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# SYSTEM FIVE: DEFAULT AND CURE

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# SYSTEM FIVE: DEFAULT AND CURE

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Each commercial lease will contain a system of clauses dealing with the rights of the landlord and the tenant respectively where one or the other fails to perform its obligations. There will be included a default article which groups together a number of provisions that help to define what constitutes a default and that, in addition, sets out remedies. A sample of a carefully drafted default article is attached as Exhibit "1". The default articles responds to the principles that apply at common law and under the Commercial Tenancy Act R.S.B.C. 1996, c. 57 (the "CTA"). The principles applicable to landlord and tenant defaults are, generally, woefully inadequate to respond to the needs of landlords and tenants in a modern commercial setting and, it is for this reason that very careful attention to the default article is required. Later in this paper there are comments on deficiencies in this area of the law as noted by the Law Reform Commission of British Columbia in its "Report on the Commercial Tenancy Act" issued in December of 1989. Coincidentally, lawyers and law clerks that deal with commercial leases should all have a copy of that report on their desks and should be familiar with it. It is an excellent analysis of how the law stands. Regrettably, none of its recommendations appear yet to have been carried forward into law and there does not seem to be much of an impetus for that to take place. Nevertheless, the report is invaluable as a source of insight into the historical origins, current state of the law, and its problem areas. In addition to careful consideration of the default article in the lease, it is also necessary to examine carefully the other articles because, throughout the lease document (and its schedules which may deal with landlord and tenant work obligations, rules and regulations, and other matters) there are interspersed numerous default-related provisions. They represent a kind of fine-tuning of the remedies to deal with specific situations. A third category

of clauses that form part of the default and cure system are provisions which may be grouped together, or may be interspersed through the various parts of the lease and which are designed to graft onto the lease additional assurances or security for performance. These take the form of deposits, letters of credit, performance bond requirements, and general self-help remedies.

A general comment pertaining to remedies is that many commercial leases are made unduly complex and inappropriately long because of the tendency for lawyers to include redundant provisions pertaining to remedies. Then, the problem is made worse by the risk of conflicting and inconsistent or ineffective provisions (for example, provisions which the courts simply will not give effect to, several of which are referred to later in this paper).

**The Default Article**

Some initial insight concerning why default articles are necessary in leases and why they contain the particular provisions that they do may be obtained by referring to pages 4 to and including 7 of the Law Reform Commission of British Columbia "Report on the Commercial Tenancy Act" (referred to in the rest of this paper simply as the "CTA Report"). They provide an overview of the CTA and summarize the general problem areas. These can be grouped basically into two general areas: Events of Default - Forfeiture and Distress.

**Events of Default - Forfeiture**

Attached as Exhibit "2" is a copy of pages 111 to 126 inclusive of the CTA Report. Note that in the introduction, the fact that landlord and tenant law historically developed out of the concept of a lease as a conveyance is noted. This historical development which, has resulted in the

commercial lease being, in many respects a hybrid kind of document which incorporates both conveyancing and property law concepts as well as, to some extent, contract principles. Its hybrid nature results in complexity, unpredictability and confusion. A prime recommendation of the CTA Report is that the principles of contract law be applied to commercial leases. In the meantime, however, it is important to note that this recommendation has not been implemented by statute and it is, therefore, necessary to keep in mind the peculiar nature of the lease when considering default remedies.

Pages 111 to and including 126 of the CTA Report (attached as Exhibit "2") explain the historical, common law developments pertaining to the landlord's right to terminate and provide an analysis of the procedural and substantive provisions of the CTA pertaining to the landlord's right to terminate where a tenant defaults.

Historically, because the lease was regarded as conveying an interest in land, a breach of one of its terms, such as a failure to pay rent, did not of itself entitle the landlord to resume possession. A right to resume possession was available only if the lease specifically gave to the landlord a right to terminate for non-payment of rent, or, if the lease either gave to the landlord the right to terminate for breach of another provision or, alternatively, if the breach would, by its nature, be construed as a condition as opposed to a mere promise. If the tenant failed to pay rent, the landlord's only remedy at common law was to levy distress or to sue for rent.

The CTA provides, in s. 25, an express right for the landlord to recover possession where rent remains unpaid for seven days and, in addition, allows the landlord to recover possession where

a tenant "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, ...". A procedure is set out in that section for recovering possession.

Other procedural remedies are available to the landlord under other sections of the Act, as well, to deal with situations where a tenant is overholding or where rent has been in arrears for over a year. A general consensus, however, is that these provisions are entirely inadequate and outdated. It is therefore the prevalent practice in leases to define carefully what events will constitute a default under the lease which entitle the landlord to terminate and to specify in clear terms his landlord's rights to terminate, to re-enter possession, and to claim damages when these defined "events of default" take place.

## **Other General Default Remedy Provisions**

It is common to find a requirement for a security deposit to which the landlord can have recourse where a default occurs. Usually, there will also be a requirement if the security deposit is drawn upon for the security deposit to be replenished or "topped up". Alternatively, an irrevocable letter of credit may be provided for and, as indicated above, a self-help remedy permitting one party to cure a default by the other at the other's expense will be provided for too. An important feature of the self-help remedy from the landlord's perspective is that once the landlord has cured the default and added the cost plus the administration fee to rent, it is then in a position to enforce remedies to terminate, or distrain, or to enforce personal property security, where rent is overdue.

**Specifically Tailored Remedies**

It is not sufficient when dealing with a lease to stop when you have finished examining the default article and the "Other General Default Remedies" described above. The next step is to review the rest of document carefully identifying situations where particular remedies have been provided for. This involves analyzing the "fine tuning" provisions of the default system. Set out below are comments concerning common default remedies that represent "fine tuning". One form of self help remedy that is sometimes found in leases entitles the Landlord to withhold utilities and other basic services where a tenant is in default.

Construction and Repair Provisions

It is typical to find provisions such as the following relating to construction and repair obligations.

Access Restrictions

A landlord will often preclude a tenant against having access at all to the project or the premises until building permits, insurance certificates, and approved plans and specifications are produced, and will reserve the right to require the removal of any person from the premises where these requirements have not been complied with.

Stop Work Right

Where work is found not to conform to approved plans and specifications, or to be not in conformity with governmental requirements, a landlord will often reserve the right to stop the work by the tenant and its contractors and may also have the right to require the removal of the work and restoration of damage caused in a removal. All of this would be at the cost of the tenant and normally an administration fee would be added. Similarly, a landlord would have the right to correct work at the tenant's cost that does not conform to requirements. (Reciprocal rights are also common in favour of tenants where landlords are required to do work).

Builders Liens

Invariably, there will be a requirement that the tenant remove any Builders' Liens that are registered against the premises or the project in connection with its work, and the landlord will reserve the right to make payment to the lien claimant or into court and obtain full recovery of the landlord's costs in obtaining removal of the lien, if the tenant does not get it removed within a stated period of time. This is a key provision for landlords who are concerned about the possibility of a lien claim impeding their ability to obtain financing on a project.

Occupational Health and Safety Concerns

It is common for an indemnity in favour of the landlord to be included in connection with fines, or liabilities arising from the actions of the tenant or its contractor under occupational health and safety legislation or other governmental requirements pertaining to personal safety.

Bonds

It is also common for the tenant to be required to produce performance bonds in connection with the work and improvements that it provides. The landlord would have the right enforce the performance bond if the tenant or its contractors breach their construction and improvement obligations.

Withholding of Tenant Allowances

Invariably, if the tenant is entitled to a construction allowance or other form of inducement payment, a default of its obligations under the lease will disentitle it to payment of that allowance until default is cured.

Withholding of Rent Payments

Tenants who have the benefit of construction or repair obligations by binding the landlord will frequently negotiate a right to withhold payment of rent or to be absolved from payment of rent during a period when the landlord is in breach of those construction or repair obligations.

Site Deficiency Problems

A tenant will frequently obtain special rights where environmental hazards, soil conditions, structural problems, inherent defects or similar problems are encountered on the site. This may involve a right to abate rent or may in certain situations entitle the tenant to terminate the lease. It is important to note that a tenant does not have a right to terminate the lease where a landlord is in default to the obligations unless the lease specifically provides for such a right or the tenant can demonstrate that there has been an effective eviction by the landlord. (For more detailed comment on this situation, you may wish to refer to the paper "Quicksand Alert" included in these materials.)

**Rent**

The lease will provide for interest to accrue on late payments of rent at a rate which is higher than the normal commercial lending rate (to provide a disincentive for a party to allow arrears or late payments to occur).

Where percentage rent is payable under the lease, it is necessary normally to include specific rights for the landlord to audit in respect of the tenant's sales (there is no implied right to audit unless it is especially provided for) and, where a significant variance is discovered, the landlord would normally have the right to require the tenant to pay the cost of the audit (plus an administration fee of 15%). There would normally also be a right to terminate the lease. The default article attached as Exhibit "1" would allow the landlord to terminate in this situation without notice. The landlord would also have the right where records are insufficient to

determine what the sales actually were for any particular period, to have the auditor estimate the sales and to bind the tenant to that estimate for the purposes of calculating the landlord's rent entitlement.

**Use - Operating - Assignment**

Liquidated Damages

As mentioned above, courts within Canada will not normally enforce a continuous operation covenant and will, therefore, not compel a tenant to stay open for business where it refuses to do so. Therefore, landlords will include liquidated damages clauses that allow the landlord to recover rent on a daily basis for each day that the tenant is not in operation. As mentioned above, however, these clauses are liable to be struck down as a penalty. Other remedies that are often included where a tenant ceases operating are the ability for the landlord to ignore exclusive use restrictions in favour of the tenant, the right to make alterations in the project that would not otherwise have been permitted. For a more detailed discussion of remedies and enforcement of these rights, you should refer to System One: Use and Operating included in these materials.

**Insurance**

Indemnity

The obligation of a tenant to maintain insurance (both property and liability) is of critical importance to a landlord. System 4: Construction and Risk Management deals in detail with these requirements. The common self-help remedy where a tenant (or in some cases the landlord) fails to insure is to permit the non-defaulting party to purchase the insurance at the cost of the defaulting party and to recover an administration fee.

A second feature of particular importance has to do with indemnity provisions. In System 4: Construction and Risk Management, there is a detailed discussion of the purpose indemnity clauses. The point to note here is that the indemnity provision of the lease has the effect of

making the enforcement of the indemnified parties' rights easier and less expensive where the defaulting party has breached its obligations under the lease.

Assignment and Subletting

As will be seen in the paper "Quicksand Alert", a tenant continues to be liable for the tenant's obligations under the lease even after it has assigned the lease. If the lease is disclaimed or repudiated by bankruptcy or insolvency proceedings the original tenants' liability for damages in respect of the period from and after the termination will normally continue. Some leases will also include a clause which requires the original tenant, should the landlord elect to require it to do so, to enter into a new lease (a "Remainder Period Lease") with the landlord on the same terms as the original lease if the original lease is terminated as a consequence of the tenant's default or as a consequence of bankruptcy or insolvency proceedings.

In some jurisdictions it appears that a landlord is not liable for damages should it breach an obligation to act reasonably in determining whether to grant its consent to an assignment or subletting by the tenant. For that reason, it is not unusual for a landlord to include a clause to the effect that it will not be held liable in damages should it refuse to grant its consent. Instead, the tenant is limited to obtaining an order from the court requiring the landlord to grant its consent where it has been unreasonably withheld contrary to the landlord's covenant to not unreasonably withhold it.

## Rights of First Refusal Options to Renew Under Special Rights

It is common for the landlord to specify that the tenant's right to exercise an option to renew the term of the lease, or to expand, or to enforce a right of first refusal or option to lease in respect of adjoining property, is contingent upon the tenant not being in default under the lease. It is also common for the landlord to specify that even if the tenant has cured a default under the lease any default will have the effect of invalidating the right. Courts tend to soften the effect of these

clauses to some extent where the default is inconsequential, inadvertent and has been cured, but it is an issue which the tenant would be best advised not to leave unaddressed. Tenants with strong negotiating positions will usually succeed in getting the clause amended so that as long as the default has been cured at the time that the right is sought to be enforced, that right will be reserved.

