Regulating residential long-term leases in British Columbia

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Abstract

There are at least 2500 unregulated private residential 99-year leases in British Columbia, the first of which were created in 1974. These are distinguished from similar long-term leases in which lessors are government or First Nations, which are in part regulated by legislation. Originally, in 1974, these 99-year leases were captured by the provisions of the *Landlord and Tenant Act*, but were later excluded from that Act and have since remained unregulated. This paper examines some of the historical context for these private long-term leases; addresses some of the reasons why these leases became unregulated and have remained so; reviews some of the problems associated with these leases and in general the nature of the power imbalance in the bargaining relationship between lessors and lessees; highlights the author's litigation in seeking to redress some aspects of this apparent power imbalance. The paper argues for regulating these leases and presents an outline of proposed legislation.

Contents

1. Historical overview

1.1. The leasehold conversion scramble in the early 1970's

In the early 1970s, during a period of very low rental vacancy of less than 1%, much like what we are experiencing in British Columbia in 2018, a movement was afoot among property developers to take advantage of new condominium legislation that allowed landlords to convert existing residential tenancy apartments into condominium strata, and to sell units as freehold.[1]

Social policy concerns arose regarding accessible and affordable tenant relocations during these conversions. Consequently, the Provincial government under Premier Barrett and an NDP government[2], amended the existing *Landlord and Tenant Act*[3], and the *Condominium Act*[4] such that municipalities were given the power to approve condominium conversions and therefore to halt them entirely[5].

It is no coincidence that during this period in the early 1970s in which condominium conversions were increasingly restricted and widely viewed as antithetical to public policy, many 99-year private leaseholds were created[6]. The perception that the conversion of apartments to long-term leases by developers exploited a loophole in the law to circumvent limits on rental increases and strata conversions, was shared by members of the legislative assembly and a legislative freeze was proposed to halt 99-year lease conversions[7] in May 1974, barely more than two weeks after the first 99-year leases were executed on May 1, 1974:

> "FREEZE ON RENTAL ACCOMMODATION
> Mr. WALLACE:…in light of the fact that long-term leases up to 99 years are being used to circumvent the *Strata Titles Act* and the provincial rent freezes, if the minister is giving consideration to a total freeze on all conversion of rental accommodation until government policy has been finalized.
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> HON. MR. MACDONALD: Mr. Speaker, we are certainly giving consideration to it and we are giving consideration to perhaps amending the legislation now before the House to

[1] Seto, D. 1987. *Condominium conversion regulations in British Columbia*. A thesis submitted in partial fulfillment of a Masters of Arts degree in the Faculty of Graduate Studies in the Department of Community and Regional Planning, University of British Columbia, p. 3, 52-60
[2] https://en.wikipedia.org/wiki/List_of_premiers_of_British_Columbia
[3] 1974, c. 45. Now the *Residential Tenancy Act*, S.B.C. 2002, c. 78
[4] Originally, *The Strata Titles Act*, SBC 1966, c. 46; renamed as *The Condominium Act*, RSBC 1979, c.61; see p. 56-60 for history, ibid note 1
[5] Ibid note 1 p. 57-58
[6] See the part 3.1 herein, "No remedial legislation for long-term residential leases", for further discussion regarding the absence of applicable legislation in British Columbia
[7] 1974 Legislative Session: 4th Session, 30th Parliament (Hansard); May 16, 1974, p. 3177

> cover this particular situation of a 99-year lease – probably an amendment to the *Landlord and Tenant Act*."

A month later, in June 1974, the proposed amendment to the *Landlord and Tenant Act* was presented in parliament.[8] Under the amendment, landlords were required to give at least 120 days' notice of termination to existing tenancies upon entering a lease of more than three years. In addition, leases exceeding three years required the approval of local governments, like the approval required for condominium conversions.[9] The amendments were proclaimed in force August 9, 1974[10]. By this time, however, several leases had already been created as of May 1, 1974, as shown in Table 1, many based on a process in which developers entered leases with themselves through corporate entities, as will be discussed further.

In 1975 parliamentary debates, prior to the election of Bill Bennett and the Social Credit party beginning in December 1975[11], the propriety of 99-year lease conversions in the context of low rental vacancy rates and legislated caps on rental increases was addressed in detail and with considerable candor by MLA, Honorable Steves. It is instructive to quote him at length:[12]

> "I would like to refer to specifics regarding landlord and tenant matters which apply to my riding. I mentioned earlier the housing vacancy rate — that the landlords themselves were down to the 0.1 per cent level in British Columbia. In my riding and elsewhere in the province we have some landlords who are actually withholding suites from the market. The landlord in particular that I am referring to is George Mulek of West Park Investments. He has a couple of apartment blocks in Richmond in which he has 20 or 30 vacant suites in out of 100, and I think this is a disgrace. In fact, I think it is criminal when people are trying to find housing in this province that landlords should be withholding housing from them.
>
> This, I believe, is also occurring elsewhere through the province, but I raise this specific case because I have documented evidence of what has been happening. This same landlord owns apartments here, I believe. I think it is Orchard House in Victoria and some others throughout the province. Some of the suites have been vacant for almost a year.
>
> One other thing: he has also held suites vacant in low-dividend housing which is trying to get into the low-dividend housing. People have actually been waiting on these lists for a long time, but he has held vacant suites in the low-dividend housing in Richmond in an attempt to convince the people in his other apartments to move there

[8] 1974 Legislative Session: 4th Session, 30th Parliament (Hansard); June 17, 1974 (afternoon)
[9] Ibid note 8 p.4143; also note *Land Title Act*, RSBC 1996, c. 250, s. 20(2)(3), and 23(1)(d) which require registration of leases exceeding three years, although I do not trace the origins of those sections
[10] Ante note 12
[11] Ibid note 2
[12] 1975 Legislative Session: 5th Session, 30th Parliament (Hansard); March 12, 1975, p. 580-582

because, basically, he wants more rent than what he is able to get under the *Landlord and Tenancy Act*.

This particular landlord, only a year ago, on April 9, 1974, made the following statement. He's a director of the Greater Vancouver Apartment Owners Association. He said:

> "In postwar years, I have built and operated several thousand good rental housing units in B.C. and Alberta, all of them in the low and medium-price range, and my tenants have been satisfied."

I might say they're not satisfied now.

> "In the present legal and political climate I've absolutely no plans for any further construction of rental apartment buildings in B.C. I've talked to other builders and they feel the same way."

Actually he's not only not building but he is withholding suites. He's converting suites to 99-year lease accommodation in order to avoid the rent controls brought in by this government a year ago. The apartment blocks that he has converted to 99-year lease are on Buswell Road in Richmond. Under Bill 155, it's illegal to evict a tenant for refusing to sign a 99-year lease. But the tenants are being told that they are not being evicted but that their apartment is going to be sold to somebody else if they don't purchase the apartment themselves. Then the person who purchases that apartment can evict them.

The tenants first received letters indicating a rent increase greater than 8 per cent on February 25 last year. Later this was amended to be within the 8 per cent rent limit, and on June 28 they received a notice that their apartments were being converted to 99-year lease. On July 5, a further explanation was slipped under their door and some tenants received estimates of the cost to them under what is called the "Blue Haven Individualized Purchase Plan." Some were told verbally that they had one week to make up their minds if they wished to purchase.

Here's what they were offered. Tenants who had been paying rent in the neighbourhood of $195 a month in 1973, in February were asked to pay $225 a month, which was over and above the 8 per cent. In July, in order to get around the 8 per cent limitation, the landlord said: "Okay, your suites are now 99-year lease and the rents you will pay are in the neighbourhood of $298 a month, plus $5,000 down payment." The total would be then roughly $350 a month, or an increase in one year from $195 to about $350 a month — an increase of around between 75 to 80 per cent. This is what is happening to tenants in my riding, and it's happening elsewhere in the province as well.

The landlord was criticized by myself and by the tenants, and we got a lawyer in the case. In fact he even advertised the apartments as "Blue Haven Strata Apartments." He never had permission to have them stratified but he advertised them as such. He is now advertising them as 99-year lease apartments.

The next thing he did was file a libel suit against the lawyer that the tenants had and against the local newspaper which was carrying the stories. That stifled the press, and the press then was afraid to carry any further stories. We hear that we have a free press in British Columbia. But when somebody is able to slap a libel suit on them simply for carrying a story about what is happening, I think that's pretty despicable. That's what happened in Richmond.

Anyway, the landlord has deliberately, and I think quite methodically, searched out loopholes to avoid the rent control Act. We find that while the legislation was being drafted and going through this Legislature last year to ban 99-year leases without the consent of the local council, Mr. Mulek went and transferred his property from property being owned by George Mulek and Brian and Violet Hitchen to West Park Investments. He did that last May, and the Act banning transfers under the Landlord and Tenant Act was proclaimed on August 9. He did it while the legislation was going through this Legislature but before it was actually proclaimed by cabinet.

The interesting thing about this is that the landlord went and leased the apartment block to himself. West Park Investments Ltd., we find, belongs to George Mulek, Brian and Violet Hitchen. In order to avoid the *Landlord and Tenant Act* and the rent controls, he went and took his own apartment building, owned by himself and the other two people I've mentioned, and set up the name West Park Investments, which was actually, the investment company which they had owned previously. Under that name he went and transferred it from them directly to the company that was owned by them. So he's leasing the apartment block to himself on a 99-year lease basis.

Recently he proceeded to give eviction notices to the tenants, and I've asked the Attorney-General (Hon. Mr. Macdonald) to carry out an investigation through his department. This is presently proceeding. As it appears, he has actually converted the apartments to 99-year lease and so the tenants are very much concerned about what rights they really have, because he has been able to, I think, somewhat avoid the provisions of the *Landlord and Tenant Act* by leasing the apartments to himself.

Now he's leasing the apartments out individually, one at a time, to new people. The new people are coming in and then they last week started sending eviction notices to the tenants. The new tenants in effect are evicting the old tenants. People are pretty upset about it in Richmond.

The reason I'm bringing this up is that this apartment owner owns apartments elsewhere in B.C. and there are other apartment owners, landlords as well, who thought they might get away with converting to 99-year lease throughout the province. If this one succeeds, I think we're going to be facing a major problem in B.C. with suites where the landlords rushed in and changed over the tenure of the apartments before the Act was proclaimed.

Even while it might be legal, I think it wrong that a person can lease a property to himself in order to avoid legislation. I think it's wrong that he should be able to use new tenants to try and evict the people he couldn't evict under the legislation if he was following the legislation properly. I think it's wrong that he should be able to use this system to jack up the rents by 75 per cent. Ironically, the way the Act reads right now, the old tenants who are being evicted by the new tenants don't even get moving expenses to which they are entitled under other terms of eviction.

What I would like to suggest, and the purpose for bringing this to your attention today, is that until the housing crisis is over — and I don't expect that will be too long — there should be a freeze on 99-year leases here in B.C., leases that are given out on an individual basis.

Presently, the 99-year lease conversion of an apartment block has to be approved by the local council. But in cases where this was avoided and a leased building is now being leased out apartment by apartment, I think this type of leasing should be frozen at

> least until the crisis is over. This may take a year or two, but the question is: where do these people go? As the conversions continue, these people are just thrown right out on their own. Most of the ones in the apartments I have been mentioning are old-age-pensioners. There's no place for them to go.
>
> I think it's also a crime that so many vacant suites are being kept in these apartments. If the 99- year leases were frozen so that they cannot convert the individual suites on a 99- year basis, then the landlord would have to rent his suites out rather than having them sit there vacant while he waits for somebody to come and buy them. I think this would also prevent other landlords from carrying out the same kind of method that this particular landlord has tried to use to hassle his tenants and get them to leave. A lot of the tenants did leave. As I mentioned, about 30 of them just couldn't take the hassle to try to get them to pay a 75 per cent increase in rent."

