RICHARDS BUELL SUTTON
Established in 1871

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NOTABLE COMMERCIAL LEASING CASES OUR LAWYERS HAVE HANDLED

Listed below are some of the most notable commercial lease cases which our lawyers have handled. Most notably is the landmark decision of the Supreme Court of Canada in *Highway Properties v Kelly Douglas* which fundamentally changed the law in Canada as it applies to commercial leases and contracts involving real estate.

Tenant's Failure to Satisfy Preconditions to a Renewal Option is Fatal; Landlord Does Not Waive Its Right to Require Strict Compliance With Preconditions By Accepting Late Payments of Rent or Negotiating Renewal Terms After Expiry of Option Deadline

We acted for the landlord under a long term lease of premises used by a tenant to operate a bowling facility, sports bar and grill. The lease was for an initial term of 10 years and contained three options to renew for additional terms of five years each. The renewal options were subject to three preconditions: (1) the tenant had to give written notice of renewal no earlier than 12 months and no later than nine months before the expiry of the initial term; (2) at the time of giving its notice the tenant could not be in breach of any covenant under the lease; and (3) the tenant had to "duly and regularly" perform its obligations throughout the initial term of the lease. The tenant failed to satisfy any of the three preconditions. It did not give any written notice of renewal and the verbal notice it claimed to have given was after the renewal option deadline had expired. The tenant was in default of its covenant to pay rent and rent was in arrears at the time the renewal option deadline expired. The tenant also had a history of late rent payments and had failed to "duly and regularly" perform its obligations throughout the initial term of the lease. The tenant argued that the landlord was estopped from relying upon the preconditions to the renewal option and, alternatively, that the landlord had waived its right to require strict compliance with those preconditions. The court rejected both of the tenant's arguments. The estoppel argument was rejected because there was no evidence that the landlord had made any promise to the tenant, during the period of time within which the tenant had to exercise the renewal option, which would have caused the tenant to believe that it did not need to give written notice to exercise the option. The court distinguished other case precedents where a landlord had lulled its tenant into believing that written notice to renew was not required, before the option deadline had expired. The court also rejected the tenant's waiver argument. By accepting late rent payments from the tenant and engaging in negotiations of renewal terms with the tenant after the option deadline had expired, the landlord did not waive its right to require strict compliance with the preconditions

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to renewal. To establish waiver by the landlord of its rights the tenant must prove that the landlord had full knowledge of its rights and unequivocally and consciously intended to abandon those rights. While the landlord's acceptance of late rent payments could prevent the landlord from seeking to terminate the lease by reason of a breach of the tenant's covenant to pay rent, that late acceptance of rent did not preclude the landlord from relying upon the preconditions to the exercise of the renewal option. Similarly, negotiating renewal terms with the tenant after the deadline for the tenant to exercise its renewal option, did not amount to conduct that could lead a tenant to believe the landlord had waived compliance with the preconditions to the renewal option. The case law is clear that a tenant who wishes to exercise a renewal option must do so in a manner which is clear, explicit, unambiguous and unequivocal. The business rationale for preconditions to a renewal option is to provide both the landlord and tenant with certainty as to their future rights and obligations. If the preconditions aren't satisfied, then the landlord is free to market the premises to another prospective tenant or even to the existing tenant. If the tenant exercises the renewal option in compliance with the preconditions under the lease, then the landlord is bound to grant the tenant the renewal term. If the tenant does not exercise the renewal option in the manner required by the lease, then the tenant is free to try to negotiate a new lease with the landlord knowing that the tenant has no obligation if those lease negotiations do not result in a concluded agreement. Once the time for giving notice of renewal has passed without being exercised, it is a new ballgame. The mere expression of interest on the part of either or both of the parties to continue in a landlord tenant relationship, and the negotiation of lease terms, does not revive the right of renewal if it has lapsed. The court also found that relief from forfeiture was not available to a tenant who fails to comply with the conditions precedent to the exercise of a renewal option. If a tenant fails to comply with those preconditions, then it does not suffer the forfeiture of an existing tenancy but simply loses its option to renew the tenancy.

The Zone Bowling Centre (2002) Ltd. v. 14100 Entertainment Blvd. Investments Ltd., 2015 BCSC 524

What Happens When a Lease Does Not Include a Clause for an Overholding Tenancy? If the Tenant Overholds With the Landlord's Consent, is the Overholding Month to Month or Year to Year?

