for which the person was entitled to the land, shall, so far as respects the rents reserved by the lease, and the recovery of a proportion thereof by the person granting the same, his or her personal representatives, be considered as within the provisions of section 10.

Apportionment and recovery of rents, annuities, and payments due at fixed periods

- 12** All rents-service hereafter reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power, and all rents-charge and other rents, annuities, pension, dividends, moduses, compositions, and all other payments of every description, made payable or coming due at fixed periods under any instrument that is hereafter executed, or (being a will or testamentary instrument) that comes into operation hereafter, shall be apportioned in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same are issuing or derived, or on the determination by any other means of the interest of any such person, the person and his or her personal representatives, or assignees shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments according to the time which has elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of the person or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions, and other payments being made; and that every such person, his or her personal representatives, and assignees, shall have the same remedies for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions, and other payments, when the entire portion of which such apportioned parts form part becomes due and payable, and not before, as he or she or they would have had for recovering such entire rents, annuities, pensions, dividends, moduses, compositions, and other payments if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the land comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall

form a part shall be received and recovered by the person who but for this section would have been entitled to such entire rents; and such portions shall be recoverable in any action from such person by the party entitled to the same under this Act.

Saving effect of express contracts

- 13** Sections 11 and 12 do not apply to any case in which it is expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance.

All grants and conveyances to be good, without attornment of tenants

- 14** All grants and conveyances heretofore or hereafter made of any real estate or rents, or of the reversion or remainder of any land, are good and effectual without any attornment of any tenant of any such land out of which such rent shall be issuing, or of the particular tenants on whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made; but no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor, or by breach of any condition for nonpayment of rent, before the notice is given to the tenant of such grant by the grantee.

Persons holding over land after expiration of lease to pay double yearly value

- 15** In case any tenant for any term of life, lives, or years or other person who comes into possession of any land by, from, or under, or by collusion with the tenant, wilfully holds over any land after the determination of any such term, and after demand made and notice in writing given for delivering the possession thereof by the landlord or lessor, or the person to whom the remainder or reversion of such land belongs, or that person's agent thereunto lawfully authorized, then and in such case the person so holding over shall, for and during the time he or she holds over or keeps the person entitled out of possession of the land pay to the person kept out of possession, or that person's personal representatives or assignees, at the rate of double the yearly value of the land so detained, for so long time as the same are detained, to be recovered in any court of competent jurisdiction.

Tenants holding premises after time they notify for quitting them to pay double rent

- 16** In case any tenant gives notice of his or her intention to quit the premises by him or her holden at a time mentioned in the notice, and does not deliver up possession thereof at such time, then the tenant or his or her per-

sonal representatives shall thenceforward pay to the landlord double the rent or sum which he or she shall otherwise have paid; to be levied and recovered at the same times and in the same manner as the single rent or sum before giving such notice could be levied or recovered; and such double rent or sum shall continue to be paid during all the time such tenant shall so continue in possession.

Definitions for purposes of sections 18 to 28

17 In sections 18 to 28:

“landlord” includes the lessor, owner, the person giving or permitting the occupation of the premises in question, and the person entitled to possession, and his or her heirs, assignees and legal representatives;

“tenant” includes an occupant, a subtenant, undertenant, and his or her assignees and legal representatives.

Landlord may apply to Supreme Court

- 18** (1) In case a tenant, after the lease or right of occupation, whether created in writing or verbally, has expired, or been determined, either by the landlord or by the tenant, by a notice to quit or notice under the lease or agreement, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, on written demand, to go out of possession of the leased land, or the land that the tenant has been permitted to occupy, the landlord may apply to the Supreme Court
- (a) setting out in an affidavit the terms of the lease or right of occupation, if verbal;
 - (b) annexing a copy of the instrument creating or containing the lease or right of occupation, if in writing;
 - (c) if a copy cannot be annexed by reason of it being mislaid, lost or destroyed, or of being in possession of the tenant, or from any other cause, then annexing a statement setting forth the terms of the lease or occupation, and the reason why a copy cannot be annexed;
 - (d) annexing a copy of the demand made for delivering possession, stating the refusal of the tenant to go out of possession, and the reasons given for the refusal, if any; and
 - (e) any explanation in regard to the refusal.

