The Law of Commercial Leasing in Canada 1999

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INTRODUCTION

1.1 The Commercial Leasing Market

[1] Leasing as a device for the acquisition and financing of goods has become an extremely important component of the Canadian and global economies. The Canadian Finance and Leasing Association, relying on World Bank and United Nations sources, recently advanced these statistics:

In 1978, annual plant and equipment leasing volumes worldwide (excluding vehicles and real estate) were about US$40 billion. By 1986, plant and equipment leasing had grown to almost US $175 billion and by 1996, worldwide annual plant and equipment leasing volumes had grown two and a half times to about US $430 billion. Canada ranks ninth in the world in annual plant and equipment leasing.[1]

[2] The same organization estimates the leasing industry to have a total of over $60 billion in financing in place with businesses and consumers in Canada. In 1997, 25% of business investment in leasing and equipment was financed through leases, and 46% of new light passenger vehicles were leased, [2] as compared with 34% acquired through loans and 20% purchased with cash. See footnote [3]

[3] The explosion of leasing activity since the 1980s has prompted a variety of legislative responses in the United States. The most significant of these was the promulgation in 1987 of Article 2A of the Uniform Commercial Code (the UCC) by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI), currently adopted by forty-eight states and undergoing periodic revision.[4] In addition, aspects of consumer leasing, particularly in the automotive field, are subject to a variety of state and federal statutes.[5] The NCCUSL's most recent efforts to codify and harmonize leasing law are embodied in a proposed Uniform Consumer Leases Act, the current draft of which is expected to receive first reading at a meeting of the Commissioners to be held this summer. [6]

[4] Internationally, the Unidroit Convention on International Financial Leasing [7] represents an attempt to harmonize important aspects of lease financing on a global basis.

[5] In contrast, Canadians have undertaken no comprehensive statutory reform of leasing law, though some aspects of leasing activity are regulated by provincial legislation.[8] One can only speculate on the reasons for Canadian inaction. It seems likely that the absence of a

significant demand for rationalization of this very complex area of the law reflects the minimal amount of litigation of leasing issues and the scarcity of published writings or commentary on the subject.[9] It may be that this state of affairs indicates that there are few problems in the law of leasing worthy of statutory redress. However, it is equally possible that the problems that exist are simply not litigated for practical reasons. Issues arising from the consumer leasing market are not likely to be presented for judicial determination since they are most likely to affect the consumer lessor who, for reasons both of cost and lack of legal sophistication, will rarely go to court. In the commercial leasing market, parties create their own private legal structures by contract. The preponderance of the caselaw that does exist in this field addresses third party priority issues, supporting the supposition that inter partes matters are largely resolved extrajudicially.

[6] While it is therefore difficult to draw firm conclusions regarding the need for legislation from a survey of the legal literature and caselaw alone, that exercise is nevertheless an important first step in addressing the question. Identification of the legal issues inherent in the current state of the law assists in the determination of what practical problems might arise in the real world of leasing. In addition, it enables us to draw informed inferences about problems that likely do exist, whether or not they are evidenced by litigation. This is particularly true in the rapidly expanding consumer leasing market.

[7] This study therefore undertakes a survey of existing Canadian law governing commercial leasing transactions, as a basis for consideration of the need for statutory reform.[10]Possible statutory responses to leasing issues are considered through a comparative examination of Article 2A of the United States Uniform Commercial Code, United States consumer leasing legislation and the Unidroit Convention on International Financial Leasing.

1.2 The Lease Transaction

[8] Because modern lease transactions adopt a variety of legal and functional forms, it is virtually impossible to delineate discrete categories or kinds of lease. Furthermore, the descriptive terminology applied to these forms varies, and no apt labels exist for some leasing structures. One can only describe in general terms the nature and objective of the several leasing devices currently in use.

[9] A lease transaction entails a contractual relationship between the lessor and the lessee, as well as a bailment. It thus invokes the traditional law of bailment along with the general principles of contract law. In its simplest form, there are only two parties to the transaction, the lessor, who owns the goods subject to the lease, and the lessee, who is entitled to their possession and use over a stipulated term in return for monetary payment, ordinarily by way of installments. The lessee may or may not be entitled to acquire title to the goods through the exercise of an option to purchase, usually at the end of the term. The lessor is generally a dealer who inventories goods for lease. Such transactions may range from the hourly rental of ski gear at a resort to the long term lease of business equipment.

[10] The functional objectives of a transaction of this kind may vary. In its "pure" form, such a lease is designed simply to enable the lessee to use the lessor's property on a pay-as- you go basis. Such a lease is sometimes described as an operating lease or in some contexts as a "true" lease, by way of distinction from a "security" lease, which lies at the other end of the spectrum.[11]

[11] A security lease is designed as a device for the acquisition of the leased goods under a deferred payment schedule, comparable in many respects to a conditional sale contract. As such, it is primarily a financing mechanism, though it may give rise to issues ordinarily arising in the context of a contract of sale or a true lease. In these transactions, the lessor retains title to the leased goods as security for payment of the sums stipulated in the contract through periodic instalments of "rent," usually along with a terminal purchase option sum.

[12] A simple lease may also function as a financing device if it is part of a "sale-leaseback" transaction. In that scenario, the original owner of the goods sells them to a financial institution, which then leases them back to the owner-cum-lessee. The lessor in such a relationship cannot be expected to assume any obligations relating to the quality or performance of the goods, which will have been acquired from another source either contemporaneously with or some time prior to the financing transaction.

[13] In the case of long term leases, a second contractual relationship is very often introduced into the picture through the assignment of the lessor's interest to a third party financer, who may or may not be related to the lessor.[12] Functionally, this arrangement enables the lessee to finance the acquisition of goods through indirect resort to the assignee's capital, simultaneously facilitating the business operations of the lessor, who would otherwise not be in a position to inventory or acquire goods for lease to its customers. The assignee in this scenario is a provider of credit, not goods. It is therefore concerned to avoid any responsibility for the quality, performance or maintenance of the goods subject to the lease, while enjoying the benefit of the lessee's payment obligations thereunder.

[14] The most complex variant of current leasing structures is what UCC Article 2A designates the "finance lease," terminology which is adopted in this context hereafter. [13] In this situation, goods are sold by a supplier to a lessor, who then leases them to the lessee. The lessor is a financial institution whose role is to finance the acquisition of the goods in question by the lessee. It is ordinarily not related to the supplier, and is not involved in the selection or evaluation of the goods acquired for purposes of the lease. The lessee will have chosen the goods subject to the lease and dealt directly with the supplier in determining their performance attributes and suitability. However, there is no contractual relationship between the supplier and the lessee. The payment structure in the lease is designed to enable the lessor to recover its capital cost and a return on its investment. The lease is functionally a device for repayment over its term of the funds advanced for acquisition of the leased goods by the lessor. Legally, the transaction entails two related contracts; the

contract of sale between supplier and lessor, and the contract of lease between lessor and lessee. The adoption of the finance lease as a device for the acquisition of goods by the lessee reflects the taxation and financing strategies of the lessee and lessor, rather than a decision to "lease" goods in the traditional sense.

[15] While the various kinds of lease transaction described above are legally and conceptually distinct in certain aspects, they share one functional objective. In today's commercial leasing market, a lease (other than one of short duration) is designed to finance the acquisition of goods, regardless of whether it is a "true" lease or a security lease. [14] The assimilation of purchase and financing functions with a legal form historically intended simply to regulate the use of one person's goods by another has broadened and complicated the range of legal issues arising from these transactions, particularly insofar as those functions entail the introduction of a third party financer. Those issues may invoke aspects of the common law of bailment, contract and assignment, choses in action legislation, the statutory and common law of sales, the provincial and territorial Personal Property Security Acts and a variety of consumer protection statutes.

[16] The complexity of modern leasing transactions, matched by the complexity of the potentially relevant law, would make a fully comprehensive analysis of all of the legal aspects of modern leasing a monumental task. However, it is possible to identify and address the primary issues that might merit attention through statutory reform. They are considered hereafter under the headings 2) quality and performance issues affecting the lessee, 3) enforcement and remedies, 4) third party rights and priorities and 5) consumer leases.

[17] In the general discussion under the first three of these headings, no attempt is made to draw the reader's attention to issues or points of law of particular relevance in the context of consumer leases. Those issues are addressed under the separate head of consumer leases, along with a discussion of currently applicable law.

2. Quality and Performance Issues Affecting the Lessee

2.1 Introduction: Terms Implied at Common Law

[18] Since the primary objective of the lessee in most leasing transactions is the acquisition and use of the goods subject to the lease, many of his or her concerns will be common to those of a purchaser. These include full and fair disclosure of information relating to the transaction, as well as assurances of timely delivery, uninterrupted use and possession and acceptable quality and performance of the leased goods.

[19] In a transaction involving only lessee and lessor, these issues might be addressed through the law of contract, the law of bailment, the law of sales or some combination of

the three. A modern legal analyst might approach inter partes problems by first considering whether the transaction in question is in substance a sale, despite its formal guise as a lease. If it is, it would fall within the scope of the provincial Sale of Goods Acts,[15] which imply into the contract statutory terms mandating that the goods supplied must correspond with their contractual description, and that those sold by a business seller must meet standards of merchantable quality, fitness for purpose and correspondence with sample. The Act also imposes upon the seller specified delivery obligations and implies contractual terms relating to the seller's title to the goods and warranting the buyer's uninterrupted possession thereof.

[20] The functionalist approach has in fact prevailed in United States courts who, before the passage of UCC Article 2A, routinely applied the provisions of UCC Article 2 on Sales to transactions that were substantively sales, though structured as leases.[16] In fact, the similarity of many aspects of contracts of sale and lease prompted considerable discussion over the desirability of simply amending Article 2 to include leases, rather than enacting a separate statutory regime.[17] While the latter course was ultimately adopted through promulgation of Article 2A, the leasing article was to a great extent modeled after Article 2.

[21] The Canadian tradition has been rather more literalist. The general scope provision of the Sale of Goods Acts defines a contract of sale as one in which the seller transfers or agrees to transfer "the property in the goods" to the buyer. At a minimum, this contemplates the transfer or agreed transfer of the whole of the seller's proprietary interest. Since a lease reserves title to the lessor, transferring only a limited interest to the lessee, a transaction structured as a lease cannot meet the definitional test determining application of the Sale of Goods Act.[18] Its provisions are therefore not directly available to a lessee, and Canadian courts have shown no inclination to adopt a functionalist characterization that would bring transactions structured as a lease within the Act.

[22] While no statutory framework therefore exists to protect the interests of a lessee in matters relating to the goods themselves, terms corresponding to those of the Sale of Goods Act have been implied in contracts of lease at common law, often by way of analogy with the statutory implied terms of sales law. The pertinent jurisprudence is traditionally regarded as part of the common law of bailment, though the modern trend is to focus on the contractual aspects of the lease relationship with the result that little distinction remains between the law of bailment and the law of contract in connection with issues other than those relating to the parties' proprietary rights.[19] Unfortunately, some uncertainty prevails in connection with the implication of terms in contracts of lease at common law.

[23] Though courts have consistently found lessors subject to an implied duty to provide goods fit for the lessee's communicated purpose, they are divided on whether their liability to fulfil that duty is strict or subject to a lesser standard of reasonable care.[20]

[24] It is also not clear whether courts will imply a condition of merchantable quality, or some equivalent, in a contract of lease. In spite of their apparent willingness to reason by

analogy with contracts of sale in some contexts,[21] there is little if any authority for the implication of such a term in a lease.[22] In contracts of sale, the condition of merchantable quality imposes a requirement of general suitability much broader than the condition of fitness, which is dependent both upon an express or implied communication of purpose and a finding of actual reliance by the buyer on the seller's skill and knowledge in providing appropriate goods.[23] Nor is an obligation imposed on a lessor at common law to maintain the leased goods,[24] or to warrant their durability. [25]

[25] The need to find a basis upon which to impose liability for defective goods in contracts of lease has sometimes been filled through implication of a term requiring that the goods correspond with their contractual description, equivalent to the term implied by statute in a contract of sale. In sales law, the condition is breached where the goods provided are essentially different from the contract description, in the sense that they are different in kind from what was to be delivered. [26] However, in the context of contracts of hire, some courts have resolved problems of deficient quality through a rather dubious expansion of the scope of liability under such a term, concluding that seriously defective goods are "essentially different" than what the lessor was to provide.[27]

[26] In a few cases involving automobiles, Canadian courts have implied a contractual obligation on the part of the lessor to provide a vehicle that could be driven safely, without reference either to presumed intention or to the common law principles governing relationships of lease or hire as a basis for that implication. [28] These cases appear to approach the requirement of safe performance as an implicit aspect of the contractual description - that is, the lease is not simply the lease of an automobile, but the lease of a safe automobile.

[27] The law is similarly unsatisfactory with respect to implied terms relating to title and to the lessee's right to undisturbed possession of the goods leased. At common law, the lessor impliedly warrants that the hirer will enjoy uninterrupted use of the goods for the period of hire. Disturbance of possession by the lessor/bailor or a third party would thus entitle the hirer to damages. While there is no common law warranty of title imposed on the lessor,[29] there is English authority to the effect that such a warranty is implied in a contract of hire-purchase, which compares in many respects to a lease containing an option to purchase. Such a warranty ensures that the owner is in a position to convey title to the hirer at the time that the option to purchase is exercised.

[28] Professor Ziegel has pointed out that neither of the traditional sales warranties of quiet possession or title are entirely appropriate to most contracts of lease. While the warranty of quiet possession offers insufficient protection against defects in the lessor's title prejudicing exercise of a purchase option, the warranty of title overprotects a lessee insofar as her interest is confined to use and possession during the term of the lease.[30]

[29] In the result, the implication of terms imposing obligations relating to the quality of and title to goods subject to the lease offers a somewhat indeterminate degree of protection

to lessees. The fact that the law is less than precise in this respect may be regarded as relatively inconsequential, in view of the standard practice of contractually excluding whatever terms might be implied. On the other hand, one cannot assume that all lease contracts will include an enforceable exclusionary provision. If resort must in some instances be had to general principles of law to determine the rights of a lessee, one would hope that those principles are clearly defined and that their application is predictable. This cannot be said of the terms regarding quality, title and undisturbed possession that might be implied in contracts of lease at common law.

