UBC SAUDER SCHOOL OF BUSINESS

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CHAPTER 6

# COMMERCIAL AND RESIDENTIAL TENANCIES

## Learning Objectives

After studying this chapter, a student should be able to:

- ☑ Distinguish between a lease and a licence and explain the importance of the distinction
- ☑ Distinguish between a commercial and a residential tenancy
- ☑ Explain the major features of each type of tenancy and how these features apply to residential and commercial situations
- ☑ Describe the types of reasons a residential landlord must give for terminating a tenancy and list a few specific examples, including termination for cause, non-payment of rent, and landlord's own use of the property
- ☑ Describe the manner in which a residential landlord must give notice of end of tenancy and the tenant's right to dispute it
- ☑ Describe when and how a rent increase notice is given in residential tenancies
- ☑ Discuss the role of an arbitrator and/or a court in settling disputes
- ☑ Explain the rights and obligations of commercial or residential landlords and tenants with respect to security deposits, repair, privacy, and assignment and subletting
- ☑ Explain the implied rights and obligations of commercial or residential landlords and tenants
- ☑ Describe the notice requirements under the *Residential Tenancy Act*
- ☑ Define the concept of "quiet enjoyment"

# NATURE OF THE RELATIONSHIP

## Difference Between a Lease and a Licence

At common law, there were two important distinctions between leases and licenses. First, a *lease* created an interest in land, while a *licence* created a mere contractual privilege. Because a lease was an interest in land, it would "run with the land" and bind successors in title. For example, if A granted B a lease, and A subsequently sold the land to C, then C would take the land subject to B's lease. In contrast, a licence did not run with the land. Therefore, if A granted B a licence, and A subsequently sold the land to C, then C would take the land free of B's licence. The reason for this is that A's land was not affected by the contractual agreement between A and B. C, not being a party to the contract, could not be affected by it.

**lease**
an instrument granting exclusive possession of land to another for a specified term, usually at a rent

**licence**
with respect to real property, a privilege to enter onto premises for a certain purpose. However, this privilege does not confer upon the licensee any title, interest, or estate in such property (e.g., exclusive right to possession of the property)

The second difference between a lease and a licence at common law was that a lease created the relationship of landlord and tenant, but a licence did not. The relationship of landlord and tenant implied many rights and obligations between the parties to the lease. In contrast, a licence was simply a contract and therefore created only those rights and obligations expressly stated in the contract.

In British Columbia today, the distinction between leases and licences is significant. A licence in BC does not create an interest in land, nor does it create the relationship of landlord and tenant. More importantly, however, the holder of a licence cannot benefit from the rights and obligations created by the *Residential Tenancy Act* and the *Commercial Tenancy Act*. It is therefore crucial to be able to determine whether an agreement between parties has created (or will create) a lease or a licence.

The test to determine whether an agreement has created a lease or a licence was set out by the Supreme Court of Canada in *Ocean Harvesters Ltd. v. Quinlan Bros. Ltd.*, 1974 CanLII 149. In that case, the Supreme Court of Canada held that whether an agreement creates a lease or a licence is a matter of intention. Did the parties to the agreement intend to create a lease and grant an interest in land, or did they simply intend to create a licence to occupy? To determine intention, one must examine the agreement, the surrounding circumstances, and the purpose behind the agreement. Terms in an agreement such as "lessor/lessee" or "licensor/licensee" will not necessarily be determinative. The most important evidence of intention will be whether or not an agreement has granted exclusive possession to the "tenant". That is, whether the "tenant" has absolute possession and control over the premises, even to the exclusion of the "landlord". Generally speaking, where a court concludes that an agreement has conferred a right to exclusive possession, then the agreement will be considered to be a lease. For example, if a "landlord" provides services such as meals and a housekeeper to a tenant, this may indicate that the "tenant" is in fact a licensee. They do not have exclusive possession, as the landlord and/or housekeeper can enter the premises. If the landlord does not provide such services and retains very limited rights, for example the right to enter and repair the premises after providing the tenant with notice, this is indicative of exclusive possession. In such a case, the agreement is more likely a lease.

## Difference Between Commercial Tenancies and Residential Tenancies

In British Columbia, tenancies are categorized as either commercial tenancies or residential tenancies. Commercial tenancies are governed almost completely by the common law and the actual terms of the lease, and to a lesser extent by the *Commercial Tenancy Act*. Residential tenancies are almost completely governed by statute law. The *Residential Tenancy Act* (or, the "Act") was passed in 1984. While the Act has very broad application, sometimes the terms of the agreement itself and the common law are relevant. Therefore, the first important question which must be answered when dealing with any landlord and tenant dispute is whether the tenancy in question is residential or commercial. Once that question is answered, the relevant law can be determined and applied.

At common law the contract between a landlord and a tenant was called a lease. This term is still used when referring to commercial tenancies. However, under the *Residential Tenancy Act*, an agreement between a landlord and tenant respecting possession of residential premises is called a "*tenancy agreement*".

**tenancy agreement**
contract between the landlord and the tenant, pertaining to the letting of residential premises

Examples of commercial tenancies are leases of factories, warehouses, stores and offices. The *Residential Tenancy Act* applies to agreements respecting possession of a "rental unit." This term is defined as living accommodation rented or intended to be rented to a tenant. Besides the usual type of units one would consider residential premises, the term includes caretakers' premises and residential premises provided to an employee to occupy during their employment. However, the Act does not apply in several circumstances, including:

- premises occupied for business purposes with a dwelling unit attached that is rented under one lease;
- living accommodation rented by a not for profit housing cooperative to a member of the cooperative;
- living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation;
- several types of communal living accommodations, such as educational institution residences for students and employees, public or private health facilities, community care, emergency shelters, and correctional institutions;
- a tenancy agreement for a term exceeding 20 years; or
- living accommodation occupied as vacation or travel accommodation.

## What Must be in the Agreement

### *Commercial*

Commercial leases of over 3 years must comply with section 59 of the *Law and Equity Act*, which requires them to be in writing if they are to be enforceable by the courts. Section 59 of the *Law and Equity Act* is covered in detail in Chapter 11: "Contracts for Real Estate Transactions".

The written document should have all the essential terms spelled out. The following is a list of these terms:

- the names of the parties;
- a description of the premises demised (leased);
- the commencement of the term (usually a specific date);
- the duration of the term (the last day must be certain or capable of being determined);
- the rent; and
- any other material terms of the contract.

Matters must be dealt with in detail in a commercial lease, otherwise the common law can impose unexpected implied obligations on the parties. This is not the case in a residential tenancy agreement because most matters are covered by the Act.

### *Residential*

Tenancy agreements are subject to the *Residential Tenancy Regulation* (the "Regulation"), which requires that a tenancy agreement be in writing, signed, and dated by both the landlord and tenant, and written in a manner that is easily read and understood by a reasonable person. Section 13 of the Act also requires that the following terms be included in every tenancy agreement:

1. the standard terms;
2. the correct legal names of the landlord and tenant;
3. the address of the rental unit;
4. the date the tenancy agreement is entered into;
5. the address for service and telephone number of the landlord or the landlord's agent;
6. the date on which the tenancy starts;
7. if the tenancy is a periodic tenancy, whether it is on a weekly, monthly, or other periodic basis;
8. if the tenancy is a fixed term tenancy,
    i. the date the tenancy ends, and
    ii. whether the tenancy may continue as a periodic tenancy, or for another fixed term after that date, or whether the tenant must vacate the rental unit on that date as permitted in circumstances prescribed under section 97(2)(a.1) of the Act;

9. the amount of rent payable for a specific period, and, if the rent varies with the number of occupants, the amount by which it varies;
10. the day in the month, or in the other period on which the tenancy is based, on which the rent is due;
11. which services and facilities are included in the rent; and
12. the amount of any security deposit or pet damage deposit and the date the security deposit or pet damage deposit was or must be paid.