- (2) This section extends and shall be construed to apply to tenancies from week to week, from month to month, from year to year, and tenancies at will, as well as to all other terms, tenancies, holdings or occupations.
- (3) An application under subsection (1) shall be commenced at a registry of the Supreme Court located in the judicial district where the land is situated.

Court to appoint time and place of inquiry, etc.

- 19** If after reading the affidavit it appears to the court that the tenant wrongfully holds and that the landlord is entitled to possession, the court shall appoint a time and place to inquire and determine whether the person complained of was a tenant of the complainant for a term or period which has expired, or has been determined by a notice to quit or otherwise, whether the tenant holds possession against the right of the landlord and whether the tenant has wrongfully refused to go out of possession, having no right to continue in possession.

Notice in writing of inquiry

- 20** (1) Notice in writing of the time and place appointed under section 19 shall be served by the landlord on the tenant or left at the tenant's residence or place of business at least 5 days before the day appointed, if not more than 32 km from the tenant's residence or place of business and one day in addition for every 32 km above the first 32, reckoning any broken number above the first 32 as 32 km.
- (2) A copy of the affidavit on which the appointment was obtained, and of the papers attached to it shall be annexed to the notice.

Court to issue writ of possession

- 21** (1) If at the time and place appointed under section 19 the tenant, having been notified as provided, fails to appear, the court, if it appears to it that the tenant wrongfully holds, may order a writ to issue to the sheriff, commanding him or her to place the landlord in possession of the premises in question.
- (2) If the tenant appears at the time and place, the court shall, in a summary manner, hear the parties, examine the matter, administer an oath or affirmation to the witnesses adduced by either party, and examine them.

- (3) If after the hearing and examination it appears to the court that the case is clearly one coming under the true intent and meaning of section 18, and that the tenant wrongfully holds against the right of the landlord, then it shall order the issue of the writ under subsection (1) which may be in the words or to the effect of the form in the Schedule; otherwise it shall dismiss the case, and the proceedings shall form part of the records of the Supreme Court.

Other rights and remedies of landlords not prejudiced

- 22 Sections 18 to 21 do not prejudice or affect any other right or right of action or remedy that landlords may possess in any of the cases provided for.

Style of cause

- 23 Proceedings under sections 18 to 21 shall be commenced at a registry of the Supreme Court located in the judicial district where the land is situated.

Service

- 24 Service of all papers and proceedings under sections 18 to 21 shall be properly effected if made as required by law in respect of writs and other proceedings in actions for the recovery of land.

Landlord may apply to registrar of Supreme Court

- 25 (1) In case a tenant
- (a) fails to pay rent within 7 days of the time agreed on, or
 - (b) makes default in observing any covenant, term or condition of the tenancy, the default being of a character as to entitle the landlord to enter again or to determine the tenancy,
- and wrongfully refuses or neglects, on demand made in writing, to pay the rent or to deliver the premises leased, which demand shall be served on the tenant or on some adult person on the land or, if vacant, be affixed to the dwelling or other building on the land, or on some portion of the fences, the landlord or the landlord's agent may apply to the registrar of the Supreme Court on affidavit
- (c) setting forth the terms of the lease or occupancy,
 - (d) the amount of rent in arrears, and the time for which it is in arrears,

- (e) producing the demand made for the payment of rent or delivery of the possession, and stating the refusal of the tenant to pay the rent or to deliver up possession, and the answer of the tenant, if an answer was made, and
- (f) setting forth that the tenant has no right to set off or the reason for withholding possession, or setting forth the covenant, term or condition in performance of which default has been made, and the particulars of the forfeiture,

and on filing of the affidavit, the registrar shall issue a summons calling on the tenant, 3 days after service, to show cause why an order should not be made for delivering up possession of the premises to the landlord, and the summons shall be served in the same manner as the demand.