2.2 The Effect of Contractual Exclusionary Provisions

[30] Since the 1989 decision of the Supreme Court of Canada in Hunter Engineering Co. v. Syncrude Canada Ltd.,[31] it has been clear that a contractual provision excluding or limiting express or implied warranties or any other liability that might otherwise arise in a contractual relationship is prima facie enforceable according to its terms. An exclusionary provision will operate to exclude warranties of quality or performance if, read in the contractual context in which it is used, it was clearly intended to have that effect regardless of the degree to which the performance rendered by the sheltered party might appear deficient. While Hunter Engineering is generally taken to have laid to rest the so-called doctrine of fundamental breach, some courts remain reluctant to enforce exclusionary provisions in lease contracts when the leased goods have proven seriously defective.

[31] A number of Ontario courts have refused enforcement of contractual provisions excluding implied terms, or under which the lessor waives any defence against an action for unfulfilled monetary obligations, including unpaid future rent. The finding that there was a "fundamental breach" of an implied term as to the safety or quality of the leased goods has been held to relieve the lessee of his or her payment obligations.[32] However, most other courts have refused to allow lessees to escape clear contractual waivers.[33] The judicial ambivalence reflected in these disparate decisions no doubt reflects a level of uncertainty regarding the rights of lessees in connection with problems of quality and performance.

2.3 Quality and Performance in Transactions Involving Third Party Financial Institutions

[32] Even if terms may be implied in a contract of lease to protect the lessee's expectations as to performance, quality and uninterrupted use of the goods, those warranties are of limited relevance in transactions involving a third party financial institution. This is true both where the transaction is a finance lease, and where there is an assignment of lease from a supplier- lessor to a finance company or bank.

[33] In the first situation, the leased goods are purchased by the financial institution from a supplier, and then leased to the lessee. The performance obligations implied in a sale transaction are thus owed by the supplier to the lessor, not to the lessee who is not privy to the contract of sale. Since the lease invariably excludes any and all obligations relating to

the quality and performance of the goods,[34] the lessee enjoys the benefit of any legally implied terms only to the extent that the contract of sale provides for assignment of the lessor's warranty rights as against the supplier to the lessee. If the supplier has made representations regarding performance or quality directly to the lessee, the latter may in addition invoke the common law doctrine of "collateral contract", pursuant to which such representations may be given contractual effect, supporting an action against the supplier for breach.[35]

[34] The typical contractual reordering of the legal rights and obligations that would otherwise inhere in this kind of transaction is appropriate, assuming that the lessor's role is solely to finance the lessee's acquisition of goods provided by the supplier. The lessor rarely plays a part in selection or evaluation of the goods, or in determination of their suitability for the purposes of the lessee. [36] It should therefore not be subject to liability for their deficient performance. In fact, it has been argued that no terms relating to quality or performance should be implied in this sort of leasing contract, either by statute or at common law. [37] On the other hand, there is no reason why the supplier should be immune from liability for the quality of the goods it has supplied to an identified lessee, any more than if the goods had been sold to the lessee directly.

[35] While the contractual definition of the parties' rights appears for the most part to effectively facilitate the appropriate outcome in a finance lease, the fact that those rights are not established by statute subjects all three parties to some degree of uncertainty. A lessee can only claim warranty protection to the extent that the supplier's or manufacturer's warranties are effectively assigned to her. Even an effective assignment may not fully protect the lessee, since the damages recoverable for breach of a warranty of quality may be limited to those suffered by the lessor. The lessee is in reality assigned only the lessor's right to enforce the warranties as to quality, not the warranties as such.[38]

[36] From the perspective of the lessor, an element of risk is associated with its necessary reliance on the contractual exclusionary provision. Though it seems that such provisions are for the most part enforced, they may be ineffective if the court so construes the contract that the exclusion does not shield the lessor from liability for a serious defect in the goods. Further, they may be invalidated on the grounds of unconscionablity or, in the opinion of Wilson J. as expressed in Hunter Engineering v. Syncrude, on the grounds that they are unreasonable.[39]

[37] Though the supplier risks little in such a transaction, it may be subject to some uncertainty in assessing the precise extent of its liability to the lessee in relation to the leased goods.

[38] Similar issues arise where the lessor supplies goods to the lessee, but assigns the lease to a third party financer.[40] In the absence of contrary contractual provision, the assignee assumes the contractual rights of the lessor, subject to any claims or defences of the lessee in existence at the time that the lessee acquires knowledge of the assignment. [41] However,

in practice the contract of lease will ordinarily contain a cut-off or waiver of defence clause pursuant to which the lessee relinquishes any claims or defences against the assignee. Since this precludes a lessee from raising a deficiency in the leased goods as a defence to the assignee's claim for the rent, the practical potency of any warranties of quality is considerably diluted, even if the lessee retains rights against the lessor.[42] Where the assignee is simply a financer and not the supplier of the goods, the contractual elimination of any performance or quality obligations is appropriate, as it is in the context of the finance lease. [43] In the absence of empirical data, it is difficult to determine whether Canadian lessees are in practice sufficiently protected by their rights against the assignor, combined with ancilliary service contracts and manufacturers' warranties.

2.4 Statutory Responses

[39] Uncertainty over the nature and extent of lessors' warranties implied at common law in contracts of lease was one of the factors motivating promulgation of UCC Article 2A. [44] In addition, its drafters appreciated that the special features of a finance lease transaction warranted clear definition of the rights and obligations of the three parties involved. [45]

[40] All of the express and implied warranty provisions of UCC Article 2 on Sales are incorporated, with appropriate modification, in Article 2A. [46] The lessee therefore enjoys a set of default rights against the lessor, supporting defined remedies for the goods' defective quality or performance, and for interference with the lessee's possession. The warranties of fitness[47] and merchantability [48] parallel those implied in contracts of sale under Article 2. [49] However, the warranties against interference with possession are specifically tailored to address the limited nature of a lessee's interest. [50]

[41] The efficacy of the warranty against interference to fully protect a lessee has been the subject of some debate. [51] While it is premature to attempt at this stage to define precisely how such a warranty should be drawn, it is worth noting that an appropriate definition of the proprietary rights and obligations of the parties to a lease would constitute one of the more meaningful components of any statutory reform of leasing law. The implication of terms relating strictly to the quality and performance of the goods, though beset with some uncertainty, is relatively simple by way of comparison with the difficulty involved in relying on dated common law notions or presumed intent to regulate the complexities of the parties' proprietary relationship in a modern lease transaction.

[42] Article 2A defers to the parties' substitution of their own risk allocations by allowing disclaimer of the statutory warranties.[52] However, to the extent that there is no disclaimer, the benefit of the statutory warranties is extended to third parties who might reasonably be expected to use or be affected by the leased goods, overcoming the barrier of privity that in general still precludes third party claims in Canada.[53]

[43] The assignment of leases by retail lessors of goods to a finance house is accommodated by Article 2A. However, the provisions regulating alienability of the parties'

interests under a lease are very complex. Though an assignment is effective notwithstanding contractual provision to the contrary, an elaborate set of rules establishes remedies for breach of contractual provisions prohibiting assignment, including the creation of security interests and other charges. In addition, transfers that materially impair the prospect of obtaining return performance or materially alter contractual risk allocations trigger defined consequences.

[44] One of the most important features of Article 2A is its delineation of special rules tailored to the realities of a finance lease. The lessor is exempted from the statutory warranties of merchantability and fitness,[55] and is subject only to a limited warranty against interference with possession.[56] However, the lessee is given the benefit of the express and implied warranties given by the supplier to the lessor in the supply contract, to the extent of the lessee's leasehold interest.[57] A supplier may effectively exclude or modify warranty obligations in the supply contract, thereby precluding warranty claims by the lessee. However, this is consistent with the general right of lessees who are themselves the supplier of goods to contract out. Furthermore, the definition of "finance lease" ensures that the lessee in such a transaction has advance notice of the terms of the supply contract, including, of course, any exclusionary provisions, before he or she is bound to the lease.[58]

[45] Although Article 2A is remarkably comprehensive in its coverage of the issues that might arise in a lease transaction, the scope of its application is limited by the choice to exclude transactions that, though framed as a lease, are in substance a security agreement. [59] Since finance leases will often in substance be security agreements, this exclusion significantly limits the impact of those provisions relating to such transactions.

[46] A finance lease, or any other, that is designed primarily to secure the payment obligations of the lessee will fall subject only to UCC Article 9, which does not address warranty obligations at all. This is, in the writer's opinion, anomalous. The fact that a transaction is designed to secure performance of a payment obligation does not mean that it has no other dimensions. A security lease also involves the acquisition and use of the leased goods by the lessee. Problems arising in connection with that aspect of the transaction must be resolved in a security lease as well as in a true lease. The analogy of a conditional sale contract demonstrates this point.

[47] A conditional sale contract is indisputably a security agreement, both under UCC Article 9 and under the Canadian Personal Property Security Acts. The seller's formal retention of title is designed to secure payment of the purchase price. Insofar as that facet of the transaction is concerned, the goods function as collateral. However, the transaction also involves the supply of goods by the seller to the buyer. In that respect, the buyer deserves and is legally entitled to the same warranty protections as a buyer under an outright contract of sale.

[48] The lessee under a security lease is in a position comparable to that of a buyer under a conditional sale contract. However, Article 2A's exclusion of security leases casts the parties

to such a transaction back upon the common law, with all its uncertainties, to resolve issues arising from deficiencies in the quality or performance of the goods subject to the lease, or from a third party's interference with the lessee's possession.[60]

[49] Furthermore, the exclusion of security leases from Article 2A obliges those affected by such a transaction to engage in the frequently difficult determination of whether the lease in question is or is not a security lease. This is particularly true in connection with finance leases. To quote a noted American commentator,

The most frequently litigated "commercial law" issue relating to personal property leases has been whether a purported lease is a so-called "true lease" or merely a disguised secured sale or loan. Since the Code has been widely enacted the issue has usually been framed as whether a lease is one "intended as security" within the meaning of section 1-201(37), defining "security interest". The cases dealing with the lease-security interest issue, as a group, are hopelessly contradictory and confusing.[61]

[50] Since those lines were written, the issue has been addressed through the amendment of UCC Â§1-201(37).[62] The amended provision defines a series of criteria designed to assist in the determination of whether a lease is or is not in substance a security agreement. However, these amendments do not appear to have entirely resolved the problem of characterization. [63]

[51] The preservation of such a problematic distinction to no apparent purpose is perplexing. Were any attempt at statutory regulation of finance leases to be undertaken in Canada, the drafters would be well advised to avoid it.

[52] The unique features of a finance lease are addressed by the Unidroit Convention on International Financial Leasing [64] in the context of international lease transactions. The Convention adopts the general approach taken in UCC Article 2A, except that it applies to all finance lease transactions falling within its definitional provisions, which accommodate security leases.[65] Under the Convention, the supplier owes the same duties to the lessee as if the lessee were a party to the supply agreement and as if the equipment were to be supplied directly to the lessee. [66] At the same time, it exempts the lessor from liability to the lessee for loss relating to the leased equipment, except to the extent that it arises due to the lessee's reliance on the lessor's skill or judgment.[67]

2.5 Conclusions

[53] The foregoing discussion reveals two significant deficiencies in existing Canadian law. No clear set of default warranty provisions exists defining the rights and obligations of parties to a lease in connection with the quality and performance of the leased goods. The lessor's title obligations and the content of an implied term defining the lessee's right to uninterrupted possession are similarly uncertain.

[54] Secondly, no special rules or principles of law have been developed to address the tripartite relationship involved in a finance lease. Specifically, the absence of a contractual relationship between supplier and lessee prevents the lessee from seeking contract remedies against the supplier for deficiencies in the quality or performance of the goods.

[55] The 1993 amendments to the British Columbia Sale of Goods act represent one possible response to the first general deficiency. [68] Under those amendments, the statutory terms regarding quality and title implied in contracts of sale were extended, in their existing form, to consumer leases. However, it is doubtful that uniform measures to that effect referable to all lease contracts would have a significant impact.

[56] The direct application of sales law to leases does not appropriately respond to the distinct issues arising from a lease transaction, particularly in connection with matters of title and possession. Furthermore, the imposition of a set of implied warranties should not be approached in isolation. Meaningful statutory reform should address related issues, including the other primary performance obligations of the lessor (such as delivery), the reciprocal performance obligations of the lessee, remedies for breach by either party and the consequences of assignment. In other words, the exercise is of the proverbial "all or nothing" variety. In view of the apparent lack of any perceived commercial or political interest in undertaking Article 2A style reform, the unlikely success of such an enterprise may not warrant the effort involved.[69] This is particularly true given the propensity of commercial parties to contract out of statutory warranty and remedies provisions.

[57] However, a more limited exercise addressing the contractual relationships of parties to a finance lease is a feasible undertaking. The peculiar features of these relationships that warrant separate attention will be explored further below.

3. Enforcement and Remedies

3.1 Introduction

[58] One of the primary inducements to promulgation of UCC Article 2A was the difficulty surrounding prediction of the remedies available for breach of the parties obligations under a lease.[70] In Canada, remedies issues appear to have caused much less difficulty, particularly since the 1987 Supreme Court decision regarding lessors' damages in Keneric Tractor Sales Ltd. v. Langille.[71] In the context of a security lease, the rights of a lessor upon the lessee's default are governed by the inter partes provisions of the PPSAs. Otherwise, remedies fall to be determined at common law.

[59] The remedies available to both parties under Canadian law will be examined below, followed by a comparison of the remedial provisions of UCC Article 2A and of the Unidroit Convention on International Financial Leasing. The enforcement rights and remedies

available to lessors under true leases and security leases respectively will be addressed separately, due to the applicability of the PPSA in the latter context.

3.2 Lessors' Remedies - the True Lease

[60] Litigation initiated by lessors on the grounds of a lessee's breach is overwhelmingly directed to enforcement of the lessee's contractual payment obligations. Although the proprietary aspect of a lease relationship entitles the lessor to resort in appropriate circumstances to proprietary remedies, the law of property in practice plays an extremely limited role in the resolution of problems arising from modern leasing relationships. Action by a lessor will almost always be premised on breach by the lessee of an express or implied contractual obligation, foremost of which is the obligation to pay rent and other prescribed sums.[72]

[61] Virtually every long-term lease provides for the payment of rent by way of instalments over its term. In addition, many leases provide for the exercise of an option to purchase upon payment of a defined sum, or a sum determined by a prescribed formula. So-called "open end" leases stipulate a termination payment according to which the lessee is obliged to pay any difference between the sum obtained by the lessor on resale of the leased goods (either to the lessee or a third party), and a predetermined amount. Other typical terms address the lessee's obligation in the event of loss or damage to the leased goods, and payments due for excess "wear and tear".

