

## STIRLING LLP\*

Suite 1460 | 701 West Georgia Street  
PO Box 10156 LCD Pacific Centre  
Vancouver, BC V7Y 1E4

t. [604.674.3818](tel:604.674.3818)

f. [604.674.3819](tel:604.674.3819)



**STIRLING**  
BUSINESS LAW

For more information contact David Martin  
[dmartin@stirlingllp.com](mailto:dmartin@stirlingllp.com)

## British Columbia Legal Nuances - Potential Traps for non-BC Lawyers

As business operates more and more on the global stage, lawyers from other Canadian provinces and attorneys from the United States and countries around the world are more frequently advising their clients with respect to legal matters in British Columbia. Companies with in-house counsel, always under pressure to keep legal costs under budget, lean on their in-house lawyers to attend to what are viewed as simple or routine legal matters without involving local legal counsel. A pressing deadline can cause someone to make the assumption that the laws where they are located are reasonable and practical and surely (hopefully?) are the same as in British Columbia. Regrettably, legal laws are not like the laws of nature and do not have universal application around the world. If you want to avoid that unpleasant moment where you discover that the laws of British Columbia are not exactly the same as the laws where you are located, keep the following in mind:

1. **Property Transfer Tax - Transfer of Beneficial Ownership.** A purchaser of commercial property in British Columbia will pay property transfer tax to the provincial government when the Form A Transfer for the real property is filed at the Land Title Office. The rate of the tax is 1% on the first \$200,000 of the fair market value of the property; 2% on the balance up to \$2.0 million; and 3% on the balance of the fair market value.

As of the date of this article, and unlike Ontario, property transfer tax is not payable in British Columbia on the transfer of beneficial interests in real property. Accordingly, for a company purchasing commercial property in British Columbia they should consider: (a) a share purchase of the registered owner of the real property if the registered owner is a nominee bare trustee company; and (b) setting up a nominee bare trust ownership structure to offer future purchasers the option to purchase the nominee bare trustee company and the beneficial interest in the real property instead of a straight transfer of legal title. On a \$40.0 million dollar commercial real estate transaction, the transfer of a beneficial interest rather than legal title would save the purchaser \$1.178 million in property transfer tax.

2. **Property Transfer Tax - Long Term Leases.** If a tenant registers its commercial lease at the British Columbia Land Title Office and the term of the lease is more than thirty (30) years, property transfer tax will be payable at the time of registration. When calculating the term of the lease it should be kept in mind that: (a) the calculation of the term includes all unexercised options to extend or renew the lease; and (b) for lease amendments the calculation of the term will include the already expired term and is not calculated solely on the remaining unexpired term of the lease.

3. **Dismissal of Employees.** Many US states have some form of employment at-will. In British Columbia, employers cannot dismiss employees without any liability for severance unless the dismissal is for cause. In addition to the British Columbia Employment Standard Acts, which sets out statutory minimums with respect to matters such as severance for dismissal without cause and holiday pay, employees may, subject to the terms of their written employment contract (if any), sue their employer for severance if they are terminated without cause. Whereas the maximum amount of severance under the Employment Standards Act is eight (8) weeks salary, –the high water mark for common law severance in British Columbia is around twenty-four (24) months’ salary. These employee severance obligations should also be kept in mind when purchasing all or part of a business or the entire assets of a business in British Columbia (see section 97 of the Employment Standards Act).
4. **Environmental - Vendor Obligation to Provide a Site Profile.** Under section 40(6) of the British Columbia Environmental Management Act, vendors of certain types of real property must provide a “site profile” to a prospective purchaser of real property. However, under section 4(13) of the Contaminated Sites Regulation, the prospective purchaser may waive in writing its right to be provided with a site profile. A sophisticated vendor will almost always exclude from the purchase agreement the obligation to provide a prospective purchaser with a site profile and, conversely, if a purchase agreement is silent on the point, a knowledgeable purchaser will push to receive a site profile from the vendor after the purchase agreement is signed.
5. **Environmental Contamination and Responsible Persons.** A key concept in determining statutory environmental remediation obligations in British Columbia is whether a person is a “responsible person”, as defined in section 45 of the Environmental Management Act. Under section 22 of the Contaminated Sites Regulation, a person is designated “not responsible” for remediation of a contaminated site if the person is a current or previous owner of, among other things, an easement, right of way or restrictive covenant. When acquiring rights in lands where there is known environmental contamination or a high risk of environmental contamination, the acquirer should consider obtaining an easement, right of way and/or restrictive covenant rights rather than becoming a tenant of the lands. Tenants of real property do not enjoy a similar designation of “not responsible” under the Contaminated Sites Regulation.
6. **Powers of Attorney and Dealings with Real Property.** If someone wishes to grant a power of attorney to deal with real property in British Columbia they should consider the following: (a) does the donor want the power of attorney to survive if they lose their mental capacity (if so, the donor should grant an enduring power of attorney); (b) the power of attorney must be signed in accordance with the requirements of the British Columbia Land Title Act, which generally means signed by the donor before a British Columbia lawyer or a notary public for the jurisdiction where the power of attorney is signed if the power of attorney is signed outside of British Columbia; and (3) if the donor wants the power of attorney to last for more than three (3) years, the power of attorney must expressly exclude the application of section 56 of the Land Title Act, otherwise the power of attorney is not effective to transfer land after three (3) years from the date it was signed.
7. **Sale of Real Property by Canadian Non-Resident.** If the vendor of real property is a non-resident of Canada, the vendor should be mindful that unless they obtain a clearance certificate from Canada

