

Report on Proposals for a New Commercial Tenancy Act

**A Report prepared for the British Columbia
Law Institute by the Members of the
Commercial Tenancy Act Reform Project
Committee**

British Columbia Law Institute

1822 East Mall, University of British Columbia, Vancouver, B.C., Canada V6T 1Z1

Voice: (604) 822-0142 Fax: (604) 822-0144 E-mail: bcli@bcli.org
WWW: <http://www.bcli.org>

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Commercial Tenancy Act Reform Project Committee

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INTRODUCTORY NOTE

Report on Proposals for a New Commercial Tenancy Act

The *Commercial Tenancy Act*, British Columbia's main statute addressing commercial leasing, is badly out of date. The act first appeared in British Columbia law in the late nineteenth century, as a compilation of a disparate set of legislative provisions enacted in England in the eighteenth and nineteenth centuries. A few provisions have been added over the years, but apart from these additions, the act has remained the same. Commercial leasing, of course, has not remained the same. It has grown and diversified along with British Columbia's economy. As a result, a split between the issues addressed by the *Commercial Tenancy Act* and the concerns of participants in the commercial leasing sector has appeared and grown very wide.

This report is the final publication for the *Commercial Tenancy Act* Reform Project, which was carried out by a volunteer project committee. Its centrepiece is a draft of a new *Commercial Tenancy Act*. This draft legislation focuses on four areas of present concern in commercial leasing: provisions implied in leases; the landlord's consent to an assignment of a lease or a sublease; the application of contractual principles to leases; and the bankruptcy of the tenant. It also contains an enabling provision for a new summary dispute resolution procedure, which is spelled out in a draft regulation. Finally, it sweeps away a number of obsolete provisions from the current act. The draft legislation is the product of several committee meetings and extensive public consultation.

On behalf of the board of the British Columbia Law Institute, I thank the committee for its work on this project. The BCLI gives its full support to the recommendations contained in this report.



Ronald A. Skolrood
Chair,
British Columbia Law Institute

October 2009

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 was 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*.

The members of the committee were:

Richard Olson—chair (to April 2009)
(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, BCLI) was the project manager.

For more information visit us on the World Wide Web at:

<http://www.bcli.org/bclrg/projects/commercial-tenancy-act-reform-project>

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Acknowledgments

The British Columbia Law Institute thanks the members of the *Commercial Tenancy Act* Reform Project Committee. Completing this project was made possible by their willingness to freely give of their time and expertise.

The project received funding from the Real Estate Foundation of British Columbia and the Notary Foundation of British Columbia. The BCLI thanks these foundations for their support. The BCLI also thanks the law firm of Blake, Cassels & Graydon LLP, which generously hosted meetings of the project committee.

This report has been enriched by the comments received to the consultation paper that preceded it. The BCLI appreciates the contributions from those individuals and organizations that responded to the consultation paper. Appendix A to this report contains a list of the respondents.

Finally, the staff of the BCLI were instrumental to the successful execution and completion of this project. Former Executive Director Arthur L. Close, Q.C., and current Executive Director Jim Emmerton were involved in the project's design and organization. Mr. Emmerton and Senior Staff Lawyer Greg Blue attended meetings of the project committee and provided helpful comments on its publications. Staff Lawyer Kevin Zakreski was the project manager and principal drafter of the report and the consultation paper. And the following research lawyers, research assistants, and other staff members assisted in the project's research, writing, and administration: Mike Barrenger, Christopher Bettencourt, Paula Burgerjon, Kristine Chew, Zachery Froese, Mike Fulton, Andrew McIntosh, Marcus Patz, Elizabeth Pinsent, and Samantha Weng.

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EXECUTIVE SUMMARY

INTRODUCTION

The *Commercial Tenancy Act* Reform Project began in the summer of 2007, with a mandate to study British Columbia's major commercial leasing statute and to make recommendations for its reform. Work on the first phase of the project progressed throughout the fall of 2007 and the winter and spring of 2008, concentrating on examining the deficiencies of the current legislation and studying leading models for reform. This phase of the project culminated in the publication in September 2008 of the *Consultation Paper on Proposals for a New Commercial Tenancy Act*. The consultation paper asked for public comment on fifty-eight tentative proposals for reform. After a six-month consultation period ended in March 2009, the second phase of the project began. This phase focussed on considering the responses to the consultation paper, settling the project's final recommendations, and implementing those regulations in draft legislation. The *Report on Proposals for a New Commercial Tenancy Act* is the culmination of all this work on the project.

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

THE COMMERCIAL TENANCY ACT REFORM PROJECT COMMITTEE

The *Commercial Tenancy Act* Reform Project was carried out by a volunteer project committee, which was formed in the summer of 2007, shortly after the commencement of the project. The members of the committee were:

Richard Olson—chair (to April 2009) <i>(associate counsel, McKechnie & Co.)</i>	Arthur L. Close, Q.C. <i>(director, British Columbia Law Institute)</i>
Sandy Lloyd <i>(former partner, Borden Ladner Gervais LLP)</i>	Ann McLean <i>(solicitor, Legal Services Branch, Ministry of Attorney General)</i>
Justice Mary V. Newbury <i>(Court of Appeal for British Columbia)</i>	Greg Umbach <i>(partner, Blake, Cassels & Graydon LLP)</i>

Kevin Zakreski (staff lawyer, BCLI) was the project manager.

THE FORMAT OF THE REPORT

The report is in two parts. Part One contains background material. It opens by providing general information on commercial leasing, introducing the project and the project committee, and describing the consultation paper that preceded the report and the structure of the report. Part One then moves on to give a historical introduction to key terms in leasing law, to describe the current legislative framework for commercial leasing in British Columbia, and to set out the reasons for reform of the law at this time. Part Two contains the committee's recommendations for reform, which have been cast in the form of draft legislation. Part Two also contains commentary on that draft legislation.

BACKGROUND

The Scope of the Project

The *Commercial Tenancy Act* Reform Project is focussed on the *Commercial Tenancy Act* and allied legislation, such as selected provisions of the *Property Law Act*, the *Law and Equity Act*, the *Land Title Act*, and the *Land Transfer Form Act*. This project does not address residential leases—that is, leases for living accommodations. In this way, it follows a division that has been present in British Columbia leasing law since the 1970s, which has separate statutes for commercial and residential leases.

Historical Introduction

As much of the terminology of leasing law is bound up with that body of law's historical development, the report spends some time pursuing the origins of important leasing concepts in English law. These concepts include protection of the tenant's right to occupy the leased premises, the landlord's right to financial compensation, and enforcement of the landlord's rights.

Review of British Columbia Legislation

Part One moves on to discuss the relevant legislation in this area. The focus is on the *Commercial Tenancy Act*. The report discusses the origins of the act in British Columbia, noting its antecedents in eighteenth- and nineteenth-century English legislation. It also contains brief summaries of the *Residential Tenancy Act*, the *Rent Distress Act*, and relevant provisions in the *Land Transfer Form Act*, the *Property Law Act*, and the *Law and Equity Act*.

Reasons for Reform

The case for reform rests on two arguments. First, the *Commercial Tenancy Act's* sheer age often makes its provisions irrelevant to the contemporary commercial leasing sector. The *Commercial Tenancy Act* first appeared in 1897 and it has only been amended sparingly since then. Many of the issues addressed by the act relate to technical matters that are now anachronisms, such as rents seck, rents of assize, and rack rents. Second, while the current *Commercial Tenancy Act* addresses such anachronisms, there are more pressing issues in commercial leasing law that are not covered by British Columbia's major statute in this area. Renewing the *Commercial Tenancy Act* creates an opportunity to pass legislation with respect to these issues.

Approach to Distress for Rent

The issue of distress for rent has divided the committee. In view of that division, it was decided not to include provisions relating to distress for rent in the draft legislation. Instead, the arguments in favour of the two positions that drew support from the committee—abolishing distress for rent and modernizing distress for rent—are presented at the end of Part One of the report.

DRAFT LEGISLATION

Overview

The draft legislation in Part Two is not intended as a complete code of commercial leasing law. Instead, it is designed as a remedial statute that addresses specific problems but also leaves part of the legal framework for commercial leasing to the common law. Six major themes are pursued in the draft legislation: (1) implied provisions for commercial leases; (2) the landlord's consent to an assignment or a sublease; (3) the application of contractual principles to leases; (4) the creation of a summary dispute resolution procedure; (5) the bankruptcy of the tenant; and (6) the repeal of obsolete provisions.

Implied Provisions

The draft legislation contains a series of implied provisions addressing topics such as the tenant's right to quiet enjoyment of the premises, the landlord's obligation not to derogate from a grant contained in the lease, payment of rent, re-entry by the landlord, and repairs. These implied provisions are default provisions; that is, they apply to leases only to the extent that the landlord and the tenant have not agreed to modify, vary, or exclude them.

Landlord's Consent to Assignment or Subletting

Currently, when a commercial lease contains a provision requiring the landlord's approval of an assignment or a subletting of the premises, British Columbia law presumes that a landlord does not have to act reasonably in deciding whether to approve a request for an assignment or a subletting. This places British Columbia law at odds with the law of most other Canadian jurisdictions, which presumes that the landlord must act reasonably in these circumstances. The draft legislation changes BC law, bringing it into line with the position taken in most of the rest of Canada. This change is subject to a special transitional rule: it only applies to leases that are entered into after the legislation comes into force.

Application of Contractual Provisions to Leases

The draft legislation encourages a development that has been occurring in the courts since the early 1970s, which involves the application of contractual doctrines to some of the thornier issues that may arise in a commercial leasing relationship. Some of the contractual doctrines supported by the draft legislation are fundamental breach, frustration, and mitigation.

Summary Dispute Resolution Procedure

The draft legislation replaces the three summary dispute resolution procedures in the current *Commercial Tenancy Act* with a single, streamlined dispute resolution procedure that applies to a wider range of disputes and that is focussed on speed in dispute resolution. A draft regulation, set out after the draft legislation, contains the detailed procedural rules for the new summary dispute resolution procedure.

Bankruptcy of the Tenant

In a historical anomaly that dates back to the 1920s, bankruptcy issues (which are normally the subject of federal legislation) are treated in the current *Commercial Tenancy Act*. The committee acknowledged the anomalous foundation of this legislation, but it also acknowledged the practical reality that a realignment of legislative distribution in this area would require a concerted federal-provincial push that is not likely to occur in the immediate future. So, the draft legislation fine-tunes the subjects addressed in the current legislation, making small changes in the following three areas: personal liability of the tenant's trustee in bankruptcy; termination of the lease; and bankruptcy sales.

Repeal of Obsolete Provisions

The creation of new draft legislation affords an opportunity to sweep away a number of provisions in the current *Commercial Tenancy Act* that no longer serve any practical purpose. Obsolete subjects such as distress in cases of rentseck, abandonment of the leased premises by a tenant holding them at a rack-rent, and the recovery of rent when the lease is not made in the form of a deed are not addressed in the draft legislation.

CONCLUSION

The current *Commercial Tenancy Act* has outlived its utility as a legal framework for commercial leasing in British Columbia. The *Report on Proposals for a New Commercial Tenancy Act* provides a practical model for a new legal framework that is more responsive to the needs of commercial leasing in twenty-first century British Columbia.

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, and 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 at the centre of British Columbia's legal framework for commercial leasing the *Commercial Tenancy Act*,² a statute that has changed little since its first appearance over 100 years ago.

B. Introduction to the Project

The British Columbia Law Institute has long identified commercial leasing in general, and the CTA in particular, as an area 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 B 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 for 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.

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 from its inception to April 2009 was 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 six-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 were 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 for which he was responsible 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.

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].

He is also an adjunct professor with the Faculty of Law, University of British Columbia, where he teaches real estate transactions. Kevin Zakreski, a staff lawyer with the BCLI, was 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 those meetings was to produce a group of tentative recommendations for reform.

D. The Consultation Paper

Those tentative recommendations, 58 in all, formed the backbone of the *Consultation Paper on Proposals for a New Commercial Tenancy Act*. The consultation paper was drafted and approved by the committee in the summer of 2007. It was approved by the BCLI board and published in September 2008. The consultation paper was posted on the BCLI website and paper copies were distributed widely, with a particular focus on lawyers practising in the area of commercial leasing and major commercial property umbrella organizations. The period for comment was open until 31 March 2009, giving the public six months to comment on the project and to express agreement or disagreement with the tentative recommendations for reform.

Response to the consultation paper proved to be somewhat lower in number than is usual for large BCLI law reform projects. This modest level of response may be a reflection of the difficult nature of the subject matter and the technical issues that many of the tentative recommendations had to address. Given the wide distribution of the consultation paper and the relatively high profile of the project (which was the subject, during the consultation period, of a number of public presentations and media reports), perhaps the most significant conclusion that can be drawn from the low level of responses is that there appears to be no widespread public opposition to the committee's proposals.

The committee is grateful for the responses that it did receive and thanks those individuals who took the time to comment on the consultation paper.⁷

E. The Structure of this Report

After the close of the consultation period, the project entered an intensive drafting phase. The committee held two meetings, each with the purpose of discussing and refining the final report for the project.

7. See, below, Appendix A for a list of respondents to the consultation paper.

The report that is the result of this process is made up of two parts. Part Two contains draft legislation. This draft legislation is a crystallization of the committee's proposals for reform of commercial leasing law in a form that could be enacted by the Legislative Assembly of British Columbia. Part Two also contains commentary on each of the provisions of the draft legislation, setting out some background information on the provision and discussing the policy choices that the committee made in recommending the provision.

Part One of the report 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. This discussion is intended to situate the project in a broader context, which may help non-specialist readers in examining the draft legislation in Part Two. Part One concludes with a brief review of the highlights of the committee's proposals for a new *Commercial Tenancy Act*.

II. HISTORICAL BACKGROUND AND KEY TERMS

A. Introduction

Some of the terminology⁸ 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.”⁹ The implications of this fundamentally dual nature¹⁰ 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 as they developed in the law of England.¹¹

8. 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 report adopts consistent use of the lease/landlord/tenant/sublease terminology, but sometimes other terms crop up in quotations.

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

10. 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.

11. The proceeding sections of the report are intended to provide a summary introduction to basic leasing terms and concepts for non-legally-trained readers. They are not offered as a compre-

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):¹²

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 report 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 report, this type of lease will be called a *lease for a fixed term*, reflecting the fact that this type of lease “may last for any interval, however irregular or lengthy.”¹³ This type of lease is one that contains a provision defining exactly when the term must end. The vast majority of contemporary commercial leases in British Columbia fall into this category. So, when this report refers to a “lease,” it is almost invariably 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 report when the CTA makes explicit reference to a lease of one of these three types.¹⁴

hensive 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 report: William Holdsworth, *A History of English Law*, 2d ed. (London: Methuen / Sweet & 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.* 369; 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.

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

13. Ziff, *supra* note 9 at 267.

14. 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

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In English law, the lease for a fixed term can be traced back to the late twelfth century.¹⁵ 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:¹⁶

"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.¹⁷ 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"),¹⁸ to another person.¹⁹ But it was far more common at this time for leases to be used as a sort of security device.²⁰ A person would borrow money from another person and, as

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*, that is 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 the tenant gives the required notice of termination. See Holdsworth, *History*, *supra* note 11, vol. 7 at 240–42; Ziff, *ibid.* at 267–68.

15. See McGovern, *supra* note 11 at 501 ("leases for years first appeared in English law at the end of the twelfth century . . .").
 16. Holdsworth, *Land Law*, *supra* note 11 at 4.
 17. See Megarry & Wade, *supra* note 11 at § 3-015 ("[Leases] always remained outside the feudal system of land-holding. . .").
 18. *The New Shorter Oxford English Dictionary*, 4th ed., s.v. "premise."
 19. See Pollock & Maitland, *supra* note 11, 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.").
 20. See Lesar, *supra* note 11 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]).
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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 something analogous to interest.²¹ 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.)²² 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 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

21. 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 a profit from the use of the land during the term.”)

22. See Humbach, *supra* note 11 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]).

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Roman law,²³ others have claimed that it was a visceral reaction to the use of leases as a device to aid usury,²⁴ and still others have argued that it was a deliberate policy choice that was driven by concerns about exposing people to double liability.²⁵ 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.²⁶

So, by the sixteenth century, leases had come to be recognized as having the characteristics of an *estate*.²⁷ 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 overlap between these two relationships, but there is also a fundamental distinction between them:²⁸

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

23. See Pollock & Maitland, *supra* note 11 at 115.

24. See Grimes, *supra* note 11 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").

25. See McGovern, *supra* note 11 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.").

26. See Holdsworth, *History*, *supra* note 11, vol. 3 at 216 (discussing without naming the case).

27. See Megarry & Wade, *supra* note 11 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]).

28. Humbach, *supra* note 11 at 1218-19 [footnote omitted].

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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.)²⁹ The word “enjoyment” does not refer to the use the tenant intends to make of the leased premises.³⁰ 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.³¹

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 premises were fit for the intended use. Once again, the rationale for this rule is best comprehended in historical terms, as the following passage demonstrates:³²

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.

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

30. 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 ‘fruo’ and refers to the exercise and use of the right and having the full benefit of it, rather than deriving pleasure from it.”).

31. See, below, Part Two, s. 7 (1) (a) and commentary for further discussion of quiet enjoyment and the committee’s recommendation for reform.

32. Grimes, *supra* note 11 at 193.

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.³³ (The word “rent” is derived from “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 mean that the landlord had made 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 distress*). 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 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 has granted landlords a power to sell the seized property and apply the

33. See Humbach, *supra* note 11 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]).

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.³⁴

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).³⁵ This strict view persisted for hundreds of years, until the late seventeenth century.³⁶ After that time, the law of waste developed and grew immeasurably more complex.