The Regulation also requires that certain standard terms be included in tenancy agreements to which the Regulation applies. The standard terms govern, among other things, security and pet damage deposits; condition inspections; payment of rent and rent increases; assignment or sublet; landlord and tenant obligations to repair; a tenant's right to have guests; landlord entry into rental unit; and ending the tenancy. To help landlords meet the requirements of the Regulation, the Ministry of the Attorney General has developed a standard form tenancy agreement. Copies of the form may be obtained from the Residential Tenancy Office or downloaded from their website at *www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/forms*. Use of the standard form is not mandatory, and landlords are free to develop their own agreements provided that they meet the requirements of the Regulation. The Regulation also requires that any tenancy agreement, whether in the standard form or not, be written in at least 8 point type and be signed and dated by both the landlord and the tenant. Furthermore, a copy of the written tenancy agreement must be provided to the tenant promptly, and in any event not later than 21 days after the agreement is entered into.

## TYPES OF TENANCIES AND TERMINATION

### Fixed Term

#### *Commercial*

A commercial lease can be granted for a fixed period, no matter how long or how short. For example, it is possible to have a lease for a term of one week or for a term of 99 years. However, both the commencement date and the length of the term must be capable of being exactly determined before the lease takes effect. A commercial lease for a fixed term automatically ends when the term is over, for example, at the end of one year in a one year lease. No notice by either party is required. Note that leases dealing with "residential" property for a period of over 20 years are not "residential tenancies" and therefore must be dealt with as commercial tenancies.

#### *Residential*

Under the *Residential Tenancy Act*, a fixed term tenancy agreement means a tenancy agreement with a predetermined expiry date. When a fixed term residential tenancy expires, one of two things will happen. First, if the landlord and tenant do not enter into a new agreement before the expiry date, and the tenant continues to occupy the premises, the landlord and the tenant are presumed to have renewed the original agreement as a month-to-month tenancy. This tenancy will be on the same terms and conditions as existed in the original agreement. Second, in narrow circumstances, the agreement can expire on the expiry date just as a commercial fixed term tenancy does. For this to happen, the tenancy agreement must provide that the tenant will vacate the rental unit on the date specified as the end of the tenancy. However, a landlord may only use a vacate clause in the tenancy agreement if that agreement is a sublease agreement or if the tenancy is a fixed term tenancy within circumstances prescribed in section 13.1 of the *Residential Tenancy Regulation*. Section 13.1 of this Regulation specifies situations where a landlord or landlord's close family member plans in good faith to occupy the rental unit. A tenant is not required to otherwise move out at the end of a term.

Where a landlord intends to enforce the vacate clause under the specific circumstances identified in the *Residential Tenancy Act* or Regulation and the tenant does not agree in writing to mutually end the tenancy and move out at the end of a term, the landlord will need to apply for an order of possession through the Residential Tenancy Branch.

## Periodic Tenancy

### *Commercial*

**Creation**. A *periodic tenancy* is one which automatically renews itself on the last day of the term for a further term of the same length until it is terminated by either party with proper notice. The most common types of periodic tenancies are weekly, monthly and yearly.

**periodic tenancy**
a tenancy which automatically renews itself on the last day of the term for a further term of the same duration until terminated by either party

Periodic commercial tenancies are created in two ways. First, a periodic commercial tenancy can be created by the express terms of the lease. For example, "the lease shall run from year to year from April 1, 1992" will create a yearly tenancy. Second, it can arise by implication of law. This happens where the tenant stays in possession of the premises after a fixed term lease ends and pays rent which the landlord accepts. When a periodic tenancy occurs in this situation, a question arises as to the length of the period in the new tenancy. In general, if the original term was for a year or more and the rent was expressed yearly, the new implied tenancy would be from year to year (for example, "the rent is $12,000 per year, payable in 12 monthly instalments of $1,000 per month" would probably result in a new yearly tenancy). If the original term was for less than a year, or the rent was expressed monthly, then a month-to-month tenancy would probably be implied. In practice, the original lease will usually set out what will happen if the tenant stays on after the fixed term lease ends. If so, the lease provisions will govern the situation.

### *Residential*

**Creation.** Periodic residential tenancies are commonly created in two ways. First, a periodic tenancy is created by the express terms of the agreement. For example, "the tenant agrees to rent the premises on a month-to-month basis." Second, a periodic tenancy can also be created by operation of section 44 of the *Residential Tenancy Act*, where a fixed term tenancy that does not require the tenant to vacate the rental unit expires, and the parties have not entered into a new agreement. In that case, the landlord and tenant are deemed to have renewed the tenancy as a month-to-month tenancy on the same terms. In a residential tenancy, fixed terms, when they end, automatically become periodic tenancies unless the parties agree otherwise.

## Termination

### *Commercial*

A commercial periodic tenancy agreement might include a clause governing the termination of the agreement. However, if no applicable clause is present, then either party can terminate a commercial periodic tenancy by giving "reasonable" notice to the other party. The end of the period of notice should coincide with the last day of the tenancy period. In the common law, reasonable notice usually means one full rental period in the case of a weekly or monthly tenancy, and six months for a yearly tenancy. However, some flexibility is allowed. In *Union Properties Western Co. v. Johnston Terminals Ltd*., 1988 CarswellBC 2706 (BC SC), the judge stated that what is reasonable depends on the circumstances of each case. In that case, 28 days' notice was considered reasonable notice to terminate a monthly tenancy. In commercial tenancies, the form of the notice is not important as long as its substance indicates an intention on the part of the person giving it to terminate the existing tenancy at a certain time. This intention must be shown with reasonable certainty. For example, a notice to terminate "on or before" a certain date has been held valid to end a commercial tenancy. Small errors in names, premises and dates have also been held irrelevant where the intention of the parties was clear.

### *Residential*

The *Residential Tenancy Act* has introduced the concept of security of tenure for tenants. Security of tenure means that a tenancy cannot be terminated except for specific reasons. For example, a tenant cannot be given notice merely for complaining about needed repairs.

The Act lists the events which will result in the end of a tenancy agreement, and these include:

44 (1) A tenancy ends only if one or more of the following applies:

(a) the tenant or landlord gives notice to end the tenancy in accordance with the Act (to be discussed later);

(b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97(2)(a.1), requires the tenant to vacate the rental unit at the end of the term;

(c) the landlord and tenant agree in writing to end the tenancy;

(d) the tenant vacates or abandons the rental unit;

(e) the tenancy agreement is frustrated;

(f) the director orders that the tenancy is ended;

(g) the tenancy agreement is a sublease agreement.

(2) [Repealed 2003-81-37.]

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

It should be noted that ending an agreement because of a landlord breach is fairly complicated, and should be used cautiously by a tenant. If the tenant can prove a breach of a material term (i.e., one which goes to the root of the whole tenancy), they may elect to treat the tenancy as over. Doing so is risky because if an arbitrator or court does not agree, the tenant will be liable in damages for unpaid rent.

**Non-payment of rent.** A landlord can give a notice of the end of the tenancy agreement to a tenant who does not pay the rent when it is due. The notice is set up differently from other types of notices because it is cancelled if the tenant pays the rent owing within 5 days of receiving the notice. A typical example of how this notice works is shown in Figure 6.1.

The provision in the Act is as follows:

46. (1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

(2) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.

(3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.

(4) Within 5 days after receiving a notice under this section, the tenant may

(a) pay the overdue rent, in which case the notice has no effect, or

(b) dispute the notice by applying for arbitration.

(5) If a tenant who has received a notice under this section does not pay the rent or apply for arbitration in accordance with subsection (4), the tenant

(a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

(b) must vacate the rental unit to which the notice relates by that date.