As indicated by Hon. Steves, during this period of condominium conversion restrictions, several developers created corporate entities with common directors, which entered leases with each other and then sold, by assignment, individual leasehold units to third parties. The Orchard House in Victoria lease is an example of this apparent scramble to create leases in which corporate entities with common directors were both the lessee and the lessor.[13] Several such leases were entered as of May 1, 1974, in which the same individual was the signatory for different corporate entities as lessor and lessee[14].

Also as Hon. Steves indicated, in the case of Orchard House, owned by Westsea Construction Ltd. ("Westsea"), units were first rented out as individual apartment tenancies after the building was constructed in about 1969[15]. In July 1974, Westsea issued a Memorandum of Offering Information[16] in which units were also offered with a down payment of "approximately $5,000", and which granted a mortgage for the balance at 10%. I have no information regarding how many existing tenants may have been forced to vacate the premises.

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[13] E.g. George Mulek is the sole signatory as the President and Director of Westsea Construction Ltd., lessor, and as the President of Capital Construction Supplies Ltd., lessee on the Orchard House lease.

[14] See Table 1

[15] Information based on my discussions with leaseholders of the first unit assignments or who are aware of circumstances at the time

[16] *Memorandum Re: Offering Information Long Term Leases – Orchard House*, dated July 12, 1974 R.W. Of incidental interest is its description of operating expenses, "The lease defines Operating Expenses and specifies the Purchaser's Share. Operating Expenses include land taxes, insurance, wages, all services and utilities, supplies, repair and maintenance of common areas and facilities and any costs necessary to operate the building." A purchaser would reasonably interpret this to mean he or she would not have to pay for the complete replacement of all the unit windows and the installation of structural support beams, as Westsea has demanded under its 2017 windows and doors project.

While Hon. Steves questioned the ethics of creating a lease by and to oneself and opined that such arrangements might be legal (given that corporate entities are well understood to be individual "persons" under the law), fundamental questions are nonetheless raised about the legality of such leases, considering the conclusion of Lord Denning of the House of Lords in *Rye v. Rye*, that a party cannot simultaneously be both a landlord and a tenant[17], which appears to be viable law in British Columbia. Certainly, questions arise as to the degree to which such corporate entities have in actuality entered into an arms-length contractual relationship.

1.2. Rationale for the 20-year limit on the application of *Residential Tenancy Act*.

In 1974, the *Landlord and Tenant Act* (the "LTA") was amended to carve off residential tenancies from commercial tenancies[18]. The revised version of the LTA applied to residential tenancies of unlimited terms[19]. As discussed, it seems that the scramble to convert apartments to 99-year leases was not to escape the application of the LTA in general, but rather to circumvent rent controls and restrictions on converting apartments to condominiums. Indeed, the LTA, as noted, was later amended specifically to restrict apartment-to-99-year-lease conversions only by local government approval, and by obligating landlords to give four months' notice before terminating an existing tenancy prior to lease conversion[20].

In 1977, under a Social Credit government, the LTA was replaced by the *Residential Tenancy Act*[21], and section 2(c) was introduced:

> **(2) This Act does not apply to,**
>
> **(c) a tenancy agreement for a term exceeding 3 years in respect of which the landlord has obtained the approval required under section 8(11)**

Section 8(11) re-stated the earlier 1974 requirement for local government approval in relation to the creation of new long-term leases. However, like the 1974 requirement, this provision was not retroactive and was too late for the May 1, 1974 leases, which therefore continued to evade regulation. Further, if any such long-terms leases were created in the future

[17] [1962] AC 496 (HL), per Lord Denning, p. 513.
[18] Law Reform Commission of British Columbia. 1973. *Report on the Landlord and Tenant Relationships: Residential Tenancies* (Project No. 12)
[19] *Landlord and Tenant Act*, SBC 1974, c. 45
[20] Ibid note 19, s.20(1)(d); 20(4)
[21] RSBC 1979, c. 365

and were approved by local governments, such leases would also avoid the provisions of the *Residential Tenancy Act*. The introduction of 2(c) was passed without parliamentary debate.[22]

In 1984, again under a Social Credit government and an increasingly deregulatory political climate and reductions in rent controls[23], the 1979 version of the *Residential Tenancy Act* was repealed and replaced with the *Residential Tenancy Act*, SBC, 1984, c. 15. Section 2 was amended so that "…this Act does not apply to (d) a tenancy agreement for a term exceeding 20 years".

In parliamentary debates, Honourable Hewitt did not explain the basis for increasing the existing term limit from 3-year tenancies to 20-years. Hon. Hewitt simply justified the increased term to 20 years as "an improvement in that area"[24], apparently suggesting that it was sufficient to offer legislative protections for mid-length leases up to 20 years, all the while continuing to allow 99-year leases to escape regulation entirely.

Incidentally, since 1984, at least two new 99-year leases were created, one in 1986 and one in 1988[25], but none appear to have been created since 1988 in B.C.

While the new section 2(d) was pushed into legislation, it did not escape considerable criticism from NDP MLA Robin Blencoe. Again, it is instructive to reproduce the parliamentary exchange in detail[26].

> "**MR. BLENCOE:…**Government policy is to allow tenancy agreements to last over 20 years. It's a radical departure, in our estimation, and a back-door way of recreating the problems that faced 99-year leaseholders until a few years ago. The minister is aware that I have also written to him about some existing and continuing problems of 99-year leaseholders. I'm hoping he will be reacting to that separately from this bill. The government, to their credit, acted to ban 99-year leases. The 99-year leaseholders found that they had practically no control over the terms of their tenancy or the standards of maintenance of their building.
>
> Mr. Chairman, I have some concerns about the concept that's coming in here with this 20-year kind of approach and I have some specific questions for the minister on this topic. First, 99-year leaseholders are classified as homeowners for the purposes of a homeowner grant. Again, my predecessor, Mr. Barber, was instrumental in convincing the government that that was a right thing to do, and the government agreed. Is it now the

[22] 1977 Legislative Session: 2nd Session 31st Parliament (Hansard), Tuesday August 30, 1977
[23] 1983 Legislative Session: 1st Session 33rd Parliament (Hansard), Tuesday July 12, 1983
[24] 1984 Legislative Session: 2nd Session, 33rd Parliament (Hansard), Wednesday, April 11, 1984 (afternoon), p.4355
[25] Ante note 41
[26] Ibid Note 24, p. 4355 - 4357

policy of the government to classify 19-year leaseholders as homeowners? If not, why not?

HON. MR. HEWITT: Mr. Chairman, the member will know that the previous Residential Tenancy Act did not apply for a tenancy agreement term exceeding three years. Under the new legislation, section 2 of the tenancy agreement is for a term exceeding 20 years. So there's an improvement in that area.

MR. BLENCOE: I'm not particularly satisfied with that answer but also suspect that we're not going to get any particular change. Let me ask another question. It is common practice for landlords to use printed lease forms when letting premises to tenants. Is it the policy of the government that the doctrine of *contra proferentem* —that's the formal title — should apply? That is that where there is an ambiguity in a document it shall be interpreted unfavourably to the party putting it forward.

HON. MR. HEWITT: Mr. Chairman, I must admit I'm not sure what the member is asking in using Latin terminology, I guess it is. But with regard to the leasehold under 20 years, this legislation would apply. That may answer his question.

MR. BLENCOE: In these printed lease forms that are going to be put together there is no guarantee that if there is an ambiguity in the document — and one of the difficulties in these lease forms is that there often is ambiguity — it shall be interpreted in favour of the party putting it forward. That's my concern. What happens is that the other side.... If we don't have some statement about ambiguity, the tenant or the leaseholder gets the short end of the stick. I am just trying to suggest to you, Mr. Minister, that there are all sorts of problems that are going to come forward in this particular area. Are you aware of that potential ambiguity, and will you consider trying to clarify that in terms of this doctrine that I have suggested?

HON. MR. HEWITT: Mr. Chairman, if we have two parties entering into a contract — i.e. a leasehold agreement — I am hopeful that both parties will recognize the value of the written word and how it is interpreted. However, where there is an issue of ambiguity or of anything else relating to that contract, I guess that would be a matter for the courts to decide.

MR. BLENCOE: You see, Mr. Chairman, that's the very point I've been trying to make in this whole debate about ambiguity. Going into the courts is a long, complicated, cumbersome process, whereas right now, if the rentalsman's office were maintained and improved, these kinds of things could be dealt with by the rentalsman, and we would not end up with lawyers getting fat fees and the courts being bogged down with these kinds of cases. I can assure the minister that we are going to get ambiguity. It should be decided in an informal way, as we have in the rentalsman's office now. That's my criticism, Mr. Minister. You say this is going to streamline the system. I suggest, and I think you know, that it's not going to streamline the system. If you don't ensure that you take care of ambiguity and have an informal process — by an objective person like a rentalsman officer, rather than the court system.... Why go to that extreme system when you have one in place now that can work out this kind of problem?

…

MR. BLENCOE: Mr. Chairman, the application, of course, does apply to the concept of tenancy agreements, and I'm talking about ambiguity in tenancy agreements. The minister has just made a statement on ambiguity that I can't agree with. They are

going into the court system, and the point I'm trying to make is: why go that route when you can use the office of the rentalsman as it is now — a far cheaper way? I'll leave it there, and go to the next question for the minister. I'm not going to stay long on these things, but I'm trying to suggest to the minister and to the public that this bill is full of so many problems that you are going to create havoc and great cost to the taxpayer.

My third question under the section 2 application is: what protection is there for a tenant whose prospective landlord uses a home-printed tenancy agreement that does not comply with the requirements of sections 5-8 and 10-17 of this bill?

HON. MR. HEWITT: First I want to clear up the previous comment that the member made. When I mentioned the courts considering the concern of both parties on a long-term lease, I assumed they might opt for the courts; but they could opt for the arbitration system, Mr. Member. I would point out to the member that the Residential Tenancy Act that is in existence at the present time doesn't prescribe written leases between parties.

Although I haven't had an opportunity to quickly swing to the other sections that the member referred to, my understanding is that such tenancy agreement would be unenforceable.

MR. BLENCOE: My fourth question to the minister is in an area which again, I think, revolves around this 20-year lease problem. By entering into a tenancy agreement of over 20 years, landlords will be able to evade the limited protections offered to tenants under this bill. For example, a fixed-term tenancy agreement, while the term of the agreement may be 20 years, may also contain a clause giving the landlord the right to terminate on certain notice, and that notice may be less than the amount set out in the act. Since this bill favours and is leaning toward the owners of property — and I think that in five hours I did manage to put some of those concerns over that all I want is fairness between the two groups, that landlords should have rights and tenants should have rights — what is there to stop all landlords insisting, on pain of eviction, that under section 29(4)(b) all tenancy agreements shall be fixed term, and such agreements subject to termination on, say, a week's notice?

HON. MR. HEWITT: Mr. Chairman, again, attempting to get an opportunity to investigate the question that the member's asking, I'm going to refer to his previous question and refer him to section 3(5) with regard to tenancy agreements that are in conflict with the act.

With regard to his last question concerning fixed-term agreements, where the landlord may insist on a shorter period of time with regard to the vacating of the property because it is a fixed-term agreement, I'd suggest to the member that the tenant, in understanding the terms of that agreement, would not enter into them. This would be prior to the tenant taking occupancy of the apartment, or whatever it might be. If the fixed-term agreement had conditions which the prospective tenant did not agree with, he wouldn't sign the agreement.

MR. BLENCOE: Where the tenancy agreement is for over 20 years — the minister can tell that I'm concerned about this 20-year section — why is there no requirement to register this agreement on the title deed at the land titles office?

HON. MR. HEWITT: If it's a leasehold, there is a requirement to file in the land registry office. If it's a tenancy agreement, there is not.

