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CHAPTER 1

INTRODUCTION

This is the fourth in a series of Reports on commercial tenancy law.[1] Unlike the preceding Reports, this Report does not tackle large and complex issues but instead deals with the following three small and unrelated areas of commercial tenancy law.

- The common law distinguishes between tenants who have entered into a lease but have not yet entered into possession of the lease premises (tenants with an interest called an *interesse termini*) and those who have entered into a lease and also entered into possession of the lease premises (tenants with a leasehold estate). The rights and obligations of landlords and tenants differ depending upon whether the tenant has entered the premises.

- A person who has been given the power to grant a lease to a tenant may do so in a manner that does not comply with the authority that he or she has been given. *The Landlord and Tenant Act* contains several provisions which allow for some of these leases to be saved, but only where the tenant has entered into possession of the lease premises.

- *The Landlord and Tenant Act* exempts a tenant, as sublandlord, from having to produce the title to the land to a prospective subtenant.

In this Report, we will consider whether any of these rules are still necessary.

We begin in Chapter 2 by discussing *interesse termini*. In Chapter 3, we discuss defective leases made under powers to lease. Chapter 4 deals with the obligation to show title. Chapter 5 contains a list of our recommendations.

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[1]The other Reports in the series are: Manitoba Law Reform Commission, *Distress for Rent in Commercial Tenancies* (Report #81, 1994); *Covenants in Commercial Tenancies* (Report #86, 1995); and *Fundamental Breach and Frustration in Commercial Tenancies* (Report #92, 1996).

CHAPTER 2

INTERESSE TERMINI

A. INTRODUCTION

A landlord and tenant may agree to have their lease begin immediately or at a future date.[1] In either case, until a tenant physically enters and takes possession of the lease premises, the tenant has an interest in the lease premises which is called an *interesse termini*:[2] "an absolute proprietary right to take possession of the land when the stipulated time for commencement of the lease arrive[s]."[3] This interest entitles the tenant to enter and take possession of the lease premises when the term of the lease begins.[4]

Thus, after a lease is executed, if the term of the lease is to begin immediately, the tenant is entitled to enter the lease premises immediately. If the term of the lease is to begin at a future date, the tenant has the right to enter and take possession of the lease premises on the future date.

An *interesse termini* is an interest only, not an estate in the lease premises. An estate vests in the tenant only when the tenant physically enters and takes possession of the lease premises. Until the tenant's entry, the entire estate belongs to the landlord.[5] This results in significant consequences to landlords and tenants.

B. THE LAW

A tenant with only an *interesse termini* cannot enforce against the landlord a covenant which depends upon him or her being in possession of the lease premises. This means that a tenant who has not entered the lease premises cannot maintain an action against the landlord for a breach of the covenant for quiet enjoyment, since the essence of such a breach is the disturbance of the tenant's possession.[6] In addition, a tenant who has not entered the lease premises cannot maintain an action for trespass against a trespasser, as this action also depends upon the tenant having entered the lease premises.[7]

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[1]A lease that is to take effect from a future date may be granted for a term which is to commence from or after the expiration or other determination of a previous lease (a reversionary lease) or it may be simply a future interest for years; they are treated as synonymous: *Woodfall's Law of Landlord and Tenant*, vol.1 (28th ed., 1978) (release 34, 1995) 6/12.

[2]*Edge* v. *Strafford* (1831), 1 C. & J. 391 at 398, 148 E.R. 1474 at 1477 (Ex.); *Doe d. Rawlings* v. *Walker* (1826), 5 B. & C. 111 at 118-119, 108 E.R. 41 at 44 (K.B.); *Lewis* v. *Baker*, [1905] 1 Ch. 46 at 51.

[3]*Woodfall's Law of Landlord and Tenant*, *supra* n. 1, at 6/14-6/15.

[4]*Mann, Crossman & Paulin, Ltd.* v. *The Registrar of the Land Registry*, [1918] 1 Ch. 202 at 210.

[5]*Lewis* v. *Baker*, *supra* n. 2, at 52; *Doe d. Rawlings* v. *Walker*, *supra* n. 2, at 118, 44.

[6]*Wallis* v. *Hands*, [1893] 2 Ch. 75 at 84-85; *Reaume* v. *Lalonde*, [1939] O.W.N. 167 at 168 (C.A.).

[7]*Wallis* v. *Hands*, *supra* n. 6, at 85-86; *Harrison* v. *Blackburn* (1864), 17 C.B. (N.S.) 678 at 691, 144 E.R. 272 at 277 (C.P.); *Ryan* v. *Clark* (1849), 14 Q.B. 65 at 73, 117 E.R. 26 at 29.

If the previous tenant wrongly remains in possession, a tenant with an *interesse termini* can sue the previous tenant in order to have him or her ejected.[8] However, although a landlord is entitled to sue a tenant who remains in possession after the term ends for a penalty equal to "double the yearly value of the land so detained"[9] (provided that the landlord gives notice in writing to deliver up the possession), a tenant who is kept out of possession cannot do so, as this remedy is only available to the person who holds the reversion in the lease property.[10] If the landlord refuses to give possession or the previous tenant rightly or wrongly remains in possession, a tenant can sue the landlord for damages[11] and can withdraw from the lease.[12] However, a tenant who has not yet entered may not be able to sue the landlord directly for possession because he or she does not have an estate on which to base a claim for possession.[13]

A tenant or his or her assignee becomes obligated to perform the tenant's covenants upon the commencement of the lease or assignment whether or not he or she enters the lease premises.[14] If the amount of rent is not agreed upon, a tenant who occupies the premises must still pay a reasonable amount of compensation to the landlord for the use and occupation of the lease premises. However, a tenant will only be liable to the landlord for the use and occupation of lease premises where he or she actually entered the premises and so has "had, held, used, occupied, possessed and enjoyed"[15] the premises.

Since an *interesse termini* is an interest only and not an estate, it cannot be conveyed as an estate.[16] In addition, an *interesse termini* cannot be surrendered to the landlord; nor can the landlord's estate be merged with it.[17] An *interesse termini* remains separate and distinct from these estates.

Thus, for example, in *Lewis* v. *Baker*, a tenant, who had an immediate lease interest in possession and a further lease interest to commence in the future immediately following the first lease in the same lease property and who 'sublet' the lease property for a term longer than his immediate subsisting lease, did not retain a reversion in the subsisting lease as, in effect, he had assigned the whole of the term of the subsisting lease as opposed to granting a sublease. The tenant's future interest in the lease property did not merge with his interest in the subsisting lease

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[8]*Coe* v. *Clay* (1829), 5 Bing. 440, 130 E.R. 1131 (C.P.); *Doe d. Parsley* v. *Day* (1842), 2 Q.B. 147 at 156, 114 E.R. 58 at 62.

[9]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 52.

[10]*Blatchford* v. *Cole* (1858), 5 C.B. (N.S.) 514, 141 E.R. 208 (C.P.). See also *Woodfall's Law of Landlord and Tenant*, *supra* n. 1, at 6/12, n. 77.

[11]*Coe* v. *Clay*, *supra* n. 8; *Reaume* v. *Lalonde*, *supra* n. 6.

[12]B. Laskin, *Cases and Notes on Land Law* (Rev. ed., 1964) 189.

[13]*Id.*, at 189. Laskin notes, however, that dicta in a number of cases indicate that when the term of a lease commences immediately, the tenant can sue the landlord directly for possession (at 189-190, citing *Doe d. Parsley* v. *Day*, *supra* n. 8, and *Ryan* v. *Clark*, *supra* n. 7).