H. Summary

The basic legal rules governing leasing developed from the thirteenth through to the fifteenth century. They have been summarized as follows:³⁷

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

34. See, below, Part One, section VI for further discussion of distress for rent.

35. See Holdsworth, *Land Law*, *supra* note 11 at 241.

36. See *ibid.*

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

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 genesis 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.³⁸ Some of these contractual agreements may effectively duplicate the basic lease rules. For example, 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.³⁹

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

39. See, e.g., Humbach, *supra* note 11 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]).

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 1266.⁴⁰ A vast number of statutes touching on discrete aspects of leasing have been 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 report 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.⁴¹

B. The Commercial Tenancy Act

The main source of legislative rules governing commercial leases in British Columbia is the CTA.⁴² The CTA first appeared in 1897, in somewhat unusual circumstances. Usually, legislation is enacted to address perceived failings in the existing law or to respond to new or emerging social or economic conditions. A bill is prepared, and it is scrutinized by the 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.⁴³ Recent revisions have focussed on consolidating amendments to statutes, renumbering sections, and making small, technical changes in language, all of which tasks 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

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

41. *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.].

42. *Supra* note 2.

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

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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.”⁴⁴

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 legislative provisions and placing them into British Columbia statutes.

This was the origin of the original CTA,⁴⁵ which in 1897 was given the title of the *Landlord and Tenant Act*.⁴⁶ The 1897 Act was included in the report of the statute revision commissioners, which was presented to the province’s lieutenant governor. The 1897 Act was not considered as a separate bill by the Legislative Assembly. Instead, the 1897 Act came into force when the whole of the Revised Statutes were brought into force by the lieutenant governor’s proclamation in early 1898.⁴⁷ Shortly thereafter, the Legislative Assembly confirmed that the entire 1897 Revised Statutes had the force of law.⁴⁸ 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.⁴⁹

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

45. 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).

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

47. *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.].

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

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

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 accommodation for individuals, as opposed to leases for business purposes) created pressure for reform.⁵⁰ 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.⁵¹ Second, in 1974, this Part was split off to form what is now called the *Residential Tenancy Act*.⁵²

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 report does not contain any 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.⁵³ Of course, most of these exclusions could

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

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

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

53. 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 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

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 leases are often inappropriate when applied to commercial leases. 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*⁵⁴ 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.⁵⁵ 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 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 pur-

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.”).

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

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

poses of this report, the most relevant of these statutes are the *Land Transfer Form Act*,⁵⁶ the *Property Law Act*,⁵⁷ and the *Law and Equity Act*.⁵⁸

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 report.

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.

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 report.

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

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

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

IV. THE CASE FOR REFORM

A. Introduction

This report proposes that the CTA⁵⁹ be repealed and replaced with a new statute governing commercial leases in this province. The specific details of this proposal are spelled out in draft legislation 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 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

59. *Supra* note 2.

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 report is the 1989 report of the Law Reform Commission of British Columbia entitled *Report on the Commercial Tenancy Act*.⁶⁰ 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 legislation 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.⁶¹

60. *Supra* note 6.

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

The Law Reform Commission of British Columbia has also published a report on distress for rent.⁶² This report pursued that subject in detail and made proposals for reform of distress for rent generally and the RDA⁶³ specifically.

Outside British Columbia, two other Canadian law reform agencies have done work on commercial leasing. The Ontario Law Reform Commission has published an influential report on landlord–tenant law generally.⁶⁴ 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.⁶⁵

Further afield, the Law Reform Commission of Ireland,⁶⁶ the New Zealand Law Commission,⁶⁷ and the Law Commission of England and Wales⁶⁸ 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.

E. Summary

The CTA is ripe for reform. Its provisions have scarcely changed since first appearing in the British Columbia statutes in the late nineteenth century. Since that time, it is fair to say that the commercial leasing sector, and the economy of this province in

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

63. *Supra* note 54.

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

65. *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).

66. *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).

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

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

general, has seen a complete transformation. As a result, the CTA contains little of relevance for twenty-first century commercial leasing. Further, its existence in this outdated form may stifle needed developments by giving the superficial sense that commercial leasing is already adequately covered by legislation.

V. HIGHLIGHTS OF THE DRAFT LEGISLATION

A. Introduction

The *Commercial Tenancy Act* proposed in Part Two of this report will continue to be primarily a remedial statute. The draft legislation is not intended to codify the law of commercial leasing. Instead, its goal is to make focussed improvements to the law. The proposed act's effect on six topics is worthy of note.

B. Implied Provisions

The proposed *Commercial Tenancy Act* contains a number of default provisions that may be implied in leases.⁶⁹ The goal of the legislation is not to attempt to define the elements that must be present to create a valid lease. That question will continue to be left to the common law. The legislation sets out a series of provisions that are implied in leases. These provisions cover the issues of the tenant's quiet enjoyment of the premises, non-derogation from the landlord's grant of lease, payment of rent, re-entry, and repair of damage. These implied provisions may be of particular assistance to unsophisticated landlords and tenants, who may enter into a valid lease that fails to address a number of these important issues. The provisions implied by the legislation may be modified, varied, or completely excluded by agreement between the landlord and the tenant. So, the statute will not disturb any resolution of these issues that landlords and tenants have settled for themselves.

C. Landlord's Consent to an Assignment or Sublease

Currently, the law presumes that if a commercial lease contains a provision requiring a tenant to obtain the landlord's consent to an assignment of the lease or a sublease, then the landlord may act arbitrarily or unreasonably in withholding its consent. The proposed *Commercial Tenancy Act* reverses this presumption,⁷⁰ bringing the law of British Columbia into line with the law in most of the other Canadian provinces and territories. The landlord and the tenant are free to agree to override this presumption. This section of the proposed legislation is subject to a transitional period. It will apply only to leases entered into after the legislation comes into force.

69. See, below, Part Two, s. 7.

70. See, below, Part Two, s. 8.

D. Application of Contractual Principles to Leases

The proposed act encourages the development that has been occurring in the courts to apply contractual principles to leasing disputes. In many cases, this development results in resolving such disputes in a way that better accords with the reasonable expectations of participants in the commercial leasing sector. The most noteworthy aspect of this part of the legislation is the application of the contractual doctrine of mitigation to a landlord faced with an abandoning tenant.⁷¹ This proposal will mark a change from the current rule, but it is a change that will bring commercial leases into line with other types of commercial contracts.

E. Summary Dispute Resolution Procedure

The proposed *Commercial Tenancy Act* modernizes the various dispute resolution procedures found in the old CTA and consolidates them into one summary dispute resolution procedure.⁷² The recommended section contains a list of disputes that may be resolved under the procedure, which is more in tune with the types of disputes found in contemporary leasing arrangements than the lists found scattered throughout the old CTA. The procedural rules governing proceedings under the summary dispute resolution procedure are set out in a separate draft regulation.

F. Bankruptcy of the Tenant

The draft legislation addresses the legal issues that arise from the tenant's bankruptcy, a subject that also is covered in the old CTA. A new *Commercial Tenancy Act* will refine the existing provisions in three main areas: personal liability of the trustee; termination of the lease; and bankruptcy sales. If a trustee remains in occupation of a premises after the tenant's bankruptcy, then the trustee may be personally liable for rent, beyond a one-month grace period. A landlord will be able to terminate a lease on the tenant's bankruptcy, if the lease grants the landlord such a right. Finally, a prohibition on bankruptcy or going out of business sales in a lease will be binding on the tenant's trustee in bankruptcy.

G. Repeal of Obsolete Provisions

The proposed *Commercial Tenancy Act* does not contain a number of provisions found in the old CTA. Obsolete subjects such as distress in cases of rentseck, abandonment of the premises by a tenant holding at a rack-rent, and the recovery of rent

71. See, below, Part 2, s. 5 (2) (b).

72. See, below, Part 2, s. 13.

in cases where the lease is not made in the form of a deed are not covered in the new *Commercial Tenancy Act*.

VI. DISTRESS FOR RENT

A. Introduction

In the consultation paper, the committee presented two options for reform of distress for rent. One option was to abolish distress for rent; the other option was to retain distress for rent but to modernize its features. Each option commanded an equal number of members of the committee. Although the committee spent a considerable amount of time debating distress for rent, both in the initial phase of the project and in its final drafting phase, and although the committee favours reform of this area of the law over the status quo, it was not able to reach an agreement on which course to recommend pursuing. This report, therefore, does not make any recommendations on reform of the law of distress for rent. Instead, in view of the committee's division of opinion, it was decided that the draft legislation in Part Two of the report would not address distress for rent. Instead, the report would present the arguments in favour of each option. This approach would give policymakers a clear sense of the options for reform in this area of the law, without suggesting that the committee as a whole prefers one approach over another.

It should be stressed, the two options presented in the report and the consultation paper that preceded it are not the only ways in which reform of this area of the law could be carried out. There are other approaches to carrying out reform of distress for rent. In addition, reform of the CTA does not depend, ultimately, on reforming the law of distress for rent. Although it would be desirable to effect reforms to this area of the law, a reformed system of distress for rent does not have to be in place before implementation of the reforms recommended in this report.

The following sections contain the arguments in favour of the two options for reform of distress for rent, largely as those arguments were presented in the consultation paper. Before discussing the options for reform, some general information on the law relating to distress for rent is provided.

B. Background on Distress for Rent

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:⁷³

73. *Interim Report on Distress for Rent*, *supra* note 68 at 5.

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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.⁷⁴ 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.⁷⁵ By far the most important contemporary form of distress is distress for rent.

A leading Canadian textbook on landlord and tenant law describes the elements of distress for rent as follows:⁷⁶

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.

74. 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.

75. *Supra* note 56, 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.”).

76. Christopher Bentley, John McNair, & Mavis Butkus, eds., *Williams & Rhodes Canadian Law of Landlord and Tenant*, looseleaf, 6th ed., vol. 1 (Toronto: Carswell, 1988) at § 8:1 [*Williams & Rhodes*].

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.⁷⁷ (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.⁷⁸ 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.⁷⁹ 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 of it is found in the RDA,⁸⁰ but a few sections in the CTA also address aspects of distress for rent.⁸¹

In the committee's view, the law of distress for rent has reached a state where reform is necessary. The law is complicated, often difficult to apply (or even state with certainty), and, in many places, out of keeping with modern commercial

77. See CTA, *supra* note 2, ss. 3–4.

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

79. See RDA, *supra* note 54, 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).

80. *Ibid.*

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

practices. The two options for reform that the committee focussed on in its deliberations are set out in the sections that follow.

C. 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”⁸²—that is, it is hopelessly complex, out of touch with contemporary social and legal norms, and prone to being exercised in an oppressive matter. The Law Commission of England and Wales has helpfully listed the following arguments in favour of abolition:⁸³

- (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. . . .
- (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.

82. *Interim Report on Distress for Rent*, *supra* note 68 at 6.

83. *Report on Distress for Rent*, *supra* note 68 at 8–9.

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.⁸⁴ The rationale for this priority appears to be historical. Section 1 can be traced back to an English law enacted in 1709.⁸⁵ This priority was intended to be a fair balancing of the interests of landlords and other creditors in a pre-industrial economy.⁸⁶ Further, distress for rent is not integrated into the province's personal property security regime.⁸⁷ As a result, a distraining landlord's priority position vis-à-vis a typical *Personal Property Security Act*⁸⁸ secured creditor can be described as follows:⁸⁹

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."

The exception to this general position is a secured party with a purchase money security interest.⁹⁰ 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.

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

85. *An act for the better security of rents, and to prevent frauds committed by tenants, supra* note 45, s. 1.

86. See *Report on Distress for Rent, supra* note 68 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.").

87. See RDA, *supra* note 54, 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.).

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

89. 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].

90. See RDA, *supra* note 54, 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.").

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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.

D. 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:⁹¹

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

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

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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.⁹²

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 enjoyed. 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.

92. See OLRRC Report, *supra* note 64 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 65 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.”).

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.

If the remedy of distress for rent is to be retained and modernized, various approaches may be possible. For example, distress might be brought more directly under the supervision of the court, providing a summary method for challenging a distress, and reducing the likelihood of abuse. Alternatively, a scheme more closely linked to the *Personal Property Security Act* might be developed. Whatever the approach might be ultimately adopted to modernize distress for rent, the RDA would be repealed and new statutory rules would be consolidated in a new *Commercial Tenancy Act*.

VII. CONCLUSION TO PART ONE

The committee's specific proposals are spelled out in Part Two. This Part contains a draft statute, a draft regulation, and extensive commentary on the policy choices made in recommending these reforms. The committee and the BCLI recommend that the provincial government move on implementing these reforms.

PART TWO—DRAFT LEGISLATION

COMMERCIAL TENANCY ACT

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

PART 1 – INTERPRETATION AND APPLICATION

Definitions

1 In this Act:

“**court**” means the Supreme Court;

“**enforcement officer**” means

(a) a person appointed as a court bailiff under the *Sheriff Act*, or

(b) a bailiff licensed under the *Business Practices and Consumer Protection Act*;

“**intermediate landlord**” means the landlord under a sublease;

“**lease**” means an agreement that creates the relationship of landlord and tenant between the parties to it;

“**lease for a term not exceeding 3 years, if there is actual occupation under the lease**” means a lease for a term that, at its beginning, does not exceed 3 years if there is actual occupation under the lease, and, if an option or covenant for renewal is included in the lease, the option or covenant must not extend the total lease periods beyond 3 years;

“**premises**” means land that is the subject matter of a lease;

“**sublease**” means a lease between a tenant and a landlord whose interest in the premises arises under a superior lease;

“**subtenant**” means the tenant under a sublease;

“**superior landlord**” means a landlord under a superior lease;

“**superior lease**” means a lease in which the tenant is also an intermediate landlord under a sublease respecting the same premises.

Comment: This section contains the definitions that apply throughout the entire act. The definition of “enforcement officer” is relevant for re-entry under Part 4. An enforcement officer must be either a court bailiff or a bailiff who has been licensed under the *Business Practices and Consumer Protection Act*.⁹³ The definition of “lease” does not attempt to spell out all the elements that must be present for parties to enter into a valid lease. The common law continues to govern this area of the law. Instead, the definition of the “lease” focuses on the agreement between the parties. This focus is needed because many of the sections in the act are remedial in nature, correcting and updating aspects of how the traditional property-law rules of leasing apply to the actual agreement entered into by a landlord and tenant. This act borrows the definition of “lease for a term not exceeding 3 years, if there is actual occupation under the lease” from the *Land Title Act*.⁹⁴ This definition is relevant for section 3, which deals with when a lease is required to be in writing. The definition of “premises” draws on the term “land,” which is given the following expanded definition in the *Interpretation Act*.⁹⁵

“land” includes any interest in land, including any right, title or estate in it of any tenure, with all buildings and houses, unless there are words to exclude buildings and houses, or to restrict the meaning.

The definitions of “intermediate landlord,” “sublease,” “subtenant,” “superior landlord,” and “superior lease” are used in section 11, which deals with the modernization of rules relating to the obligations of tenants and subtenants.

Application of this Act

- 2 (1) Subject to subsection (2), this Act applies to a lease of premises situated in British Columbia.
- (2) This Act does not apply to
 - (a) a lease to which the *Residential Tenancy Act* applies, except to the extent that Act provides that this Act applies,
 - (b) a lease to which the *Manufactured Home Park Tenancy Act* applies, except to the extent that Act provides that this Act applies, or
 - (c) prescribed leases or premises.

93. S.B.C. 2004, c. 2, ss. 125, 142–45. See also *Debt Collection Industry Regulation*, B.C. Reg. 295/2004.

94. R.S.B.C. 1996, c. 250, s. 1 [LTA].

95. R.S.B.C. 1996, c. 238, s. 29.

- (3) The application of this Act may not be excluded, varied or limited by a lease, except as otherwise provided in this Act.

Comment: In simple terms, this act applies to commercial leases of premises located in British Columbia. Subsections (1) and (2) achieve that result in legislative language. Subsection (1) limits the geographic scope of the act to British Columbia. Subsection (2) limits the types of leases covered by the act by excluding leases to which either the RTA⁹⁶ or the *Manufactured Home Park Tenancy Act*⁹⁷ applies. Subsection (2) (c) gives the government scope to exclude other types of leases or premises from the application of the *Commercial Tenancy Act* by promulgating a regulation to that effect. A regulation-making power to carry this provision into effect is set out in section 23, below. It was noted above⁹⁸ that section 4 of the RTA contains a list of agreements that are not covered by the RTA. Since these agreements would typically not be considered commercial leases, the committee takes no position on whether or not they should be considered to fall within the scope of a new *Commercial Tenancy Act*, other than to note that the application of this act to them could be excluded by a regulation under this paragraph. Subsection (3) makes the basic point that the provisions of this act prevail over any private arrangement reached by a landlord and a tenant, unless (and only to the extent that) this act provides that such an agreement prevails. In fact, many of the sections that follow have been crafted as default provisions that can be varied or excluded by the agreement of a landlord and tenant.

PART 2 – LEASES

Creation of lease

- 3 (1) Subject to section 59 of the *Law and Equity Act*, no particular form is required for the creation of a lease.
- (2) A landlord who enters into a lease must deliver the instrument creating it to the tenant in a form registrable under the *Land Title Act*.
- (3) Subsection (2) does not apply if
- (a) the lease is a lease for a term not exceeding 3 years, if there is actual occupation under the lease, or
 - (b) the parties otherwise agree in writing.