(6) If

(a) a tenancy agreement requires the tenant to pay utility charges to the landlord, and

(b) the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them,

the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

**FIGURE 6.1: Notice of End of Tenancy Agreement for Non-Payment of Rent**

The following events might occur where a tenant's rent is due on the 1st of the month:

| | | |
|---|---|---|
| 1st of the month | – | tenant fails to pay rent |
| 3rd of the month | – | landlord serves a notice on the tenant to pay the rent owing by midnight on the 8th, or the tenancy is ended on the 13th |
| 6th of the month | – | tenant applies to an arbitrator for an extension to pay arrears and arbitrator extends date of payment to midnight of the 10th |
| 10th of the month | – | tenant pays rent and notice of the end of tenancy agreement becomes void |

**For cause.** Under section 47(1) a landlord may, at any time, give the tenant a notice of the end of the tenancy if any one of the following events has occurred:

(a) the tenant does not pay the security deposit or pet damage deposit within 30 days of the date it is required to be paid under the tenancy agreement;

(b) the tenant is repeatedly late paying rent;

(c) there are an unreasonable number of occupants in a rental unit;

(d) the tenant or a person permitted on the residential property by the tenant has

  (i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,

  (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or

  (iii) put the landlord's property at significant risk;

(e) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that

  (i) has caused or is likely to cause damage to the landlord's property,

  (ii) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety, or physical well-being of anther occupant of the residential property, or

  (iii) has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord;

(f) the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;

(g) the tenant does not repair damage to a rental unit or other residential property, as required under section 32(3) [obligations to repair and maintain], within a reasonable time;

(h) the tenant

  (i) has failed to comply with a material term, and

  (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

(i) the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 *[assignment and subletting]*;

(j) the tenant knowingly gives false information about the residential property to a prospective tenant or purchaser viewing the residential property;

(k) the rental unit must be vacated to comply with an order of a federal, British Columbia, regional, or municipal government authority;

(l) the tenant has not complied with an order of an arbitrator within 30 days of the later of the following days:

  (i) the date the tenant receives the order;

  (ii) the date specified in the order for the tenant to comply with the order.

A notice of the end of the tenancy agreement given under this section must be not less than one month and is effective on the last day of an ensuing rental payment period.

Finally, section 56 provides that if an arbitrator considers that it would be unreasonable or unfair to the landlord or other occupants of the property to require the landlord to give one month's notice, the arbitrator may order the tenancy agreement to end on a specified date.

## ALERT

**Cannabis and Real Estate**

On October 17, 2018, the federal *Cannabis Act* came into force, legalizing the possession, consumption, and growth of recreational cannabis across Canada, subject to certain limitations prescribed in the Act. Under the *Cannabis Act*, individuals who are 18 years of age or older are now permitted to do each of the following:

1. possess up to 30 grams of dried cannabis;
2. consume cannabis in locations authorized and regulated by local jurisdictions; and
3. cultivate up to four cannabis plants per residence.

The Act also permits the sale and distribution of cannabis by persons authorized to do so under provincial legislation. The *Cannabis Act* and related provincial legislation regulating cannabis have significant implications for licensees and others involved in the British Columbia real estate industry.

**What are the new laws in British Columbia relating to cannabis?**

In addition to the federal *Cannabis Act*, the Government of British Columbia has enacted the *Cannabis Control and Licensing Act* (the "CCLA") and the *Cannabis Distribution Act* (the "CDA") which provide a more detailed regulatory scheme for recreational cannabis in response to the legalization of recreational cannabis. The CCLA regulates the possession, use, and cultivation of recreational cannabis in British Columbia. Under the CCLA, individuals in British Columbia who are 19 years of age or older are permitted to possess up to 30 grams of dried cannabis (or an equivalent amount) in public and may possess up to four cannabis plants in their residence provided that no part of the residence is used as a day-care and the plants are not visible from a public place. In addition to the CCLA, the CDA establishes a public wholesale cannabis distribution monopoly and sets out the parameters for the retail sale of cannabis by the Government.

**How does the *Cannabis Control and Licensing Act* amend the *Residential Tenancy Act*?**

The CCLA amends the *Residential Tenancy Act* to include a provision which states that if a tenancy agreement entered into before October 17, 2018: (a) includes a term that prohibits or limits smoking tobacco; and (b) does not include a term that expressly permits smoking cannabis, the tenancy agreement will be deemed to include a term that prohibits or limits smoking cannabis in the same manner that smoking tobacco is prohibited or limited. Additionally, tenancy agreements entered into before October 17, 2018 are deemed to prohibit growing cannabis plants in or on the residential property unless (a) the tenant is growing federally authorized medical cannabis and (b) growing the plants is not contrary to the terms of the tenancy agreement. These deemed restrictions do not apply to residential tenancy agreements entered into on or after October 17, 2018, meaning that landlords and tenants are free to negotiate these terms once the CCLA is in effect. Additionally, this means that landlords who wish to impose restrictions or prohibitions on a tenant's use or cultivation of cannabis must now expressly include such terms in the lease agreement.

**Landlord use of property.** Under section 49, where a landlord enters an agreement in good faith with a purchaser for the sale of the rental unit occupied under a tenancy agreement and:

1. all conditions precedent in the sale agreement have been satisfied;
2. the purchaser is an individual and the purchaser, or a close family member of the purchaser, intends in good faith to occupy the rental unit. (The Act defines a "close family member" as the individual's father, mother, spouse or child, or the father, mother or child of that individual's spouse.); and
3. the purchaser requests in writing that the landlord give the tenant of the premises a notice of the end of the tenancy agreement,

the landlord may give a two month notice of the end of the tenancy agreement to the tenant. Figure 6.2 illustrates a typical situation where a purchaser wants to occupy premises occupied by a residential tenant. Similarly, where the landlord intends in good faith that the landlord, or a spouse, child, or parent of the landlord or landlord's spouse will occupy the premises, the landlord can give a two month notice of the end

of the tenancy agreement. If the landlord issues the Two Month Notice to End Tenancy to the tenant on behalf of a purchaser of the property, the notice must contain the name and address of the purchaser who asked the landlord to give the notice (see section 49(7) of the Act). Additionally, the notice must be at least two months and is effective on the last day of a rental payment period.

**FIGURE 6.2: Notice of the End of The Tenancy Agreement, Where Purchaser of Property Wants to Occupy Residential Premises**

1. On March 18th, the purchaser makes an offer to purchase a home occupied by a tenant on a month-to-month tenancy.
2. The contract of purchase and sale has the following terms:
   (a) it is subject to the purchaser arranging a mortgage by March 25th;*
   (b) the sale is to be completed on May 31st;
   (c) the purchaser has stated in the contract the intention to occupy the home; and
   (d) the vendor is required to give notice to the tenant on the purchaser's behalf.
3. On March 24th, the purchaser arranges a mortgage and removes the "subject" clause.
4. On March 26th, the vendor gives a notice of the end of the tenancy agreement to the tenant effective May 31st.

* This clause is referred to as a "subject" clause or condition precedent. How these clauses work is explained in the chapters dealing with the law of contracts.

## ALERT

A licensee acting as a representative for the buyer of a tenanted property was disciplined for failing to ensure that the Contract for Purchase and Sale (the "Contract") complied with section 49 of the Act. The Contract, formed on May 7, included a term for vacant possession of the property as of 3 p.m. on June 14, leaving less than the required two months' notice to end the tenancy for landlord use of property under section 49. The Contract was silent regarding any details of the tenancy or any requirement for the seller to provide such notice. The tenants were notified of the sale on May 15 and, despite assurances from the seller's licensee that 30 days' notice would suffice, they could not vacate the property prior to June 30. Accordingly, the Contract had to be amended to reflect altered completion and possession dates.

The licensee was found to have acted contrary to the *Real Estate Services Rules* requiring him to act with reasonable care and skill (section 34) and in the best interests of his client (section 30) by failing to include a clause requiring the seller to provide notice to the tenant to end the tenancy, failing to include any details of the tenancy in the Contract, and failing to notify his clients of their requirement to produce a written request for vacant possession. As a result, the licensee had his licence suspended for 7 days and, in addition to paying $1,250 in enforcement expenses, was ordered to successfully complete the Real Estate Trading Services Remedial Education Course at his own expense.

(2016 CanLII 37874 (BC REC))

A Two Month Notice to End Tenancy applies to fixed term tenancies as well as periodic tenancies; however, in the case of fixed term tenancies, the effective date of the notice cannot be earlier than the termination date of the fixed term tenancy that is stated in the fixed term tenancy agreement. This is illustrated in the following example.