## Conclusion

It should be apparent from what is set out above that the negotiation of default provisions in a lease requires a comprehensive, co-ordinated, and thorough analysis of the entire document and that it is not sufficient to rely upon the remedies and enforcement rights that are available to landlords or tenants under the common law or the landlord and tenant legislation of the province.

## E X H I B I T 1

**Section 16.01 Right to Re-enter**

(a) An "Event of Default" occurs when:

(i) the Tenant defaults in the payment of Rent or Sales Taxes and fails to remedy the default within five (5) days after written notice;

(ii) the Tenant commits a breach that is capable of remedy other than a default in the payment of Rent or Sales Taxes, and fails to remedy the breach within ten (10) days after written notice that (1) specifies particulars of the breach, and (2) requires the Tenant to remedy the breach (or if the breach would reasonably take more than ten (10) days to remedy, fails to start remedying the breach within the ten (10) day period, or fails to continue diligently and expeditiously to complete the remedy);

(iii) the Tenant commits a breach of this Lease that is not capable of remedy and receives written notice specifying particulars of the breach;

(iv) a report or statement required from the Tenant under this Lease is false or misleading except for a misstatement that is the result of an innocent clerical error;

(v) the Tenant, or a Person carrying on business in a part of the Premises, or an Indemnifier becomes bankrupt or insolvent or takes the benefit of any statute for bankrupt or insolvent debtors (including, but not limited to, the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended), or makes any proposal, assignment or arrangement with its creditors;

(vi) a receiver or a receiver and manager is appointed for all or a part of the property of the Tenant, or of another Person carrying on business in the Premises, or of an Indemnifier;

(vii) steps are taken or proceedings are instituted for the dissolution, winding up or other termination of the Tenant's or the Indemnifier's existence or for the liquidation of their respective assets;

(viii) the Tenant makes or attempts to make a bulk sale of any of its assets regardless of where they are situated (except for a bulk sale made to a Transferee when the Transfer has been consented to by the Landlord);

(ix) the Premises are vacant or unoccupied for five (5) consecutive days or the Tenant abandons or attempts to abandon the Premises, or sells or disposes of property of the Tenant or removes it from the Premises so that there does not remain sufficient property of the Tenant on the Premises free and clear of any lien, charge or other encumbrance ranking ahead of the Landlord's lien to satisfy the Rent due or accruing for at least twelve (12) months;

(x) the Tenant effects or attempts to effect a Transfer that is not permitted by this Lease;

(xi) this Lease or any of the Tenant's assets on the Premises are taken or seized under a writ of execution, an assignment, pledge, charge, debenture, or other security instrument;

(xii) the Tenant defaults in the timely payment of Rent and any such default has occurred on two previous occasions, notwithstanding that such defaults may have been cured within the period after notice has been provided pursuant to the terms of this Lease;

(xiii) there has been an Unexpected Termination (as that term is defined in Section 16.01(c)) of any lease which the Tenant or an Affiliate of the Tenant holds for premises in the Shopping Centre or in another shopping centre or development that is owned (in whole or in part), operated or

managed by or on behalf of the Landlord, an Affiliate of the Landlord, or its successors or assigns, or that is operated or managed by a Management Company or an Affiliate of a Management Company; or

(xiv) the Indemnity Agreement is terminated for any reason whatsoever, whether by the Indemnifier or by any other Person or by effect of law, or, alternatively, if the obligations of the Indemnifier under the Indemnity Agreement are reduced, modified or otherwise limited except by way of an agreement made in writing by the Landlord.

(b) Notwithstanding:

(i) anything in any applicable statute or other legislation or any regulation that exists now or that comes into existence and any rule of law or equity,

(ii) any defect in any notice given by the Landlord, including without limitation, an error in the amount of Rent in arrears (provided, however, that Rent is, in fact, in arrears) or a failure of the notice to require the Tenant to make compensation in money or remedy the breach; and

(iii) the Landlord's election not to give notice to the Tenant in respect of a breach (other than that for which notice must be given under Section 16.01(a)(i) and (ii) above),

upon the occurrence of any Event of Default the full amount of the current month's and the next three (3) months' instalments of Minimum Rent and Additional Rent and Sales Taxes, will become due and payable. At the option of the Landlord, this Lease shall be ipso facto terminated and the full amount of the Rent (calculated according to Section 16.02(b)) for that part of the Term that would have remained but for the Unexpected Termination (as that term is defined in Section 16.01(c)) shall become due and payable. If this Lease is so terminated, the Landlord, to the extent permitted by law, may immediately repossess the Premises and expel all Persons from the Premises and may remove all property from the Premises, sell or dispose of it as the Landlord considers appropriate, or store it in a public warehouse or elsewhere at the cost of the Tenant, all without service of notice, without legal proceedings, and without liability for loss or damage and wholly without prejudice to the rights of the Landlord to recover arrears of Rent or damages for any antecedent default by the Tenant of its obligations or agreements under this Lease or of any term or condition of this Lease, and wholly without prejudice to the rights of the Landlord to recover from the Tenant damages for loss of Rent suffered by reason of this Lease having been prematurely terminated.

(c) In this Article XVI, an "Unexpected Termination" means (i) a termination of a lease or a re-entry by a landlord due to a default under a lease, (ii) a surrender of a lease to which the landlord does not consent in writing or (iii) a repudiation, disclaimer or disaffirmation of a lease.

(d) It is understood and agreed that the Tenant shall be responsible for all of the legal costs of the Landlord associated with the Landlord preparing and issuing its notice to the Tenant under Section 16.01(a)(i) and (ii) above.

**Section 16.02 Right to Terminate or Relet**

(a) If the Landlord does not exercise its right under Section 16.01 to terminate this Lease, it may nevertheless relet the Premises or a part of them for whatever term or terms (which may be for a term extending beyond the Term) and at whatever Rent and upon whatever other terms, covenants and conditions the Landlord considers advisable. On each such reletting, the Rent received by the Landlord from the reletting will be applied as follows: first to the payment of amounts owed to the Landlord that are not Rent or Sales Taxes; second to the payment of any costs and expenses of the reletting including brokerage fees and solicitors fees (on a solicitor and client or substantial indemnity basis, as the case may be), and the costs of any alterations or repairs needed to facilitate the reletting; third to the payment of Rent; and the residue, if any, will be held by the Landlord and applied in payment of Rent and Sales Taxes as it becomes due and payable. If the Rent and Sales Taxes received from reletting during a month is less than that to be paid during that month by the Tenant, the Tenant will pay the deficiency, which will be calculated and paid monthly in advance on or before

the first day of every month. No repossession of the Premises by the Landlord will be construed as an election on its part to terminate this Lease unless a written notice of termination is given to the Tenant. If the Landlord relets without terminating, it may afterwards elect to terminate this Lease for the previous default. If the Landlord terminates this Lease for a default, it may recover from the Tenant damages it incurs by reason of the default, including, without limitation, the cost of recovering the Premises, legal fees (on a solicitor and client or substantial indemnity basis, as the case may be), and the worth at the time of the termination, of the excess, if any, of the amount of Rent and Sales Taxes required to be paid under this Lease for the remainder of the Term over the rental value, at the time, of the Premises for the remainder of the Term, all of which amounts will be due immediately and payable by the Tenant to the Landlord.

(b) If an Unexpected Termination of this Lease occurs, (as that term is defined in Section 16.01(c)), then for the purpose of calculating Rent under Section 16.01(b) and the Landlord's damages, the Gross Revenue and Additional Rent will each be deemed to have increased at the minimum rate of five percent (5%) per annum for that part of the Term that would have remained but for the Unexpected Termination, and Percentage Rent will be deemed to have been calculated and paid on the Gross Revenue so assumed.

**Section 16.03 Expenses**

If legal proceedings are brought for recovery of possession of the Premises, for the recovery of Rent or Sales Taxes, or because of a default by the Tenant, the Tenant will pay to the Landlord its expenses, including its legal fees (on a solicitor and client or substantial indemnity basis, as the case may be).

**Section 16.04 Waiver of Exemption from Distress**

Despite the Landlord and Tenant Act, or any other applicable Act, legislation, or any legal or equitable rule of law (a) none of the inventory, furniture, equipment or other property that is, or was at any time, owned by the Tenant is exempt from levy by distress for Rent, (b) no failure of the Landlord or its agent to comply with any restriction or requirement concerning the day of the week, time of day or night, method of entry, giving of notice, appraising of goods or any other restriction or requirement, will void or make voidable any distress effected by the Landlord or subject the Landlord to damages where the Tenant owes arrears of Rent at the time of the distress, and (c) the Landlord's right of distress will be considered to continue and will be exercisable despite any forfeiture or other termination of this Lease.

**Section 16.05 Fraudulent or Clandestine Removal of Goods**

Removal by the Tenant of its goods outside the ordinary course of its business either during or after Shopping Centre hours shall be deemed to be a fraudulent or clandestine act thereby enabling the Landlord to avail itself of all remedies at law including, but not limited to, the Landlord's rights to follow the Tenant's goods and to recover more than the value of the goods so removed.

EXHIBIT 2

# CHAPTER IX PROCEDURE

## A. Introduction

Previous chapters of this Report have explored various aspects of the classic view of a tenancy -- that at the time the tenancy was created, the landlord conveyed an interest in land to the tenant in return for the "purchase price" of rent. That classic view has shaped the law in a number of ways that, in a modern context, are unsatisfactory.[1] The classic view also affected procedure as well as substance and nowhere is this more clearly revealed than in those provisions of the *Commercial Tenancy Act* which govern the landlord's remedies for recovering possession of the rented premises. They are, as will be seen, relics of a bygone era.

In England, before the 19th century, the common law proceedings for recovery of possession, which were the only ones available to a landlord, were cumbersome and expensive. This led to the enactment of various pieces of legislation which permitted the landlord to recover premises through summary proceedings. In British Columbia, this legislation was adopted almost verbatim. It has been carried forward into the current *Commercial Tenancy Act*.

The Act contains no fewer than three summary procedures. Because they are contained in a statute rather than in *Rules of Court*, they have escaped the modernization and rationalization that other aspects of civil procedure have undergone. Highly technical in nature, they often prove to be something of a minefield to the landlord who attempts to use them. Moreover, the *Rules of Court* appear to render them obsolete. In this Chapter we consider whether the various summary procedure provisions of the Commercial Tenancy Act still serve a useful function. To this end, a brief review of the historical context is necessary.

1. Although the courts are moving away from a strictly classic view toward a contractual model. *See* Chapter III, *supra*.

## B. Historical Background

### 1. Landlord's Common Law Rights To Recover Possession

The common law procedures for recovering possession of rented property were developed at a time when most tenancies were agricultural in nature. Rent was paid from the profits of the harvest. When crops failed, the tenant was unable to pay. The tenant's response varied with circumstances. Sometimes he abandoned the premises. Sometimes he simply remained on the land without paying the rent. Because the lease was regarded as conveying an interest in land, a breach of one of its terms, such as a failure to pay rent, did not of itself entitle the landlord to resume possession. A right of possession was available only in the circumstances described below.

*(a) Termination*

A tenancy terminates when the period for which it was created expires "by effluxion of time."[2] This would include a tenancy created for a term of years or a tenancy created for the lifetime of the landlord, the tenant or some other person. The concept of termination also applies to events which bring an end to a periodic tenancy such as one that runs from year-to-year. Such a tenancy is open-ended in duration, but either party can usually terminate it by an appropriate notice given in accordance with the terms of the tenancy agreement.[3] When a tenancy terminates in any of these ways the landlord has a right to possession.

