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Uniform Commercial Tenancies Act Progress Report #4

Report of the Working Group

Fredericton, New Brunswick

August 2016

Background

- ▶ Working group formed in 2011
- ▶ Progress reports presented at Annual Meetings in 2012, 2013 and 2014
- ▶ Commercial tenancies law in Canada is fragmented, outdated, and in some respects, obsolete
 - ▶ Much of it is copied from 18th and 19th Century English legislation
- ▶ Several provincial law reform agencies have recommended ways to modernize aspects of commercial tenancies law
 - ▶ However, no common law provincial legislature has enacted legislation that can be a modern precedent for reform
- ▶ Quebec *Civil Code* can offer guidance
 - ▶ The *Uniform Commercial Tenancies Act* designed for adoption in the common law provinces only
 - ▶ Working group will recommend amendments to the *Civil Code* where they are thought necessary

Background

- ▶ Current working group members:
 - ▶ Leah Howie, Chair (Law Reform Commission of Saskatchewan)
 - ▶ Nigel Bankes (University of Calgary, Faculty of Law)
 - ▶ Brennan Carroll (Borden Ladner Gervais)
 - ▶ Christopher Cheung (Ontario Bar Association)
 - ▶ Michelle Cumyn (Université Laval)
 - ▶ James Leal (Nelligan O'Brien Payne)
 - ▶ Richard Olson (McKechnie & Company)
 - ▶ Jonnette Watson-Hamilton (University of Calgary, Faculty of Law)

2016-2017 Plan

- ▶ Working group met in May and June of 2016 and discussed two topics
 1. Overholding tenants
 2. Relief from forfeiture
- ▶ Progress Report #4 delivered in August 2016
 - ▶ Report sets out the results of the working group's May and June meetings
 - ▶ Contains preliminary recommendations and consultation questions
- ▶ Working group will meet monthly from Sept - May of 2017 in order to finish discussing the remaining topics
- ▶ Will present the final report of the working group at the 2017 annual meeting
 - ▶ Intending to start work on drafting the UCTA over the course of the next year

Overholding Tenants

- ▶ Overholding tenants are tenants that remain in possession after the expiration of the term of the lease without the landlord's consent
- ▶ Issues arising when a tenant overholds include:
 - ▶ The landlord's options for regaining possession
 - ▶ Working group discussed actions for possession (including the summary procedure available in some provinces)
 - ▶ Working group did not discuss re-entry (will be discussed as a discrete topic)
 - ▶ The availability of remedies such as compensation for use and occupation and double rent
 - ▶ The implications of accepting rent from an overholding tenant

Summary Procedure

- ▶ All of the Canadian common law provinces except AB and NFLD & LAB have a summary procedure for the ejectment of overholding tenants
 - ▶ Generally only allow a landlord to obtain possession (no compensation)
- ▶ Provisions set out conditions that must be met in order for the landlord to bring the matter before the court
- ▶ Once these conditions are met there is a 2 step procedure:
 1. Landlord must show it is *prima facie* entitled to an order for possession - if successful, a court date is set and the tenant is notified;
 2. Summary hearing held on the landlord's entitlement to the order for possession
- ▶ No summary procedure in Quebec - landlord must follow a regular procedure based on article 1889 of the *Civil Code*

Summary Procedure: Recommendations of Law Reform Agencies

- ▶ BCLRC recommended removing the summary procedure for recovering possession from an overholding tenant
 - ▶ CBA criticized this recommendation
- ▶ BCLI recommending replacing the summary procedure with an updated dispute resolution procedure contained in a regulation
- ▶ ONLRC recommended that the summary procedure should be available to tenants

Summary Procedure: Working Group Preliminary Recommendations

1. The UCTA should include a summary type of procedure to solve certain overholding tenant related disputes
 - ▶ Should be available to tenants to regain possession
 - ▶ Tenants should be able to raise a variety of defences
2. The UCTA should contain an enabling provision in the broader dispute resolution provision, with the details of the procedure contained in a regulation
 - ▶ Each province will need to incorporate their own rules of court
3. The summary procedure should be streamlined
 - ▶ Should not be a two-step procedure
 - ▶ The formalities required in the first step should be removed