### *Example – Fixed Term Tenancies*

Arnie, a real estate licensee, has a listing on Vince's property, which is occupied by Thomas, a residential tenant. Paula, a prospective purchaser, tells her licensee that she intends to occupy the property after completion. Paula's licensee communicates this to Arnie. Arnie drafts a contract of purchase and sale requiring Vince to deliver vacant possession of the property to Paula. Arnie sets the completion date in the contract for three months in the future, anticipating that this will give Vince enough time to serve a Two Month Notice ending tenancy on Thomas.

The contract is entered into by Paula and Vince. Once all the subjects in the contract have been removed, Paula asks Vince (in writing) to give Thomas notice ending the tenancy. Vince serves a Two Month Notice ending the tenancy on Thomas to end the tenancy on the day before the completion date. This will allow Vince to deliver vacant possession to Paula, as he is required to do under the contract. However, after receiving Vince's notice, Thomas refuses to move out. Thomas produces a fixed term tenancy agreement which does not expire for six months. Vince agrees that he signed the agreement, but he had forgotten what he had signed. Arnie should have asked Vince whether the tenancy agreement was month-to-month or a fixed term. He also should have checked with the tenant and should have reviewed the agreement itself. Due to Arnie's error, Vince may not be able to deliver vacant possession of the property to Paula, which would amount to a breach of contract.

Further, under section 49(6) of the Act, if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following:

(a) demolish the rental unit;

[…]

(c) convert the residential property to strata lots under the *Strata Property Act*;

(d) convert the residential property into a not for profit housing cooperative under the *Cooperative Association Act*;

(e) convert the rental unit for use by a caretaker, manager, or superintendent of the residential property; or

(f) convert the rental unit to a non-residential use,

the landlord can give a notice of the end of the tenancy agreement to the tenant.

In each of the above circumstances the notice must be at least four months and is effective on the last day of a rental payment period. It is important to note that a Four Month Notice to End Tenancy applies to fixed term tenancies as well as month-to-month tenancies; however, the effective date cannot be earlier than the date specified as the end of the tenancy in the tenancy agreement.

Finally, a landlord who gives a tenant notice under section 49 (landlord's use of property) must pay the tenant, on or before the effective date of the notice, an amount that is equivalent to one month's rent (section 51).

## ALERT

**Tenant's Rights on Receiving Notice for Landlord Use of Property**

A landlord who gives a tenant notice ending the tenancy for landlord use must pay the tenant, on or before the effective date of the notice, the equivalent of one month's rent as compensation. The landlord may choose to offer the tenant one month rent free, rather than collecting the rent and returning it to the tenant as compensation. Therefore, a seller who is asked to terminate a tenancy by a buyer will incur costs in order to do so. The seller's licensee should ensure that the seller understands the costs of terminating a tenancy for buyer occupation. The seller may also wish to address these costs in the contract of purchase and sale (e.g., by seeking some contribution toward these costs by the buyer who is asking for vacant possession).

Should any tenant vacate in compliance with a notice of the end of the tenancy agreement and later prove that the purchaser (or eligible family member), or the landlord (or eligible family member), did not occupy the premises for at least six months within a reasonable time after the effective date of the notice, an arbitrator at the Residential Tenancy Branch may order that the purchaser, or the landlord, as the case may be, pay the tenant an amount that is the equivalent of 12 months' rent (section 51(2)). This remedy is in addition to one month's rent payment discussed earlier. The same remedy is available if the landlord does not demolish or convert, etc., the premises.

**Renovations or repairs: director's orders.** In the event a landlord wishes to end a tenancy to carry out renovations or repairs, the landlord must first apply to the Residential Tenancy Branch requesting an order ending the tenancy and granting the landlord possession of the rental unit (see section 49.2 of the Act). In order to be successful, the landlord must satisfy the Residential Tenancy Branch that:

a. the landlord intends in good faith to renovate or repair the rental unit and has all the necessary permits and approvals required by law to carry out the renovations or repairs;

b. the renovations or repairs require the rental unit to be vacant;

c. the renovations or repairs are necessary to prolong or sustain the use of the rental unit or the building in which the rental unit is located; and

d. the only reasonable way to achieve the necessary vacancy is to end the tenancy agreement.

If granted, an order under section 49.2 will not require the tenant to move out of the rental unit for at least four months after the date of the order. If the tenancy is a periodic tenancy, then the move-out date must fall on the last day of a rental payment period (i.e., the day before rent is due), and if it is a fixed term tenancy, then the move-out date can be no earlier than the end of the fixed term. Further, if a landlord ends a tenancy

to renovate or repair the rental unit, a tenant has a right of first refusal to enter into a new tenancy agreement at a rent determined by the landlord after the renovations or repairs are complete. This right of first refusal applies only to a rental unit in a residential property containing five or more rental units. A landlord must compensate a tenant 12 months' rent (unless excused by an arbitrator in extenuating circumstances) if the tenant exercises a right of first refusal and the landlord fails to give the tenant notice (at least 45 days before the completion of the renovations or repairs) of the availability date of the rental unit, and a tenancy agreement for the tenant to sign effective on the available date.

Finally, similar to the rules discussed earlier in the section about landlord use of property, a tenant who must vacate a rental unit for renovations or repairs is entitled to the equivalent of one month's rent from the landlord, which must be paid prior to the date that the tenant is required to leave. Additionally, a landlord who obtains an order ending a tenancy for renovations or repairs must accomplish those renovations or repairs within a reasonable period of time after the order comes into effect. If they fail to do so, they may be required to pay the tenant who was forced to vacate the equivalent of 12 months' rent, in addition to the one month's rent discussed earlier.

**Notice of the end of the tenancy agreement by the tenant.** Under section 45, a tenant can give notice of the end of the tenancy agreement, other than a fixed term agreement, on or before the last day of a rental payment period to be effective on the last day of a later rental payment period, but the period of notice must be at least one month.

If the tenant is given a two month notice under the "landlord use of property" provision, the tenant may in turn give the landlord at least 10 days written notice of an earlier end date. In such a case, the tenant owes a proportional amount of rent for the dates of occupation, and the landlord must pay the tenant the remaining pro-rated amount in addition to the required compensation equal to one-month's rent.

**Form of notice.** In sharp contrast to the requirements of reasonableness and the flexible provisions of the common law which govern commercial tenancies, residential tenancies have a strict set of rules under the Act which must be followed in order to terminate a tenancy. A notice given by a landlord is void unless the required form is used. A notice given by a tenant may be in any written form but must contain the necessary details. A defective notice may be allowed if it is reasonable in the circumstances and if the person receiving the notice was aware of the information that was left out.

Section 52 specifies that a notice to end a tenancy must be in writing and must also:

- be signed and dated by the landlord or tenant giving the notice;
- give the address of the rental unit;
- state the effective date of the notice; and
- where the landlord is giving notice, state the grounds for ending the tenancy.

**Dispute of notice of the end of the tenancy agreement.** Where a tenant is given a proper notice, they may apply to an arbitrator for an order setting it aside. The tenant must apply within a limited time unless the arbitrator extends it. Where the notice is for non-payment of rent the tenant has 5 days; where it is for cause the tenant has 10 days; where it is for the landlord use of the property the tenant has 15 days; and where it is for the demolition or major renovation of the rental unit the tenant has 30 days. If the tenant does not dispute the notice, the tenant is deemed to have accepted the end of the tenancy agreement on the effective date given in the notice.

At a hearing of a dispute the arbitrator will review the reason for the notice and either make an order for possession by the landlord or set aside the notice. An order for possession is a court order which can be carried out by the sheriff if the tenant fails to comply with it.

## Tenancy at Will

### *Commercial*

**tenancy at will**
a tenancy where the tenant, with the consent of the landlord, occupies land as a tenant for a term which can be terminated by either party at any time

A *tenancy at will* arises when a tenant, with the consent of the owner, occupies land for a term which can be terminated by either party at any time. This kind of tenancy can be created expressly or by implication, and frequently arises when the seller of land permits the buyer to occupy the property until the sale is completed. It can be terminated by any act of the parties inconsistent with its existence, for example, a demand for possession.