*(b) Forfeiture*

In some cases a tenancy will be void or voidable[4] if a specified event occurs. For example, the tenancy agreement might provide that the tenancy is subject to the condition that "the land is used for farming." If the tenant uses the land for any other purpose, he forfeits the tenancy and the landlord has the right to treat it as at an end,[5] with a corresponding right to reclaim possession of the premises.

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2. Woodfall, *Law of Landlord and Tenant* (10th ed., 1871) 262. *See also* 18 Halsbury (1st ed., 1911) para. 899-936.

3. Woodfall, *supra*, n. 2 at 262.

4. Originally, any provision that upon the happening of a certain event the lease was "void" was construed literally; the lease ceased to exist when the event occurred. Since the 19th century, the courts have construed the word "void" as meaning "voidable," so that the lessor has the choice either to terminate the lease or to waive the forfeiture: Holdsworth, *A History of English Law* (2nd ed., 1937) Vol. VII, 293.

5. Notwithstanding the forfeiture, the lease continues until the landlord does some act which shows his intention to terminate it: Halsbury, *supra*, n. 2, para. 1036.

A condition, which on its breach gives the landlord the right to terminate the tenancy, is to be contrasted with lesser provisions, "mere promises," whose non-performance or breach will not lead to a termination of the tenancy.[6] A simple covenant to pay rent is such a mere promise and the landlord has no right to evict the tenant for breach of that promise. His only remedy at common law is to levy distress or to bring an action for rent.[7]

This distinction was not lost on landlords and it became common for tenancy agreements to be framed so that the non-payment of rent or the bankruptcy of the tenant constituted a breach of condition. That technique was superseded by the practice of including in the tenancy agreement an even more explicit provision which gives the landlord the right to resume possession of the premises, or to bring an action for possession, if the tenant failed to pay rent[8] or observe other covenants. This is the "proviso for re-entry" and it is a common feature of most commercial tenancy agreements today.[9]

*(c) Surrender and Merger*

The tenant's interest may be surrendered or otherwise become merged in the landlord's reversionary interest. These concepts were discussed earlier in this Report.[10] In either case, the original tenancy terminates[11] and the landlord has a right to possession.

### 2. Landlord's Common Law Remedies To Recover Possession

At common law, the landlord could enforce his right to possession in two ways. First, he could use self-help and physically re-enter the property. Alternately, he might take legal proceedings in the form of an action in ejectment.

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6. Cole, *The Law and Practice of Ejectment* (1857) 403.
7. *Ibid.*, at 410-11.
8. Even so, a formal demand of rent in accordance with the strict rules of the common law had to be made before the landlord could re-enter, unless the lease contained express words dispensing with this necessity: Woodfall, *supra*, n. 2 at 291-292. *See also Tom* v. *Shofer*, [1953] 1 D.L.R. 356 (N.S.S.C. App. Div.); *Marshall Steel Ltd.* v. *Johnston Marine Terminals Ltd.*, [1989] B.C.D. Civ. 2344-01 (C.A.). The rent had to be demanded in the precise sum due, on the exact day it was payable (usually on the last day of the lease), at a convenient time before sunset, and upon the land.
9. *See* the proviso for re-entry in the *Land Transfer Form Act*, *infra*, n. 61.
10. *See* Chapter IV, *supra*.
11. Halsbury, *supra*, n. 2, para. 1058-1067.

### *(a) Re-Entry*

In some ways, re-entry[12] is the ideal remedy for the landlord whose tenant fails to pay rent or refuses to vacate the premises after the tenancy has terminated. It has the virtue of being relatively quick and cheap.

But this course of action also has its risks. If the landlord misperceives the facts and he has no right to re-enter, he may be liable for damages for trespass and possibly for consequential losses if the re-entry disturbs the tenant's business. He must also be wary of committing assault. Even if his right to re-enter is not in question, he can use only reasonable force to evict a resisting tenant. As one 19th century observer commented:[13]

> If the right of entry be clear and free from all doubt but the tenant in possession is a strong resolute man, or an obstinate litigious person, it is generally more advisable to proceed by ejectment than by entry. It is not easy to turn out such a person and his family and servants and their respective goods and chattels in a legal manner, without being guilty of a breach of the peace, or of any excess of force and violence.

Exercising a right of re-entry so as to cause a real or apprehended breach of the peace is an offence.[14]

A further difficulty with physical re-entry was that it created no authenticating documentation that might be used to satisfy a subsequent purchaser from the landlord that the termination of the tenancy and the re-entry were regular. The absence of such documentation might render the reversion less marketable since a subsequent purchaser might have no assurance that the tenant would not reappear and assert an entitlement to his former estate. This difficulty is present even where the tenant willingly gives up possession or has abandoned the premises.

A final disadvantage of re-entry at common law was that it resolved only the issue of physical possession.[15] Separate proceedings were necessary to recover arrears of rent, damages for

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12. A right of re-entry means the legal right to enter the premises and take actual possession: Cole, *supra*, n. 6 at 66.

13. Cole, *ibid.*, at 70.

14. *Criminal Code*, R.S.C. 1985, c. C-46, s. 72(1), (1.1). The provision contains a general prohibition against forcible entry in circumstances likely to cause a breach of the peace, whether or not the person is entitled to enter. There is a corresponding offence created by s. 72(2). It is "forcible detainer" to, without colour of right, remain in possession of land as against a person legally entitled to possession of it. Prosecutions under these provisions seem to be rare.

15. The moment the party having a right of entry enters on any part of the property for the purpose of taking possession, he becomes legally seised or possessed (according to the nature of his title), and any previous tenants in possession and all other persons, who afterwards remain on the property without his permission and against his will become trespassers: Cole, *supra*, n. 6 at 67.

the tenant's continued use of the property or any other relief to which the landlord might he entitled.

*(b) Ejectment*

The landlord could enforce a right of re-entry by bringing an action of ejectment.[16] This was a complicated proceeding involving the demise of the premises to fictional tenants, Doe and Roe, whose subsequent "ejectment" was enforced by the sheriff. In a most convoluted way, this brought into issue the question of possession of the property between the actual tenant and his landlord.[17]

No damages were recoverable in an action of ejectment. By commencing such proceedings, the landlord elected to treat the tenant as a trespasser. Accordingly, he could not thereafter sue the tenant for rent or compensation for use and occupation. His only remedy was to bring another action[18] in trespass for "mesne profits."[19] The action of ejectment itself was slow, awkward and expensive.

### 3. Statutory Developments

From the landlord's perspective, the law concerning the recovery of possession was deficient in a number of ways. The tenant's non-payment of rent or breach of other terms of the tenancy agreement did not automatically lead to a right to repossess the property. Even where the right existed, or the tenant was wrongfully overholding, the remedies for enforcement were unsatisfactory. A number of developments took place in the 18th and 19th centuries to improve the landlord's position.

The *Distress for Rent Act, 1737*[20] provided, among other things, a summary procedure before justices of the peace for the recovery of land that was abandoned by a tenant in arrears of rent. The *Common Law Procedure Act, 1852*,[21] abolished the

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16. *Ibid. See Robinson, Little & Co. (Trustees of) v. Marlowe Yeoman Ltd.*, (1986) 5 B.C.L.R. (2d) 67 (C.A.).

17. The whole purpose of ejectment was to avoid the use of the "real action" of novel disseisin for trying the issue of title to the land. The procedural advantages of ejectment, which are almost incomprehensible today, ensured that by the start of the 17th century ejectment had become the usual mechanism for claiming land. *See* Milsom, *Historical Foundations of the Common Law* (2nd ed., 1981) 161-163; Holdsworth, *supra*, n. 4, Vol. VII, 4-79.

18. Cole, *supra*, n. 6 at 634.

19. "Mesne profits" are, essentially, compensation for use and occupation of premises from an overholding tenant.

20. 11 Geo. 2, c. 19, ss. 16-17.

21. 15 & 16 Vict., c. 76, ss. 168-209.

many fictions and technical limitations that accompanied the action of ejectment.[22] In 1873, the name of the action of ejectment was changed to "an action for the recovery of land."[23] This is the term now used in British Columbia.

Historically, an action of ejectment could only be brought in a superior court. In 1856, legislation was enacted that allowed the recovery of "small tenements" in County Court.[24] It applied to premises whose value or annual rent did not exceed 50 pounds. The procedure was available for the recovery of possession from an overholding tenant or for non-payment of rent.[25]

The *Common Law Procedure Act, 1852* also contained two special procedures for actions of ejectment by a landlord in specified circumstances. One procedure applied to the recovery of possession from an overholding tenant.[26] The other concerned ejectment for non-payment of rent.[27] The relevant provisions in the *Common Law Procedure Act, 1852* are, in some sense, the predecessors of the procedural provisions of our *Commercial Tenancy Act.* In practice, however, they were superseded over eighty years ago by yet another development.

From the middle of the 19th century, the civil procedure of England allowed proceedings to be commenced by way of a specially endorsed writ for specified types of claim or causes of action.[28] If the plaintiff's claim was one that could be made the subject of a specially endorsed writ, he enjoyed a procedural advantage. He could apply in a summary way to the court and, on veri-

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22. A simple writ claiming the land sought to be recovered was substituted. Another substantive improvement was that the landlord could recover mesne profits in the ejectment proceedings without having to bring a separate action. *See* Rhodes, *Williams and Rhodes Canadian Law of Landlord and Tenant* (5th ed., 1983) para. 13:9:2.

23. *Supreme Court of Judicature Act*, 36 & 37 Vict., c. 66.

24. *County Courts Act*, 19 & 20 Vict., c. 108, ss. 50, 52. This Act was based on (1846) 9 & 10 Vict., c. 95, ss. 122, 123, 126, and 127. In addition, there was a summary procedure for the recovery of land before justices under (1838) 1 & 2 Vict., c. 74, ss. 1-8. It applied to overholding tenants whose rent did not exceed 20 pounds per year. While very similar to the remedy provided by s. 50 of the *County Courts Act*, it was not repealed thereby: Cole, *supra*, n. 6 at 669.

25. Provided that the landlord had a right of re-entry: s. 52.

26. Ss. 213 to 218. These sections substantially re-enacted in *An Act for enabling Landlords more speedily to recover Possession of Lands and Tenements unlawfully held over by Tenants*, (1820) 1 Geo. 4, c. 87. A major advantage of this procedure was that the tenant could be compelled to provide sureties for damages and costs. However, the procedure was only available if the lease was in writing: Cole, *supra*, n. 6 at 378.

27. Ss. 210 to 212. These sections substantially re-enacted *An Act for the more effectual preventing of Frauds committed by Tenants, and for the more easy Recovery of Rents, and Renewal of Leases*, (1731) 4 Geo. 2, c. 28. They permitted an action of ejectment where one-half year's rent was in arrears, there was no sufficient distress, and the landlord had a legal right of re-entry for non-payment of rent. This was an improvement on the common law insofar as no formal demand of rent was necessary before the procedure could be invoked.

28. *Common Law Procedure Act, 1852*, 15 & 16 Vict., c. 76, ss. 25, 27. Specially endorsed writs became part of the English Supreme Court Rules through the *Judicature Acts* of 1873 (36 & 37 Vict., c. 66, Schedule I, R. 7) and 1875 (38 & 39 Vict., c. 77, Schedule I, Order III, R. 6). The first Rules of Court promulgated in British Columbia in 1880 (pursuant to the *Judicature Act*, S.B.C. 1879, s. 17) copied the English Rules of Court in almost every detail, including Order III, R. 6.

fying his own cause of action, was permitted to enter final judgment without proceeding to a trial, if the defendant could not demonstrate any defence to the claim. This procedure was quick and highly convenient.