MR. BLENCOE: Would you not suggest that a 20-year tenancy agreement does give some indication of a fairly permanent situation and that there should be some requirement for registration or something so that at least the tenant knows that the deed or something is registered on that particular aspect? I think that's a point the minister should take up. I'm not going to get into an argument about it; I'm just again today pointing out what I consider to be some real problems with this bill…

…

MR. BLENCOE: …

I have a supplementary question to that particular question I was asking. If it becomes clear, Mr. Minister, in this fixed terminancy kind of situation, that landlords are using it to avoid the Residential Tenancy Act, are you prepared to take some action on that particular consequence? As you know and I know, this 99-year-lease problem created all sorts of headaches, not only for the tenant but also for the government. I'm really concerned that we're going to have a repeat of the 99-year lease: no protection, and no act covering these leaseholders. If it becomes a problem — if they clearly are trying to get around the *Residential Tenancy Act* — are you prepared to take some action?

HON. MR. HEWITT: Basically, nothing has changed from the previous act with regard to this matter. Under the previous act, however, a landlord, in having a tenant sign an agreement prior to moving in, would then have him sign the eviction notice before he moved in as well, so that the landlord would have in his hand the tenancy agreement and the signed eviction notice which really said that the tenant had agreed to notice of eviction on a certain date.

MR. BLENCOE: I don't think that has clarified.... I still think I have brought up a good point, Mr. Chairman. I think it's going to become an issue, and the minister can't avoid it. Hopefully he won't continue to avoid some of the problems I've put to him about the 99-year leases still in place…"

As we can see, when the 20-year limit was the subject of parliamentary debate, Mr. Blencoe of the NDP opposition well understood the effects of excluding 99-year leases from the *Residential Tenancy Act*. With great prescience, Mr. Blencoe foresaw the problems associated with such an exclusion: lease ambiguities would have to be interpreted by the courts, a highly cumbersome system of dispute resolution. Mr. Blencoe's reference to the standard-form nature of these 99-year leases and the application of *contra proferentem* when interpreting ambiguities was also prescient, since I had sought to put this very argument before the Court of Appeal[27], an argument that is currently referenced in my Application for Leave to Appeal to the Supreme Court of Canada[28].

[27] Respondent's Factum, *Trenchard v. Westsea Construction Ltd.* CA44007

[28] Application for Leave to Appeal to the S.C.C. filed by Trenchard, docket 37936; I was unaware of Mr. Blencoe's 1984 criticisms until well after I filed this Application in November 2017

Note that the requirement for long-term leases to be approved by local governments was eventually repealed in 2002[29], thus eliminating the last of any protections for long-term leaseholders that may have been afforded through public municipal scrutiny into proposed new 99-year leases. Although a municipal approval process would have been extremely limited in terms of any protections to leaseholders, until 2002 there remained on the books at least some notional recognition that long-term leases posed special considerations.

Nevertheless, we are left with the enigmatic decision by the government of the day to increase from three years to 20 the tenancy term for which the *Residential Tenancy Act* would apply. Why did the legislators choose 20 years over some other term? This specific choice was not debated in parliament, and the actual policy reasons do not appear to be a matter of public record. However, it seems unlikely that the 20-year term was arbitrarily selected, so we are left to discern whether there is a rational basis in law or policy for selecting the 20-year period in question. Here I consider two possible sources of law and policy for the 20-year term.

1.2.1. Settlement of inherited interests

The historical rationale for limiting residential tenancies to 20 years may relate, at least in part, to the "settlement" of inherited interests[30]. Bogart and Richardson (2010)[31] describe the settlement process in this way:

> "… a settlement legally bound the hands of all heirs when it was written. A settlement could not be changed until a tenant in tail (i.e., the next in line to inherit) who was born after the date of settlement came of age (i.e. reached age 21). Then, the current life tenant (usually the father) and the future tenant in tail (usually the son) could remove the entail by the legal process of common recovery. These facts meant that a settlement could be changed only infrequently, at intervals of 21 years or longer, as a family waited for an heir to come of age and for the father and son to reach an agreement about restructuring the estate."

The B.C. Law Reform Commission (1988) described the effect of legislation on the settlement of leases in this way:

> "Under the common law, a person who received less than a full interest of land under a settlement could not deal with the land unless empowered to do so under the terms of the

[29] BC Reg. 477/2003; 2002-78-115; amended without debate: 2002 Legislative Session, 3rd Session 37th Parliament (Hansard), Monday Nov 4, 2002, p. 4266

[30] British Columbia Law Reform Commission. 1988. Report on the *Land (Settled Estate) Act*, LRC 99.

[31] Bogart, D. and Richardson, G. 2010. *Estate Acts, 1600-1830: A new source for British History.* Research in Economic History, Vol 27, 1-50

> settlement. The *Land (Settled Estate) Act* permits settled land to be sold, leased or charged…A life tenant may grant a lease without judicial authorization or the consent of the other parties, so long as it does not exceed 21 years and the "best rent" is obtained. For example, an agricultural or occupational lease may not exceed 21 years…The court, however, can authorise a lease for a longer period of time"[32]

Obviously, while one is an infant, he or she lacks capacity to consent (or to withhold consent) to sales, leases or charges on land. So, it seems the laws were originally designed to protect heirs' inheritance of property interests. Thus, the 21-year period being very near the 20-year limit under the *Residential Tenancy Act* (observing that the age of majority was 21 before 1970[33]), we find a possible rationale for the 20-year limit on the application of the *Residential Tenancy Act*; i.e. any lease longer than 20 years potentially prejudiced inheritance rights.

The 21-year tenancy term is traceable at least as far back as the 1600s in England, and primarily in the context of rural or agricultural properties.[34] However, if indeed the source of the 20-year period, codified as a limit on the application of the B.C. *Residential Tenancy Act*, relates to issues of estate settlement, these issues seem to have been remedied by other legislation[35]. So, while the 21-year term is well established in archaic English property law, its rationale no longer seems relevant in residential tenancy law or social policy.

1.2.2. The implication that leases longer than 20 years are commercial

Another possible source for the 20-year limitation on the application of the *Residential Tenancy Act*, is its connection to leasehold reforms that were occurring in Scotland in the early 1970s, and generally in the United Kingdom in terms of rent controls[36], as they were in B.C. and across North America[37]. In 1974, Scotland introduced "the 20 Year Lease Rule"[38], which

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[32] Ibid note 30 part C "Operation of the Legislation"
[33] Ibid note 30, part D "Proceedings under the Act"
[34] Clay, C., 1981. Lifeleasehold in the Western Counties of England 1650—1750. *The Agricultural History Review*, *29*(2), pp.83-96.
[35] Ibid note 30, see part E "Developments since 1886"
[36] For overview, see: https://en.wikipedia.org/wiki/History_of_rent_control_in_England_and_Wales#Scope_of_regulation; also see note 70 for legislation that regulates long-leases in England and Wales
[37] Glendon, M. 1982. *The Transformation of American Landlord Tenant Law*, 23 BCL Rev. 503; The Ontario Law Reform Commission, *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies* (1968)
[38] https://shepwedd.com/knowledge/time-change-20-year-lease-rule, retrieved February 24, 2018

restricted residential long-term leases to 20 years[39]. The implication was that commercial leases could be longer than 20 years, but the provision was enacted in the context of new legislation that prohibited landlords from charging "feu duties" on residential leases; thus, by limiting the duration of residential leases to 20 years, landlords could not circumvent the new prohibition on feu duties by charging rental payments that replicated recurring feu duties[40].

Notably, in the B.C. context, feu duties appear to be not so different from landlord "management fees" on 99-year leases, which are either directly allowed under a small number of 99-year leases in B.C.[41], or are interpreted by landlords to be allowed under the lease and are therefore charged as operating expenses[42]. In the former case, management fees are at least specifically limited to "a fee not exceeding that charged by management companies for strata corporations under the *Condominium Act* in the city in which the Land is situate"[43]; in the latter case, there is no limitation under the lease as to what management fees are charged, and in fact there is no express authorization for them at all[44]. Indeed there is no mechanism under the lease for leaseholders even to compel lessors to disclose the basis on which lessors are charging such fees or even their amounts[45]. The circumstance in which long-term leaseholders in B.C. face escalating management fees, with no disclosed basis for their increase, is reminiscent of the problem in England in Wales in which millions of apartment and flat long-leaseholders face periodic doubling of ground rents.[46]

Nonetheless, in terms of the application of residential tenancy legislation to leases of up to only 20-year terms, it may be that this limit was intended or understood to imply that leases longer than 20 years were in fact commercial leases. Perhaps it was thought at the time that the

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[39] *Land Tenure Reform (Scotland) Act 1974*, 1974 c. 38, s. 8.
[40] Ibid note 38.
[41] E.g. the Bristol Court (Richmond) lease (1986), and Suncreek Estates lease (Surrey) (1988)
[42] As stated in a letter from Westsea to leaseholders, October 24, 2017
[43] Ibid note 41
[44] Orchard House head lease, May 1, 1974, and other leases also effective May 1, 1974
[45] For example, leaseholders, including myself, have written to Westsea seeking a breakdown for a 38% in 2018 operating expenses that includes management fees, a category of expenses that have not before been itemized in annual audit reports, to my knowledge. In my case, I have been informed by Westsea's legal counsel that Westsea will not respond to my inquiry. Also see sections following about my litigation to interpret the lease as containing an implied "transparency" clause.
[46] https://www.theguardian.com/money/2017/jul/25/leasehold-houses-and-the-ground-rent-scandal-all-you-need-to-know; it should also be noted that long-term leases in England and Wales are otherwise highly regulated: ante note 71

Landlord and Tenant Act, as it was in 1974, did apply to all possible residential tenancies, while any longer term was assumed to be a commercial lease, governed by different factors and law.

In my view, if the 20-year term was not arbitrary, of the two alternatives I have considered, it is more likely that the 20-year term relates to the implication that leases longer than 20 years are commercial in nature. This is consistent with views that have been subsequently expressed by government representatives, and with related commentary from the courts, to be discussed further.

2. The nature of the 99-year residential lease

2.1 Is a residential lease with a term that is longer than 20 years a quasi-commercial lease?

Basic qualitative differences between residential and commercial leases are well described by the following[47]:

> **"Residential Lease Agreement**
> A residential lease agreement is a contract between an individual(s) tenant and the landlord to use property for his/her living arrangement. A typical residential lease for housing includes a home, townhouse, condominium, and an apartment. The property is primarily used for a residence, not for a profit. No commercial purpose exists such as for the sale of goods, services, or manufacturing products. The consideration (rent) for the occupation of a residential rental is typically based upon a set amount per month varying from a month-to-month lease to a term of years.
>
> **Commercial Lease**
> A commercial lease is a contract between a business tenant and landlord for use of commercial property to generate a profit through the sale of goods, services, or manufacture of a product. The premise is a business space not designed for sleeping and day-to-day living for the residential tenant. The commercial property typically is a warehouse, strip mall, or office space in an industrial or commercial building. The consideration (rent) is typically based upon the amount of square footage occupied by the tenant plus, in some instances, a percentage of the gross received by the tenant. The term of the lease is typically for a set number of years where upon near the end of the term, the tenant has an option to renew for another set term."

In the Orchard House lease, Article 4.09 requires leaseholders "To use each of the suites for the purpose of a private residence only." Further, the land and building are zoned for single-

[47] https://real-estate-law.freeadvice.com/real-estate-law/real-estate-law/residential_lease_commercial.htm, retrieved February 22, 2018

family dwellings, home occupations, and multiple dwellings.[48] Residents clearly use the premises for living arrangements, although many leaseholders sub-let their premises.