96. *Supra* note 52.

97. S.B.C. 2002, c. 77.

98. *Supra* note 53.

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Comment: At common law, there were no formal requirements that had to be met for the creation of a lease.⁹⁹ A few requirements have been imposed by statute, but they are not particularly demanding. This section carries forward that policy.

Subsection (1) provides that a lease may be made in any form. The reference to section 59 of the LEA¹⁰⁰ is a reference to a rule of general application regarding when contracts must be in writing. The heart of this provision reads as follows:¹⁰¹

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." Since leases come within this general description, they must be in writing, subject to an exception discussed below.¹⁰²

The writing requirement first appeared in a seventeenth-century English statute called the *Statute of Frauds*.¹⁰³ 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*¹⁰⁴ as provincial legislation. Other provinces and territories rely on the original English Act as received legislation.¹⁰⁵

99. See Ziff, *supra* note 9 at 269 ("The common law does not establish formal requirements for the creation of a lease.").

100. *Supra* note 58.

101. LEA, *ibid.*, s. 59 (3).

102. See, below, section 27.

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

104. 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.

105. 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 at *Williams & Rhodes supra* note 76, vol. 1 at § 2:1:1.

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British Columbia re-enacted the *Statute of Frauds* in 1897.¹⁰⁶ Substantial revisions were made to the act in 1958.¹⁰⁷ The current writing requirements were enacted in 1985.¹⁰⁸ The committee considered whether amendments should be made to them or, even, if they should be repealed for leases. Manitoba has made this decision,¹⁰⁹ partially implementing recommendations from the Manitoba Law Reform Commission.¹¹⁰ In the end, the committee recommends retaining the writing requirement in its current form. The formalities required by section 59 are not particularly stringent. They 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.

Subsection (2) substantively re-enacts section 5 (2) of the PLA.¹¹¹ The committee has concluded that this provision, which only applies to leases, should be consolidated with the *Commercial Tenancy Act* rather than left in a statute of general application. The committee also considered the broader question of reforms to the rules governing registration of leases. The committee noted that this issue often polarizes landlords and tenants. 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 LTA¹¹² 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.

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

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

108. *Law Reform Amendment Act, 1985*, S.B.C. 1985, c. 10, s. 7. These amendments were made to implement a report of the Law Reform Commission of British Columbia. See *Report on the Statute of Frauds*, *infra* note 282.

109. *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).

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

111. *Supra* note 57.

112. *Supra* note 94.

Subsection (3) sets out the circumstances when the general rule in subsection (2) will not apply to a given case. Paragraph (a) creates an exception for short-term leases. The rationale for this exception is that leases for a term not exceeding three years need not be in writing. If a party had a statutory right to demand that a short-term lease be in registrable form (which would, of necessity, be in writing), then this right would be inconsistent with and would serve to undercut the policy of allowing short-term oral leases. The tenant under such a short-term lease is required to be in actual occupation of the premises in order to give some protection to third parties, who could be misled by the absence of a record of the lease on title to the property.¹¹³ Paragraph (b) allows a landlord and a tenant to agree in writing that the lease need not be made in registrable form. In practice, many landlords and tenants enter into such agreements. This subsection is substantially similar to the equivalent provision currently found in the PLA.¹¹⁴

Interesse termini

4 The doctrine of *interesse termini* is abolished.

Comment: This section abrogates the common-law doctrine of *interesse termini*. 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”).

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*.¹¹⁵

An *interesse termini* is an interest in land, but it is a curious type of interest. The main consequence of the tenant having this limited interest instead of an estate in the leased premises is that the tenant’s remedies are drastically curtailed if the tenant is prevented from taking possession of the leased premises. For instance, the tenant cannot enforce any of the covenants of the lease, including the covenant of quiet enjoyment.¹¹⁶ The tenant is also unable to sue in trespass, if another person is occupying the leased prem-

113. See, below, text accompanying footnotes 288–291 for further discussion of actual occupation.

114. *Supra* note 57, s. 5 (2).

115. *Williams & Rhodes, supra* note 76, vol. 1 at § 3:10.

116. *Ibid.*, vol. 1 at § 3:10:1 (“It is now well settled that the lessee, having only an *interesse termini*, cannot before entry maintain an action for breach of the covenant of quiet enjoyment if he cannot get possession.” [citation omitted]).

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ises.¹¹⁷ 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.¹¹⁸ Damages against the landlord are calculated according to the following principles:¹¹⁹

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.¹²⁰

Interesse termini has seen little development in the courts over the last 50 years. The consultation paper cited only two cases, both of which just briefly mentioned the doctrine.¹²¹ As the consultation paper was being readied for publication, a judgment in an Ontario case containing a sustained discussion of *interesse termini* was handed down.¹²² The case is helpfully summarized in *Williams & Rhodes*.¹²³

117. See *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies*, *supra* note 91, Appendix F at 129 (“[A]t common law a lessee under a lease had no estate in the land before entry; hence he could not sue for breach of any covenants which envisaged an estate nor could he bring trespass against a third person unless there had been entry.”) (quoting Bora Laskin, *Cases and Notes on Land Law*, rev. ed. (Toronto: University of Toronto Press, 1964) at 189).

118. *Williams & Rhodes*, *supra* note 76, vol. 1 at § 3:10:1.

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

120. See Holdsworth, *Land Law*, *supra* note 11 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]).

121. *1173253 Ontario Ltd. v. Ordanis* (1997), 49 O.T.C. 235, 18 R.P.R. (3d) 59 (Gen. Div.); *Sittuk Investments Ltd. v. A. Farber & Partners Inc.* (2002), 61 O.R. (3d) 546, (*sub nom. Sittuk Investments Ltd. v. Aylen Estate*) 10 R.P.R. (4th) 204 (S.C.J.).

122. *Midas Realty Corp. of Canada v. Galvic Investments Ltd.* (2008), 70 R.P.R. (4th) 261, 168 A.C.W.S. (3d) 398 (Ont. S.C.J.), *aff'd* 2009 ONCA 84, 75 R.P.R. (4th) 197. The Court of Appeal’s brief endorsement does not mention *interesse termini*, which did not appear to be among the issues on appeal for the case.

123. *Supra* note 76 at § 3:10:1 [citation omitted].

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In *Midas Realty Corp. of Canada Inc. v. Galvic Investments Ltd.* the applicant franchisor [Midas] sought to enforce its right to possession of the premises pursuant to an “optional lease agreement” between the franchisor and the landlord [Galvic]. The tenant [a corporation related to Galvic] agreed that the franchisor had a contractual right to a lease but argued that as the franchisor had not entered into possession of the premises it had only an *interesse termini* and was, therefore, not entitled to specific performance. The court disagreed. Cullity, J. found that the absence of an estate may prevent enforcement of covenants in a lease by a tenant with an *interesse termini* but an agreement for a lease implies a contractual obligation to deliver possession of the premises on the commencement date and there is no reason why the principles governing the availability of specific performance should not also apply to such an obligation. The franchisor’s application for an order requiring a lease to be executed in its favour and delivery of possession of the premises was allowed.

The consultation paper tentatively recommended abolishing *interesse termini*. This tentative recommendation built on the work of previous Canadian law reform commissions, which had made similar recommendations.¹²⁴ These agencies recommended abolishing *interesse termini* because, in their view, the doctrine depended on an old conception of the law of real property and could prove to be a trap for the unwary. The committee also considered opposing arguments, particularly those advanced by the Real Property Section of the Canadian Bar Association (BC Branch) in response to the LRCBC Report.¹²⁵ The section argued that it was unnecessary to abolish *interesse termini*. Instead, resort should be had to the court’s equitable jurisdiction, particularly its jurisdiction to award specific performance.

The committee has decided that *interesse termini* should be abolished. The theory underlying this doctrine, which rests on the importance of actual possession of land, has been overtaken. Abolishing *interesse termini* will clarify and modernize the law and should provide a small net benefit for tenants. The practical effect of taking this step is neatly summarized in the Manitoba Law Reform Commission’s report on the subject.¹²⁶

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.

124. See LRCBC Report, *supra* note 6 at 12; OLRC Report, *supra* note 64 at 61; *Report on Commercial Tenancies: Miscellaneous Issues*, *supra* note 65 at 5.

125. See 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 Sub-section of the B.C. Branch of the Canadian Bar Association* (Vancouver: Canadian Bar Association (BC Branch), 1988).

126. *Supra* note 65 at 5 [footnote omitted].

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In abolishing *interesse termini*, British Columbia would be joining Alberta,¹²⁷ the United Kingdom,¹²⁸ Australia,¹²⁹ and a number of American states.¹³⁰ In addition, it is worthwhile to note that the doctrine has been abolished for residential tenancies in British Columbia.¹³¹

Application of contractual rules to leases

- 5 (1) Subject to section 6 [*rent reduction or diversion*], the general law of contract applies with respect to the effect which one party's breach of a provision of a lease has on another party's right to relief and obligation to perform.
- (2) Without limiting subsection (1),
- (a) subject to section 9 [*relief from forfeiture*], if a landlord or tenant breaches a material provision of the lease, unless the lease otherwise provides, the other party may elect to treat the lease as terminated, but the lease is not terminated until the other party is given notice of the election,
 - (b) if a tenant abandons the premises, and the landlord elects to affirm the lease and claim payment of rent, the landlord has a duty to mitigate its losses.
- (3) The *Frustrated Contract Act* and the doctrine of frustration of contract apply to leases.

Comment: This section implements three tentative recommendations from the consultation paper. Before discussing these specific provisions in detail, it is useful to begin by noting a number of general points about the application of contractual principles to leases.

As was observed in Part One, leases can be characterized as being both a conveyance of an interest in property and a commercial contract.¹³² Commentators have 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 the Supreme Court of Canada

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

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

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

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

131. See RTA, *supra* note 52, s. 16.

132. See, above, Part One, section II.A.–C.

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in the *Highway Properties* case¹³³ 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.¹³⁴

One critic has argued that legal issues in this area can be analyzed by using the following five categories:¹³⁵

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 jurisprudence in Canada since *Highway Properties* appears to have left the law straddling categories (3) and (4).¹³⁶

The committee considered legislative reforms to restate the landlord–tenant relationship on a purely contractual basis. Such reforms would have the effect of moving the law of commercial leasing in British Columbia into category (5). In the end, the committee tentatively recommended in the consultation paper that these proposals should not be pursued. That position was supported by the majority of respondents.

In the result, this report contains a draft provision focussed on three areas where the dual nature of leases as conveyances and contracts has led to difficulties in the courts.

133. *Supra* note 41.

134. 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.”].

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

136. *Ibid.* at 493–94.

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These areas are the independence of lease covenants and fundamental breach, mitigation, and frustration.

Subsections (1) and (2) (a) address the independence of the provisions of a lease (which, in this context, are traditionally called *covenants*).¹³⁷ At common law, the covenants 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*.¹³⁸ Contractual doctrines, such as fundamental breach,¹³⁹ historically had no application in disputes involving commercial leases.

As commentators have pointed out, the rationale for the historical rule has not been clearly articulated in the jurisprudence.¹⁴⁰ Recent cases show that the courts have begun to develop the law in this area by applying contractual principles, particularly the doctrine

137. See *Report on Covenants in Commercial Tenancies*, *supra* note 65 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.”).

138. 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]).

139. 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.”).

140. See Brock & Philips, *supra* note 134 at 1005 (“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.” [footnote omitted]).

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of fundamental breach. The leading British Columbia case is *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.*¹⁴¹ In *Lehndorff*, the Court of Appeal held that, in addition to historical real property principles, contractual principles also applied to commercial leases.¹⁴² In this case, the landlord's unreasonable refusal to grant its consent to the assignment could be characterized as a fundamental breach.¹⁴³ *Lehndorff* has been followed in a number of subsequent British Columbia cases.¹⁴⁴ Subsection (1) confirms and reinforces this development in the courts, by restating that the general rules of contract law apply to leases. Subsection (2) (a) contains a special rule for cases involving fundamental breach. If the party not in breach wishes to treat the lease as terminated by the breach, then this wish only becomes effective when that party notifies the party in breach. This right is made subject to the right of the party in breach to seek relief from forfeiture in the courts and to any express provision that has been put into the lease setting out the consequences of a fundamental breach.

Subsection (2) (b) deals with mitigation. The concept of mitigation of damages is described in this passage from a contract-law textbook:¹⁴⁵

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."¹⁴⁶ But the traditional position for leases 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 lease as a conveyance. A contract-law principle like mitigation does not apply to a property-law transaction like a conveyance.

141. (1989), 59 D.L.R. (4th) 1, 37 B.C.L.R. (2d) 306 (C.A.) [*Lehndorff* cited to D.L.R.].

142. *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.").

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

144. 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.

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

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

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Mitigation comes to the fore in cases where a landlord claims future rent from a tenant that 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 Columbia¹⁴⁷ and elsewhere,¹⁴⁸ have made it clear that a landlord still does not have a duty to mitigate its damages in these circumstances.

Mitigation has proved to be a controversial topic in the law of leasing. Past law reform reports have favoured imposing a duty to mitigate on landlords;¹⁴⁹ other legal bodies have opposed enacting such reforms.¹⁵⁰ The responses to the consultation paper were also nearly equally divided, with a bare majority favouring requiring a landlord to mitigate its damages. The committee has decided to implement its tentative recommendation with this subsection requiring a landlord to mitigate its losses if a tenant abandons the premises and the landlord elects to affirm the lease and claim payment of rent. Adopting this contractual rule will guard against the likelihood of economic waste resulting from abandoned premises standing empty. Further, it is worth noting that the onus of establishing mitigation in proceedings falls on the party in breach,¹⁵¹ which in cases covered by the proposed legislation would be the tenant. This onus is often characterized as being a particularly heavy one, because the courts are wary to reward a person who has breached a contract.¹⁵² Finally, the duty of a party to mitigate its losses has always been subject to a reasonableness requirement. The following passage from the seminal case on mitigation¹⁵³ shows that this reasonableness requirement has been an integral part of the doctrine from its inception.¹⁵⁴

147. See *Transco Mills Ltd. v. Percan Enterprises Ltd.* (1993), 100 D.L.R. (4th) 359, 76 B.C.L.R. (2d) 129 (C.A.). But see *Ma v. Ul*, 2007 BCPC 375, [2007] B.C.J. No. 2567 at para. 78, Dyer Prov. Ct. J. (“mitigation is in fact involved where there is (as in this case before me) re-letting on the tenant’s account”).

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

149. See LRCBC Report, *supra* note 6 at 61; OLRC Report, *supra* note 64 at 130–31.

150. See Gray & Holmes, *supra* note 125 at 5–7.

151. See, e.g., *Keneric Tractor Sales Ltd. v. Langille*, [1987] 2 S.C.R. 440 at 458–59, 43 D.L.R. (4th) 171, Wilson J.

152. See M.P. Furmston, ed., *Cheshire, Fifoot and Furmston’s Law of Contract*, 15th ed. (Oxford: Oxford University Press, 2007) at 780 (“But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.”).

153. *British Westinghouse Electric and Manufacturing Co., Ltd. v. Underground Electric Railways Co. of London, Ltd.*, [1912] A.C. 673 (U.K.H.L.).

154. *Ibid.* at 689, Viscount Haldane L.C.

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The fundamental basis is thus compensation for pecuniary loss, naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. . . .

[T]his second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would ordinary take in the course of business.

These two elements of mitigation may not allay all concerns raised by the respondents to the consultation paper, but they do go a considerable distance in safeguarding against the overriding fear that making landlords subject to mitigation would expose them to undue prejudice.

Since the doctrine of mitigation contains a reasonableness component, it was decided that a specific reference to landlords not being required to rent out the abandoned premises in favour of other premises (which was raised in the consultation paper) is not necessary.

Subsection (3) provides that the *Frustrated Contract Act*¹⁵⁵ and the doctrine of frustration apply to leases. The doctrine is given a succinct definition in the following passage from a leading case:¹⁵⁶

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.

Traditionally, the doctrine of frustration was not available in cases involving leases.¹⁵⁷ The courts appear to be developing the common law in the direction of reversing the traditional rule,¹⁵⁸ but at this point the question of whether the doctrine of frustration applies

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

156. *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.

157. 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.).

158. 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.

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to a commercial lease is, in most common-law jurisdictions, not free from doubt.¹⁵⁹ This confusion does not plague British Columbia law. Clarity reigns in this jurisdiction as a result of a previous law reform effort. In a 1971 report,¹⁶⁰ the Law Reform Commission of British Columbia recommended enacting legislation¹⁶¹ to dispel any confusion over whether the doctrine of frustration and British Columbia's *Frustrated Contract Act* applies to leases. This legislation was enacted in 1974,¹⁶² and it is currently section 30 of the CTA.¹⁶³ It is worthwhile to note here that the *Frustrated Contract Act* contains rules directed at sorting out the consequences of a frustrated contract, in particular when restitution is available and how such restitution should be calculated.¹⁶⁴ Subsection (3) of the draft legislation carries forward the current law, which appears to be performing well.

Rent reduction or diversion

- 6 (1) A tenant must not refuse to pay rent solely because the landlord has breached a provision of the lease.
- (2) Subsection (1) does not affect the right of a tenant, if the right exists in circumstances other than those described in subsection (1),
 - (a) to deduct from rent otherwise payable an amount in respect of a judgment in favour of the tenant against the landlord, or
 - (b) to cease paying rent on electing to terminate the lease under section 5 (2) [*application of contractual rules to leases*].
- (3) If a landlord breaches a material provision of a lease and the tenant does not wish to elect to terminate the lease under section 5 (2) [*application of contractual rules to leases*], then the tenant may apply under Part 3 to the court for an order that the rent payable under the lease
 - (a) be reduced
 - (i) by an amount equal to the reduction in value of the premises to the tenant because of the breach, or

159. See *Williams & Rhodes*, *supra* note 76, vol. 1 at § 1:1:5.

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

161. *Ibid.* at 16.

