

**COMMERCIAL LEASE
AGREEMENTS A TO Z**

**NEGOTIATING AND DRAFTING
KEY BUSINESS AGREEMENTS
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**FUNDAMENTALS OF
COMMERCIAL LEASING
– A PRACTICAL APPROACH**

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Table of Contents

I. INTRODUCTION	1
II. CREATION OF LANDLORD/TENANT RELATIONSHIP	1
A. Definitions and Evidentiary Requirements	1
B. Practical Considerations in Creating the Landlord/Tenant Relationship	3
(i) Parties.....	3
(ii) Premises.....	5
(iii) Offer to Lease	8
(iv) Form of Lease.....	9
(v) Use of Premises	11
(vi) Construction of the Landlord/Tenant Work	13
(vii) Operating Costs – Common Area and Maintenance Costs.....	15
(viii) Insurance	17
(ix) Assignment and Subletting	19
III. REMEDIES.....	21
IV. CONCLUSION.....	24

FUNDAMENTALS OF COMMERCIAL LEASING — A PRACTICAL APPROACH

I. INTRODUCTION

Commercial real estate has consistently represented an attractive investment vehicle to institutional and individual investors alike. One of its hallmarks is its purported ability to deliver a steady predictable cash flow derived from the various commercial properties that make up any given investment. Commercial leases, through their structure and the means by which they allocate commercial risks between landholders and their tenants, represent the fundamental building block of commercial real estate investments and because of their fundamental nature, a practical understanding of the issues that commonly arise in the commercial leasing context is essential to negotiating fair and workable lease documents. Commercial leasing is a broad term covering such diverse situations as the sale and leaseback of a commercial manufacturing facility or warehouse, the simple lease of office space, and the development of shopping centres or business parks (to name but a few), and as such, it is impossible in a presentation such as this to cover all of the potential issues that might arise in a commercial leasing context. This paper will focus on the fundamentals and requirements of the formation of the landlord and tenant relationship in British Columbia, the nature of the leasehold relationship at law and key concepts that arise in the creation of any lease. While many of the concepts discussed in this paper are not restricted to any particular jurisdiction, this paper focuses primarily on commercial leasing practices in British Columbia.

II. CREATION OF LANDLORD/TENANT RELATIONSHIP

A. Definitions and Evidentiary Requirements

Before discussing the creation of the landlord/tenant relationship within the context of common commercial real estate transactions, it is useful to review the nature and requirements of a leasehold interest at law. The relationship between landlord and tenant under a lease is more than a contractual relationship, although it does create contractual obligations on the parties. A lease, by definition, involves a grant by the landlord of an estate in the landlord's land which grants the tenant exclusive possession over a specifically identified portion of land for a specifically identified period of time. It is the creation of the tenant's interest in the land and the right of exclusive possession which distinguishes the lease from lesser interests such as licenses or easements. That having been said, however, the contractual elements of the lease are equally important in establishing the rights and remedies of the parties and courts in Canada have long recognized the dual nature of the

landlord/tenant relationship. It is now settled law in Canada that the rights and remedies of landlords and tenants can be rooted in either real property or the contractual nature of a lease.¹

The transfer by a lease of an interest in land has given rise to certain formal requirements which date back to the English *Statute of Frauds*. In British Columbia, these requirements are now reflected in subsection 59(3) of the *Law and Equity Act*, which states that any contract respecting land or disposition of land is not enforceable unless it is in writing signed by the party to be charged by it or that party's agent, and such writing contains a reasonable indication of the subject matter of the disposition.² It should be noted that such a requirement does not apply to circumstances where the lease or the contract to grant a lease is for a period of less than three years and if the party charged by the disposition has acquiesced or behaved in such a manner consistent with that disposition. Such action may include the acceptance of a payment or deposit. Similarly, a person alleging a disposition of land by way of lease may get around the formal evidentiary requirements by showing reasonable reliance in such a manner that the party relying on such a disposition has changed its position with an inequitable result.

An enforceable lease does not require a specific form or particular wording so long as the essential requirements of a lease can be found within the documentation provided by the parties or can be implied from their conduct. These essential terms are described in *Williams & Rhodes Canadian Law of Landlord and Tenant* as:

...the parties, a description of the premises to be demised, the commencement and duration of the term, the rent, if any and all material terms of the contract not incident to the relation of the landlord and tenant including any covenants or conditions exceptions or reservations.³

In circumstances where the parties are explicit that the correspondence or documentation between them is not to create a lease, no lease will be implied. Otherwise, the existence of a landlord/tenant relationship can be implied from a document or series of documents even when a formal lease is contemplated but never executed.⁴ As a further point, it should be noted that unless the parties otherwise provide in their lease, subsection 5(2) of the *Property Law Act*, requires that a landlord who makes a lease or agreement for lease for a term exceeding three years, where there is actual occupation granted under the lease, grant that lease in a form that is registrable against title to the

¹ *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 [*Highway Properties*].

² (Eng.) ch. 3, R.S.B.C. 1996 c. 253, c. 59(3)(a).

³ C.A. Bentley, J.H. McNair & M.J. Butkus, *Williams & Rhodes – Canadian Law of Landlord and Tenant*, 6th ed., (Toronto: Carswell, 2005-release 8) at 3-4.

⁴ *Deshugh Estates Ltd. v. Robin's Foods Inc.* (1998), 19 R.P.R. (3d) 40 (B.C.S.C.).

landlord's property in the applicable land title office.⁵ Since in most circumstances landlords wish to control the circumstances under which a lease will be registered against their title, it is important to clearly address the issue of registration of the lease early in the negotiations and prior to the execution of any offer to lease. In most circumstances involving a multi-tenant complex, landlords are unwilling to permit any registration on the part of the tenant against title, as such registrations may interfere with the landlord's financing arrangements or may complicate title or prove difficult to remove in circumstances where the lease is terminated. A tenant, on the other hand, may require that the lease be registered not only for the purposes of giving notice to potential third parties claiming an interest in the property, but also for the purposes of granting the lease as security to its own lenders. Where registration is required, the parties typically register a short form of lease that is modified so as not to reveal the business terms between the parties. Such a registration must be accompanied with a tax return filed under the *Property Transfer Tax Act*, although in most cases, provided the lease and all renewals therein has a term of 30 years or less from the date of registration of the lease, an exemption from the payment of tax is available.⁶

B. Practical Considerations in Creating the Landlord/Tenant Relationship

(i) Parties

In practice, most initial arrangements relating to a lease involve the leasing agents for either the landlord or the tenant or both. Sometimes, it is the landlord's property manager who acts on behalf of the landlord. In other instances, the party that is ostensibly acting as the landlord for the purposes of lease negotiations is a completely different party from the party who appears as the property's registered owner on title. This may arise as a result of the common practice within the real estate community under which nominees hold title for the true beneficial owner of the property pursuant to an unregistered form of declaration of trust. Such an arrangement permits a transfer of beneficial ownership by the landlord without triggering property transfer tax. In most cases, the declaration of trust will contain a provision making the nominee the agent of the landlord for the purposes of any agreements relating to the property. Often, the rights to enter into and negotiate leases are also delegated to the landlord's property manager. The result of these arrangements is often confusing and it is incumbent upon the tenant to ensure that the party with whom it is dealing has sufficient authority to enter into and complete the transaction contemplated by the lease. This issue is perhaps less of a concern in circumstances where recognized and reputable agents and property owners are involved. Nevertheless, where the party purporting to act as landlord is different from the party appearing on title to the property involved, the tenant should seek some form of written assurance

⁵ *Property Law Act*, R.S.B.C. 1996, c. 377, s. 5(2).