In terms of the legal differences between commercial and residential tenancies, one of the key distinctions is that for commercial leases there is a presumption of equality of bargaining power between the parties, which is not presumed in residential tenancies. An apt description, noted in the American context but generally applicable in B.C., is as follows:[49]

> "Treating commercial and residential leases differently is logical for several reasons. First, in the commercial context a tenant's right to assign is best characterized as an object of value that is often the subject of bargaining, as noted by the courts. "Where a businessman must make contingency plans in order to protect himself against the unpredictable vacillations of business, both good and bad, the ability to assign a lease is a valuable right for which he bargains and gives consideration." *Ringwood Assocs., Ltd. v. Jack's of Route 23*, Inc., 153 N.J. Super. 294, 310, 379 A.2d 508, 516 (1977). In contrast, the typical residential tenant has little concern for assignment rights. If the matter arises at all, it will arise long after the lease is consummated, and in connection with an unanticipated abandonment. Second, the residential landlord and tenant relationship is traditionally so one-sided that, like most lease provisions, rights of assignment are usually not a subject for bargaining. Third, a landlord's concerns may be quite different regarding commercial and residential leases. For example, a commercial lease is usually for a substantially longer term, and the commercial tenant's identity is apt to affect the long-term market value of the rental property. Thus, commercial landlords scrutinize tenants more closely than their residential counterparts. The commercial landlord has traditionally demanded freedom to decide how the property will be used and specifically who the tenants will be."

Of course, here we are concerned with <u>long-term</u> residential leases. According to the description above, the long-term nature of a 99-year lease is indicative of a commercial lease. This may be one source for mistaking a 99-year residential lease for a commercial lease. From there, the error is perhaps compounded by suggesting that residential long-leases are private contracts entered at arms-length between parties of equal bargaining power, much in the way that commercial leases are understood to be. For example, in recent years, B.C government representatives have tended to take this view.[50]

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[48] Victoria City zoning bylaw Part 3.4. Zone Bonus Multiple Dwelling District

[49] Murray S. Levin, *Withholding Consent to Assignment: The Changing Rights of the Commercial Landlord*, 30 DePaul L. Rev. 109 (1980)

[50] As indicated in correspondence from elected representatives and Provincial government executives under governments prior to the current NDP, to leaseholders

However, in view of the standard-form nature of the lease and its multiple assignments from the original lessee[51] to parties who did not negotiate in any aspect with the lessor regarding lease terms, this is a fiction that is in no small way perpetuated by the courts, as will be further discussed. These leases may also be misconstrued as quasi-commercial contracts because of the unique market value of re-assigned interests, discussed in the following section. This misconception supports the suggestion that leases longer than 20 years were considered by B.C. legislators and policy-makers to be commercial leases, and therefore outside the scope of the *Residential Tenancy Act*.

2.2. The benefits and costs of 99-year residential leases for landlords and lessees

In this section I identify factors affecting the value of long-term leases, which perhaps distinguishes long-term leases from short-term ones. However, even if we accept that these 99-year leases are a specialized sub-set of residential tenancies and a category of tenancy that is not appropriately addressed by the current *Residential Tenancy Act*, the unique nature of these leases does not transform them into commercial leases that are best left to the machinations of the free market without regulation. On the contrary, these are standard-form leases, as Robin Blencoe astutely identified in 1984, not entered at arms-length by parties of equal bargaining power. Further, the qualitative residential nature of these leases is obvious. These circumstances, on their face, invoke the need for protective legislation.

I do not propose a detailed evaluation of the relative costs and benefits of a 99-year lease, which are complex[52]. However, a simple description of lease values, with Orchard House as a case in point, is roughly as follows.

When the Orchard House 99-year lease was created in 1974, leaseholders acquired their interests on assignment by effectively pre-paying rent for 99-years to the original lessee, Capital Construction Supplies Ltd. In turn, assignees can re-assign their lease interests for the market value of the term remainder. Presumably there was a mix between buyers intending to use the units as residents and those who intended to sub-let the units, or perhaps to re-sell later for a profit.

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[51] In law referred to as *pro tanto*, or assignments of portions of the original entire lease interest: Friedman, M. 2004. *Friedman on Leases*, Fifth Edition (P. Randolph, Jr., ed.) Vol 1.

[52] For an in-depth treatment, see Hamilton, S.W. 1999. *Residential leasehold estates – a paper prepared for Canada Mortgage and Housing Corporation*, Faculty of Commerce and Business Administration, UBC

Generally, for leases longer than 60 years, there is only a slight difference between a lease market value and the market value of a comparable fee-simple[53]. Leases with terms less than 60 years tend to diminish in market value, the rate of which accelerates as the term expires.[54] Here Capital Construction Supplies Ltd. and Westsea Construction Ltd. ("Westsea") were governed by the same principals, and so any profit earned on the original sale of lease assignments by the lessee, Capital Construction Supplies Ltd., also went directly to the principals of the current lessor, Westsea. The principals of Westsea therefore earned roughly the same income by the sales of Orchard House lease interests as they would have earned had they sold the leases as freehold condominiums[55].

Westsea retains the value of the reversionary interest (the fee-simple). This value is near zero at the beginning of the 99-year lease, but increases inversely to the diminishing unit re-sale value to the leaseholders[56]. So, at the end of the 99-year term, the leaseholders' right to possess their units is extinguished, and Westsea retains a building and a property that is worth its entire free-hold value. Let's imagine that in 2073, Westsea decides to re-lease all the interests for another 99-year term or even to rent the units out as short-term leases or as month-to-month rentals; or maybe Westsea simply decides to sell the entire property. Whichever way, Westsea has earned approximately the freehold value of all the units in 1974, and then earns the freehold value again in 2073 (building plus property if they sell both), or perhaps decides to profit from shorter-term rentals.

While it is clear there is potential profit to the lessees for the term remainder of a lease that is longer than 60 years, this potential tends to diminish for terms of less than 60 years, as noted[57]. That said, for Orchard House, with about 55 years remaining on its lease, upon my review of Orchard House sales between 1998 to 2017, and comparing them with sales data from

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[53] Ibid note 52, Executive Summary, p. x-xi. However, "even in the early stages of a prepaid leasehold the increase in market value is not likely to keep pace exactly with that of a fee simple" (p. xiii); this principle was recognized by the court in *Musqueam Indian Band v. Glass*, [1997] FCJ No 1339 (QL), although on appeal to the Supreme Court of Canada [2000] 2 SCR 633, 2000 SCC 52, the ground lease was valued of on a fee simple basis; this is a different circumstance from the present analysis which is valuation of the lease itself, and the *Musqueam* cases support the principle that at the beginning of a 99-year lease, its value is near that of a fee simple, but diminishes to zero starting near the mid-term of the lease

[54] Ibid note 52, Figure 6.4, and Table 7.1

[55] This conclusion derives from ibid note 13 as discussed.

[56] Ibid note 52, Figure 6.4, and Table 7.1

[57] Ibid note 52, Figure 6.4, and Table 7.1

a strata high-rise on the neighboring block in James Bay for the same period, the data appears inconclusive as to whether Orchard House sales are presently moving in a different direction from Roberts House.

Also, while Westsea profited substantially (presumably) in the mid-1970s when lease units were sold by assignment, Westsea retains the reversionary value. Indeed, although speculative, Westsea may have profited more substantially by selling individual leasehold units than by selling the entire building on a condominium conversion. Certainly, these factors distinguish a long-term lease from a shorter-term lease, but again this does not transform a long residential lease into a commercial lease.

Is Westsea double-compensated for the free-hold value of the building (not including the property, for the sake of argument) by twice selling the building at freehold values? Some might argue that for Westsea to twice obtain the value of the building in 99 or 100 years is simply a prudent investment decision, and there is always some risk to Westsea over the course of such a long lease. Under this argument, these risks over 99 years mean that Westsea is not double-compensated for the free-hold value.

2.3. Operating expenses

But what is the risk to Westsea?

Under the lease, leaseholders pay for the repair and maintenance costs of the building. Of course, what exactly "repair and maintenance" means under the lease is the subject of ongoing disagreement and litigation (discussed in sections following).

However, on my understanding of Westsea's argument about what constitutes operating expenses, there really is no risk at all to Westsea. All costs associated with maintenance and repair are charged back to the leaseholders[58]; similarly, any administrative overhead for everything that is remotely associated with the building and its maintenance and repair, can be charged back to the leaseholders; if there is any litigation, Westsea, by its logic, can charge all

[58] It is not denied that under the Article 7.01 of the Orchard House lease (and others), operating expenses include "all other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands"; there is, however, a body of law that constrains the otherwise open-ended interpretation of the word "all", and so does the lease itself, as I argue in the context of ongoing litigation; in fact the lease was held to be so constrained by Mr. Justice MacKenzie in *Trenchard v. Westsea Construction Ltd*., 2016 BCSC 1752 (CanLII); this finding was not overturned on appeal 2017 BCCA 352 despite that the CA allowed, in part, the appeal of Mr. Justice MacKenzie's decision.

those costs to the leaseholders[59]. Moreover, it appears that Westsea feels it can charge "management fees", which are not clearly defined, but would appear to be additional profit to Westsea for "managing" the building and, as noted in earlier, resembles feu duties that were finally outlawed in Scotland in 1974[60] or of escalating leasehold ground rents in England and Wales[61]. It is useful to note that 99-year leases (and longer) in England and Wales are otherwise well-regulated by existing legislation[62].

This is not all: according to Westsea's logic, Westsea can also make capital improvements to the building and charge all the costs back to the leaseholders so that Westsea could, in theory, be renovating a building so that it lasts indefinitely, all on the backs of the leaseholders who finance Westsea's projects to continually improve the building. With these constant renovations and building upgrades, Westsea can, in concept, keep re-leasing the building and earn roughly fee-simple value for the building every 99 years, or some such period. Under this logic, Westsea ensures 100% risk and cost-free reversionary value at the end of the lease. And along the way, they earn a tidy income for 99-years as a "management fee" along the way. Triple compensation?

Of course, in terms of the value of the reversionary interest, current directors will not live to see those profit margins (except the yearly management fees), but the business model is structured so that the corporate entities involved sustain an essentially risk-free, repeating, roughly fee-simple sale for the indefinite future.

Should a lessor in this scenario bear some of the risk? One of the arguments I am advancing under current litigation is that if Westsea invests in the reversionary interest of their building; i.e. the fee-simple value after the expiry of the 99-year lease, then those are capital investments which are not operating expenses under the lease, and are not chargeable to the leaseholders[63]. For leaseholders to pay for Westsea's capital investments in the reversionary interest of the lease is to unjustly enrich Westsea at the cost of the leaseholders. So, projects that are more than "repair and maintenance", such as the installation of structural beam supports and

[59] C.f. note 16, in which Westsea's current interpretation appears to be at odds with the original lease offering
[60] Ibid note 38; it should be noted that compensation may be payable to Scottish landlords for now prohibited feu duties: http://www.gov.scot/Topics/Justice/law/17975/Abolition
[61] Ibid note 46
[62] Ante note 71
[63] I am indebted to Ron Falcioni, a leaseholder of Westsea Towers in Vancouver, for bringing this argument to my attention

replacement of all the windows with upgraded double-pane windows (granted, fulfilling BC Building Code requirements), constitute a capital investment in the reversionary interest of the building. Viewed from another angle, leaseholders pay operating costs to keep the building in its original state (less normal wear and tear) for the life of the lease. This means that Westsea's profit in 1974, or thereabouts, was indeed real and substantial profit that is not gradually eaten up by the expenses associated with maintaining the building. This seems fair and makes reasonable sense.

However, under this theory, as long as the building is maintained to its original standard (presumably meeting legislated living standards when the lease was created in 1974), the re-sale value of the building could diminish substantially by the end of the lease, largely because building standards in 2073 could necessitate a whole new building once the 99 years' worth of patching and general maintenance are complete and what remains is a sub-standard building that a new buyer would be loath to purchase. At that time Westsea could demolish the building, take out a bank loan and build a whole new one, and profit all over again on a new building in 2073 or soon after.

In the meantime, however, if Westsea invests to create value in the building beyond the current 99-year period so that the building doesn't need to be demolished in 2073 and can last for another 99 years or some other period, then Westsea would profit again in 2073 or thereabouts without the associated costs of constructing a new building. All well and good if that is the building owner's objective, and no one would reasonably dispute that Westsea is entitled to plan for such prospects, but leaseholders should not be on the hook to cover Westsea's investments so that it profits all over again in the future. This is tantamount to leaseholders paying for Westsea's brand-new building should it decide to demolish the existing one in 2073 and sell the new one, with zero corresponding benefit to the leaseholders.