The legal machinery involving a specially endorsed writ and summary judgment works best in actions where the dispute between the parties is factually simple such as whether or not a debt has been paid. As such, it seems well suited to deal with a landlord's claim for possession based on the non-payment of rent or overholding. Nonetheless, it was not until 1883 that this procedure was finally made available to allow a landlord to recover possession.[29] In that year the English Supreme Court Rules were revised to allow the issuance of a specially endorsed writ for the recovery of land from an overholding tenant. The British Columbia Rules of 1890 followed this revision. In 1902, the English Rules were amended to permit a specially endorsed writ to issue against a tenant who had forfeited the lease for non-payment of rent. The British Columbia Rules were amended accordingly in 1906 and the summary judgment procedure remains available to landlords under the current *Rules of Court*.[30]

## C. The Procedural Provisions of the *Commercial Tenancy Act*

### 1. INTRODUCTIUN

The statutory procedures developed in England in the 18th and 19th centuries were designed to overcome problems associated with land tenure concepts rooted in the feudal system. They were, with few permutations, adopted in British Columbia.[31] The current *Commercial Tenancy Act* contains three summary procedures which the landlord may invoke to recover possession of rented premises.

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29. *See generally*, Halsbury, *supra*, n. 2, para. 1074, fn. (e).

30. The specially endorsed writ for the recovery of possession of land remained available until 1976. In that year the Rules of Court were substantially revised with the result that summary judgment procedure was made available in all cases.

31. *Over-holding Tenants' Act*, S.B.C. 1895, c. 53, and *Landlord and Tenant Act*, R.S.B.C. 1897, c. 110. The 1911 revision of British Columbia statutes consolidated the procedural provisions of these two Acts in essentially their present form: *Landlord and Tenant Act*, R.S.B.C. 1911, c. 126.

#### 2. SECTIONS 5 AND 6

The procedure described in sections 5 and 6 adopts almost verbatim[32] that set out in the *Distress for Rent Act, 1737*.[33] It is available only if three conditions are satisfied. First, the tenant must hold the land "at a rack-rent, or where the rent reserved is full three-fourths of the yearly value of the demised premisea." Second, the rent must be in arrears for one year. Finally, the tenant must have abandoned the premises without leaving sufficient distress.

Section 5 provides that, at the landlord's request, two Justices of the Peace may visit the premises and post a notice. If the tenancy is not brought back into good standing within 14 days, the landlord's right to possession is confirmed and the lease is rendered void.[34] This proceeding is subject to a summary review by the Supreme Court which has a wide discretion as to the order it may make.

#### 3. SECTIONS 17 TO 27

Sections 17 to 27 provide the landlord with a remedy against an overholding tenant whose lease has expired or has otherwise been determined.[35] Sections 18 to 21 establish a two-stage process for the eviction of the overholding tenant.[36] The first atage requires an application to court[37] to determine, on affidavit evidence, whether the landlord has a *prima facie* right to invoke the procedure. If he has, a court date is set, of which the

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32. The full text of these sections is set out in Appendix A.

33. *Supra*, n. 20.

34. This procedure was originally held to apply only where the landlord had an express right of re-entry under the lease: *Ex parte Pilton*, (1818) 1 B.& Ald. 369, 106 E.R. 136 (K.B.). In 1817, it was extended to leases where no such right had been reserved: *Deserted Tenements Act, 1817*, 57 Geo. 3, c. 52.

35. The full text of these sections is set out in Appendix A. The procedure appears to be based on a combination of ss. 213-218 of the *Common Law Procedure Act, 1852*, *supra*, n. 21, and the *County Courts Act*, (1856) 19 & 20 Vict, c. 108, s. 50, *supra*, n. 24. However, the provisions of the *County Courts Act* were also echoed in British Columbia's *County Courts Act* until 1962: *see County Court Jurisdiction Act*, S.B.C. 1885, c. 7, ss. 31-39; *County Courts Act*, R.S.B.C. 1960, c. 81, ss. 50-59; repealed by S.B.C. 1962, c. 17, s. 3.

36. *Melanson* v. *Cavolo*, (1980) 25 a.C.L.R. 110 (Co. Ct.).

37. S. 18, in its current form provides that the application for an order for possession is brought in a County Court. S. 22 provides that an eviction order may be appealed to the Supreme Court which court may "examine the proceedings and evidence" in the County Court and, if necessary, restore the tenant to possession. In *Czekay* v. *Swanson*, (1951) 3 W.W.R. 228 (B.C. S.C.), it was held that the provisions of s. 22 in effect create an appeal. Further appeal lies to the Court of Appeal: *Mital* v. *Andrews*, [1950] 1 W.W.R. 423, 2 D.L.R. 51 (B.C.C.A.). Ss. 23 and 24 concern costs and witnesses. Ss. 26 and 27 deal with the style of cause and the service of documents in respect of the procedure under these sections.
This will be altered when the merger of the Supreme and County Courts contemplated by the new *Supreme Court Act*, S.B.C. 1989, c. 40 is completed. Consequential amendments vest jurisdiction in respect of the summary procedure in the Supreme Court. Ss. 22 to 24 will be repealed. The amendments are expected to come into force on July 1, 1990.

tenant must be notified. At the inquiry the court determines the issue of title to the premises in a summary fashion.

If the tenant is found to be wrongfully overholding, a writ of possession is issued; otherwise the case must be dismissed. Section 25 provides that the summary procedure does not derogate from any other right or remedy to which the landlord may be entitled. Thus the landlord may, in other proceedings, claim arrears of rent or mesne profits.[38]

These sections are strictly construed.[39] For example, it is a condition precedent to the court's jurisdiction that the lease must be terminated before a written demand for possession can be made.[40] Moreover, the summary procedure is inappropriate in a case involving complicated questions of fact or law. Such issues must be resolved in an ordinary trial.[41]

#### 4. SECTIONS 28 TO 31

A further summary eviction procedure is provided by sections 28 to 31.[42] The landlord has a right to apply to court[43] for possession where the tenant is seven days late in paying rent or has breached a fundamental term of the tenancy agreement but refuses, on written demand, to pay the rent or leave the premises.

Again, a two-stage procedure is involved. The first stage involves an application to the registrar of the court for the issuance of a show-cause summons. This application must be supported by an affidavit containing the appropriate averments of fact. The summons brings the matter before the court which summarily determines the parties' rights. If the landlord satisfies the court as to his rights, an order for possession may issue.[44]

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38. There is nothing to prevent the landlord from applying for any remedy given to him by statute or common law: *Re Broom and Goodwin*, (1910) 2 O.W.N. 125, 17 O.W.R. 102.

39. *See, e.g., Foreshore Projects Ltd.* v. *Warner Shelter Corp.*, (1983) 49 B.C.L.R. 26 (Co. Ct.); *2733-4th Ave. Dev. Ltd.* v. *Xavier*, (1981) 33 B.C.L.R. 397 (Co. Ct.); *Burquitlam Co-op. Housing Assn.* v. *Romund*, (1976) 1 B.C.L.R. 229 (Co. Ct.); *Claud Loo* v. *Sun Fat*, [1925] 4 D.L.R. 134 (B.C. Co. Ct.); *Sabourin Holdings Ltd.* v. *Rapid Rent-A-Car Ltd.*, [1989] B.C.D. Civ. 2320-01.

40. *Foreshore Projects Ltd.* v. *Warner Shelter Corp.*, *ibid.*

41. *See, e.g., Foreshore Projects Ltd.* v. *Warner Shelter Corp.*, (1983) 49 B.C.L.R. 26 (Co. Ct.); *2733 - 4th Ave. Dev. Ltd.* v. *Xavier*, (1981) 33 B.C.L.R. 397 (Co. Ct.); *Burquitlam Co-op. Housing Assn.* v. *Romund*, (1976) 1 B.C.L.R. 229 (Co. Ct.); *Claud Loo* v. *Sun Fat*, [1925] 4 D.L.R. 134 (B.C. Co. Ct.); *Sabourin Holdings Ltd.* v. *Rapid Rent-A-Car Ltd.*, [1989] B.C.D. Civ. 2320-01.

42. The full text of these sections is set out in Appendix A. The procedure under these sections appears to be based on a combination of ss. 210-212 of the *Common Law Procedure Act, 1852*, *supra*, n. 21, and the *County Courts Act*, (1856) 19 & 20 Vict., c. 108, s. 52, *supra*, n. 24. *See also supra*, n. 35.

43. Application is currently made to a county court. The *Supreme Court Act*, S.B.C. 1989, c. 40 will transfer this jurisdiction to the Supreme Court when it comes into force. *See supra*, n. 37.

44. These sections do not entitle the landlord to summary judgment for unpaid rent: *Sherwood* v. *Lewis*, [1939] 2 W.W.R. 49, 54 B.C.R. 72 (Co. Ct.).

The procedures set out in these sections require strict compliance.

## D. Analysis

### 1. The Summary Procedure Provisions Are Archaic

When they were enacted, the summary procedures undoubtedly represented a significant enhancement of the legal position of the landlord who wished to recover the possession of premises. Today they are an anachronism. They are based on a historical view of the tenancy that is increasingly being called into question. They are much more technical and more complex than the general rules of civil procedure that govern other kinds of claims. Finally, the language of some of the provisions is woefully out of date.[45] In short, the summary procedures no longer seem to accomplish their original purpose.

The procedure under sections 5 and 6 will rarely, if ever, be of use to the modern landlord since it can be invoked only if the tenant is in arrear of one year's rent. It is difficult to envisage this circumstance arising in a modern commercial tenancy.

Each of the two procedures available under sections 18 to 31 contemplate a two-stage process. This is awkward and time-consuming. The limited range of issues which may be brought before the court encourages a multiplicity of proceedings. The strict construction given to the provisions make their use hazardous.[46]

One final point underscores the conclusion that the summary procedure provisions are archaic: they can only be invoked by the landlord. A tenant faced with a breach of the tenancy agreement by the landlord must bring an ordinary action to obtain a remedy. While this is no great loss to tbe tenant in practice, it does illustrate that (in theory at least) the Act does not achieve a fair balance between the interests of landlords and ten-

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45. An example of the difficulties raised by the archaic language of the *Commercial Tenancy Act* is *James and Becker* v. *Yarimi Enterprises Ltd.*, (1984) 57 B.C.L.R. 131 (Co. Ct.). The landlord, seeking an order under s. 18, had attached the exhibits to his affidavit by wrapping an elastic band around them because they were too bulky to be attached by staples. A court application was necessary to decide that the exhibits had been properly "annexed" within the meaning of the Act.

46. The current requirement that proceedings must be brought in a County Court is also at odds with the normal monetary and territorial distribution of jurisdiction among the various court levels. This aspect of the procedure will be rationalized when the merger of the Supreme and county courts is complete. *See supra*, n. 37.

ants so far as remedies and procedure are concerned. The interests of the former are clearly favoured.

### 2. The Summary Procedure Provisions Are Redundant

#### *(a) Internal Redundancy*

In a modern context, it makes little sense to retain three distinct procedures by which the landlord can summarily recover possession of the rented premises. Because many of the concerns which led to the enactment of the different procedures are no longer relevant, such duplication is difficult to justify. Sections 18 to 27 and sections 28 to 31, for example, overlap to such an extent that it has been held that, in some situations, the landlord can elect either procedure.[47]

#### *(b) External Redundancy*

When first enacted, the summary procedures differed so substantially from the normal proceedings in ejectment that it was necessary to spell out the procedural details with great precision. Most of this procedural detail has been carried forward into the current *Commercial Tenancy Act.* These special procedures seem unnecessary today because a superior remedy is available under the *Rules of Court.*

The Rules deal with all procedural matters likely to arise in litigation between landlord and tenant. They also provide summary procedures for obtaining judgment, in appropriate cases, without a full trial. As noted earlier, since the turn of the century landlords have had the ability to issue process under the general rules of court claiming possession of land. Sucb a claim is one on wbich summary judgment was,[48] and continues to be,[49]

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47. *Mirasol Farms Ltd.* v. *Lemer (Prelutsky)*, (1978) 6 B.C.L.R. 170, 5 R.P.R. 178 (Co. Ct.).