⁶ R.S.B.C. 1996, c. 378, s. 14(4)(o).

from the landlord's solicitor confirming the landlord's authority to enter into the lease arrangement. It is also prudent in such circumstances to perform some measure of due diligence in the form of land title and corporate searches so as to identify any possible issues relating to the landlord's title such as judgments or other charges affecting the property and the landlord's authority to deal with it. A corporate search will also identify any failure on the part of the landlord to comply with the filing requirements under the British Columbia *Business Corporations Act*.⁷ Additionally, depending on the parties' intentions for the property, it may be prudent to conduct other due diligence searches, in particular with regard to the compliance of the building located on the premises with provincial and municipal building requirements. A review of title may identify as well any charges on title in favour of any of the landlord's lenders for the purposes of the negotiations between the landlord and the tenant relating to the landlord's requirements for subordination agreements from the tenant and the tenant's requirement for non-disturbance agreements from the landlord's lenders.

From the landlord's perspective, the landlord will take the necessary steps to ensure that the proposed tenant is credit-worthy and is financially capable to meet its obligations under the proposed lease. Such due diligence on the part of the landlord should include investigations into the corporate status of the tenant so as to ensure that the party being offered as the tenant corresponds to the party on whose financial capability the landlord is relying. In practice, concerns as to the tenant's financial capabilities can be addressed by obtaining the appropriate covenant from the tenant's principal or parent company who has sufficient financial capability or by the requirement for a substantial deposit. In circumstances where the landlord is to rely on the covenant of an international parent to bolster the obligations of a newly incorporated Canadian subsidiary, practical difficulties can arise. Failure to perform on the part of the tenant may result in expensive execution proceedings outside of the landlord's jurisdiction. In such circumstances, a substantial deposit or letter of credit as additional security for the tenant's performance of its obligations may represent a more desirable solution.

Care should be taken if the intended tenant under a lease is not yet incorporated at the time the offer to lease is executed. In such circumstances, the parties may choose to have the lease executed by an existing related company of the proposed tenant, such as the tenant's parent, with the intention that the lease be assigned once the tenant is incorporated. The parties must be explicit as to whether or not the original signatory to the lease or offer to lease is to be released once the actual tenant is incorporated and the lease is assigned. Otherwise, a party may find itself unintentionally bound to a lease and its associated liabilities. It should be noted that the British Columbia *Business Corporations Act*, now contains provisions explicitly permitting parties to enter into "pre-incorporation" contracts so that landlords can now enter into an offer to lease or other contract with a tenant which is

⁷ S.B.C. 2002, c. 57.

yet to be incorporated.⁸ In such circumstances, a “facilitator” enters into the contract on behalf of the company to be incorporated and is then released from its obligations under the contract once the company is incorporated and has adopted the contract. A landlord in such circumstances may want to explicitly provide in the offer to lease that notwithstanding the incorporation of the company and its adoption of the offer to lease, the facilitator shall continue to be bound under the terms of the contract as a covenantor jointly and severally liable with the newly incorporated company.

(ii) Premises

Perhaps the clearest limitation on the ability of parties to lease premises in British Columbia arises under section 73 of the *Land Title Act* which effectively limits the ability of parties to enter into a lease of a portion of a parcel of land for a period of more than three years unless the subdivision provisions within the *Land Title Act* have been complied with. This section reads as follows:

- 73(1) Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of:
- (a) transferring it, or
 - (b) leasing it, agreeing to lease it for a life, or for a term exceeding three years.

Subsection (3) creates a special exemption from the subdivision requirement permitting parties to lease a building or a portion of a building.¹⁰

The effect of this section on leases that have been entered into by parties in contravention of its terms has been finally addressed in British Columbia in the well-known case of *International Paper Industries Ltd. v. Top Line Industries Inc.*¹¹ Despite earlier case law which suggested that leases entered into contrary to section 73 could be enforceable between the parties as personal contracts, the *Top Line* decision has made it clear in British Columbia that such leases are void from the outset and cannot even be used as the basis for enforcement by the parties themselves of the rights purportedly granted therein. Subsequent decisions of the courts in British Columbia have, to a varying degree, attempted to question the conclusion reached in the *Top Line* case.¹² However, it

⁸ *Business Corporations Act*, *supra*, note 7, s. 20.

⁹ *Land Title Act*, R.S.B.C. 1996 c. 250, s. 73(1).

¹⁰ *Ibid.*, s. 73(3).

¹¹ (1996), 20 B.C.L.R. (3d) 41 (C.A.) [*Top Line*].

¹² *Jack v. Jack Estate*, 2001 BCSC 1497; *Coe v. Houle* (1999), 69 B.C.L.R. (3d) 156 (S.C.); and *Pfeiffer v. Russell*, [1999] B.C.J. No. 2253.

remains clear that the lease of a portion of a property that has not been appropriately subdivided in accordance with the *Land Title Act* remains an illegal contract.

In order to avoid the issues surrounding section 73 of the *Land Title Act* in circumstances where land must be subdivided, it is essential that the parties explicitly address the requirement that subdivision take place as a condition of the lease and that the parties determine between themselves who will have the responsibility and expense of proceeding with such subdivision. In the event subdivision fails to proceed in those circumstances, the remedies of the parties will arise only from the breach of the covenant to subdivide rather than from any breach of lease obligations. Alternatively, the parties may attempt to circumvent section 73 of the *Land Title Act* by having the land owner grant a different form of occupancy right in respect of the unsubdivided parcel. Such a right might take the form of a purely contractual licence or an easement relating to adjoining property or statutory rights of way to the extent they can be granted. There is significant risk in having the parties rely on a lesser interest in the land in circumstances where the true intention of the parties is to create a landlord/tenant relationship. The *Top Line* case considered the possibility of a licence in such situation and commented as follows:

More importantly, if the tenant were said to merely have a contractual right or licence enforceable against the landlord only, to occupy the leased premises in accordance with the terms set forth in the Lease, the public policy aims of Section 73 would still be offended – the requirements as to access highway allowances drainage flooding erosion environmental impact and future subdivision listed in Section 86 would be circumvented; the tenant would be vulnerable to be defeated by a third party purchaser and any such purchaser relying on a register would be buying a lawsuit at best. As well the door would be open if only a crack, for arguments in other cases by land owners and developers whose interests it would be to remain or appear ignorant of the requirements of the Land Title Act.¹³