It is on this basis that I argue there must be a distinction between operating costs that keep the building in its original condition and which cover basic maintenance and repair, and those costs that are more properly associated with the reversionary interest of the land (i.e. are investments in the form of capital costs that create value for the owner at the expiry of the lease). The former are payable by the leaseholders, while the latter should not be.

Likely it will not be an easy exercise for a court to sort out these distinctions, but if my argument holds water, a court may find that at least some apportionment of costs is required. I

note that my legal case is not limited to the "capital costs argument". For example, there are subtle distinctions between replacement costs and capital costs, the former of which arguably are also not chargeable as operating expenses, but the details of these and other arguments I intend to make are beyond the scope of this paper.

Nor does the value structure of these long-leases alter the shortcomings within the lease as a contractual arrangement. Simply because the structure of costs-benefits in these long-leases is different from shorter-term leases, does nothing to mitigate the gross imbalance and asymmetry in the relationship between landlord and lessees over the life of the lease that has propagated since the inception of the original lease when original assignees had no bargaining power over lease terms. It is precisely this asymmetry that ought to be regulated.

2.4. Social policy concerns

"*It is frequently forgotten that society has vested interests in respect of landlord and tenant laws.*"[64]

An argument raised by lessors may be that, rather than categorizing long-term leases as either residential or commercial in nature, long-term leases are simply private contracts which should not attract regulation. Viewed this way, any underlying social policy concerns related to residential tenancies and housing policy are dispensed with, and issues of interpretation are considered solely based on the raw principles of contract law.

First, issues of social policy are inescapable when the rights of a class of society are subject to exploitation. The class in this case consists of leaseholders who, when leaseholds were originally sold, sought competitively-priced dwellings (i.e. in the sense of leasehold unit prices being close to similar strata apartment-type dwellings); and since then, the class is leaseholders who have sought comparatively low-cost dwellings. In both cases, the classes have been subject to exploitation because they have not entered the lease on a footing of equal bargaining power with the landlord, and there are inadequate mechanisms under the lease for leaseholders to ensure lessor accountability and to resolve disputes.

In this case, as Hon. Steves observed in 1975, the corporate parties to the contract were one and the same individual, George Mulek and, given this, the notion of negotiations having occurred during the drafting of the contract is absurd if not comical. In these circumstances,

[64] Bradbrook, A. 1998. Residential Tenancy Law – The Second Stage of Reforms. 20 Sydney L. Rev. 402, at 434

society has a responsibility to enact protections that look beyond bald contract principles, even if such principles may ultimately entail their own inherent protections.

Further, if these leases are simply a private contract in the absence of housing policy considerations, then presumably consumer protection legislation ought to apply, thus invoking protective mechanisms that are nonetheless similar in principle to those that arise in a housing context.

In concluding this part, based on the considerations above, there appears to be no convincing rationale for why a residential lease should be unregulated simply because its term exceeds 20 years: any inheritance issues are addressed through other legislation; these leases are not commercial either qualitatively or legally, nor are the market considerations sufficient to bring these leases within the character of a commercial lease. There is, however, a reasonable argument that long-term residential leases are unique and perhaps do not fall clearly under the umbrella of the existing *Residential Tenancy Act*. Nonetheless, the unique nature of these leases only reinforces why independent legislation – a brand new Act – ought to be enacted to regulate them.

3. New legislation

3.1. No remedial legislation for residential long-leases in British Columbia

As indicated, there is no governing or remedial legislation for any of these private long-term residential leases. The leases were drafted pursuant to the *Short Form Leases Act*[65] (for those of 1974), and pursuant to the *Land Transfer Form Act*[66] (for those in the 1980s), but these Acts provide only for the expanded definition of terms contained in the leases, and do not regulate, add to or derogate from the rights or duties contained in the leases. Further, leases that were entered into before May 3, 1974, including the Orchard House lease, are not remediated by the provisions of the *Frustrated Contracts Act*[67]. This alone is important enough to demand legislative change because of the potential for lessors to continue charging operating costs to leaseholders even if the lease happens to be frustrated by some catastrophe and leaseholders lose their physical leasehold interests, whether or not that catastrophic peril is insured.

[65] RSBC 1960, c. 357
[66] RSBC 1996, c. 252
[67] RSBC 1996, c. 166

Only in British Columbia and Saskatchewan is the application of residential tenancy legislation limited to tenancies with terms of 20 years or less[68]. In all other Provinces, residential tenancy legislation either does not contain a term-length restriction, and by implication therefore governs 99-year leases, or expressly applies to 99-year leases; in Manitoba, the *Life Leases Act* governs leases with terms of 50 years or more, and life leases with indeterminate terms; the Quebec Civil Code applies to leases up to 100 years, and any lease longer than 100 years is deemed to be 100 years[69]. In England and Wales, where long residential leases are widespread[70], specific legislation applies to leases longer than 21 years.[71]

In British Columbia, the *Strata Property Act*[72] governs strata common-interest ownership in similar circumstances to long-term leases; i.e. both strata and long-term leases frequently involve multi-unit apartment-type accommodations. Indeed, provisions of the *Strata Property Act* allow lessor governments or First Nations with leases for which remaining terms are at least 50 years, to convert leases to strata titles and thereby be subject to the provisions of the *Strata Property Act*[73], while 99-year private residential leases are omitted from these provisions.

Similarly, in British Columbia, specific legislation governs tenancies involving manufactured homes.[74] Under the *Commercial Tenancy Act*[75], which has been held not to apply to 99-year residential leases[76], a bundle of rights and responsibilities are created for parties to

[68] SBC 2002, c. 78, s. 4(i) (British Columbia); SS 2006, C. R-22.0001, s. 5(g)(ii) (Saskatchewan)
[69] SA 2004, c. R-17.1, s. 2(1) (Alberta); CCSM, c. R-119; *Life Leases Act*, CCSM, c. L130, definitions (Manitoba); SO 2006, c. 17, ss. 3-7 (Ontario); Civil Code of Quebec, c. CCQ-1991, c. IV Lease, Art. 1880; .RS, c. 401; unrestricted def. "fixed term" (Nova Scotia); SNB 1975, c. R-10.2, "Long Term Tenancies", ss. 24.2-24.7, 29.1 (New Brunswick); RSPEI Cap. R-13.1 (Prince Edward Island); SNL 2000, c. R-14.1 s. 3 (Newfoundland)
[70] Bracke, P., Pinchbeck, E.W. and Wyatt, J. 2017. The time value of housing: Historical evidence on discount rates. *The Economic Journal*. "In England and Wales as many as 1 million houses and 2 million flats are owned under long leases, 40% of recent new build properties are leased, and leaseholds account for around a quarter of residential sales" (p.3)
[71] Including, but not limited to: *Commonhold and Leasehold Reform Act*, 2002, c. 15; *Landlord and Tenant Act 1985*, c. 70, s.26(2)(a), *Landlord and Tenant Act 1987*, c. 31, s. 59(3)
[72] SBC 1998, c. 43
[73] *Ibid.* Part 12 – Leasehold Strata Plans, Definitions, ss. 200-207
[74] *Manufactured Home Park Tenancy Act*, SBC 2002, c. 77, s.2 "What this Act applies to"
[75] RSBC 1996, c. 57
[76] *Westsea Construction Ltd. v. Mathers*, 2014 BCSC 143

commercial leases[77]. Further, consumer-protection legislation protects leases of goods, but this does not extend to residential tenancy leases[78].

Moreover, despite a finding that the *Commercial Tenancy Act* does not apply to a 99-year residential lease in B.C.[79], as noted earlier, there is a body of judicial authority that relies upon the premise that 99-year residential leases are commercial leases; as previously noted, the theory sustained is that 99-year residential leases are commercial leases negotiated at arms-length between sophisticated parties of equal bargaining power.[80] [81]

3.2. Who will be affected by new legislation?

There are at least 2500 individual 99-year private residential leases (by assignment) in British Columbia. These privately-owned leasehold properties are distinct from 99-year leases that are owned by governments or First Nations and which are potentially captured by provisions of Part 12 of the *Strata Property Act*[82]. None of the private residential leaseholds are regulated by any other legislation (subsequently discussed further).

These private residential leaseholds are distributed over at least 20 high-rise and low-rise apartment-style buildings in Victoria and Greater Vancouver. For at least ten of these head leases, the lease term commenced in 1974; for at least one, the term commenced in 1986, and another in 1988. To my knowledge, these leaseholds are as follows:

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[77] Although the Law Reform Commission has recommended this Act be overhauled: ante note 91 (LRC report)

[78] *Business Practices and Consumer Protection Act*, SBC 2004, c. 2; Application of Act; Part 5 – definition "lease"

[79] Ibid. note 75, and *Westsea Construction v. 0759553* Ltd. 2012 BCSC 1799 involve Sussex Square Apartments, another 99-year residential lease (term starting 1984), not identified in the affidavits of Hugh Trenchard herein.

[80] *Sector v. Priatel* 2004 BCSC 45 (CanLII); followed in: *Harbuz v. Capital Construction Supplies Ltd*., 2011 BCSC 778 (CanLII); considered in: *Archibald v. 1219 Harwood Street (Chelsea) Ltd*., 2009 BCPC 364 (CanLII), all three involving residential 99-year leases; a similar finding was made in *Evergreen Building Ltd. v. IBI Leaseholds Ltd*., 2008 BCSC 235 (CanLII), involving an office lease, but where the court does not distinguish between residential and commercial leases (appeal allowed on issue of costs only 271 BCAC 298).

[81] Westsea also made this argument at the Petition hearing: Appendix 2, p. 267 (lines 14-42); p. 268 (lines 42-47)

[82] SBC 1998, c. 43

Building	Location	Owner	Units	Lease start
Orchard House	Victoria	#Westsea Construction Ltd.	211	May 1, 1974
Villa Royale	Victoria	#Congdon Construction Ltd.	128	May 1, 1974
El Mirador	Victoria	#Congdon Construction Ltd.	65	May 1, 1974
Ocean Villa	Victoria	#Congdon Construction Ltd.	42	May 1, 1974 Modified: March 20th, 1981
Edgemont Villa	Victoria		41	
Westsea Towers	Vancouver	#Westsea Construction Ltd	157	May 1, 1974
The Chelsea	Vancouver	#First Canadian Land Corp.	40	May 1, 1974
The Heritage	Vancouver	#First Canadian Land Corp.	171	May 1, 1974
El Cid	Vancouver	Sheridan Investments Ltd.	208	May 1, 1974
The Horizon	Vancouver		89	
The Martinique	Vancouver	First Canadian Land Corp.	92	May 1, 1974
The St. Pierre	Vancouver		41	
The Surfcrest	Vancouver	Sheridan Investments Ltd.	160	May 1, 1974
Lancaster Gate	Vancouver		84	
[83]Suncreek Estates	Surrey	#Westsea Construction Ltd	302	Oct 24, 1988
[84]Bristol Court	Richmond	#Ryan Gardens Apartments Ltd.	110	Aug 1, 1986
Sussex Square	Richmond	#Westsea Construction Ltd	216	Oct 1, 1984 Modified: Jan 1, 1988
Blue Haven	Richmond		102	
Imperial Apartments	Richmond		50	
The Crestwind	Richmond		51	
Mayfair Court	Richmond		246	
TOTAL			**2606**	

Table 1. Private (non-government or First Nation) 99-year residential leases in B.C. # Refers to leases in which the landlord and the lessee are different corporate entities, but for which the signatory is the same individual. Where space is blank, I have not obtained the information.

[83] Lease allows for a leaseholder management board, whose advice and recommendations the Lessor "agrees to give serious consideration to". I contacted one leaseholder at Suncreek Estates, who said no such leasehold board exists; but who suggested that given the past actions of the owner, it seems unlikely the owner would implement the advice and recommendations of such an association.