[14]*Harrison* v. *Blackburn*, *supra* n. 7, at 691, 277; *Ryan* v. *Clark*, *supra* n. 7, at 73, 29; *Williams* v. *Bosanquet* (1819), 1 Brod. & B. 238 at 258 and 262, 129 E.R. 714 at 721 and 723 (C.P.). So too is the landlord obligated by most of his or her lease obligations (such as the obligation to yield up the lease property in repair), whether or not the tenant enters: *Lewis* v. *Baker*, *supra* n. 2, at 52.

[15]*Edge* v. *Strafford*, *supra* n. 2, at 397, 1477; *Lowe* v. *Ross* (1850), 5 Ex. 553 at 556, 155 E.R. 242 at 244.

[16]*Doe d. Rawlings* v. *Walker*, *supra* n. 2, at 118, 44; *Lewis* v. *Baker*, *supra* n. 2, at 52. However, an *interesse termini* can be granted by the tenant to another person and it passes on the tenant's death to the tenant's executors or administrators: *Took* v. *Glascock* (1669), 1 Wms. Saund. 250 at 251, 85 E.R. 298 at 299, editor's n. 1 (K.B.). See also *Wheeler* v. *Thorogood* (1589), Cro. Eliz. 127, 78 E.R. 384 (Q.B.); *Williams* v. *Bosanquet*, *supra* n. 14, at 256, 721; *Lock* v. *Furze* (1865), 19 C.B. (N.S.) 96 at 118 and 122, 144 E.R. 722 at 731 and 732 (C.P.); *Mann, Crossman & Paulin, Ltd.* v. *The Registrar of the Land Registry*, *supra* n. 4, at 208 and 210; *Edge* v. *Strafford*, *supra* n. 2, at 398, 1477.

[17]*Doe d. Rawlings* v. *Walker*, *supra* n. 2, at 118-119 and 122-123, 44-45.

so as to vest in him a reversion in the property. Instead, the reversion during the subsisting term was vested in the head landlord. This meant that the tenant was not able to distrain against his 'subtenant' during the term of the subsisting lease.[18] Similarly, when a landlord grants two leases in the same property, one with a term to commence immediately and another with a term to commence at a future date, his or her interest in the two leases remains separate. The landlord retains the reversion in the subsisting lease[19] and so can distrain for rent under the subsisting lease.[20]

C. PROBLEMS WITH THE LAW

The *interesse termini* rule has been criticized for lacking justification and for being unduly complex[21] (the proof of this is surely in the preceding discussion). It has also been described -- in 1918 -- as "an archaic survival which has no place in our present jurisprudence".[22] The rule is also seen as having the potential to cause considerable harm to commercial tenants. Location and layout of lease premises are considered to be so important to commercial tenants that an enforceable right to possession against the landlord is seen to be a necessary remedy.[23] Allowing tenants who are prevented from entering lease premises when entitled to do so to enforce a right to possession against their landlords is thought to be particularly reasonable where no outstanding rights of third persons would be affected.[24]

The Ontario Law Reform Commission summarized the problem in this way: "*interesse termini* represents another instance of the negative impact of the estate aspect of landlord and tenant law."[25]

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[18]*Lewis* v. *Baker*, *supra* n. 2. See also *Woodfall's Landlord and Tenant*, *supra* n. 1, at 6/15, where it is suggested that to preserve a reversion in himself or herself, the tenant should, before subletting, obtain the grant to himself or herself of an immediate concurrent lease for a longer term, instead of the grant of a future lease to follow the subsisting term.

[19]*Doe d. Rawlings* v. *Walker*, *supra* n. 2, at 118-119 and 122-123, 44-45; *Lewis* v. *Baker*, *supra* n. 2, at 52. See also *Woodfall's Law of Landlord and Tenant*, *supra* n. 1, at 6/15.

[20]*Smith* v. *Day* (1837), 2 M. & W. 684, 150 E.R. 931 (Ex.).

[21]Property Law and Equity Reform Committee (N.Z.), *Legislation Relating to Landlord and Tenant* (Final Report, 1986) 13.

[22]Note, "Is *Interesse Termini* Necessary?" (1918), 18 Colum. L. Rev. 595 at 596.

[23]Ontario Law Reform Commission, *Landlord and Tenant Law* (Report, 1976) 61.

[24]Laskin, *Cases and Notes on Land Law*, *supra* n. 12, at 190.

[25]Ontario Law Reform Commission, *Landlord and Tenant Law Applicable to Residential Tenancies* (Interim Report, 1968) 58. The Ontario Law Reform Commission also criticized the *interesse termini* doctrine for the fact that damages which can be awarded to a tenant who is not given possession pursuant to a lease are inadequate: Ontario Law Reform Commission, *Landlord and Tenant Law*, *supra* n. 23, at 61. At the time of that Report, where possession could not be given because of a defect in the landlord's title, such as where the previous tenant remained in possession under an option to renew of which the landlord was unaware, the measure of damages was governed by the rule in *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158. This rule limited the availability of damages for breach of contract concerning an interest in land, including a lease interest. A tenant's recovery of damages was limited to certain expenses, such as the cost of preparation of the lease by a lawyer; the tenant could not recover for damages for the loss of his or her bargain: *Reaume* v. *Lalonde*, *supra* n. 6, at 168, citing *Rotman* v. *Pennett* (1920), 47 O.L.R. 433 (H.C.), aff'd (1921), 49 O.L.R. 114 (C.A.). However, the Supreme Court of Canada has since recommended in *obiter dictum* "that the rule in *Bain v. Fothergill* should no longer be followed in respect of land transactions in those Provinces which have a Torrens system of title registration or a near similar system.": *A.V.G. Management Science Ltd.* v. *Barwell Developments Ltd.* (1978), 92 D.L.R. (3d) 289 at 301 (S.C.C.). This recommendation has been followed, for example, by *Kopec* v. *Pyret*, [1987] 3 W.W.R. 449 (Sask. C.A.) (a sale of land case). If the *Bain* v. *Fothergill* rule is no longer applied to commercial leases, a tenant should be able to recover damages in accordance with contract principles for not being put into possession for a defect in the title.

D. REFORM

Law reform agencies that have considered the doctrine of *interesse termini* agree that the doctrine should be abolished.[26] The Ontario Law Reform Commission felt that a commercial tenant should have the same rights both before and after he or she takes possession, in particular that he or she should be able to obtain a judgment for possession prior to entry to the lease premises.[27] The Property Law and Equity Reform Committee (New Zealand) commented that the complexity caused by the rule of *interesse termini* could "be reduced without any great loss to legal doctrine, and with beneficial practical results."[28] The New Zealand Law Commission indicated that, in their view, a tenant should not need to perfect title to lease premises by taking possession.[29]

The rule has been abolished in Manitoba[30] and in most of the other Canadian common law provinces for residential tenancies[31] and it has been abolished for both residential and commercial tenancies in Alberta[32] and England.[33]

We also are convinced of the need to abolish this rule for commercial tenancies.

RECOMMENDATION 1

Legislation should abolish the doctrine of interesse termini for commercial tenancies.

The effect of abolition would be that a grant of a lease for a term to commence immediately or from a future date would vest in the tenant an estate in the land to take effect from the date fixed for the commencement of the term without actual entry by the tenant. After the date for commencement of the term, the tenant would be able to maintain an action for trespass or an action for a breach of a covenant without the necessity for entry.[34] In addition, a tenant would be able to sue a landlord not only for damages but also for possession.

