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UNIFORM LAW CONFERENCE OF CANADA

UNIFORM COMMERCIAL TENANCIES ACT
FINAL REPORT OF THE WORKING GROUP

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1. Introduction

1.1 Background

[1] Commercial tenancies law in Canada is fragmented, outdated, and, in some respects, obsolete. Most common law jurisdictions have legislation dealing with aspects of commercial tenancies. However, much of it was copied from 18th and 19th Century English legislation and was originally enacted over 100 years ago or was patterned on statutes enacted at that time. The legislation was designed for both residential and commercial tenancies, which are now separated. The archaic nature of much of this legislation is evident in the obsolete terminology in its provisions and its focus on matters that have little or no contemporary commercial significance.

[2] The statutory measures that exist are often scattered among various enactments. In some jurisdictions, the right of distress[1] and the rights of landlords in bankruptcy of tenants[2] are contained in separate legislation. In some jurisdictions, aspects of leasing law are contained in land titles legislation[3], and in others, in omnibus statutes.[4]

[3] Through its discussions, the Working Group has agreed that a modern commercial tenancies act is desirable in order to better serve unsophisticated parties to commercial leases, generally smaller tenants, but also smaller landlords. Current commercial tenancy legislation is frequently so outdated as to be irrelevant and is so scattered that it may be difficult to access. A modern commercial tenancies act could address contemporary issues in commercial leasing, all in one place.

[4] The Working Group has also concluded that a *Uniform Commercial Tenancies Act* (*UCTA*) is desirable to better serve national organizations that have commercial leases in multiple Canadian jurisdictions. While this will frequently be landlords, there are also several national retail stores and national professional firms that will be tenants across the country. Uniformity allows for greater ease in working within the legislation. Further, uniformity will, when the legislation is litigated, result in case law that may apply across Canada rather than in just one jurisdiction.

[5] Several provincial law reform agencies have recommended ways to modernize aspects of commercial tenancies law.[5] However, no common law provincial legislature has enacted legislation that can be a modern precedent for reform.[6] The Civil Code of Québec (Civil Code) offers a comprehensive and up-to-date statement of the private law as it now stands in Québec, including provisions regarding commercial tenancies.[7] While the Civil Code cannot provide a direct model for reform in the common law provinces, it offers guidance and, by way of comparison, raises interesting issues on several aspects of this area of law. The Working Group will consider the extent to which the law of Québec should be harmonized with that of the common law provinces. However, the UCTA is designed for adoption in the common law provinces only.

[6] The overall context of the Working Group's work is important to keep in mind. Commercial leases cover a broad spectrum of relationships. Unlike residential tenancies, commercial tenancies involve relationships ranging from a large real estate investment trust leasing many floors to a national professional firm to the lease of a small shop in town by a small landlord. The Working Group has been careful to consider the consequences of various proposed provisions so that they do not give rise to unintended consequences.

1.2 Project Status

[7] This report is the final report of the Working Group and it accompanies the draft *Uniform Commercial Tenancies Act*.

1.3 Project Organization

[8] At its Annual Meeting in 2011, the Uniform Law Conference of Canada (ULCC) accepted the Law Reform Commission of Saskatchewan's proposal for a project on commercial tenancies and resolved that a Working Group be formed to undertake the project. The Working Group is presently composed of:

Leah Howie, Chair (Law Reform Commission of Saskatchewan);
Nigel Bankes (University of Calgary);
Michelle Cumyn (Université Laval);
Doug Downey (Downey, Tornosky, Lassaline & Timpano Law);
Erin Eccleston (MLT Aikins);
Linda Galessiere (Camelino Galessiere)
James Leal (Nelligan O'Brien Payne);
Richard Olson (McKechnie & Company); and
Jonnette Watson-Hamilton (University of Calgary)

Previous Working Group members include Christopher Cheung, Brennan Carroll, Elizabeth Hall, Michael Milani, Reche McKeague, Joanne Sauder, and Catherine Skinner.

1.4 ULCC Working Group

[9] Members of the Working Group include practitioners and academics from various provinces. Leah Howie, Director of the Law Reform Commission of Saskatchewan chairs the Working Group. The Working Group first met in May 2012 and has presented progress reports at the 2012-2017 Annual Meetings.

[10] Since the 2017 ULCC meeting, the Working Group has met frequently by conference call to review the draft *UCTA* provisions prepared by Alexander Fyfe (British Columbia Ministry of Justice). Several members of the Working Group additionally met in person in April 2018.