162. See *Landlord and Tenant Act*, *supra* note 52, s. 61 (1) (e).

163. *Supra* note 2.

164. *Frustrated Contract Act*, *supra* note 155, ss. 5–8.

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- (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 breach can be remedied.
- (4) Any order under subsection (3) may be made subject to any conditions that are fair and equitable in the circumstances.

Comment: The policy underlying rent abatement or diversion is to give the tenant an additional remedy in the face of a breach of a material provision of the lease. Instead of treating the breach as a repudiation of the lease (in accordance with contractual principles), 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.

The need for such legislation flows from the traditional conception of the independence of lease covenants. As noted in the commentary to section 5, above, a breach of a covenant by one party does not relieve the other party from performing its covenants under the lease. As a result of this traditional rule, a landlord could fail to deliver on one of the key elements of the bargain and still require the tenant to pay rent. Section 5 deals with bringing this situation into line with modern contractual principles. This section gives tenants an alternative remedy.

Subsection (1) provides that, as a general rule, a tenant is not entitled to refuse to pay rent in the face of a material breach of a provision of the lease by the landlord. Refusing to pay rent is a serious step, which should require the supervision of the court. Subsection (2) contains exceptions to the general rule in subsection (1). Paragraph (a) confirms that nothing in subsection (1) prevents a tenant from deducting an amount from the rent if the tenant has a judgment against the landlord. Paragraph (b) resolves a potential conflict by providing that a tenant that elects to terminate a lease after one of its material provisions has been breached by the landlord is not obligated to continue paying rent.

The heart of this section is found in subsection (3). Subsection (3) establishes the process for a tenant to apply to the Supreme Court if the landlord has breached a material provision of the lease and the tenant elects not to terminate the lease. An application to court is required under this subsection to guard against the possibility of a right to reduce or divert rent being abused. Paragraph (a) sets out the standards to apply in reducing the rent payable. The reduction compensates the tenant either for the diminution in value of the premises as a result of the breach or for expenses incurred in repairing the breach. Paragraph (b) provides that rent may be diverted to a third party. This may be of use where the breach is the result of the landlord failing to compensate a third-party supplier

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of goods or services (such as utilities) to the premises. Subsection (4) confirms that the court may make its order subject to terms and conditions.

Provisions implied in leases

- 7 (1) Subject to subsection (2), a lease is deemed to contain the following provisions:

Comment: 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 requirements¹⁶⁵ 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 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. . . .”¹⁶⁶ These two terms go back to the origins of landlord–tenant law, but this category is not closed. Future court cases may come to the conclusion that other terms are implied in leases by law.¹⁶⁷

The purpose of this section is to set out basic provisions that will be implied in commercial leases, unless these provisions are modified, varied, or excluded under subsection (2). The paragraphs following this subsection restate the terms implied at common

165. 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. . . .” [textual cross-references and footnote omitted]).

166. 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.

167. For instance, some commentators have noted the evolution in the courts of an emerging implied term concerning environmental contamination. 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.) (QL); *O’Connor v. Fleck*, 2000 BCSC 1147, 79 B.C.L.R. (3d) 280 (S.C.). See also MacDonald, *ibid.* (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”).

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law, along with a select few other important terms for leases. This restatement is intended to make the law more accessible and certain, and to benefit landlords and tenants that may inadvertently have failed to address these issues in their leases. It is not intended as a codification of the law, nor is it intended to create a statutory form of lease. The parties would have to intend to enter into a lease and agree on its essential requirements before this section could be of assistance.

- (a) subject to payment of the rent and performance of the covenants of the lease, the tenant, and anyone claiming lawfully under the tenant, may peaceably possess and enjoy the premises without any interruption or disturbance from the landlord or anyone claiming under the landlord;

Comment: This subsection contains the covenant of quiet enjoyment. The covenant of quiet enjoyment is considered to embrace two distinct, but interrelated, policies:¹⁶⁸ (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;¹⁶⁹ 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 implied by this subsection is restricted, or qualified. The covenant of quiet enjoyment may be either qualified or absolute.¹⁷⁰ This distinction turns on the scope of protection afforded to the tenant. A qualified 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.¹⁷¹ An absolute covenant “is an assurance against interruption by those who have a *superior* covenant to that of the landlord.”¹⁷² In an

168. See *Williams & Rhodes*, *supra* note 76, vol. 1 at § 9:1; Robert V. Wickett, “Problems Encountered by Tenants: Occupation, Use, and Enjoyment of Premises,” in *Commercial Leasing Disputes*, *supra* note 166, 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.

169. See Malen, *ibid.*

170. See *581834 Alberta Ltd. v. Alberta (Gaming and Liquor Commission)*, 2007 ABCA 332, 287 D.L.R. (4th) 276 at paras. 10–12 [*581834 Alberta Ltd.* cited to D.L.R.].

171. See *Williams & Rhodes*, *supra* note 76, 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. . .”).

172. Malen, *supra* note 168 at 123 [emphasis in original].

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illustration of the difference between the two types of covenants, a recent case concluded that a typically worded qualified covenant did not protect a subtenant “from interference by a mortgagee who foreclosed on a mortgage granted by a head landlord.”¹⁷³ In the same circumstances, an absolute covenant would protect the subtenant.

This subsection implies a qualified covenant of quiet enjoyment in leases as opposed to an absolute covenant in order to maintain continuity with the common law. Landlords and tenants are free to agree on an absolute covenant. The committee did not think it advisable to change the default position for cases in which that express agreement is not found.

- (b) the landlord may not derogate from a grant contained in the lease;

Comment: There is a general principle of real estate law that a grantor is not to derogate from the grant, which means “he must not seek to take away with one hand what he gives with the other.”¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷

173. *581834 Alberta Ltd.*, *supra* note 170 at para. 22.

174. *Megarry & Wade*, *supra* note 11 at § 14-208.

175. But the principle may also be relevant in connection with other issues. *See, e.g., Williams & Rhodes*, *supra* note 76, vol. 1 at § 9:1:13 (discussing application of non-derogation from grant to easements enjoyed by tenants).

176. *See* OLRC Report, *supra* note 64 at 94 (“[I]f 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]).

177. *See* OLRC Report, *ibid.* (“[F]or 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]).

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There is a great deal of overlap between non-derogation from grant and the tenant's right to quiet enjoyment.¹⁷⁸ But the two concepts have historically been analytically distinct¹⁷⁹ and they have been argued and applied separately in recent Canadian cases.¹⁸⁰ There are situations in which non-derogation from grant applies even though a breach of the covenant for quiet enjoyment has not occurred.¹⁸¹

In view of the development of non-derogation from grant as a separate principle from quiet enjoyment, this subsection contains a distinct implied provision relating to non-derogation from grant.

- (c) the tenant must pay the rent payable under the lease when it falls due;

Comment: 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.¹⁸² This subsection creates an implied term requiring payment of rent. It is not intended as a dramatic change in the substantive law; rather it is intended to make that law more accessible by restating it in the statute. This subsection may be of assistance in those unusual cases where a commercial lease fails to contain a provision requiring the payment of rent. Finally, the subsection will bring the British Columbia Act into line with similar legislation in Alberta, Saskatchewan, and Manitoba.¹⁸³

178. See *Megarry & Wade*, *supra* note 11 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 . . .”).

179. See *Williams & Rhodes*, *supra* note 76, vol. 1 at § 9:1:13.

180. 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.).

181. See *Megarry & Wade*, *supra* note 11 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]).

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

183. Alberta: *Land Titles Act*, R.S.A. 2000, c. L-4 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, S.S. 2000, c. L-5.1, 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*, R.S.M. 1987, c. R30, C.C.S.M. c. R30, s. 92 (a) (“In the memorandum of lease, unless a contrary intention appears therein, there shall

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The subsection is drafted in simple terms, providing that a tenant must pay the rent when it falls due. Ordinarily, it is clear from the lease when the rent will fall due. If it cannot be determined from the lease, or if the lease is silent on this point, then the law presumes that the rent is due at the end of each year of the lease's term.¹⁸⁴

- (d) if the tenant is in arrears of rent or has breached a material provision of the lease, the landlord may give the tenant notice in writing at the premises of the landlord's right to re-enter and resume possession of the premises as follows:
 - (i) 5 days' notice, if the tenant is in arrears of rent; or
 - (ii) 10 days' notice, if the tenant is in breach of any other material provision of the lease;
- (e) if the tenant fails to cure a breach that is the subject of a notice under a provision implied by subsection (1) (d) (i) or fails to commence and diligently pursue curing a breach that is the subject of a notice under a provision implied by subsection (1) (d) (ii), the landlord may re-enter and resume possession of the premises;
- (f) if the landlord exercises a right to re-enter and resume possession of the premises under a provision implied by subsection (1) (e), all rights of the tenant with respect to the premises, other than rights under section 9 [*relief from forfeiture*], are terminated;

Comment: These three paragraphs set out implied terms defining when a landlord is able to re-enter the premises and what notice of re-entry is required. *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.

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.”).

184. See *Canada Square Corp. Ltd. v. Versafood Services Ltd.* (1979), 25 O.R. (2d) 591 at 606, 101 D.L.R. (3d) 742 (H.C.J.), Carruthers J. (“The agreement is silent as to when rent is to be paid. My understanding is that under these circumstances, rent is deemed to be payable at the end of each year of the term.”), *aff'd (sub nom. Canada Square Corp. v. VS Services Ltd.)* (1981), 34 O.R. (2d) 250, 130 D.L.R. (3d) 205 (C.A.). See also *Williams & Rhodes*, *supra* note 76, vol. 1 at § 6:6:1.

The common law only provides 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 provisions of the lease that are *conditions* and provisions 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.”¹⁸⁵ As a result of this rule, most commercial leases contain a provision 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.

British Columbia currently lacks a statutory right or implied term of re-entry, which is anomalous in view of the prevalence of such legislation in most other Canadian jurisdictions.¹⁸⁶ Paragraphs (d)–(f) are intended to cure this anomaly. Paragraph (d) sets out the notice requirement that landlords must comply with on exercising their rights under this implied provision. Much of the commentary on the proposal for this implied provision, as it appeared in the consultation paper, focussed on the issue of notice. Many of the comments made the point that the proposed 10 days’ notice was too long. (On the other hand, a few felt that it was too short.) Paragraph (d) responds to these concerns by setting out two notice periods—a shorter period for cases where rent is in arrears, and the proposed 10-day period for other breaches of the lease. Paragraph (e) establishes the tenant’s right to cure breaches during the notice period. In the case of arrears of rent, curing the breach is straightforward—the arrears must be paid. The class of breaches of a material provision is potentially quite large and varied. In view of this consideration, the committee has set a different standard for these breaches. It may not be possible, in all cases, to cure the breach in 10 days. So, under paragraph (e), the tenant is only required “to commence and diligently pursue” curing the breach. Knowing what will meet this standard will turn on the facts of a given case. Paragraph (f) confirms the effect of re-entry under this implied provision. Re-entry terminates the tenant’s interest in the premises, subject only to the tenant’s right to apply to court for relief from forfeiture.

- (g) the tenant must repair, at its expense, any damage caused by the tenant or a person for whom the tenant is responsible, except reasonable wear and tear.

Comment: This paragraph contains an obligation on the tenant to repair any damage to the premises caused by the tenant or by any person for whom the tenant is responsible. Most commercial leases address this topic, often in detailed and intricate terms. For

185. See *Williams & Rhodes, ibid.*, vol. 1 at § 12:7:1.

186. See Olson, *supra* note 4 at § VIII.C.b (citing legislation currently in force in six provinces and two territories).

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those leases that do not address the issue, it is appropriate for the tenant to be liable for damage it caused or a person it was responsible for caused. This general position is qualified by an exception for “reasonable wear and tear.” This expression is commonly found in leases. It has been interpreted in a number of judgments. For instance, one judge described reasonable wear and tear as “any damage arising from the ordinary and normal operation of the elements or other natural causes of damage to or deterioration of the property.”¹⁸⁷ Another case described the term by reference to the permitted uses for the premises under the lease.¹⁸⁸ It is generally conceded in the jurisprudence that this term is not defined with a high level of precision.¹⁸⁹ But a flexible standard is needed in an implied provision that may potentially apply to a wide range of situations. Some ambiguity may be the price to pay for such flexibility.

- (2) The parties to a lease may agree to modify, vary or exclude the application of any of the provisions implied by subsection (1).

Comment: Under subsection (2), a landlord and a tenant may agree to contract out of any or all of the provisions implied by subsection (1). 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) and (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).¹⁹⁰

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. All of the respondents to the consultation paper agreed with this approach.

The expression “modify, vary, or exclude the application” of any of the implied provisions is at the heart of subsection (2). This expression is intended to be very broad in scope. The intent of this provision is to fill in gaps in commercial leases, not to disturb agreements that landlords and tenants have reached with one another.

187. *Bartram v. Rempel*, [1949] 2 W.W.R. 1183 at 1184, [1950] 4 D.L.R. 442 (B.C.C.A.), O’Halloran J.A.

188. *Calandra v. B.A. Cleaners Ltd.* (1990), 73 O.R. (2d) 449 at 459–60, 11 R.P.R. (2d) 63 (Dist. Ct.).

189. *See, e.g., Kamoo v. Brampton Caledon Housing Corp.*, [2005] O.J. No. 3911 at para. 16 (Sm. Cl. Ct.), Klein Deputy J. (“There tends to be a great deal of ambiguity and subjectivity in this area.”).

190. *Supra* note 52, s. 5.

Landlord's consent to assignment or sublease not to be unreasonably withheld

- 8**
- (1) If a lease contains a provision against assigning, subletting or otherwise disposing of the premises without the landlord's consent, this provision is deemed to be subject to a provision that such consent is not to be unreasonably withheld.
 - (2) If a lease contains a provision against the transfer of shares of the tenant without the consent of the landlord, this provision is deemed to be subject to a provision that such consent is not to be unreasonably withheld.
 - (3) The parties to a lease may agree to modify, vary or exclude the application of the provisions implied by subsections (1) or (2).
 - (4) This section does not apply to a lease entered into before the date on which this Act comes into force.

Comment: Control of assignment and subletting is a major point of contention in commercial leases. For a tenant, 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).¹⁹¹ 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 the lease 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 to whomever it chooses and it does not need to obtain the landlord's consent.¹⁹² Most landlords will balk at this result, so the almost 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

191. See Harvey M. Haber, "Assignment and Subletting," in Haber, *supra* note 168, 31 at 31.

192. See *Williams & Rhodes*, *supra* note 76, 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 omitted]).

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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.¹⁹³

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.”¹⁹⁴ The committee agreed with this characterization and tentatively recommended enacting a reasonableness requirement as part of a new *Commercial Tenancy Act*. The responses to this tentative recommendation tended to oppose this proposal, although the number of responses received on this point were few and, among those few, some appeared to base their opposition on a (mistaken) sense that contracting out of the proposed provision would not be permitted. The committee carefully considered all responses and decided that, in the end, the arguments in favour of a reasonableness requirement were persuasive. The default position should be that a landlord will act reasonably; if the parties wish to vary that position, then they should be able to do it, but this result should be brought about by negotiation and expressly adopted by the parties rather than reached by operation of law.

Subsection (1) sets out the main reasonableness requirement for an assignment, subletting, or other disposition¹⁹⁵ of the premises by the tenant. Subsection (1) applies if the lease contains a provision against assignment, subletting, or other disposition without the consent of the landlord. The subsection implies a provision into such leases to the effect that the provision is subject to an implied provision that the landlord must not unreasonably withhold its consent. This approach of implying a provision in leases within the scope of the section is similar to the approach taken in other Canadian jurisdictions.¹⁹⁶

193. 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.

194. *Supra* note 6 at 38.

195. “Disposition” has been given a broader meaning at law than its ordinary meaning. *See Interpretation Act, supra* note 95, s. 29 (“‘dispose’ means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things”).

196. *See, e.g., Ontario: Commercial Tenancies Act, supra* note 193, s. 23 (1) (“In every lease . . . containing a covenant, condition or agreement against assigning, underletting, or parting with the pos-

Subsection (2) addresses a distinct, but related, situation. Some commercial leases contain prohibitions on the transfer of a corporate tenant's shares without the landlord's consent.¹⁹⁷ These provisions are usually intended to prevent the tenant from making an end run around a prohibition on assignment or subletting without the landlord's consent. This manoeuvre could be accomplished by transferring enough shares of a closely held company to change the controlling interest in that company. In the committee's view, this situation is functionally similar to an assignment or a subletting, but it would not be caught by subsection (1), because it involves a disposition of shares, rather than a disposition of the premises. The purpose of subsection (2) is to put a disposition of shares on the same footing as a disposition of the premises.

Subsection (3) ensures that subsections (1) and (2) operate as default rules. As a number of respondents to the consultation paper pointed out, there may be circumstances in which a landlord and a tenant may agree to abandon the reasonableness standard for consent to assignment or subletting. For example, a landlord in a multi-tenant building may feel that balancing its interests and those of a number of tenants requires more flexibility than may be permitted under a standard of reasonableness. Or, the parties may wish to address this issue in a more complex way. It is well known that arguments over what is "reasonable" in these circumstances has led to a considerable amount of litigation. While a simple standard is acceptable in a statute of general application that must apply to a great variety of leases, landlords and tenants may want to craft a more detailed exposition of what is reasonable in the circumstances of their specific lease.