In the rare case where a lease does not stipulate the amount of rent, the landlord would be able to sue the tenant for use and occupation of the lease premises (after the term commences), even if the tenant has not yet entered the lease premises.

Abolition would not affect the principle that the grant of a lease with a term to commence at a future date would not operate as an immediate assignment of the landlord's reversion to the

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[26]Ontario Law Reform Commission, *Landlord and Tenant Law*, *supra* n. 23, at 61; Property Law and Equity Reform Committee (N.Z.), *Legislation Relating to Landlord and Tenant*, *supra* n. 21, at 13-14; Law Commission (N.Z.), *A New Property Law Act* (Report #29, 1994) 56 and 271.

[27]Ontario Law Reform Commission, *Landlord and Tenant Law*, *supra* n. 23, at 61.

[28]Property Law and Equity Reform Committee (N.Z.), *Legislation Relating to Landlord and Tenant*, *supra* n. 21, at 13.

[29]Law Commission (N.Z.), *A New Property Law Act*, *supra* n. 26, at 271.

[30]*The Residential Tenancies Act*, C.C.S.M. c. R119, s. 192 (2).

[31]*Residential Tenancy Act*, R.S.B.C. 1979, c. 365.1, s. 48 (3); *Residential Tenancies Act*, R.S.N. 1990, c. R-14, s. 16; *Landlord and Tenant Act*, R.S.O. 1990, c. L.7, s. 85; *The Residential Tenancies Act*, R.S.S. 1978, c. R-22, s. 14; *Residential Tenancies Act*, R.S.N.W.T. 1988, c. R-5, s. 2(3); *Landlord and Tenant Act*, R.S.Y. 1986, c. 98, s. 66.

[32]*Law of Property Act*, R.S.A. 1980, c. L-8, s. 59.3.

[33]*Law of Property Act, 1925* (U.K.), 15 & 16 Geo. 5, c. 20, ss. 149 (1) and (2).

[34]*Woodfall's Law of Landlord and Tenant*, *supra* n. 1, at 6/14-6/15: this would reverse *Wallis* v. *Hands*, *supra* n. 6.

tenant.[35] However, abolition may mean that once the date for the term of a lease that is to commence in the future passes, the tenant under the future lease would be entitled to maintain an action for double value against an overholding tenant.[36]

[35]"It is considered that the general proposition that the grant of a reversionary lease [lease which commences from a future date or after the expiration of another lease] does not transfer the reversion remains correct despite the abolition of the doctrine of *interesse termini*. . . .": *Woodfall's Law of Landlord and Tenant*, *supra* n. 1, at 6/12, n. 77.

[36]*Woodfall's Law of Landlord and Tenant*, *supra* n. 1, at 6/12, n. 77. In Manitoba, s. 52 of *The Landlord and Tenant Act*, C.C.S.M. c. L70, provides for the penalty of double value against overholding tenants.

CHAPTER 3

OBLIGATION TO SHOW TITLE

A. INTRODUCTION

A contract to grant a lease, sublease or assignment is an agreement in which the parties promise to enter into one of these documents in the future. In this Chapter, we will consider one aspect of such a contract: the obligation to show title.

B. THE LAW

At common law, when a person who intended to become a tenant[1] entered into an agreement to lease, he or she was entitled to be given full disclosure of the title to the land.[2] In practice, a prospective tenant would not always ask to be shown the title, particularly for a lease of a great estate, relying instead on the honour of the landlord.[3] However, the prudent approach would have been to exercise this right because a prospective tenant who did not use due diligence in looking into the title was deemed to have constructive notice of the encumbrances which affected the title.[4] An exception was made where "the deed cannot be got at, or for some other reason, where, with the exercise of all the prudence in the world, you cannot see it, and then there may be no constructive notice affecting the title. . . ."[5]

A person who was obligated to produce the title to the freehold had an onerous job due to the conveyancing system which existed in England at the time.

> . . . [T]he common law made it very difficult for a purchaser of an estate or interest in land to be sure that they had acquired the estate or interest they had bargained for. This was its great difficulty. A purchaser ran the risk that the title they acquired was invalid for any of the following reasons:
>
> (1) that a title document through which the seller derived title was invalid;
>
> (2) that a lost document did not support the seller's title, or even adversely affected it;
>
> (3) that the transfer tendered to the purchaser was not valid;
>
> (4) that the seller had granted a previous legal interest in the land to some other person; and

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[1]For the purposes of this Chapter, "tenant" includes subtenant and assignee unless the context requires otherwise. "Landlord" includes sublandlord and assignee. "Lease" includes a sublease and assignment.

[2]R. Megarry and H.W.R. Wade, *The Law of Real Property* (5th ed., 1984) 724.

[3]*Keech* v. *Hall* (1778), 1 Dougl. 21 at 23, 99 E.R. 17 at 18 (K.B.). But see Megarry and Wade, *The Law of Real Property*, *supra* n. 2, at 724.

[4]*Keech v. Hall*, *supra* n. 3, at 23, 18; *Patman v. Harland* (1881), 17 Ch.D. 353 at 355; *Feilden* v. *Slater* (1869), L.R. 7 Eq. 523 at 530.

[5]*Patman* v. *Harland*, *supra* n. 4, at 356.

(5) that there was a prior equitable interest or equity in existence.

A purchaser who was a *bona fide* purchaser for value would not be affected by a prior equitable interest, but the doctrine of constructive notice, under which a purchaser was fixed with notice of all interests that would have been discovered by a reasonable investigation, exacerbated purchasers' difficulties.

Conveyancers developed elaborate procedures to guard against these risks. There being no official source of land ownership information, purchasers' advisers investigated title backwards for a period of time sufficient to give reasonable assurance that adverse claims to the land would have come forward - sixty years was such a period. Purchasers usually received title deeds which, if valid, established their ownership. They and their advisers made investigations to determine who was in possession. All this made the acquisition of estates and interests in land expensive, slow and difficult. Despite such investigations, a purchaser's title was uncertain because of the risks mentioned above, which could not be completely nullified by the most careful investigation.[6]

The difficulties faced by conveyancers led to the enactment of legislation in England which was intended to make the acquisition of interests in land quicker, cheaper, easier and safer. The legislation allowed individuals to record documents affecting land in a facility provided by the government.[7] This public recording system made the investigation of title and verification by the purchaser less onerous. However, it did not provide a means for determining the legal effect of encumbrances affecting the title. A person who searched the title had to examine each recorded instrument to consider whether it was made by the proper parties, in proper form and duly executed in order to determine the legal effect of each instrument.[8]

Thus, even with the establishment of a public recording system, the landlord's obligation to show title remained an onerous one that required a great deal of time, vigilance and care. The obligation to show the title was particularly problematic for tenants who wanted to assign or sublease their lease interests, as they could not search the register without the authorization of the landlord.[9] A tenant who could not obtain the head landlord's consent to examine the register or compel the head landlord to disclose the title deeds that related to the freeholds could not comply with the rule.[10]

Landlords acknowledged the appropriateness of prospective tenants of long-term leases being able to examine the title to the land, but they considered the same practice to be too onerous for short-term leases. To avoid the obligation, landlords often stipulated in their leases that their tenants would not be entitled to be shown the title.[11]

Legislation was enacted in England which reversed the common law obligation to show title and brought the law into line with the practices of landlords.[12] The legislation provided that

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[6]Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta*, vol. 1 (Report #69, 1993) 17-18. The convention of investigating title for a period of at least 60 years was reduced to a period of at least 40 years by the *Vendor and Purchaser Act, 1874* (U.K.), 37 & 38 Vict., c. 78, s. 1; to at least 30 years by the *Law of Property Act, 1925* (U.K.), 15 & 16 Geo. 5, c. 20, s. 44(1); and to at least 15 years by the *Law of Property Act 1969* (U.K.), 1969, c. 59, s. 23.