[62] Whatever their terms as to payment, modern commercial leases invariably provide for acceleration of the lessee's payment obligations in the event of default. They will also typically include a provision stating that a default by the lessee, including non-payment of any sum due under the lease, entitles the lessor to terminate the lease and to recover liquidated damages comprised of all unpaid instalments of rent due to the end of the term, along with any other sums payable by the lessee. In effect, failure to pay a single installment of rent at any point in the term of the lease entitles the lessor to recover the balance owing by the lessor, comprised of the cumulated sums payable for the remaining term, along with any past payments in arrears.

[63] The question of whether liquidated damages provisions of this kind are enforceable by lessors was the subject of considerable uncertainty before judgment was rendered by the Supreme Court in Keneric Tractor Sales Ltd. v. Langille.[73] In its earlier decision in Canadian Acceptance Corp. Ltd. v. Regent Park Butcher Shop[74], the Manitoba Court of Appeal had held that such a provision was not enforceable where the default consisted simply of non-payment of an installment of rent. While the lessor could terminate the lease according to its terms, it could recover only for unpaid sums already accrued due, plus interest. However, that case was substantially over-ruled by the Supreme Court in Keneric Tractor Sales.[75]

[64] The judgment in Keneric Tractor Sales addresses the enforceability of a liquidated

damages provision only indirectly, in that it was directed to the distinct question of what damages were available at common law to a lessor for the lessee's breach of the obligation to pay rent. The Court held that the ordinary principles of contract damages apply, such that a lessor who has exercised a contractual right of termination is entitled to be put in the position it would have been in had the contract of lease been performed. In the case before it, the application of that principle meant that the lessor was entitled to recover the sum in which it was liable to its assignee under a recourse provision in the assignment (since, of course, they would not have had to pay anything to the assignee had the lessee not defaulted). That amount was calculated by taking the original purchase price of the leased tractors and deducting prepaid rent, adding a 20% margin and subtracting the sum received from sale of the repossessed equipment, less the costs of repossession, repair and resale. Though the Court pointed out that the assessment of damages must be subject to the usual limitations of remoteness and the duty to mitigate, those requirements were satisfied on the facts.

[65] Wilson J. further indicated that if the lessee had not known that the lease would be assigned to the finance company (such that the losses to which the lessor was subject under the assignment would be too remote) the lessor's recovery would be the value of unpaid rentals under the lease, discounted for early receipt, minus the proceeds of sale plus the expenses of repossession, repair and resale. In other words, since the lessee would have paid all the installments of rent due to the end of the term had it not breached the contract, the measure of damages for breach would properly include a sum equivalent to all unpaid rent.

[66] The principles expressed in Keneric Tractor Sales have since determined the damages available to a lessor for the lessee's breach, and have been used repeatedly as a basis for upholding liquidated damages clauses of the kind referred to earlier.[76] A liquidated damages provision may be struck down as penal only if it does not represent a genuine pre-estimate of the damages suffered by the party enforcing it. The typical liquidated damages provision is clearly consistent with the damages that would actually be awarded for non-payment of rent under the principle laid down in Keneric Tractor Sales, since they would include all sums that the lessee would have had to pay under the entire term of the lease. A discount must in principle be given for the value of early receipt of the rent, as well as for any sums realized through the re-leasing or sale of the goods. [77]

[67] The decision in Keneric Tractor Sales seems to have been accepted by the courts as having fully clarified the principles to be applied to determine a lessor's recovery for the lessee's breach, and thereby provided a clear basis for evaluation of the enforceability of liquidated damages clauses.[78] Nevertheless, litigants continue to challenge such clauses on a remarkably regular basis, as is demonstrated by the number of recent cases in which the issue has been contested in the context of sign rentals.[79] In general, the courts have had little trouble concluding that the lessor can recover all sums claimed, even where the liquidated damages clause does not include an appropriate discount for early payment of the accelerated rentals, provided that the outcome is not highly unreasonable. [80] The fact

that the breach triggering the clause has occurred during a renewal term, such that the lessor has already recovered the full cost of the leased sign along with interest and other expenses, has proven no obstacle to its enforcement. [81]

[68] The principles in Keneric Tractor Ltd. presuppose that the lessee's default entitles the lessor to terminate the lease. If the lease does not include a termination provision, resort must be had to the general common law principles governing discharge for breach. They require a determination of the sometimes difficult question of whether the breach amounts to, i) a repudiation, ii) a breach of condition or iii) a breach of an innominate term where the breach deprives the lessor of substantially the whole benefit of the contract. [82] However, since few modern leases omit a termination provision, this appears to be of little practical concern.

[69] In the rare case in which a lessee's non-payment would not entitle the lessor to terminate the lease, he or she may in effect cure her breach by compensating the lessor for losses associated with the missed payment and continuing with the contractual payment schedule. However, there is no general recognition of a right to cure a contractual breach in Canadian law.

[70] A lessor who exercises a contractual right of repossession of the leased goods under a true lease is subject to no procedural or substantive restrictions, other than those imposed by the contract of lease. In other words, there are no legal requirements relating to the giving of notices prior to seizure or disposition of the leased goods, or otherwise regulating the manner of disposition or the recovery of a deficiency. The lessor, as owner of the goods, is seen as having the right to deal with them as it pleases.

[71] In summary, a lessor under a true lease is subject to no statutory restriction in the exercise of contractual rights of termination and repossession of the goods, and may in general recover from the lessee all sums remaining due under the lease, either as common law damages or through the enforcement of a liquidated damages provision.

3.3 Lessors' Remedies - the Security Lease

[72] The term security lease is used as a short-hand reference to a contract structured as a lease that is primarily a device to secure repayment of a debt. The lessor retains title not because it has a genuine residual interest in the goods, but to facilitate repossession and disposition of the leased goods should the lessor default in payment. The goods are, from the lessor's perspective, merely collateral.

[73] Such a lease falls within the scope of all the Canadian PPSAs,[83] which prescribe the remedies available to the lessor upon the lessee's default. Simply stated, the lessor may seize the goods and dispose of them after giving notice to the lessee and other persons with an interest in them. [84] If a deficiency remains after application of the proceeds of sale to the expenses of realization and the outstanding debt, the lessor is entitled to recover it from the

lessee.[85] Alternatively, the lessor may elect to retain the collateral in satisfaction of the debt - a rarely chosen course of action. [86]

[74] In addition to its right to realize against the leased goods as collateral, the lessor has the right to sue for contract damages for the lessee's breach. The PPSAs provide that a security interest does not merge merely because the secured creditor (lessor) has reduced its claim to judgment.[87] This enables the lessor to exercise both its contractual and proprietary rights to the extent necessary to satisfy the obligations outstanding under the lease, provided of course that it may not recover more in total than what is owed. [88]

[75] The PPSAs permit lessees to effectively cure a breach comprised of a default in payment at any time prior to disposition of the leased goods by paying the amount actually in arrears, plus any realization expenses already incurred by the lessor. [89] The lease is thereby reinstated, and payments resume according to the contractual payment schedule. Although the Act also confers a right to redeem the goods by payment of the entire amount secured,[90] the lessee will rarely be in a position to exercise that right.

[76] Besides observing the procedural provisions of the PPSA, the lessor must act throughout in good faith and in a commercially reasonable manner.[91] The statutory remedial regime thus enables the lessor to recover the debt due under the terms of the contract of lease, while protecting the lessee by ensuring that the best possible value is obtained from disposition of the leased goods. In addition, the lessee's rights of reinstatement protect him from the precipitate loss of the leased goods that might otherwise result from a late payment.

[77] The question of whether such a realization regime is appropriate in the context of security leases has already received a statutory response. However, the supplementary question of whether comparable provisions should apply to the lessor in a true lease remains open. The primary advantage of subjecting true long term leases to the inter partes enforcement provisions of the PPSAs would lie in the elimination of the need to determine whether a given transaction is a true lease or a security lease, assuming that the distinction could be avoided for purposes of the application of most if not all of those provisions.[92] Such an approach is not entirely unfeasible. Under the PPSA, the lessor would retain the right to recover the leased goods, along with monetary damages calculated as provided in Keneric Tractor Sales. The imposition of the relatively minimal notice requirements accompanying disposition, and the conferral of rights of reinstatement on the lessee would not appear to unduly prejudice the lessor. [93]Only those provisions that might impair recognition of the true lessor's reversionary interest in the leased goods would raise difficulties. In particular, the PPSA contemplates a statutory right of redemption which, applied to a true lease, would enable a lessee to acquire the goods in spite of the absence of a contractual option to purchase. Further, the PPSA entitles the lessee to any surplus realized on disposition of collateral, a provision that would inappropriately deprive the true lessor of the full value of its reversionary interest. [94]

[78] To sum up, a lessor under a security lease may recover damages for the lessee's breach or default in the same manner as a lessor under a true lease. In addition, the lessor is entitled by statute to repossess and dispose of the leased goods in satisfaction of the lessee's contractual payment obligations. However, the security lessor's rights of repossession and disposition must conform with the procedural provisions of the PPSA, and with its general requirement of commercial reasonableness. In addition, the lessee may reinstate the lease or redeem the leased collateral by making the payments prescribed.

3.4 The Distinction Between a True Lease and a Security Agreement

[79] The discussion under the previous heading is premised on the assumption that the transaction in question is properly characterized as a security agreement, as that term is used in the Canadian PPSAs. If it is not, the inter partes provisions of the Act are not applicable. A lessor who intends to terminate a lease and repossess the leased goods must therefore ascertain whether the lease is "in substance" a security agreement in order to determine whether its realization activities are subject to the PPSA.

[80] The PPSA addresses the issue of characterization in very general terms. It provides that the Act applies "to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral."[95] A security interest is defined as an interest in goods and other defined categories of personal property "that secures payment or performance of an obligation."[96]

[81] The question of whether a particular transaction is functionally a lease or a security agreement is the subject of a significant though not enormous body of caselaw. While a degree of uncertainty will inevitably remain in connection with some variants of a lease transaction, it seems that a reasonably clear approach to characterization has emerged. [97]

[82] In the United States, legislators have attempted to facilitate characterization by defining a series of detailed criteria determining whether a transaction creates a lease or a security interest. However, the difficulty involved in attempting to define decisive rules is evident in the terms of the amended UCC provision itself. In addition to laying down a set of positive indicia of a security interest, Â§1-201(37) includes a list of features that are not to be regarded as conclusive of the issue. Nevertheless, these detailed provisions have not eliminated the need to litigate the issue in difficult cases, and the caselaw emerging from that litigation continues to be inconsistent. [98]

[83] While the question may merit further study, this author's provisional view is that little is to be gained by emulating the UCC attempt to define the characteristics of a lease that is in substance a security agreement with greater particularity.

3.5 Lessees' Remedies

[84] A lessee's remedies for breach of the express or implied terms of the lease fall to be

determined at common law. Lessees will most often be affected by either a breach of contractual obligations relating to the quality or performance of the goods, or a breach affecting the lessor's title in such a way as to interfere with the lessee's continued possession or with her ultimate acquisition of title through exercise of an option to purchase. A lessee under a finance lease of course has no grounds for a contract remedy against the supplier of the leased goods, given the absence of a contractual relationship.

[85] There is no doubt that the lessee may, subject to contractual waiver or exclusionary provisions, recover damages for any breach by the lessor. Since Keneric Tractor Sales Ltd. v. Langille,[99] it is clear that the quantum of damages recoverable is to be determined under ordinary contract principles. However, the unique characteristics of a lease may make it difficult in some circumstances to accurately assess the lessee's loss. A buyer who fails to receive contracted for goods or who properly rejects a deficient tender can quite readily be compensated on the basis of the cost of acquiring a directly equivalent substitute. A lessee, however, may not so easily find a directly equivalent substitute for the unfulfilled lease, or may have good reasons for not choosing to replace the lease with an exact equivalent.

Nevertheless, difficulties of this kind do not appear to have manifested themselves in the Canadian caselaw, and they are not beyond the ability of the courts to redress through proper application of common law principles.[100]

[86] The more difficult question is whether a lessee may reject the goods and terminate her obligations under the lease in the event of the lessor's defective performance. Under general contract law, the victim of a contractual breach is entitled to terminate a contract if the breach is a repudiation,[101] a breach of condition or a breach of an innominate term where the breach goes to the root of the contract.[102] Unfortunately, the principles governing the question of discharge for breach have not been articulated and applied with uniform clarity by Canadian and commonwealth courts. The regrettable misuse of the catch-all phrase "fundamental breach" is particularly troubling.[103] While a reasonably clear set of governing principles can be extracted from the more carefully reasoned authorities, a degree of uncertainty in the extent to which those principles are applied by lawyers and judges prevails.

[87] Assuming that the circumstances of a case warrant the conclusion that the lessor's breach to entitles the lessee to terminate the lease, an additional problem presents itself. In contracts for the sale of goods, the Sale of Goods Act prescribes that a buyer loses the right to reject non-conforming goods once he or she has "accepted" them. The circumstances constituting acceptance are defined.[104] If the principles of sales law are applied by analogy to the implication of terms in a contract of lease, perhaps they can and should be similarly applied to remedies issues. Though Canadian authority on the point is scarce, a distinguished commentator on British hire-purchase law expresses this view:

The right to rescind the agreement or to treat it as discharged for breach of condition will in any event be lost if the hirer expressly or by implication affirms the agreement with

knowledge of the breach or if he has derived substantial benefit under the agreement. The right to rescind will also be lost where the parties cannot be restore to their status quo, e.g. by reason of destruction of the goods.[105]

[88] This suggests that the concept of "acceptance" is not directly applicable to leases, though "affirmation: may well amount to substantially the same thing.[106]

[89] To summarize, a lessee may sue the lessor for common law damages on the grounds of the lessor's breach of a contractual obligation, though determination of the quantum of damages may be difficult in some circumstances. In addition, the lessee may terminate the lease and reject the leased goods if the lessor's default qualifies at common law as a discharging breach, unless she is viewed as having affirmed the lease. Whether acceptance of the goods is equivalent to affirmation is unclear.

[90] Issues relating to a lessee's rights of termination appear not to have raised any appreciable litigation in Canada. This is no doubt largely due to the presence in most leases of contractual provisions comprehensively defining the parties rights of termination and cure.

3.6 Contractual Waivers - The "Hell or High Water" Provision

[91] A lessee's right to pursue a remedy on the grounds of the lessor's breach of contract may be and often is limited or relinquished by way of an exclusionary provision or waiver included in the lease agreement. Such a waiver precludes the lessee both from initiating an action for breach, and from raising the lessor's breach as a defence in an action by the lessor to enforce the lessee's payment or other obligations.

