



# BRITISH COLUMBIA LAW INSTITUTE

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## COMMERCIAL TENANCY ACT REFORM PROJECT

### Backgrounder

#### Introduction to the Commercial Tenancy Act Reform Project

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#### INTRODUCTION

The British Columbia Law Institute has commenced a major project to study the law of commercial leasing. The focus of the project will be on the *Commercial Tenancy Act*<sup>1</sup> and related provincial legislation. A volunteer project committee has been formed to study the main legal issues addressed by this legislation and to evaluate the leading options for reform. The project is scheduled to run for two years and will culminate in the publication of a report that will include a draft of a new *Commercial Tenancy Act* and commentary on the draft legislation. The *Commercial Tenancy Act* Reform Project has been made possible by funding from The Real Estate Foundation of British Columbia and the Notary Foundation of British Columbia.

#### MEMBERS OF THE PROJECT COMMITTEE

Richard Olson—chair ( <i>associate counsel, McKechnie &amp; 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>chair, British Columbia Law Institute</i> )
Justice Mary V. Newbury ( <i>Court of Appeal for British Columbia</i> )	Greg Umbach ( <i>partner, Blake, Cassels &amp; Graydon LLP</i> )

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

#### LEGAL BACKGROUND

A lease governs the relationship between two parties commonly referred to as a landlord and a tenant. The landlord grants the tenant exclusive possession of a piece of land for a defined period of time (called a term). In exchange, the tenant makes payments to the landlord called rent. Rent is usually payable on a periodic basis over the life of the term.

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1. R.S.B.C. 1996, c. 57.

The law applicable to leases is found partly in judicial decisions made by the courts and partly in statutes enacted by the Legislature. British Columbia has had legislation in this area since it enacted the *Landlord and Tenant Act* in 1897.<sup>2</sup> This Act was a consolidation of earlier British Imperial statutes that were in force in British Columbia and provisions copied from Ontario and Manitoba legislation.

For most of the twentieth century, the *Landlord and Tenant Act* applied to all leases in British Columbia. In the 1970s there was a significant change in its scope. First, in 1970,<sup>3</sup> a new Part was added to the legislation to deal with residential tenancies—that is, leases applicable to living accommodations for individuals. Then, in 1974, this Part was hived off to form what is now called the *Residential Tenancy Act*.<sup>4</sup> The law of residential tenancies has received extensive and sustained attention from the provincial government since it was detached from the commercial tenancy portion of the legislation.<sup>5</sup> Since the *Residential Tenancy Act* is a comparatively modern statute that governs a discrete area of the law, it will not be considered as part of this law reform project.

In contrast to legislation governing residential tenancies, the statute applicable to those tenancies involving businesses or other commercial operations has been neglected by government. The *Commercial Tenancy Act* that is in force in 2007 is essentially the same Act that the Legislature passed in 1897.

The *Commercial Tenancy Act* contains a patchwork of rules governing some aspects of commercial leasing. Five main groups of provisions emerge from the Act: (1) provisions relating to distress, which is the right of a landlord to seize the property of a tenant at the premises, without recourse to the courts or legal process, if the tenant fails to pay rent as it comes due;<sup>6</sup> (2) procedural provisions, which are mainly concerned with the recovery of the premises by the landlord in certain defined situations;<sup>7</sup> (3) apportionment of payments (particularly rent) that are due in the event that a period terminates before the payment comes due;<sup>8</sup> (4) provisions relating to the parties to the lease;<sup>9</sup> and (5) bankruptcy provisions.<sup>10</sup>

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2. R.S.B.C. 1897, c. 110.

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

4. *Landlord and Tenant Act*, S.B.C. 1974, c. 45.

5. The latest version of the legislation was enacted in 2002. See *Residential Tenancy Act*, S.B.C. 2002, c. 78.

6. See *Commercial Tenancy Act*, *supra* note 1, ss. 1–7.

7. See *Commercial Tenancy Act*, *ibid.*, ss. 18–28.

8. See *Commercial Tenancy Act*, *ibid.*, ss. 11–14. Note that section 12, which is the key provision in this group, actually applies to apportionment of payments generally; it is not restricted to apportionment of rent payable under a commercial lease.