[7]*Land Registry Act, 1862* (U.K.), 25 & 26 Vict., c. 53. For a discussion of the earliest instrument recording legislation in England, see T.W. Mapp, *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens' System* (Alberta Law Review Book Series, vol. 1, 1978) 46-49.

[8]V. Di Castri, *Registration of Title to Land*, vol. 1 (release 2, 1996) 1-12 to 1-13.

[9]*Land Registry Act, 1862* (U.K.), 25 & 26 Vict., c. 53, s. 137.

[10]Megarry and Wade, *supra* n. 2, at 724.

[11]Megarry and Wade, *supra* n. 2, at 724.

[12]*Vendor and Purchaser Act, 1874* (U.K.), 37 & 38 Vict., c. 78, s. 2, as am. by the *Conveyancing and Law of Property Act, 1881* (U.K.), 44 & 45 Vict., c. 41, ss. 3(1) and 13(1) and the *Law of Property Act, 1925* (U.K.), 15 & 16 Geo. 5, c. 20, ss. 44(2)-(4).

a prospective tenant under a contract for the grant of a lease would not be entitled to call for the title to the freehold.

However, a person who intended to become a tenant could make it a prerequisite of entering into the contract that he or she be given a fuller disclosure of the title;[13] it was advisable to do so particularly for a long lease, as the tenant bore the risk of the title turning out to be bad.[14] For example, a tenant who did not inspect the landlord's title would be subject to any restrictions that affected the freehold.[15] Thus, a tenant who did not ask to see the landlord's title was in the same position as one who, prior to the legislation being enacted, expressly bargained to take the lease without looking into the landlord's title: bound by constructive notice of the contents of the title.[16]

The rule that a prospective tenant had constructive notice of encumbrances affecting the title despite his or her lack of entitlement to be shown the title was considered to be unjust to tenants. The rule was abrogated in England by the enactment of subsection 44(5) of the *Law of Property Act, 1925*. It provides that a prospective tenant who is not entitled to call for the title to the freehold (but who could have contracted to be shown the title) shall not "be deemed to be affected with notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice."[17] However, if an encumbrance that is required or authorized to be registered is registered, the purchaser will be deemed to have actual notice of the registered interest.[18] Thus, in England, a prospective tenant should refuse to enter into a contract to lease unless he or she first obtains the permission of the landlord to inspect the register.[19]

Manitoba has enacted legislation similar to the early English legislation. Section 9 of Manitoba's *Landlord and Tenant Act*[20] provides that, where a tenant enters into a contract to grant a lease with a prospective subtenant, the subtenant is not entitled to be shown the head

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[13]*Vendor and Purchaser Act, 1874* (U.K.), 37 & 38 Vict., c. 78, s. 2, as am. by the *Conveyancing and Law of Property Act, 1881* (U.K.), 44 & 45 Vict., c. 41, ss. 3(9) and 13(2) and the *Law of Property Act, 1925* (U.K.), 15 & 16 Geo. 5, c. 20, s. 44(11). See also *Thornewell* v. *Johnson* (1881), 50 L.J. Ch. 641 (H.C.J.); *Patman* v. *Harland* (1881), 17 Ch. D. 353 at 359.

[14]Megarry and Wade, *The Law of Real Property*, *supra* n. 2, at 725.

[15]*White* v. *Bijou Mansions, Ltd.*, [1937] 1 Ch. 610 at 619.

[16]*Patman* v. *Harland*, *supra* n. 4, at 359.

[17]*Law of Property Act, 1925* (U.K.), 15 & 16 Geo. 5, c. 20, s. 44(5). It has been suggested that the words "title to" a lease or sublease include the lease or sublease itself: Megarry and Wade, *The Law of Real Property*, *supra* n. 2, at 724. Subsection 44(5) has been criticized (*id.*, at 725-726):

> Taken by itself, this provision merely shifts the hardship from the shoulders of the lessee on to those of the owner of the equitable incumbrance; for the lessee, when his lease is granted, becomes a purchaser of a legal estate for value without notice, and the equitable interest is void against him. For example, he could build in violation of a restrictive covenant, so that the person entitled to the benefit of it would lose it. And similarly, extraordinary as it may seem, he could take free from an equitable mortgage made by deposit of title deeds. The Law of Property Act 1925 has provided a remedy which is worse than the disease, for it creates insecurity of property.
>
> The Act protects a purchaser only from the consequences of being unable to investigate title fully. It does not, it appears, protect him if he has notice *aliunde*, *e.g.* actual notice. This is particularly important where the equitable incumbrance is registered as a land charge, as often it will be, since registration is deemed to be actual notice.

[18]*Law of Property Act, 1925* (U.K.), 15 & 16 Geo. 5, c. 20, s. 198. The interests that could be registered are specified in the *Land Charges Act, 1925* (U.K.), 15 & 16 Geo. 5, c. 22, s. 10, as amended. See also Megarry and Wade, *The Law of Real Property*, *supra* n. 2, at 180 and 726.

[19]*White* v. *Bijou Mansions, Ltd.*, *supra* n. 15, at 619 and 621.

[20]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 9 (enacted S.M. 1931, c. 29, s. 9. This section is based on the *Conveyancing and Law of Property Act, 1881* (U.K.), 44 & 45 Vict., c. 41, s. 13). Ontario has similar legislation: *Landlord and Tenant Act*, R.S.O. 1990. c. L.7, s. 10 (enacted S.O. 1911, c. 37, s. 10).

landlord's title, unless the parties agree otherwise.[21] Unlike the English legislation, the Manitoba provision does not pertain to contracts to grant a lease nor to contracts to grant an assignment but only to contracts to grant a sublease.

Manitoba does not have equivalent legislation to the English legislation which exempts a person who is not entitled to call for the landlord's title from being deemed to have constructive notice of encumbrances noted on the title.

C. PROBLEMS WITH THE LAW

Approximately 95 to 96 percent of titles to land in Manitoba are registered under the Torrens land titles system.[22] Over time, this percentage is increasing due to several statutory provisions that allow for the conversion of "old system" land to the Torrens land titles system.[23] The Torrens system differs significantly from the conveyancing system which inspired the enactment in England of legislation respecting the obligation to show title.[24] Generally, the Torrens system allows a purchaser of an interest in land to acquire ownership free of prior interests that are not reflected in the register that is maintained by the province.[25] As a certificate of title is definitive of who is the owner of the land (with the exception of overriding interests) and as any person can examine a title to land at a Land Titles Office without permission from the proprietor of the land, any objection by a landlord to produce the title to land that is registered under the Torrens system for a prospective tenant is not well-founded. By the same token, there is no particular need for a landlord to produce the title since it is easily available to all at the Land Titles Office.

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[21]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 9:

> **Sub-lessee cannot call for title**
> **9(1)** On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.
>
> **Saving intention**
> **9(2)** This section applies only if and as far as the contrary intention is not expressed in the contract, and has effect subject to the terms of the contract and to the provisions therein contained.