Revenue Agency prior to closing, the purchaser is entitled under the federal Income Tax Act (section 116) to maintain a significant holdback on closing until the clearance certificate is obtained. The holdback can range, depending on the nature of the property, from 25% to 50% of the sale price. Depending on workflow volumes at Canada Revenue Agency, it can take anywhere from weeks to several months to obtain a clearance certificate.

The perfect storm for a non-resident vendor is as follows: (a) the non-resident vendor enters into a binding contract to sell real property; (b) the application to obtain a clearance certificate is not made until very near or at closing; and (c) the vendor has a significant mortgage registered on title to the property. In this scenario, the vendor may be required to bring cash to the closing because after the non-resident holdback amount is deducted from the sale proceeds, there are insufficient funds to payout the mortgage at closing. For a vendor who is selling assets to address a cash flow crisis, this is a less than ideal outcome.

8. **Purchase of Shares in a Private British Columbia Corporation.** A purchaser of shares in a private British Columbia corporation should undertake a court bailiff search of the vendor shareholder to determine if the vendor shareholder's interest in the shares has been seized by the court bailiff. If the vendor's interest in the shares have been seized by the court bailiff, then the vendor will be unable to transfer clear title to the shares to the purchaser on closing.
9. **Asset Transaction - Provincial Sales Tax Exemption.** In British Columbia provincial sales tax (currently at the rate of 7%) is payable on the purchase of most forms of tangible personal property. However, when a new corporation purchases tangible personal property before it starts to carry on business, it is exempt from the payment of provincial sales tax if, in consideration for the purchase of the tangible personal property, the new company issues shares to the seller and the seller owns the shares for a period of not less than eight (8) months from the date of the transfer of the tangible personal property (section 3.14.1 of the Social Service Tax Act Regulations). After the eight-month period, the purchaser can redeem the shares issued to the vendor. Accordingly, structuring options should be considered when a corporation purchases a business with tangible personal property of significant value.
10. **Commercial Landlord and Duty to Mitigate a Tenant's Breach.** The laws regarding interests in real property have some features that deviate from the general law of contracts. Under general contract law, if one party breaches a contract then the non-defaulting party has a duty to take reasonable steps to mitigate its damages. As of the date of this article, no such duty exists on commercial landlords in British Columbia (see *Transco Mills Ltd. v. Percan Enterprises Ltd. et. al*, (1993) 83 B.C.L.R. (2d) 254 (B.C.C.A.)). If a commercial tenant is not profitable at a specific premise and goes dark and vacates the premises, a landlord is not obligated to take any steps to mitigate its damages. The landlord may continue to insist that the tenant pay its monthly rent as it falls due for the balance of the lease term regardless of how many months or years remain on the lease. This is a more likely outcome if the tenant or the guarantor of the lease (often a parent company with a healthy balance sheet) has significant financial resources.

11. **Leases of Less than the Entire Parcel.** After a decision by the British Columbia Court of Appeal in 1996 known as the Top Line Case (which was a surprise to a good part of the real estate bar), a large number of industrial and some retail leases in British Columbia were determined to be void at law. The Top Line Case applied to any lease in British Columbia of less than an entire parcel of subdivided land. An exception was provided in the Land Title Act for leases of a part of a building, which would apply to almost all office leases and a good number but not all retail leases.

