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COMMERCIAL TENANCY ACT REFORM PROJECT

Background

Consultation Paper on Proposals for a New Commercial Tenancy Act

Date: 30 September 2008

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 the *Consultation on Proposals for a New Commercial Tenancy Act* 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 im-

plied 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.