[22]Telephone conversation with R.M. Wilson, Deputy Registrar General and District Registrar, Winnipeg Land Titles Office (December 12, 1995). Registration under the Torrens system is governed by *The Real Property Act*, C.C.S.M. c. R30 (first enacted as *The Real Property Act of 1885*, S.M. 1885, c. 28).

[23]For example, an owner of an estate or interest in land under the old system may apply to the district registrar of the district in which the land is situated to have the estate or interest or the whole title to the land registered under the Torrens system: *The Real Property Act*, C.C.S.M. c. R30, s. 29(1). In addition, with some exceptions, an owner who subdivides must bring the land under the Torrens system: *The Registry Act*, C.C.S.M. c. R50, s. 47(1); furthermore, an owner who deals with a mineral interest, other than a mineral lease or instruments relating thereto, must bring that interest under the Torrens system: *The Registry Act*, C.C.S.M. c. R50, s. 47(4).

[24]The present English system of conveyancing continues to differ significantly from Manitoba's system. Where title to the land is registered in England, all encumbrances which affect a tenant or tenant's assignee are readily ascertainable from the register and there is no reason for a landlord to refuse access to his or her title. However, the *Land Registration Act, 1925* (U.K.). 15 & 16 Geo. 5, c. 21, s. 110 does not assist tenants and leaves them in no better a situation than they were in under the old conveyancing system, since a tenant is unable to search the register without the registered proprietor's authority and there is no obligation on the proprietor to give permission. Thus, a tenant is bound by the encumbrances on the register but has no means of discovering what they are. As such, the pitfalls of the old conveyancing system are preserved: Megarry and Wade, *The Law of Real Property*, *supra* n. 2, at 727.

[25]*The Real Property Act*, C.C.S.M. c. R30, s. 59(1). However, a certificate of title is deemed to be subject, without mention being made on the certificate, to overriding interests such as a subsisting lease for a term of less than three years with actual occupation: *The Real Property Act*, C.C.S.M. c.R30, s. 58(1)(d). The allowance of certain interests to override the register means that a purchaser must search for a particular type of overriding interest in a location other than the register.

Of the Manitoba land that is not registered under the Torrens system, most appears to belong to the Province of Manitoba.[26] Any person who wishes to know whether land with a particular legal description is Crown land belonging to the Province of Manitoba can ascertain this by searching the registry that is administered by the Department of Natural Resources pursuant to *The Crown Lands Act*.[27] In addition, some Manitoba land not registered under the Torrens system is federally held Crown land. The ownership of this land is ascertainable by a search of various federally administered land registries.[28]

The remainder of Manitoba land not registered under the Torrens system is privately held land.[29] Although there is no authority which forces dealings with respect to non-Torrens land to be recorded in the old system registry,[30] it is probable that all dealings with respect to privately held non-Torrens land are recorded.[31] What makes this likely is that a person with an interest in land "is vulnerable to losing his interest if he does not record. . . . This prophylactic effect makes it more likely that the public records will disclose all instruments relevant to . . . [the previous owner's] claim of ownership."[32] Any person who wishes to determine ownership of land that is recorded in the old system registry can examine the abstract and conduct a search of the chain of title.[33]

As mentioned above, section 9 of *The Landlord and Tenant Act* provides that a tenant as sublandlord is not obligated to produce the title to the freehold to the prospective subtenant. This provision reversed the common law rule only insofar as contracts to grant a sublease. This distinction, would have been relevant in terms of the additional difficulty that a tenant as sublandlord would have had in producing the title for a prospective subtenant to land recorded in the old system registry. However, this provision has no logical basis today given the prevalence of the Torrens land titles system in Manitoba.

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[26]Telephone conversation with R.M. Wilson, *supra* n. 22. Any patent or grant of land from the Crown after February 20, 1914 will fall under the Torrens land titles system: *The Real Property Act*, C.C.S.M. c. R30, s. 27.

[27]*The Crown Lands Act*, C.C.S.M. c. C340, s. 11.

[28]Telephone conversation with R.M. Wilson, *supra* n. 22. Federal lands are recorded in registries administered by the federal government; for example, the *Land Titles Act*, R.S.C. 1985, c. L-5, governs the registration of land administered by the Department of Indian Affairs and Northern Development; the *Indian Act*, R.S.C. 1985, c. I-5, s. 21 provides for a "Reserve Land Register" for documents relating to possession and occupation of lands in reserves; the *National Parks Act*, R.S.C. 1985, c. N-14, describes in its Schedule the lands that constitute the National Parks of Canada.

[29]Telephone conversation with R.M. Wilson, *supra* n. 22.

[30]Recording of land not registered under the Torrens system is governed by *The Registry Act*, C.C.S.M. c. R50.

[31]Telephone conversation with R.M. Wilson, *supra* n. 22.

[32]Mapp, *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens' System*, *supra* n. 7, at 50, describing the effects of land recording statutes which he dubs "race-notice" statutes because of their focus on timeliness in recording and notice for determining the priority between purchasers. Manitoba's land recording statute falls into this category: *The Registry Act*, C.C.S.M. c. R50, s. 56. But see Megarry and Wade, *The Law of Real Property*, *supra* n. 2, at 170:

> The object of the registration of land charges is to simplify the traditional conveyancing by eliminating the doctrine of notice and the elaborate inquiries which it necessitated. If the incumbrance is registrable and duly registered, its owner is protected and the purchaser can ascertain it without trouble; if it is not registered, the purchaser takes free from it and its owner's rights against the land are defeated. Much time and trouble are thus saved. But the system will only work satisfactorily if the owners of incumbrances realise that they must take a positive step to protect themselves. That is its principal weakness, for experience has shown that even professional lawyers often neglect to register. Their clients or their insurance companies therefore pay the price of the mechanical simplicity which is achieved at the sacrifice, in some cases, of justice and equity.

[33]Telephone conversation with R.M. Wilson, *supra* n. 22. See also *The Registry Act*, C.C.S.M. c. R50, s. 65. However, although it is likely that all instruments pertaining to a piece of land are recorded, a purchaser "cannot rely on the public records; he must still make a diligent search for outstanding interests in order to protect himself from the doctrine of constructive notice.": Mapp, *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens' System*, *supra* n. 7, at 50.

D. REFORM

As discussed in the preceding section, the vast majority of titles to land in Manitoba are registered in accordance with the Torrens land titles system, a system which allows an interested person to easily search the title to the land. Of the land that is not registered under the Torrens system, most is held by the provincial or federal Crown, the ownership being ascertainable, or is privately held land that is recorded pursuant to *The Registry Act*, the ownership of which is ascertainable by examination of the abstract of title. Since only a small number of titles to land in Manitoba are not registered under the Torrens system and title to non-Torrens land is ascertainable (albeit with greater difficulty than Torrens land), we believe that section 9 of *The Landlord and Tenant Act* is an unnecessary provision which should be repealed; we note that the Ontario Law Reform Commission also proposed repeal.[34]

The effect of repeal would be that a prospective subtenant, like a prospective tenant or prospective assignee of a tenant, would be entitled to require assurances of ownership of his or her landlord when entering into a contract to grant a sublease. In practice, the repeal would have no adverse effect; present practices will continue (except that an outdated provision in the Act would be gone): a prospective tenant, subtenant or assignee will continue to examine the title to the freehold by checking the Land Titles Office and by conducting any other necessary searches to determine overriding interests, before entering into a contract to lease, as he or she would otherwise be bound by constructive notice of the encumbrances affecting that title.