The impact of section 73 and the *Top Line* decision do not, however, affect the abilities of parties to enter into executed leases in respect of buildings or portions of buildings to be constructed and located on a portion of unsubdivided land in the future. As previously discussed, subsection 73(3) provides an exemption from the requirements of section 73 for leases of buildings and portions thereof. In the case of *465559 B.C. Ltd. v. Cactus Café Maple Ridge*, the Court of Appeal again considered the effect of section 73 of the *Land Title Act* in the context of an offer to lease that was entered into and executed by parties for a portion of land upon which a building was to be constructed

¹³ *Top Line, supra*, note 11 at 58.

in the future.¹⁴ The Court of Appeal agreed with the court below in finding that such an offer to lease fell within the exemption of subsection 73(3) as being a lease of a building or portion thereof and despite the fact that the offer to lease contemplated a future building and required the landlord to construct a patio on the property which was not part of the building, the court held the offer to lease to be an enforceable contract.

Another area that gives rise to the potential for dispute between the landlord and tenant relating to the premises involves the manner in which the area of the premises is measured. Where the offer to lease or lease expresses the minimum rent payable is based on a “per square foot” amount, the means of measurement and the assumptions upon which it is based can have a significant impact on the amount of rent paid. The means of measurement will also impact the amount payable by the tenant as its proportionate share of common area maintenance costs. Not surprisingly, the landlord is motivated to use a method of measurement which serves to maximize the rentable area of the premises and common areas for the purposes of maximizing its rent. This can be accomplished by adopting a definition of rentable area in the lease that results in a measurement from the outside face of a bearing wall and includes columns, common stairwells and other areas that are not readily usable by the tenant. Alternatively, many leases adopt the standard published by the Building Owners and Managers Association International (“BOMA”), the latest version of which was published in 1996. The 1996 version of the BOMA standard represented a significant departure from the previous 1980 version in that it permits a gross-up of the useable area of the premises by amounts attributable to shared common space not only on floors within a multi-tenanted building, but also by amounts to reflect common areas provided to the building such as lobbies, concierge areas, lounges and other facilities. In reviewing a lease, therefore, it is important to be clear as to which version of the BOMA standard applies.

Irrespective of the manner of measurement to be used by the landlord, it is incumbent upon a tenant to ensure that it has an adequate understanding of the impact that the manner of measurement will have on its liability to pay rent under the lease. This is particularly true given that most commercial leases provide for an adjustment of the rent during the term based on a re-measurement of the premises, if required by the landlord. If necessary, the tenant should reserve the right to retain its own architect or surveyor to challenge the measurement of the premises or alternatively, specify a maximum possible area for the purposes of calculation of rent under the lease. Certainly in circumstances where a tenant is renewing or renegotiating its lease prior to its termination, a tenant should seek to delete any portion of the lease that permits a re-measurement of the premises and a rental adjustment and specify a fixed rentable area for the purposes of future terms.

¹⁴ (2001), 93 B.C.L.R. (3d) 224 (C.A.).

(iii) Offer to Lease

In most commercial contexts, the first step in creating a landlord/tenant relationship is the execution of some form letter of intent or offer to lease. As a practical matter, this document is often created by a leasing broker and is based either on a standard form document used by the landlord or by the broker. The intention of this document is to evidence the “business terms” under which the lease is to be granted. Often, there is significant pressure on the parties to execute the form of offer as quickly as possible. The landlord wishes to evidence the tenant’s commitment to lease the space. The tenant, who may have been searching for appropriate space for a long time, may wish to ensure that the space is obtained and the broker wishes to see the parties reach an agreement as soon as possible. Unfortunately, in many instances, as a result of the desire of the parties to have some evidence of their agreement, the parties fail to appreciate the relationship between the terms of the offer or letter of intent and the lease that is ultimately derived from it, and the offer or letter of intent is executed without the benefit of legal advice.

The offer to lease must, at a minimum, canvass and address all of the salient business terms and requirements of the parties. These may include standard business terms such as the size of the premises, the lease payments, the term of the lease, the proposed use of the demised premises, the amount of the deposit, any tenant inducements, and similar requirements. It is essential, however, that any other terms that are critical to either of the parties which may fall outside of standard lease terms also be reflected in the offer to lease and that the parties turn their mind to these issues and reach a workable solution to these matters prior to the execution of the offer to lease. These items may include such things as any construction work to be completed by the parties and the timing of such work, the terms of payment of any tenant inducement, specific parking requirements, the right to use adjacent space for storage, right of first refusal and renewal, exclusive use requirements, the ability to register the lease on title and granted as security, particular rights of assignment or subletting, and any number of other matters that affect the specific requirements of the landlord or the tenant. In many circumstances, due to the pressure on the parties to complete the transaction, such specific concerns are not adequately addressed in the offer to lease or, even more problematically, the parties consciously choose to ignore such issues by leaving it “to the lawyers” to resolve these matters during the negotiation of the lease itself. Parties who choose to execute offers to lease without fully addressing their commercial and business needs and without the benefit of legal advice, do so at their peril since in most circumstances without explicit language to the contrary, the offer to lease itself represents a binding contract between the parties. Indeed, the offer to lease may, even if it specifically contemplates the execution of a formal lease, constitute in certain circumstances, a

lease in and of itself unless the document clearly demonstrates otherwise.¹⁵ A poorly drafted offer to lease may serve to hamstring the parties or their counsel when it comes time to negotiate the actual terms of the lease resulting in significant delay and incurred costs.

(iv) Form of Lease

In most circumstances, the offer to lease will reference a standard form of lease as being the basis of the ultimate lease to be negotiated between the parties, subject only to the business terms reflected in the offer to lease. Typically, the form of standard lease is skewed in favour of the party who has developed the form, and in executing an offer to lease that adopts this standard form without the benefit of legal advice, the other party may give up significant rights without any negotiation. Many offers to lease contain a condition precedent wherein the standard form of lease referred to is made available to the other party for review and approval, and in the event this party fails to approve the form of lease within a specified period, the offer to lease itself is terminated. This approval period can be as short as five days from the date the form of lease is made available and in some circumstances, the approval language deems the form of lease to be approved unless notice of non-approval is given within the approval period. The result is that a party may unintentionally approve the form of lease and thereby foreclose its ability to negotiate the terms of the lease in failing to deliver the notice in a timely fashion. Alternatively, a party might unintentionally be deemed to have approved the form of lease while negotiating its form, but failing to formally extend the approval period. While this may be a desirable result for the party offering its standard form lease since it may result in a significant restriction in the negotiating abilities of the other party, such a unilateral restriction does not represent the ideal commencement of the landlord and tenant relationship between the parties.