[84] This lease also allows for a leaseholder management board

Of the leases I have reviewed, some eight or nine of these building head-leases contain identical terms; some three others contain nearly identical terms to the other first eight or nine; at least two additional 99-year leases contain significantly different terms from those of the other buildings[85]. In all cases, the set of assigned leases for each individual building contain identical terms (i.e. leases within each building are identical, while not all leases between buildings are identical).

3.3. Proposed "Residential Long-term Leases Act"

For the reasons as discussed above, there is a sound argument that entirely new legislation is required to regulate 99-year residential leases. Long-term leases do not fit easily within the character of existing residential tenancy legislation because of their unique market and organizational structure. Thus, it appears necessary to codify legislation that is independent of the *Residential Tenancy Act*. New provisions should include the right to form a tenancy association, rights of disclosure, clarification of operating expenses, and end-of-lease provisions, among other things as outlined below.

Legislative models specifically tailored for long-term leases include legislation from the United Kingdom, the *Landlord and Tenant Act, 1985*; the *Landlord and Tenant Act, 1987*, and the *Commonhold and Leasehold Reform Act 2002*[86]. In respect of out-dated common law rules, recommendations from the Law Reform Commissions of B.C. and Ontario, as referred to herein, ought to be reviewed.

As a starting point, below is an outline containing what I suggest are the essential elements of new legislation.

1. Objects of Act

To remedy conflicts or problems between leaseholders and landlords party to long residential leases; i.e. leases longer than 20 years, typically with 99-year terms. Legislation attempts to equalize a power imbalance between lessors and lessees. It attempts to clarify ambiguous, confusing and sometimes irrelevant or inappropriate (in today's context) common-law principles.

2. Disclosure provisions

- Tenant's right to inspect accounts and request disclosure of engineering or other expert reports, accounts, receipts, and to take copies of same.

[85] i.e. the Bristol Court, and Suncreek Estates leases, which are identical to each other
[86] See part 7 herein for a list of legislative models and guides

- Tenant's right to request and obtain contact information for other leaseholders from landlord; alternatively, the landlord's obligation to ask leaseholders if they are willing to release their contact information for the purpose of a leaseholders association, and for the landlord to publish the contact information of all such willing leaseholders.

3. Right to organize tenancy association and right to manage

- Tenant's right to organize a tenancy association with which the landlord is obligated to consult and communicate on issues affecting the building and leasehold interests.
- Tenancy association given the option to manage building operations.
- Tenant's right to hold meetings in building common areas and to post notices.

4. Operating expenses clarified

- Clarified distinction between capital expenditures and operating expenses.
- Prohibition on funding capital projects through operating budgets.
- In connection with the above, a time limitation on the charging of operating expenses (i.e. costs that are normally amortized over periods longer than, say 18 months, such as capital expenditures, are not chargeable).
- Clarification of who pays for replacement costs of old and worn building components.
- Limitations on charging interest for overdue rent.
- Landlord prohibited from charging litigation costs as an operating expense, unless ordered by court/tribunal.

5. Fixtures

- Clarification of what items are fixtures versus chattels.
- Landlord may not remove fixtures during a subsisting lease unless tenant agrees[87].

6. Breaches

- Landlord prohibited from forfeiture proceedings for minor tenant breaches (i.e. forfeiture action cannot be taken for amounts which are less than a prescribed sum unless the amount or any part of it has been outstanding for a prescribed period).
- Tenant's right to withhold operating expenses to some prescribed extent if landlord breaches material covenants.

[87] E.g. At Orchard House, the lessor has repeatedly threatened to remove dishwashers even in instances in which lessees were previously given permission to install them.

7. End-of-lease provisions

- Prior to the end of the 99-year term, tenant association and landlord to re-negotiate lease; e.g. not less than 20 years from the expiry of the lease.
- Limitations on rents for overholding.
- Limitations to premiums charged to leaseholders for renewed lease term.
- Options to convert leases to strata or leaseholder buyout.

8. Lease modifications

- Landlord prohibited from unilaterally creating new tenant obligations under "Rules and Regulations"[88].
- Landlord and head lessee prohibited from modifying lease without assignee approvals[89].
- Tenancy association may propose (perhaps by 75% or 2/3 leaseholder majority as opposed to a bare majority) amendments to lease "Rules and Regulations" including restrictions on cigarette and cannabis smoke.

9. Common law terms to be expressed or abolished[90]

- Premises are fit for habitation.[91]
- The provisions of the *Frustrated Contracts Act*[92] apply[93] (thus over-riding common law that makes it ambiguous as to the application of the doctrine of frustration or which says the doctrine of frustration does not apply to leases)
- Common law doctrine of *interesse termini* abolished.[94]
- Doctrine that covenants that run with land abolished (i.e. leases are contracts as regulated by this statute).

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[88] This is a serious problem: in May 1983, Westsea issued "Rules of Orchard House" including "3. No resident is to lend out his keys for the building…Any resident who does this could be held responsible for re-keying of the building, and be given a termination notice to vacate the apartment." Later in an undated letter, Westsea issued "Rules and Regulations", containing "(8) The owner shall be at liberty to add to, amend and cancel these regulations, or any of them, for the conduct and management of the car parking area… and the licensee shall be bound by any reasonable addition, amendment or cancellation…" Article 4.11 of the lease permits such unilateral changes.

[89] C.f. Table 1 in which two leases contain head lease modifications – it seems unlikely assignee leaseholders were consulted on those changes.

[90] For a full treatment of these, Law Reform Commission Reports should be reviewed: ibid note 18

[91] Ibid note 18, p. 134-135

[92] Ibid note 67, s. 1(2)(c): the Act does not apply to contracts entered into before May 3, 1974

[93] See note 18, p. 136-138

[94] Abolished in existing Residential Tenancy legislation in B.C. – see note 18, p.135-136; and see Law Reform Commission, 1989. *Report on the Commercial Tenancy Act* LRC 108, in which the LRC recommends the doctrine be abolished also for commercial tenancies, p. 8-9

- Lease terms should be declared inter-dependent[95] thus permitting tenants to withhold rent (perhaps by placing into trust) in instances of landlord breaches (c.f. "Breaches" above).

10. Effects of sale of property and new landlord

- Duty of lessor ("old lessor") to inform tenants of lessor's transferred interests.
- Old lessor to remain liable to tenants for old lessor's breaches prior to transfer.
- Right of parties to renegotiate lease terms.
- Right of parties to re-negotiate terms of building management.

11. Dispute resolution

- Civil Dispute Resolution Tribunal given clear jurisdiction to adjudicate disputes regarding any of matter of disclosure, operating expenses for matters involving sums up to $35,000, amendments to "Rules and regulations", fixtures, breaches, end-of-lease provisions, but not limited thereto.
- The right of individual leaseholders to initiate representative actions on behalf of others. This should include provisions on how to notify leaseholders of actions without the requirement for personal service.

4. My experience as a leaseholder

In 2011, I acquired a 99-year lease interest (about 62 years remained at the time) for a two-bedroom suite in a high-rise residential apartment-style building in Victoria, British Columbia, called Orchard House. Orchard House contains about 211 suites. The head lease was entered between Westsea Construction Supplies Ltd. ("Westsea"), as landlord, and Capital Construction Supplies Ltd., as tenant, dated May 1, 1974. Units were subsequently assigned and re-assigned to third parties. I acquired my lease by re-assignment. The lease assignments and re-assignments contain language that assume the terms of the original head-lease.

As previously noted, the head lease was entered by two corporate entities with a common officer, George Mulek. The lease was not negotiated by any of the assignees, and it was presented to me and other assignees on a take-it-or-leave it basis (i.e. a standard-form contract).

[95] "… it should be a term of every tenancy agreement that all the conditions are interdependent, that is to say the landlord cannot enforce the tenant's covenants unless he himself has carried out his own obligations cast upon him under the agreement or by law. This raises the question of what the tenant should do to protect himself as to rent withheld because of a claimed default by the landlord." Law Reform Committee of South Australia. 1975. Thirty-Fifth Report Of The Law Reform Committee of South Australia Relating to Standard Terms in Tenancy Agreements.

Beginning in 2013, my experience as a leaseholder has been dominated by years of litigation with Westsea, over what started with my request for information about a pending windows/doors project and for an engineering report. Since then, it is hardly an exaggeration to say that this litigation has become a multi-headed hydra. As a self-represented litigant unable to afford costly lawyers, I have now laboured through numerous litigation steps over what are in essence very simple issues. These steps have involved two appeals by Westsea, and a number of interim hearings on procedural matters prior to the hearings on their merits in the Supreme Court of B.C., the B.C. Court of Appeal, and presently in respect of an Application for Leave to the Supreme Court of Canada (see section 6 herein for a litigation summary).

To me, the very fact that I have laboured though onerous litigation to resolve issues that are essentially very simple, truly reflects the scope of the asymmetric power structure of the lease. As a leaseholder with limited means, I must litigate toe-to-toe with experienced lawyers who are supported by all the resources of a mid-sized law firm.

At the same time, Westsea seeks to charge its litigation costs, incurred while defending against my legal proceedings, back to the leaseholders as an operating expense. In effect, this gives Westsea carte blanche to fight every disputed matter to its maximum extent by appeals and delays. In this circumstance, the lessor has no incentive to compromise or negotiate settlements because the associated costs of the lessor's adversarial position can always be charged straight back to the leaseholders. It is unsurprising then that many American States have outlawed lease terms that cause tenants to pay the litigation costs of their landlord,[96] although similar provisions appear to have been omitted from Canadian residential tenancy legislation.

In addition, lessors' legal counsel has written letters to the leaseholders that are, in my opinion, reasonably interpreted as presenting me as responsible for increasing leaseholders' operating costs. It seems that some leaseholders have come to perceive matters in just this way[97].

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[96] AK Stat § 34.03.040 (2016) (Alaska), CT Gen Stat § 47a-4a (2012) (Connecticut), KS Stat § 58-2547 (2015) Kansas, KY. Rev. Stat 383.570 (2016) (Kentucky), NE Code 76-1415 (1)(c) (2016), NV Rev Stat § 118A.220 (2015) (Nevada), Ohio Rev Code § 5321.13 (2016), 41 OK Stat § 41-113 (2016) (Oklahoma). Variations: permitting 25% of unpaid rent as attorney's fees HI Rev Stat § 521-35 (2016) (Hawaii); fees awarded to prevailing party: AZ Rev Stat § 33-1315 (2016) (Arizona) OR Rev Stat § 90.255 (2015); VA Code § 55-248.9 (2016) (Virginia), MA Gen L ch.186 § 20 (2016) (Massachusetts),WA Rev Code § 59.18.230 (2016) (Washington)

[97] At least two emails to me directly or copied to me from other leaseholders, clearly represent the view that most if not all the 38% increase in 2018 operating expenses are directly due to my litigation, despite that the October 24, 2017 letter from Westsea refers to increases to several different operating expenses.

The litigation process may ultimately bankrupt me, not to mention the profound emotional and energetic toll associated with the entire process. With this I am not seeking sympathy; rather I ask that my involvement in continuous litigation for these years be recognized as symptomatic of a fundamental imbalance in the bargaining positions between Westsea and the leaseholders in relation to matters of operating expenses that are paid by leaseholders under the lease. In the face of these issues, and a paralyzing and protracted litigation process that so far has not actually resolved any of the primary substantive issues put before the courts, as I will describe in more detail, I am seeking intervention at the public-policy and legislative level with a view to enacting new legislation that takes steps toward redressing this profound power imbalance.

Indeed, my experience much describes the state of the common law prior to the advent of the universal call for residential tenancy legislation in the 1960s. As described by the Law Reform Commission of British Columbia[98]:

> "In the 1960s it became clear that the common law was not functioning efficiently in resolving problems between landlords of residential tenancies and their tenants. The fact that the legal relationship was much allied with the concept of the leasehold estate, and the fact that freedom of contract had, in practical terms, come to operate entirely to the benefit of landlords, meant that the law was producing unreasonable and unfair results. The call for reform was virtually unanimous."