We acted for a subtenant who operated a marina business under a long term sublease which expired January 30, 2009 after several years. When the sublease expired, the subtenant overheld with the sublandlord's consent and continued to pay rent in annual installments, before later changing to monthly installments. More than two years after the initial sublease term expired, the sublandlord gave one month's notice in July 2011 requiring the subtenant to vacate the marina by the end of August 2011. The subtenant objected to the short notice and refused to vacate. The court had to determine whether the overholding tenancy created after the initial sublease term expired, was month to month or year to year. The distinction

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was critical for the length of notice the sublandlord had to give to end the overholding tenancy. Generally speaking, one clear month's notice is required to terminate a month to month tenancy but six months' notice, effective at the end of the tenancy year, is required to terminate a year to year tenancy. In this case, by giving one month's notice in July 2011 to terminate a month to month tenancy effective at the end of August 2011, the sublandlord missed the opportunity to give the six months' notice that would have been required to terminate a year to year tenancy effective January 30, 2012. By the time the sublandlord considered whether the subtenant was overholding on a year to year tenancy, it was too late for the sublandlord to give six months' notice of termination of a year to year tenancy effective any sooner than January 30, 2013 (18 months after the one months' notice was given in July 2011). The court found in favour of the subtenant. A tenant's overholding upon expiry of a lease of a term for years, and a landlord's acceptance of rent, creates a year to year tenancy. This common law rule can be modified by an express overholding provision in the lease or by subsequent agreement of the parties. The common law requires six months' notice of termination of a year to year tenancy, effective at the end of the tenancy year. The sublandlord could have avoided the creation of a year to year overholding tenancy by including an express overholding provision that would have created a month to month tenancy, in the event the subtenant overheld with the sublandlord's consent and continued to pay rent after the initial sublease term expired.

Van-Air Holdings Ltd. v. Delta Charters (1982) Inc, 2013 BCSC 1322

Estoppel Certificates Don't Always Mean What They Say

Estoppel certificates are used by potential lenders and purchasers of a revenue property, to determine whether there are any disputes or issues under the lease which cannot be identified by simply reviewing the lease documents. A tenant who asserts that "all is well" may be barred from subsequently taking a contrary position against the landlord. In some cases, however, an estoppel certificate can't be used to prevent a tenant from arguing a different position than the position it took when signing the estoppel certificate. We acted for a tenant who signed an estoppel certificate which incorrectly said the tenant was in the second renewal period when it was actually in the first renewal period. The tenant didn't correct the mistake before signing and returning the estoppel certificate and subsequently, the new landlord tried to hold the tenant to the statement made in the estoppel certificate. The court, however, accepted our argument that a purchaser/new landlord cannot be misled by a statement of the terms and conditions of the lease when the lease documents are clearly identified and available for the landlord to review and determine the status of the tenancy for itself. An estoppel certificate cannot have the effect of altering the terms of the lease and cannot be characterized as an amending agreement because no consideration is paid to the tenant when the estoppel certificate is signed. A mis-statement by the tenant in the estoppel certificate as to the legal effect of the lease will not prevent the tenant from enforcing the actual terms of the lease.

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677815 B.C. Ltd. v. Mega Wraps B.C. Restaurants Inc. et al, 2005 BCSC 503

One Month's Notice Required to Terminate a Monthly Tenancy; Delivery of Notice to an Adult Person at the Leased Premises is Sufficient Notice to Tenant

We acted for a university which sought to terminate a student housing lease with a tenant who was a former student of the university. The Residential Tenancy Act of British Columbia does not apply to living accommodations owned by an educational institution and made available for lease to students of that institution. The lease was for a monthly tenancy but it did not contain a provision permitted the landlord to terminate the tenancy. At common law, in the absence of an express provision to the contrary, the notice required for termination of a monthly tenancy is reasonable notice and, for a monthly tenancy, reasonable notice is notice equal in length to the period of the tenancy. The court applied that common law principle and permitted the landlord to terminate the monthly tenancy on one clear month's notice. The tenant tried to fight the termination by arguing he didn't receive one clear month's notice of termination. At common law, delivery of the notice to an adult person at the leased premises is adequate. The court found that the landlord delivered the notice and left it with an adult person at the premises and that was sufficient notice to the tenant.

The University of British Columbia v. Mirsayah, 2005 BCSC 452

Landlord's Claim for Actual Legal Expenses Based on Clause in Lease Requires Demand for Payment and Separate Action Against Tenant if Not Paid

In British Columbia, courts are often asked to enforce provisions in contracts which permit recovery of actual legal expenses, rather than award ordinary legal costs to the successful litigant. Many commercial lease agreements contain provisions allowing the landlord to claim recovery of its actual legal expenses as additional rent owing under the lease. If, based on a lease provision, a landlord seeks recovery of actual legal expenses it incurred as a result of a default by the tenant, then the court will typically not allow a landlord to recover its actual legal expenses, in the original court action. Instead, if the landlord is successful in the original action against the tenant, the court will give the landlord two choices: either the landlord can accept an award for ordinary legal costs in the original action or, if it wishes to pursue recovery of its actual legal expenses based on a clause in the lease, the court will require the landlord to make a demand for payment on the tenant for the expenses claimed and, if not paid, then the landlord may bring a second action against the tenant to recover those legal expenses. If the landlord elects to pursue its contractual remedy in a second action against the tenant, then it is not entitled to recover ordinary legal costs for being successful in the original action.