This is not to say that standard landlord or tenant leases are undesirable in all circumstances. Obviously, some form of standardization is required in order for a landlord or a large tenant to carry on its business in a larger commercial context. It is not practical for a landlord in a shopping centre, business park or office building where there are multiple tenants to individually negotiate each term of the leases for these premises. The leases within such a larger context must be consistent and complement one another in order to properly protect the landlord's interest. Similarly, a large tenant with multiple premises that has developed a standard form lease has done so in the context of requirements that have been recognized as key to its business over time. Presumably in developing such standard forms, the parties are seeking an efficient way to streamline the negotiation process.

¹⁵ *British Columbia (Egg Marketing Board) v. Jansen Industries Ltd.* (1992), 24 R.P.R. (2d) 36 (B.C.S.C.).

That being said however, the offer to lease must give the party to be encumbered by the lease sufficient time to review its terms and understand its implications and must give the party an ability to terminate the offer to lease without negative consequences if the form of lease is unacceptable or if an acceptable form of lease cannot be negotiated within the time specified in the offer. It is prudent for the party reviewing the standard form lease to require that the lease be received on execution of the offer to lease and that a form of lease acceptable to that party's solicitors, taking into account the business terms of the offer and such other terms as may be required, be negotiated between the parties within a specified reasonable period. While the insertion of language that permits the negotiation of the lease to go beyond the terms of the offer to lease might have the undesirable effect of reopening the lease negotiations, such language does allow the parties to properly address matters that might not have been evident during the course of the business negotiations but which arise as a result of the specific wording contained within the standard form lease.

It should be noted that circumstances arise, given the relative bargaining strength of the parties, where one of the parties (typically the tenant) is forced to accept the leasing terms imposed by the other party. Such circumstances can arise where a tenant is taking a relatively small space in a multi-tenanted complex or in circumstances where a landlord requires a certain anchor tenant in order to make a project viable. In such circumstances, any right on the part of the party to approve the standard form lease is, as practical matter, illusory. However, even in such circumstances, a thorough legal review of the lease is beneficial to ensure that both parties have a complete understanding of their respective obligations.

As a final point concerning forms of lease in the context of commercial transactions in British Columbia, it should be remembered that certain leases, particularly those based on older precedents, incorporate the provisions of Schedule 4 of the *Land Transfer Form Act*.¹⁶ Under this schedule, references in the lease to the specific wording contained within the schedule has the expanded meaning set out in the schedule. While on the surface there may be some benefit to taking advantage of the shortened wording provided by the *Land Transfer Form Act*, on review, most parties find the wording to be quite dated and that it may not usefully express their intentions. Unfortunately, in circumstances where the parties choose to develop their own form of lease, they may inadvertently, in reliance on an old precedent which refers the *Land Transfer Form Act*, bring themselves within the terms of that Act without intending to. In most circumstances, the interests of the parties are better served by specific language addressed to the particular needs of their lease.

¹⁶ R.S.B.C. 1996 c. 252.

(v) Use of Premises

A fundamental term that must be addressed in the offer to lease is the “use” provision which specifies the specific purposes for which the tenant is entitled to use the premises. This provision goes to the heart of the tenant’s entitlement to quiet enjoyment of the premises without interference and is obviously crucial to the tenant’s ability to carry on its business. From the landlord’s perspective, the tenant’s permitted use as specified in the offer and later incorporated into the terms of the lease is equally significant in that the tenant’s permitted use must not offend any restrictive covenants granted to other tenants and as a practical matter, must not interfere with the uses of other tenants within a multi-tenant complex. In most circumstances, a tenant will attempt to use broad language to define its use in an effort to permit its own flexibility and capture future potential uses for the premises which may result from changes in the tenant’s business. The landlord, on the other hand, may, particularly in the context of shopping centres or specialized facilities, be motivated to narrowly define the tenant’s permitted use and deal with changes in the tenant’s business by means of a mechanism requiring the landlord’s consent. Whatever the motivations of the parties, it is important the both parties have knowledge of any potential restrictions which could effect a tenant’s potential use for the premises and that the parties have a full appreciation of any practical constraints which could affect this potential use. Where there are any concerns, it is prudent for the offer to lease to contain a specific condition precedent in favour of one or both parties giving them sufficient time to complete the necessary investigations to ensure the proposed use is permitted.

In terms of restrictions which might affect a tenant’s proposed use of premises, these can take a variety of forms. Appropriate zoning inquiries should be made with the applicable municipality to ensure that the tenant’s proposed use does not offend existing zoning and land use requirements. Such inquiries should be undertaken even in circumstances where the tenant’s proposed use is consistent with a previous use of the premises. Circumstances may arise where, for example, a previous use had been grandfathered under previous zoning and is no longer permitted under the existing land use requirements. Additionally, municipal staff may draw fine distinctions between what is permitted under the existing zoning and what is being proposed by the tenant. For example, the existing zoning might permit retail sale of certain goods but prohibit wholesale sale of the same goods and the failure on the part of the parties to appreciate the distinction might result in the tenant being prohibited from carrying on its business from the premises. Typically, inquiries relating to the existing zoning and permitted uses for a property are undertaken by the leasing agent and are done on an informal basis. Given the potential impact of the contravention of existing zoning, it is incumbent upon the parties to ensure that such inquiries are in fact made and the existing zoning and land use restrictions are thoroughly reviewed.

The tenant's enquiries with respect to its proposed use of the premises should also include a review of any governmental permits required by it to carry on business. If a tenant already operates a similar business in the jurisdiction, it can to some degree rely on its past experience. However, where it is moving from another jurisdiction, it should ensure the necessary permitting requirements are investigated well in advance. For example, if a water discharge or air emission permit is required, the tenant should be aware of the conditions that must be met in order to receive such permits. Such requirements may have a significant impact on the design of the building and the necessary services to be provided to the premises, so in order to properly negotiate the respective responsibilities of the landlord and tenant for new construction work or allocate the cost of services, the tenant must be armed with such permitting information. In this regard, a tenant would likely benefit from the services of a permitting consultant familiar with the area and its requirements.

Potential restrictions on the use of property can also be found in covenants and encumbrances registered against title to the property on which the premises are located. Not only can business parks be subject to statutory building schemes which often contain restrictions on use of the property, title may be subject to old charges and encumbrances which, notwithstanding their age, may continue to be enforceable. Such covenants may, for example, require the consent of an adjacent property owner with respect to any construction or significant renovation to the buildings located on the property. Alternatively, a covenant may require that existing parking be partially available to the public or alternatively, there may be a requirement to grant an easement to a neighbouring property owner or for property owners to share the costs of access to the premises. In the circumstances, therefore, it is prudent for a landlord to have a clear understanding of what it can deliver and for a tenant to thoroughly review the charges on title so as to ensure that any potential restrictions on the proposed use of the premises are sufficiently addressed.