1.5 Project Funding

[11] Research and administrative tasks are performed by the Law Reform Commission's Director. The Law Reform Commission and the ULCC share the costs of report translation. Drafting services are provided by a legislative counsel at the British Columbia Ministry of Justice.

2.0 Outstanding Policy Issues

[12] Near the end of the Working Group's review of the draft *UCTA*, the Working Group began reviewing earlier progress reports of the Working Group to determine whether any issues remained outstanding. All outstanding issues were dealt with by the Working Group with the exception of whether the *UCTA* should impose a duty on a landlord to repair the leased premises, and whether the *UCTA* should impose a duty on either the landlord or the tenant to maintain the leased premises during the course of the commercial tenancy.

[13] The Working Group discussed this issue in 2012 and was unable to reach a consensus. Accordingly, in 2013 the Working Group asked the ULCC delegates the following consultation questions:

1. Should the *UCTA* include an implied obligation to repair on the tenant only?
2. Should the *UCTA* include an implied obligation to repair on both the tenant and the landlord?
3. Should the *UCTA* exclude any implied obligation to repair?

[14] In its most recent discussions of this topic, the Working Group agreed the *UCTA* should include an implied obligation to repair damage caused by the tenant but was again unable to reach consensus on whether the *UCTA* should include an implied obligation to repair on the landlord. A related issue is whether there should be any duty to maintain the premises associated with the duty to repair the premises.

[15] The majority view was that the *UCTA* should not include an implied obligation to repair on the landlord, and the *UCTA* is currently drafted to reflect the majority view. However, given the lack of consensus and the potential importance of this topic, the Working Group is seeking input from ULCC delegates on this issue.

2.1 Duty to Repair

[15] The Working Group agreed the *UCTA* should contain a provision requiring the tenant to "repair, at its expense, any damage caused by the tenant or a person for whom the tenant is responsible, except reasonable wear and tear." This provision is similar to that recommended by the British Columbia Law Institute[8] and reflects to a degree provisions currently found throughout the common law jurisdictions. At common law, tenants are required to use the premises in a "tenant-like manner", which does not extend to an obligation to maintain or repair the premises.

[16] Commercial landlords are not currently required to repair the premises in commercial leasing legislation in the common law Canadian jurisdictions. The common law has also not historically implied such an obligation. There are, however, a series of cases which have expanded the scope of quiet enjoyment to include an obligation to repair if the failure to repair deprives the tenant of substantially the whole benefit of the contract.[9]

[17] In Quebec, commercial landlords are required to repair the leased premises. The applicable articles of the Civil Code provide as follows:

> **1854.** The lessor is bound to deliver the leased property to the lessee in a good state of repair in all respects and to provide him with peaceable enjoyment of the property throughout the term of the lease.
>
> He is also bound to warrant the lessee that the property may be used for the purpose for which it was leased and to maintain the property for that purpose throughout the term of the lease.

1864. The lessor is bound, during the term of the lease, to make all necessary repairs to the leased property other than lesser maintenance repairs, which are assumed by the lessee unless they result from normal aging of the property or superior force.

1865. The lessee shall allow urgent and necessary repairs to be made to ensure the preservation or enjoyment of the leased property.

A lessor who makes such repairs may require the lessee to vacate or be dispossessed of the property temporarily but, if the repairs are not urgent, he shall first obtain the authorization of the court, which also fixes the conditions required to protect the rights of the lessee.

The lessee retains, according to the circumstances, the right to obtain a reduction of rent, to apply for the resiliation of the lease or, if he vacates or is dispossessed of the property temporarily, to demand compensation.

1866. A lessee who becomes aware of a serious defect or deterioration of the leased property is bound to inform the lessor within a reasonable time.

1867. Where a lessor fails to make the repairs or improvements he is bound to make under the lease or by law, the lessee may apply to the court for authorization to carry them out himself.

If the court grants authorization to make the repairs or improvements, it determines their amount and fixes the conditions to be observed in carrying them out. The lessee may then withhold from his rent the amount of the expenses incurred to carry out the authorized work, up to the amount fixed by the court.

1868. Where the lessee has attempted to inform the lessor, or has informed him but the lessor has not acted in due course, the lessee may undertake repairs or incur expenses, even without the authorization of the court, provided they are urgent and necessary to ensure the preservation or enjoyment of the leased property. The lessor may intervene at any time, however, to pursue the work.

The lessee is entitled to reimbursement of the reasonable expenses he incurred for that purpose; he may, if necessary, withhold the amount of such expenses from his rent.

1869. The lessee is bound to render an account to the lessor of the repairs or improvements made to the property and the expenses incurred and to deliver to him the vouchers for such expenses and, in the case of movable property, the replaced parts.