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BUK Investments Ltd. v. Pappas, 2002 BCSC 161

Implied Term of Lease Requiring Tenant to Return Premises Uncontaminated at End of Lease Term; Landlord's Use of Statutory Cost Recovery Action to Recover Costs of Remediation from Tenant

We represented a landlord who had leased premises to a brass and aluminum foundry tenant under five consecutive leases over a 26 year period. When the tenant moved out of the building after 26 years of occupancy, a substantial amount of metallic dust and industrial waste was left behind in wall and ceiling cavities and on the dirt floor of a crawl space below the floor of the building. The metallic dust and waste contained contaminants which the landlord wanted removed from the building at the tenant's cost. We successfully argued that there was an implied term under the lease requiring the tenant to return the premises in an uncontaminated state at the end of the lease term. The landlord did not just sue the tenant based on express and implied covenants under the lease. The landlord also brought a cost recovery action under the BC Waste Management Act (now known as the Environmental Management Act). The court's decision represented the first trial level judgment in British Columbia to consider a statutory cost recovery action under recent amendments to this legislation. The court accepted our argument that the tenant was the person responsible under the Act for the cost to remove the contaminants. The case is also notable for finding that the value of the real property would be diminished so long as the contaminants remained on site. The only way to avoid that diminished value was to require the tenant to remove the contaminants from the building. Although a landlord can only recover costs of remediation (i.e. out of pocket expenses incurred to investigate and remediate a contaminated site) in a statutory cost recovery action, the landlord was also able to recover damages for the tenant's breach of express and implied covenants under the lease.

O'Connor V Fleck, (2000), 79 B.C.L.R. (3d) 280, 2000 BCSC 1147

Relief from Forfeiture Is Not Available to Excuse a Tenant's Failure to Satisfy a Condition Precedent to a Right of Renewal

We acted for a landlord who made application under the Commercial Tenancy Act for a declaration that a tenant was wrongfully in possession following the expiry of the initial lease term. The lease contained a renewal option which the tenant could exercise provided its gross annual revenue exceeded $13,000,000 in the 12-month period immediately preceding the time for exercising the option. The tenant failed to meet the sales threshold but blamed its failure on the disruption cause to its business by the landlord's construction activity at the shopping centre. The tenant asked the court to grant the tenant relief from forfeiture under the court's discretionary power in the Law and Equity Act. The court drew a distinction

between a tenant who forfeits the balance of a lease term by reason of a breach of covenant under a lease, and a tenant who fails to satisfy a condition precedent to a right of renewal. The court concluded that the landlord's refusal to renew the lease was neither a penalty nor the forfeiture of any right of the tenant. A right to renew a lease is a privilege to which a tenant is to be entitled in certain circumstances and on certain terms. The failure to satisfy a condition precedent is not a forfeiture and the general power of the court to grant a tenant relief from forfeiture was not available.

Intra Land Corporation v. Northwood Food Corporation, (1999) BCJ No. 1352 (QL) (SC)

Rent Distress Not Illegal if Some Rent Owed; Promissory Estoppel Preventing Landlord from Enforcing Terms of Lease Will End on Reasonable Notice to Tenant

We acted for a landlord which had been held liable at trial for damages in trespass arising out of a rent distress. The court of appeal accepted our submission that a distraint for rent was not illegal, and therefore not a trespass, so long as some rent was in arrears at the time the distraint took place. The fact that the distress was excessive did not make it unlawful. Although the landlord had claimed several months arrears of rent, more than it could prove was owing, proof of a single month's arrears of rent meant that the distraint was lawful. The court of appeal overturned the trial judge's decision on this point and found for the landlord. The tenant had entered into a commercial lease with the landlord for a five-year term. After two years, the tenant began to experience financial difficulties and couldn't afford to pay the monthly rent stipulated by the lease. Following discussions between the landlord and the tenant, the tenant paid a reduced rent for the next two and one-half years. Eventually the tenant failed to pay the reduced rent and the landlord tried to distrain for the full rent as stipulated in the lease. At trial, the judge found that the conduct of the landlord at the time the tenant began to pay the reduced rent amounted to a promissory estoppel, and that, as a result, the landlord was not entitled to collect the full rent stipulated in the lease. Although the court of appeal accepted the trial judge's finding of a promissory estoppel, it found that the landlord could give reasonable notice to the tenant of the landlord's intention to revert back to the terms of the lease. The court of appeal concluded the promissory estoppel could be brought to an end by the landlord on reasonable notice to the tenant.