RECOMMENDATION 2

Section 9 of The Landlord and Tenant Act should be repealed.

[34]Ontario Law Reform Commission, *Landlord and Tenant Law* (Report, 1976) 48.

CHAPTER 4

DEFECTIVE LEASES MADE UNDER POWERS TO LEASE

A. INTRODUCTION

A person who owns real property absolutely is entitled to lease the property to another person. He or she may also confer the right to lease the property on someone else, by a power of attorney,[1] by will[2] or by appointing another person as his or her agent.[3] In addition, a person, such as a trustee, may be entitled by statute to grant a lease of real property.[4]

It sometimes happens that through mistake, inadvertence, ignorance or dishonesty, persons who have been empowered to grant leases fail to comply with the terms of the empowering document or statute. For example, a person with a power to grant a lease for up to 15 years might mistakenly grant a lease for a term that exceeds this time period.

At common law, when a lease did not comply with the power to lease, the lease was invalid. To remedy this problem, legislation was enacted so that some of these leases could be saved.

B. THE LAW

Sections 10 to 15 of *The Landlord and Tenant Act*[5] provide for the validation of a lease granted in breach of a power to lease.

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[1]*Matthewson* v. *Burns* (1913), 12 D.L.R. 236 (Ont. S.C.).

[2]*Hallett* v. *Martin* (1883), 24 Ch. D. 624.

[3]*Raingold* v. *Bromley*, [1931] 2 Ch. 307.

[4]Section 27 of *The Trustee Act*, C.C.S.M. c. T160, empowers trustees to lease land held in trust. A trustee can only enter into leases with respect to the property for periods longer than three years if a power of sale is vested in the trustee in the trust document. If the trust document does not contain a power of sale, a trustee can still grant leases, other than mining leases, of any land for a term which does not exceed three years. In addition, the *Settled Estates Act, 1856* (U.K.), which was received into Manitoba law in 1870, gives Manitoba's Court of Queen's Bench the power to authorize a lease of all or part of a property and it empowers a life tenant to grant leases to the property for a period of not more than 21 years without the approval of the remainderman or the Court, unless such action was expressly forbidden in the document which created the successive interests: *Settled Estates Act, 1856* (U.K.), 19 & 20 Vict., c. 120, ss. 2, 11 and 32. In Manitoba Law Reform Commission, *The Trust Provisions in The Perpetuities and Accumulations Act* (Report #89, 1995), the Commission noted that the interests of life tenants and remaindermen are best protected by the provisions in *The Perpetuities and Accumulations Act* and *The Trustee Act* and the continued application of the *Settled Estates Act, 1856* is an impediment to this; for this reason, the Commission recommended that the *Settled Estates Act, 1856* be repealed.

[5]Sections 10 to 15 of *The Landlord and Tenant Act*, C.C.S.M. c. L70, are derived from statutory provisions which were enacted in England in the mid-nineteenth century and which are now contained in the *Law of Property Act, 1925* (U.K.), 15 & 16 Geo. 5, c. 20, s. 152; this legislation replaced the *Leases Act, 1849* (U.K.), 12 & 13 Vict., c. 26 and the *Leases Act, 1850* (U.K.), 13 & 14 Vict., c. 17. Similar provisions to Manitoba's are found in other Canadian jurisdictions: *Landlord and Tenant Act*, R.S.O. 1990, c. L.7, ss. 11-16; *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1, s. 7; *Landlord and Tenant Act*, R.S.P.E.I. 1988, c. L-4, s. 8; *Commercial Tenancies Act*, R.S.N.W.T. 1988, c. C-10, s. 7; *Landlord and Tenant Act*, R.S.Y. 1986, c. 98, s. 7.

Section 10 of *The Landlord and Tenant Act* provides that where a lease is invalid because of a failure by the person who grants the lease to comply with the terms of the power to lease, the tenant may request that the lease be considered to be an agreement for lease. An agreement for lease is a legally enforceable agreement by which one person agrees to grant a lease and another agrees to take a lease. It is distinguishable from a lease because "a lease is actually a conveyance of a legal estate in land, whereas a contract for a lease is an agreement that such a conveyance shall be entered into at a future date."[6]

For an invalid lease to be considered to be a contract to grant a lease, the lease must have been entered into in good faith and the tenant must have entered into possession of the lease premises. The tenant must demonstrate that, apart from the deviation from the power which is in question, the lease is in all other respects a proper lease and one which the person who granted it could properly have granted.[7] In order to be saved, the variations to the lease which are necessary in order to comply with the power must be made.[8]

The legislation is intended to cure defects that have occurred through mistake or inadvertence by landlords or ignorance by tenants.[9] Thus, for example, the omission of a common form condition, such as a condition of re-entry, is "exactly the sort of provision the inclusion of which, when necessary in order to validate the lease, was contemplated by . . . [the legislation]."[10]

Furthermore, the legislation is intended to cure defects as to form and execution rather than matters of substance.[11] The legislation may validate a lease created under a power, but cannot create a power which does not exist.[12] Thus, for example, the English legislation upon which Manitoba's legislation is based has been interpreted as not allowing for the validation of a lease which is invalid because part of the lease premises could not be leased.[13] Nor can a lease be validated if another person's consent is required to exercise the power to lease and the lease was executed without that consent.[14]

Section 12 of *The Landlord and Tenant Act* provides that, at the request of the person who grants the lease, a tenant who is in possession and who would have been bound by the lease had it been valid must accept the grantor's confirmation of the invalid lease, without variation. A

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[6]*Woodfall's Law of Landlord and Tenant*, vol. 1 (28th ed., 1978) (release 34, 1995) 4/1. The more commonly used expression "agreement for lease" is synonymous with the expression "contract for a grant [of a lease]" which is used in *The Landlord and Tenant Act*, C.C.S.M. c.L70, s.10: *Woodfall's Law of Landlord and Tenant*, *id.*, at 4/1.

[7]*Kisch* v. *Hawes Brothers, Ltd.*, [1935] 1 Ch. 102 at 110.

[8]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 10: "the lease . . . shall be considered a contract for a grant . . . of a valid lease under such power, to the like purport and effect as the invalid lease, save so far as any variation may be necessary in order to comply with the terms of the power. . . ." See also *Pawson* v. *Revell*, [1958] 2 Q.B. 360 at 365 and 369 (C.A.).

[9]The words of the preamble in the *Leases Act, 1849*, 12 & 13 Vict., c. 26 (the predecessor to Manitoba's legislation) demonstrate the intention of the legislators: "WHEREAS, through Mistake or Inadvertence on the Part of Persons granting Leases, and through Ignorance on the Part of Lessees of the Titles of Persons from whom Leases are accepted, Leases granted by Persons having valid Powers of Leasing are frequently invalid as against the Successors in Estate of such Persons by reason of the Nonobservance or Omission of some Condition or Restriction, or by reason of some other Deviation from the Terms of such Powers. . . ." See also *Gas Light and Coke Co.* v. *Towse* (1887), 35 Ch. D. 519 at 539-540.

[10]*Pawson* v. *Revell*, *supra* n. 8, at 369.

[11]*In re Newell and Nevill's Contract*, [1900] 1 Ch. 90 at 94; *Hallett* v. *Martin*, *supra* n. 2, at 632-633.