Unless the parties agree that the tenancy shall be rent-free, the landlord is entitled to be compensated for the "use and occupation" of the land. However, if rent is paid on a regular basis, the law will imply that it has become a periodic tenancy even though the original relationship may have been a tenancy at will. This implication can be overruled by an express agreement.

### *Residential*

A tenancy at will is not expressly mentioned in the *Residential Tenancy Act*, and other than the provisions regarding tenant's failure to pay rent, the statute is not set up to handle it. The minimum notice period specified in the Act for any end of tenancy agreement is five days. It is not clear whether or not a notice of termination for a tenancy at will would have to satisfy this minimum time period.

## RESIDENTIAL TENANCY ARBITRATIONS

For many years, the courts have not been considered to be the best choice for resolving disputes between landlords and tenants. Today, most disputes are addressed through arbitrators of the Residential Tenancy Branch ("RTB"). The Act specifically limits the jurisdiction of the courts to hear matters concerning residential tenancies. The Act provides that, except where the claim is for more than the monetary limit for claims under the *Small Claims Act* or where the dispute is linked substantially to a matter that is before the Supreme Court, a court does not have and must not exercise any jurisdiction in matters that must be submitted to arbitration under the Act. Matters that may be resolved by arbitration include disputes regarding rights, obligations and prohibitions under the Act, and in particular, rights and obligations under the terms of a residential tenancy agreement.

The RTB is an administrative body tasked with overseeing residential tenancies in British Columbia. The RTB employs Information Officers who respond to queries from members of the public and assist landlords and tenants in navigating RTB proceedings. The RTB also conducts dispute resolution hearings, makes orders for the completion of specific tasks arising from those proceedings, and orders administrative penalties in appropriate circumstances. In 2019, the RTB introduced a Compliance and Enforcement Unit (the "Unit") to conduct investigations of repeat or serious non-compliance with tenancy laws or orders of the RTB. The Unit issues warnings to ensure compliance, and if necessary, administers monetary penalties. For continued non-compliance, fines of up to $5,000 per day may be levied.

Part 5 of the Act outlines the rules for the appointment and proceedings of an arbitrator. The application for arbitration must be in the required form, with the required fee, and give details of the matter being submitted to arbitration. A copy of the application must be given to the other party within three days after it is made. The director makes an appointment from a group of arbitrators appointed by the government, and sets a time, date and place for the arbitration.

The arbitrator is given wide powers. They may conduct the hearing in any manner considered necessary. The arbitrator may refuse a hearing where they consider the matter frivolous, vexatious, or not initiated in good faith. The arbitrator must make a decision on the merits of the matter and is not bound by legal precedent. The arbitrator may receive and accept any evidence they consider appropriate, whether or not it would be admissible in a court of law, or is under oath. The hearing may include a submission made orally (even by phone) or in writing, although the other party must be given an opportunity to answer the submission. Either party may be represented, for example, by a real estate service provider or by a lawyer. The arbitrator may legally require witnesses to attend and give evidence under oath.

The arbitrator must give the decision within 30 days of the hearing, and the decision must be made in writing. The decision is final and binding on the parties, and can be filed in the Supreme Court and enforced as a judgment or order of that court.

### Tenancies of Manufactured Homes

Tenancies at manufactured home sites and manufactured home parks in British Columbia are not regulated by the Act and are instead governed by the *Manufactured Home Park Tenancy Act* (the "MHPTA") and its regulation. Disputes between landlords and tenants in manufactured home parks are still referred to arbitrators at the RTB. Licensees should be aware that tenants in manufactured home parks enjoy many of the same protections as those covered under the Act. For example, section 5 of the MHPTA states that landlords and tenants may not avoid or contract out of the MHPTA or its regulations, mirroring section 5

of the Act. Section 26(2) of the MHPTA requires tenants to maintain reasonable cleanliness throughout the manufactured home site and in common areas, which is very similar to the same requirement laid out in section 32(2) of the Act.

It is important for licensees to be mindful that under section 30 of the *Manufactured Home Park Tenancy Act Regulation* (the "MHPTAR"), landlords are permitted to establish rules to regulate manufactured home parks. However, those rules must be reasonable or they will not be enforceable. In one case (102020 RTB Decision 6445), a landlord proposed new park rules which were contested by the tenants. These rules included fines of $1,000 for improperly maintained yards issued without warning or notice, fines of $1,000 for any infraction of rules issued without warning or notice, and immediate termination of the tenancy if residents were found to be slandering the park on social media. While the landlord admitted that the fines were intended as a preventative measure and were unlikely to actually be issued, the tenants argued that the threat of such high fines amounted to bullying of residents.

The RTB Arbitrator found that fines of $1,000 for breaching a rule or failing to maintain a yard are "wholly unreasonable" and not permitted by either the MHPTA or the MHPTAR. As well, the rule allowing for the landlord to terminate a tenancy if a tenant was found to be posting derogatory comments online was seen as an attempt to contract out of or avoid the MHPTA and the protections it affords to tenants. The Arbitrator noted that, "while the landlord has every legitimate operational and business reason to maintain a well-run park, implementing draconian and unreasonable rules is not the best method for doing so." The Arbitrator ordered the landlord to comply with the MHPTA and the MHPTAR, and rescind the rules.

## THE KEY RIGHTS AND OBLIGATIONS OF THE PARTIES IN A TENANCY RELATIONSHIP

### Rent

#### *Commercial*

**rent**
a sum that a tenant promises to pay to the landlord in return for possession of the premises during the term of the lease

*Rent* is an agreed sum that a tenant promises to pay in return for exclusive possession of the premises during the term of the lease. Rent and the allocation of operating expenses (property taxes, building maintenance, landscaping, utilities, etc.) are often the most heavily negotiated aspects of a commercial lease. Generally, the landlord will prefer the tenant to pay as high a rent as possible and to cover as many operating expenses as possible, while the tenant would prefer exactly the opposite. In commercial leasing, certain phrases commonly refer to particular arrangements for the payment of rent and operating expenses by the parties:

- **Gross lease:** In some leases, the amount of rent paid by the tenant is inclusive of all operating expenses that the tenant must contribute to. In other words, the tenant will never be required to contribute to any operating expenses outside of what the tenant pays in rent. From a tenant's point of view, a gross lease is most desirable because it is the landlord's responsibility to pay any increase in expenses until there is a rent review or an adjustment for any escalation in expenses.
- **Triple net lease:** On the other end of the spectrum from gross leases are triple net leases. In a triple net lease, the tenant pays a base rent plus all applicable operating expenses, including any increases that occur from time to time.

Gross leases and triple net leases represent opposite ends of the spectrum. However, payment of operating expenses is highly negotiable and there are many other arrangements which may fall somewhere between these two extremes. For example, a single net lease historically implied payment of base rent and property taxes. A double net (net-net) lease implied payment of base rent, property taxes, and building insurance. A triple net (net-net-net) lease implied payment of base rent, property taxes, insurance, and building repairs and maintenance. As with most issues in commercial leasing, it is important to carefully review the lease itself to determine exactly how operating expenses are shared between the parties.

As for increases to rent, the tenant is protected to the extent that the landlord cannot raise the rent beyond what may be provided for in the lease for the duration of the term. This protection is not very strong under a periodic commercial tenancy because a landlord is easily able to terminate the tenancy by giving appropriate notice and at the same time, or later, advising the tenant that, if they wish to stay on, a new lease must be entered into at a higher rent.

Rent can be paid in goods or in services. It does not include all payments which a tenant is required to make under the terms of the lease, unless the agreement provides otherwise. For example, money spent on improvements, repairs or taxes is not rent. The time of payment of the rent is usually fixed by the lease, although in the absence of an agreement, the rent will not be due in advance. When the rent becomes due on a specific day, the tenant has the whole of that day to pay it. It is not in arrears until after midnight on that day. Rent can legally be due on a Sunday.