The International Knitwear Architects Inc. v. Kabob Investments Ltd, (1995), 49 R.P.R. (2d) 268 (BCCA)

Letter of Intent Setting Out Parties, Premises, Term, Commencement Date and Rent Creates a Valid and Enforceable Lease

We represented a commercial tenant and argued that a "letter of intent" contained all the essential elements to establish a binding and enforceable lease agreement (i.e. the names of the parties, a

description of the premises, the length of the lease term, the commencement date and the rent payable). The fact that the parties continued to discuss certain details after signing the letter of intent did not change the character of the letter. The court found the letter was a valid and enforceable lease agreement notwithstanding the parties referred to it as a "letter of intent". It is not necessary that the parties agree upon, and record in writing, each and every detail relating to their proposed relationship of landlord and tenant in order to create a valid and legally binding lease agreement. What is necessary is that there be a meeting of minds as to the essential terms. Substantial damages were subsequently awarded to the tenant for the landlord's breach of that agreement in failing to give full occupation of the premises to the tenant.

Dolphin Transport Ltd. v. Weather B Transport Co., (1993), 30 R.P.R. (2d) 111 (BCSC)

Letter Agreement Creates Valid and Enforceable Lease; Simply Describing the Lease Rate as "Triple Net" Will Not Create a Triple Net Lease

We represented a commercial tenant who sought to enforce a letter agreement stated to be "subject to the execution by the parties of a mutually satisfactory lease". The court accepted our submission that the letter agreement contained all the essential terms required to create a binding and enforceable lease (i.e. the names of the parties, a description of the premises, the rent payable, the length of the lease term and the commencement date). The court enforced the letter agreement as a valid lease, without the need for execution of a more formal lease agreement. The landlord then tried to argue that the reference in the letter agreement to "triple net" lease rates meant the agreement was for a "triple net" lease where the tenant is required to pay all the costs or expenses relating to the premises. The court, however, concluded that the parties did not know or understand the technical meaning of a "triple net lease" because the agreement specifically required the landlord to pay building insurance, maintenance and other expenses that, by definition of a "triple net" lease, would have been borne by the tenant, and not by the landlord. Instead, the court concluded the parties created a simple lease with an agreed rental rate per square foot for each year of the lease and a specific agreement as to which expenses would be borne by each of them.

B.C. Egg Marketing Board v. Jansen Industries Ltd, (1992), 24 R.P.R. (2d) 36 (BCSC)

Repudiation of Lease Obligations and Abandonment of Premises by Tenant Gives Rise to Landlord's Right to Recover Damages for Prospective Loss of Future Rent; Commercial Leases Give Rise to Contractual Rights and Remedies, Not Just Property Rights

We represented a commercial landlord in the most significant commercial leasing decision ever handed down by the Supreme Court of Canada. The anchor tenant in a newly completed shopping centre repudiated its lease obligations, less than two years into a 15-year lease. The tenant ceased to carry on

business in breach of an express operating covenant in its lease. Eventually the tenant abandoned the premises and ceased paying rent altogether. The anchor tenant's move impacted other retail tenants who closed their businesses and the shopping centre began to take on a "ghost town" appearance. In 1971, when the case was heard by the Supreme Court of Canada, the law governing commercial leases recognized three mutually exclusive courses of action that a landlord may take where a tenant is in fundamental breach of the lease or has repudiated it entirely. **First**, the landlord could affirm the lease, preserve the relationship of landlord and tenant, insist on performance by the tenant and sue for rent as it fell due, or damages as they occurred. **Second**, the landlord could elect to terminate the lease and sue for rent arrears or damages to the date the lease was terminated, but not for any future losses. **Third**, the landlord could re-enter the premises, without terminating the lease, and advise the tenant of the landlord's intention to re-let the premises on the tenant's account. Before the Supreme Court of Canada changed the law in 1971, a landlord who terminated a lease, also terminated the landlord/tenant relationship and the estate or interest which the tenant had in the land. Prior to 1971 the law did not treat leases in the same manner as other commercial contracts and limited landlords to those remedies which were available under the law of real property. A lease termination was considered a surrender by operation of law which had the effect of obliterating all the terms and conditions of the lease agreement. The Supreme Court of Canada, however, accepted our argument and found that the time had come to permit landlords to choose a **fourth** alternative: namely that the landlord can elect to terminate the lease with notice to the defaulting tenant that damages will be claimed for prospective loss of future rent, and not simply pursue recovery of rent arrears or damages incurred up to the date of termination. In this case, for the first time ever in Canada, the Supreme Court of Canada stated that it was no longer sensible to pretend that a commercial lease was simply a conveyance of an estate or interest in land and not also a contract. The court found that it was untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because those covenants were associated with an estate in land. This decision fundamentally changed the law as it applied to commercial leases, and to all contracts involving real property, in Canada from that day forward.

Highway Properties Limited v. Kelly, Douglas and Company Limited, [1971] SCR 562

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