[12]*Iron Trades Employers Insurance Association, Ltd.* v. *Union Land and House Investors, Ltd.*,[1937] 1 Ch. 313 at 323.

[13]*Brown* v. *Peto*, [1900] 1 Q.B. 346, aff'd [1900] 2 Q.B. 653 (C.A.). The Court stated that to rectify the lease by severing certain rights for the land "would be to make an entirely new lease, and not to rectify the already existing lease.": *id.*. at 355.

[14]*Iron Trades Employers Insurance Association, Ltd.* v. *Union Land and House Investors, Ltd.*, *supra* n. 12, at 322.

lease may be confirmed by a written memorandum or note that confirms and accepts the lease, signed either by the person who granted the lease or someone on his or her behalf.

C. PROBLEMS WITH THE LAW

The substance of the sections which authorize the validation of a defective lease is sensible and just in most respects. However, the requirement that a defective lease can be cured only where a tenant has physically entered into possession of the lease premises but cannot be cured where a tenant has not physically entered into possession of the lease premises has been criticized. As the Ontario Law Reform Commission has noted:

> [T]here does not seem to be any reason to impose a requirement that the tenant be in possession, since the tenancy agreement is validated only where it was entered into in good faith and since the section has the effect of amending the invalid tenancy agreement so that it complies with the power. If it complies, it will be a normal legal tenancy agreement and should be enforceable, and if the tenant does not agree to the compliance, he need not invoke the section. If the parties do not want compliance, they may agree to the terms of the invalid tenancy agreement. If the agreement does not meet all legal requirements, it will be in force in equity only if there is possession and if other equitable requirements are met.[15]

We concur with these comments.

D. REFORM

The Ontario Law Reform Commission recommended removal of the requirement in Ontario's equivalent to section 10 of *The Landlord and Tenant Act* that a tenant be in possession in order for a defect in a lease made under a power of leasing to be validated at the request of the tenant. It further recommended that the requirement that a tenant be in possession for the landlord's confirmation of the invalid lease to be binding on the tenant in their equivalent provision to Manitoba's section 12 of *The Landlord and Tenant Act* should also be deleted.

We agree with their proposals for reform.

RECOMMENDATION 3

Sections 10 and 12 of The Landlord and Tenant Act should be amended to remove the requirement that a tenant be in possession of the lease interest in order for a defective lease made under a power to lease to be validated.

[15]Ontario Law Reform Commission, *Landlord and Tenant Law* (Report, 1976) 53.

CHAPTER 5

LIST OF RECOMMENDATIONS

The following is a list of the recommendations contained in this Report.

1. Legislation should abolish the doctrine of *interesse termini* for commercial tenancies. (p. 5)

2. Section 9 of *The Landlord and Tenant Act* should be repealed. (p. 12)

3. Sections 10 and 12 of *The Landlord and Tenant Act* should be amended to remove the requirement that a tenant be in possession of the lease interest in order for a defective lease made under a power to lease to be validated. (p. 15)

In our view, the recommendations which we are proposing will not have a detrimental effect on any party. We believe, therefore, that there is no need for transitional provisions and that legislation which implements these recommendations should come into effect immediately.

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 29th day of July 1996.

Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

REPORT ON *COMMERCIAL TENANCIES: MISCELLANEOUS ISSUES*

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

The Manitoba Law Reform Commission's Report on *Commercial Tenancies: Miscellaneous Issues* recommends that three small and unrelated areas of commercial tenancy law be modernized.

INTERESSE TERMINI

A tenant who has entered into a lease but who has not yet entered into possession of the lease premises has an interest in the lease premises which is called an *interesse termini*. Until the tenant enters, the entire estate is held by the landlord. The tenant's *interesse termini* cannot be merged with the landlord's estate nor surrendered to the landlord. Certain rights are not available to tenants and landlords when a tenant has not yet entered into possession.

A tenant who has not yet entered into possession cannot enforce a breach of the covenant for quiet enjoyment against the landlord; neither can the tenant maintain an action for trespass against a trespasser. A tenant who is kept out of possession can sue the landlord for damages for not putting him or her into possession but may not be able to sue the landlord directly for possession. A tenant who has not entered into possession cannot be sued by the landlord for use and occupation of the premises where the amount of rent is not agreed upon between the parties.

The Commission believes that these distinctions based on entry into possession serve no purpose. The rights of commercial landlords and tenants should not depend upon whether or not the tenant enters into possession of the lease premises: a tenant should be able to maintain an action for possession or an action for breach of the covenant for quiet enjoyment against the landlord and an action for trespass against a trespasser without having to enter into possession; a landlord should be able to sue a tenant for use and occupation of the lease premises after the term commences, whether or not the tenant has entered the lease premises. The Commission recommends that legislation should abolish the doctrine of *interesse termini* for commercial tenancies.

OBLIGATION TO SHOW TITLE

At common law, when a person who intended to become a tenant, subtenant or assignee entered into a contract to grant a lease, sublease or assignment in the future, he or she was entitled to be given full disclosure of the title to the land. The obligation to show title was an onerous one before the development of a public recording system of interests in land and it continued to be onerous even afterwards. The obligation was particularly onerous for tenants who wanted to sublet as they could not compel their head landlords to produce the titles and, so, could not necessarily comply with the obligation. Section 9 of Manitoba's *Landlord and Tenant Act* addressed this problem by providing that a tenant who enters into a contract to grant a lease with a prospective subtenant is not obliged to produce the title to the land, unless the parties agree otherwise.

However, today, approximately 95 to 96 percent of titles to Manitoba land are registered under the Torrens land titles system. A purchaser of an interest in land can easily examine title to the land at a Land Titles Office without permission from the proprietor of the land. The ownership of the land not covered by the Torrens system is also ascertainable.

Accordingly, the Commission considers that section 9 of *The Landlord and Tenant Act* has outlived its usefulness and recommends its repeal. Prospective subtenants, like prospective tenants and their assignees, should be entitled to assurances of ownership of their landlords when entering into contracts for the grant of a sublease. In practice, given the ease with which the Torrens land titles registry can be searched and the constructive notice of the encumbrances affecting title that is attributed to a purchaser who has not conducted a diligent search of the register, prospective tenants, subtenants or assignees will continue to examine the title to the freehold by checking the Land Titles Office and making other searches to determine overriding interests before entering into contracts to grant a lease, sublease or assignment.

DEFECTIVE LEASES MADE UNDER POWERS TO LEASE

A person who owns real property absolutely is entitled to lease the property to another person or may confer the right to lease the property on someone else by a power of attorney, testamentary will or the appointment of an agent. In addition, a trustee may be entitled by statute to grant a lease of real property.

It sometimes happens that through mistake, inadvertence, ignorance or dishonesty, persons who have been empowered to grant leases fail to comply with the terms of the empowering document or statute. At common law, a lease that failed to comply was invalid. However, section 10 of *The Landlord and Tenant Act* provides that where a lease is invalid because of a failure by the person who grants the lease to comply with the terms of the power to lease, the tenant may request that the lease be validated. The tenant must have entered into the lease in good faith, have actually entered into possession of the lease premises and must demonstrate that, apart from the deviation from the power which is in question, the lease is one which the grantor could properly have granted. Variations to the lease which are necessary in order to comply with the power to lease are then made. The section cures defects of form and execution that have occurred through mistake or inadvertence by landlords or ignorance by tenants; it does not cure matters of substance.