[92] Particularly where a lease is used fundamentally as a secured financing device, the lessor will wish to protect the value of the lease by dissociating the lessee's payment obligations from problems relating to the leased goods. In other words, the lessor's objective is to create defined and enforceable terms of payment pursuant to which the credit advanced to the lessor in connection with acquisition of the goods will be recovered. If the lessee were permitted to defend the lessor's claim for rent and other payments on the grounds of deficiencies relating to the use or performance of the goods, the lessor would lose its ability to recover the planned return on its capital in any predictable fashion. Accordingly, financing leases will invariably include a provision of the kind often referred to in the United States as a "hell or high water" clause. It is aptly described by one writer as follows:

The essence of this structure is a provision requiring that the lessee, once it accepts the leased item, to pay its rent in all events (i.e., come hell or high water) without regard for the proper function of the item or the conduct of the lessor with respect to the subject or any other transaction.[107]

[93] In explanation of the commercial practice supporting such a provision, the author (counsel to a large American leasing company) continues as follows:

This sort of provision, while it may seem harsh, in practice makes good sense for the interest of all concerned. The lessor is expending the cash needed to purchase the equipment from its vendor (or foregoing the cash proceeds which would be realized from a sale of used equipment out of its inventory) but is also assuming the credit risk associated with the lessee's ability to make the contracted payments as well as (in most cases) the residual risk associated with the equipment value at lease expiration. In return, the lessor needs at least the assurance of a legal entitlement to the contracted rent in order to permit both the financing activity described infra and any semblance of rational planning or forecasting of capital requirements, both of which ultimately impact the availability of capital for future transactions [108]

[94] Such a provision is designed to protect a financial institution who is a lessor under a finance lease, or who assumes the lease under an assignment from the original supplier-lessor. However, such provisions may also be used to prevent a lessee from asserting claims against a supplier-lessor.

[95] The use of a "hell or high water" clause in a lease that is primarily a financing device is legitimate, provided that the lessee is properly appraised of his or her position and appropriate measures can be taken to address performance issues outside the parameters of the lease itself (e.g., through warranties extended by a manufacturer). Subject to the ordinary contract law considerations of misrepresentation, unconscionability and assent, there is no doubt that such provisions are enforceable in Canada.

3.7 Lessors' Remedies under UCC Article 2A

[96] The remedies provisions of UCC Article 2A, which operate only in the absence of contrary contractual provision, are complex and for that reason will be reviewed here in very summary form. They are designed to address both the lessor's right to terminate the lease and the quantification of damages for the lessee's breach.

[97] A lessor is entitled to terminate the lease if the lessee wrongfully rejects or revokes acceptance of the goods, fails to make a payment when due or repudiates the lease. It may also do so pursuant to a contractual provision to that effect, or if the default (whether or not of the type just enumerated) substantially impairs the value of the lease contract to the lessor. The right of termination or cancellation of the lease is accompanied by a right to repossess the goods and recover damages. In the event of a default by the lessee that does not invoke the lessor's right to terminate, the lessor may pursued the remedies provided in the lease and recover damages.[109] The lessor is under no obligation to give notice prior to repossessing goods following cancellation of the lease, or prior to disposing of them.[110]

[98] The general thrust of those provisions does not differ markedly from the common law

principles that would determine the lessor's right to terminate a lease in Canada, except that a single instance of non-payment would not ordinarily invoke that right in the absence of a contractual provision to that effect. If, however, the lease is a security lease falling within the inter partes provisions of the PPSA, a single non-payment is a default triggering the lessor's rights of realization.[111]

[99] The quantum of damages recoverable by the lessor is defined by a range of formulas tailored to the circumstances associated with breach. Detailed provisions address (i) damages accompanying the disposition of goods by a "substantially similar" new lease[112] (ii) damages accompanying disposition of goods by sale or by a lease that is not "substantially similar"[113] (iii) damages accompanying an election to retain the goods[114] , and (iv) damages otherwise required to put the lessor in as good a position as performance would have done.[115] In addition, special provisions govern an action for the rent, where the lessee has committed a breach of the kind justifying termination, or where such action is contemplated by the contract.[116] Liquidated damages provisions are endorsed, subject to a "reasonableness" qualification.[117]

[100] The operation and efficacy of these provisions is difficult to evaluate without further detailed investigation of American caselaw and the prevailing practices in the American leasing market.[118] However, it is not self-evident that the promulgation of such a complex statutory regime would be a worthwhile enterprise, particularly in view of the fact that it would likely be supplanted by a contractually defined remedial scheme in most leases.

[101] Article 2A also contains provisions specifically referable to a finance lessor's remedial rights against the lessee. In non-consumer finance leases, the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods. The benefit of that provision is explicitly extended to assignees. [119] As explained in the Official Comment,

This section extends the benefits of the classic "hell or high water" clause to a finance lease that is not a consumer lease. This section is self-executing; no special provision need be added to the contract.

[102] The Comment goes on to point out that the provision recognizes the function of the finance lessor in a tripartite relationship, in which the lessee is looking to the supplier to perform the essential covenants and warranties.

3.8 Lessors' Remedies under the Unidroit Convention on International Financial Leasing

[103] The provisions of the Unidroit convention relating to the remedial rights of finance lessors are much less detailed that those of the UCC. [120] It has been described as stating the rights of the lessor in terms that, in most respects, are consonant with a lessor - lessee relationship rather than the lender - borrower relationship that a finance lease substantively

represents.[121] However, the lessor may contractually define its rights such that "the lessor's ultimate recovery may be equivalent to that of a lender or a seller of the leased goods."[122]

[104] The convention differs from Article 2A in that the lessor may terminate the lease only where the lessee's default is "substantial". In addition, the lessee is given a right to cure default. More importantly, it does not endorse the "hell or high water" clause as a default statutory rule limiting the lessee's right to raise deficiencies in the leased equipment as against the lessor.S[123] However, it does not preclude the operation of such a contractual provision.

[105] It would appear that the convention has little of consequence to offer by way of precedent for the development of a domestic Canadian remedial regime.

3.9 Lessees' Remedies under UCC Article 2A

[106] The provisions of UCC Article 2A regarding the lessee's rights of termination, rejection of the goods and damages are no less detailed than those relating to the remedies of the lessor. Though the complexity of these provisions does not commend them, they do address issues that are not clearly resolved under Canadian law.

[107] Rights of cancellation paralleling those of the lessor are specified, in the event of a substantial breach. [124] Of particular interest are the provisions addressing the lessee's acceptance of the goods, including his or her right to revoke acceptance.[125] The bar to rejection created by these provisions is considerably more flexible than either the correlative acceptance provisions of Canadian sales law, or the result that would obtain on application of the common law principles of termination for breach.[126] A lessee who has accepted goods known to be defective on the understanding that the defect will be cured may subsequently revoke his or her acceptance. Moreover, acceptance may be revoked in appropriate circumstances where the nonconformity relied upon was not discovered prior to acceptance, or where a default by the lessor substantially impairs the value of the leased goods. An example of the latter situation offered in the Official Comment would be a failure by the lessor to fulfill its obligation to maintain leased equipment or to supply other goods which are necessary for the operation of the leased equipment.

[108] Special rules apply to finance leases, under which the lessee is precluded from revoking acceptance if made with knowledge of a nonconformity with respect to the lease agreement, as opposed to the supply agreement. Acceptance made without knowledge of such nonconformity may be revoked in limited circumstances.[127]

[109] Like so much of Article 2A, the provisions relating to acceptance and revocation of acceptance are not easily understood,[128] and have been criticized in some quarters. [129] However, they demonstrate the importance of rethinking the problems of acceptance in the modern world of commercial leasing.

[110] The same could be said of Article 2A's provisions regarding the lessee's damages. In particular, special rules are established for quantification where (i) the lessee seeks a replacement lease to "cover" the lessor's default,[130] or (ii) the "cover" provisions are not relevant, in which case damages depend upon the difference between contract rent and market rent.[131]

[111] As has been noted above, a lessee's remedies against the lessor in a finance lease are extremely limited. That fact is compensated to some extent by the express acknowledgment of rights against the supplier of the leased goods. However, while the lessee can clearly sue the supplier for damages for breach of the warranties contained in the supply contract, Article 2A does not appear to permit rejection of the goods on that ground.[132] In the result, a lessee under a finance lease will be bound to the keep the goods in most circumstances, albeit with a right to compensatory damages.

3.10 Lessees' Remedies under the Unidroit Convention on International Financial Leasing

[112] Unlike UCC Article 2A, the Convention takes the position that non-delivery of the goods or non-conformance with the supply agreement may give the lessee under a finance lease rights against the lessor. Prima facie, the lessee has (i) a right to reject a non-conforming tender, (ii) a right to withhold rental payments until a conforming tender is made, and (iii) a right to terminate the leasing agreement and recover sums paid in advance.[133] However, the lessee may lose these rights through application of a choice of law rule referable to the rights the lessee would have as a buyer from the lessor. Since the position of a lessee under the Convention will vary according to the choice of law rule adopted it cannot be taken as representative of a satisfactory uniform remedial regime.

[113] Like Article 2A, the Convention provides for enforcement by the lessee of the supplier's obligations under the supply contract, which obligations are declared owing directly to the lessee.[134] However, a breach by the supplier does not entitle the lessee to terminate or rescind the supply agreement without the consent of the lessor, precluding rejection of non- conforming goods.

3.11 Conclusions

[114] Canadian law governing the remedies available to parties to a lease is reasonably well defined. Rights of termination on both sides are ordinarily provided for by contract, and are otherwise determined by the ordinary contract law principles defining discharging breach, though some uncertainty exists regarding the effect of acceptance of the goods on the lessee's rights of rejection. In the case of security leases falling within the PPSA, the lessor's exercise of rights of termination, repossession and disposition of the leased goods is qualified by the procedural requirements of the statute, by the general statutory obligation to act in good faith and in a commercially reasonable manner and by the lessee's statutory rights of reinstatement and redemption.

[115] Each of the parties is entitled to contract damages for the other's breach of contract, subject to any contractual limitation or waiver (which will ordinarily operate in favour of the lessor). The quantification of damages is based on the general contract rule that the party not in breach should be put in the position he or she would have been in had the contract been performed. Though quantification may be difficult in some circumstances, it is clearly possible.

[116] Article 2A attempts to define both rights of termination and the quantification of damages more precisely, offering a complex set of rules designed to respond to the particular circumstances of the breach. The right to terminate may depend upon the severity of the breach, the possibility of cure and, in connection with termination by a lessee, the effect of acceptance. Damages are to be assessed on the basis of the availability and choice of substitute performance.

[117] Though the Canadian law determining the remedies of parties to a lease is notably deficient on points of precision and detail in comparison to its American counterpart, there is little reason to conclude that it is seriously inadequate in the context of the typical non-consumer transaction.[135] Nothing would be gained by an attempt to extend the antiquated Sale of Goods Act remedial regime to modern contracts of lease. Nor is there an apparent need to create an entirely new Article 2A style remedial structure.

[118] However, consideration might be given to the extension of the PPSA inter partes enforcement provisions to true leases of significant duration, subject to some exceptions in favour of lessors repossessing goods under a true lease. Such a course would further reduce if not entirely eliminate the need to differentiate between a true lease and a security lease for purposes of determining the applicability of the PPSA. In addition, it would offer some protection to defaulting lessees with limited encroachment on the enforcement rights of lessors.

4. Third Party Rights and Priorities

4.1 Introduction

[119] The contractual aspect of a lease transaction dominates the determination of the parties rights and liabilities thereunder. However, their associated proprietary interests provide the basis for disputes arising from third party dealings with either the lessor or the lessee.

[120] At common law, the lessor is the owner of the goods leased and as such holds legal title thereto. The lessee acquires the rights of a bailee, which are surprisingly difficult to define. However, it seems that the lessee/bailee's right to possession is a limited form of

proprietary right, sometimes called a "special property" as distinguished from the "general property" of the bailor.[136] The proprietary rights of the parties to a bailment are described by one distinguished writer as follows,

A bailment gives rise to a form of property because it creates a division of interests in rem within the compass of a single chattel... The bailee obtains a legal interest in the form of possession, which is in many respects equivalent to an estate in land; and in the case of some bailments at least (such as pawns, liens and probably contracts of hire) this interest is preserved although the bailor disposes of his interest during the bailment to a third party. The bailor retains a reversionary interest.[137]

[121] At the inter partes level, the lessor's sale or encumbrance of her title may constitute breach of an express or statutorily implied term of the lease. Similarly, a transfer by the lessee that infringes upon the lessor's title or her right to return of the goods at the end of the lease constitutes a breach of contract on the part of the lessee. The general remedies of the parties for breaches of contract were discussed earlier.

[122] However, dispositions of this kind may also give rise to competing claims to the goods involving the third parties who have dealt with the lessor or the lessee. It is worth noting that the need to establish clear rules to resolve such disputes was not a primary concern in the move to promulgate a uniform leasing statute in the United States.[138] In Canada, they can for the most part be resolved under the priorities provisions of the provincial Personal Property Security Acts. [139]

4.2 Competitions Between the Lessor and Third Parties Dealing with the Lessee

[123] The provincial legislatures have, for the most part, already made the policy choice determining the appropriate statutory approach to resolution of priority disputes between a commercial lessor and third parties, through subjection of all leases for a term of more than one year to the provincial PPSA priorities regimes. [140] Ontario, Manitoba and the Yukon have yet to implement this approach. However, it is incorporated in the 1993 revision of the Manitoba Act,[141] as yet unproclaimed, and has been recommended for adoption in Ontario in a recent Canadian Bar Association Report.S [142] In addition, leases that are in substance security agreements, whatever their duration, fall within the scope of the PPSA in all provinces.

[124] The practical effect of the choice to include commercially significant true leases within the scope of the PPSAs is that lessors must register their interest in the appropriate provincial personal property security registry to protect themselves against third party claims. Competing claims to the leased goods arising between a lessor (or lessor's assignee) and parties dealing with the lessee will be determined under the statutory priority rules. The third parties involved may be the lessee's secured creditors, transferees of the lessee, the lessee's judgment creditors or his or her trustee in bankruptcy. The applicable priorities rules are those generally governing a competition between a security interest and third

parties. In other words, a lessor is, for purposes of determining priorities disputes, in the same position as the holder of a security interest. This means that a lessor who has failed to register its interest may be subordinated to the interests of any of the aforementioned third parties.[143]

[125] The desirability of requiring registration of true leases has been hotly debated.[144] While that debate has in the United States been decided against the advocates of registration, the converse view has overwhelmingly been adopted in Canada, and nothing is to be gained by revisiting it.