Westsea insists that it exercises prudent and reasonable discretion in carrying out its covenants under the lease and incurring the costs that Westsea charges back to leaseholders as operating expenses[99]. To demonstrate its prudence, among other things, Westsea argues it is sufficient to provide an annual audit report to the leaseholders, as the lease requires[100]. In most respects, I do not dispute that costs are incurred reasonably and prudently, nor do the leaseholders in general so it seems. On the other hand, an audit report tells the leaseholders very little about how costs are incurred and whether they are justified. An audit report does not tell leaseholders that the work was in fact performed and, perhaps most importantly, an audit report

[98] Law Reform Commission of British Columbia, *Report on the Landlord and Tenant Relationships: Residential Tenancies* (Project No. 12) (1973).
[99] E.g. letter from Westsea to Trenchard, dated January 22, 2014
[100] E.g. letter from Westsea to Trenchard, dated June 9, 2014; it is worth noting audit reports are becoming increasingly tardy: originally audited statements were delivered by mid-February of the following year, whereas more recently, statements are issued in June/July of the following year – a factor over which tenants have no control, and delayed notice of costs charged as operating expenses diminishes the opportunity for lessees to challenge them

does not interpret any provisions of the lease in terms of whether a cost is legally an operating expense or not. An audit report is merely a first step that may (or may not) lead to further inquiries that leaseholders should be entitled to have answered, given that they are the ones paying the bills.

In the present circumstances, as the Orchard House building and lease approaches its mid-life and, as Westsea undertakes various renovation and upgrading projects here and at other leasehold complexes owned by Westsea such as Westsea Towers in Vancouver and Suncreek Estates in Surrey, questions have arisen about the propriety of certain costs that Westsea has incurred. Most recently, questions have arisen regarding Westsea's large-scale project to replace all the windows and sliding glass doors in the 211-unit, 22-storey, Orchard House building[101].

First, the lease is clear that repair and maintenance of windows and sliding doors are the responsibility of the leaseholders, subject to a wear and tear exception[102], meaning that the replacement of old and worn windows is the responsibility of Westsea[103]. However, Westsea has interpreted the replacement of windows and doors to be part of Westsea's covenant to repair the outer walls, the costs of which Westsea may recover as operating expenses from the leaseholders[104].

The proper interpretation of these lease provisions must come through the courts and, for certain issues, perhaps the need for interpretation by the courts may not be altered by legislation. However, there are some basic rights that leaseholders do not have, but ought to have, including the basic right to obtain information from Westsea about the costs they are incurring, the payment for which are charged to leaseholders as operating expenses. In part 3.3 above, I have outlined other provisions of proposed new legislation.

It is in the context of a request for information that my litigation began.

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[101] In 2018, Westsea is in the process of commencing a windows replacement project at Westsea Towers in Vancouver, similar to the windows and doors replacement projects at Orchard House; and Westsea Towers leaseholders have raised similar questions as to the propriety of Westsea's project

[102] Article 4.03

[103] an argument that is currently in litigation before the courts

[104] As outlined in pleadings currently in litigation; also per letter from Westsea to Trenchard, dated Dec 12, 2013

5. Litigation background

5.1. Requests for engineering report

In 2011, when I acquired my lease interest, Westsea had just completed a round of partial window replacements for all the corner units in the building. In November 2013, Westsea sent a letter notifying leaseholders of a project to replace all the remaining windows and sliding glass doors, in addition to other building repairs. The letter referred to a "Project Prioritization Assessment" (the "PPA") authored by an engineering firm, Read Jones Christoffersen. At the time I did not know exactly what a PPA was, but it seemed to be an engineering report of some kind.

I made some initial inquiries and requested to review the PPA, which I described as "the engineering report". Ultimately, I was interested in the rationale and justification for the multi-million-dollar windows replacement project that Westsea was proposing to charge back to the leaseholders as an operating expense under the lease.

Westsea answered some of my inquiries, but initially it did not respond to my request for the engineering report. I made further requests, to which Westsea responded that no such engineering report yet existed, but that it would provide one when completed.

In addition, Westsea said, "To continue to answer your inquiries will unfairly increase the costs and expenses to all the leaseholders at Orchard House."[105] Such a remark appears to devalue the legitimacy of my inquiries and deflects scrutiny from Westsea toward me instead.

A similar reference to leaseholder inquiries made under pain of increased costs was made most recently in January 2018 from counsel for Westsea: "Please keep in mind that the legal costs incurred in responding to correspondence from leaseholders are chargeable as operating expenses."[106] Clearly there are cost inefficiencies associated with answering inquiries individually, but Westsea has no obligation to consult with an Orchard House leaseholders' association[107] by which general leaseholder inquiries could be made on a representative basis and thus streamline efficiencies in lessor/lessee communications. This leaves leaseholders to make

[105] Letter from Westsea to Trenchard, dated January 22, 2014
[106] Letter from counsel for Westsea to Orchard House leaseholders, dated January 16, 2018
[107] The "Orchard House Leasehold Owners Association" was an attempt at such an organization in the 1990's but eventually disbanded; more recently, attempts to organize a leaseholder association has confronted the hurdle of being unable to obtain current contact information for leaseholders, while Westsea argues that for it to release current contact information to leaseholders is a breach of privacy. The same argument from Westsea has confronted leaseholders from Westsea Towers in Vancouver in the context of a similar windows and doors project underway there in 2018.

inquiries individually and, in responding to such individual inquiries, Westsea can wield the double-edged Damocles sword of increased costs to the leaseholders, all the while parried as though to protect the interests of all the other leaseholders against purportedly disgruntled leaseholders posing unreasonable questions[108].

Regarding the requested report, it soon became apparent that Westsea did not view the PPA as an "engineering report"[109], and Westsea suggested I was asking for something that did not yet exist and insisted that I obtain my own engineering assessment or pre-pay their engineers for an evaluation report.

However, because the November 2013 letter specifically mentioned a report (the PPA) authored by engineers – and, in my view, must have been an "engineering report" – I persisted in my request to see this report. Although Westsea asserted that it was not obligated to provide me access to any engineering reports, it permitted me one half-hour to view the PPA, and demanded that I not take a copy of the report or share any of its contents with others. After eventually seeing this document, despite Westsea's assertion that no engineering report yet existed in relation to its proposed windows/doors project, the PPA itself relied on "visual observations of the building, review of past reports[110], and feedback from Westsea" [my emphasis]. Surely, if any such reports were authored by engineers, then they were "engineering reports."

5.2. My request for information related to a threefold increase in repairs and maintenance costs

After I reviewed this report, I made no further inquiries for any reports. However, a few months later, Westsea provided its annual audit report that contained reference to a threefold increase in repair and maintenance costs from one year to the next. I then inquired about the source of that increase, and was similarly told that Westsea was not obligated to provide that information. Westsea informed me, however, that I could pre-pay its auditors to provide details

[108] Indeed, the argument that Westsea is protecting the interests of leaseholders was presented in its Appeal Factum in *Trenchard v. Westsea* CA44007; further, counsel for Westsea described me personally as a "disgruntled leaseholder" when I raised concerns by email to BDO, the auditors for Westsea – by itself this is a relatively innocuous description, but it appears to devalue the legitimacy of my concerns

[109] Transcript of the Proceedings in Chambers before Mr. Justice MacKenzie January 4-7, 2016, p. 230; counsel for Westsea asserted "it's not a report"

[110] Indeed, the presence of engineering reports in respect of the 2010/2011 windows replacement project were made clear in a letter from Westsea in March 2010 in response to inquiries from at least one leaseholder at the time; such reports were clearly relevant to my inquiries, and Westsea ought to have recognized the connection based on the substance of my request for information that may have outlined the rationale for the windows/doors project that was eventually undertaken in 2016/2017

of information[111] that I believe Westsea itself must have generated and had in its possession, and which did not need to come from its auditors.

5.3. Litigation branch #1

Consequent to Westsea's reluctance to explain the threefold increase in repair and maintenance costs, I commenced an action in the BC Supreme Court for an interpretation of a specific term in the lease that requires Westsea to exercise prudent and reasonable discretion in fulfilling its covenants under the lease. I argued that this term implies an obligation on Westsea to be transparent and, when leaseholders request such information, to disclose material information that affects their interests. I refer to this as "Litigation branch # 1".

5.3.1. Interim decision of Madam Justice Power on substituted service

Under the *Supreme Court Rules*, a party commencing an action by petition is required to serve personally all parties whose interests are affected by the action[112]. In my case, adherence to this requirement meant arranging for process servers (agents) to locate leaseholders wherever they were resident, whether that was in Victoria, the Gulf Islands, Vancouver, Arizona, California, Switzerland, or elsewhere while on vacation, and to serve a copy of my petition on these individuals in person.

Moreover, Westsea also argued that all the institutional mortgagees on title were parties whose interests were affected by my action[113], which substantially increased the difficulty associated with service. Further, process servers would have been required to prepare affidavits of service for every service effected – an onerous and very costly process. To make matters more difficult, Westsea insisted that it could not provide current contact information for leaseholders because to do so would be a breach of leaseholders' privacy[114].

To complete service as Westsea demanded would have been a feat of considerable impracticality, if not near-impossibility. Because of Westsea's insistence on personal service, both in respect of all leaseholders and all the mortgagees on title, I successfully sought an order

[111] Letter from Westsea to Trenchard, June 9, 2014
[112] *Supreme Court Rules*, Rule 16-1(3)
[113] Letter from counsel for Westsea, dated September 10, 2014
[114] Ibid note 110

from the court for substituted service[115] (which did not include mortgagee institutions). This meant that rather than being required to serve all the leaseholders personally, I could serve them by email or by inserting copies of my amended petition, as it was at the time, into leaseholders' mailboxes located in the Orchard House lobby.

Under one of the terms of the court order, I was not required to serve "those resident mailboxes associated with units belonging to the Respondent", and Westsea's counsel provided me with a list of these unit numbers. Indeed, I recall that during actual court proceedings, counsel for Westsea intimated they were doing me a favor by reducing the number of units I needed to serve.

With the court order for substituted service in hand, I spent a week of evenings and a weekend in February/early March 2015 preparing copies of my amended petition and folding them so they could be inserted into all the mailboxes at Orchard House. The following weekend, I spent a few hours emailing and inserting documents in mailboxes and, for those mailboxes that were full, I mailed them by Canada Post.[116]

Shortly after I completed substituted service, I received a letter from Westsea's legal counsel[117]. In this letter, counsel for Westsea stated:

> "It has come to our attention that you have delivered litigation material in relation to the above-noted Petition to mailboxes to tenants of Westsea Construction Ltd. As a result, you are in violation of the terms of the Order of Madam Justice Power, made January 22, 2015.
>
> "Your conduct is completely inappropriate. We intend to bring your conduct to the attention of the Court, and may also seek instructions to bring applications in relation to your contempt of Court. Should you continue to breach orders of the Court Westsea will, in addition to applying for an order dismissing your Petition entirely, seek special costs against you for acting in contempt of Court."

Needless to say I found this surprising, given my meticulous efforts to effect service properly according to the court order[118]. Since Westsea's counsel delivered its letter before I had completed my affidavit of service, I included this letter in my affidavit – in itself no small feat to prepare – so I could explain the possibility of having mistakenly inserted documents into mailboxes of one or more units owned by Westsea, and why this was not done deliberately.