Subsection (4) sets out a transitional rule for this section. The reasonableness requirement in this section only applies to leases entered into after the new act comes into force. The committee concluded that a special transitional rule is needed for this section

session, or disposing of the land or property leased without licence or consent, such covenant, condition or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that such licence or consent is not to be unreasonably withheld.").

197. See, e.g., 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. 4, s. 11.1 (e) [*Commercial Leasing: Annotated Precedents*] ("If the Tenant is a corporation or if the Transferee is a corporation and, at any time during the Term or any renewal of it, any or all of the corporate shares or voting rights of shareholders of the Tenant or the Transferee are transferred by sale, assignment, bequest, inheritance, trust, operation of law, or other disposition, or treasury shares be issued so as to result in the control of the Tenant or the Transferee having changed from one person or group of persons to another person or group of persons without the prior written consent of the Landlord, which consent will not be unreasonably withheld, then, and so often as such a change of control occurs, the Landlord will have the right to terminate this lease at any time after such change of control by giving the Tenant 60 days' written notice of such termination.").

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because many leases may have been entered into on the basis of the previous law regarding this issue. The new act should not disturb those arrangements.

Relief from forfeiture

- 9 A tenant has the right to seek relief from forfeiture under the *Law and Equity Act* irrespective of the character of the breach on which the forfeiture is based and despite
- (a) the landlord's exercise of a right of re-entry under a provision implied by section 7 (1) (e) [*provisions implied in leases*] or of a similar right given by the lease, or
 - (b) the landlord's election to treat the lease as terminated under section 5 (2) [*application of contractual rules to leases*].

Comment: 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.”¹⁹⁸ As the concept of forfeiture is relevant to a number of areas of the law, this is a general definition. In commercial leasing, a breach of a provision of a lease does not automatically lead to the termination (forfeiture) of the lease.¹⁹⁹ Section 7 (1) (e) of this draft legislation contains a default implied term relating to when a landlord is entitled to re-enter and terminate a lease. If a lease contains an express provision addressing this issue, then that express provision would govern. 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.²⁰⁰

This section does not reform the law regarding relief from forfeiture.²⁰¹ It merely confirms the entitlement to seek relief under the existing provisions of the LEA.²⁰² The LEA contains two distinct provisions relating to relief from forfeiture. Section 24 gives the court

198. 52 C.J.S. *Landlord and Tenant* § 165 (2003).

199. See LRCBC Report, *supra* note 6 at 97 (“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.” [footnotes omitted]).

200. 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).

201. The consultation paper noted that this subject should be tackled as a separate law reform project, because it affects more than just commercial leasing.

202. *Supra* note 58.

a seemingly²⁰³ wide-ranging jurisdiction to “relieve against all penalties and forfeitures.” Sections 26–28 set out a much narrower ground for relief in cases of breach of provision to insure the premises against damage from fire.

Assignment

- 10** (1) In this section, “**assignment**” includes any disposition, whether consensual or by operation of law, but does not include
- (a) the creation of a sublease, or
 - (b) an assignment made to secure the payment or performance of an obligation, so long as the assignee has not asserted rights associated with an estate in the premises to enforce the security;
- (2) Subject to Part 5, a person who takes an assignment of the interest of a landlord or a tenant has all the rights, and is subject to all the obligations, of the assignor arising under the lease.
- (3) Subsection (2) applies to a right or obligation despite the fact that it
- (a) does not touch, concern or have reference to the premises,
 - (b) became enforceable before the assignment, or
 - (c) relates to something not in existence at the time the lease was created.
- (4) The parties to a lease may agree to modify, vary or exclude the application of subsection (2).
- (5) Unless the parties otherwise agree, no assignor is relieved of liability for any breach of the lease, whether occurring before or after the assignment.
- (6) If the interest of a landlord has been assigned, the tenant may continue to pay rent to the assignor until the landlord or the assignee gives the tenant notice in writing that payment is to be made to the assignee.

Comment: This section is concerned with the enforceability of a lease after the assignment of the landlord’s or the tenant’s interest in that lease to another person. As a result of a lease being conceived of as both a conveyance of property and a commercial con-

203. Some courts have held that this legislation does not expand the court’s original equitable jurisdiction and must be applied only in cases of fraud, accident, surprise, or mistake. *See Emerald Christmas Tree*, *supra* note 47 at 127–29.

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tract, landlords and tenants are bound by both privity of estate and privity of contract.²⁰⁴ This dual relationship undergoes some complex changes when a landlord or a tenant assigns its interest in a lease. Under the traditional rules, the landlord and the tenant retain their privity of contract until the lease is terminated, even if one or the other assigns its interest in the lease.²⁰⁵ 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.²⁰⁶ 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 a result, assignments have caused practical problems because the enforceability of the provisions of the lease ends up turning on what the LRCBC Report characterized as “a confusing web of statutory, common law and equitable rules.”²⁰⁷ The purpose of this section is to replace those confusing rules with a more straightforward approach to enforceability on assignment.

Subsection (1) gives the term “assignment” an extended meaning. In order to appreciate the full scope of this definition, it is important to note that the word “disposition” is itself given a very broad meaning in the *Interpretation Act*.²⁰⁸ This broad meaning is qualified by the exceptions in paragraphs (a) and (b), which relate to subleases and security arrangements.

Subsection (2) contains a broad, general rule covering assignments. Under subsection (2), the assignee has the rights and is subject to the obligations of the assignor. Subsection (2) does not apply in cases covered by Part 5, which deals with an assignment in bankruptcy by the tenant.

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

205. See *Report on Covenants in Commercial Tenancies*, *supra* note 65 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]).

206. 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.”).

207. *Supra* note 6 at 43.

208. *Supra* note 95, s. 29 (“‘dispose’ means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things”).

Subsection (3) is intended to underscore the general rule set out in subsection (2). It lists three older, judge-made rules and provides that the new general rule set out in subsection (2) prevails over them.

Subsection (4) allows the parties to an assignment to modify, vary, or exclude the application of subsection (2). This is consistent with the approach of most of the draft legislation, which favours default over mandatory rules.

Subsection (5) makes it clear that any cause of action against the assignor is not affected merely by the fact of the assignment. Subsection (6) protects a tenant against the possibility of double liability for rent in cases where a tenant makes a rent payment to an assignee landlord without knowledge of the assignment.

Subtenancy

- 11** If the interest of an intermediate landlord arising under a superior lease is merged with the interest of a superior landlord
- (a) if the superior lease is renewed or replaced by another lease between the superior landlord and the same intermediate landlord, the rights and obligations arising under a sublease are the same as if the merger had not occurred, or
 - (b) if the superior lease is not renewed or replaced by another lease between the superior landlord and the same intermediate landlord, the rights and obligations of a subtenant in relation to the superior landlord are the same as if the subtenant were the tenant of the superior landlord and as if the sublease was the lease between them.

Comment: This section addresses the anomalous position at common law of a subtenant after a merger or surrender of an interest in a lease. Merger and surrender are long-standing technical terms in the law of landlord and tenant. The OLRC Report contains a good discussion of the distinction between merger and surrender:²⁰⁹

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.

209. *Supra* note 64 at 37 [footnote omitted].

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When a merger or surrender occurs, there is no longer privity of estate between the parties in a commercial leasing arrangement. This conclusion has the most legal significance when there has previously been a subletting of a lease.

This section relies on specialized terminology, which is defined in section 1. Among these defined terms are “intermediate landlord” (the landlord under a sublease—sometimes referred to in leases as a “sublandlord”), “superior landlord” (the landlord under a superior lease), and “superior lease” (a lease in which the tenant is also an intermediate landlord under a sublease respecting the same premises). A superior landlord may be the owner of the premises, but it need not be. There may be a chain of subleases with respect to a single premises, and the surrender or merger may occur somewhere down that chain. The special terms in this section allow for that possibility to be covered off by the legislation.

For the sake of economy, the section refers only to a “merger” of an interest. Although merger and surrender are separate concepts, and they should not be confused, a surrender of necessity involves a merger.²¹⁰ So, even though this section only refers to mergers, it also applies to cases of surrender.

Paragraph (a) deals with situations in which a tenant (who is also an intermediate landlord under a sublease) surrenders a (superior) lease with a view to obtaining a new (superior) lease from the head (or superior) landlord. At common law, this act would have the effect of releasing any subtenant from its obligations to the tenant. Paragraph (a) is designed to ensure that these obligations will continue and that the new superior lease will become the reversion, without the need for surrender of any sublease. Paragraph (a) substantially carries forward section 8 of the old CTA,²¹¹ but in modern legislative language.

Paragraph (b) addresses a curious facet of the common-law rules on merger and surrender. As Megarry and Wade explained, the destruction of privity of estate between the superior landlord and the head tenant (or intermediate landlord) would have the following consequences at common law:²¹²

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

210. See *Williams & Rhodes*, *supra* note 76, vol. 1 at § 12:5:1 (“Every strict technical surrender is indeed attended with the merger of the estate surrendered. . .”).

211. *Supra* note 2.

212. *Megarry & Wade*, *supra* note 11 at § 15-055.

Legislation has been in place since the nineteenth century to reverse the common law.²¹³ In British Columbia, this legislation is currently located in the PLA.²¹⁴ Paragraph (b) substantially carries forward this legislation. Since the provision only applies to leases, it is logical to place it in a new *Commercial Tenancy Act*, rather than leaving it in a statute of general application like the PLA.

PART 3 – SUMMARY DISPUTE RESOLUTION

Summary dispute resolution

- 12 (1) The court may, on application under the prescribed summary dispute resolution procedure, make one or more of the following orders:
- (a) an order that the landlord or the tenant recover
 - (i) possession of the premises, or
 - (ii) damages or other relief resulting from a breach of a material provision of the lease;
 - (b) an order that the landlord recover
 - (i) arrears of rent,
 - (ii) compensation for use and occupation under section 14 (a) [*compensation from overholding tenant*], or
 - (iii) indemnity under section 14 (b) [*compensation from overholding tenant*];
 - (c) if a landlord or a tenant has not delivered an executed copy of the lease to the other party in accordance with this Act or a provision of an agreement between the parties within 21 days of being given notice in writing, an order that that party deliver an executed copy of the lease to the other party;
 - (d) 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 lease has been validly terminated under section 5 (2) [*application of contractual rules to leases*],

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

214. *Supra* note 57, s. 38 (1).

- (iii) allowing the landlord, or any person acting on the landlord's behalf, access to the premises for the purpose of
 - (A) enabling the landlord to carry out such repairs to the premises that the landlord is obliged to carry out under the lease or an enactment, or
 - (B) enabling the landlord to carry out such repairs to the premises that tenant is obliged to carry out under the lease or an enactment, but has failed to carry out after reasonable notice by the landlord,
 - (iv) for the diversion or abatement of rent under section 6 [*rent reduction or diversion*],
 - (v) for the relief of a tenant under section 24 or 26 of the *Law and Equity Act*, or
 - (vi) permitting the landlord to dispose of the property of a tenant or other person if
 - (A) a tenant has abandoned the premises, or
 - (B) the tenancy has expired or been terminated in accordance with this Act or a lease, and
the tenant or another person has left property behind on the premises and
 - (C) the tenant or other person has failed, after 5 days written notice from the landlord, to remove the property, or
 - (D) if the owner of the goods, whether the tenant or another person, cannot be found with reasonable efforts, or if the owner of the goods is unknown, on such terms as to notice and the application of the proceeds of the disposition as the court considers appropriate.
- (2) In making an order under this section, the court may impose such terms as it considers appropriate.
 - (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.
 - (4) Nothing in the section affects the rights of a landlord and tenant to agree in the lease to submit disputes to arbitration.

Comment: Any landlord–tenant relationship contains the potential for dispute. The fact situations that may produce a dispute are almost limitless. Over the years, commercial leasing law has evolved a number of dispute resolution procedures. The word “procedure” should be understood in a very broad sense here, as some of these procedures involve proceedings in court but others do not. The consultation paper contained a lengthy review of the details of these dispute resolution procedures. For the purposes of this comment, it is sufficient to note that the old CTA²¹⁵ itself contains three distinct court-based dispute resolution procedures. One procedure involves a summary application to the Supreme Court of British Columbia for recovery of possession by the landlord in cases where a tenant remains in possession of the premises after the lease has expired or has otherwise been terminated.²¹⁶ This procedure is frequently used; the other two procedures, in contrast, have much more limited utility. One is a summary application to a registrar of the Supreme Court by a landlord to recover possession in cases in which a tenant makes a specified default—most commonly failing to pay the rent within seven days of it becoming due.²¹⁷ Because this procedure can be stopped at any point in the process by the tenant paying the arrears of rent, it has fallen out of favour. The other procedure involves an application to a justice of the peace by a landlord to recover possession in cases where the tenant was holding possession at a rack-rent and has deserted the premises.²¹⁸ A *rack-rent* is “a very high, excessive, or extortionate rent; a rent (nearly) equal to the annual income obtainable from the property.”²¹⁹ (The provision requires the rent to be at least three-quarters of the yearly value of the premises.) This archaic concept no longer forms part of the commercial leasing landscape in British Columbia, so landlords and tenants cannot even meet the conditions to use this procedure.

The goals of this section of the draft legislation are to replace the disparate dispute resolution procedures currently found in the CTA with a single procedure and to refocus the procedure on disputes that are relevant to current commercial leasing practices. Another important goal is to streamline the procedure and to increase the speed of reaching a resolution of disputes. The procedural provisions that support this section are not included in the draft legislation. They have been set forth in a separate draft regulation, which is found below.

This section is an enabling provision, listing the types of disputes that will be subject to summary resolution under the procedure found in the regulation. The committee’s starting point was the list of orders available under a dispute resolution proposal in the

215. *Supra* note 2.

216. *See* CTA, *ibid.*, ss. 18–24.

217. *See* CTA, *ibid.*, ss. 25–28.

218. *See* CTA, *ibid.*, ss. 5–6.

219. *The New Shorter Oxford English Dictionary*, 4th ed., s.v. “rack-rent.”

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LRCBC Report.²²⁰ A few new items have been added to this core list, and a few have been taken away to correspond to differing recommendations in the final reports. The final list contains four broad groups of items.

Paragraph (1) (a) focuses on recovery of the premises and relief in the face of a breach of a material provision of the lease. This provision replaces the two procedures currently found in the CTA²²¹ with a single, streamlined procedure. In addition to avoiding the two-step procedure that is currently used in the CTA, this procedure allows for the applicant to seek other orders, in addition to the order for possession, unlike the current procedure, which requires multiple applications. Subparagraph (ii) is broad in scope. It could, for instance, cover an issue raised in the consultation paper regarding shopping centre leases. The issue turns on a dispute between a landlord that wishes to demolish or redevelop the shopping centre and a tenant or tenants that wish to remain in possession, in accordance with the terms of their lease or leases. This issue came to a head in a recent case from Manitoba.²²² In the *Unicity Mall* case, 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.²²³ Most of the smaller tenants of the shopping centre agreed with the landlord to terminate their leases, but two tenants wanted to carry on.²²⁴ They argued that the proposed redevelopment would harm their businesses and would be in breach of their leases. They sought an injunction to prevent it.²²⁵ 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.²²⁶

This decision was reversed on appeal.²²⁷ The Court of Appeal 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.²²⁸ Given the deteriorating conditions in the

220. *Supra* note 6 at 148–49.

221. *Supra* note 2, ss. 18–24, 25–28.

222. *Santarsieri (Michael) Inc. v. Unicity Mall Ltd.* (1999), 137 Man. R. (2) 100, (*sub nom. Michael Santarsieri Inc. v. Unicity Mall Ltd.*) 26 R.P.R. (3d) 98 (Q.B.) [*Unicity Mall* cited to R.P.R.].

223. *Ibid.* at paras. 5–6.

224. *Ibid.* at para. 7.

225. *Ibid.* at para. 1.

226. *Ibid.* at para. 46.

227. *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.) [cited to R.P.R.].

228. *Ibid.* at para. 17.

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shopping centre (which was almost entirely vacant by this point), the Court of Appeal concluded that the injunction served no proper purpose.²²⁹

Paragraph (1) (b) deals with the recovery of arrears of rent. Subparagraphs (ii) and (iii) address the analogous situation of compensation from a (former) tenant that remains in possession after the termination of a lease.

Paragraph (1) (c) is aimed at a specific issue. In some cases, a landlord (or a tenant) fails to deliver an executed copy of the lease to the other party. This failure can cause confusion over the content of the parties' agreement. The PLA²³⁰ contains a provision requiring a landlord to deliver a lease in registrable form, unless the parties otherwise agree, but this provision does not completely address the issue raised in paragraph (1) (c).

Paragraph (1) (d) contains a series of orders that relate to typical landlord–tenant disputes. These disputes include disputes over consent to assignment or subletting, repairs, and relief from forfeiture under the LEA.²³¹ In each case, the committee concluded that speed in resolving the dispute is of the essence and, therefore, proceeding under a summary procedure is called for.

PART 4 – RE-ENTRY AND OVERHOLDING

Effecting re-entry

- 13** (1) Subject to subsection (2), a landlord exercising its right of re-entry under a provision implied by section 7 (1) (e) [*provisions implied in leases*] or a similar right given by the lease must engage an enforcement officer to carry out the re-entry.
- (2) Subsection (1) does not apply if the tenant has ceased to occupy the premises at the time re-entry or a similar right given by a lease is exercised.

Comment: Re-entry may be defined as follows:²³²

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

229. *Ibid.* at paras. 26–28.