Availability of Other Remedies in Summary Procedure

- ▶ Most provinces limit the remedy to a writ of possession
- ▶ If a landlord wishes to pursue other remedies such as double rent, double value, or arrears of rent, they must bring another action
- ▶ NB allows landlords to add claims for payment of rent and double value
- ▶ NS also allows a landlord to claim for arrears of rent and for the value of the tenant's use and occupation, however the court is only able to award up to \$500

Available Remedies: Recommendations of Law Reform Agencies

- ▶ ONLRC - judges hearing a summary application for a writ of possession should be entitled to make a number of different orders to deal comprehensively with the matter
- ▶ BCLRC - critical of the narrow scope of the summary procedure
- ▶ BCLI - proposed allowing a landlord to obtain compensation for use and occupation, and an indemnity for any liability resulting from the landlord's inability to deliver vacant possession to a new tenant, by use of the summary dispute resolution procedure

Available Remedies: Working Group Preliminary Recommendations

1. The remedies available in the summary proceeding should not be restricted to a writ of possession - Courts should be able to deal fully with the matter
 - ▶ The UCTA should state that the court can make any order necessary to resolve the dispute before it
 - ▶ If parts of the dispute are too complex to be dealt with in a summary proceeding, they can be severed and dealt with in a trial

Remedies: Double Rent, Double Value, and Use and Occupation

- ▶ Double rent and double value available in BC, MB, ON, NB, PEI, NWT, YK and NU
 - ▶ Double rent and double value both based on English legislation
- ▶ Double rent applies where the tenant has the power to determining the tenancy by notice - does not apply where the tenant is holding over in good faith
- ▶ Double value applies where a tenant for life, lives or years continues in possession after determination of the term - only applies where the tenant willfully holds over following a written demand for possession
- ▶ Neither penalty appears to apply where a tenant fails to give up possession after a periodic tenancy is terminated by notice from the landlord
- ▶ If a landlord is not entitled to either double rent or double value, they may sue for the common law remedy for “use and occupation”

Remedies: Recommendations of Law Reform Agencies

- ▶ BCLRC recommended removing double rent and double value from BC Act as both are essentially penal in character
- ▶ BCLI proposed removing double rent and double value:
If a tenant continues to occupy the premises after the lease has expired or been terminated in accordance with the lease or this Act, the landlord may recover from the tenant:
 - a) *Compensation for use and occupation of the premises, and*
 - b) *Indemnity for any liability resulting from the landlord's inability to deliver vacant possession of the premises to a new tenant or purchaser*
- ▶ The indemnity provision in (b) is not found in the common law
- ▶ Alberta's *Law of Property Act* directs the courts to consider the nature of the overholding tenant's use and occupation and the rent payable under the prior tenancy in determining the amount of compensation recoverable from an overholding tenant

Remedies: Working Group Preliminary Recommendations

1. Double rent and double value should no longer be available as both are arbitrary and punitive, and are rarely sought
2. The UCTA should restate the common law right to compensation for use and occupation
3. The UCTA should include an indemnity provision similar to the provision proposed by the BCLI

Deemed Term Upon Acceptance of Rent

- ▶ If a landlord accepts rent from a tenant after a lease is expired, at common law, the presumption is that a new tenancy has been created
 - ▶ If the original tenancy was a tenancy of years, a tenancy from year to year is deemed to have been created
 - ▶ If the original tenancy was for a shorter term, a tenancy of month to month is created
- ▶ Most professionally prepared leases will contain a provision overriding the common law rule and stating that an overholding tenancy is a month to month tenancy