Where the premises are strata titled, a further restriction on the use of the premises may be set out in the bylaws of the strata corporation, which should be thoroughly reviewed so as to ensure that they will not adversely affect the proposed use of the premises. In the context of strata titled properties, it is also useful to review the available minutes of any strata council and strata corporation meetings to determine whether any construction deficiencies or maintenance issues have plagued the complex, as such costs will no doubt be shifted to the tenant as part of the tenant's operating costs under the lease. This is of particular importance in respect of commercial premises that form part of a mixed-use residential and commercial strata complex. In these circumstances, it is important that the parties have a thorough understanding of the manner in which costs are allocated as between the commercial segments of the complex and the residential segments.

As a final point concerning the potential use of the premises, it is critical that both the landlord and the tenant understand and address the potential impacts of a tenant's proposed use of the premises, particularly in the context of the effect of this use on other tenants in a multi-tenant facility. If the potential use is one that might give rise to noise, fumes, dust or other circumstances which might interfere with other tenants or give rise to a nuisance claim, it is incumbent upon the parties to attempt to address such concerns at the outset. Failing to do so merely postpones the inevitable conflict and possible litigation between the parties at a later time, as the tenant makes the argument that the landlord had full knowledge of the tenant's use of the premises and is thereby prevented from interfering with the tenant's quiet enjoyment in accordance with this use while the landlord argues that the tenant is in breach of the lease by reason of its interference with the use and enjoyment of adjacent premises by neighbouring tenants or third parties. The strategies to be used by the parties in addressing such concerns will vary depending upon the use in question. In the case of the use of potentially hazardous material on the premises, the landlord might require the tenant to prepare an ongoing environmental management plan or provide proof that it has the appropriate environmental certification, or otherwise demonstrate its abilities to properly store and dispose of such hazardous materials. In the case of noise, fumes or dust, the parties might negotiate as part of the landlord or tenant's work that appropriate sound baffling or filters be installed and maintained in order to minimize such a risk. Additionally, the parties could develop a separate notice requirement so that there is an opportunity to cure within a reasonable time any activity giving rise to a nuisance type of complaint. The key point, however, is for the parties to recognize and address as much as possible, the practical concerns that may arise out of the proposed use of the premises.

(vi) Construction of the Landlord/Tenant Work

It is common, particularly in multi-tenant or "build-to-suit" facilities, for a lease or offer to lease to require the construction of significant improvements to the premises. This, in turn, gives rise to many potential areas of conflict between the landlord and the tenant unless the parties develop a mechanism within the lease or offer to lease or not only to allocate the existing obligations as between them to supply different aspects of the premises, but also a means for allocating future obligations which may be unforeseen at the time the lease is executed. It should be noted that particularly in the context of "build-to-suit" premises, the construction obligations of the landlord are set out in their entirety in the offer to lease and may not be repeated within the actual lease document so as to permit the landlord, who may simply be a developer, to transfer its obligations as lessor to a third party investor while retaining its obligations as contractor to construct the landlord improvements. In such circumstances, it is important to ensure that the offer to lease contains language that expressly provides that the obligations of the developer/landlord under the offer to lease, including any obligation to repair construction deficiencies and transfer any third party

warranties, should continue to survive notwithstanding the execution of the lease itself. Similarly, the lease should not provide that it represents the entire agreement between the parties.

Typically, the landlord's construction obligations for new construction require that the landlord provide a "base building" which meets certain minimal standardized requirements as to the material used, the level of workmanship and the level of finish. It is then intended that during the "fixturing" period, the tenant construct whatever improvements it requires and that at the conclusion of the fixturing period the tenant open for business. Difficulties arise when a tenant's business has particular requirements in terms of servicing, amenities, access, communication needs, or other requirements which impact upon the basic building structure provided by the landlord. A financial institution may, for example, require drive-thru teller access or particular security glass for its windows. Alternatively, a restaurant may have particular air conditioning or ventilation requirements. It is therefore critical that the landlord be required to provide the tenant with as much technical information as possible relating to the base building and the services that will be provided as part of the base building structure so that this information can be reviewed by the tenant's consultants and compared to the ultimate requirements for the tenant's business. Any inconsistencies must be addressed not only from a technical standpoint, but also from the standpoint of cost allocation between the parties before an enforceable lease or offer to lease is created.

The other issue which arises in circumstances where extensive landlord work is to be completed occurs when there is a delay in the completion of this work which ultimately impacts on the tenant's ability to take possession of the premises. To address this issue, a tenant might seek an indemnity from the landlord for any damages suffered by it resulting from such a delay. However, not surprisingly, most landlords resist the granting of such an indemnity. Alternatively, a tenant might seek to reserve for itself the right to terminate the lease in the event the landlord is unable to deliver the premises by a specific date. Where the tenant is taking premises within a new shopping centre or other multi-tenant facility where it is relying on the facility itself to attract its clientele, the tenant may wish to reserve its right to terminate the lease in the event the landlord is unable to complete construction of the centre itself on time or if one or more anchor tenants are not open for business by a certain date.

In terms of the tenant's improvements, it is imperative that the lease or offer to lease establish a workable mechanism for approval by the landlord of the plans and specifications for the tenant's work. Where possible, such approval should be in place as part of the execution of the offer to lease. However, if early approval is not possible, the tenant should, prior to execution of the offer to lease, ensure that those elements of its improvements that it specifically requires as part of its business are approved by the landlord without the requirement for further consent. For example, if a particular

layout or signage or colour scheme is required by the tenant to carry on business as part of its obligations under a franchising agreement, the tenant should ensure that such requirements are approved by the landlord without any further consent under the lease. With respect to the remaining tenant improvements where further approvals are required by the landlord after execution of the offer to lease, the offer or the lease should require such approval on the part of the landlord to not be unreasonably withheld or delayed and should, if possible, provide for a third party such as the landlord's architect to settle any disputes in a timely fashion.

In many circumstances, the landlord will contribute an allowance toward tenant improvements as an inducement to entice a tenant to take space in the landlord's building. Such an inducement is generally expressed as a payment based on a cost per square foot which may or may not be linked to the actual cost incurred by the tenant in installing the tenant improvements. The landlord should ensure that the lease or offer to lease contains sufficient protections so as to prevent the use of the entire inducement by the tenant prior to completion of the necessary tenant improvements. Additionally, the landlord must be careful to ensure that no builders' liens arise as a result of the failure of the tenant to pay its subtrades. Typically, therefore, the offer to lease will provide that the inducement be payable only after the opening of the premises for business by the tenant, receipt by the landlord of a statutory declaration that the tenant's work has been completed and the period for filing builders' liens has expired, and receipt by the landlord of satisfactory evidence as to any amount that the tenant should have spent in respect of its improvements as a condition of receiving the inducement. Obviously, even if the foregoing steps are taken to protect the landlord's interest, there is still a risk that the tenant may go out of business prior to termination of the lease, thereby depriving the landlord of any benefit derived from paying the inducement. In such circumstances, a landlord may choose to pay a portion of the inducement when the tenant opens for business with the remaining portion being payable a number of years later, provided the tenant is still in good standing under the terms of the lease. Alternatively, many landlords structure the inducement as a loan to the tenant which is repayable if the tenant fails to perform under the terms of the lease. Such payment structures may have *Income Tax Act* implications and should be thoroughly reviewed from a tax perspective before they are implemented.