Section 12 of *The Landlord and Tenant Act* provides that, at the request of the grantor of an invalid lease, a tenant who would have been bound by the lease had it been valid and who is in possession must accept the grantor's confirmation of the invalid lease, without variation.

The substance of sections 10 and 12 of *The Landlord and Tenant Act* is sensible and just in most respects. However, the Commission believes that the requirement that a tenant has entered into possession in order for a defect in a lease made under a power to lease to be validated is unnecessary. The Commission recommends, therefore, that sections 10 and 12 of *The Landlord and Tenant Act* be amended to remove this requirement.

SOMMAIRE DU RAPPORT

LA LOCATION COMMERCIALE: QUESTIONS DIVERSES

SOMMAIRE

Dans son rapport intitulé *Commercial Tenancies: Miscellaneous Issues*, la Commission de réforme du droit du Manitoba recommande que soient modernisés trois domaines mineurs et distincts du droit de la location commerciale.

INTERESSE TERMINI

Le locataire a un intérêt dans les locaux à l'égard desquels il a passé un bail mais dont il n'a pas encore pris possession. Cet intérêt s'appelle *interesse termini*. Le locateur détient tout le domaine tant que le locataire ne prend pas possession des locaux. L'*interesse termini* du locataire ne peut être intégré au domaine du locateur ni être cédé à ce dernier. Le locataire et le locateur sont privés de certains droits tant que le locataire n'a pas pris possession des locaux loués.

Le locataire qui n'a pas encore pris possession des locaux loués ne peut invoquer la violation d'un engagement de jouissance paisible contre le locateur ni intenter une action pour intrusion. Le locataire que l'on empêche de prendre possession des locaux loués peut intenter une action en dommages-intérêts contre le locateur pour non-prise de possession, mais peut être empêché d'intenter directement contre lui une action pour possession. De même, le locateur ne peut pas intenter contre le locataire qui n'a pas pris possession des locaux des poursuites pour utilisation et occupation des locaux s'il n'a pas été convenu entre eux d'un loyer.

Selon la Commission, ces distinctions fondées sur la prise de possession ne sont d'aucune utilité. Les droits du locateur et du locataire ne devraient pas être fonction du fait qu'il y ait eu ou non prise de possession par le locataire des locaux loués: le locataire devrait pouvoir intenter une action pour possession ou pour violation d'engagement de jouissance paisible contre le locateur ainsi qu'une action pour intrusion, sans avoir à prendre possession des locaux; de même, le locateur devrait pouvoir intenter contre le locataire des poursuites pour utilisation et occupation des locaux loués après l'entrée en vigueur du bail, que le locataire ait ou non pris possession des locaux loués. La Commission recommande donc que soit abolie par disposition législative la doctrine du droit *interesse termini* en ce qui concerne la location commerciale.

OBLIGATION DE PRODUIRE LE TITRE

En common law, la personne qui se proposait de devenir locataire, sous-locataire ou cessionnaire et qui passait un contrat accordant un bail, un sous-bail ou une cession avait le droit d'exiger la pleine divulgation du titre du bien-fonds. L'obligation d'avoir à produire le titre était très onéreuse avant que ne soit mis en place un système public d'enregistrement des intérêts dans les biens-fonds et elle l'est demeurée même après la mise en place d'un tel système. Cette obligation se révélait particulièrement onéreuse pour les locataires qui voulaient sous-louer et qui n'avaient aucun moyen de forcer leur locateur à produire les titres, ce qui fait qu'ils ne pouvaient se conformer à l'obligation. L'article 9 de la *Loi sur le louage d'immeubles* du Manitoba a réglé ce problème en soustrayant le locataire qui passe un contrat pour accorder un bail à un sous-locataire éventuel de l'obligation de produire le titre du bien-fonds, à moins d'accord contraire des parties.

Aujourd'hui, de 95 à 96 pour cent environ des titres sur des biens-fonds manitobains sont enregistrés conformément au système d'enregistrement Torrens. L'acheteur d'un intérêt dans un bien-fonds peut facilement examiner le titre du bien-fonds à un bureau des titres fonciers sans avoir à obtenir la permission du propriétaire du bien-fonds. Il est également possible de vérifier les titres de propriété sur les biens-fonds qui ne sont pas enregistrés dans le système Torrens.

Par conséquent, la Commission estime que l'article 9 de la *Loi sur le louage d'immeubles* n'a plus de raison d'être et recommande son abrogation. Les sous-locataires éventuels, comme les locataires éventuels et leurs cessionnaires, devraient pouvoir obtenir la garantie que leur locateur détient le titre de propriété des locaux au moment de passer un contrat accordant un sous-bail. Dans les faits, compte tenu de la facilité avec laquelle des recherches peuvent être faites dans le système d'enregistrement Torrens et de la connaissance des droits de charges touchant le titre attribué à un acheteur qui n'a pas effectué de recherches attentives dans le registre, les locataires, les sous-locataires ou les cessionnaires éventuels continueront de vérifier le titre relatif à la propriété franche en faisant les recherches voulues à un bureau des titres fonciers ainsi que les autres recherches nécessaires pour déterminer s'il existe des intérêts prédominants avant de passer des contrats accordant un bail, un sous-bail ou une cession.

VICES ENTACHANT UN BAIL PASSÉ EN VERTU DU POUVOIR DE DONNER À BAIL

Le propriétaire peut donner à bail à une autre personne le bien réel qu'il possède de façon absolue. De même, il peut, par procuration, testament ou nomination d'un mandataire, conférer à quelqu'un d'autre le droit de louer le bien. En outre, il est possible qu'un fiduciaire soit autorisé, de par une loi, à donner à bail le bien réel.

Il arrive parfois que des personnes, qui ont été habilitées à accorder des baux, ne se conforment pas, soit par erreur, inadvertance, ignorance ou malhonnêteté, aux dispositions du document ou de la loi qui les habilite. En common law, le bail qui dérogeait à l'une des dispositions d'un tel document ou d'une telle loi était invalide. Toutefois, l'article 10 de la *Loi sur le louage d'immeubles* permet au locataire de demander que soit validé un bail qui est invalide du fait que le donneur à bail ne s'est pas conformé aux dispositions relatives au pouvoir de donner à bail. Le locataire doit avoir passé le bail de bonne foi, avoir pris possession des locaux loués et démontrer que le bail aurait pu être accordé légalement, n'eût été de la dérogation au pouvoir de donner à bail. Le bail est alors modifié de sorte qu'il soit conforme au pouvoir de donner à bail. Cet article sert à réparer les vices de forme et d'exécution attribuables à une erreur ou à une inadvertance des locateurs ou à l'ignorance des locataires. Il ne vise pas les questions de fond.

L'article 12 de la *Loi sur le louage d'immeubles* dispose que le locataire qui aurait été lié par le bail s'il avait été valide et qui a pris possession des locaux loués doit, à la demande du donneur du bail invalide, accepter la ratification du bail invalide sans qu'il ne soit modifié.

L'essentiel des articles 10 et 12 de la *Loi sur le louage d'immeubles* est fondé et juste à presque tous les égards. Toutefois, la Commission estime inutile l'exigence voulant que le locataire ait pris possession des locaux pour que soit validé un bail entaché d'un vice et accordé en vertu d'un pouvoir de donner à bail. Elle recommande donc que les articles 10 et 12 de la *Loi sur le louage d'immeubles* soient modifiés de sorte à y enlever cette exigence.