230. *Supra* note 57, s. 5 (2).

231. *Supra* note 58, ss. 24, 26–28.

232. H. Scott MacDonald, “Non-Payment of Rent: A Defaulting Tenant Under a Commercial Lease,” in *Commercial Leasing Disputes*, *supra* note 166, 2.1 at 2.1.17.

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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.

A simple right to re-entry is included among the implied provisions in section 7 (1) of this draft legislation. This section concerns the procedure for effecting re-entry.

The consultation paper focussed on the self-help nature of re-entry and reviewed earlier proposals for reform.²³³ In the end, the consultation paper tentatively recommended retaining re-entry as a self-help remedy. Even though this proposal leaves the landlord open to some risks, the committee decided that these risks were overcome by the desirability of retaining re-entry as a remedy that may be deployed in a rapid and inexpensive manner.

The consultation paper also proposed requiring a landlord to engage a bailiff to effect re-entry. A modified version of this proposal is implemented by this section. On further deliberation, the committee has decided that this requirement should be limited to cases where the tenant is still in possession when the landlord effects re-entry. If the tenant has abandoned the premises, then the risk of misconduct is comparatively lower. The committee concluded that the rationale for its tentative recommendation was weaker in these circumstances and that landlords should not be required by law to bear additional costs in the face of abandonment by a tenant.

The section uses the phrase “enforcement officer,” which is defined in section 1. An enforcement officer is a person appointed as a court bailiff under the *Sheriff Act*²³⁴ or a bailiff licensed under the *Business Practices and Consumer Protection Act*.²³⁵

Compensation from overholding tenant

- 14** If a tenant continues to occupy the premises after the lease has expired or been terminated in accordance with the lease or this Act, the landlord may recover from the tenant
- (a) compensation for use and occupation of the premises, and
 - (b) indemnity for any liability resulting from the landlord’s inability to deliver vacant possession of the premises to a new tenant or purchaser.

Comment: This section confirms the right of a landlord to receive compensation from a tenant that has remained in occupation of the premises after the lease has been termi-

233. See, e.g., OLRC Report, *supra* note 64 at 168.

234. R.S.B.C. 1996, c. 425.

235. *Supra* note 93.

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nated. In part, this section replaces sections 15–16 of the old CTA,²³⁶ which apply penal sanctions to overholding tenants. These sections were intended to punish overholding tenants by requiring payment of rent “at the rate of double the yearly value of the land” (section 15) or payment of “double the rent or sum which [the tenant] shall otherwise have paid” (section 16). The application of these sections is not as straightforward as similar provisions that sometimes crop up in leases, because the sections contain a convoluted series of conditions to be met before they can be applied and because, given their penal character, they are interpreted very strictly by the courts.²³⁷

Section 14 (a), in essence, restates the current common-law rules on overholding. At common law, a contract is implied when a person occupies a premises without being in a lease with the owner.²³⁸ Under this implied contract, the person is obligated to pay reasonable compensation to the landowner. Technically, this compensation is considered to be in the nature of damages,²³⁹ but practically it can be thought of as being akin to rent. (The compensation is not rent *per se*, since no relationship of landlord and tenant exists between the parties in these circumstances.) One of the conditions for maintaining an action for use and occupation is that a relationship of landlord and tenant existed at one time between the parties,²⁴⁰ so it is primarily (if not exclusively) of use in cases of overholding tenants. Sophisticated landlords often include provisions on overholding in leases. These provisions tend to create a monthly tenancy when a tenant overholds, often at an increased rent.²⁴¹ (The rent increase is intended to act as a disincentive for a tenant to remain in this position.) Since these provisions create a landlord–tenant relationship they are not in conflict with this section of the draft legislation, which applies in the absence of a landlord–tenant relationship.

236. *Supra* note 2.

237. *See Sami's Restaurant Corp. v. W. Hanley & Co.*, 2003 BCSC 1181, [2003] B.C.J. No. 1790 (QL), *aff'd*, 2004 BCCA 157, 36 R.P.R. (4th) 308; *Amadon Properties Ltd. v. Pacific Apparel Inc.* (1990), 13 R.P.R. (2d) 186, 23 A.C.W.S. (3d) 76 (B.C.S.C.).

238. *See Williams & Rhodes, supra* note 76, vol. 1 at § 7:1:7 (“If a person is in occupation without a lease, although the relationship of landlord and tenant will not exist, the law will imply a contract for payment to the landlord of a reasonable amount for the use and occupation of his land.” [citations omitted]).

239. *See* LRCBC Report, *supra* note 6 at 93 (“the landlord’s claim against an overholding tenant is, technically, one for damages” [footnote omitted]).

240. *See Williams & Rhodes, supra* note 76, vol. 1 at § 7:1:7 (“the defendant must have held or occupied the premises as a tenant to the plaintiff; or by his permission or sufferance” [citations omitted]).

241. *See, e.g., Commercial Leasing: Annotated Precedents, supra* note 197 at c. 3, s. 5.10 (“if the Tenant continues to occupy the Leased Premises after the expiration of this Lease without any further written agreement and without objection by the Landlord, the Tenant will be a monthly tenant at a monthly base rent equal to 150% of the monthly instalment of Annual Base Rent”).

In addition to compensation for use and occupation, the section also provides for an indemnity to the landlord for any liability that results from its inability to deliver vacant possession of the premises. This provision is not found in the common law. It may be of use in cases where the landlord suffers a loss to a third party (such as an incoming purchaser or tenant) as a result of the inability to deliver vacant possession of the premises.²⁴² Orders under this section may be obtained by use of the summary dispute resolution procedure.²⁴³

PART 5 – BANKRUPTCY OF TENANT

Introductory comment: This Part carries forward section 29 of the old CTA,²⁴⁴ with a number of reforms. It may seem anomalous for commercial leasing legislation to address issues related to the tenant's bankruptcy, given that bankruptcy and insolvency is a subject that falls within federal legislative jurisdiction.²⁴⁵ The federal Parliament has exercised this jurisdiction by enacting comprehensive bankruptcy legislation, the *Bankruptcy and Insolvency Act*.²⁴⁶ But the BIA provides that, subject to two limited exceptions, "the rights of lessors shall be determined according to the laws of the province in which the leased premises are situated."²⁴⁷ The BIA created this space for provincial legislation in response to a judgment from the 1920s,²⁴⁸ which struck down parts of what, at the time, was a comprehensive federal provision dealing with the bankruptcy of tenants.²⁴⁹ In response, the federal Parliament repealed the entire provision. Almost immediately thereafter, the provinces stepped into the gap and enacted legislation that was substantially the same as the repealed federal provision. British Columbia's legislation is section 29 of the CTA.

As the existence of bankruptcy provisions in provincial commercial leasing legislation is the result, to a large degree, of a historical anomaly, the committee gave some consideration to not carrying forward this provision in a new *Commercial Tenancy Act*. The consequence of such a decision would be to clear the way for Parliament to enact legislation dealing with the bankruptcy of a tenant in the BIA. While such a re-ordering of the legislation structure may be welcome in theory, implementing this plan carries some considerable risks in practice. Chief among those risks is the possibility that the federal gov-

242. See LRCBC Report, *supra* note 6 at 93.

243. See, above, section 12 (1) (b) (ii) and (iii).

244. *Supra* note 2.

245. *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, s. 91 (21), reprinted in R.S.C. 1985, App. II, No. 5.

246. R.S.C. 1985, c. B-3 [BIA].

247. BIA, *ibid.*, s. 146.

248. See *Re Stober* (1923), 4 C.B.R. 34 (Qc. S.C.).

249. See *Bankruptcy Act*, S.C. 1919, c. 36, s. 52.

ernment would not make reform of the BIA a priority, even if British Columbia repealed section 29. This would deprive participants in the commercial leasing sector of legislation that has proved useful.

Nevertheless, section 29 has not been substantially amended since the 1920s, and parts of it are showing their age. This Part contains the committee's reformed legislation dealing with the bankruptcy of a tenant.

Interpretation

- 15** In this Part, section 2 of the *Bankruptcy and Insolvency Act* (Canada) applies.

Comment: This section carries forward section 29 (1) of the old CTA.²⁵⁰ Section 2 of the BIA²⁵¹ contains a large number of defined terms, some of which have special, technical meanings in the bankruptcy process. Adopting these terms for this Part allows for greater economy of drafting and for consistency in interpretation of the provisions of the CTA and the BIA.

Trustee's right to occupy premises

- 16** (1) If a tenant becomes bankrupt, the trustee may retain possession of the premises until the earlier of
- (a) 3 months from the date the trustee assumed the trustee's powers with respect to the tenant's estate, or
 - (b) the expiration of the lease
- on the same terms and conditions as the tenant would have held the premises had the tenant not become a bankrupt.
- (2) Nothing in subsection (1) restricts a landlord from terminating a lease, if the lease contains a provision allowing it to be terminated by the landlord on the bankruptcy of the tenant.
- (3) The court may, on application by a trustee, order a landlord who has terminated a lease due to the tenant's bankruptcy
- (a) to reinstate the lease, if the trustee demonstrates that the reinstatement of the lease is essential to the disposition of the tenant's estate as a going concern, or
 - (b) to permit the trustee to occupy the premises until the earlier of

250. *Supra* note 2.

251. *Supra* note 246.

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(i) 3 months from the date the trustee assumed the trustee's powers with respect to the tenant's estate, or

(ii) the expiration of the lease,

if the trustee demonstrates that the occupancy of the premises is necessary to the administration of the tenant's estate.

Comment: This section corresponds to section 29 (2) of the old CTA,²⁵² with one significant change. The intent is still "to put the trustee in the shoes of the tenant,"²⁵³ as one case characterized it. Subsection (1) implements that intent by carrying forward the provision from section 29 (2) of the old CTA allowing a trustee to retain possession of the premises upon the tenant's bankruptcy. The trustee's right to possession is limited to three months or to the date of expiration of the lease, whichever occurs earlier.

The main change in policy is found in subsection (2). Unlike section 29 (2), which applied "notwithstanding a condition, covenant or agreement in a lease" giving the landlord the right to terminate it on the tenant's bankruptcy, subsection (2) gives legislative support to such provisions in leases. In the committee's view, the general principle that parties should be bound by their bargains should prevail in these circumstances. If the landlord and the tenant have entered into a lease that gives the landlord an option to terminate the lease on the tenant's bankruptcy, then the governing legislation should not remove that right. It is hard to think of another supplier of goods or services that is treated in the way the current legislation treats landlords.

Subsection (2) focuses on leases that provide a landlord with an option to terminate the lease on the bankruptcy of the tenant, as opposed to leases that terminate automatically on the bankruptcy of the tenant. The committee decided that the subsection should have this focus for two reasons, one related to practice, the other to law. First, it is comparatively rare to encounter a lease that terminates automatically on the landlord's bankruptcy. In practice, most leases give the landlord an option to terminate. Second, and perhaps more important, the law already appears to allow for the automatic termination of a lease on the tenant's bankruptcy. This conclusion is said to flow from the Supreme Court of British Columbia's decision in *Hyatt Construction*.²⁵⁴ Since law and practice limit

252. *Supra* note 2.

253. *Raymond, Chabot, Fafard, Gagnon Inc. v. Hyatt Construction Corp.* (1983), 47 C.B.R. (N.S.) 179 at 186, [1983] B.C.J. No. 1740 (S.C.), Spencer J. [*Hyatt Construction* cited to C.B.R.], *rev'd on other grounds* (1984), 51 B.C.L.R. 129, (*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.).

254. *Ibid.* at 186. The *Hyatt Construction* case did not deal with a lease that terminated automatically on the tenant's bankruptcy, but remarked in passing that such leases would be acceptable for the purposes of section 29 (3) of the CTA.

concerns about leases that terminate automatically on a tenant's bankruptcy, subsection (2) is aimed at what is more clearly a problem area.

Subsection (3) provides a mechanism for those cases that do not conform to the general principle set out in subsection (2). Under subsection (3), the tenant's trustee in bankruptcy may apply to the Supreme Court for an order either to reinstate the lease or to permit the trustee to occupy the premises for up to three months. The trustee is required to meet a high standard in obtaining these orders. They are intended to provide for exceptional cases, where maintaining the lease in force or occupying the premises is integral to the disposition of the bankrupt tenant's business.

Disposal of lease

- 17 (1) If a tenant becomes bankrupt and either
- (a) the lease does not provide that the lease terminates on the tenant's bankruptcy, or
 - (b) the landlord does not exercise a right, if any, under the lease to terminate the lease on the tenant's bankruptcy at the time of filing its proof of claim,
- the trustee may dispose of the tenant's interest under the lease for the unexpired term to as full an extent as could have been done by the tenant, had the tenant not become bankrupt.
- (2) A trustee of a bankrupt tenant may surrender possession of the premises to the landlord at any time.
 - (3) A surrender under subsection (2) constitutes a disclaimer of the lease and terminates the liability of the trustee and the bankrupt's estate for the payment of rent accruing after the surrender.

Comment: This section applies to cases where the trustee disposes of the tenant's interest in the lease to a third party (typically by assignment), as opposed to retaining possession of the premises under the terms of the lease. (Cases in which the trustee decides to occupy the premises are the subject of the previous section.) Subsection (1) confirms that the trustee has the right to dispose of the tenant's interest in the lease to the same extent as the tenant could have if it had not gone bankrupt. This subsection is similar to section 29 (3) of the old CTA,²⁵⁵ with a noteworthy exception. Section 29 (3) overrides any provisions in the lease requiring the landlord's consent to an assignment or subletting. Subsection (1) does not contain such an override. Instead, it is consistent with the general tenor of this Part, which is that the bargain made by the tenant will not be altered by the fact of its bankruptcy.

255. *Supra* note 2.

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Subsection (1) also does not carry forward from section 29 (3) the requirement that a transferee of the tenant's interest in the lease "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." This requirement is unnecessary since the vast majority of commercial leases require the landlord's consent to an assignment or subletting. Concerns about the transferee's ability to observe or perform the terms of the lease may be allayed at this stage.

The draft legislation also does not carry forward the landlord's preference for up to three months' arrears of rent found in section 29 (5) of the old CTA. A similar provision in Alberta's legislation²⁵⁶ was struck down as being an unconstitutional intrusion into federal bankruptcy jurisdiction which is in operational conflict with the BIA.²⁵⁷ While this judgment does not necessarily apply to British Columbia (where the courts have shown an inclination to sidestep section 29 (5) and simply apply the BIA)²⁵⁸ there are no compelling policy reasons for carrying forward this preference in a new *Commercial Tenancy Act*.

Subsection (2) carries forward section 29 (4) of the old CTA, which allows the trustee of a bankrupt tenant to surrender possession of the premises to the landlord. Subsection (3) confirms that such a surrender terminates the trustee's liability for rent.

Liability for rent

- 18** (1) Subject to subsection (2), commencing from the date the trustee assumes the trustee's powers with respect to a bankrupt tenant's estate, the trustee must pay rent to the landlord, calculated and payable in accordance with the provisions of the lease, for the longer of
- (a) the period during which the trustee has possession of the premises, or
 - (b) the period the trustee is entitled to possession of the premises, whether that possession or entitlement to possession arises under the lease or under section 17 [*trustee's right to occupy premises*].
- (2) The trustee's liability under subsection (1) for the first month the trustee has, or is entitled to, possession must not exceed the value of the

256. *Landlord's Rights on Bankruptcy Act*, R.S.A. 2000, c. L-5, s. 2 (b) (i).

257. *Principal Plaza Leaseholds Ltd. v. Principal Group Ltd. (Trustee of)*, [1996] 9 W.W.R. 539 at para. 215, 41 Alta. L.R. (3d) 248 (Q.B.).

258. *See Sawridge Manor Ltd. v. Western Canadian Beverage Corp.* (1995), 61 B.C.A.C. 32, 33 C.B.R. (3d) 249 at para. 25 (C.A.), Taylor J.A. (for the court).

bankrupt's property available for distribution, but the trustee is personally liable for rent in respect of the second and succeeding months.

Comment: This section contains a change in the law. Currently, section 29 (7) of the old CTA²⁵⁹ 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.” Section 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. 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 for the use and occupation.”²⁶⁰ So, these two provisions of the old CTA modify the common law by limiting the amount of compensation that would be available to the landlord. British Columbia is alone among Canadian jurisdictions in legislatively capping the personal liability of the trustee,²⁶¹ but the legislation and case law of the majority of the other provinces and territories effectively reaches the same result by limiting the landlord to “claiming occupation rent only from the estate of the bankrupt [tenant].”²⁶²

This section of the draft legislation lifts the cap on the trustee's personal liability, subject to a one-month grace period. The general rule is stated in subsection (1). It provides that the trustee is responsible for *rent* (not *occupation rent*) commencing from the date on which the trustee assumed power with respect to the bankrupt tenant's estate. This general rule is subject to the qualification in subsection (2), which provides that, during the first month in which the trustee has, or is entitled to, possession of the premises, the trustee's liability is limited to the value of the bankrupt tenant's property that is available for distribution.

This section is based on a recommendation found in the LRCBC Report.²⁶³ In the BC Commission's view, the vulnerability of the landlord as a creditor justified imposing personal liability on the trustee.²⁶⁴

259. *Supra* note 2.

260. Lloyd W. Houlden, Geoffrey B. Morawetz, & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, looseleaf, 4th ed., vol. 2 (Toronto: Carswell, 2005) at G§125 (3) [citation omitted].

261. *See* William A.C. Rowe, “The Trustee in Bankruptcy's Liability for Occupation Rent” (1985) 51 C.B.R. (N.S.) 206 at 209.