[126] Although true leases having a term of less than one year do not fall within the scope of the PPSAs, significant third party issues are not likely to arise in connection with short-term leases.[145] There is certainly no evidence of such disputes in the reported cases.

4.3 Competitions Between the Lessee and Third Parties Dealing with the Lessor

[127] The PPSAs provide that a lessee of goods leased in the ordinary course of business of the lessor takes free of any security interest given by the lessor.[146] All commercial lessors fall within the scope of this provision, whether they are finance lessors or lessors of inventory. This means that a secured creditor of the lessor whose interest arises before the date of the lease cannot seize the leased goods from the lessee in the event of the lessor's default.

[128] Third party claims that come into being after creation of the lease will ordinarily flow from assignment of the lease by the lessor, or from the lessor's grant of a security interest in the leased goods or the chattel paper arising from the lease. Though such creditors may thereby become entitled to enforce the lease as against the lessee, they have no right to interfere with the lessee's possession and use, in the absence of a default.

[129] The PPSA reflects the rules of common law and equity relating to assignments, providing in effect that the rights of an assignee are subject to the terms of the contract between the lessor and lessee. [147] Similarly, a creditor who takes a security interest in the goods themselves can take no more than the lessor has to give. Since the lessor's interest is subject to the "special" proprietary rights of the lessee, a subsequent secured creditor cannot displace the lessee's rights.

4.4 Conclusions

[130] Article 2A of the Uniform Commercial Code contains a series of very complicated provisions regulating disputes between the parties to a lease and third parties. [148] Their application and meaning is, in the words of one commentator "not always clear". In view of the relatively comprehensive coverage of third party issues by the PPSAs, there is no apparent need to create a separate system of statutory priority rules specifically applicable to leases. The few disputes that fall outside the scope of the PPSAs may be resolved under

the principles of common law.

5. Consumer Leases

5.1 Introduction

[131] The recent exponential growth in leasing as a device for the acquisition of personal use goods by individuals presents a range of consumer protection issues that are not addressed in any comprehensive manner under existing provincial or federal law. Although leases do fall within the scope of some provincial consumer legislation, that legislation generally fails to address issues unique to a leasing transaction.

[132] Issues specific to consumer leasing transactions have not been considered in the Canadian legal literature, nor are they evident in Canadian caselaw. In contrast, consumer protection in the context of lease transactions is the subject of a substantial body of American writing, and has long been on United States federal and state legislative agendas. While the absence of Canadian caselaw and commentary makes it difficult to determine the existence and extent of problems relating to consumer leasing in this country, one might reasonably assume that those identified in the United States consumer leasing market are replicated here. It is therefore appropriate to review the American legislative responses to consumer leasing issues as a background to consideration of the current state of Canadian law.

5.2 Consumer Protection Legislation in the United States

[133] A considerable body of federal and state legislation designed to address problems and inequities in the consumer leasing market already exists in the United States. The federal Consumer Leasing Act (often referred to as the CLA)[149] and its implementing Regulation M[150] impose significant disclosure obligations on lessors of goods acquired by individuals for personal or family use. However, the impact of the Consumer Leasing Act is considerably diminished by its anachronistic definition of scope, which is limited to consumer leases having a value of $25,000 or less.

[134] State legislatures have also taken an active role in the development of consumer leasing law, focusing in particular on the growing motor vehicle leasing market.[151] However, a study committee on consumer leasing established by the National Conference of Commissioners on Uniform State Law concluded in 1995 that comprehensive uniform state legislation should be drafted. The committee's objectives were to provide leadership in an increasingly important filed of commercial activity and to pre-empt "piecemeal reactive legislation" responding to developing problems.[152] The recommendations contained in the study report led to the drafting of the Uniform Consumer Leasing Act (UCLA),[153] which will be presented for first reading to the NCCUSL this summer.[154] The UCLA is designed to

address gaps in existing statutory coverage, as well as to promote uniformity in state legislation.

[135] The UCLA responds to all of the broad issues identified by American commentators as most pressing, as well as to numerous others.[155] It is worth noting that the comprehensive scheme of regulation embodied in the UCLA is not likely to be welcomed wholeheartedly by commercial lessors. The National Vehicle Leasing Association of the United States calls the present draft "extremely problematic," identifying a number of its aspects as points of particular concern.[156]

[136] The UCLA provides a focus for the following discussion.

5.2.1 Key Issues in Consumer Leasing under United States Law

[137] A consumer lease transaction raises a spectrum of potential issues, including unconscionability and disclosure, contract formation, terms, remedies and enforcement. However, five particularly significant areas of concern have been identified in the American literature. They are; pre-contract disclosure, default and early termination payments, risk of loss in connection with "gap" liability, excess wear and tear provisions and non-assignability.S[157] These will be reviewed in turn, followed by consideration of additional issues arising in the consumer context.

[138] Disclosure of the cost of leasing: In the United States, a great deal of effort has been devoted to devising disclosure requirements that will both make the costs of leasing intelligible to consumers, and warn them of their risks and the consequences of early termination. The creation of an ideal formula governing global disclosure of the credit costs associated with a lease is a complex undertaking, and the definition of such a formula is beyond the scope of this study. However, it is worth considering two approaches offered by the UCLA and the federal Consumer Leasing Act.

[139] The Consumer Leasing Act, via its implementing regulation M, prescribes an extensive and detailed list of disclosures relating to the charges imposed on the lessee. In addition, it obliges automobile lessors to demonstrate how the scheduled periodic payment is derived using a mathematical progression based on the concept of capitalized cost, which loosely correlates to the total purchase price payable under a deferred sale contract. This mathematical progression includes disclosures of the "gross capitalized cost," the "adjusted capitalized cost," the "residual value (of the leased vehicle)," the "depreciation and any amortized amounts," and the "rent charge, "along with related descriptors[158]

[140] The UCLA adopts by reference all of the disclosure requirements of the Consumer Leasing Act and in addition proposes, somewhat controversially, a formula for calculation of an "Annual Lease Rate,"[159] generally referred to as an ALR, which is a percentage figure comparable to the annual percentage rate in credit sale transactions.[160]

[141] The primary objective of those who support an ALR provision is to provide consumers a basis for effective comparison shopping. [161] However, others question the need for and the reliability of an ALR as an effective disclosure device.[162] The ALR provisions of the UCLA are permissive rather than mandatory, in that they are applicable only to those lessors who chose to use a percentage lease rate in their lease advertising and disclosures.[163]

[142] The unique nature of lease financing and the widely diverse ways in which a lease transaction may be structured make it very difficult to define a perfect unitary measure of the cost of leasing. However, the difficulty faced by consumers attempting to understand the relative costs of diverse lease structures and contracts makes the imposition of some kind of uniform disclosure requirement an essential component of consumer leasing legislation. The up-front disclosure requirements of the Consumer Leasing Act and the UCLA enable consumers to make informed choices by providing some basis for understanding of the actual costs they are assuming, and for comparison shopping as between alternative lease providers.

[143] Early termination: Early termination costs have also been the subject of considerable discussion and legislative activity in the United States, particularly in the context of motor vehicle leasing.[164] The legislation addresses both disclosure of early termination liability, and the substantive limitation of such liability.

[144] The UCLA provides that early termination provisions in a consumer lease must reflect "an amount that is reasonable in the light of the anticipated or actual harm caused by the early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy." In addition, it provides a "safe harbour" formula for determination of early termination liability that is presumptively reasonable,[165] and caps the amount of permissible early termination payments to ensure that the lessee is not charged more than she would pay if she made all the scheduled payments to the end of the lease. These provisions operate as a substantive limitation on the absolute amount of early termination liability and provide a basis for disclosure of early termination costs.[166]

[145] The need for clear disclosure of early termination liability cannot be overstated. As has already been seen, leases routinely entitle the lessor to recover all unpaid rentals and other payments due to the end of the lease term, subject to deduction for the disposition value of the leased goods and a discount for early receipt of rental monies and other costs saved. Although such liquidated damages provisions are clearly enforceable under current law, there is little doubt that most consumers would be astonished at the extent of their liability thereunder. From the consumer's point of view, they are being forced to pay for goods that have been surrendered to or repossessed by the lessor.

[146] A decision to adopt a substantive limit on early termination liability may be more controversial than statutory disclosure requirements, but is warranted provided that it is appropriately designed to enable the lessor to recover the actual loss of the benefits of performance without over-reaching.

[147] Other disclosure issues: In addition, the UCLA provides for conspicuous notices that the transaction does not confer ownership rights, clear disclosure of the lessee's insurance risks and obligations, blunt warnings to guarantors regarding the liability assumed, the pre-contractual provision of sample lease forms and provision of follow up information.[167]

[148] "Gap" liability: The issue of "gap" liability is explained as follows in the Reporter's Notes to the UCLA, Â§402,

When leased goods are destroyed, stolen, or otherwise become a total loss during the term of the lease, this event constitutes a de facto early termination of the lease. Although insurance will usually cover all or most of the current market value of the goods, there is typically a "gap" between that sum and the amount due to terminate the lease at that point.

[149] Lessors sometimes absorb these losses internally or protect themselves through insurance. However, "gap" liability is frequently imposed on the lessee, particularly in the context of motor vehicle leases, where such liability is most often to arise. If the leased goods are lost early in the term of the lease the "gap" liability may be substantial, because the down payment in the transaction may be small, and the amortization of the capitalized cost through the monthly rental payments occurs at a slower rate than the depreciation in value of the leased goods.[168] Where lessees are subject to "gap" liability, lessors may offer "gap liability waivers" or "gap protection" at a price, thereby adding an additional cost to the lease.

[150] The consumer motor vehicle legislation of some states addresses this problem by requiring prominent disclosure of the potential liability of lessees for the gap amount, along with information on "gap" insurance protection that may be available through the lessor or otherwise.[169] This approach does not relieve consumers of gap liability, but rather enables them to anticipate and manage the risk of its occurrence. The UCLA has taken a different route. It prohibits the imposition of gap liability on a lessee, except where the lessee has failed to maintain required casualty insurance or the loss of the goods was occasioned by the lessee's fraud, intentional conduct or gross negligence.[170] As a result, lessors must absorb the risk of gap losses, and will distribute them through their overall pricing structure or insurance arrangements.[171]

[151] Excess wear and tear provisions: Charges under excess wear and tear provisions have also been the subject of concern in the United States leasing market, where there are indications that some consumers are unfairly required to pay substantial amounts for excess wear and use of leased goods. Again, this problem is most likely to occur in connection with motor vehicle leasing.[172] The federal Consumer Protection Act obliges lessors to disclose their standards for excess wear and tear, which standards must not be unreasonable.[173] The problem is similarly addressed in the UCLA by subjecting excess wear and tear provisions to a reasonableness standard. In addition, procedures are established to ensure that lessees receive timely notice of excess wear and tear claims, and to give them an opportunity to

inspect the goods and, if necessary, resolve any dispute through an independent inspection.[174]

[152] Restrictions on assignment by lessee: Finally, some commentators have pointed out that the typical contractual prohibition against assignment of the lessee's interest effectively locks the lessee into the lease by preventing him or her from selling it should he or she become unable to maintain payments.[175] A consumer lessee is thus seriously disadvantaged as compared with a consumer purchaser, who may re-sell the goods and apply the proceeds to his or her purchase obligations. The UCLA addresses this problem by way of a provision entitling a lessee to assign a lease of more than one year, subject to the consent of the lessor, which may only be withheld on the grounds of a good faith belief that the sublease or assignment would jeopardize its rights.[176]

5.2.2 Other issues raised by the Uniform Consumer Leases Act

[153] The UCLA responds to the five key areas of concern outlined above. In addition, it addresses a number of other issues relevant to Canadian consumer lessors,[177] which will be briefly outlined. Notably, most its provisions apply both to lessors and to their assignees. The term "holder" is used in the Act as a catch-all reference to both groups.

[154] Good faith, unconscionability and misleading conduct: The UCLA stipulates that every contract or duty within the Act imposes an obligation of good faith in its performance or enforcement.[178] While such an obligation is imposed under Canadian law in connection with a lessor's realization activities where the lease is a security lease falling within Part V of the PPSAs, the parties to a lease are otherwise not subject to a comparable duty of care.

[155] In addition, a consumer lease, or some of its provisions, may be rendered unenforceable on the grounds of unconscionability, assessed as at the time of contract formation. Unconscionable conduct inducing the contract or occurring in the collection of a claim arising under the lease may also be penalized through the grant of "appropriate relief," including statutory damages.[179] In addition, consumers are encouraged to take action against unconscionable conduct through the provision that a successful claimant on those grounds will be awarded reasonable attorney's fees.[180] In Canada, consumer lessors in most provinces are offered protection against unconscionability under the unfair business practices legislation discussed below. Otherwise, resort must be had to the general principles of contract law.

[156] Similarly, the UCLA contains a broad prohibition against misleading advertising, incorporating by reference the advertising rules of implementing Regulation M of the Consumer Leasing Act. It also prohibits advertisement of lease rates, unless they are calculated in accordance with the formula established in the Act.S[181] In Canada, the misleading advertising provisions of the Competition Act in theory offer consumer lessees some protection,[182] though there appears to be no evidence that they are in fact relied upon as a source of remedy. The provincial unfair business practices statues that apply to leases

also confer a right of action for loss occasioned by misleading conduct. However, there is no uniform nation wide protection against misleading practices under provincial law.

[157] Implied warranties: The UCLA prohibits the use of specified terms in consumer leases, but does not, in its current draft form, imply any positive obligations regarding quality, performance, title or quiet possession of the leased goods.[183] However, the UCLA may ultimately incorporate the Article 2A warranties by reference, thus rendering them subject to its own general prohibition against waiver. In the Canadian context, non-waivable statutory warranties addressing issues of quality, performance and uninterrupted use and enjoyment would be an appropriate component of a consumer leasing statute, since such warranties currently exist in only a few jurisdictions. The extension of supplier warranties to consumers in a finance lease should also be addressed.