(vii) Operating Costs – Common Area and Maintenance Costs

While there are many situations in which a tenant is only required to pay gross rent in respect of its occupation of the premises with the intention that any other costs associated with its ownership be for the account of the landlord, in most circumstances, costs such as taxes, utilities, and repair and maintenance obligations are transferred to the tenant either as a direct obligation or as an obligation to reimburse the landlord for such costs. In the case of multi-tenanted facilities such as shopping

centres, the tenant is also responsible for reimbursing the landlord for its portion of common area maintenance or CAM costs, based on the portion of the shopping centre leased by the particular tenant. The definitions of operating costs for which the landlord is entitled to reimbursement is usually very expansive. Further, the landlord's entitlement is often bolstered by a generalized statement indicating that the lease is intended to be "a completely carefree net lease" for the landlord and requiring the tenant to pay, unless otherwise provided in the lease, all costs, charges and expenses of any kind associated with the premises.

Most commercial leases permit the landlord to recover its management or administrative costs in operating the property and such costs are typically expressed as a percentage of either the operating costs themselves or of the net rent chargeable to the tenant for the premises. Such management and administrative services can be provided either by the landlord or by a management company or by some combination of the two. Unless a lease is clear in permitting a landlord to recover both its administrative costs and any management fees paid to a third party manager, it could be argued that the collection of both such fees represents a duplication and the tenant ought not be required to pay the landlord's internal fees as well as any external management fees. A well-drafted lease will ensure that such flexibility on the part of the landlord is preserved.¹⁷ In light of the expansive obligations of the tenant, it is incumbent on the parties to identify and explicitly exclude any costs which are to remain the responsibility of the landlord, either for a portion of or throughout the term of the lease. Typically, the landlord should be responsible for its own income tax liability associated with owning the premises, its own debt service with respect to financing associated with the premises, and the costs associated with leasing other premises within the facility. Additionally, the landlord is usually responsible to a greater or lesser degree for structural deficiencies and repair costs associated therewith relating to the building in which the premises are located. In some cases this responsibility is restricted to such structural repair costs arising from construction defects, only so as not to include normal repair and maintenance costs as the building ages. As well, the structural elements are limited to such things as footings and foundations, the roof structure and exterior walls.

In negotiating the lease from the perspective of the landlord's responsibility for structural repairs, it is often the tenant's position that the building and the structural elements making it up represent the landlord's capital asset for which the tenant is paying the basic rent. It is therefore inequitable for the tenant to then be made responsible for and required to pay the landlord to repair and replace the very asset that was to be made available to the tenant under the terms of the lease. The landlord's position is simply that costs associated with the repair of structural elements are simply further examples of operating costs to be passed to the tenant. Much time can be spent and cost incurred in

¹⁷ *Han v. 9938 Investments Ltd.* (1995), 5 B.C.L.R. (3d) 306 (C.A.).

debating this issue. In the final analysis, the matter might best be addressed in taking a more practical approach. A frank discussion between the tenant and the landlord as to the manner in which operating costs have been calculated in the past together with a review of the availability of insurance and an investigation as to the condition of the building often serves to provide some measure of comfort to the parties as to their respective obligations. That being said, however, in circumstances where the building or premises represent new construction, any obligations on the part of the tenant for reimbursement for operating costs relating to maintenance and repair should be expressly subject to the landlord's obligations under any building warranty provided for in the lease or offer to lease.

Most commercial leases provide for the major upgrade or replacement from time to time during the term of the lease of major mechanical systems such as heating, ventilation and air conditioning systems (HVAC). In most circumstances where the landlord is responsible for the maintenance, repair and replacement of such systems, the leases provide that the tenant's responsibility for the payment for such major costs will be amortized over the effective life of the equipment and further, the landlord often receives a further amount as part of the operating costs representing the notional interest payable in respect of the unamortized portion of the replacement costs. There are circumstances, however, where the tenant takes on the costs of the maintenance, repair and replacement of major mechanical systems. This often arises in circumstances where the tenant is the sole tenant in a standalone building or is otherwise serviced by dedicated systems. It is important in those circumstances that the parties address the potential inequity if the major mechanical system requires replacement immediately prior to the end of the lease term. Unless some means is contained within the lease to partially compensate the tenant, at the end of the lease, the landlord will obtain a windfall. In such circumstances, the parties should explore the possibility of the landlord compensating the tenant on termination based on the current value of the system as of the termination date. The parties may even choose to develop an amortization schedule to determine this value based on the expected life of the system.

(viii) Insurance

It is beyond the scope of this paper to enter into a detailed and comprehensive discussion of insurance issues relating to commercially leased premises. Typically, the insurance provisions within a standard commercial lease are highly technical and require a review by the parties' insurance professionals, not only to ensure that there is appropriate insurance available either under the tenant's or the landlord's policies of insurance to adequately cover the risks associated with the tenant's use of the property, but also to determine whether the insurance called for is commercially available at an acceptable cost to the parties. In requesting such a review by the parties' insurance

brokers, it is important that not only the actual insurance provisions themselves be reviewed, but also the provisions of any indemnities and releases of or by the parties which could give rise to further risks that need to be addressed in the insurance policies.

As a practical matter, in most standard commercial leases the landlord is responsible for obtaining insurance relating to damage to the building and the common areas, liability arising from the use of the building and common areas and, to some degree or other, insurance relating to any interruption in the rental stream obtained from the building. Conversely, tenants' insurance will typically address the premises, the leasehold improvements and fixtures, as well as the tenants' property, including inventory, liabilities arising from the conduct by the tenants of its business and business interruption insurance to cover lost profits, and rental liability should the tenants' occupation of the premises be interrupted. Typically, the landlord recovers its insurance costs as an operating cost from its tenants. The tenants, in turn, are able to rely on the landlord's greater financial capacity and reputation in obtaining this insurance at a lesser incremental cost.

In some cases, however, particularly in circumstances where a large tenant is to occupy a standalone building, it may make economic sense for the tenant, rather than the landlord, to obtain insurance relating to the building. In these circumstances, the landlord should be added as an additional insured and the lease must specifically address the landlord's entitlement to insurance proceeds in the event of destruction of the building, if the landlord is contractually bound under the lease to rebuild it. An "additional insured" does not have the right to administer the policy of insurance and must rely on the named insured to process the claim of the additional insured in the event the insurance is called upon. In these circumstances, therefore, it is particularly important that an insurance professional acting for the additional insured review the relevant policy.