262. *Ibid.* at 211.

263. *Supra* note 6.

264. *Ibid.* at 82 [footnote omitted].

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[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, this approach strikes a superior balance between the interests of the parties.

Liquidation sales

- 19** A provision in a lease that prohibits the sale or liquidation of a bankrupt tenant's property on the premises applies to the trustee.

Comment: Liquidation sales can be a point of conflict between trustees and landlords. Such sales are often an effective way to realize value out of the bankrupt tenant's estate. But they can also create an impression of desperation about a property and cause friction in multi-tenant properties. Landlords often insert a provision into the lease restricting or prohibiting tenants from holding liquidation sales.²⁶⁵ It is not clear whether, under the current law, such provisions would bind a trustee of a bankrupt tenant. This section of the draft legislation is intended to remove all doubts over whether such provisions are binding on trustees. It is consistent with other sections in this Part which give support to the agreements reached in the lease and provide that they will not be overridden as a result of the tenant's bankruptcy.

PART 6 – GENERAL

Offence Act

- 20** Section 5 of the *Offence Act* does not apply to this Act or the regulations.

Comment: Section 5 of the *Offence Act*²⁶⁶ provides that “[a] person who contravenes an enactment by doing an act that it forbids, or omitting to do an act that it requires to be done, commits an offence against the enactment.” A general penalty created in section 4 of the *Offence Act* applies if the enactment does not contain specific penalties.²⁶⁷ Many

265. See, e.g., *Commercial Leasing: Annotated Precedents*, supra note 197 at c. 2B, s. 6.1 (b) (“The Tenant will not . . . unless expressly consented to by the landlord, conduct on the Leased Premises an auction sale, or any ‘distress sale,’ ‘bankruptcy sale,’ ‘going out of business sale,’ ‘bulk sale,’ or any other sale designed to convey to the public that business operations are to be discontinued. . .”).

266. R.S.B.C. 1996, c. 338.

267. The general penalty is a fine of not more than \$2000 or imprisonment for not more than 6 months, or both.

enactments oust the application of section 5 of the *Offence Act* in a manner similar to this section in the draft legislation. The rationale for such a section is that a breach of a provision of this act or its regulations should not subject the person in breach to quasi-criminal penalties.

Giving or serving documents

- 21** (1) All documents that are required or permitted under this Act or the regulations to be given to or served on a landlord, tenant or subtenant may be given or served in accordance with a method provided for in the lease.
- (2) If the lease does not provide for giving or serving a document, or if the document is to be given or served to a person who is not a landlord, tenant or subtenant, the document may be given or served in any one of the following ways:
- (a) by leaving a copy with the person;
 - (b) by sending a copy by ordinary mail or registered mail to the address where the person carries on business;
 - (c) by transmitting a copy to a fax number provided as an address for service by the person to be served;
 - (d) if the person is a tenant or subtenant,
 - (i) by leaving a copy at the premises with a person who has apparent control or management of the tenant's or subtenant's business,
 - (ii) by leaving a copy in a mail box or mail slot at the premises,
 - (iii) by sending a copy by ordinary mail or registered mail to the address of the premises, or
 - (iv) by attaching a copy to a door or other conspicuous place at the premises;
 - (e) if the person is a landlord,
 - (i) by leaving a copy with the agent of the landlord,
 - (ii) by leaving a copy in a mail box or mail slot at the address where the landlord carries on business as a landlord;
 - (f) as ordered by the court;
 - (g) by any other means of service prescribed in the regulations.

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Comment: This section is modelled on section 88 of the RTA.²⁶⁸ Its intent is to provide a comprehensive and flexible means for giving notices and other documents. Subsection (1) makes it clear that the notice provision of a commercial lease prevails over the legislation. If the parties have agreed to a method of giving notice, then the legislation should not disturb that arrangement. Subsection (2) is a default provision that lists a variety of means of giving notice. Paragraphs (a) to (c) set out methods that may be used with any person. Paragraphs (d) and (e) set out additional methods for tenants and landlords. Paragraphs (f) and (g) allow for other methods that may be appropriate, as ordered by the court or prescribed by regulation.

Receipt of documents

22 A document given or served in accordance with section 21 (2) [*giving or serving documents*] is deemed to be received as follows:

- (a) if given or served by mail, on the 5th day after it is mailed;
- (b) if given or served by fax, on the 3rd day after it is faxed;
- (c) if given or served by attaching a copy of the document to a door or other place, on the 3rd day after it is attached;
- (d) if given or served by leaving a copy of the document in a mail box or mail slot, on the 3rd day after it is left.

Comment: This section goes hand-in-hand with the previous section. It is intended to remove any doubts about whether a notice that was given in accordance with the act was actually received by the intended recipient. These doubts are resolved by declaring that the notice is deemed to be received by the recipient as of the time set out in this section. This section is modelled on an equivalent section in the RTA.²⁶⁹

Power to make regulations

- 23** (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.
- (2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:
- (a) exempting leases or premises from all or part of this Act;
 - (b) respecting leases, including prescribing
 - (i) standard terms that must be included in every lease, and

²⁶⁸. *Supra* note 52.

²⁶⁹. *Ibid.*, s. 90.

- (ii) formal requirements for leases;
- (c) respecting rights and obligations of landlords and tenants that are not inconsistent with this Act, and providing that those rights and obligations must be terms of leases;
- (d) defining a word or phrase used but not defined in this Act;
- (e) respecting the summary dispute resolution procedure for the purpose of Part 3;
- (f) respecting any form, notice or document referred to in this Act;
- (g) respecting means of giving or serving documents under this Act;
- (h) prescribing any form, notice or document for the purpose of the summary dispute resolution procedure.

Comment: Most contemporary statutes include a section authorizing the Lieutenant Governor in Council (the provincial cabinet) to make regulations on a variety of subjects. These subjects tend to involve procedural or technical issues, which are better and quicker addressed through regulation than by passing amending legislation. Subsection (1) is a standard provision found in most BC statutes.²⁷⁰ Subsection (2) contains a list of specific topics on which regulations may be made. Many of these topics are included in case the need for regulations arises in the future. But paragraph (2) (e) is worthy of note, because the proposed summary dispute resolution procedure is an integral part of the reforms proposed in this report. A draft regulation is included immediately after this draft legislation.

270. See *Interpretation Act*, *supra* note 95, s. 41 (1) (“If an enactment provides that the Lieutenant Governor in Council or any other person may make regulations, the enactment must be construed as empowering the Lieutenant Governor in Council or that other person, for the purpose of carrying out the enactment according to its intent, to (a) make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it, (b) provide for administrative and procedural matters for which no express, or only partial, provision has been made, (c) limit the application of a regulation in time or place or both, (d) prescribe the amount of a fee authorized by the enactment, (e) provide, for a regulation made by or with the approval of the Lieutenant Governor in Council, that its contravention constitutes an offence, and (f) provide that a person who is guilty of an offence created under paragraph (e) is liable to a penalty not greater than the penalties provided in the *Offence Act*.”).

PART 7 – TRANSITION, REPEAL AND CONSEQUENTIAL AND RELATED AMENDMENTS

Transition

Transition

- 24** Subject to section 8 (4) [*landlord's consent to assignment or sublease not to be unreasonably withheld*], this Act applies to leases entered into before or after this Act comes into force.

Comment: Much of this proposed act is remedial in nature. In the committee's view, it would be to the benefit of participants in the commercial leasing sector to have access to the reforms contained in this act (such as the summary dispute resolution procedure) as soon as the act comes into force. The other alternatives that were considered were providing a transitional period or providing that the legislation would only apply to leases entered into after the legislation came into force. A transitional period of six months to a year is often employed when the new legislation changes the nature of certain transactions, imposes new procedures or filing requirements, or affects the ways in which participants in a given sector interact with the government or a regulator. Having legislation apply only to transactions entered into after the legislation comes into force is appropriate when the legislation fundamentally alters the premises on which those transactions were negotiated and concluded. Neither consideration applies with overriding force to the new *Commercial Tenancy Act*, except for the new implied provision requiring that a landlord not unreasonably withhold its consent to a request for an assignment or a subletting of the leased premises. A special transitional rule for that case is set out in section 8, above.

Repeal

- 25** (1) *The title of the Commercial Tenancy Act, R.S.B.C. 1996, c. 57, is repealed and the following substituted*

APPORTIONMENT ACT .

- (2) *Sections 10–13 of the Commercial Tenancy Act are renumbered sections 1–4.*

- (3) *Sections 1–9 and 14–30 of the Commercial Tenancy Act are repealed.*

Comment: The old CTA²⁷¹ will be repealed and replaced with the new *Commercial Tenancy Act* upon the new act's coming into force. This section achieves that result for the

271. *Supra* note 2.

bulk of the CTA. It preserves sections 10 to 13 under the new title of *Apportionment Act*. The preserved sections, of course, deal with apportionment. As a periodic payment, rent may be divided into pieces by unforeseen events, such as the death of the landlord or the tenant, an assignment or other devolution of interest, re-entry by the landlord, or surrender of the lease. The common law had no means of apportioning rent payments in these circumstances, resulting in a windfall for the tenant if rent was to be paid in arrears. So, legislation was passed to address this problem. In British Columbia, this legislation is found in sections 10 to 13 of the CTA, and it is flawed in many respects. The consultation paper tentatively recommended addressing those flaws in a separate law reform project, because the legislation applies more broadly than may be expected. In addition to rent, sections 10 to 13 also cover dividends, annuities, and other sorts of periodic payments. This section in the draft legislation is meant to preserve the apportionment provisions intact until such time as they may be addressed in a dedicated law reform project.

Consequential and Related Amendments

Law and Equity Act

26 Section 25 (1) of the Law and Equity Act, R.S.B.C. 1996, c. 253, is amended

(a) in paragraph (a) by striking out “or”,

(b) in paragraph (b) by adding “or” after “land,” and

(c) by adding the following paragraph

(c) a lease to which the *Commercial Tenancy Act* applies, .

Comment: Section 25 of the LEA²⁷² deals with relief against acceleration provisions. An acceleration provision is a type of penalty that requires immediate payment of all of a remaining series of periodic payments as a consequence of a specified breach. Acceleration provisions commonly appear in all sorts of agreements that provide for future payments of some kind. In the commercial leasing sector, 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.”²⁷³ For example, a lease may provide that the landlord has the option of requiring the tenant to pay all remaining rental payments if a tenant does not make a rental payment and fails to remedy this breach within a specified time. 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.²⁷⁴ The LEA contains a section that

272. *Supra* note 58.

273. *Supra* note 6 at 66.

274. *Ibid.*

grants the court a wide-ranging jurisdiction to relieve against penalties and forfeitures,²⁷⁵ but a decision of the Court of Appeal has held that this section does not apply to acceleration provisions.²⁷⁶ Shortly after this decision was rendered, section 25 was enacted, specifically to deal with acceleration provisions. But section 25 is limited in scope; it only applies to mortgages and agreements for sale of land. The courts have held that section 25 cannot be extended to cover other types of agreements, and that acceleration provisions in those agreements cannot be relieved against under section 24.²⁷⁷ In the committee's view, the protection afforded by section 25 of the LEA should be extended to commercial leases. 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."²⁷⁸

27 Section 59 (2) is amended

(a) by repealing paragraphs (a) and (b) and substituting the following:

- (a) a lease or agreement for lease for a term that, at its beginning, does not exceed 3 years if there is actual occupation under the lease or agreement, and, if an option or covenant for renewal is included in the lease or agreement, the option or covenant must not extend the total lease periods beyond 3 years, or; **and**

(b) by renumbering paragraph (c) as paragraph (b).

Comment: This proposed amendment to section 59 of the LEA²⁷⁹ deals with the requirement of leases to be in writing. The committee considered this topic in some depth in the consultation paper, starting with the fundamental question of whether a writing requirement is still needed at all.

The writing requirement—which applies not just to leases, but to all agreements respecting land or an interest in land—first appeared in a seventeenth-century English statute called the *Statute of Frauds*.²⁸⁰ 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

275. *Supra* note 58, s. 24.

276. *Emerald Christmas Tree*, *supra* note 47.

277. *See Spetifore Estate v. S. Spetifore and Sons Ltd.* (1998), 80 A.C.W.S. (3d) 432 [1998] B.C.J. No. 1470 at para. 42, (S.C.) (QL), Coultas J., *aff'd*, 1999 BCCA 158, [1999] B.C.J. No. 776 (QL).

278. *Supra* note 6 at 68.

279. *Supra* note 58.

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

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Perjury.”²⁸¹ It is now widely conceded that the legislation no longer serves this original purpose,²⁸² but that does not mean that it has outlived its utility. As the Law Reform Commission of British Columbia pointed out, the legislation still advances the following three policy goals: (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.²⁸³ It is also worthwhile to note that repealing the writing requirement for commercial leases alone would isolate them from all other types of real estate transactions, potentially creating confusion in the mind of the public.

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.²⁸⁴ 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.

Although the committee has concluded that the writing requirement should be retained, it is also recommending making some refinements to it. These refinements relate to the types of commercial leases that are exempt from the writing requirement. The relevant part of section 59 of the LEA currently reads as follows:

281. *Ibid.*, preamble.

282. See Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (LRC 33) (Vancouver: The Commission, 1977) 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]).

283. *Ibid.* at 50–53.

284. 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).

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- (2) This section does not apply to
- (a) a contract to grant a lease of land for a term of 3 years or less,
 - (b) a grant of a lease of land for a term of 3 years or less, or
 - (c) a guarantee or indemnity arising by operation of law or imposed by statute.

Paragraphs (a) and (b) set out the types of leases that are not subject to the writing requirement. (Paragraph (c) is not relevant for the purposes of this report.) The reference to “a term of three years or less” can be traced back to seventeenth-century *Statute of Frauds*. It is worthwhile retaining this time frame for more than historical reasons. Although there is an element of arbitrariness to any period that would be used to mark off the upper limit of the exemption from the writing requirement, three years seems to be as good a dividing line as any between informal and enduring arrangements. Further, the three-year term is the same time period used in connection with registration of title under the LTA.²⁸⁵ But, section 59 uses language that is similar to, but not the same, as the language used in the LTA. The purpose of this proposed amendment to section 59 is to harmonize its language with the LTA. The new paragraph (a) draws on 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” in the LTA²⁸⁶ to achieve this result. In addition to clearing up inconsistencies between the two Acts, this proposed amendment also resolves an issue that is left open under the current section 59. Currently, it is not clear whether the “three-year term” referred to in section 59 includes any renewal of that term that is provided for in the lease. The British Columbia courts have not squarely faced this issue, but it has been inconclusively touched on in one case before an administrative tribunal.²⁸⁷ The LTA, on the other hand, contains a clear resolution of this issue, providing that “if an option or covenant for renewal is included in the lease or agreement, the option or covenant must not extend the total lease periods beyond 3 years.” Another matter raised by the wording of the LTA is actual occupation under the lease. This expression has been interpreted in the case law²⁸⁸ as requiring something more than the right to

285. *Supra* note 94, s. 23 (2) (d) (“An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following: . . . (d) a lease or agreement for lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement. . .”).

286. *Ibid.*, s. 1.

287. *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).

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

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possession of the leased premises.²⁸⁹ 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.”²⁹⁰ In the context of an agricultural lease, the following elements were cited as concrete examples of what “actual occupation” means:²⁹¹

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 is 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.

Property Law Act

28 Section 38 of the Property Law Act, R.S.B.C. 1996, c. 377, is repealed.

Comment: The substance of section 38 of the PLA²⁹² is incorporated into section 11 (b) of the draft legislation. Since this provision, which deals with the rights of subtenants, only applies to commercial leases, it makes more sense to consolidate it with the main commercial leasing statute for the province, rather than to leave it in a statute of general application.

Rent Distress Act

29 The Rent Distress Act, R.S.B.C. 1996, c. 403, is amended by adding the following sections:

Payment by execution creditor of rent before removal of chattels taken in execution

- 6.1** 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

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

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

291. *Ibid.* at para. 31.

292. *Supra* note 57.

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.

Rent in arrear on a lease expired may be distrained for after determination of lease

6.2 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

6.3 Distress under section 6.2 [*rent in arrear on a lease expired may be distrained for after determination of lease*] 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.

Comment: This section is a consequential amendment that flows from the decisions to repeal the old CTA²⁹³ and replace it with a new act and to leave the issue of distress for rent out of the draft legislation included with this report.²⁹⁴ British Columbia's main statute addressing rent distress is the RDA,²⁹⁵ but a few sections dealing with that subject were found in the old CTA. Since this report is not recommending any changes at this time to the law of distress, it is necessary to preserve these three sections, or the law would inadvertently be changed upon the repeal of the old CTA. The first section deals with the interaction of distress for rent with a remedy available to a judgment creditor. Under the *Court Order Enforcement Act*,²⁹⁶ a creditor may enforce a judgment for money against a debtor by issuing a writ of execution, which directs the sheriff to seize the debtor's per-

293. *Supra* note 2.

294. *See*, above, Part One, section VI.

295. *Supra* note 54.

