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## COMMERCIAL TENANCY ACT REFORM PROJECT

### Backgrounder

## Report on Proposals for a New Commercial Tenancy Act

Date: 25 November 2009

### 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)  
(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.

## 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.