Most commercial leases require that the tenant's insurance contain a waiver of subrogation so as to ensure that to the extent the tenant makes a claim under its insurance as a result of actions of the landlord, the insurer is precluded from paying out on such a claim and then seeking corresponding compensation from the landlord by stepping into the tenant's shoes. Tenants will often insist on a similar waiver of subrogation in the landlord's policies. This is often resisted by landlords who wish to avoid the administrative obligation of having to amend its insurance every time it enters into a lease with a new tenant. While such a waiver of subrogation is desirable, the tenant is probably adequately protected if the lease contains a release by the landlord itself for damages to it caused by the tenant to the extent the landlord receives insurance proceeds therefor.

It is important to recognize that the insurance provisions of a commercial lease work in tandem with the release and indemnification provisions. The terms of a lease relating to release and

indemnification are often the source of consideration discussion between the parties, particularly in the context of negligence. A landlord will, for example, seek to be released by the tenant for any and all damage suffered by the tenant in occupying the leased premises, including damage that may result from the landlord's negligence. Similarly, the landlord may seek indemnification from the tenant in respect of any and all third party claims made against it arising from the occupation of the premises by the tenant. On the basis of "fairness", a tenant may take the view that it is inequitable to release the landlord when there has been negligence on the part of it or its agents. However, in most circumstances, the release relates to risks for which insurance is available in any event. In such circumstances, it may make more commercial sense for the tenant to preserve its negligence claims as against the landlord only to the extent that insurance proceeds are insufficient to cover the loss.

In the case of indemnities, it must be remembered that indemnities are very narrowly construed by the courts, as they represent a party taking on a contractual risk that it would not otherwise be obliged to accept. It is therefore important that indemnities be carefully drafted to specifically identify the parties to be indemnified (which should include the officers and directors of the party receiving the indemnification), and to specifically identify the risks against which the indemnity is being granted. Again, to the extent a party is granting an indemnity, it is crucial that that party ensure that there is insurance coverage available to it to cover off this additional risk.

In many commercial leases, the release and indemnity language favours the landlord and do not provide reciprocal rights in favour of the tenant. Where possible, such an allocation of risk should be resisted, particularly given the fact that the tenant has contributed a proportionate share to the landlord's insurance costs and having done so, to the extent insurance is available, the parties can be said to have allocated that risk to the insurer. This general principle has been approved by the Supreme Court of Canada in the case of *Ross Southward Prior Ltd. v. Puyortech Products*.¹⁸ The exception to this general principle, however, occurs when the lease clearly provides that the tenant continues to be liable to the landlord for such risks, notwithstanding the fact that insurance is obtained by the landlord in respect of the same risks.

(ix) Assignment and Subletting

At common law, unless a lease otherwise provides, a tenant is free to assign its interest under the lease without the consent of the landlord. In most commercial leases, therefore, any assignment or subletting on the part of the tenant requires the landlord's consent, which is normally stated as not to be unreasonably withheld or delayed. Unlike other provinces such as Ontario and Alberta, there is no

¹⁸ (1975), 57 D.L.R. (3d) 248 (S.C.C.).

statutory provision which provides that there will be an implication that a landlord agrees not to unreasonably withhold its consent where the lease provides that consent is necessary but is silent on its terms. Case law in British Columbia, however, would suggest that unless the lease specifically otherwise provides, the requirement for reasonableness will be implied.¹⁹ Obviously, if the landlord intends to retain the right to unreasonably withhold its consent, the lease should be specific on this point. Whether or not consent is unreasonably withheld depends upon the particular circumstances of the case and involves both a subjective analysis as to the true reason behind the landlord withholding its consent and an objective analysis as to whether in the circumstances of the lease, such withholding of consent was reasonable.²⁰

Given that it may be difficult to assess whether or not a withholding of consent is reasonable, most landlords develop provisions within their leases which specifically provide that the parties agree that the landlord shall be entitled to withhold its consent and that such withholding shall not be unreasonable in the circumstances specified in the lease. These circumstances may include a requirement that any assignee enter into an assumption agreement acceptable to the landlord wherein the assignee assumes all of the obligations of the tenant. In the case of a sublease, the landlord may require the subtenant to enter into a similar document wherein the subtenant covenants directly with the landlord to abide by the terms of the lease, thereby creating a direct contractual link between the landlord and the subtenant. Other common requirements for consent may include that the landlord be satisfied with the financial capability of the proposed assignee, that the use of the premises not change, that the assignee and its proposed use not offend any covenants or obligations of the landlord to other tenants in the complex, and a variety of other conditions depending on the type of lease involved. In drafting such a provision, it is important that the list of circumstances under which the landlord is entitled to withhold consent not be limited to the matters specified so that the landlord has the flexibility to argue that a reason outside of the requirements specified might still be reasonable in the circumstances.

To avoid circumstances where a tenant tries to take advantage of increased rental rates during the term of its lease by receiving compensation for assigning a lease at a lower rental rate or subletting at a rate higher than that specified in the lease, most leases require a review by the landlord of the actual assignment or sublease as a condition of the consent. In circumstances where a tenant is attempting to speculate and take advantage of an increase in rental rates, the lease will provide that the landlord has the option to terminate the existing lease and enter into a new lease directly with the assignee or the subtenant. In most cases, tenants should seek to amend this provision to allow it to

¹⁹ *461647 B.C. Ltd. v. Wolmuth* (18 May 1995), Victoria 95-1628 (B.C.S.C.).

²⁰ *Lehndorff Canadian Pension Properties Limited et al v. Davis Management Ltd.* (1989), 37 B.C.L.R. (2d) 306 (C.A.).

withdraw its consent to the assignment or sublease in circumstances where the landlord is seeking to exercise its termination right.

The concept of assignment where such consent is required is expanded under most commercial leases so as to include circumstances where there is change in control by the tenant. Such a change in control may be based on a change in the operating minds or mind of the tenant, in the case of closely held companies, or may be linked to a change in the shareholders that are capable of electing the board of the corporate tenant. In such circumstances, it is prudent for the lease to have a provision entitling the landlord to request and receive corporate information relating to the tenant so as to ascertain its shareholders from time to time throughout the term of the lease. In many circumstances, a tenant will seek amendments to the lease to permit consent where no assignment is required in situations where there is a transfer amongst related corporations or family members, or as part of a corporate reorganization such as an amalgamation or where there is a sale of the chain of stores or other establishments of which the tenant is part. In the case of changes in control where the tenant is a public company, the lease should specifically restrict the application of any change in control provision so no consent is required while the company is a public corporation.

In most cases, standard commercial leases provide that on an assignment, the existing tenant and any covenantors continue to remain obligated under the lease. In such circumstances, the tenant should require as part of the consent agreement that the landlord agree to a reassignment of the lease to the tenant in the event the assignee defaults. As well, any consent arrangement involving the original tenant and covenantor should be specific about whether the tenant and the covenantor are released if the assignee exercises a renewal right as contained in the lease. Obviously, in such circumstances, most tenants will seek such a release, but any requirement on the part of the landlord to do so should be specified within the lease document.