The lessor is bound to reimburse the lessee for any amount in excess of the rent withheld, but not in excess of the amount the lessee was authorized to disburse, where that is the case.

1890. Upon termination of the lease, the lessee is bound to surrender the property in the condition in which he received it but he is not liable for changes resulting from aging or fair wear and tear of the property or superior force.

The condition of the property may be established by the description made or the photographs

taken by the parties; if it is not so established, the lessee is presumed to have received the property in good condition at the beginning of the lease.

[18] The Working Group considered including a provision based on the Civil Code in the *UCTA*. The following provision was discussed as a potential option for the purposes of discussion by the Working Group:

> ***Repairs to the Leased Premises***
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> *2.12 (1) The landlord must, subject to subsection (5), make all necessary repairs to the leased premises other than minor maintenance repairs, which are assumed by the tenant unless they result from normal aging of the property or force majeure.*
>
> > *(i) a determination of what repairs are necessary must include a consideration of the condition of the leased premises at the time the commercial lease was entered into.*
> >
> > *(ii) if there is no evidence of the condition of the leased premises at the time the commercial lease was entered into, the leased premises shall be presumed to have been in good condition.*
>
> *(2) The tenant shall allow urgent and necessary repairs to be made to ensure the preservation or enjoyment of the leased premises. The landlord may require the tenant to vacate or be dispossessed of the leased premises temporarily in order to make urgent and necessary repairs.*
>
> > *(i) the tenant may apply under section 6.1. for a determination of whether the repairs are urgent and necessary.*
>
> *(3) If the repairs are not urgent and the landlord requires the tenant to vacate the leased premises or to be dispossess of the leased premises in order to make the repairs*
>
> > *(i) the landlord must obtain an order under section 5.1 [summary dispute resolution] in order to require the tenant to vacate or be dispossess of the leased premises.*
> >
> > > *(a) in making the order, the court may reduced the amount of rent owed by the tenant, and award compensation to the tenant.*
> >
> > *(ii) the tenant may terminate the commercial lease prior to or after receiving the order under subsection 3(i).*
>
> *(4) A tenant who becomes aware of a serious defect or deterioration of the leased premises must inform the landlord within a reasonable time.*
>
> *(5) A landlord may elect, within 30 days of being informed of the serious defect or*

deterioration, to not undertake a necessary repair to the leased premises if undertaking the repair would not be commercially reasonable.

(i) A landlord who elects to not undertake a necessary repair must provide written notice of the election to the tenant.

(6) A tenant who receives notice of an election not to make the necessary repairs under subsection (5) may:

(i) apply under section 6.1 for a determination of whether completing the necessary repairs would not be commercially reasonable;

(ii) complete the necessary repairs at their own expense; or

(iii) elect to terminate the lease.

(7) If the landlord fails to make an election under subsection (5) and fails to make the repairs or improvements required under subsection (1) in a reasonable time, the tenant may:

(i) apply to the court under section 6.1 for an order authorizing the tenant to conduct the repairs

(a) when granting the order under 6.1 to make the repairs or improvements, the court must determine their amount of the repairs or improvements and may add conditions to be observed in carrying out the work;

(b) the tenant may then withhold from rent the amount of the expenses incurred to carry out the work, up to the amount fixed by the court.

(ii) undertake the repairs or incur expenses without a court order if the repairs are urgent and necessary to ensure the preservation or enjoyment of the leased premises

(a) the tenant is entitled to reimbursement of reasonable expenses incurred and may withhold this amount from rent after providing an account of the expenses incurred to the landlord;

(b) the landlord may intervene at any time to either complete the work, or make an election under subsection (5).

[19] The Working Group is in agreement that any such provision should be able to be contracted out of by the parties to a commercial lease. The result would likely be that most leases prepared by legal counsel will contract out of this type of provision, and the provision will thus primarily apply to unsophisticated landlords and tenants.

