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IS THERE "QUIET ENJOYMENT" IF IT STINKS?

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Odours in leased premises raise issues for landlords and tenants. Common questions and concerns include:

- Does everyone agree there is an odour or is one party particularly sensitive?
- Who is responsible for addressing an odour?
- Can a tenant terminate a lease because of an odour?
- Would an odour impact the tenant's business?

The British Columbia Court of Appeal recently considered some of these questions. *Stearman v. Powers*, 2014 BCCA 206 involves a tenant who leased premises in Nanaimo and operated a retail clothing store. The lease term was five years and the commencement date was November 1, 2008. During the winter months of 2008 and 2009 the tenant noticed a "creosote-like" smell and by April, 2009 she had contacted an air conditioning technician to investigate further. At trial, both a former and subsequent tenant of the premises gave evidence that the premises did have a smell although not everyone noticed the smell at the premises. After taking a few additional steps to investigate the smell, the tenant stopped paying rent and ultimately vacated the premises. She also delivered a letter to the landlord purporting to terminate the lease.

At trial, the judge concluded that a smell did exist resulting in:

- a breach of the tenant's right to quiet enjoyment of the premises;
- a breach of the implied fitness of the premises for a clothing store; and
- a fundamental breach of the lease because the landlord failed to remedy the odour.

The Court of Appeal's reasoning highlights the number one rule for landlords and tenants – read and consider the lease terms. Reviewing these terms the court noted that the tenant, not the landlord, was obligated to service and repair the HVAC system and yet did little or nothing in the way of repairs to address the odour. Other lease terms also indicated that the landlord should not be liable for the odour including (in summary): the tenant had accepted the premises "as is"; the landlord was not responsible for defects or

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changes of conditions of the premises; the landlord was not responsible for loss or damage caused by machinery, wiring, pipes, appliances or fixtures; and, there were no unwritten representations or warranties. In the circumstances, the appeal court concluded there was no fundamental breach of the lease by the landlord and there could be no implied warranty the premises were fit for a particular use.

One definition of "quiet enjoyment" cited by the appeal court is: "exclusive occupancy of the premises without interference by the landlord". The underlined portion of this definition was emphasized by the court. Generally, an odour is not something a landlord creates. In this case, there was no evidence that the landlord took any action, or failed to take any action, which caused the offensive odour. For these reasons the odour was also not a breach of the tenant's right to quiet enjoyment.

Lease terms govern parties' rights and obligations and are a paramount consideration whenever issues arise. Quiet enjoyment is an implied right for every tenant and a landlord should not interfere with what it has granted, however, when circumstances are beyond a landlord's control, there can be a good argument the landlord is not interfering with this right.

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