III. REMEDIES

It is beyond the scope of this paper to enter into a detailed discussion of the possible remedies available to a landlord in the event a tenant defaults under its lease. However, it is useful to keep in mind the available remedies and their limitations as part of the negotiation of any lease arrangement between a landlord and tenant. The wording of the lease itself provides the basis for the exercise of most remedies available to the landlord and it is critical that the landlord review the default provisions of the lease and be aware of any notice requirements and cure periods before it takes any steps against the tenant. The landlord must be careful not to take steps that are contrary to the lease or which may be perceived as acquiescing in the tenant's default.

The *Highway Properties* case discussed earlier recognized the remedies of a landlord when faced with a breach as follows:

- (a) the landlord may insist on performance and sue for rent or damages as they become due without terminating the lease;
- (b) the landlord may give notice to the tenant proposing to re-let the premises on the tenant's account and enter into possession of the premises on that basis; or
- (c) the landlord may elect to terminate the lease with notice to the tenant of an intention to claim damages for the loss and benefit.²¹

It should be noted that if the landlord intends to terminate the lease and claim damages for its loss of benefit, it is critical that proper notice be given to the tenant in the manner specified under the lease. Failure to give such proper notice may result in an improper termination of the lease and a damage claim by the tenant against the landlord.²² Additionally, the landlord in such circumstances has an obligation to mitigate his damages by taking reasonable steps to re-let the premises.

Most leases also provide that in circumstances of a breach, the landlord is entitled to utilize any deposit to rectify such a breach. However, in all such circumstances, the exact wording of the lease in respect of any obligations on the part of the landlord should be examined to ensure that the deposit is available for such purpose. In many cases, a lease simply provides that the deposit is to be used on account of rent payable for various months during the term of the lease without explicitly indicating that the deposit can also be used for the purposes of remedying any breach. It is not uncommon for landlords to seek as part of their leases a general security agreement from the tenant charging the assets of the tenant as security for the tenant's obligations under the lease. This is particularly common in circumstances where the landlord has provided a tenant inducement which is repayable by the tenant or which may be repayable in the event the tenant defaults under the lease. In the event the landlord intends to seek such further security, this intention should be explicit in the offer to lease rather than left as part of the landlord's standard form lease to be negotiated by the parties. The granting of such security may cause significant difficulties for the tenant in its relationship with its own lenders, who no doubt will also be seeking to charge the tenant's goods. Any commitment on the part of the tenant to grant such security should be conditional upon the landlord providing a form of subordination or intercreditor agreement which is acceptable to the tenant's lender.

²¹ *Highway Properties, supra*, note 1.

²² *Langley Crossing Shopping Centre Inc. v. North-West Produce Ltd.* (2000), 73 B.C.L.R. (3d) 55 (B.C.C.A.).

The remedies available to a landlord are supplemented by statutory remedies available under the *Rent Distress Act*, and the *Commercial Tenancy Act*.²³ The *Rent Distress Act* provides landlords with an additional remedy to distrain against the goods of the tenant if the tenant is in arrears, with the intention that such goods will be appraised and sold to be applied on account of the arrears in rent. Extreme caution must be used before a landlord takes advantage of this remedy. It is only available in circumstances where the lease remains in force and there are arrears under it. Additionally, a distress cannot be levied against goods that are not goods of the tenant or against goods which are exempt under the *Rent Distress Act*. In addition, it is unlikely that distraint can be levied against intangible property such as intellectual property, share certificates or accounts receivable.²⁴ Failure to comply with the requirements of the *Rent Distress Act* in levying distress can result in the landlord being liable for double the value of the property distrained and sold.²⁵ In most circumstances, landlords rely on the expertise of bailiffs and bailiff services in order to exercise their rights under the *Rent Distress Act*. However, given the complications and potential liability that can result from an improper exercise of these rights, it is prudent for landlords to obtain legal advice prior to embarking on this remedy.

The *Rent Distress Act* also provides a potential cause of action to a landlord who is faced with a tenant who vacates the premises during the term of the lease with all its goods in an attempt to evade the landlord's right to distrain.

Section 13 of the *Rent Distress Act* provides as follows:

- 13(1) A tenant or lessee who fraudulently removes and conveys away his or her personal property and every person who willingly and knowingly aids the tenant or lessee in doing so, or in concealing it, must pay to the landlord or lessor double the value of the property carried off or concealed.
- (2) The penalty under subsection (1) may be recovered by action in court of competent jurisdiction.²⁶

This section was considered by the British Columbia Court of Appeal in the decision of *Sun Life Assurance Company of Canada v. Ritchie*, where the Court of Appeal upheld a judgment in favour of a landlord against certain individuals who participated in the removal of certain clothing inventory belonging to the tenant from a store whose lease was in default.²⁷ It should be noted that the

²³ *Rent Distress Act*, R.S.B.C. 1996, c. 403; *Commercial Tenancy Act*, R.S.B.C. 1996, c. 57.

²⁴ *Re Modatech Systems Inc.* (1998), 59 B.C.L.R. (3d) 128 (C.A.).

²⁵ *Rent Distress Act*, *supra*, note 23, s. 10.

²⁶ *Ibid.*, s. 13.

²⁷ (2000), 76 B.C.L.R. (3d) 93 (C.A.).

landlord's entitlement to judgment in those circumstances was not limited to the arrears in rent owing under the lease or damages suffered by it resulting from the tenant's breach.

Despite its arcane language, the *Commercial Tenancy Act* can offer some comfort to landlords who wish to evict a defaulting tenant and obtain possession of the lease premises particularly. The *Commercial Tenancy Act* provides a court-sanctioned mechanism to obtain a Writ of Possession in circumstances where the tenant is in arrears or default and refuses on written demand to go out of possession of the leased land.²⁸ In circumstances where the landlord is attempting to obtain such a Writ of Possession for non-payment of rent, there is a common law obligation on the part of the landlord to demand payment before proceeding under this section.²⁹ Where a landlord is concerned that its actions in retaking possession of premises might be subject to attack as wrongful by the tenant, the landlord should follow the procedures set out in the *Commercial Tenancy Act*.

IV. CONCLUSION

As can be seen from the matters discussed in this paper, the successful negotiation of a commercial lease can be an extremely complex process involving innumerable issues. These issues require the parties to make a realistic assessment of their bargaining position and their short and long-term needs and goals. It requires that parties be creative and have an understanding of the current market for the space they are seeking to rent. Many practitioners comment that the best type of lease is one that is put into a drawer and never reviewed until the time comes for its renewal. In most cases this goal can only be achieved if the parties are frank and forthright in their negotiations at the outset.

²⁸ *Supra*, note 23, ss. 18-21.

²⁹ *Marshall Steel Ltd. v. Johnson Marine Terminals Ltd.* (1989), 37 B.C.L.R. (2d) 34.

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