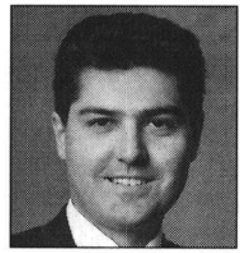
B.C.'s Land Title Act may void your lease, or at least give either tenant or landlord some wriggle room

Watch out for Sec. 73



LEGAL AFFAIRS

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In 1996 the **British Columbia Court of Appeal** rendered a decision that cast a cloud over the validity of certain leases. To this day, there are still cases arising which are impacted by the rule.

From the 1996 Court of Appeal case and the Land Title Act comes the legal rule that a lease of a portion of an unsubdivided parcel of land for a term of greater than three years is unenforceable. This is an important decision because of the serious impact of the rule. This column will serve as a reminder to be careful to all those who may be involved in leasing.

In the 1996 Court of Appeal decision, a landlord and tenant had entered into a long-term lease for a portion of certain unsubdivided land. The lease also contained a right of renewal. The parties didn't consider whether or not the lease was ever to be registered in the Land Title Office, nor whether the land was to be sub-divided at some future date to match the area leased. When the tenant was refused the right to renew, it went to court seeking a declaration as to the validity of the lease and its entitlement to another term. However, the landlord said the lease was unenforceable or void because it did not comply with Section 73 of the Land Title Act. Section 73 provides that "no person shall subdivide land into smaller parcels than those of which he is the owner for the purpose of… leasing it or agreeing to lease it for a life, or for a term exceeding 3 years." The result was that because the parties failed to comply with Section 73 of the Land Title Act, the lease was determined to be an illegal contract. Accordingly, the tenant was unable to enforce the lease, including its right of renewal in the lease. From then on, any lease over three years which purports to lease only a portion of unsubdivided land is an illegal contract. The key points to watch out for are:

a.) a lease over three years;

b.) only a portion of land is covered by the lease; and

c.) the land has not been subdivided to conform with the leased area.

A landlord used this rule to evict a tenant

Since the British Columbia Court of Appeal made this decision the rule has come up in a number of cases. In a few cases that arose in 2000, a landlord successfully used this rule to evict a tenant, and a tenant tried to use the rule to get out of an offer to lease. As you will see, the one who tries to use the rule is the one that is trying to get out of a contract.

Ginseng case

Perhaps one of the more interesting cases was a case where two parties entered into a "lease and crop sharing" agreement under which about 13 acres of the landlord's 169-acre property was to be developed to grow a crop of ginseng.

As it turns out, a complete crop rotation for ginseng is 57 months, almost two years longer than the three-year limit stated above. The parties began to have disagreements and ended up in court. The tenant wanted to enforce the agreement and the landlord wanted the tenant off the land.

Rather than trying to argue against the Court of Appeal decision, they tried to get around it by asking the court to answer three pertinent questions.

Firstly, they wanted to know whether or not the crop sharing agreement was in fact a lease because, if it were not, the rule wouldn't apply. If it was a lease, they wanted to know whether or not section 73 of the Land Title Act makes all provisions of the agreement unenforceable (since the agreement had a lot of non-lease language). If the entire agreement was unenforceable, they wanted to know what other rights they might rely on to make their claims.

The ginseng grower argued that the agreement was not a lease but was merely a licence coupled with a "profit a prendre" (a mere right to share in the ginseng crop).

The court disposed of this argument rather quickly. It was very clear that the agreement was intended to be a lease and not a licence. For example, licences cannot be registered in the Land Title Office and registration in the Land Title Office was contemplated. The agreement also gave remedies on default such as re-entry and taking possession, remedies which a landlord would normally get. Thirdly, the tenant had agreed not to assign or sublet which was inconsistent with the rights of a licensee.

The court applied the Court of Appeal's ruling and confirmed that the tenant would not be entitled to enforce any obligations under the agreement.

The ginseng grower asked the court to apply its discretion to enforce specific parts of the contract notwithstanding the violation of the Land Title Act. Unfortunately for the tenant, the court decided that it could not exercise discretion to allow any part of the contract to exist. Therefore the lease was unenforceable.

Restaurant ruling

In another case, a restaurant tried to use the rule to escape liability under an offer to lease. In this case, the landlord had constructed two separate buildings on the land without subdividing the land with the intention to lease each building to a different tenant. Each tenant would share common ingress and egress, parking, landscaping and common costs as if the two buildings were one. For some undisclosed reason, after entering into an offer to lease, the restaurant decided that the location was not for them. The landlord sued for damages for breach of the offer to lease. The tenant argued that Section 73(1) of the Land Title Act applied to make the offer to lease unenforceable because the lease was for a part of unsubdivided land. However, the landlord said that the offer to lease applied to one building only and therefore fell within the exception in Section 73(3) of the Land Title Act. The tenant tried to argue that the inclusion of a right to an outside patio space constituted a lease of a portion of land. However, neither the **Supreme Court** or Court of Appeal agreed and the tenant was found to be liable for breach of the offer to lease.

In another case, **BC Rail** effectively terminated its relationship with **Domtar** using this rule.

The cases show that the rule set out by the Court of Appeal still stands. Because of this, you should consider whether the rule affects you. If you are a landlord or a tenant leasing a portion of unsubdivided land, you are at risk. Each case would have to be looked at carefully to see if it violates the rule. Even though the restaurant case found that patio space was not considered a lease of land on the right facts, it could still be found that a lease of a building with a lease of a portion of the land around the building could violate this rule.

Seek advice from your lawyer on how best to remedy any problems which may arise as a result of such cases.◆

Don Sihota is a lawyer with Clark, Wilson Barristers and Solicitors, Vancouver, providing advice on business acquisitions and sales, corporate restructuring and commercial transactions. The information in this column should not be construed as legal advice.