48. Until 1976 the claim would be made on a specially endorsed writ. *See, e.g.*, Supreme Court Rules, 1961, Order 3, Rule 6(2). Summary judgment would then be claimed under Order 14. The machinery of the specially endorsed writ was intended to prevent vexatious defences and applied only in simple cases: Williston & Rolls, *The Law of Civil Procedure* (1970) vol. 1, 280. If there was a meritorious defence, the application for summary judgment was dismissed and the defendant was given leave to defend the action: Order 14, Rule 1.

49. *See* Rule 18 and Rule 18A. Rule 18 is the summary judgment procedure in its modern form. Rule 18A, introduced in September 1983, is also available in landlord and tenant proceedings. Because Rule 18A is designed to have disputed issues of fact determined expeditiously, the Rule is properly described as a "summary trial procedure" rather than a summary judgment procedure. Judgment may be applied for and must be granted unless the Court is unable on the whole of the evidence before it to find the facts necessary to decide the issues of fact or law, or is of the opinion that it would be unjust to decide the issues on the evidence before it: Fraser & Horn, *The Conduct of Civil Litigation in British Columbia* (1978) vol. 1, 579. *See also* Rule 42(3) which provides for issuance of a writ of possession to enforce an order for the recovery or delivery of possession of land. No leave is necessary to issue the writ: *MacMillan Bloedel Industries Ltd.* v. *Anderson*, (1982) 37 B.C.L.R. 192 (S.C.).

available. Because of the technical nature of the summary procedures under the *Commercial Tenancy Act*, proceeding under the *Rules of Court* may well be the preferred course of action for most landlords.

The summary procedures of the Act have been a dead letter for many years. The overlapping of the Rules and the Act renders the continued existence of most of the procedural sections of the Act not only superfluous but potentially confusing. The Act gives no hint that an action for possession can be brought under the *Rules of Court* without reference to the *Commercial Tenancy Act*.[50]

### 3. Multiplicity Of Proceedings

The court has no jurisdiction to hear an application under any of the summary provisions of the Act unless all procedural requirements have been satisfied.[51] Where an irregularity occurs, it cannot be corrected. The landlord must bring a new application. At the hearing of a summary application for possession, the court can only decide which party has the immediate right to the rented premises.[52] The tenant cannot raise an unrelated defence in the same proceeding.[53] Where complicated questions of fact or law arise, the parties must commence an ordinary action.[54] The court cannot refer an application under one of the summary procedure provisions to the trial list, or make any of the other orders usually available in Chambers.

The factors cited above all encourage a multiplicity of proceedings. This flies in the face of the policy enunciated in section 10 of the *Law and Equity Act*:[55]

> The court, in the exercise of its jurisdiction in any cause or matter before it, shall grant, either absolutely or on reasonable conditions that to it seem just, all remedies any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that,

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50. A casual reading of the Act might lead to a view that the statutory remedies are the only ones available to a landlord.

51. *See, e.g.*, *2733-4th Ave. Dev. Ltd.* v. *Xavier*, (1981) 33 B.C.L.R. 397 (Co. Ct.); *Burquitlam Co-op. Housing Assn.* v. *Romund*, (1976) 1 B.C.L.R. 229 (Co. Ct.); *Foreshore Projects Ltd.* v. *Warner Shelter Corp.*, *supra*, n. 39.

52. *See, e.g.*, *McBain* v. *Herbert*, (1956) 19 W.W.R. 562 (Man. Q.B.), where it was held that the procedure under the equivalent of s. 28 did not empower the court to give summary judgment for unpaid rent.

53. *See, e.g.*, *238709 B.C. Ltd.* v. *McCallum Equity Corp.*, [1986] B.C.D. Civ. 2344-01 (Co. Ct.) where it was held that the tenant's defence alleging misrepresentation by the landlord did not relieve him from his duty to pay rent, and that therefore the landlord was technically entitled to an order of possession.

54. *See* the cases cited at n. 41, *supra*.

55. R.S.B.C. 1979, c. 224.

> as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of the matters avoided.

The application of those principles to landlord and tenant litigation requires that the court be able to grant relief based on a consideration of all relevant facts and dispose of all outstanding issues between the parties. The procedural sections of the *Commercial Tenancy Act* fall far short of that goal.

## E. Reform

### 1. Procedure

The analysis set out above leaves little doubt that the procedural sections of the *Commercial Tenancy Act* are in a sad state of repair. The main question we confront is whether any attempt should be made to devise a new set of procedural provisions that are more in tune with contemporary needs for inclusion in a new Act. Or should procedure be left entirely to the *Rules of Court*? To us, the answer seems clear.

It is our view that the *Rules of Court* already provide an entirely adequate procedural framework for the resolution of landlord and tenant disputes. Under the Rules, the bulk of commercial tenancy cases can, in all likelihood, be disposed of in summary proceedings. A full trial will be available where it is appropriate.

We believe that a new Act need go no further than to list possible orders the court may make in a commercial tenancy dispute. Such a provision is included in the draft legislation.[56] By implication, this leaves all procedural matters to be governed by the *Rules of Court*.

### 2. A Statutory Right Of Re-Entry

#### *(a) The Principle*

One justification for the procedural provisions of the *Commercial Tenancy Act* is the need to provide a remedy for the landlord whose rent is unpaid and who has not reserved, in the tenancy agreement, the right to repossess the premises in those cir-

56. *See* s. 14 of the draft legislation in Chapter X.

cumstances. The tenant may abandon the premises or remain in possession without paying the rent.[57]

Possession of the premises on such a default is of obvious importance to the landlord. As a result, in practice, most written tenancy agreements expressly provide the landlord with a right to re-enter on non-payment of rent. This practice is, in fact, so pervasive that, arguably, the need to provide a statutory right to possession (as distinct from a remedy to enforce that right) has vanished.

On the other hand, one does occasionally hear of oral tenancies of commercial premises. By their nature they are unlikely to contemplate explicitly a right of re-entry. A similar concern arises with informally drawn tenancy agreements which are entered into without the assistance of a legal advisor. The landlord in this sort of arrangement commonly fails to appreciate that it is necessary to negotiate for, and include in the agreement, a right of re-entry.

On balance, we believe the *Commercial Tenancy Act* should continue to provide relief in the "informal lease" kind of situation. Rather than dealing with it as a procedural matter, however, it would be preferable to cast this relief in the form of a statutory proviso for re-entry. This would eliminate the only justification for retaining the procedural provisions of the present Act. While this would result in somewhat less judicial supervision in these cases, other remedies seem adequate to deal with potential abuse.[58]

*(b) Scope*

What should be the scope of the proposed statutory right of re-entry? The procedure under section 28 of the current Act provides a remedy for the tenant's breach of a material covenant of the tenancy agreement as well as for his non-payment of rent. Should the statutory proviso have the same scope as section 28? Or should it be narrower and confined to a failure to pay rent?

Two factors are worth noting on this question. First, no other province appears to have gone as far as section 28 in pro-

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57. These are the situations dealt with in s. 5 and in s. 28(a) respectively.
58. Any infraction of the tenant's rights can be dealt with by a subsequent action for damages or by granting him relief from forfeiture. *See* Chapter VII and s. 6 of the draft legislation.

viding a statutory right of re-entry.[59] Second, section 28 is rarely invoked to enforce a forfeiture for breach of a material covenant.[60]

It is our preliminary view that the statutory right of re-entry should not be available if the tenant breaches a material covenant of the tenancy agreement. The experience under section 28 suggests that such a provision is rarely necessary. We are also concerned that a right of self-help in situations involving a breach of the tenancy agreement (other than a failure to pay rent) might lend itself to abuse. The existence of arrears is a matter that is seldom in dispute, and the exercise of a statutory right of re-entry for non-payment of rent would not appear to require judicial supervision. But the tenant may have legitimate grounds to dispute the landlord's view that a different material provision of the tenancy agreement has been breached. We do not believe the *Commercial Tenancy Act* should, itself, provide a vehicle for landlord self-help in such cases.

This approach to the statutory right of re-entry does not, of course, interfere with the landlord's option to include in the tenancy agreement a right to re-enter for breach of a material covenant.

*(c) Duration of Breach*

How soon after the non-payment of rent should the landlord be able to re-enter the premises? The summary procedure under section 28 of the *Commercial Tenancy Act* can be invoked if the tenant fails to pay his rent within seven days of the time agreed on. On the other hand, if the procedure set out in section 5 is to be invoked, the rent must be a year in arrear. Clause 14 of the lease portion of the *Land Transfer Form Act*[61] provides for re-entry on non-payment of rent for 15 days. This is also the period chosen by most other provinces which have a statutory right of

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59. Rhodes, *supra*, n. 22, para. 13:9:11. In Manitoba, the landlord may re-enter if the tenant is convicted of keeping a disorderly house within the meaning of the *Criminal Code*: *The Landlord and Tenant Act*, R.S.M. 1970, c. L70, s. 17(2).

60. We have only found two reported cases involving an application for summary relief for breach of a material covenant. In *Powliuk* v. *Drinkwater*, [1956] 1 D.L.R. (2d) 338 (B.C. Co. Ct.) the court found the procedure for breach of a covenant under s. 28 to be "complicated and absurd." In *American Traders Co.* v. *Gemini Bootery Ltd.*, (1979) 19 B.C.L.R. 83 (Co. Ct.) the landlord's application was dismissed because tenant's noise did not constitute nuisance so as to forfeit the lease.

61. R.S.B.C. 1979, c. 221, Schedule 4. This is based on *The Leases Act, 1845*, 8 & 9 Vict., c. 124, Sched. 2, Col. 2, Form 11.

re-entry, although the range extends to two months and even half a year.[62]

It is our conclusion that the new legislation should entitle the landlord to re-enter after 15 days' non-payment of rent. This length of time appears to strike a reasonable balance between the interests of the landlord and the tenant. Our draft legislation reflects this view.[63]

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62. *See The Landlord and Tenant Act*, R.S.M. 1970, c. L70, s. 17(1) (15 days); *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1, s. 8 (15 days); *Landlord and Tenant Act*, R.S.P.E.I. 1974, c. L-7, s. 9 (15 days); *The Landlord and Tenant Act*, R.S.S. 1978, c. L-6, s. 9(1) (2 months); *The Judicature Act*, R.S.N. 1970, c. 187, s. 130 (half a year).

63. *See* s. 5 of the draft legislation in Chapter X.

# "QUICKSAND ALERT" LANDLORD AND TENANT LAWS THAT AFFECT DAY-TO-DAY COMMERCIAL LEASING MATTERS IN UNFORSEEN WAYS

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## TABLE OF CONTENTS

A. Continuing Liability of the Tenant ..... 2
B. Continuing Liability of Landlord ..... 3
C. Guarantees/Indemnities/Letters of Credit/Security Interests and their Effectiveness upon Bankruptcy of the Tenant ..... 4
  i) Guarantees ..... 4
  ii) Indemnities ..... 5
  iii) Letters of Credit ..... 5
  iv) Security Interests ..... 6
  v) Promissory Notes ..... 7
D. Deemed Surrender - Fresh Lease ..... 7
E. Deemed Waiver ..... 8
F. Subleases ..... 9
  (a) The Effect of Surrender on a Sublease ..... 9
  (b) Subtenant's Ability to Retain the Leased Premises - Relief from Forfeiture ..... 14
  (c) Subtenants Ability to Protect its Goods on the Premises from Landlord's Distraint ..... 15
  (d) Effect of Bankruptcy or Winding-up Order on Subleases ..... 16
G. Leasehold Mortgages ..... 16
H. Independence of Covenants ..... 17
I. Abatement and Set Off ..... 18
J. Fundamental Breach ..... 20
L. Tenant's Right to Reject Mortgagee in Possession as its Landlord ..... 22
M. Leases Don't Get Frustrated ..... 23
N. No Damages for Unreasonably Withholding Consent ..... 24
O. Limitation Periods ..... 24
P. Rule Against Perpetuities ..... 25

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The principles of landlord and tenant law, historically, developed separately from the principles of contract law and equity with which business persons and commercial lawyers are familiar. Consequently, in tenancy matters, what one might expect to be the applicable legal principles are often different from those that actually apply.

