

PASSED WITH AMENDMENTS
5/12/86 JS.

Retail Tenancies Bill

EXPLANATORY MEMORANDUM

PART 1—PRELIMINARY

Purpose.

Clause 1 states the purpose of the Bill which is to reform the law relating to retail tenancy agreements.

Commencement.

Clause 2 provides that the commencement of the Bill will be on a day or days proclaimed.

Definitions.

Clause 3 defines various terms used in the Bill such as accountant, building, common area, exempt premises, key-money, landlord, lease, registered valuer, retail premises, retail shopping centre, spouse and statutory option. It also provides when a retail premises lease is entered into.

Application.

Clause 4 provides that the Bill shall apply to a retail premises lease that is entered into after the commencement of this section unless the lease is entered into under an option granted or an agreement made before that commencement. Part 3 of the Bill dealing with determination of disputes shall apply to all retail premises leases whether entered into before or after the commencement of this section.

Exemption from Act.

Clause 5 enables the Governor in Council to exempt any class or kind of premises from the operation of the Act by regulation.

Act to bind Crown.

Clause 6 provides that the Bill will bind the Crown.

PART 2—RETAIL PREMISES LEASES

Disclosure.

Clause 7 provides that a landlord must give a tenant a disclosure statement in the form contained in the Schedule to the Bill at least 7 days before entering into a retail premises lease otherwise the tenant may give the landlord a written notice of termination at any time within 28 days after entering into the lease.

Tenant to be given copy of lease.

Clause 8 provides that the landlord will provide the tenant with a copy of the lease during a certain period of time following execution of the lease.

Key-money and goodwill.

Clause 9 provides that a provision in a retail premises lease is void if it entitles the landlord to obtain from the tenant any key-money or goodwill. However there are a number of exceptions to this general rule—firstly, that the landlord may recover from the tenant costs which the landlord reasonably incurred in investigating a proposed assignee of the tenant or sub-lessee of the premises; secondly, the landlord may recover from the tenant costs reasonably incurred in connection with the documentation of the lease, an assignment of the lease, or a sub-lease and the obtaining of any necessary consent to the assignment or sub-lease or thirdly, the landlord may claim goodwill from the tenant in relation to the sale of a business which the landlord operated from the premises immediately before the sale if the lease was granted to the tenant in the course of the sale of the business. This clause also provides a formula for a penalty payable by the tenant to the landlord if the tenant assigns at certain times during the term of the lease before the completion of the term.

Rent review.

Clause 10 contains a number of prohibitions on provisions contained within leases dealing with rent review. Firstly, a provision that requires that rent payable after the review must exceed or be not less than the rent payable immediately before the review is void. Secondly, a provision that rent is to be determined either in whole or in part by reference to an index of prices, costs or wages or in any other similar manner is void. Thirdly, a provision in a retail premises lease for a review of the rent is void unless the lease specifies how the review is to be made. This clause also makes provision for determination of rent if the provision in a lease is made void by this section or if the landlord and tenant are unable to reach agreement about the result of the review by a registered valuer.

Rent based on turnover.

Clause 11 provides that if rent is to be determined by reference to turnover it must specify how the rent is to be determined. It also provides that if turnover is to be used to determine the rent the tenant must provide the landlord with certain statements during certain periods of time and that the tenant must at the request of the landlord permit an accountant to carry out an audit of those turnover figures on behalf of the landlord and at the cost of the landlord. This clause also provides a list of certain matters that are not included in turnover. Similarly as in the previous clause if this clause makes a provision in the lease determining rent by reference to turnover void the rent is to be determined in writing by agreement of the landlord and tenant or in default determined by a registered valuer.

Turnover figures not generally required.

Clause 12 provides that turnover figures are not generally required unless they are needed for the purposes of determining rent or the landlord and tenant are regarded as related corporations. This clause also provides that the landlord must not communicate any of the turnover information to a third party without the consent of the tenant and in default the tenant is removed from any obligations to provide any turnover figures or statements to the landlord during the term of the lease. It also sets out certain situations where turnover information may be used and released by the landlord.