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[115] *Trenchard v. Westsea Construction Ltd*. 14-2941; order of Madam Justice Power, in Chambers, January 15, 2015, entered February 16, 2015, pursuant to Rule 4-4 of the *Supreme Court Rules*
[116] Affidavit of Service of Hugh Trenchard, sworn and filed March 23, 2015
[117] Letter from counsel for Westsea to Trenchard, dated March 9, 2015
[118] Ibid 113, in which I identified sources of possible error in effecting delivery into the mailboxes

In mentioning this letter, it is only my intention to give another example of why a court process to resolve basic issues between lessor and lessees, particularly in circumstances in which numerous leaseholders are common parties to a lease, is generally unfavourable for leaseholders. Even the assistance of a court does not prevent counsel for the landlord from sending what seems to be unnecessarily peremptory correspondence that might discourage unrepresented leaseholders from seeking resolution to legitimate issues. This circumstance reinforces why it is necessary to legislate a reasonable and simplified dispute resolution process. Again, Robin Blencoe's foresight in recognizing just these sorts of problems with the court processes for lessor/lessee disputes was highly prescient.

5.3.2. The decision of Mr. Justice MacKenzie on whether litigation costs are an Operating Expense

The petition eventually went before the court in January 2015. After four days of hearings, the parties came to an agreement whereby my application to the court to find that the lease contained an obligation on Westsea to disclose pertinent requested information, would be dismissed by consent on the basis that Westsea would disclose a single engineering report to the leaseholders.

However, an additional issue I had raised was whether Westsea could charge its litigation costs back to all the leaseholders as an operating expense under the lease. The parties argued this matter before Mr. Justice MacKenzie. In his decision[119], Mr. Justice MacKenzie found the lease to mean Westsea could not charge its litigation costs as an operating expense under the lease.

5.3.3. Westsea's appeal

Westsea appealed Mr. Justice MacKenzie's decision. The Court of Appeal hearing occurred more than a year later. The Court of Appeal held that Mr. Justice MacKenzie's decision was premature; that Westsea first had to attempt to charge its litigation costs to all the leaseholders, and if leaseholders refused, to sue them for the costs[120]. Until Westsea had taken this step, the Court of Appeal found that the leaseholders had not been given proper notice of Westsea's election to seek its costs under the lease; only after that step could a court properly decide the interpretation issue. The Court of Appeal, however, specifically did not overturn Mr.

[119] *Trenchard v. Westsea Construction Ltd*., 2016 BCSC 1752 (CanLII)
[120] *Trenchard v. Westsea Construction Ltd*., 2017 BCCA 352 (CanLII)

Justice MacKenzie's interpretation of the lease, leaving open the possibility that, on new litigation, a court will follow the reasoning of Mr. Justice MacKenzie to order that Westsea cannot charge its litigation costs to the leaseholders.

Westsea has since gone back and demanded its litigation costs from the leaseholders – roughly fulfilling the required procedure as outlined by the Court of Appeal by including the cost among a variety of other operating expenses that total a 38% increase in operating costs for 2018, but without identifying the specific amount being charged as a litigation cost[121]. Leaseholders have been unable to determine how much of the 38% increase is due to the litigation costs, and some leaseholders have mistakenly but understandably attributed most, or a high proportion, of that 38% increase to the litigation costs[122]. In addition, leaseholders are unable to determine what proportion of these litigation costs are being charged in advance of their being incurred, as opposed to those which may already have been incurred.

To compound the problem – and this is egregious in my opinion, and really underscores why legislative intervention is now necessary – Westsea has stated that if leaseholders do not pay the cost, Westsea may take proceedings in default to terminate leaseholders' interests. So, by effectively pressing the re-set button on these issues, the Court of Appeal decision means that leaseholders must now fight a landlord who is threatening to terminate their leases if leaseholders do not pay the litigation costs[123].

It is true that the Court of Appeal did not overturn Mr. Justice MacKenzie's interpretation that Westsea's litigation costs are not operating costs – so this remains good law – but what leaseholder is willing to litigate with Westsea in these circumstances? Often individuals acquire these leasehold interests because they are less costly than strata and fee-simple properties. Such people do not possess the means to hire lawyers to fight these issues. Nor do I, but I happen to

[121] Letter from Westsea to leaseholders dated October 24, 2017
[122] Emails to Trenchard from leaseholders (not named)
[123] Letter from Singleton Reynolds, counsel for Westsea, January 16, 2018 "If any leaseholder fails to pay their share of operating expenses, we have been instructed to initiate proceedings against any defaulting leaseholder, which may include applying to the Supreme Court of British Columbia for an order terminating the lease of your suite, or in the alternative, a court ordered sale of your leasehold interest." By lumping in litigation costs in with "share of operating expenses", the writer is ambiguous as to the effect of disputing litigation costs in isolation from other costs, which by themselves would be unlikely to constitute a material breach of the lease to allow Westsea to repudiate the lease: *Stearman v. Powers*, 2014 BCCA 206; however, the letter is sufficiently intimidating and few would risk disputing payment for litigation costs in these circumstances – this is a consequence the Court of Appeal did not foresee, nor was a meaningful opportunity given to the parties to make submissions on this point.

have many years of experience in various facets of the legal profession generally, and am well-trained to undertake the procedural steps involved and to understand the substantive legal issues.

Thus, leaseholders are left in a fundamentally unworkable situation that has not at all been resolved by the courts; circumstances that have in fact now been exacerbated by the courts. This is precisely the sort of circumstance that our elected policy makers ought to take legislative steps to rectify. The reality is that our circumstances are not much different from those of landlords and tenants in the 1960s and early 70's before comprehensive legislation swept across North America and the Commonwealth to redress the very sorts of power imbalances we continue to experience in these leases.

Although it is fair to say that the current issues have only recently become exposed to the light of day because the buildings themselves are just reaching their mid-life and becoming in need of major repairs, renovations and upgrades, it is apparent that in these circumstances the leases are skewed in favor of the landlords. So it is only now becoming abundantly clear that the absence of legislation to regulate these leases is a glaring omission of government action.[124]

5.4. Litigation branch #2

About two years later in about July 2016, after Westsea notified leaseholders of a cost increase from about $3.5 million to $5.5 million and started its windows and doors project, I commenced "Litigation branch #2". This branch involves the question of who, under the lease, is in fact obligated to pay for the windows/doors replacement project.

Soon after, Westsea applied to have this action struck on the basis that it was *res judicata*, meaning the issues had been decided under Litigation branch #1. Westsea's application was unsuccessful[125] and they subsequently appealed. In December 2017, Westsea abandoned its appeal. The parties have since re-set the trial date for June 3, 2019 for 15 days, and there is a Case Planning Conference set for April 12, 2018, in which I will seek orders relating to Westsea's witnesses, expert witnesses, disclosure, and costs.

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[124] See my argument and the references in my Memorandum of Argument contained in my Application for Leave to Appeal to the Supreme Court of Canada; it should also be noted that the Province began a review of these leases in 2003, but for whatever reason, that review was discontinued before any legislative action occurred: Ministry of Community, Aboriginal and Women's Services – Housing Policy Branch. April 2003. *Life Lease and Long Term Lease Housing – Discussion Paper*.

[125] *Trenchard v. Westsea Construction Ltd*. SC16-3355 per Madam Justice Power in Chambers, August 2, 2017

6. Litigation outline

6.1. Litigation branch #1

2013 – 2015

- Trenchard asks Westsea to disclose an engineering report. Westsea refuses or resists (although Westsea argues it always intended to provide such a report).
- Trenchard applies (by Petition) for an interpretation of the lease that requires Westsea to be transparent about its costs.
- Before the hearing on its merits, Trenchard applies for and obtains an order from the court for substituted service.

2016

- January 4-7: Petition hearing. After 4 hearing days, parties agree by consent (the "Consent Order") to dismiss Trenchard's application on condition that Westsea would send a letter promising to send an engineering report. Mr. Justice MacKenzie also heard submissions on issue of whether Westsea could charge its litigation costs as operating expenses under the lease.
- February: Further to the Consent Order, Westsea sends letter to leaseholders.
- March: Further to the Consent Order, Westsea sends engineering report.
- September: Mr. Justice MacKenzie issues decision that litigation costs are <u>not</u> operating expenses under the lease.
- Westsea appeals decision of Mr. Justice MacKenzie.

2017

- October: Court of Appeal (CA) allows Westsea's appeal in part. Court of Appeal did not overturn lower court interpretation, but said that Westsea, if it elects to seek recovery of its litigation costs related to the Petition, must first send leaseholders a bill and, if leaseholders refuse to pay, to sue them for recovery.
- October: Westsea informs leaseholders of 38% increase in operating costs including "legal costs", which apparently includes Westsea's litigation costs from the Petition.
- November: Trenchard files an application for leave to appeal the CA decision to the Supreme Court of Canada (SCC).
- December: Hearing before CA Registrar to settle terms of CA Order, since parties did not agree as to proper terms. Registrar agreed with Westsea that the CA did not specifically order Westsea to itemize its costs since that was only part of CA rationale to allow Westsea's appeal, in part, of Mr. Justice MacKenzie's decision.

2018

- February 8: SCC registry formally opens leave application file.
- March: Westsea files and serves its SCC Application for Leave to Cross-Appeal.
- March. Trenchard files and serves a Response to the Westsea's Application for Leave to Cross-Appeal.

6.2. Litigation branch #2

2016

- July: Westsea notifies leaseholders of windows/doors project and starts actual project.
- August: Trenchard commences action.
- October: Trenchard amends claims.
- December: Westsea applies to strike claims as *res judicata* on basis that the Petition matter decided same issues.

2017

- June: Hearing whether to strike claims, and my application to further amend my claims.
- July: Westsea completes windows/doors project.
- August: Court dismisses Westsea's *res judicata* claim, allows my application to amend, and orders costs payable forthwith to Trenchard.
- August: Westsea pays $2800 costs to Trenchard.
- September: Westsea appeals decision. Due to Westea's appeal, parties agree to adjourn trial date originally set for May 2018.
- November: Westsea abandons appeal.
- December: Trenchard files amended claims further to court decision. Parties re-set trial date for 15 days starting June 3, 2019.

2018

- April: Case Planning Conference set for April 12, 2018 regarding disclosure, witnesses, and costs.
- Anticipated examinations for discovery of parties' witnesses

2019

- Trial set for June 3, 2019.

Acknowledgments

Special thanks to those leaseholders who have provided copies of lease-related documents, and those individuals who offered editing assistance and comments on how to improve this paper.

7. Recommended models and guides for new legislation

Commonhold and Leasehold Reform Act 2002, 2002 c. 19 (UK)

Commonhold and Leasehold Reform Act 2002, c. 15 Explanatory Notes, Part 2 Leasehold Reform (UK)

Discussion Paper on Conversion of Long Leases. Discussion paper 112. Scottish Law Commission, April 2001.

Hamilton, S.W. 1999. *Residential leasehold estates – a paper prepared for Canada Mortgage and Housing Corporation*, Faculty of Commerce and Business Administration, UBC.

Lamont, D. Q.C. *Residential Tenancies* (3rd ed.) The Carswell Company, Toronto (1978)

Landlord and Tenant Act 1985, 1985. c.70 (UK)

Landlord and Tenant Act 1987, 1987 c. 31 (UK)

Law Reform Commission of British Columbia. 1973. *Report on the Landlord and Tenant Relationships: Residential Tenancies* (Project No. 12)

Law Reform Commission of British Columbia. 1989. *Report on the Commercial Tenancy Act* LRC 108

Ministry of Community, Aboriginal and Women's Services – Housing Policy Branch. April 2003. *Life Lease and Long Term Lease Housing – Discussion Paper*.

Ontario Law Reform Commission. 1968. *Interim Report on the Landlord and Tenant Law Applicable to Residential Tenancies*

Residential Tenancies Act, 2006, S.O. 2006, c. 17 (specifically in relation to guidelines for eligible capital expenditures and extraordinary operating costs)

Various U.S. residential tenancy legislation that prohibits landlords from charging their attorney's fees to tenants; e.g. *AZ Rev Stat* par. 33-1315 (2016) Title 33 – Property Prohibited provisions in rental agreements *Landlord and Tenant Act 1985*, 1985. c.70