

**Bob Reid**



# The Ongoing Saga of *Top Line*: the Illegal Lease

In 1996 the British Columbia Court of Appeal in *International Paper Industries Ltd. v. Top Line Industries Inc.* (1996), 20 B.C.L.R. (3d) 41, held that a purported lease for a term exceeding three years of a portion of unsubdivided land was illegal, and that neither party could enforce personal or proprietary rights in respect of the leased premises pursuant to the lease.

The reasons given for this determination were to maintain public control by municipal authorities of real estate development and thereby protect the public interest, and to maintain the operation of the “Torrens” system of land title registration. Section 73(1) of the *Land Title Act*, R.S.B.C. 1996, c. 250, states that no land may be subdivided without the authority of an approving officer who, according to s. 85(3), is entitled to refuse to allow a subdivision if it is “contrary to the public interest.” If approval is not obtained, then an instrument transferring or leasing the land is not registrable [s. 73(4)].

The Court found that a lease entered into in contravention of s. 73(1) created no personal or property rights between a landlord and tenant. Moreover, the Court refused to imply into the terms of the lease a covenant or obligation on the

part of one party or the other to seek and obtain subdivision approval. Nor would the Court “do a rescue operation” and deem the lease to be a licence in order to give the tenant some rights in respect of the leased premises. The Court did, however, find that its determination was “without prejudice to any entitlement the tenant may have to sue for whatever other remedies might be available to it on other branches of the law.” Whatever they might be.

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The result of *Top Line* was that a tenant to a lease of unsubdivided land for a term exceeding three years could walk away from any obligations or liabilities under the lease. Similarly, the landlord could recover possession of the land, as the tenant had no right of possession or occupation.

The Court revisited its decision in *Top Line Industries Ltd. v. International Paper Industries Ltd.* (2000), 184 D.L.R. (4th) 534, and reaffirmed its earlier

decision and reasoning. The landlord sought damages for use and occupation of the leased premises for a two-year period during which the tenant paid its rent into court pending the outcome of the appeal.

At the end of this period, the Court held the lease to be illegal and granted the landlord possession. The Court determined that the landlord could not obtain indirectly what it could not obtain directly—rent for the leased premises! To gain possession of the premises, the landlord established that the lease was illegal because it violated s. 73 of the *Act*. Then, to claim for use and occupation, the landlord had to have consented to the tenant’s occupation; but how could the landlord have consented to occupation if the lease was illegal? The Court was unwilling to find that although the lease was illegal, the tenant’s occupation was not. The Court followed a clear rule of law that it will not “allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality.” “Gains or losses resulting from illegal transactions remain where

they have fallen.” The Court did note, however, that neither trespass nor unjust enrichment was argued.

The ruling that a lease for a term greater than three years of a portion of unsubdivided land is illegal, and creates no personal or property rights between the parties, has challenged the ingenuity of the Bar to circumvent or limit the scope of *Top Line*.

In *BC Rail Ltd. v. Domtar Inc. and Stella-Jones Inc.* (1999), 71 B.C.L.R. (3d) 242 (S.C.), Madam Justice Boyd dealt with an argument that *Top Line* was wrongly decided, and that she was not bound by it because it was decided *per incuriam*, that is, without reference to relevant statutory provisions in the *Property Law Act*, R.S.B.C. 1996, c. 377. Section 5(2) provides that “a person who as landlord...makes a lease,” “must... deliver an instrument creating the lease...to the tenant...in a form registrable under the *Land Title Act*.” Section 7 provides that the lease must

“describe the parcel of land...such that the title to the parcel is registrable under the *Land Title Act*.” Therefore the landlord has a statutory obligation to subdivide the property to give the tenant a lease capable of being registered. It was argued that the failure of the Court in *Top Line* to address this statutory obligation means it is not a binding decision—an argument adopted by the judge in *Russell v. Pfeiffier* [1998] B.C.J. No. 973.

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*Therefore she determined the lease was illegal, and declared it null and void.*

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Madam Justice Boyd, however, found that the decision in *Top Line* was not decided *per incuriam* because the sections in the *Property Law Act* were in the respondent’s *factum* in the *Top Line*

appeal. Therefore she determined the lease was illegal, and declared it null and void.