- (2) An application under subsection (1) shall be commenced at a registry of the Supreme Court located in the judicial district where the land is situated.

Procedure on hearing and on enforcement of order for possession

- 26**
- (1) Subject to subsection (3), on return of the summons, the court shall, if the tenant appears, hear the parties on the evidence they may adduce on oath, and if the tenant, having been served as provided, does not appear, proceed in the tenant's absence and make an order, either to confirm the tenant in possession or to deliver possession to the landlord, as the facts of the case warrant.
 - (2) In case an order is made for the tenant to deliver possession, and the tenant refuses, then the sheriff shall, with assistance as required, proceed under the order to eject and remove the tenant, and the tenant's goods.
 - (3) If a tenant, in case the default is for nonpayment of rent, before enforcement of the order, pays the arrears and all costs, the proceedings shall be stayed and the tenant may continue in possession of the former tenancy.
 - (4) If the premises are vacant, or the tenant is not in possession, or if in possession and the tenant refuses, on demand made in the presence of a witness, to admit the sheriff, the latter, after a reasonable time has been allowed to the tenant or person in possession to comply with the demand for admittance, may force open any door in order to gain en-

trance, eject the tenant or occupant and give proper possession to the landlord or the landlord's agent.

Costs

- 27 The court may award costs which may be added to the costs of the levy for rent.

Form of summons and order

- 28 The summons to be issued and the order required for possession may be in forms as provided by the Rules of Court.

Application of *Bankruptcy and Insolvency Act* (Canada) and rights of trustee and landlord

- 29 (1) In construing any word or expression occurring in this section, reference may be had to the interpretation section of the *Bankruptcy and Insolvency Act* (Canada).
- (2) Where a receiving order or an assignment is made against or by a lessee under the *Bankruptcy and Insolvency Act* (Canada), the custodian or trustee, notwithstanding a condition, covenant or agreement in a lease, has the right to hold and retain the leased premises for a period not exceeding 3 months from the date of the receiving order or assignment, or until the expiration of the tenancy, whichever happens first, on the same terms and conditions as the lessee might have held the premises had no receiving order or assignment been made.
- (3) If the lessee is a tenant of premises the tenancy of which is not determined by the making of a receiving order or assignment, the custodian or trustee may surrender possession at any time, and the tenancy shall terminate, but nothing shall prevent the trustee from transferring or disposing of a lease or leasehold property, or an interest of the lessee, for the unexpired term to as full an extent as could have been done by the lessee had the receiving order or assignment not been made. If the lease contains a covenant, condition or agreement that the lessee or his or her assignees should not assign or sublet the premises without the leave or consent of the landlord or other person, the covenant, condition or agreement shall be of no effect in case of such a transfer or disposition of the lease or leasehold property if the Supreme Court, on the application of the trustee and after notice of the application to the landlord, approves the transfer or disposition proposed to be made of the lease or leasehold property. Before the person to whom

the lease or leasehold property is transferred or disposed of is permitted to go into occupation, that person shall deposit with the landlord a sum equal to 3 months' rent, or supply to the landlord a guarantee bond approved by the court in a sum equal to 3 months' rent, as security to the landlord that the person will observe and perform the terms of the lease, but the amount deposited or secured to the landlord shall not exceed the rent for the term assigned or sublet.