9. See *Commercial Tenancy Act*, *ibid.*, ss. 8, 14.

The *Commercial Tenancy Act* is not a comprehensive statute. Other statutes contain rules applicable to commercial leases. These rules are found in the *Rent Distress Act*<sup>11</sup> and in certain provisions of the *Law and Equity Act*,<sup>12</sup> the *Property Law Act*,<sup>13</sup> the *Land Title Act*,<sup>14</sup> and the *Land Transfer Form Act*.<sup>15</sup>

While development of the statutes applicable to commercial leasing in British Columbia has largely been stagnant, judge-made law has taken the lead in delivering reform in incremental steps. The 1971 decision of the Supreme Court of Canada in *Highway Properties Ltd. v. Kelly, Douglas and Co.*<sup>16</sup> has been the catalyst of this movement. This case reinvigorated a debate over the fundamental conception of a lease. Prior to this decision, Canadian law largely viewed leases as estates in land governed by the law of real property. In *Highway Properties*, the Supreme Court of Canada emphasized the point that a lease is also a contract and that the law of contract often provides remedies and ideas that are more in keeping with the expectations of participants in the modern commercial leasing sector. The implications of this decision are still being worked out in the courts. A number of the most significant post-*Highway Properties* cases have been decided in the courts of British Columbia.<sup>17</sup>

## REASONS FOR REFORM

There are two primary reasons why reform of this area of the law is needed.

First, the *Commercial Tenancy Act* is badly out of date. As noted earlier, much of the Act has survived intact from the original 1897 Act. Further, much of that 1897 Act hearkened back to an even earlier time, before the Industrial Revolution had taken hold in the United Kingdom. There is a distinct seventeenth-century flavour to the *Commercial Tenancy Act*, in both conception and language. It does not take much searching to find sections that are likely to baffle the contemporary reader. For example, consider this provision:

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10. See *Commercial Tenancy Act*, *ibid.*, s. 29. This provision is actually one of the most recent additions to the Act. It dates from 1924 and was enacted in response to a court decision that had held an equivalent provision in federal bankruptcy legislation to be constitutionally invalid. In 1949, the federal government re-asserted control over a number of issues arising from the bankruptcy of a tenant, but section 29 has remained a part of the Act in its original form.
  11. R.S.B.C. 1996, c. 403.
  12. R.S.B.C. 1996, c. 253.
  13. R.S.B.C. 1996, c. 377.
  14. R.S.B.C. 1996, c. 250.
  15. R.S.B.C. 1996, c. 252.
  16. [1971] S.C.R. 562, 17 D.L.R. (3d) 710.
  17. See *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.* (1989), 59 D.L.R. (4th) 1, 37 B.C.L.R. (2d) 306 (C.A.); *Transco Mills Ltd. v. Percan Enterprises Ltd.* (1993), 100 D.L.R. (4th) 359, 76 B.C.L.R. (2d) 129 (C.A.); *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2005 BCCA 583, 262 D.L.R. (4th) 169, 50 B.C.L.R. (4th) 250.

### 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.

Provisions such as this one mark off the *Commercial Tenancy Act* as belonging to a different time. The Act is more in touch with the needs of a society in which agriculture is the dominant economic activity. Since agriculture plays a relatively small role in contemporary commercial leasing, and since even the needs of the agricultural sector have moved on from the concerns addressed by the *Commercial Tenancy Act*, the Act is largely ignored in practice. It is effectively a dead letter. Only full-scale reform that modernizes and simplifies the legislation can rejuvenate it.

This point leads into the second reason for reform. Maintaining the *Commercial Tenancy Act* 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 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.

