

"YOU AND THE LAW"

BUSINESS OWNERS: IS YOUR LEASE PROTECTED?

By Janice Mucalov, LL.B.

Perhaps you're a shop owner renting in a busy mall. Or you're a marketing or other firm with a long-term lease in a great downtown office. You probably settled on your prized location after scouting the market. You've spent money on advertising your business, and you've invested in unique leasehold improvements (like your storefront, built-in counters or fixed partitions). Maybe the rent you pay is now below current market rates.

But all business owners who carry on their business under a long-term lease should beware.

If you haven't registered your lease against your landlord's title, your location may not be protected. If your landlord sells the property or defaults on their mortgage, the buyer or mortgage lender (for their own valid reasons) could possibly turf you out, and you could lose your lease and location.

A recent BC Supreme Court case illustrates this risk. In essence, it involved a tenant in a Victoria hotel property (who leased restaurant and banquet facilities) and a sub-tenant (who sub-leased space for a pub). Both basically had 5-year leases with renewal options. The hotel owner took out a first and second mortgage. When the lenders loaned their money, each knew the restaurant, banquet and pub were being operated under leases. They registered their mortgages in the Land Title Office. But neither the tenant nor the sub-tenant had registered their leases.

A few years later, the hotel owner stopped making its mortgage payments. The lenders started foreclosure proceedings. The first mortgage lender had an interested buyer who wanted vacant possession of the hotel. So the lender wanted to evict the tenant and sub-tenant, even though their leases hadn't run out. They, however, wanted to stay.

Here are the key points: In BC, a lease for 3 years or longer must be registered in the Land Title Office, or else it is only valid as a contract between the landlord and the tenant. If unregistered, it generally doesn't bind a third party (for example, a good-faith buyer or mortgage lender who registers their respective transfer or mortgage). Sometimes there's an exception if they knew about the unregistered lease and tried to defeat the lease, amounting to "equitable fraud." But merely knowing about an unregistered lease may not, by itself, amount to fraud – it depends on the circumstances.

In this case, the court said that when the lenders loaned the money, they never intended to interfere with the leases. They knew about the leases that generated cash flow and could help the owner make its mortgage payments. The court decided, however, that actual notice of the unregistered leases wasn't enough to prevent the lenders from defeating the leases – there had to be some additional act of dishonesty or deceit. Here, the lenders were simply acting in the normal course of business when lending, and there was no evidence that they were acting dishonestly. So when the hotel owner later defaulted on the mortgage loans, the first mortgagee had no obligation to honour the unregistered leases when foreclosing and was entitled to obtain vacant possession.

This case dealt with a mortgage foreclosure, not a buyer who wished to evict a tenant with an unregistered lease. But the bottom line is this: If you value your lease, love your location or put substantial capital into your space, consider having your lawyer register your lease in the Land Title Office. If you register your lease, a buyer or mortgage lender who comes along later won't be able to kick you out.

This column has been written with the assistance of Frey & Company. The column provides information only and must not be relied on for legal advice. Please contact Michael Frey for legal advice concerning your particular case.

Lawyer Janice Mucalov has authored several popular law books and writes about legal affairs for a variety of publications. "You and the Law®" is a registered trade mark. ©Janice Mucalov.



FREY & COMPANY Litigation Counsel

300-754 Broughton Street
250.380.2702 • mfrey@mfreylaw.com

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