- (4) The custodian or trustee has the further right, at any time before surrendering possession, to disclaim any lease, and his or her entry into possession of the leased premises and their occupation by him or her while required for the purposes of the trust estate shall not be evidence of an intention on his or her part to elect to retain the premises, nor affect his or her right to disclaim or to surrender possession under this section. If after occupation of the leased premises the custodian or trustee elects to retain them and after assigns the lease to a person approved by the court as by subsection (3) provided, the liability of the trustee and of the estate of the debtor is, subject to the provisions of subsection (5), limited to the payment of rent for the period of time during which the custodian or trustee remains in possession of the leased premises for the purposes of the trust estate.
- (5) The landlord has a preferred claim against the estate of the lessee for arrears of rent not exceeding 3 months' rent accrued due prior to the date of the receiving order or assignment, together with all costs of distress properly made before the date in respect of the rent hereby made a preferred claim.
- (6) The landlord may prove as a general creditor for
 - (a) all surplus rent accrued due at the date of the receiving order or assignment; and
 - (b) any accelerated rent to which he or she may be entitled under his or her lease, not exceeding an amount equal to 3 months' rent.
- (7) Except as aforesaid, the landlord is not entitled to prove as a creditor for rent for any portion of the unexpired term of the lease, but the trustee shall pay to the landlord for the period during which the trustee or the custodian actually occupies the premises from and after the date of the receiving order or assignment a rental calculated on the basis of the lease and payable in accordance with its terms, except that any payment already made to the landlord as rent in advance in respect of that period, and any payment to be made to the landlord in re-

spect of accelerated rent, shall be credited against the amount payable by the trustee for that period.

- (8) The landlord is not entitled to distrain the goods of the lessee after the date of the receiving order or assignment, and all goods distrained before that date shall on demand be delivered by the person holding them to the custodian or trustee.
- (9) Nothing in this section shall render the trustee personally liable beyond the assets of the debtor in the trustee's hands.

Frustration

- 30 The *Frustrated Contract Act* and the doctrine of frustration of contract apply to leases.

LIST OF TENTATIVE RECOMMENDATIONS

1. *The Commercial Tenancy Act should be repealed and replaced with a new Commercial Tenancy Act. (21–22)*
2. *Commercial leases should continue to be subject to the requirement in section 59 of the Law and Equity Act that most leases be in writing. (23–25)*
3. *The writing requirement for commercial leases and agreements for lease should continue to be subject to the exception for leases or agreements for lease with a term of three years or less. (26–27)*
4. *Section 59 (2) of the Law and Equity Act should be amended to provide that the exception to the formalities of writing only extend to leases or agreements for lease with a term of three years or less if (a) there is actual occupation under the lease and (b) any option or covenant to renew does not have the potential to extend the lease term beyond three years. (27–28)*
5. *A new Commercial Tenancy Act should not include a provision dealing with the registration of leases. (29–31)*
6. *A new Commercial Tenancy Act should contain a provision abolishing interesse termini. (31–36)*
7. *A new Commercial Tenancy Act should not abrogate any existing terms implied at common law in commercial leases, but it should also contain certain terms implied by the statute. (38–39)*
8. *A new Commercial Tenancy Act should imply a statutory covenant for quiet enjoyment modelled on the covenant currently found in the Land Transfer Form Act in commercial leases. (39–42)*
9. *A new Commercial Tenancy Act should contain an implied term requiring the landlord not to derogate from its grant of a lease. (42–43)*
10. *A new Commercial Tenancy Act should contain an implied term requiring the tenant to pay the rent payable under the lease when it comes due. (43–44)*

11. *A new Commercial Tenancy Act should contain an implied term giving a landlord a right to terminate the lease and re-enter the leased premises if the rent is in arrears or if the tenant has breached any other covenant of the lease, if the landlord gives the tenant 10 days written notice at the leased premises of its right to terminate the lease and re-enter the leased premises and the tenant fails to pay the arrears of rent or remedy the breach. (44-46)*

12. *A new Commercial Tenancy Act should contain an implied term requiring a tenant to use the premises responsibly during the term of the lease and to repair damage caused by the tenant, except where the landlord's insurance covers the damage. (46-47)*

13. *A new Commercial Tenancy Act should allow the statutory implied terms to be displaced by the express agreement of the parties. (48)*

14. *A new Commercial Tenancy Act should not prescribe a standard form lease by regulation, which parties could use by their express assent. (48-49)*