### ISSUES

At this initial stage in the project, the project committee has identified a number of issues to focus on:

- (1) formal requirements for the creation of a tenancy;
- (2) tenant's rights on taking possession (the doctrine of *interesse termini*);
- (3) the application of contractual principles to leases, including (a) the interdependence of mutual covenants, (b) the doctrine of fundamental breach, (c) mitigation, (d) claims for future rent, and (e) specific performance;
- (4) merger or surrender;
- (5) subleases;
- (6) assignment;
- (7) distress;
- (8) apportionment;
- (9) relief from forfeiture;

- (10) environmental issues;
- (11) the tenant's right to quiet enjoyment;
- (12) standard (or implied) terms for leases;
- (13) overholding tenant;
- (14) bankruptcy or insolvency of the tenant or the landlord;
- (15) recovery of possession by the landlord;
- (16) special provisions for shopping centre leases;
- (17) applicability of statutes other than the *Commercial Tenancy Act*, including the provisions of the *Land transfer Form Act*, the *Land Title Act*, the *Property Law Act*, and the *Law and Equity Act*;
- (18) registration of leases;
- (19) summary dispute resolution;
- (20) obsolete provisions in the *Commercial Tenancy Act*;
- (21) transitional issues;
- (22) conflict of laws.

### **EARLIER LAW REFORM WORK**

Law reform bodies, both in British Columbia and outside the province, have produced several reports that have a bearing on this project and that provide models for reform of British Columbia's commercial tenancy law.

- (1) Law Reform Commission of British Columbia, *Report on the Commercial Tenancy Act* (LRC 108) (Vancouver: The Commission, 1989).
- (2) Law Reform Commission of British Columbia, *Report on Distress for Rent* (LRC 53) (Vancouver: The Commission, 1981).
- (3) Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (Toronto: The Commission, 1976).
- (4) Manitoba Law Reform Commission, *Report on Distress for Rent in Commercial Tenancies* (MLRC Rep. No. 81) (Winnipeg: The Commission, 1994).
- (5) Manitoba Law Reform Commission, *Report on Covenants in Commercial Tenancies* (MLRC Rep. No. 86) (Winnipeg: The Commission, 1995).
- (6) Manitoba Law Reform Commission, *Report on Fundamental Breach and Frustration in Commercial Tenancies* (MLRC Rep. No. 92) (Winnipeg: The Commission, 1996).
- (7) Manitoba Law Reform Commission, *Report on Commercial Tenancies: Miscellaneous Issues* (MLRC Rep. No. 95) (Winnipeg: The Commission, 1996).

## **GOALS OF THE PROJECT**

The main goal of the project is the publication of a final report, including draft legislation and commentary, which may be used as the basis for a new *Commercial Tenancy Act* for British Columbia. Subsidiary goals for the project include promoting understanding of legal issues in the commercial tenancy field generally and elucidating the current operation of commercial tenancy legislation in British Columbia.

## **NEXT STEPS IN THE PROJECT**

### **Committee Meetings**

The committee will meet monthly in fall–winter 2007 and winter–spring 2008 to consider the options for reform of commercial tenancy law.

### **Consultation Paper and Formal Consultation**

A consultation paper surveying the current law, discussing the reasons for reform, canvassing the options for reform, and setting out the committee’s tentative recommendations for reform will be published in summer–fall 2008. A formal consultation, which will allow interested persons to give their views on the committee’s tentative recommendations, will be held over fall–winter 2008 and winter–spring 2009.

### **Final Report and Draft Legislation**

The final report, including draft legislation that may be implemented as a new *Commercial Tenancy Act*, will be published in June 2009.

## **TOPICS NOT COVERED IN THIS PROJECT**

This project will not address residential tenancies and the main statute governing them, the *Residential Tenancy Act*.

## **ABOUT THE BRITISH COLUMBIA LAW INSTITUTE**

The British Columbia Law Institute was incorporated in 1997 under the British Columbia *Society Act*. Its mission is to be a leader in law reform by carrying out the best in scholarly law reform research and writing and the best in outreach relating to law reform.

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