She also refused to accept the tenant’s argument that the landlord was estopped from obtaining a declaration that the lease was unenforceable. Domtar, relying on the terms of the lease, had built a plant for treating wood at a cost over \$600,000, had given BC Rail the status of preferred carrier of product from the plant, and had purchased an adjoining property on which part of the plant is located. Domtar argued that BC Rail, having taken commercial advantage of having the plant on its land, could not now take advantage of its failure to subdivide the property. According to Domtar, BC Rail was estopped from obtaining a declaration that the lease was unenforceable. Madam Justice Boyd disagreed. She found the reasoning in *Top Line*, that the public policy objectives of s. 73 “must prevail over what could otherwise be a successful argument founded on equitable

estoppel” also was applicable to the case before her.

Domtar appealed and requested that a panel of five judges hear the appeal for the purpose of reconsidering the Court of Appeal’s decision in *Top Line*. On the date of the hearing, the parties had settled their dispute and the Court refused to exercise its discretion to hear the appeal. The Court stated, “It does not appear that the *Top Line* decision is creating significant problems which require immediate attention.” See *BC Rail Ltd. v. Domtar et al.*, [2001] BCCA 117.

Therefore, it remains to be seen whether the Court of Appeal will have another opportunity to reconsider its decision in *Top Line*. Perhaps! Attempts continue, however, to limit the scope of *Top Line*.

The illegality created by s. 73(1) does not apply to a subdivision for the purpose of leasing a building or part of a building [s. 73(3)]. In *456559 B.C. Ltd. v. Cactus Café Maple Ridge Ltd. and Cactus Restaurants Ltd.* [2001] B.C.J. No. 2160, [2001] BCCA 622, affirming [2000] B.C.J. 2299, BCSC 1652, the question of what was included in the meaning of a “building or part of a building” was discussed.

In 1994 the parties entered into an Offer to Lease, for a period exceeding three years, premises that were to be built. The landlord/plaintiff was seeking damages from an alleged breach of the Offer to Lease. The tenants/defendants argued that the Offer was illegal and therefore unenforceable, because it pertained to a lease of a portion of unsubdivided land and as such, contravened s. 73(1) of the *Land Title Act*. Their argument was that because the lease also included the lease of an outside patio premise, it was a lease of land, and not a lease of a building, or part of a building. The Tenant was to have the right to construct an uncovered patio area of approximately 200 square feet, adjacent to the premises.

The tenants argued that because the lease included the lease of an outside

patio, it was a lease of land and not a lease of a building, or part of a building.

The trial judge found that the Offer to Lease pertained to the lease of a building, or part of a building, and not land because the lease did not give the tenants the right to construct a patio without constructing a building to house a restaurant. Moreover, the patio was to be considered part of the landscaping for the building.

Therefore, the patio was an extension of the building and was governed by subsection (3) of s. 73 and not subsection (1).

The tenants then argued that the inclusion of parking spaces in the Offer to Lease created a lease of land rather than of a building. The judge found that the reference to parking spaces in the lease merely gave the tenants permission to have their customers park on the landlord's land without fear of trespass. It did not convey an interest in land. The judge also found that the

calculation of the amount of rent payable pertained to the operation of the building as a restaurant.

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The Court of Appeal dismissed the appeal. It agreed that the reference to the patio in the Offer to Lease did not create an interest in land but was a contractual right to build a patio, and could not be exercised without the building first being built. Also the words in the Offer to Lease referring to the patio as “part of the landscaping” were present solely for the purpose of calculation of the rent.

Another drafting option available to avoid a determination that a lease is illegal—because it is a lease of land and

therefore falls within s.73 (1) of the *Act*—is to restrict the lease to the building, and give the tenant an easement over the landlord's property for the patio and parking spaces. The question then arises about whether the easement is actually an easement at law. If, however, the tenant as owner of the dominant tenement is given exclusive possession of the area included in the patio or parking spaces, a court may determine the easement to be a lease. Then *Top Line* becomes the issue once again. ▲

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