The remedies of a landlord for non-payment of rent on commercial premises are as follows:

- the landlord can bring a court action for the rent either by suing for the sum as would any creditor, or by reclaiming possession of the property through an expedited hearing process under the *Commercial Tenancy Act*;
- the landlord can re-enter the premises and cancel the balance of the term of the tenant; and
- the landlord can distrain for arrears of rent. Distraint or distress means a seizure and sale of the tenant's personal property to pay the arrears.

### *Residential*

Rent increases are regulated by Part 3 of the Act. A landlord may increase the rent in only two circumstances. First, a landlord may increase a tenant's rent if at least 12 months have passed since that tenant's last rent increase for those premises, or since the tenant started to rent the premises. Second, a landlord may raise the rent any time the premises are re-rented to new tenants, even though it may have been raised less than 12 months prior to the re-rental. However, when a change of tenant occurs, if the rent is not raised at that time, a landlord must wait until the new tenant has occupied the premises for 12 months before collecting a higher rent. The rent cannot be increased merely because a new landlord buys the premises. A change of landlord does not give a right to raise the rent.

Written notice of an increase must be given to a tenant at least three months before it becomes effective. If insufficient notice is given, or if the increase is imposed earlier than allowed by the Act, the notice is deemed to take effect on the earliest date that would comply with the Act. The Act has been amended so that landlords must now use a prescribed form when serving a notice of a rent increase.

Under the *Residential Tenancy Act Regulation*, landlords may increase rent on an annual basis up to an amount equal to the Consumer Price Index (CPI) for British Columbia. Each year, the Residential Tenancy Branch publishes the maximum allowable rent increase based on BC's CPI at that time. The Act also stipulates that tenants may not dispute at arbitration any increase that complies with Part 3. In certain circumstances, as set out in the Regulation, landlords may apply for approval of additional rent increases. For example, when the landlord has completed significant repairs or renovations or has incurred a financial loss from an extraordinary increase in the operating expenses of the residential property, the landlord may apply to the Residential Tenancy Branch to approve an additional rent increase. Finally, a tenant may agree to a rent increase greater than the prescribed amount. If a landlord collects a rent increase that does not comply with the Regulation, a tenant may deduct the increase from future rent payments or otherwise recover the increase (section 43(5)).

Rents can no longer be increased above the maximum annual allowable amount between fixed-term tenancy agreements with the same tenant. This protects tenants by preventing landlords from significantly increasing rent from year to year, at the end of the fixed term.

Furthermore, landlords are no longer able to apply for an additional rent increase on the basis that the rent is significantly lower than other similar rental units in the same geographic area.

**FIGURE 6.3: Comparison of Residential and Commercial Tenancies**

| Item | Commercial | Residential |
|---|---|---|
| **Name of Contract** | Lease | Tenancy Agreement |
| **Term Certain/Fixed Term Tenancies** | Automatically expires at end of term. No notice required. If tenant stays on and landlord accepts rent, becomes a periodic tenancy. Period depends on original term. | Expires at end of term in certain circumstances (tenancy agreement is a sublease agreement or landlord or landlord's close family member plans in good faith to occupy the rental unit). |
| **Rent** | No increase during fixed term. Can increase at end of term, or terminate a periodic tenancy and renew at higher rate. | Can only increase if 12 months since tenant's last increase or since tenant moved in. Limited to CPI unless special circumstances. Can also increase if new tenant, even if last increase was less than 12 months ago. |

## Security Deposits

### *Commercial*

There are no legal restrictions regarding *security deposits* for commercial tenancies. This is an item left open for negotiation. Usually, marketplace economics dictate the amount. The same applies to the question of interest, if any, on such deposits. The landlord will usually require some form of a security deposit to ensure that the tenant will continue to pay the rent, as well as to protect against damage to the property committed by the tenant. Sometimes, the security deposit takes the form of pre-payment of rent for the last month or two. According to the common law, return of the deposit is a personal obligation of the landlord; therefore, someone who purchases the property from the landlord is under no duty to the tenant to repay it. However, the parties to a sale of a commercial tenant-occupied property often make it a term of the sale that the buyer of the property will be responsible for the return of the security deposit to the tenant and the buyer will be given a monetary credit on the statement of adjustments prepared at the time of closing the deal.

**security deposit**
a sum of money paid to the landlord as collateral in case the tenant damages the premises or otherwise violates a term of the tenancy agreement

### *Residential*

Section 17 of the Act provides that a landlord may require a tenant to pay a security deposit as a condition of entering into a tenancy agreement or as a term of a tenancy agreement. A landlord may only collect a security deposit at the time the tenancy agreement is entered into. Further, the deposit may not be more than one-half of one month's rent. Only one security deposit can be collected for each residential unit. Landlords may collect extra deposits for such things as keys, access cards, and garage door openers. In addition, landlords have the right to decide whether to allow pets and are permitted to collect an additional damage deposit to cover damage that might be caused by pets, but these pet damage deposits may not be more than one-half of one month's rent. A landlord must pay interest (compounded annually) on both the security deposit and the pet damage deposit. The Act provides a detailed method to determine the interest rate to be charged.

Section 38 of the Act requires the landlord to pay the deposit and the interest accrued on it to the tenant within 15 days after the termination of the tenancy. Section 38(6) provides that if a landlord refuses to return a deposit to a tenant, and does not apply for Dispute Resolution, a landlord must repay the tenant double the security deposit, pet deposit, or both, as applicable. The tenant may make an application to the Residential Tenancy Branch through the Direct Request process, which will allow an arbitrator to issue a monetary award against the landlord without holding an oral hearing.

According to section 93, a security deposit and the obligations of the landlord run with the land; therefore, a buyer, when buying rented property, must make sure to collect any security deposit and accrued interest from the seller, because the buyer will have to pay these amounts out to the tenants as their tenancies end.

Section 23 of the Act requires that at the start of a tenancy, the landlord and tenant together must inspect the condition of the rental unit. This must take place on either the day the tenant is entitled to possession of the rental unit or on another mutually agreed day. The landlord must offer the tenant at least two opportunities, as prescribed, for the inspection and must complete a condition inspection report, to be signed by both the landlord and tenant. The landlord must give the tenant a copy of that report in accordance with

the Regulation. Section 24 provides that a tenant's failure to participate extinguishes the tenant's right to the return of a security or pet damage deposit, and a landlord's failure to participate or to comply with the section extinguishes the landlord's right to claim against either a security deposit or pet damage deposit.

## Distress

### *Commercial*

**distress**
a legal term for a landlord's right to seize and sell a tenant's personal property in order to recover arrears of rent

A commercial landlord can exercise the common law remedy of *distress* by seizing a tenant's goods and eventually selling them to satisfy a claim for rent owing. Distress is often the most effective remedy available to the landlord. The right has some limits as set out in sections 3 to 7 of the *Commercial Tenancy Act* and in the *Rent Distress Act*.

### *Residential*

Section 26(3) of the *Residential Tenancy Act* abolishes the remedy of distress in residential tenancies.

## Mitigation

### *Commercial*

**mitigation**
a principle requiring that a party who has suffered loss take reasonable action to minimize the amount of loss suffered

Where one party breaches a contract, the law usually requires the other party to *mitigate* their damages. In other words, the innocent party must try to reduce the loss suffered as a result of the breach. This principle is discussed in more detail in Chapter 10: "The Law of Contract". If a tenant improperly abandons the premises, the landlord may be able to sue the tenant for each month's rent. However, once a landlord is held to have surrendered the lease, they will lose any claim for rent against the tenant after the surrender.

There are two types of surrender. First, surrender can occur by an act of the parties. Second, it can arise by operation of law. A surrender is the giving up of the term so that it joins with the reversion (i.e., the interest remaining with the landlord). A surrender by an act of the parties would occur when the tenant offers to terminate the lease early and the landlord accepts. For example, if T were a tenant for a fixed term of 5 years and, after only one year, T offered to cancel the lease by paying two months' rent, a surrender by an act of the parties would occur if the landlord accepted T's offer.

A surrender by operation of law occurs where the landlord does some act which is inconsistent with the continuation of the tenancy. For example, this might occur where the landlord re-enters and attempts to re-rent the premises after the tenant had wrongfully abandoned the premises, without clearly indicating that this is being done on the tenant's account. The intention of the parties is not relevant in this type of surrender.