Commercial tenancy law is a quirky, hybrid blend of ancient conveyancing concepts and modern contract principles.

Lawyers that practice primarily in other areas are often surprised when they discover how much commercial landlord and tenant law is out of date and out of harmony with modern contract law.

Here are some examples:

A. Continuing Liability of the Tenant

When a party assigns a contract and the other party agrees to accept performance by the assignee in lieu of the original party, a novation is considered to occur. In that situation, the original party is released from performing further obligations. It is not unusual therefore, to hear from a tenant that it expected to be relieved of its obligations under the lease when the lease was assigned and the landlord consented to the assignment. In fact, after a lease is assigned, regardless of whether the landlord consents, the original tenant continues to be responsible for performance of all of the lease obligations. (This liability does not continue where there is a renewal of the lease by the new tenant, but due to some rather esoteric case law, it seems that the liability might continue if the term is extended pursuant to an option to extend (as opposed to an option to renew) that was included in the original lease). Another source of confusion concerns the nature of the original tenant's continuing liability after an assignment of the lease. Considering that after an assignment of the lease, the new tenant is directly responsible for performing the tenant's obligations, there is a tendency to think of the original tenant as a mere guarantor. A guarantor is released from its liability if the person holding the benefit of the guarantee materially modifies the guaranteed contract. The guarantor can also be released if the debtor is given extra time to pay a debt, or modifications to the debt arrangement (which may be beneficial to the debtor) are agreed to by the person holding the benefit of the guarantee. However this is not the case with a tenant's obligations. The original tenant, even after it assigns the lease, continues to be

primarily responsible. Except in those limited situations described earlier there is a deemed surrender and a fresh lease is considered to occur, amendments of the lease that are made between the assignee (new tenant) and landlord do not have the effect of excusing the original tenant from its original obligations under the lease even if they have a major impact on the landlord and tenant relationship. (Examples are agreements to impose additional repair obligations, to change the permitted use of the premises, to increase the rent, or restrict the tenant's use of the premises. None of these changes has the effect of releasing the tenant from its original obligations.)

> *Williams & Rhodes, Canadian Law of Landlord and Tenant*, 6th ed. (Toronto: Carswell, 1988), "Liability of (Lessee) Assignor to Lessor", Ch. 15:3:6.

## B. Continuing Liability of Landlord

The basic principle is that there remains continuing liability of the tenant and the landlord, respectively, after the assignment of the lease or the reversion as the case may be, based on the concept of privity of contract. The sale of the property, and assignment of the lease to the purchaser, does not affect the privity of contract between the landlord and tenant, unless there is express language in the lease releasing the landlord from its obligations under the lease on the sale of the property or a formal release is obtained from the tenant in favour of the landlord at the time of the sale of the property and assignment of the lease. Consequently, in the absence of such a release, the tenant may enforce the covenants in the lease against the landlord even after the sale of the property and notwithstanding that it might also be able to

advance its claim against the new landlord. For example, unless expressly provided otherwise in the lease or some other document executed between the landlord and tenant, the Landlord will remain liable to the tenant for any overpayments in rent and additional rent made by the tenant. Such liability will continue to survive until six months after the expiry of the term of the lease by virtue of the provisions of the Limitations Act as discussed below.

> *Superior Acceptance Corp. v. 22 College Street Inc.* (1992) 25 R.P.R. (2d) 208, Craig, J., Halsbury's Laws of England, 4th ed., vol. 27 (London: Butterworths, 1981)
>
> *Devon Estates Limited v. Royal Trust Co.,* [1995] 2 W.W.R. 293 (Alberta Queen's Bench);
>
> *Canada Trustco. Mortgage Co. v. Mundet Industries Ltd.*, [1996] O.J. No. 3746 (Ont. Ct. Gen. Div.)

## C. Guarantees/Indemnities/Letters of Credit/Security Interests and their Effectiveness upon Bankruptcy of the Tenant

i) Guarantees - A guarantor provides the guarantee with a secondary obligor who will perform the obligations of the primary obligor if the primary obligor fails to. As a result, when a tenant's obligations under a lease are guaranteed by another, the guarantor can escape liability if the tenant's obligations no longer exist. If the tenant goes bankrupt and the trustee in bankruptcy disclaims the lease, the guarantor can no longer be compelled to perform the tenant's obligations under the lease because they have been extinguished by the disclaimer. Despite the increased modern use of terminology in guarantee documents stating that the obligation of a guarantor is primary and does not depend on the failure of the primary obligor or the even existence of the primary obligation, there continues to be doubt in the legal community that the original concept of a guarantee, and the above-mentioned

result in a lease context, can be erased with good drafting. Consequently, most landlords no longer accept guarantees but proceed by way of one of the other methods set out below.

> *Cummer-Yonge Investments Ltd.* v. *Fagot*, [1965] 2 O.R. 152 (affirmed in the Ontario Court of Appeal)

ii) Indemnities - An indemnifier provides the indemnifiee with a primary obligation to perform the same obligations that are owed by another. The indemnifier's obligation does not depend on the existence of those other obligations, or on the failure of the other party to perform them. The indemnifier's obligations, if the indemnity is properly worded, are separate and independent and capable of being enforced regardless of the status of the other obligor. The courts have upheld the enforceability of an Indemnity Agreement in the context of the disclaimer (upon bankruptcy of the tenant) of the lease which was the subject of the Indemnity Agreement. Some practitioners are concerned about the tax and financial statement consequences of signing an Indemnity Agreement, in that the obligations of the indemnifier may not be mere contingent liabilities.

> *Sifton Properties Ltd.* v. *Ruby Dodson* (1994), 28 C.B.R. (3rd) 151 (Ontario Court of Justice - General Division)

iii) Letters of Credit - A letter of credit is a banking instrument that provides for instant access to the credit afforded to the named party, by presentation to the issuing bank of the original instrument along with the criteria required to be established for presentment. Some landlords require their tenants to provide them with a letter of credit for a stipulated amount, to be drawn upon in the event of the tenant's failure to perform its obligations under

the lease. When the tenant goes bankrupt and the lease is disclaimed, the landlord may resort to the letter of credit for even the future rent claim.

> _885676 Ontario Ltd. (Trustee of)_ v. _Frasmet Holdings Ltd._ (1993), 12.O.R. (3d) 62 (Ont. Ct. (Gen. Div.))

iv) Security Interests - A tenant may grant to its landlord a security interest in the tenant's personal property, to secure the payment of rent and any other obligations of the tenant under the lease. If the tenant goes bankrupt and the trustee in bankruptcy disclaims the lease, one would expect that the security agreement would be unaffected as secured creditors may realize on secured property of a bankrupt, outside of the bankruptcy. However, there was a case in Ontario where the landlord attempted to realize on the tenant's secured equipment in order to recover the loss of future rent, and the court held that the security could not be enforced because the trustee's disclaimer of the lease put an end to the obligations that were secured by the security agreement.

Why would a security agreement not "survive" the bankruptcy of the tenant and disclaimer of the lease? The court in the subject case noted that it was possible for any security for a tenant's obligations to be drafted to survive termination of the lease for repudiation or some other breach. However, it found that "when the default or breach is the bankruptcy of the tenant, ... [the] statutory regime governs ...". Implicitly, it was treating a security agreement as a secondary obligation that hinged on the presence of the primary

obligation, and the court as much as said that security could not be drafted to survive termination of the lease upon bankruptcy.

> Peat Marwick Thorne Inc., Trustee v. Natco Trading Corporation Et Al. (1995), 22 O.R. (3d) 727 (Ontario Court (General Division))

v) Promissory Notes - A landlord may require that a promissory note be issued by a party, in some cases one of the principals of the tenant, stipulating a sum that the promissor will be obliged to pay on demand. The courts have upheld a landlord's right to claim under the promissory note after the bankruptcy of the tenant and disclaimer of the lease.

> Markborough Properties Ltd. v. Shiraz Rajan (1993), 24 C.B.R. (3d), 291 (B.C.S.C.)

## D. Deemed Surrender - Fresh Lease

There is a principle to the effect that if the landlord and tenant agree to extend the term of a lease (where there is no option for extension provided for in the lease), agree to expand the leased premises (where no option for expansion was originally provided for in the lease), or agree to change the rent so that a single blended rent in respect of the expanded and original premises is payable, a new lease is considered to come into effect (and, depending on the circumstances, the prior lease arrangement is considered to be surrendered). This is important in the situation where the landlord entered into the lease with a tenant whose financial strength was particularly important to it and the tenant has assigned the lease to the new tenant with whom the landlord enters into the amending arrangements. The result is that the

covenant of the initial tenant is released. So-called "blend extend" arrangements are frequently made (particularly in the office leasing area), and in most instances the parties are not aware that where the arrangement is made with a subsequent tenant (an assignee of the original tenant), the effect is that the original tenant is released from its obligations after the amendment.

*Jenkin R. Lewis & Son Ltd.* v. *Kerman*, [1971] 1 Ch. 477 (English C.A.).

*Pye* v. *Bank of Montreal* (1986), 41 R.P.R. 1 (N.S.C.A.).

*Avlor Investments Ltd.* v. *J.K. Children's Wear Inc.* (1991), 85 D.L.R. (4th) 239 (Ont. Ct. (Gen. Div.)).

*Centrovincial Estates P.L.C.* v. *Bulk Storage Ltd.* (1983), 46 P & CR 393.

*Selous Street Properties Ltd.* v. *Oronel Fabrics Ltd.* (1984), 270 E.G. 643.

*Friends' Provident Life Office* v. *British Railways Board*, [1996] 1 All E.R. 336.

E. Deemed Waiver

If a landlord becomes aware of a default by a tenant which would entitle the landlord to terminate the lease and instead of electing to terminate the lease the landlord does something, which indicates an intention to continue to recognize the subsistence of the landlord and tenant relationship (such as accepting rent that relates to a period after the default, or if the landlord were to distrain, or demand postdated cheques for future rent), the landlord will be considered to have waived its right to terminate in respect of the particular default. In that case, until a new default arises, the landlord will not have a right to terminate. This applies

even where the landlord accepts rent and deposits it by mistake or accepts rent and states expressly that despite its acceptance of rent, it reserves its right to terminate the lease.

Paul M. Perrell, "Landlord's Rights to End a Commercial Lease and Claim Damages" (1993) 2 National Real Property Law Review 211.

Francine Baker-Sigal and Zev Rosenblum, "Landlord Waiver of Tenant Default," Legal Alert Vol. 11, No. 11.

*1012765 Ontario Inc.* v. *Regional Shopping Centres Limited*, Ont. Ct. (Gen. Div.), June 15, 1993, Rosenberg J. (unreported). (This case is inconsistent with the others in this area.)

*Lippman* v. *Lee Yick* (1953), O.R. 514 (H.C.).

*Central Estates (Belgravia)* v. *Woolgar (No. 2)*, [1972] 1 W.L.R. 1048, [1992] 3 All E.R. 610 (C.A.).

*R.* v. *Paulson* (1920), 54 D.L.R. 331 (P.C.).

## F. Subleases

### (a) The Effect of Surrender on a Sublease

#### (i) At Common Law:

At common law, privity of estate was destroyed upon merger or surrender of a tenant's reversion and, as a result, covenants were thereby prevented from running with the reversion. As such, following the surrender of the head lease, a subtenant is released from its obligations under the sublease. This means the subtenant would be in a position to remain in possession for the balance of the term of the sublease without payment of rent or observance of any covenants! It should be stressed, however, that the covenants may not be enforced against the subtenant by reason of there being no privity of estate

as between the head landlord and the subtenant. If, however, there is privity of contract, the subtenant will continue to remain liable.

Even more problematic for landlords is the fact that this common law rule remains unaltered in situations where the head landlord is unaware of the existence of the subtenancy.

Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976), at 37.

C. Bentley, *Williams & Rhodes, Canadian Law of Landlord and Tenant*, Volume 1, 6th ed. (Toronto: Carswell, 1988) at 12-24 & 12-25; L. Blundell, *Woodfall's Law of Landlord and Tenant*, Volume 1, 27th ed. (London: Sweet and Maxwell, 1968) at 17/18; A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property*, (Toronto: Canada Law Book, 1985) v. 1 at page 291; Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976), at 37; *Royal Bank of Canada* v. *Loeb Inc.*, [1995] O.J. No. 1702 (Ontario Court (Gen. Div.), June 8, 1995, Feldman J.); *Webb* v. *Russell* (1789) 3 Term. Rep. 393.

A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property*, (Toronto: Canada Law Book, 1985) v. 1 at page 291; *Parker* v. *Jones*, [1910] 2 K.B. 32.

(ii) Section 17 of the Ontario Commercial Tenancies Act

What if a tenant (sublandlord) surrenders the headlease prior to the expiration of the term of the headlease? Section 17 of the Ontario *Commercial Tenancies Act* provides that where a tenant surrenders the headlease, the landlord becomes an assignee of any reversion expectant on a valid sublease granted by the tenant to a third party and accordingly is bound as landlord by

the terms of the sublease with the subtenant. Simply put, a subtenant's rights are not disturbed in instances where the head lease is surrendered. The head landlord, as a result, acquires all rights, benefits and advantages as against the subtenant arising by virtue of the sublease and, in turn, the subtenant acquires all rights as against the head landlord which rights the subtenant held by virtue of the sublease. In effect, Section 17 preserves the rights and obligations of subtenants so that the subtenancy remains unaffected in instances where there is a surrender of the head lease. It also preserves the liability of the subtenant in respect of payment of rent and observance of its covenants (being those that are set out in the sublease).

It is important to note that this provision only applies with respect to a "surrender" of a lease and not to a termination of the lease by the landlord. In simpler terms, if the tenant and the landlord agree that the tenant's lease will come to an end before the expiry of the term, this will be viewed in law as a "surrender of the lease". If on the other hand if the landlord exercises its rights under the lease to terminate the lease as opposed to agreeing on an early termination of the lease, the lease will have been terminated and the rights of a subtenant under Section 17 of the Act will not apply.

The Canadian jurisdictions which have enacted an equivalent to Ontario's Section 17 are: (i) **Manitoba:** *Landlord and Tenant Act*, R.S.M. 1987, c. L70, s.16; (ii)**New Brunswick:** *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1, s. 5; (iii) **Northwest Territories:** *Commercial Tenancies Act*, R.S.N.W.T. 1974, c. L-2, s. 6; (iv) **Prince Edward Island:** *Landlord and Tenant Act*, R.S.P.E.I. 1988, c. L-4, s.6; (v) **Saskatchewan:** *Landlord and Tenant Act*, R.S.S. 1978, c. L-6, s. 8; and (vi) **Yukon Territory:** *Landlord and Tenant Act*, R.S.Y.T. 1986, c. 98, s. 5(1). Several Canadian jurisdictions have not enacted an equivalent to Ontario's Section 17 and thus remain subject to the common law position as to the effect of a surrender on a sublease. These jurisdictions are: (i) Alberta; (ii) British Columbia; (iii) Newfoundland; and (iv) Nova Scotia. It should be noted that, in the Province of Quebec, the Civil Code does not provide for any contractual privity ("lien de droit") as between the head landlord and subtenant. As a result, if the head lease is cancelled, terminated or resiliated, the subtenant must relinquish possession of the premises. This is true even in situations where the head landlord and tenant voluntarily agree to terminate the head lease.

Shapiro v. Handleman, [1974] O.R. 223 (C.A.)

A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property*, (Toronto: Canada Law Book, 1985) v. 1 at page 291

(iii) Conduct Respecting The Acceptance of Surrenders

In jurisdictions where there is no equivalent to Section 17 of Ontario's *Commercial Tenancies Act*, it is absolutely critical that a landlord does not accept the surrender of a head lease without first obtaining a written representation from its tenant that there are no subsisting subtenancies affecting the premises. If, on the other hand, the premises are the subject of a sublease in which there is no privity of contract between landlord and subtenant, the landlord should not accept the surrender until such time as it has entered into a tenancy agreement directly with the subtenant or obtained the subtenant's release and surrender of its rights in the subleased premises.

If the subtenant refuses to co-operate, the landlord should, if at all possible, consider terminating the head lease if has grounds to do so, as opposed to accepting the surrender.

(iv) Surrender Agreements

Standard form surrender agreements should provide that the tenant is required to provide the landlord with a representation and warranty that the premises, or any part thereof, are not the subject of a valid or subsisting subtenancy agreement. The surrender agreement should also provide that the landlord's acceptance of the surrender is conditional on there being no subtenancies. While the inclusion of these provisions is clearly critical in jurisdictions where there is no equivalent to Ontario's Section 17, it may also be beneficial to include these provisions in the other jurisdictions, to help avoid surprises on the part of the landlord.

(v) Subleases & Consents To Sublease

Most standard form sublease and consent to sublease agreements provide for the subtenant's waiver of any *statutory* rights that the subtenant may have to, *inter alia*, retain the unexpired term of the sublease or to remain in occupation of any portion of the subleased premises. Clearly, the intent here

is to avoid having to deal with the continued occupation of an undesirable subtenant. However, in order to achieve this objective, these documents should provide for the subtenant's waiver of both its statutory and common law rights.

(b) Subtenant's Ability to Retain the Leased Premises - Relief from Forfeiture

Section 21 of the Ontario *Commercial Tenancies Act* permits a subtenant or underlessee to apply to the court for relief from forfeiture. Simply put, the tenant can apply to Court for an order permitting it to retain its leased premises subject to court imposed lease terms as to payment of rents, expenses, compensation and giving of security amongst other things save for the term, which term would coincide with the term granted to the tenant under the sublease plus any options to renew but in any event not longer than the term of the original head lease. However, many sublease agreements specifically provide that the subtenant waives its rights under Section 21 of the Act. The rights of the subtenant on such an application will depend on many factors including whether the landlord has consented to the sublease. The Courts will be refrain from permitting the subtenant to continue under its sublease with the landlord where it would be unfairly prejudicial to the landlord if it were to be forced to be bound by the sublease which would have imposed obligations on the landlord which obligations were materially different and inconsistent with its obligations under the head lease. A tenant leasing only part of the premises that were the subject of the

head lease could be forced to assume the whole head lease as it pertains to all of the premises subject to the head lease and not just the subleased premises, if it wants to continue in possession of the subleased premises. In most cases the tenant would not be in a financial position to do so and would accordingly lose possession of its subleased premises unless it could make its own deal directly with the landlord. The underlying principle is that a Court must be satisfied that the granting of relief to a subtenant under Section 21 of the Ontario *Commercial Tenancies Act* will not unfairly prejudice or adversely affect the head-landlord.

> The Canadian jurisdictions which have enacted an equivalent to Ontario's Section 21 are: (i) **Manitoba:** *Landlord and Tenant Act*, R.S.M. 1987, c. L70, s.20; (ii)**New Brunswick:** *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1, s. 15; (iii) **Northwest Territories:** *Commercial Tenancies Act*, R.S.N.W.T. 1974, c. L-2, s. 47; (iv) **Prince Edward Island:** *Landlord and Tenant Act*, R.S.P.E.I. 1988, c. L-4, s. 16; (v) **Saskatchewan:** *Landlord and Tenant Act*, R.S.S. 1978, c. L-6, s. 11; and (vi) **Yukon Territory:** *Landlord and Tenant Act*, R.S.Y.T. 1986, c. 98, s. 58(1). Where no equivalent to Section 21 exists, the subtenant has no right to apply for relief.
>
> Golden Griddle Corp. *v.* Toronto (City) 33 O.R. (3d) 545 (C.A.), leave to S.C.C. denied.

(c) Subtenants Ability to Protect its Goods on the Premises from Landlord's Distraint

Section 32(2) of the Ontario *Commercial Tenancies Act* allows a subtenant, occupying the premises *with the consent of the landlord*, to provide a statutory declaration that the tenant has no interest in its goods and to pay any rent owing under its sublease directly to the landlord, upon which landlord will have no right to distrain against those goods upon the premises belonging to the subtenant.

An equivalent to Ontario's Section 32(2) may be found under New Brunswick's *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1, s. 34(2)-(6).

(d) Effect of Bankruptcy or Winding-up Order on Subleases

Section 39(2) of the Act allows a subtenant, occupying the premises *with the consent of the landlord*, a means of protecting its leasehold interest in the event of the bankruptcy or winding up of the tenant, by electing within three months of the filing of the bankruptcy to take over the head lease on the same terms and conditions save and except as to rent. Rent payable by the subtenant to the landlord on the subtenants assumption of the head lease is the greater of the amount payable under the sublease and the amount payable under the head lease. A subtenant is not required to pay any arrears owed to the landlord by the head tenant as a condition of electing to assume the head lease under Section 39(2).

The Canadian jurisdictions which have enacted an equivalent to Ontario's Section 21 are: (i) **Alberta:** *Seizures Act*, R.S.A. 1980, c. S-11, s. 10-12; **(ii) Manitoba:** *Landlord and Tenant Act*, R.S.M. 1987, c. L70, s.47(2), (3); **(iii)New Brunswick:** *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1, s. 44(2); **(iv) Prince Edward Island:** *Landlord and Tenant Act*, R.S.P.E.I. 1988, c. L-4, s. 75(1), (2); **(v) Saskatchewan:** *Landlord and Tenant Act*, R.S.S. 1978, c. L-6, s. 49(1), (2), (3). Where no equivalent to Section 39(2) exists, a subtenant has no such right to elect.

*Hammersmith Manor Enterprises Inc. v. Frazzor Corp.* (1991), 4 O.R. (3d) 46, 19 R.P.R. (2d) 87 (Gen. Div.)

*Westhill One Ltd. v. Taylor* (1989), 70 O.R.. (2d) 93 (H.C.)

G. Leasehold Mortgages

Considering that very often, when a tenant grants a leasehold mortgage to its lender it does so by way of sublease, it is important to consider the implications to a landlord and to a

tenant's lender of proceeding on this basis. Generally speaking, when landlords are asked to consider granting their consent, if the lease so requires, to the tenant's granting of a security interest in favour of its lender, the discussion focusses on what rights of the tenant the lender may be entitled to enjoy, and on what obligations the lender may be willing or required to accept, if the lender were to ultimately realize on the leasehold interest. Rarely does anyone consider the implications of the lender taking a subtenant's interest in the leased premises. However, that is exactly what is accomplished when one of these transactions take place and accordingly, a lender taking security in the tenant's leasehold interest by way of the grant of a sublease should carefully consider its rights and obligations as subtenant, as set out above. Likewise, the landlord should consider the implications of having the lender as a subtenant. Many of the issues addressed above regarding the peculiarities of subleases will require attention in the consent-to-leasehold-mortgage document to be signed by the landlord, the tenant and its lender.

## H. Independence of Covenants

One would think that if a landlord failed to perform important obligations in a lease, the tenant would be exempted from paying rent. That is not the case unless the lease expressly allows the tenant to withhold rent or the tenant is actually owed a debt by the landlord. Likewise, failure by the tenant to pay rent does not excuse the landlord from its obligations

(unless the landlord chooses to exercise a right of termination in respect of the tenant's default).

> *Cross* v. *Piggott,* [1922] 2 W.W.R. 662, 32 Man. R. 362, 69 D.L.R. 107 (K.B.).
>
> McCarthy v. Queen-Yonge Investments Ltd., [1961] O.R. 41 (H.C.).
>
> *Report on Landlord and Tenant Law,* (Ontario Law Reform Commission, 1976), "The Independence of Covenants in a Tenancy Agreement", Ch. XIX.