[158] Since the UCLA does not directly address implied terms or other substantive contractual rights, it does not consider the implications of the lessee's acceptance or non-acceptance of defective goods. As was mentioned earlier, Article 2A contains complex provisions regarding the effect of acceptance, revocation of acceptance and the relationship between acceptance and damages. These questions are generally not addressed in the context of lease transactions by Canadian legislation, and the outcome determined by application of the common law principles governing discharge for breach is not entirely predictable. Any prospective uniform Canadian legislation should thus address the relationship between breach and rejection, giving special consideration to the rules appropriate to finance leases.[184]

[159] Hell or high water and cut-off of defence provisions: The UCLA makes no mention of the extension of supplier warranties to a lessee in a finance lease transaction, presumably on the ground that this is covered by Article 2A. However, the UCLA nullifies the operation of "hell or high water" contractual provisions in consumer leases.[185] It also precludes waiver of defence or cut-off clauses that would protect the assignee of a lessor from claims for breach of express or implied warranties. The pertinent provision states that,

... [A] holder is subject to all claims and defenses arising from the lease which the lessee could assert against the lessor and, in the case of a finance lease, the supplier. A lessee's recovery from a holder under this subsection may not exceed amounts paid by the lessee under the lease.[186]

[160] Since a third party financer is almost always involved in a modern leasing transaction, either as an assignee or as lessor under a finance lease, such a provision is a necessary corollary of any meaningful attempt to provide warranty protection to consumer lessees.

[161] Prohibited terms: Contractual terms prohibited by the UCLA include "deemed insecurity" acceleration provisions, assignments of wages, and the grant of permission to enter premises or commit breach of the peace in repossession of the leased goods.[187]

[162] Delinquency and default charges: Delinquency and default charges are permitted, but being in the nature of liquidated damages, they must be reasonable in the light of stated factors. Late charges are conclusively reasonable if they comply with the formula provided. In addition, the pyramiding of late charges is prohibited.[188] The substantive regulation of late charges is an appropriate protective device. Even if a lessor would be precluded by a Canadian court from enforcing such provisions on the ground that they are penal in nature, consumers are in practice likely to comply with demands for payment of such charges as are stipulated in the contract.

[163] Open-end leases: The UCLA in its current draft form permits open-end leases, but restricts the end-payment provisions to ensure that they reflect a reasonable approximation of the anticipated fair market value of the goods on lease expiration. As the Reporter's Notes indicate, the concern of the drafters is that an inflated estimate of residual value may leave the consumer subject to a substantial end-of-term liability if the goods depreciate more rapidly than expected. The provisions include a rebuttable presumption restricting the lessee's liability to an amount no greater than three monthly payments. Notably, the current draft has rejected the more radical alternative approach proposed in Draft 7, namely, the prohibition of open-end leases in the consumer context.

[164] Payment or trade-in pending approval of lease: A provision of the UCLA addresses the routine practice of entering into a lease with reservation by the lessor of the right to disapprove or cancel it if the customer's credit is not approved.S[189] The customer will often have surrendered any trade-in, made front-end lease payments and taken delivery of the leased goods.[190] Provision is made for expeditious return of trade-ins and refund of payments in the event the requisite approval is denied.

[165] Right to cure default: A consumer lessee must be given the opportunity to cure a default in payment once in every twelve month period. Payment of sums actually in arrears including default charges reinstates the terms of the lease. [191] This provision resembles the reinstatement provisions available to lessors under a security lease subject to the PPSAs, except that it is available only prior to repossession of the goods. The lessee is granted a grace period following default within which to effect cure. The provision appears to impose a minimal burden on lessors, while offering lessee's meaningful protection against both loss of the leased goods and the imposition of a substantial early termination liability.

[166] Repossession and disposition of goods: The UCLA provides for the repossession and disposition of leased goods and prescribes the manner in which the proceeds of disposition must be applied, in terms similar in some respects to those of the PPSA provisions regulating lessors' enforcement rights under a security lease.[192] The lessee is liable for any deficiency after application of the "realized value" of the goods to the lessee's outstanding obligations under the lease. Provisions are made for the determination of the "realized value" so as to ensure that it represents the full value of the repossessed goods.[193] Dispositions are subject to the commercial reasonableness standard that is similarly applied to a lessor's realization activities by the PPSAs.

[167] The imposition of clear statutory protocols and standards on repossessing lessors provides consumer lessees some assurance that the best possible value will be realized through disposition of the leased goods, thus minimizing their exposure to a deficiency claim. Such assurances are currently available in the context of security leases under the PPSAs. There is no reason why they should not be similarly available to lessees under non-security leases.

[168] Deficiency claims: The UCLA endorses the recovery of a deficiency against a consumer lessee. Given that modern leases function primarily as an alternative to the purchase of goods through funds acquired from third party lenders, lessors are entitled to the return on investment provided under the contractual payment schedule.[194] However, non- compliance by the lessor with the statutory provisions governing repossession and disposition may appropriately trigger at least a partial loss of the deficiency claim. In the context of consumer security leases, some of the PPSAs provide that failure by the lessor to observe the statutory realization provisions raises a defence to any deficiency claim "to the extent that the non-compliance affects the ability of the debtor [lessee] to protect the debtor's interest in the collateral or makes the accurate determination of the deficiency impracticable."[195] This seems an appropriate penalty.

[169] Penalties for non-compliance: Since the Act imposes no positive contractual obligations on the parties to a lease, it does not contemplate an action by the lessee for breach of contract. The lessee's remedies for breach of contract fall to be determined under the complex remedial regime of UCC Article 2A, discussed earlier. However, violations of the Act subject the holder to civil liability for "actual damages suffered as a consequence of the violation."[196] In addition, statutory damages (established by regulation) are prescribed for violation of specified provisions, either by way of a flat dollar amount or some proportion of the lease obligation. The Reporter's Notes to Draft 7 indicate that the pertinent provisions are those that involve more serious misconduct that ought to be discouraged even though it may not produce measurable "actual damages" for the lessee. A successful lessee litigant is also entitled to costs and reasonable attorney's fees.

[170] No waiver of Act: Like most consumer protection legislation, the provisions of the UCLA are not waivable, except in settlement of a bona fide dispute or collection claim, provided such settlement is not unconscionable.

[171] Choice of forum restricted: The UCLA, like Article 2A, prohibits contractual designation of an inappropriate forum, thereby avoiding choice of jurisdictions with little consumer protection and ensuring that necessary litigation will take place in a jurisdiction convenient to the lessee.

[172] Electronic records: The UCLA responds to the realities of the modern world by providing for the recording and authentication of lease transactions in non-paper formats.

[173] Third party beneficiaries: The UCLA does not address the rights of third party family members and other foreseeable users who are injured by leased goods. Article 2A, however, dispenses with the traditional requirement of privity in defined circumstances.[197] A similar approach to this problem appears in some provincial consumer legislation, in the context of sales.[198]

5.2.3 Scope of Consumer Leasing Legislation

[174] The UCLA raises two issues regarding the appropriate scope of consumer leasing legislation. The first relates to the definition of a consumer transaction. In other words, who is a consumer, and what features of the transaction are relevant to its inclusion in the Act? The second general issue is whether consumer leasing legislation should apply to a lease that is functionally a security agreement, in that the lessor retains a proprietary interest primarily as a device to secure payment of the sums due under the terms of the contract.

[175] The UCLA responds to the first question in a manner typical of consumer protection legislation. It applies only to leases by individuals who are acquiring the goods for primarily personal, family or household purposes.[199] In addition, the transaction must fall within a prescribed monetary limit and time frame. Leases for a term of less than four months are excluded, as are transactions having a total contractual obligation of greater than $150,000.[200]

[176] The limitation as to term is designed to exclude such transactions as daily or weekly car rentals and temporary rentals of recreational equipment. The debate over the question of whether a "rent to own" transaction should be brought within the scope of the Act has been resolved in the negative, apparently on the grounds that a lessee under such an agreement can terminate at any time without liability for prospective payments.

[177] The limitation as to the value of transactions falling within the Act reflects the assumption that consumers acquiring payment obligations in excess of $150,000 with respect the acquisition of personal use goods are sufficiently sophisticated to protect their own interests.[201] Whether that assumption is warranted is debatable, and the need for a monetary limitation may be open for further consideration. In favour of such a limitation is the argument that the statute's imposition of more onerous responsibilities upon lessors will increase the costs associated with such transactions, a consideration that becomes increasingly pertinent as the lessor's exposure expands.

[178] There is also room for consideration of whether small business lessees are less in need of protection than consumer lessees. The suggestion that the Act might extend to transactions involving a business lessee where an individual is personally liable for performance has not been implemented in the UCLA.

[179] The exercise of drawing lines delineating the parameters of a consumer lease largely involves articulation of what we instinctively view as a consumer transaction. However, the

second general issue noted above involves a policy choice of a different kind. The UCLA, adopts the UCC Article 2A definition of "lease," so as to prima facie exclude from its scope transactions that are not considered leases under 2A. Since Article 2A explicitly provides that "creation of a security interest is not a lease",[202] a transaction that is in substance designed primarily to secure payment or performance of an obligation falls outside the scope of both leasing statutes.

[180] As has been noted earlier, this distinction is anomalous. A lease that is designed to operate functionally as a device to secure performance of the payment obligations it creates nevertheless involves a "lease" component as well as a security component, in the same way that a secured installment sales contract involves a sale component along with a security component. In Canada, sales law governs the sales aspects of such a transaction, while the PPSA governs those aspects relating to the security function - specifically, priorities disputes and the enforcement of the security interest. There is no reason why a lessee should not be protected as to the "lease", that is, the acquisition and use of goods aspect of the relationship, especially in a consumer transaction.

[181] Having definitionally excluded security leases from its scope, the UCLA appears to be ambivalent about that choice. In Part 3 regarding lease terms and practices, it stipulates that a lease may provide for "a security interest in the leased goods".[203] Accompanying provisions clarify that a security interest may not, however, be taken in other property of the lessee to secure payment of the lease obligation. This is consistent with the statutory protections conferred by other statutes on consumer purchasers. However, the provision seems to fundamentally contradict the position that a transaction that "creates a security interest" falls outside the scope of the Act.[204] Regardless of how this inconsistency is resolved in the United States, it should simply be avoided by the drafters of Canadian legislation.

5.3 Canadian Law

[182] Consumer leases are, of course, subject to the common law principles discussed earlier, except to the extent that those principles are superseded by legislation. The legislation currently in place may be considered under four general headings; disclosure, implied warranties, unconscionability and unfair practices, and termination and enforcement.

5.3.1 Disclosure

[183] All provinces have statutes regulating disclosure of the cost of credit in consumer sales transactions, generally designated as cost of credit disclosure or consumer protection legislation. Few contain disclosure requirements applicable to leases, and those that do generally fail to address the disclosure issues described above.

[184] In Manitoba, the Yukon and the Northwest Territories, cost of credit legislation

contains provisions applicable to hire-purchase transactions, but not to leases generally. [205] Since a contract of hire purchase is fundamentally a contract of sale, these disclosure provisions are not tailored to address the disclosure issues specific to lease transactions.

[185] British Columbia draws leases within the scope of its Consumer Protection Act by inclusion of lessors and lessees in the definitions of seller and buyer respectively, and of leases in the definition of "executory contract". Since the disclosure requirements thereby made applicable to leases are tailored to address consumer sale transactions, their application to leases is both functionally awkward and substantively incomplete. However, most of the disclosure issues identified above are addressed in the context of consumer motor vehicle leases by regulation under the Motor Dealer Act.[206]

[186] In Alberta, the Consumer Credit Transactions Act mandates disclosures specifically tailored to leases which, though formulated in fairly general terms, address many of the issues identified above.[207] It does not, however, impose any substantive limitations on lessors rights, nor does it respond specifically or in detail to all of the problems considered in the American literature.

[187] Overall, Canadian consumer lessees enjoy far less protection than their purchasing counterparts.[208] For the most part, they are left to the conscience of lessors in connection with the information provided as a basis for their leasing decisions.

5.3.2 Implied Warranties

[188] In general, those provinces that make statutory provision for implied warranties of quality and title in consumer sales transactions extend the same protections to consumer lessees. In British Columbia, New Brunswick and Saskatchewan, non-waivable provisions imply such terms in all consumer lease contracts.[209] However, in Manitoba, the Northwest Territories and the Yukon, comparable provisions are limited to contracts of hire purchase.[210] In Ontario, Nova Scotia, Newfoundland, Prince Edward Island and Alberta, consumer buyers are protected only to the extent that the Sale of Goods Act implied conditions and warranties are not waived by contract, and consumer lessees are not protected at all.

[189] The tri-partite relationship between supplier, lessor and lessee comprising a finance lease is not addressed in any legislation. Thus, there is no general statutory provision for the extension of warranties of quality by a supplier to the lessee. Saskatchewan does impose liability for breach of the statutory warranties of quality on manufacturers,[211] and British Columbia specifically provides that the express warranties and guarantees made by an automobile manufacturer are assigned to the consumer in motor vehicle leases. [212] These provisions may fortuitously impose some quality obligations on manufacturer suppliers.[213]

[190] Though consumer lessees may enjoy the benefit of warranties implied at common

law, such warranties may be contractually excluded and are in any event neither readily accessible nor sufficiently well defined to offer meaningful protection.

5.3.3 Unconscionability and Unfair Practices

[191] Statutory coverage of consumer lease transactions is more comprehensive in connection with problems of unconscionability and misleading or exploitive business practices than in any other respect. Seven of the common law provinces have unfair business practices legislation of some kind, all of which applies to consumer lessees. Such legislation prohibits the making of false or potentially misleading representations, non-disclosure of material information or other conduct that is unconscionable or that inappropriately disadvantages consumer buyers or lessees. The prohibitions against such conduct are generally intended to extend to manufacturers and other supply line parties, as well as retail dealers. While the terminology of some statutes would encompass lessors who are simply providing a financial service, [214] others may be limited to those who are engaged in the business of providing the leased goods.[215] A lessee who suffers loss as a result of prohibited conduct on the part of a lessor, manufacturer or other supplier is given a civil cause of action supporting a range of remedies, including recission and damages.

[192] This provincial legislation is complemented federally by the Competition Act, which contains misleading advertising provisions applicable to lease transactions by virtue of the definition of "supply."[216]

[193] Unfair business practices legislation is of some value to consumer lessees, though its practical effectiveness is limited by the need to resort to litigation as an enforcement device. [217] However, it is not an effective substitute for specific mandatory disclosure requirements.