15. *A new Commercial Tenancy Act should contain a provision imposing an obligation on a landlord to act reasonably in considering whether to grant or withhold consent to an assignment or a subletting of the lease. (50-52)*

16. *A new Commercial Tenancy Act should impose a default obligation on landlords to act reasonably in considering whether to grant or withhold consent to an assignment or a subletting, which may be varied or excluded by the express agreement of the parties. (52-53)*

17. *A new Commercial Tenancy Act should not declare that any purported attempt to prohibit an assignment or a subletting of the term of a commercial lease is void and unenforceable. (53-54)*

18. *A new Commercial Tenancy Act should not contain a provision allowing landlords only to claim reimbursement of reasonable expenses incurred in connection with considering a proposed assignment or subletting. (54)*

19. *A new Commercial Tenancy Act should contain a requirement for landlords to act reasonably in considering whether to grant or withhold consent to an assignment or a subletting that only applies to leases entered into after the legislation comes into force. (55)*

20. A new Commercial Tenancy Act should contain a provision that provides that any subtenant will continue to be bound by the sublease in the event a merger or surrender of the head lease. **(56–57)**

21. A new Commercial Tenancy Act should carry forward the policy of section 8 of the current Commercial Tenancy Act and provide that a subtenant will continue to be bound by its obligations in the event that the head lease is surrendered with a view to its renewal. **(57)**

22. A new Commercial Tenancy Act should not contain a provision that preserves the right and obligations of a subtenant when a superior landlord terminates a superior tenancy by re-entry or forfeiture. **(57–58)**

23. A new Commercial Tenancy Act should not contain provisions governing apportionment in respect of time. **(59–62)**

24. The existing general apportionment provisions in sections 10–13 of the Commercial Tenancy Act should be re-enacted in the Law and Equity Act and should form the basis of a future law reform project in their own right. **(62)**

25. A new Commercial Tenancy Act should not contain a provision addressing apportionment in respect of estate. **(63)**

26 (a). A new Commercial Tenancy Act should abolish distress for rent.

26 (b). A new Commercial Tenancy Act should contain a modernized version of distress for rent, consistent with the proposals made in this section. **(64–71)**

27. A new Commercial Tenancy Act should not contain a provision that declares that the relationship of landlord and tenant is founded on the contract between the parties and does not depend on tenure and that a reversion in the land is not necessary to create the relationship of landlord and tenant. **(73–75)**

28. A new Commercial Tenancy Act should carry forward section 30 of the Commercial Tenancy Act, which provides for the application of the Frustrated Contract Act and the doctrine of frustration to leases. **(75–77)**

29. A new Commercial Tenancy Act should contain a provision declaring that contractual principles apply to a party's right to relief for breach of a covenant and obligations to perform covenants under a commercial lease. **(77–79)**

30. A new Commercial Tenancy Act should contain a provision allowing a tenant to apply to court for an order for abatement of rent or payment of rent into court if the landlord has breached a material provision of the lease. **(79–82)**

31. A new Commercial Tenancy Act should provide that a person who takes an assignment of the interest of a landlord or tenant has all the rights, and is subject to all the obligations, of the assignor arising under a commercial lease, unless the parties agree otherwise. **(82–84)**

32. A new Commercial Tenancy Act should not contain a restatement of the law governing a landlord's claim for future rent from a tenant who has abandoned the leased premises. **(84–85)**

33. Section 25 of the Law and Equity Act should be amended to include commercial leases. **(85–86)**

34. A new Commercial Tenancy Act should contain a provision requiring a landlord to mitigate its losses claimed as future rent, but this duty to mitigate does not require a landlord to prefer re-letting the abandoned leased premises over other premises owned by the landlord. **(86–88)**

35. A new Commercial Tenancy Act should not contain provisions providing tenants with security of tenure. **(88–90)**

36. A new Commercial Tenancy Act should provide for a comprehensive and consolidated summary dispute resolution procedure. **(95–97)**