Right to at least 5 years' tenancy.

Clause 13 provides a first tenant with an implied statutory option to renew the lease for a period extending the total period of occupation of the premises to a maximum of 5 years. Also if the landlord gives the tenant notice before the end of the term that the premises are to be demolished or substantially repaired then the tenant is not entitled to the implied

option. This clause also provides that the terms and conditions upon which the lease is renewable under the statutory option are the same as those upon which the lease is held at the time the tenant gives the notice of exercising the option except that the tenant does not have any further statutory option to renew the lease and if the lease does not provide for the review of the amount of rent payable, rent payable is that as agreed between the parties or in default by a registered valuer.

Options to renew.

Clause 14 contains a number of matters relating to options to renew—it provides for certain details to be contained in a lease if the lease contains an option; it requires the landlord to notify the tenant in writing of a date after which the option is no longer exercisable at least 3 months before that date; it provides the circumstances in which the option is not exercisable; it requires the landlord if there is no option to renew the lease to notify the tenant at least 3 months before the end of the lease whether or not the landlord intends to renew the lease and in default of providing this notice the lease continues until the landlord gives 3 months notice.

Sharing of operating expenses.

Clause 15 provides that if a retail premises lease requires the tenant to pay the landlord operating expenses the lease must specify certain detail about such expenses and the way they are calculated and recovered from the tenant. It also contains a requirement that the landlord must provide the tenant with annual estimates of those expenses and annual statements of expenditure incurred. There is a power to make regulations to prohibit the landlord obtaining certain payments from the tenant and the manner in which certain items and expenses may be calculated and apportioned to a tenant. There is also a provision that the landlord must not accept payment from a tenant of more than the total estimated amount of the item of expense or the actual amount, whichever is the greater, and also a requirement for the landlord to repay the tenant overpayments at the time the annual statements are provided.

Consent to assignment or sub-lease.

Clause 16 provides that in certain circumstances the consent of the landlord to an assignment of the tenant's lease is to be taken to have been given. It also provides that a landlord must not unreasonably withhold his consent to an assignment of the lease.

Compensation by landlord.

Clause 17 provides that certain provisions are implied in the lease dealing with the liability of the landlord to pay compensation to the tenant in certain circumstances.

Provisions about chambers of commerce and merchants' associations.

Clause 18 provides that provisions within a lease purporting to prevent or restrict the right of the tenant to join any tenants' association, chamber of commerce or other similar body or compelling them to join are void. There is also provision empowering regulations to be made with respect to these matters.

Indemnities.

Clause 19 provides that certain provisions in leases dealing with indemnities are void. It also provides that in certain instances the landlord must indemnify the tenant.

PART 3—DETERMINATION OF DISPUTES

Panel of arbitrators.

Clause 20 details the appointment of a panel of arbitrators by the Governor in Council, their period of appointment, terms and conditions and remuneration.

References to arbitrators.

Clause 21 sets out the procedure of bringing a dispute under a retail premises lease before an arbitrator.

Arbitration.

Clause 22 provides for the application of the *Commercial Arbitration Act 1984* to arbitrations under this Act; additional powers of the arbitrator and fees and expenses of the arbitrator to be borne jointly by the parties and costs cannot be allowed to or against a party unless the party has been frivolous or vexatious.

PART 4—GENERAL

Service of Notices.

Clause 23 provides the manner in which notices can be served.

Act prevails.

Clause 24 provides that a provision of a lease is void in so far as it attempts to over-ride the operation of this Act or is contrary to or inconsistent with anything in this Act.

Regulations.

Clause 25 empowers the Governor in Council to make regulations for or with respect to any matter required or permitted by this Act.

Review of Act.

Clause 26 provides that after 5 years of operation of this Act there shall be a review conducted on the need for the Act to continue in operation and the report of such review shall be laid before both Houses of Parliament.

SCHEDULE

DISCLOSURE STATEMENT

This sets out the form of the disclosure statement to be provided by the landlord to the tenant prior to the entry into of a retail premises lease.