The Supreme Court of Canada decision in the case of *Highway Properties Ltd. v. Kelly Douglas & Co. Ltd.*, 1971 CanLII 123 (SCC), held that it is possible for a landlord to terminate the lease and sue for damages for the loss of the benefit of the lease for the unexpired term. The landlord must notify the tenant that they intend to terminate the lease and to make a claim for damages. In this way, the landlord preserves all of their rights against the tenant for any loss suffered as a result of any inability to re-rent or for any rent shortfall.

### *Residential*

Section 7(2) changes the common law by imposing an express duty on residential landlords and tenants to mitigate their damages or loss that results from the other's non-compliance with the Act or Regulation, or from a breach of the tenancy agreement. For example, if a tenant wrongfully vacates the premises prior to the expiry of a fixed term residential tenancy agreement, the landlord must still attempt to re-rent the premises at a reasonably economic rent.

#### *Example*

On December 1st, John rents a premises from Gordon for the period of one year. Rent of $500 is payable on the 1st of each month. In March, John abandons the premises. Gordon does not bother to re-rent the premises until December 1st, after the term has expired. Result? If this is a residential tenancy, Gordon will not have met his duty to mitigate his damages, and will only be able to claim damages for losses that could not have been avoided. If Gordon could have re-rented for $500 a month, he would only be able to recover nominal damages.

## Delivery or Service of Documents under the *Residential Tenancy Act*

Part 6, Division 1 of the Act sets out the rules for delivery or service of any documents required to be given under the Act, for example, for rent increases or for ending the tenancy agreement. Section 88 provides that most documents that are required or permitted to be given to or served on another person must be given in one of a number of listed ways. However, notices that are not served personally are not considered received until later. For example, where a notice has been given by:

- mail, it is considered received on the fifth day after mailing;
- email, it is considered received on the third day after it is sent;
- fax, it is considered received on the third day after it was faxed; and
- attaching a copy to a door, or leaving a copy in a mail box or mail slot, it is considered received on the third day after it was attached or left.

## Quiet Enjoyment and Privacy

### *Commercial*

Because a lease grants exclusive possession of a piece of property and conveys an interest or estate in that land, there is an implied *covenant of quiet enjoyment* at common law. The term "quiet enjoyment" does not simply mean freedom from noise; rather, it is an assurance to the tenant against the consequences of a defective title. In other words, if the landlord, or anyone who claims to have received rights from the landlord, attacks the tenant's right to the premises, it would be a breach of this covenant. It also assures the tenant of the use and enjoyment of the premises for all usual purposes without physical interference or unreasonable disturbance from the landlord. However, this right can be altered by the terms of the lease. Therefore, it is common in commercial leases for the landlord to provide for an unrestricted right to enter the premises for inspection at any time the landlord wishes.

**covenant of quiet enjoyment**
a guarantee to the tenant that they will be able to possess and enjoy the premises without significant interference

### *Residential*

The implied covenant for quiet enjoyment has specifically been preserved by the *Residential Tenancy Act*. Section 28 states:

> **Protection of tenant's right to quiet enjoyment**
> **28** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
> (a) reasonable privacy;
> (b) freedom from unreasonable disturbance;
> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

#### *Example*

In *Ashurwin Holdings Ltd v. British Columbia*, 2012 BCSC 1408, the tenant brought a complaint to the Residential Tenancy Branch, alleging that the disturbance resulting from his landlord's extensive and prolonged renovations to the building breached his right to quiet enjoyment. Specifically, the tenant complained of dust, excessive noise and vibrations from power tools, as well as ongoing swearing and yelling by the contractors. The tenant was ultimately successful and was awarded $700, about one month's rent.

One aspect of quiet enjoyment is "reasonable privacy". The Act goes on to limit a landlord's right to enter a rental unit, in furtherance of protecting a tenant's right to reasonable privacy. Section 29 states:

> **Landlord's right to enter rental unit restricted**
> **29** (1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:
> (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;

(b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
  (i) the purpose for entering, which must be reasonable;
  (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;
(c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;
(d) the landlord has an order of the director authorizing the entry;
(e) the tenant has abandoned the rental unit;
(f) an emergency exists and the entry is necessary to protect life or property.

(2) A landlord may inspect a rental unit monthly in accordance with subsection (1) (b).

When seeking access to an occupied rental unit, the landlord must ensure that they are complying with section 29.

## As a Licensee...

You may be asked to list a property for a client that is either partially tenanted (e.g., the basement suite is being rented subject to a tenancy agreement) or is completely tenanted. A listing licensee should keep in mind the following in order to respect the tenant's right to quiet enjoyment:

Section 29 of the *Residential Tenancy Act* outlines the circumstances under which a landlord may enter a rental unit. This provision applies to licensees when they act as agents of the landlord. Under section 29, a landlord or licensee may enter a rental unit if the tenant gives permission at the time of entry or not more than 30 days before the entry. Alternatively, section 29 allows the landlord to serve the tenant with at least 24 hours (and not more than 30 days) notice for access between the hours of 8 a.m. and 9 p.m., unless the tenant agrees otherwise.

A listing licensee's first step should be to contact the tenant and attempt to create a written schedule/agreement for open house(s) and showings that is acceptable to all parties involved. A process, or line of communication, can be established with the tenant in the event that the licensee would like urgent access to the rental unit (outside of the set schedule). Tenant cooperation will make the sale process much smoother than if the tenant is not consulted or does not feel respected in the process. However, if a schedule cannot be agreed upon or the tenant is generally uncooperative in allowing access, a listing licensee can provide 24 hours notice to show the rental unit.

With respect to hosting open houses, the Residential Tenancy Branch advises that landlords should be aware of the tenants' right to quiet enjoyment and should avoid holding multiple open houses in a short period of time, as these have the potential to be disruptive.

When marketing a tenant occupied property, remember that taking photographs or videos of the rental unit has the potential to violate the tenant's right to privacy. Therefore, avoid capturing images or videos of the tenant's photographs and unique personal belongings. A listing licensee may wish to provide any images or videos of the rental unit to the tenant before publishing them to ensure that the tenant has no concerns.

Finally, the value of tenant cooperation in the sale of a tenant-occupied property cannot be overestimated. A listing licensee should practice early, open, and frequent communication with the tenant to achieve this.

## Derogation from Grant

### *Commercial*

**covenant of non-derogation from the grant** a guarantee to the tenant that the landlord will not substantially deprive them of the benefit conferred by the tenancy agreement

The implied covenant of quiet enjoyment is very similar to another rule, namely, the *covenant of non-derogation from the grant*. This means that the landlord cannot deliberately prejudice any rights which they have granted to the tenant under the lease. Having given a thing with one hand, the landlord must not take away the means of enjoying it with the other. For example, a landlord cannot grant a lease of premises to a tenant and then, by actions on adjoining premises, frustrate the tenant's lease (for example, by blasting rocks to such an extent that the sound waves cause the tenant's house to fall down).

### *Residential*

The common law right of the tenant against derogation from grant of the landlord still exists for residential tenants.

## *Interesse Termini*

### *Commercial*

There is an implied covenant on the part of a commercial landlord to let the tenant into possession of the leased premises at the beginning of the term of the lease. If the landlord does not do so, they will be liable for damages. However, the commercial tenant cannot get an order for specific performance in these circumstances. The tenant may only sue for damages. This is because of the common law doctrine of *interesse termini*, which provides that no estate in land passes until the tenant takes possession.

### *Residential*

The doctrine of *interesse termini* has been abolished under the *Residential Tenancy Act*. Therefore, if a residential tenant is refused possession by the landlord at the start of the term of the tenancy, the tenant can obtain an order for possession against the landlord. The residential tenant is not limited to damages.

## Landlord's Duty to Repair

### *Commercial*

There has always been an implied condition that leased furnished premises be reasonably fit for human habitation and occupation. However, the law does not impose a similar obligation for unfurnished premises. The doctrine of *caveat lessee* (let the tenant beware) applies in commercial tenancies. There is no obligation on the landlord to repair. The tenant has to satisfy themselves as to the suitability of the premises before entering into the lease.