5.3.4 Termination and Enforcement

[194] Under Canadian law, a consumer lessee's default and termination liability is almost entirely determined by the terms of the lease, unconstrained by statutory regulation. This means that a lessor may, in the event of the lessee's default in making even a single payment, repossess the leased goods and sue for the balance of the payments stipulated to the end of the lease term, subject only to the contract law obligation to mitigate.[218] Aside from considerations of substantive fairness, the general absence of mandatory disclosure requirements may leave the lessee with a significant unanticipated liability.

[195] The only legislative limitation on a lessee's termination or default liability lies in the British Columbia Motor Dealer Leasing Regulation enacted pursuant to the Motor Dealers Act.[219] Under the regulation, deemed provisions in a lease contract stipulate that (a) where the consumer's end of term liability is based on the estimated residual value of the vehicle, such estimated value must be a reasonable approximation of fair market value at that time, and (b) where the consumer's liability relates to the difference between the estimated

residual value and the actual fair market value of a motor vehicle at the end of term, that liability is limited to a maximum of the sum of three average monthly lease payments. These provisions, which resemble those of the United States Consumer Leasing Act and other American legislation, operate to protect consumer lessees under open-end vehicle leases from exorbitant end of term payment liabilities.

[196] Otherwise, a lessor's enforcement rights are only constrained by the realization provisions of the provincial PPSAs, provided the lease is in substance a security agreement.[220] Under those provisions, the lessor is obliged to give notice prior to disposing of or electing to retain repossessed goods and is subject to a general statutory duty of good faith and commercial reasonableness in exercising its rights of realization. In addition, the consumer lessee who has fallen into arrears under the lease is entitled to reinstate the lease and resume the contractual payment schedule by remitting to the lessor any payments in default exclusive of the operation of an acceleration provision, along with the lessor's actual realization expenditures incurred to that point in time.

[197] Some of the PPSAs contain other provisions designed to protect consumers lessees (like other consumer debtors) in connection with the lessor's enforcement of the lease. Generally speaking, failure on the part of the lessor to observe the requirements of the Act may be raised as a partial defence to any deficiency claim, and will entitle the lessee to seek damages for any loss sustained as a result of that failure. See footnote 221 221 In some jurisdictions, a consumer lessee will automatically be entitled to a relatively modest sum by way of "deemed damages," in recognition of the difficulty of proving that the lessor's non-compliance with a statutory requirement has caused a quantifiable loss.[222]

[198] In British Columbia, a lessor must elect to either sue on the lessee's personal covenant to pay, or repossess the leased goods. If it elects action on the covenant, its proprietary claim to the leased goods is extinguished by judgment. If it elects to repossess the goods, the lessor will have no right to claim a deficiency.[223]

[199] Since the PPSA enforcement provisions pertain only to a security lease, their application will depend on the sometimes difficult preliminary determination that the lease is "in substance" a security agreement. [224]

5.4 Conclusions

[200] If any attempt is to be made to create uniformity in Canadian leasing law, the consumer leasing market would appear to be its most appropriate subject. The unique nature of a lease transaction exposes consumers to significant potential liabilities, particularly in relation to early termination, that most would not fully understand or anticipate.[225] These difficulties arise largely from the fact that consumer leases are in reality financing transactions - a fact fully understood by lessors. Overall, no consistent pattern of regulation of consumer leases emerges from current legislation. The coverage of consumer protection statutes is both limited and discrepant, and many of the provisions that do

extend to consumer leases were designed to respond to the often different concerns of consumer purchasers.

[201] Three approaches to consumer protection legislation present themselves. First, one might simply make existing law governing consumer sales transactions applicable to leases. Secondly, uniform legislation governing consumer leases might be drafted for adoption by the provincial legislatures. Thirdly, uniform legislation might be drafted governing consumer lease and sale transactions, incorporating some provisions of general application and some differentiated to address the specific nature of the transactions of sale and lease respectively.

[202] The simple application of consumer sales legislation to leases is an unsatisfactory solution. Existing disclosure provisions designed to address consumer purchase and borrowing transactions do not translate intelligibly into meaningful disclosure of leasing costs. Moreover, they fail to address the most pressing and complex disclosure problems arising in a lease transaction. Specifically, they do not provide for (a) a unitary comparative disclosure standard that would facilitate full understanding of all of the costs of leasing and comparison shopping for the best terms, (b) disclosures relating to potential gap liability and other insurance risks, or (c) disclosure of early termination and end of lease liability, including termination liability under an open-end lease and excess wear and tear charges.

[203] Existing law is similarly unsatisfactory in connection with warranties of quality and uninterrupted possession. Many provinces make no provision for mandatory implied warranties in consumer transactions of sale, and existing Sale of Goods statutes are dated and poorly suited to the modern leasing market. Suitable remedial schemes for breach of warranty are lacking, as is any provision for warranty protection in the now commonplace finance lease transaction. In addition, standardized provisions governing the liability of lessors' assignees and the effectiveness of cut-off of defence provisions in a consumer lease are needed.

[204] The exercise by lessors of rights of enforcement, including rights of repossession and disposition of the leased goods, are only regulated in the context of a security lease falling within the provincial PPSAs, and the invocation of these provisions depends upon satisfaction of the preliminary "substance" test, referred to above. Canadian law offers nothing comparable to the provisions of the NCCUSL Uniform Consumer Leasing Act designed to address problems of excessive termination liability, fair determination of the residual value of the collateral for purposes of end-of-term payments, fair application of excess wear and tear standards and gap liability.

[205] These deficiencies, among others of less consequence, can only be remedied through comprehensive uniform legislation tailored to address the specific features of a lease transaction, including those of a finance lease. The objective in such legislation need not be to limit the substantive rights of lessors, insofar as they are exercised appropriately. Rather, it should be designed to ensure that lessees both understand the nature of the transaction

and the liabilities they have assumed thereunder, and are protected against abuses. This might be accomplished either by way of a stand alone consumer leasing statute, or through legislation governing both sale and lease transactions in the consumer market. These alternatives will be addressed below, in the conclusion to this study.

6. Conclusion

[206] There is no doubt that the current law of leasing in Canada is both complex and, in some respects, poorly defined. However, this study has not revealed a pressing need for a comprehensive, all-encompassing leasing statute of the kind represented by UCC Article 2A. Equally important, the achievement of such legislation is likely unfeasible in the Canadian context.[226]

[207] Article 2A addresses all of the issues raised in this study (with the exception of those specific to consumer leases), along with a considerable range of other issues that have not been discussed. They include basic contract formation, writing requirements, choice of law, construction of the contract, insurance and risk and contract modification. The codification of Canadian leasing law in legislation comparable to Article 2A would be a very substantial undertaking. Moreover, the appropriateness of a comprehensive statutory exercise of this kind must be considered in context. That context is, in the United States, a tradition of codification in matters of private commercial law. Article 2A was a natural outgrowth of Article 2 on Sales and, to a lesser extent, a corollary of Article 9 on Secured Transactions. Canadians share neither that tradition, nor the highly developed code of commercial law in which it is manifest.

[208] Some have also observed that a comprehensive leasing statute would be anomalous in the absence of a sales law counterpart, an observation with which I agree.[227] Moreover, the fact that parties almost uniformly contract out of statutorily imposed obligations inconsistent with their chosen allocations of risk means that comprehensive legislation is likely to be largely symbolic.

[209] These points do not, however, preclude serious consideration of a consumer leasing statute. Since such legislation would impose non-waivable substantive and procedural obligations, it would represent a meaningful exercise in both rationalization of the law and protection of consumers.

[210] Consumer leasing, particularly in the motor vehicle market, has become very significant, both in terms of the number of transactions taking place each year, and in terms of their individual and cumulative value. As the foregoing discussion indicates, these transactions are not regulated by an coherent body of law. To the extent that they are subject to existing provincial legislation, there is no nation-wide uniformity in treatment. In sum, the law in this are is substantively deficient, difficult to ascertain and lacking in

uniformity - three good reasons for statutory reform.

[211] There are practical obstacles to the enactment of consumer leasing legislation that cannot be ignored and that may require further investigation. First is the anomaly mentioned earlier of promulgating uniform consumer leasing legislation in the absence of uniform consumer sales law. Ideally, this could be overcome by addressing both forms of transaction, either in a single statute or through companion legislation. Consumer sales law across the country is not uniform, and is long overdue for rationalization and modernization. However, the decision to proceed with consumer leasing legislation should not be entirely dependent on the possibility of reforming consumer sales law. Consumer lessors are in a very different position than consumer purchasers in terms of the nature and extent of the liability to which they are subject in connection with lease transactions, and the need for disclosure is particularly acute in this area. At a minimum, disclosure standards should be established and termination liability addressed through legislation.

[212] The second obstacle to the realization of statutory reform in this area is the apparent lack of political interest in consumer protection. Governments have largely dismantled consumer affairs departments, and limited funding is available to administer existing legislation. This difficulty may be exacerbated by a third obstacle to reform, namely industry opposition to comprehensive legislation.

[213] Another feasible and worthwhile project for reform lies in the creation of a finance leasing statute addressing the unique tripartite relationship involved in a finance lease. The heart of such legislation would be; i) the extension of suppliers' and manufacturers' warranties to the lessee, ii) definition of the lessor's obligations to the lessee in connection with the goods, specifically in connection with undisturbed possession and in connection with fitness for use where the lessee has relied upon the lessor's advice, and iii) restriction of the lessee's claims against the lessor in matters relating to the goods' quality and performance.

[214] In addition, the statute might address such ancillary matters as the lessee's rights in the event of non-delivery, the effect of acceptance of goods in connection with the lessee's rights of rejection, the supplier's or lessor's right to cure defective performance, the relationship between the supplier's liability to the lessee and its liability to the lessor under the contract of sale (ie., so as to avoid duplication of liability), general remedies and enforcement rights and the assignability of the lease.

[215] Uniform legislation governing finance leases would address the current absence of rules of law tailored to these transactions and would promote harmonization of law at the international level, particularly as between Canada and the United States. Further, it would enhance the transactional efficiencies realized by parties to a finance lease by providing a default set of rules that would eliminate the need for contractual terms designed to effectively define the parties respective relationships in a fashion appropriate to the nature of the transaction.

[216] In conclusion, this study is founded almost entirely on an examination of current leasing law and the available literature. It is not an empirical investigation of the commercial leasing market. Any decision to proceed with the drafting of uniform legislation of any kind should therefore be founded on more broadly based consultations with the profession and further investigation of prevailing practices and acknowledged practical issues in the marketplace. Professional accounting firms and others may also make a valuable contribution to these deliberations.

APPENDIX "A"

EXTRACT FROM THE REPORT OF THE STUDY COMMITTEE ON A PROPOSED CONSUMER LEASING ACT NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
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The actual list of topics to be covered in a uniform leasing act must be left to a drafting committee and to the NCCUSL. The list of topics that have been incorporated in consumer leasing laws or have been considered by state legislatures and in their regulatory bodies should serve as an agenda for a drafting committee, although a drafting committee should not be confined to these topics alone. The most important topics to be considered will include:

(g) Clarifying the power of a lessor by contract to have consumers agree not to assert defences against assignees;

(h) Clarifying the ability of consumers to cure defaults by reinstating the lease contract;

(i) Clarifying early termination rights for both lessor and lessee;

(j) Clarifying rights of repossession and disposition of leased goods on default or at the conclusion of the lease;

(k) Clarifying the liability for total theft or casualty loss of leased goods and any gap between the gross early termination liability and the value of the leased goods under the insurance policy;

(l) Balancing the interests of lessors and lessee with respect to charges for excess wear and tear of leased goods;

(m) Balancing the interests of lessors and lessees with respect to prohibitions of assignments of the lease by the consumer;

(n) Clarifying quality commitments, including express warranties, implied warranties and lemon laws;

(o) Requiring disclosure of various terms the most important of which are the capitalized cost of the leased asset and some figure, such as an APR, to allow comparison shopping.

APPENDIX "B"

UNIFORM CONSUMER LEASES ACT

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FOOTNOTES

Footnote: 1 Canadian Finance & Leasing Association, CFLA Backgrounder on the Asset-based financing, equipment & vehicle leasing industry, May 1999, available online at http://www.canadianleasing.ca/backgroundermay99.html. This report offers a useful overview of leasing devices and practices in the Canadian marketplace.

United States statistical data indicates leasing activity in the hundreds of billions of dollars annually. In 1996, the U.S. Commerce Department estimated that leasing transactions accounted for approximately $168.9 billion dollars of new equipment installed in 1995, an expansion of 11.6% over 1995. In 1995, the volume of equipment leasing activity had increased by an estimated 28.1% over 1994. See Stephen T. Whelan, Lawrence F. Flick II

and Robert D. Strauss, Annual Review of Leases (1997), 52 Bus. Law. 1517, (1996), 51 Bus. Law. 1381. It is not clear whether these statistics include consumer leases.

Footnote: 2 Another study indicates that 41.7% of new vehicles registered in 1997 were leased, up from 35.1% in 1996. See Vertex Consultants report on Canadian New Vehicle Leasing Data, April 1998, available online through the Canadian Bankers Association website at http://www.cba.ca.

Footnote: 3 Canadian Finance & Leasing Association, supra note 3.

Footnote: 4 The most recent proposals are incorporated in a Draft Revision 2A dated March of 1999.

Footnote: 5 United States consumer protection legislation is discussed in more detail infra, at heading 5.

Footnote: 6 As at the date of this writing, the most recent draft was that prepared for the NCCUSL annual meeting scheduled to take place in July 1999. It is available online at http://www.law.upenn.edu/library/ulc/consleas/claam99.htm. The working draft previous to that was Number 7, dated March 1999.

Footnote: 7 The Convention was adopted at the Diplomatic Conference for the Adoption of the Draft Unidroit Conventions on International Factoring and International Financial Leasing held in Ottawa in May, 1988.

Footnote: 8 Of primary significance is the regulation of defined leasing transactions by the provincial Personal Property Security Acts (PPSAs), discussed infra. The Saskatchewan Personal Property Security Act, 1993, S.S. 1993, c. P-6.2, is referred to hereafter as a generally representative model of the legislation in effect in the common law provinces other than Ontario. Some leasing transactions are also subject to one or more components of a haphazard patchwork of consumer protection statutes, also discussed infra.