Deemed Term: Recommendations of Law Reform Agencies

- ▶ BCLI decided not to add a provision that would deem an overholding tenant to be a month to month tenant
 - ▶ Concern that overriding the existing common law rule could lead to confusion and uncertainty
- ▶ ONLRC recommended including a provision stating that the acceptance of arrears of rent or compensation for use and occupation by a landlord from an overholding tenant does not operate as a reinstatement of the tenancy or a creation of the new tenancy unless the parties agree
- ▶ Alberta's *Law of Property Act* states that the acceptance of payments by a landlord for use and occupation or as arrears of rent from an overholding tenant does not operate as a waiver of the notice to quit or the creation of a new tenancy

Deemed Term: Working Group Preliminary Recommendations

1. The UCTA should not state that acceptance of rent or compensation for use and occupation from an overholding tenant does not operate as a reinstatement of the tenancy unless both parties agree
- ▶ Working group unable to agree whether the UCTA should alter the common law rule that acceptance of rent from a year to year overholding tenant creates a new yearly tenancy

Consultation Question:

Should the UCTA include any provisions altering the common law rules regarding deemed terms upon acceptance of rent from an overholding tenant?

Relief from Forfeiture

- ▶ Equitable remedy that either party can seek to prevent a lease from terminating following a breach of certain terms
- ▶ Typical situation is a tenant seeking relief from forfeiture to prevent a landlord from exercising their right of re-entry and termination of the lease
- ▶ Canadian provisions dealing with relief from forfeiture are based on provisions that began appearing in England in the 19th century
- ▶ 3 types of provisions, found in various combinations across Canada
 1. Provisions dealing with breaches of covenants to insure;
 2. General relief from forfeiture provisions; and
 3. Relief from forfeiture provisions in the leasing context
- ▶ The restrictions on resiliating a commercial lease in QC bear some resemblance to the factors courts will consider when deciding to grant relief

Breach of Covenant to Insure: Working Group Preliminary Recommendation

- ▶ Provisions typically authorize a court to grant relief from forfeiture for a breach of a covenant to maintain fire insurance on the premises
 - ▶ Found in BC, SK, AB and NB
 - ▶ BCLRC recommended retaining
 - ▶ BCLI recommended retaining
-
1. The UCTA should not contain a specific relief from forfeiture provision due to a breach of a covenant or condition to insure since this type of provision is rarely used and unnecessary

General Relief from Forfeiture: Working Group Recommendations

- ▶ Typically gives the court jurisdiction to relieve “against all penalties and forfeitures”
- ▶ Found in every province and territory except Quebec
- ▶ Provision found in legislation setting out court’s jurisdiction
- ▶ Can apply in a commercial leasing context, but have a much broader application
- ▶ Working group unable to make any recommendations regarding these types of provisions

Commercial Tenancies Relief from Forfeiture Provisions

- ▶ Based on English legislation
- ▶ Found in SK, MB, ON, NB, PEI, YK, NWT, NU - all substantially similar
- ▶ BCLI did not recommend that BC add similar provisions, instead they proposed a new section:

A tenant has the right to seek relief from forfeiture under the Law and Equity Act irrespective of the character of the breach on which the forfeiture is based and despite:

- a) The landlord's exercise of a right of re-entry under a provision implied by section 7(1)(e) [provisions implied in leases] or of a similar right given by the lease, or*
 - b) The landlord's election to treat the lease as terminated under section 5(2) [application of contractual rules to leases]*
- ▶ This section does not change the law on relief from forfeiture - confirms the tenant's right to seek relief under already existing provisions

Commercial Tenancies Relief from Forfeiture Provisions: Working Group Preliminary Recommendation & Consultation Questions

1. The UCTA should not contain specific provisions regarding relief from forfeiture in the commercial leasing context

Consultation Question

Should the dispute resolution provisions in the UCTA affirm the court's jurisdiction to grant relief from forfeiture to either the landlord or the tenant?

Consultation Question

Should the UCTA set out specific situations where relief from forfeiture could be granted?

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Thank you