[20] A majority of the Working Group was ultimately not in favour of including this, or any

other provision, requiring a landlord to repair the leased premises. Reasons given in support of this view included:

- Such a provision would apply to leases that omit a repair provision because it was either overlooked, one or both parties were aware the law does not require a landlord to repair, the amount of rent agreed to was based on an "as is" assessment of the property, or neither party was of the view there was anything to repair (e.g. a lease for bare land for uses such as farming or a parking lot);
- Including a repair obligation would likely require a provision be included requiring both parties to maintain the premises, and defining a maintenance standard would be challenging;
- Which party should be required to repair will depend on the circumstances and the specific nature of the property being leased (e.g. multi-tenanted buildings, leases of bare land, leases of strata lots, leases of single tenanted property);
- Most leases today are "triple net" and the cost of repair falls on the tenant as an operating cost. Typically, landlords only pay for "structural" repairs;
- There is a wide variety of commercial leases, both in terms of the nature of the property being leased and the nature of the parties to the lease; imposing an obligation to repair in all circumstances may result in an injustice to one party or another;
- Implied terms in leases exist to provide basic protections to both parties, but implied terms should not be a substitute for parties taking care of their own interests by carrying out due diligence before entering an agreement and negotiating terms on important issues.

[21] A minority of the Working Group remains of the view that a provision requiring a landlord to repair the leased premises should be included in the *UCTA* as a matter of fairness and to reflect what may be the expectations of parties to a commercial lease, particularly those who enter into commercial lease agreements without the assistance of legal counsel. These members also noted that the Civil Code provisions have been in place for 25 years and have provided a foundation for reasonable and fair solutions to this issue.

Consultation Question #1: Should the *UCTA* include a provision requiring landlords to repair the leased premises?

Consultation Question #2: If the *UCTA* is not going to require a landlord to repair the leased premises, should the *UCTA* contain a provision explicitly stating that landlords have no duty to repair the leased premises (subject to any agreement between the parties), so that unsophisticated parties are made aware?

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[1] See e.g. *Rent Distress Act,* RSBC 1996, c 403; *Civil Enforcement Act,* RSA 2000, c C-15, ss 104-105.
[2] See e.g. *Landlord's Rights on Bankruptcy Act,* RSA 2000, c L-5.
[3] See e.g. *The Land Titles Act, 2000,* SS 2000, c L-5.1, ss 137-146; *Land Titles Act,* RSA 2000, c L-4, ss 95-101.
[4] See e.g. *Law and Equity Act,* RSBC 1996, c 253, s 45.
[5] See Ontario Law Reform Commission, Report on Landlord and Tenant Law (Toronto: The Commission, 1976) [OLRC Report]; Law Reform Commission of British Columbia, Distress for Rent (LRC 53)(Vancouver: The Commission, 1981) and Report on the Commercial Tenancy Act (LRC 108) (Vancouver: The Commission, 1989) [BCLRC Report]; Manitoba Law Reform Commission, Distress for Rent in Commercial Tenancies (Report #81) (Winnipeg: The Commission, 1994), Covenants in Commercial Tenancies (Report #86)(Winnipeg: The Commission, 1995) [MLRC Report No. 86], Fundamental Breach and Frustration in Commercial Tenancies (Report #92) (Winnipeg: The Commission, 1996) [MLC Report No. 92], Commercial Tenancies: Miscellaneous Issues (Report

#95) (Winnipeg: The Commission, 1996) [MLRC Report No. 95]; Law Reform Commission of Saskatchewan, Proposals Relating to Distress for Rent (1993); Report on Proposals for a New Commercial Tenancy Act (BCLI, 2009) (Vancouver, the BCLI: 2009) at 53 [BCLI Report on Proposals].

[6] Bill 10, *Commercial Tenancy Act,* 2nd Sess 35th Leg, British Columbia, 1993, based on the LRCBC Report, *ibid*, was not enacted.

[7] The Civil Code of Québec was enacted in 1991 and entered into force in 1994. Québec's previous code, the Civil Code of Lower Canada, was enacted in 1866. Complete revision and restatement of the private law of Québec leading up to the enactment of the Civil Code of Québec began in the 1950s and took four decades to complete. The provisions regarding commercial tenancies are found at articles 1851 and following.

[8] BCLI Report on Proposals, *supra* note v, s. 7(1)(g).

[9] Richard Olson, *A Commercial Tenancy Handbook* (2010-Release 1) (Toronto: Thomson Reuters Canada, 2004) at 7-20, citing *Hong Kong Fir Shipping Co. v Kawasaki Kisen Kaisha Ltd.* (1961), [1962] 2 QB 26, [1962] 2 All ER 474 (Eng QB); *Syncrude Canada Ltd. v Hunter Engineering Co.*, [1989] 1 SCR 426; *Wesbild Enterprises Ltd. v. Pacific Stationers Ltd.* (1990), 52 BCLR (2d) 317 (BCCA); *Firth v BD Management Ltd.* (1990), 73 DLR (4th) 375 (BCCA); but see the cautionary view in *Broadway Melody Music Ltd. v. Ho* (1991), 14 RPR (2d) 190 (BCSC).