I. Abatement and Set Off

Under the Doctrine of the Independence of Covenants, a breach of covenant by a landlord does not affect the tenant's obligations under the tenancy agreement (an action for damages being the tenant's only remedy), and, conversely, a breach by a tenant of its obligations does not affect the landlord's obligation to perform its covenants (unless of course it utilizes its right to terminate the tenancy where the breach is one in respect of which termination is permitted). The concept developed out of the requirements of an early agricultural economy which placed primary importance on the conveyance of the leasehold estate, the supporting and contractual element being given a secondary status.

Unless the lease specifically provides otherwise, a tenant may set off against rent due under the lease a debt due to the tenant by the landlord pursuant to Section 35(1) of the Act. Despite the provision in the Act for a right to set off, the parties are free to contract out of the statutory provision and it is for this reason that the majority of standard form commercial leases provide that all rent is payable when due without deduction, abatement or set off.

Many leases go on further to specifically provide that the tenant waives any rights it has under any statute which may permit tenant to set off any amounts against rent.

One may even think that if the leased premises are damaged or destroyed, or are rendered unfit for the use intended, rent would abate until the premises were rebuilt. However, rent remains due and payable no matter what the state of the demised premises unless the lease specifically provides otherwise. It is well established law that in the absence of a contrary term in the lease or in the absence of statutory provisions, the destruction of the premises will neither terminate the lease or afford the tenant a defence in an action for non-payment of rent. There is also no implied condition in a lease of land or unfinished building that it will be fit for the use intended by the tenant. The idea that a leasehold interest is an interest in land, and the land, is incapable of destruction and that therefore under no circumstances where a lease is granted can the transaction be frustrated, still looms large on the landlord and tenant landscape. It reflects the predominance of feudal property law notions and ignores the fact that in many instances, the true purpose and content of the landlord and tenant transaction involves an opportunity to carry on business or to capitalize on the economic potential of a particular location or setting.

> *Pensionfund Realty Limited* v. *MacCoshams Storage & Distribution Centres (Winnipeg) Ltd. et al*, Court of Queens Bench of Manitoba, Unreported, No. CI 90-01-43427, March 14, 1994.

J. Fundamental Breach

There is a basic principle of contract law that where one party to the contract commits a breach that is so important that it has the effect of destroying the fundamental purpose of the contract, the other party is excused from performing. Until recently, it was believed that this principle only applied to leases if the landlord physically deprived a tenant from occupying the leased premises. However, several cases have applied the doctrine of fundamental breach to situations where the tenant was not *physically* deprived of its right to enjoy the premises. For example in *Lehndorff* (see citation below), the British Columbia Court of Appeal held that the landlord had fundamentally breached the lease by unreasonably withholding its consent to an assignment. Notwithstanding the foregoing, there is still some uncertainty as to what extent the principle does or does not apply. In a recent Ontario decision *(Framlance* - see citation below), the Court stated that in order to be successful on a claim based on fundamental breach, tenants must establish: "acts of commission by the lessor which are calculated to destroy the lessee's enjoyment of the premises". It remains to be seen how this will be interpreted or whether it will even be followed. Clearly, the fundamental breach principle has been solidly wedged into commercial leasing law and we can expect further cases on the issue.

Paul M. Perell, "The Fundamental Breach" in H. Haber, ed., *Tenant's Rights and Remedies in a Commercial Lease* (Aurora: Canada Law Book Inc., 1998) 157.

*Hunter Engineering Co.* v. *Syncrude Canada Ltd.* (1989), 57 D.L.R. (4th) 321, [1989] 1 S.C.R. 426. (General Principles of Fundamental Breach).

*Lehndorff Canadian Pension Properties Ltd.* v. *Davis Management Ltd.* (1989), 59 D.L.R. (4th) 1 (B.C.C.A.). (Successful fundamental breach claim based on a landlord's failure to consent to an assignment of the Lease.)

*Ad Hoc Management Inc.* v. *Prudential Assurance Co.* (1995), 55 A.C.W.S. (3d) 409 (Ont. C.A.). (Successful fundamental breach claim based on a landlord's failure to honour a law firm office tenant's right of first refusal/option to expand.)

*Prince Business Inc.* v. *Vancouver Trade Mart Inc.*, [1994] B.C.J. No. 2647 (B.C.C.A.) (Successful fundamental breach claim based on a landlord's breach of a tenant's exclusive.)

*Country Shop Donuts Ltd.* v. *Great West Life Assurance* (1996), 5 R.P.R. (3d) 187 (Ont. Ct. (Gen. Div.)). (Unsuccessful fundamental breach claim despite the Court having found that the landlord breached the tenant's exclusive.)

*Chisos Investment Co.* v. *Houlahan*, [1999] O.J. No. 1374 (Ont. Ct. (Gen. Div.)). (Successful fundamental breach claim based on a landlord's failure to reimburse its tenant for the tenant's lease payments on its former location, which location the landlord had originally induced the tenant to leave by committing to pay the rent on its behalf.)

*Framlance Properties Ltd.* v. *Dahan's Fashion Optical Ltd.*, [2000] O.J. No. 1746 (Superior Court of Justice) (Unsuccessful fundamental breach case based on a landlord's failure to repair and the tenant's claim that the premises were not fit for business.)

*Shun Cheong Holdings B.C. Ltd.* v. *Gold Ocean City Supermarket Ltd.* (2000), 31 R.P.R. (3d) 179 (B.C.S.C.) (Successful fundamental breach case based on a situation factually similar to that in Framlance.)

## K. No Obligation For Landlord to Repair

Since, historically, the lease was primarily a conveyance of an interest in land, it did not carry with it any implied obligation for the landlord to repair the leased premises nor was there any implied obligation to ensure that the leased premises were in good repair at the outset of the lease. During the term of a lease there are implied obligations for the tenant to repair but none for the landlord. Even if a lease exempts the tenant from making certain repairs (for example, structural repairs), the landlord is not obligated to make those exempted repairs unless it expressly agrees to perform them.

*Williams & Rhodes, Canadian Law of Landlord and Tenant*, 6th ed. (Toronto: Carswell, 1988), "Repairs - Landlord's Duty", Chapter 10.

John D. McKellar, "Repairs and Alterations" in H. Haber, ed., *Shopping Centre Leases* (Agincourt: Canada Law Book Limited, 1976) 455.

David Vanek, "Obligations to Repair of Landlord and Tenant", in *The Lease In Modern Business*, 1965 L.S.U.C. Special Lecture Series.

## L. Tenant's Right to Reject Mortgagee in Possession as its Landlord

The recent Ontario Court of Appeal decision, *Goodyear Canada Inc. v. Burnamthorpe Square Inc.* reminded us that if a mortgage goes into default, not only can the mortgagee evict tenants whose leases were entered into after the mortgage, but if the mortgagee goes into possession those tenants may refuse to recognize the mortgagee as their landlord. That allows them to walk away from their leases with no liability to the landlord or to the mortgagee. This right exists even in a situation where the landlord has previously assigned its rights under the lease as collateral security for the loan. If a tenant does not choose to reject the mortgagee as its landlord, and instead pays rent to the mortgagee after the mortgagee takes possession, a new tenancy relationship arises between the mortgagee and the tenant in the nature of a yearly tenancy. Either the tenant or the mortgagee may terminate the yearly tenancy on six (6) months' notice effective at the end of a year of the tenancy. (All of this assumes that there is no separate agreement (commonly called a non-disturbance agreement) between the tenant and the mortgagee requiring them to continue as landlord and tenant with each other in accordance with the terms of the original lease.) This principle

caught many lawyers by surprise. However, it is the law. Leave to appeal the Court of Appeal decision was sought but the Supreme Court of Canada refused to hear the appeal.

> *Goodyear Canada Inc.* v. *Burnamthorpe Square Inc.* (1997), 32 O.R. (3d) 657 (Ont. Ct. (Gen. Div.); (1998), 41 O.R. (3d) 321 (C.A.); leave to appeal to S.C.C. denied, [1998] S.C.C.A. No. 629.

## M. Leases Don't Get Frustrated

There is a principle of contract law under which parties can treat a contract as being ended, where circumstances over which neither party has control make the performance of the contract impossible. Contract lawyers, familiar with this principle, sometimes assume that if leased premises are burned down, or if the premises are destroyed, or made useless for the tenant's purposes (for example, by virtue of governmental action making access to the premises impossible), the tenant will be excused from paying rent or from continuing as tenant. However, historically, the lease was treated primarily as a conveyance of an interest in land and therefore, since that interest in land continues in the situations just described, the tenant is still obligated to pay rent and to perform its obligations under the lease unless a provision changing that obligation is included in the lease document.

> *National Carriers Ltd.* v. *Panalpina (Northern) Ltd.*, [1981] 2 W.L.R. 45 (H.L.).

> *Cricklewood Property and Investment Ltd.* v. *Leightons Investment Trust Ltd.*, [1995] A.C. 221 (H.L.).

> Joseph T. Robertson, "Frustrated Leases: 'No to Never-But Rarely Ever'", [1982] 60 Canadian Bar Review 619.

## N. No Damages for Unreasonably Withholding Consent

It is generally accepted in Canadian common law, that where a lease provides that the landlord will not unreasonably withhold its consent to an assignment or sublease by a tenant, a tenant's only remedy if the landlord does unreasonably withhold consent is to apply to the court for an order requiring the landlord to give its consent. The landlord is not liable for damages. (Although a case in British Columbia did hold a landlord liable for damages for withholding consent, the case has not been followed in other jurisdictions yet.)

> *Williams & Rhodes, Canadian Law of Landlord and Tenant*, 6th ed. (Toronto: Carswell, 1988), "Landlord not obliged to give Consent", Chapter 15:5:1.
>
> *Canada Permanent Mortgage Corporation* v. *Markglen Investments Limited*, January 8, 1985, Krever J. (unreported).
>
> *Treloar* v. *Bigge* (1874), L.R. 9 Ex. 151.
>
> *Evans* v. *Levy*, [1910] 1 Ch. 452.
>
> *Cornish* v. *Boles* (1914), 31 O.L.R. 505, D.L.R. 447 (C.A.).
>
> *Cedar Valley Investments Inc.* v. *Port Moody* (1981), 22 R.P.R. 80 (B.C.S.C.) (Wherein the court referred the issue to trial as to whether normal contractual remedies were available for enforcement of the Landlord's obligation to consent.)

## O. Limitation Periods

In Ontario the limitation period for suing on a contract is six (6) years. However, pursuant to the Limitations Act of Ontario, *R.S.O. 1990, c.L.15*, the limitation period does not commence until the expiry of the term of the lease. Accordingly, if you had a twenty year term, a tenant could claim against the Landlord for matters that occurred in the first or second

years of the term of the lease up until twenty-six (26) years after the commencement of the term, unless the lease provides otherwise.

P. Rule Against Perpetuities

The common law Rule Against Perpetuities, which requires an interest in land to vest within 21 years after the creation thereof, does not apply to options to renew leases. Likewise, the rule according to Ontario's Perpetuities Act, R.S.O. 1990, c.P.9 provides exceptions for options to renew. But an option to expand, commonly found in an office lease or a department store lease, may offend the rule if it creates an interest that will not vest for 21 years. It may be desirable for a tenant enjoying an expansion option to structure its transaction differently to avoid the option being struck down by the Rule Against Perpetuities.

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The examples set out above represent merely a sampling of the many anomalous principles of commercial landlord and tenant law. Gradually the courts have begun to intervene to impose the principles of contract law on landlord and tenant commercial relationships. A law reform commission in British Columbia has recommended that the legislature take that step instead of waiting for the courts deal with the problem, but no action has been taken by any province to implement such an approach. In fact, Alberta recently repealed its commercial

landlord and tenant legislation. In Alberta, the principles of common law alone govern landlord and tenant relationships, with the exception of certain specific areas such as bankruptcy and insolvency and landlord's rights of distress.