37. A new Commercial Tenancy Act should contain a short enabling statement for a summary dispute resolution procedure that emphasizes expeditious proceedings and should leave procedural details to a regulation, which may in the future be incorporated into the Rules of Court. **(97–98)**

38. The summary dispute resolution procedure contained in or authorized by a new Commercial Tenancy Act should be modelled on section 14 of the draft legislation included in the LRCBC Report, with the modifications proposed in the foregoing discussion. **(98–102)**

39. A new Commercial Tenancy Act should continue to treat re-entry as a self-help remedy. **(102–04)**

40. A new Commercial Tenancy Act should require landlords to engage a bailiff to effect re-entry. **(104)**

41. A new Commercial Tenancy Act should adopt a new one-stage summary procedure for recovery of possession of the leased premises from an overholding tenant. **(105–06)**

42. A new Commercial Tenancy Act should authorize the court to make any order, as appropriate, as part of the summary procedure to recover possession from an overholding tenant. **(106–07)**

43. A new Commercial Tenancy Act should not contain a provision that, in the absence of an agreement of the parties to the contrary, deems a tenant that remains in possession after the expiration of a lease to be a tenant under a month-to-month lease. **(107–08)**

44. The provisions of the Law and Equity Act dealing with relief against forfeiture should form the subject of a separate law reform project. **(110–12)**

45. A new Commercial Tenancy Act should contain provisions dealing with the rights and obligations of a trustee in bankruptcy and a landlord upon the bankruptcy of a tenant. **(115–16)**

46. A new Commercial Tenancy Act should contain a provision that holds a trustee in bankruptcy of a bankrupt tenant personally liable for any rent payable, subject to a one-month grace period from personal liability. **(116–18)**

47. A new Commercial Tenancy Act should contain a provision that allows a landlord to terminate a lease at its option, if the lease permits it, on the tenant's bankruptcy, but this provision should be subject to the right of the trustee to apply to court for an order to maintain the lease if it is integral to the disposition of the bankrupt tenant's business as a going concern. **(118–19)**

48. A new Commercial Tenancy Act should contain a provision confirming that lease provisions prohibiting bankruptcy sales are binding on a tenant's trustee in bankruptcy. **(119–20)**

49. A new Commercial Tenancy Act should not give landlords a preferred claim for three months' rent and should not address the mechanics of making a claim for surplus rent or accelerated rent. **(120–22)**

50. *A new Commercial Tenancy Act should not extend its provisions on bankruptcy of the tenant to cover insolvency of the tenant. (123–24)*

51. *A new Commercial Tenancy Act should not contain a provision addressing legal issues arising from the bankruptcy or insolvency of a landlord. (124–25)*

52. *A new Commercial Tenancy Act should not contain provisions that allow a shopping centre tenant to enforce an exclusive use clause/ restrictive covenant directly against another tenant, despite the fact that there is no contractual relationship between them. (126–30)*

53. *A new Commercial Tenancy Act should include within its summary dispute resolution procedure provisions accommodating disputes in a shopping centre or other multi-tenant building where a landlord does not fill vacancies as a means to effect a redevelopment. (130–31)*

54. *A new Commercial Tenancy Act should not include a specific provision authorizing actions for rent against a tenant for life. (132–33)*

55. *A new Commercial Tenancy Act should not include a provision allowing a landlord summarily to recover possession of the leased premises when the conditions currently set out in section 5 of the Commercial Tenancy Act are met. (133–34)*

56. *A new Commercial Tenancy Act should not include a provision extending the right of distress to cases of rentseck, chief rents, or rents of assize. (134–35)*

57. *A new Commercial Tenancy Act should not include a provision allowing a landlord to recover rent by an action in the courts in cases where the lease is not in the form of a deed. (135–36)*

58. *A new Commercial Tenancy Act should not include penal provisions requiring an overholding tenant to pay double rent or rent at double the yearly value of the land. (136–38)*

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