### *Residential*

Under section 32 of the *Residential Tenancy Act*, the landlord has a duty to repair all types of residential premises, furnished or unfurnished, even if they were in disrepair when the tenancy agreement was made.

**Landlord and tenant obligations to repair and maintain**

32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that
(a) complies with health, safety and housing standards required by law, and
(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

[…]

(5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

Where the landlord breaches this section or fails to provide a service or facility they are obliged to provide, the arbitrator can order the tenant to pay the rent to a named person to be used to remedy the failure. It should be noted that a landlord may not contract out of this obligation to maintain the premises.

Under section 33 of the Act, the landlord must conspicuously post on the property or give to the tenant in writing, the name and telephone number of a person the tenant is to contact for emergency repairs. Emergency repairs are defined by the Act as repairs that are urgent, necessary for the health or safety of anyone or for the preservation or use of the residential property, and made for the purpose of: repairing major leaks in the pipes or roof, damaged or blocked water or sewer pipes or plumbing fixtures, the primary heating system, damaged or defective locks that give access to the residential premises or the electrical systems.

If emergency repairs are not made within a reasonable time after a tenant has made a reasonable effort on two or more occasions to contact the person at the telephone number referred to above, then the tenant may have the repairs made. The tenant may then deduct the amount of the cost (less any reimbursements received from the landlord) of these repairs from future rent payments. The tenant must provide the landlord with a written account, including receipts for each expense incurred for emergency repairs, and if the landlord is of the opinion that the costs were unreasonable or not for emergency repairs, then the landlord may apply for arbitration.

## Tenant's Duty to Repair

### *Commercial*

There is an implied covenant that the tenant will treat the premises in a tenant-like manner. This means that a tenant must do those odd jobs required to maintain the premises as would a reasonable tenant (for example, replacing burnt-out light bulbs, or unplugging a sink). Aside from treating the premises in a tenant-like manner, the tenant has no obligation to repair. The tenant does have a duty, however, not to intentionally harm the premises by pulling down the walls or performing acts of a similarly destructive nature which would constitute waste. There is a further implied covenant that the tenant will deliver up the premises as they found them, fair wear and tear excepted. "Fair wear and tear excepted" is used to describe the aging process which all buildings necessarily suffer from the elements and by being used by a reasonable tenant.

### *Residential*

The Act has imposed a slightly higher duty on the residential tenant than existed at common law. The relevant provision is also contained in section 32:

**Landlord and tenant obligations to repair and maintain**

32 (2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

(3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(4) A tenant is not required to make repairs for reasonable wear and tear.

## The Right to Assign or Sublet

### *Commercial*

An assignment is the transfer by a party of all of the party's interest in a property to another party. The person transferring the interest is called the assignor, and the person receiving it is called the assignee.

A sublease is a lease by the original tenant (the sublandlord) to a third party (the subtenant) for less than the total remainder of the sublandlord's original lease term (the head lease term). A sublease can be for part or all of the premises. Further, a sublandlord can sublease some or almost all of the remainder of their head lease term, as long as they reserve some period of time at the end of the head lease for their re-entry (typically, this would be for the final day of the term). Failure to do so will result in the arrangement being characterized as an assignment.

For example, if a tenant for a term of 1 year (365 days) immediately enters into an agreement to lease the same premises to a subtenant for 364 days beginning on January 1st, the tenant must provide for their right of re-entry on December 30th to retain an interest in the sublease. Another example of a sublease would be where a tenant of 1,200 square feet grants a lease for 200 square feet to a third party for 3 months beginning on January 1st, while the head lease expires on December 31st. In this case, the sublandlord would have a right to re-enter the premises on March 31st, reserving a 9 month period for themselves prior to the expiration of the head lease.

Unless there is an express prohibition in the lease, a tenant under a commercial lease may assign or sublet without the consent of the landlord.

Courts strictly interpret any express prohibition against subletting or assigning, so if a lease states only that the tenant "shall not assign", then a sublease would not breach the lease. If a lease states only that the tenant cannot sublet, assignment would still be possible. Finally, if the lease states that the tenant "shall not assign or sublet the premises", the tenant may still assign or sublet a portion of the premises without being in breach of the lease.

### *Residential*

Section 34 of the Act has simplified the legal position for residential premises. A residential tenant may not assign or sublet unless the landlord consents in writing. If a tenancy agreement is for a fixed term of 6 months or more the landlord may not unreasonably withhold consent. A landlord may never charge for this consent.

**FIGURE 6.4: Comparison of Residential and Commercial Tenancies**

| Item | Commercial | Residential |
|---|---|---|
| Name of Contract | Lease | Tenancy Agreement |
| Term Certain/Fixed Term Tenancies | Automatically expires at end of term. No notice required. If tenant stays on and landlord accepts rent, becomes a periodic tenancy. Period depends on original term. | Expires at end of term only if landlord and tenant agree in writing at outset or if "proper" notice of the end of the tenancy agreement is given. Otherwise, if no new agreement is entered into, renewed as month-to-month periodic tenancy. |
| Periodic Tenancies | Can be created as above or expressly in lease. Can be terminated on reasonable notice. Usually means one period or 6 months on year-to-year lease. | Can be created as above or expressly in tenancy agreement. Can be terminated by notice. Notice period depends on reason for end of tenancy as specified in Act. |
| Form and Content of Contract | Should be in writing but form and content are, to a great extent, up to the parties. If for more than 3 years, should be written and registered. | Must be in writing and in the prescribed form. If for more than 3 years should be registered. Content is governed, to great extent, by Act. |
| Notice of Termination (Periodic Tenancies) | No required form. Notice period must be reasonable. | Required form for landlords. Landlord's reasons must be given and tenant's rights explained. Notice periods are prescribed. |
| Tenancy at Will | Created and terminated "at will." | Not provided for in Act. |
| Disputes | Settled by courts or by individual (e.g., landlord can use distress to recover rent). | Settled by courts or arbitration. |
| Rent | No increase during fixed term. Can increase at end of term, or terminate a periodic tenancy and renew at higher rate. | Can only increase if 12 months since tenant's last increase or since tenant moved in. Limited to CPI unless special circumstances. Can also increase if new tenant, even if last increase was less than 12 months ago. |
| Distress | Can seize tenant's belongings and sell to cover rent in arrears. | Cannot use this remedy. |
| Security Deposit | Amount, interest and repayment method are matters of negotiation in lease contract. | Can collect one-half of one month's rent. Must return deposit and interest within 15 days, or file a claim against deposit. |
| Privacy | Tenant has right to exclusive possession at common law, but landlord can insert right to enter in lease. Matter to be negotiated in lease. | Generally, landlord must give at least 24 hours written notice to enter during specific hours, unless tenant consents, emergency exists or tenant has abandoned. Strict limits on changing locks. |
| Assignment and Subletting | Allowed unless lease expressly prohibits. Landlord can forbid, limit, or even charge for consent. Matter to be negotiated in lease. | Allowed at any time with landlord's consent. If a fixed term tenancy of six months or more, landlord can't arbitrarily refuse. Landlord can never charge for consent. |
| Mitigation | Landlord has no obligation to mitigate damages. | Both parties required to mitigate damages resulting from breach of Act or of the tenancy agreement. |
| *Interesse Termini* | Tenant can sue for damages but not for specific performance if refused possession at start of lease. | Tenant can obtain order for possession if refused possession at start of lease, or sue for damages. |
| Quiet Enjoyment | Tenant has right to be free of claims against title. | Same rights exist as in commercial tenancies. |
| Derogation From Grant | Landlord cannot prejudice rights they have created. | Same rights exist as in commercial tenancies. |
| Repair | Landlord must ensure that furnished premises are reasonably fit for human habitation. Tenant must treat in tenant-like manner and leave them as found except for fair wear and tear. | Landlord must repair all premises even if damage existed at time tenancy agreement made. Tenant must meet ordinary cleanliness standards and repair damage done by self or guests. Provisions of Act govern. |