In 2007, the provincial government passed remedial legislation to address some of the issues raised in the *Top Line Case*. As a result of the 2007 legislation, a lease of less than an entire parcel of land was not void at law and was enforceable between the parties that entered into the lease.

However a lease for less than an entire parcel of land cannot be registered at the Land Title Office and does not run with the lands, so a future owner of the property or assignee of the tenant's interest cannot enforce the lease against the original landlord or tenant, as applicable. Accordingly, if purchasing real property that contains leases of less than an entire parcel or receiving an assignment of a tenant's right to a lease of less than an entire parcel, the new owner/tenant should consider obtaining an assignment and assumption agreement directly from the other parties to the lease to establish privity of contract.

12. **Counterclaims and Limitation Periods.** Before you file a legal action in British Columbia, give some thought of what claims your soon-to-be adversary may have against you in relation to the same matter. The filing of your claim may result in your adversary being able to file counterclaims that otherwise they would be statute barred from making (section 22 of the British Columbia Statute of Limitations Act).
13. **Mortgages - Land Transfer Form Act.** The provincial government passed the Land Transfer Form Act to, among other things, incorporate well understood legal concepts and to eliminate the need to include verbose and antiquated legal language in real property deeds, leases and mortgages. A large number of mortgages in British Columbia are made pursuant to the Land Transfer Form Act and many of the provisions of the Act are viewed as beneficial to lenders. However, most local lenders exclude Clause 15 of Schedule 6 of the Land Transfer Form Act from the mortgage terms as the section can be opportunistically relied on by borrowers to accelerate the repayment of a mortgage to the financial detriment of the lender.
14. **Corporate Debtors and PPSA Searches and Registrations.** In regards to the British Columbia Personal Property Registry, when: (a) registering a security interest against a corporate debtor; or (b) searching a corporate debtor's name, no periods whatsoever are to be included in the debtor's name – not even for Ltd.; Corp.; or Inc. (section 6 of the British Columbia Personal Property Security Regulation). If you search a corporate debtor's name using periods or register a financing statement against a corporate debtor using periods in the debtor's name, you are not in compliance with the PPSA regulations in British Columbia and do so at your peril. For my colleagues from Ontario, please note that in British Columbia a collateral description of "equipment" or "consumer goods" with no further description is inadequate according to section 11(3) of the British Columbia Personal Property Security Regulation.

15. **Corporate Name - Cheap Name Protection.** When starting a business in Canada, one of the first questions is where to incorporate. Often, the client incorporates pursuant to the corporate legislation of the province where the business will start operations. Another option is to incorporate pursuant to the federal Canada Business Corporations Act. One advantage to incorporating under the Canada Business Corporations Act is that the company's name can be extra-provincially registered in any province in Canada. In contrast, if a business incorporates in one province pursuant to that province's corporate legislation and then wishes to extra-provincially register in another province, there could be problems if there is already a company in the second province with a similar or the identical corporate name.
  
16. **Real Property Closings and Pending Registrations.** For the majority of real estate transactions in British Columbia, closing funds are paid to the vendor's lawyer when the transfer documents are "pending" registrations at the Land Title Office. This closing practice is incorporated into the standard form contracts used by residential real estate brokers and in many purchase agreements for commercial properties. Many lawyers from other jurisdictions find this level of closing transaction risk to be unacceptable.

The transaction risk is that if the Form A Transfer is determined by the Land Title Office to be defective, for whatever reason, the purchaser may then need the cooperation of the vendor and/or the vendor's lawyer to correct the registration defect. If a registration defect is not corrected within a certain time period, the application to register will ultimately be cancelled.

Obtaining cooperation can be challenging if the vendor or the vendor's lawyer dies or loses mental capacity, the vendor files for bankruptcy, the vendor becomes entangled in a marital dispute, there is a post-closing dispute among multiple co-vendors, etc. Most annoying would be a vendor who displays indifference to the registration defect and fails to provide minimal assistance to correct the defect even though they have received full payment of the purchase price. Many non-British Columbia lawyers, when advised of this local closing practice for real estate transactions, will insist that title insurance be obtained with gap coverage for the period of time from when the Form A is submitted to the Land Title Office for registration until the Form A Transfer is fully registered and the purchaser is recorded as the new registered owner.

For more information contact David Martin  
[dmartin@stirlingllp.com](mailto:dmartin@stirlingllp.com)