296. R.S.B.C. 1996, c. 78.

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sonal property, so that property may be sold to satisfy the debt. This section requires the judgment creditor to first pay to the debtor's landlord any amount owing for arrears of rent, up to one year's arrears, before the judgment is enforced by writ of execution. In effect, the section creates a preference for a commercial landlord, of up to one year's arrears of rent, in execution proceedings. The second and third sections are concerned with employing distress for rent after a lease has come to an end. At common law, a landlord was unable to distrain against the goods of an overholding tenant—that is, a tenant that remained in possession of the leased premises after the lease has terminated.²⁹⁷ This section reverses the common law rule. The section after it places a time limit on when distress may be exercised against an overholding tenant. Under the legislation, distress is only available for six months after the date on which the lease was terminated. Similar provisions creating a six-month period after termination of a commercial lease in which distress for rent may be carried out are found in almost all other Canadian common-law jurisdictions.²⁹⁸

The proposed location for these sections is after a series of sections dealing with exemptions and before a section concerning the sale of distrained goods. This location is appropriate for the relocated CTA sections, but it is not absolutely necessary that they be placed here. The RDA is not as carefully organized as a modern statute, so a case could be made for locating these sections almost anywhere in the RDA.

The inclusion of these sections among the consequential amendments required by the draft legislation should not be taken as the committee's endorsement of their substance or drafting.

Commencement

30 This Act comes into force by regulation of the Lieutenant Governor in Council.

Comment: Self-explanatory.

297. See *Williams & Rhodes*, *supra* note 76, vol. 1 at § 8:1:2.

298. Saskatchewan: *The Landlord and Tenant Act*, *supra* note 193, s. 20; Manitoba: *The Landlord and Tenant Act*, *supra* note 193, s. 30; Ontario: *Commercial Tenancies Act*, *supra* note 193, s. 41; New Brunswick: *Landlord and Tenant Act*, *supra* note 193, s. 21; Prince Edward Island: *Landlord and Tenant Act*, *supra* note 193, s. 26; Nova Scotia: *Tenancies and Distress for Rent Act*, R.S.N.S. 1989, c. 464, s. 15; Yukon: *Landlord and Tenant Act*, R.S.Y. 2002, *supra* note 193, s. 18; Northwest Territories and Nunavut: *Commercial Tenancies Act*, *supra* note 193, s. 18.

**COMMERCIAL TENANCY ACT SUMMARY DISPUTE
RESOLUTION PROCEDURE REGULATION**

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Object

- 1 The object of this summary dispute resolution procedure is to provide a speedier and less expensive determination of a number of disputes that commonly arise with respect to commercial leases.

Comment: The enabling provision for the summary dispute resolution procedure is set out in section 12 of the draft legislation, above. The procedure is contained in this regulation. This approach is a departure from that taken in the old CTA,²⁹⁹ which contains relatively detailed procedural provisions relating to two distinct dispute resolution mechanisms.³⁰⁰ There are some advantages to incorporating procedural rules directly within the

299. *Supra* note 2.

300. *Ibid.*, ss. 18–24, 25–28.

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governing statute. 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 Court³⁰¹ 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. But these advantages are outweighed by the disadvantages of incorporating procedural provisions in the statute. It is comparatively difficult to amend legislation and, as a result, procedural rules set out in 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. Incorporating procedural provisions would also make the legislation much longer, and would run counter to a clear trend in favour of locating procedural provisions in regulations. This draft regulation could be adopted under the *Commercial Tenancy Act*, or it could be incorporated in a future version of the Rules of Court.³⁰²

This section announces the objects and goals of the draft regulation, clearly placing the emphasis on speed in resolving commercial leasing disputes. The reason for this emphasis on speed is explained partly by the current state of dispute resolution under the CTA. This point is thrown into sharp relief by briefly summarizing the two main dispute resolution procedures in the old CTA.

Sections 18–24 of the CTA 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.³⁰³ The steps required to regain possession from an overholding tenant are somewhat complex, but they must be followed very closely. There are four “preconditions to a landlord’s claim

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

302. As this report was nearing completion, the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [Supreme Court Civil Rules] were promulgated by the Lieutenant Governor in Council. The Supreme Court Civil Rules are slated to come into force after the publication of this report—on 1 July 2010. The drafting of this report was too far along and the deadline for its completion was too near to allow the committee to completely revise this regulation. An effort has been made to highlight issues and terminology that would require attention in the transition from the Rules of Court to the Supreme Court Civil Rules. Where appropriate, editorial comments set off in italics and brackets are included in the commentary that follows.

303. CTA, *supra* note 2, s. 18 (1). See also Olson, *supra* note 4 at § APP.D.A.

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for relief” that must be fulfilled.³⁰⁴ 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.³⁰⁵ This initial application used to be *ex parte*, but a recent decision³⁰⁶ 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.

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 premises. 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.

In part, the speed in dispute resolution promised by the new procedure can be achieved by eliminating the cumbersome, repetitive steps contained in the old CTA procedures. The procedure set out in this draft regulation is also much more in tune with current court procedures. Finally, this draft regulation limits the use of certain procedures and shortens certain time limits.

304. Olson, *ibid.* at § APP.D.A.2 (“(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 (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”).

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

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

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Interpretation

- 2 (1) In this regulation:
- “**Act**” means the *Commercial Tenancy Act*;
- “**court**” means the Supreme Court;
- “**petitioner**” means a person who files a petition under section 11 [*petition*];
- “**respondent**” means a person who files a response to a petition.
- (2) A reference to a rule in this regulation is a reference to that rule in the Rules of Court.

Comment: Self-explanatory.

Application

- 3 (1) Subject to subsection (2), this regulation applies to the disputes listed in section 12 of the Act involving leases entered into before or after this regulation comes into force.
- (2) This regulation does not apply to proceedings commenced before this regulation comes into force.

Comment: This section contains a transitional rule for the new procedure. Any proceedings commenced under one of the old CTA³⁰⁷ procedures—or under any other procedure—before this regulation comes into force will be continued under that old procedure even after this regulation comes into force. In all other cases, the new procedure will apply, even if the lease at issue was entered into before this regulation comes into force. In the committee’s view, this approach to transition is appropriate because the new procedure contains advantages not found in any of the old procedures and is unlikely to prejudice anyone who has not actually commenced proceedings under one of the old procedures.

Conflicts with Rules of Court

- 4 (1) Except as provided by this regulation, the *Rules of Court* apply to all applications under the Act and this regulation.
- (2) In the event of a conflict between this regulation and the *Rules of Court*, this regulation applies.

307. *Supra* note 2.

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Comment: This section is intended to resolve conflicts between this draft regulation and the Rules of Court.³⁰⁸ The Rules of Court contain a large number of detailed requirements governing proceedings in the Supreme Court. Under this section, these provisions of the Rules of Court supplement the draft regulation by providing guidance in those areas where the regulation is silent. Those subjects that the regulation expressly addresses are governed by the regulation, despite any contrary provisions in the Rules of Court.

Court may dispense

- 5 The court may dispense with compliance with the whole or any part of this regulation if the court considers it just and convenient to do so.

Comment: The purpose of this section is to give the court the flexibility to respond to issues that may arise in individual cases. No set of rules can hope to cover all variations that may occur in practice. This section confirms that the court always has the power to adjust the application of the regulation to do justice where the case requires it.

The phrase “just and convenient” crops up in a few places in the Rules of Court, notably in Rule 15 (5) (a), which deals with adding a party to the proceedings. [*Rule 6-2 (7) of the Supreme Court Civil Rules is the equivalent of Rule 15 (5) (a), and it retains the phrase “just and convenient.”*] The phrase has been considered in a stream of court cases in connection with that rule. These cases tend to emphasize the wide-ranging nature of these terms and the undesirability of confining them within narrow limits.³⁰⁹ It is clear that a proposed action is not “just and convenient” if it causes prejudice to a party.³¹⁰ Some cases have emphasized other factors in addition to prejudice, such as the cost and delay that could result from applying the rule.³¹¹

Venue

- 6 (1) Unless the court otherwise orders, every proceeding under this regulation must be commenced,

308. *Supra* note 301.

309. *See, e.g., Lui v. West Granville Manor Ltd.*, [1987] 4 W.W.R. 49, 11 B.C.L.R. (2d) 273 at 303 (C.A.), Lambert J.A. (“I do not think it is desirable to try to be more precise. The interests of justice and convenience must govern, and those interests tend to suffer when the guidelines for the exercise of judgment under the rules become narrowly defined.”).

310. *See, e.g., Bank of Montreal v. Ricketts* (1990), 68 D.L.R. (4th) 716, 44 B.C.L.R. (2d) 95 at 109–10 (C.A.), Locke J.A.

311. *See Court of Milan Bankruptcy Proceedings v. Yorkton Securities Inc.*, 1999 BCCA 774, (*sub nom. CO. CE. FIN srl (Bankrupt) v. Yorkton Securities Inc.*) 132 B.C.A.C. 67 at para. 18, Prowse J.A.

- (a) if the premises that is the subject of the proceeding is located in a municipality and there is a registry of the court located in that municipality, at that registry, or
- (b) if the premises that is the subject of the proceeding is not located in a municipality or, if it is located in a municipality but there is no registry of the court located in that municipality, at any registry located in the judicial district in which the land is located,
- and all applications in the proceedings must be heard at the location of that registry.
- (2) For the purposes of subsection (1), the Vancouver and New Westminster registries are deemed to be the same registry.
- (3) If the subject of a proceeding is more than one parcel of land, each of which may be closer to different registries of the court, the party commencing the proceeding has the right to decide in which of those registries to commence the proceeding.
- (4) This section does not apply if the parties agree that the proceeding may be commenced at a registry other than the registry referred to in subsection (1) or (3).

Comment: This section is based on section 21 of the LEA.³¹² Section 21 applies to foreclosure proceedings (involving mortgages or agreements for sale) and to proceedings under the *Builders Lien Act*.³¹³ The rationale for this section is that proceedings involving land should be commenced at a local venue—that is, at the registry of the court that is nearest to the land. This is required to limit the possibility of prejudice to a party (most likely, the tenant) that may flow from having to respond to proceedings commenced at a far distance from the land, as well as limiting the cost involved in defending such proceedings.³¹⁴ The section permits the local venue rule to be varied by order of the court or agreement of the parties. The court has the discretion to order that proceedings incorrectly commenced at one registry be transferred to the correct registry.³¹⁵

312. *Supra* note 58.

313. *See Builders Lien Act*, S.B.C. 1997, c. 45, s. 27.

314. *See Bank of Nova Scotia v. Sloan*, [1997] B.C.J. No. 2954 at para. 34, 76 A.C.W.S. (3d) 837 (S.C.).

315. *See Keith Dahlen Construction Ltd. v. Zahara*, 2004 BCSC 686, 35 C.L.R. (3d) 307.

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Election to use summary procedure

- 7 This regulation applies to an application authorized by the Act if an endorsement in the prescribed form is added or attached to the petition or response.

Comment: This section (and many of the sections in this draft regulation) is inspired by Rule 66, the fast track litigation rule. Rule 66 has generally been positively received, though there has been some criticism of certain aspects of the rule.³¹⁶ This regulation employs an opt-in procedure, similar to Rule 66. All that is required to opt into the summary procedure is to include an endorsement on the petition or response. The form of endorsement will be prescribed; it should be similar in nature to Form 137, which is used in connection with Rule 66. Proceedings not commenced under this regulation, of course, would be subject to the court's general procedure. *[Rule 66 has not been retained in the Supreme Court Civil Rules; instead, a new fast-track procedure for claims where the amount in issue is less than \$100 000 has been adopted. There are a number of similarities between the new Rule 15-1 and the former Rule 66. Given the nature of the borrowings from Rule 66, the transition should not greatly affect this draft regulation.]*

When regulation ceases to apply

- 8 This regulation ceases to apply to a proceeding if
- (a) the parties to the proceeding file a consent order to that effect, or
 - (b) the court, on its own motion or on the application of any party, so orders.

Comment: This section confirms that the parties may agree to opt out of the procedure and use the court's general procedure. This section also confirms that the court (which, in any event, always has the inherent jurisdiction to control its procedure) may order that this regulation no longer applies to a proceeding. The next section contains considerations for the court to take into account in making an order under subsection (b).

Considerations of court

- 9 In exercising its discretion under subsection 8 (b), the court must take into account
- (a) the likelihood that the proceeding can be resolved in a timely manner, consistent with the object of this regulation, and
 - (b) whether it is reasonable in the circumstances to continue the proceeding under this regulation.

316. See David Roberts, "Rule 66: A Good Start" (1998) 56 Advocate 725.

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Comment: This regulation places significant limitations on the parties' ability to use certain procedures. It also requires adherence to strict time limits. Complying with these rules may be difficult or not appropriate in certain cases, even if the parties believe that the case should come within the scope of the regulation. The court may take these factors into account, along with the overall concern with speed, in deciding whether proceedings should continue under this regulation.

Style of proceeding

- 10** The style of a proceeding under this regulation must include the words "Subject to the *Commercial Tenancy Act Summary Dispute Resolution Procedure Regulation*" immediately below the listed parties.

Comment: This requirement is included for the sake of clarity and administrative efficiency.

Petition

- 11** A person wishing to bring an application under this regulation must file a petition in the form set out in Schedule 1.

Comment: This section deals with how to commence proceedings under this draft regulation. Proceedings are commenced by petition, as they are under the old CTA's dispute resolution procedures.³¹⁷ In general terms, proceedings in the Supreme Court of British Columbia are commenced either by writ of summons or by originating application. Most proceedings that are brought by originating application are commenced by petition. It is appropriate for proceedings under this draft regulation to be commenced by petition. Proceeding by way of petition tends to be quicker than proceeding by way of writ of summons. This is due, in part, to limiting the types of procedures that may be used in proceedings commenced by petition. This draft regulation also relies on limiting procedures in order to attain speed in dispute resolution. *[Rules 16-1 (5)–(23) of the Supreme Court Civil Rules contain a number of detailed requirements for proceeding by petition that are not found in the current Rules of Court. A major transitional issue for the draft regulation is the extent to which these requirements should apply. A balance will have to be struck between this draft regulation's purpose, which is to emphasize speed in dispute resolution, and the need for these requirements to preserve consistency in proceedings and to facilitate administration of the courts. See, also, section 15, below, which incorporates by reference the provisions of current Rule 51A. There is some overlap between Rule 51A and Rule 16-1.]*

317. *Supra* note 2, ss. 18–24, 25–28. See also Rules of Court, *supra* note 301, r. 10 (1) (a), (3).

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The section refers to “Schedule 1” as the source of the form of petition for use as part of the summary procedure. This schedule is not included as part of this draft regulation. When the draft regulation is implemented a form can be attached. It should be modelled on the form of petition that is in use under the Rules of Court.

Service

- 12** (1) Unless the court orders otherwise, a copy of the petition and of each affidavit in support must be served on all persons whose interests may be affected by the order sought.
- (2) Service may be effected in any manner permitted by section 21 of the Act.

Comment: Section 21 of the draft act, above, sets out a list of methods for giving or serving documents. Note that section 21 is more generous in the methods of permissible service than the Rules of Court, and should serve to enhance the speed of dispute resolution under this draft regulation.

Response

- 13** A person who has been served with a copy of a filed petition under section 12 [*service*] and who wishes to receive notice of the time and date of the hearing of the petition or to respond to it must, deliver to the petitioner 2 copies, and to every other party of record one copy, of
- (a) a response in the prescribed form, and
- (b) each affidavit on which the respondent intends to rely.

Comment: This section sets out the requirements for responding to a petition under this draft regulation. These requirements are similar to what is required under the Rules of Court.

Time for response

- 14** A respondent must deliver the documents referred to in section 13 [*response*] on or before the 4th day after the date on which the respondent entered an appearance.

Comment: The time for response under this section is shorter than the time allowed under the Rules of Court.³¹⁸

318. See *ibid.*, r. 10 (6) (time for response on or before the eighth day after date on which respondent entered appearance).

Reply by petitioner

- 15** A petitioner who wishes to respond to any document provided under section 13 *[response]* must, no later than the date on which the notice of hearing is delivered to the respondent in accordance with Rule 51A, deliver any affidavits in reply to each respondent who delivered a response under section 13.

Comment: A reply is not required. If a petition does wish to reply, then the reply must respond to a matter raised in the respondent's response or affidavit in support. Rule 51A governs setting down applications for a hearing in court. *[Rule 51A has not been carried forward in the Supreme Court Civil Rules. Equivalent rules are located in Rule 16-1 for petition proceedings.]*

No additional affidavits

- 16** Unless all parties of record consent, a party must not deliver any affidavits additional to those delivered under sections 12 *[service]*, 13 *[response]* and 15 *[reply by petitioner]*.

Comment: The draft regulation contemplates calling evidence by affidavit, rather than in-person testimony. This section limits the affidavits that may be relied on to those delivered in connection with the petition, response, and reply (if there is a reply).

Orders

- 17** In the hearing of a petition under this regulation the court may make any order under Rule 18A or Rule 52.

Comment: This section gives the court authorization to make a wide range of orders, drawn from those that may be made in a summary trial (Rule 18A) or a chambers application (Rule 52). *[The equivalent rules in the Supreme Court Civil Rules are Rule 9-7 (summary trial) and Rule 22-1 (chambers proceedings).]*

APPENDIX A

Respondents to the Consultation Paper

Note: If the name of an organization follows the name of an individual, it is provided for purposes of identification only. Responses received from organizations are listed by the organization name alone.

Peter Anderson,
Shareholder
Boughton Law Corporation

British Columbia Association of Insolvency & Restructuring Professionals

B.W.F. Fodchuk,
Barrister & Solicitor

Insolvency Law Section, Canadian Bar Association (BC Branch)

Robert F. Kavanagh,
Vice President, Asset Management
GWL Realty Advisors Inc.

Kyungsoo Lee

Jim Milligan

Urban Development Institute

confidential responses

APPENDIX B

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 personal 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 entrance, 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 secu-

urity 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 respect 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 be-

fore 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.

PRINCIPAL FUNDERS IN 2008

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- The Law Foundation of British Columbia;
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