Footnote: 9 In 1990, eminent commercial law scholars Jacob S. Ziegel and Ronald C.C. Cuming publicly agreed that the enactment of a comprehensive Canadian uniform leasing statute comparable to UCC Article 2A was unfeasible and largely unnecessary. They did, however, point to some aspects of leasing law that could and should be addressed by legislation. See Jacob S. Ziegel, Should Canada Adopt an Article 2A Type Law on Personal Property Leasing? (1990), 16 C.B.L.J. 369, Ronald C.C. Cuming, An Article 2A for Canada? A Comment on Professor Ziegel's Paper (1990), 16 C.B.L.J. 439. At the time those articles were written Professor Ziegel observed (at note 36) that the Canadian jurisprudence was "surprisingly modest given the number and value of outstanding equipment leases." A current review of the cases indicates that little has changed, save for those moderately developed bodies of caselaw addressing priorities issues in the context of the PPSAs and the question of lessors' monetary remedies upon the lessee's default.

Footnote: 10 This study is limited to the law in effect in the common law jurisdictions of Canada. No attempt has been made to address the distinctive legal regime in place under the Quebec Civil Code. Appropriate adjustments in any proposed uniform treatment of leasing issues would be required to accommodate its application to Quebec.

Footnote: 11 The distinction between a true lease and a security lease, or a lease that is in substance a security agreement, is relevant in connection with the priority provisions and registration requirements of all of the Canadian PPSAs. The distinction is particularly important in Ontario, where only security leases fall subject to the PPSA. It is similarly relevant for some purposes in other jurisdictions, as will be discussed infra at heading 3.

Footnote: 12 This may involve an assignment of title to the goods along with the contractual rights of the assignor under the lease contract, or may be limited to assignment of the contractual rights alone. See in this regard R. M. Goode, Hire-Purchase Law and Practice (London: Butterworths, 1970) at 667-670.

Footnote: 13 UCC 2A-103(g).

Footnote: 14 This is clearly the view of commercial lessors, as represented by the Canadian Finance & Leasing Association. See CFLA Backgrounder, supra note 1.

Footnote: 15 The Sale of Goods Acts of the Canadian common law provinces mirror the British Sale of Goods Act of 1893. The British Columbia Sale of Goods Act, R.S.B.C. 1996, c. 410 is an exception, to the extent of the relatively minor amendments it incorporates. Under that Act, consumer leases are subject to those provisions that imply terms relating to quality and title into contracts of sale. See ss.1, defn. "lease," "lessee," "lessor," 15 - 20. The efforts of the Uniform Law Conference of Canada to modernize the Canadian law of sales through its publication of the Uniform Sale of Goods Act in 1981 have gone unrewarded. See the proceedings of the Uniform Law Conference of Canada, Sixty- Third Annual Meeting (1981), Appendix S, as modified by Proceedings of the Sixty-Fourth Annual Meeting (1982), Appendix HH.

Footnote: 16 For a sampling of cases addressing the substantive nature of a transaction as either one of sale or lease, see Uniform Laws Annotated, Volume 1, Uniform Commercial Code (West Publishing Co. 1989 and suppl.) at Â§ 2-106, Note 10. See also Amelia H. Boss, Panacea or Nightmare? Leases in Article 2 (1984), 64 Boston Univ. L. Rev. 39 at 48, 49, Charles W. Mooney, Personal Property Leasing: A Challenge (1981), 36 Bus. Law. 1605 at 1618-1621. The problems of characterization endemic to the functionalist approach have largely been overcome in the United States with the enactment of UCC Article 2A, which imposes upon parties to a lease (other than a finance lease) obligations largely equivalent to those imposed on parties to a contract of sale under UCC Article 2.

Footnote: 17 For a critique of this debate, see Boss, ibid.

Footnote: 18 M.B. Bridge, Sale of Goods (Toronto & Vancouver: Butterworths, 1988) at 45-46.

Footnote: 19 Keneric Tractor Sales Ltd. v. Langille (1988), 43 D.L.R. (4th) 171 (S.C.C.).

Footnote: 20 There are relatively few reported Canadian cases on point. Those that articulate a standard of care appear to have adopted the lower standard. See Coleshaw v. Lipsett (1973), 33 D.L.R. (3d) 382 (Sask. Q.B.), M. v. Sinclair (1980), 15 C.C.L.T. 57 (Ont. H.C.), Boorman v. Morris, [1944] 3 D.L.R. 382, Crawford and Crawford v. Ferris, [1953] O.W.N. 713. On this view, the lessor's liability for the fitness of goods supplied is more limited than that of a seller, who is strictly liable for breach of the statutorily implied condition that the goods will be reasonably fit for their intended purpose. The "reasonableness" qualification relates to the degree to which the goods fulfil their purpose, not the degree of care that must be exercised by the seller. If goods are not reasonably fit, the seller is not excused by having taken reasonable care to ensure that they are reasonably fit. See Bridge, supra note 18 at 461-62. For a through discussion of the terms implied in contracts of lease, see N.E. Palmer, Bailment (Sydney: The Law Book Company Limited, 1991). The implied term of fitness is discussed at 1220 et.seq.

Footnote: 21 See the obiter discussion on this point in Burlington Leasing Ltd. v. DeMoura (1975), 60 D.L.R. (3d) 71 (Ont. Cty. Ct.) at 74.

Footnote: 22 See Palmer, supra note 20 at 1246-47. Some have suggested that a lessor is subject to an implied duty to provide goods that are "hireworthy" - a term that would seem to connote the leasing equivalent to the requirement that goods sold be "merchantable". However, this appears to be a relatively uncommon view. See A.D.M. Forte, Finance Leases and Implied Terms of Quality and Fitness: A Retrospectie and Prospective Review, [1995] Jurid. Rev. 119 at 123 - 126.

Footnote: 23 The statutory condition of fitness is defined in these terms:

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods will be reasonable fit for such purpose. See e.g. Saskatchewan Sale of Goods Act, R.S.S. 1978, c. S-1, s.16.1.

The requirement of reliance in the context of contracts of hire is confirmed by Astley Industrial Trust, Ltd. v. Grimley, [1963] 2 All E.R. 33 at 42, 44, Burlington Leasing Ltd. v. DeMoura, supra note 21 at 74.

Footnote: 24 Palmer, supra note 20 at 1230.

Footnote: 25 Ibid. at 1235. See U.C.B. Leasing Ltd. v. Holtom, [1987] R.T.R. 362, in which the court refused to find a continuing obligation that a car should remain fit through the term its hire, a car, though it acknowledged that the position might be different in the context of other kinds of goods.

Footnote: 26 The question of what descriptive words are to be included in the "description" of goods for purposes of determining compliance with the implied condition is not always easy to resolve. However, if the description simply identifies the goods without accompanying qualitative adjectives, it is only necessary that the goods provided meet the identity test - e.g., a computer is a computer, regardless of how well it works. For the principles pertinent to contracts of sale, see Bridge, supra note 18 at 431-51.

Footnote: 27 Burlington Leasing Ltd. v. DeMoura, supra note 21 at 79.

Footnote: 28 Chrysler Credit Canada Ltd. v. Shipperbottom, [1993] O.J. No. 1707 (Ont. Ct. Just. Gen. Div.), GMAC Leaseco Ltd. v. 405818 Ontario Ltd., [1998] O.J. No. 2827 (Ont. Ct. Just. Gen. Div.). There is authority for the view that at common law the lessor impliedly contracts that the chattel is reasonably safe. See Palmer, supra note 20 at 1220.

Footnote: 29 Palmer, supra note 20 at 1215.

Footnote: 30 Ziegel, supra note at 406.

Footnote: 31 [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321.

Footnote: 32 A finding of fundamental breach was held to be a defence to the lessor's action for unpaid rent in Scarborough Tire & Spring Service Ltd. v. Campbell Graphics Inc., [1994] O.J. No. 2092 (Ct. Just. Gen. Div.) and GMAC Leaseco Ltd. v. 405818 Ontario Ltd., [1998] O.J. No. 2827 (Ct. Just. Gen. Div). In Chrysler Credit Canada Ltd. v. Shipperbottom, [1993] O.J. No. 1707 (Ct. Just Gen. Div.), a lessee was awarded damages against the lessor for a "fundamental breach" causing him loss of enjoyment, physical inconvenience and vexation resulting from the leasing of a defective car, in spite of a contractual provision excluding implied warranties of quality or fitness. Notably, the Ontario

Court of Appeal decided in the earlier case of Canadian-Dominion Leasing Corp. Ltd. v. George Welch & Co. (1981), 125 D.L.R. (3d) 723 that a lessor was entitled to recover damages for the lessee's failure to pay the rental due on a photocopying machine even if he (the lessor) was in fundamental breach (apparently of an implied term as to quality), since the contractual exclusion clause operated to relieve him of liability.

Footnote: 33 For a discussion of authorities see Chrysler Credit Canada Ltd. v. Adorable - Pacific Rim Boarding Kennels for Dogs and Cats Ltd. (1992), 130 A.R. 273 (Q.B. Master).

Footnote: 34 See the "Hell or High Water" Provision, infra at heading 3.6.

Footnote: 35 The theory of collateral contract is demonstrated in the context of a hire purchase agreement by the decision in Andrews v. Hopkinson, [1956] 3 All E.R. 422. See also Goode, supra note 12 at 638-42.

Footnote: 36 This factual assumption appears in most of the literature discussing the warranty obligations of a finance lessor. However, increasing specialization in the leasing industry may mean that some finance lessors do offer advice. Following is an extract from a paper published by the Canadian Finance & Leasing Association, supra note 1,

An asset management-based business requires specialized industry and equipment/vehicle expertise. With operating leases in particular, lessors must be able to accurately estimate residual values several years hence at lease-end when the equipment or vehicle must be re-leased or sold on the secondary market.

Because of this critical requirement, leasing companies frequently specialize in a limited range of equipment or vehicles. This is another important difference between bank lending and leasing. The expertise developed of the lessee's industry and on specific equipment or vehicles allows lessors a greater advisory role to lessees on appropriate equipment or vehicles to use in a specific business.

Footnote: 37 See Forte, supra note 22. This position was adopted in Scotland in the case of G.M. Shepherd Ltd. v. North West Securities Ltd., [1991] S.L.T. 499.

Footnote: 38 See Ziegel, supra note 9, Boss, supra note 16 at 62.

Footnote: 39 Supra note 31. It seems that Wilson J's notion of unreasonableness has neither been clearly defined nor seriously pursued since the judgment in Hunter. It was rejected in the context of a lease transaction in Chrysler Credit Canada Ltd. v. Adorable - Pacific Rim Boarding Kennels for Dogs and Cats Ltd., supra, note 33. Nevertheless, the potential for its invocation by a court sympathetic to a lessee remains.

Footnote: 40 Ordinarily, the lessor will assign the entire lease, including its title to the goods. However, in some instances only the lessor's right to payment will be assigned, leaving title resident in the lessor. The route chosen will depend upon the nature of the financing arrangements between the lessor and the assignee. The law of assignment is very complex, and a full analysis of the various issues that might arise from an assignment by either lessor or lessee is beyond the scope of this paper. For an overview of the relationships arising from various forms of assignment, see R.M. Goode, supra note 12, Chapter 23, at 511 et. seq.

Footnote: 41 The common law rules of assignment are largely replicated in statutory form under provincial legislation. See e.g. the Choses in Action Act, R.S.S. 1978, c. C-11,

the Saskatchewan PPSA, supra note 8, s. 41, discussed in Ronald C. Cuming and Roderick J. Wood, Saskatchewan and Manitoba Personal Property Security Acts Handbook, (Carswell, 1994) at 328-32.

Footnote: 42 The lessee will be entitled to pursue the lessor-assignor for breach of warranty in the absence of a contractual term permitting assignment of the lessor's obligations, since the burdens of a contract cannot be assigned along with its benefits without the consent of the opposite party. See R.M. Goode, supra note 12 at 513. A lessee so foolish as to agree both to assignment of the lessor's contractual obligations and to a cut-off of defence clause would seem to have thereby deprived himself or herself of any remedy for deficiencies in the goods.

Footnote: 43 Theoretically, an anti-assignment provision may be included in the lease to prevent an assignment by the lessor, though lessors are in practice generally in a position to refuse such a clause. The effectiveness of an anti-assignment provision as between lessee and assignee in the face of an unauthorized assignment is not entirely clear, though recent authority suggests that an equitable assignment may operate in spite of an anti-assignment clause. See Yablonski v. Cawood, [1997] 3 W.W.R. 351 (Sask. C.A.). See also Cuming & Wood, Alberta Personal Property Security Act Handbook, 4th edn. (Carswell, 1998) at 390-91.

Footnote: 44 See Mooney, supra note 16 at 1618-1621.

Footnote: 45 Statutory regulation of leases is also a feature of the law of several Commonwealth jurisdictions. However, Article 2A is by far the most comprehensive attempt at codification, and little is to be gained by a survey of the more limited legislation of England and Australia. -

Footnote: 46 For an outline of Article 2A's implied terms, see John Levin, Lease Terms Implied Under UCC Article 2A (1994), 27 U.C.C.L.J. 227.

Footnote: 47 UCC 2A-213.

Footnote: 48 UCC 2A-212.

Footnote: 49 The concept of merchantability is defined in some detail, following Article 2's apparent attempt to resolve the considerable uncertainty arising from judicial efforts to define the meaning of merchantable quality as the term appears in the British Sale of Goods Act. For a discussion of the Sale of Goods Act provision, see Bridge, supra note 18 at 489 et. seq.

Footnote: 50 The Official Comment to UCC 2A-211 indicates that the general purpose of the warranty is to ensure that no person holding a claim or interest that arose from an act or omission of the lessor will be able to interfere with the lessee's use and enjoyment of the

goods for the lease term.

Footnote: 51 See Ziegel and Cuming, both supra note 9 at 406-407 and 432-436 respectively.

Footnote: 52 UCC 2A-214. Though the prima facie rule is that warranty disclaimers must be in writing and conspicuous, exclusion or modification of the statutory warranties by course of dealings, course of performance or usage of trade is also countenanced.

Footnote: 53 USS 2A-216. Some provincial consumer protection legislation, discussed infra at heading 5.3, accommodates third party claims for breach of warranty. Otherwise, injured parties who are not contractually related to the lessor must rely on their rights under the law of tort, which are dependent upon proof of negligence.

Footnote: 54 UCC 2A-303.

Footnote: 55 An exception should be made in cases in which the lessor in fact offers advice as to the suitability of the goods subject to the lease. See supra, note 36.

Footnote: 56 Note that the finance lessor warrants freedom from interference with enjoyment by a third party whose claim or interest arose from the lessor's own act or omission. UCC 2A-211(1). However, the finance lessor is not subject to the broader warranty given by other commercial lessors, that the goods "are delivered free of the rightful claim of any person by way of infringement or the like." UCC 2A- 211(2).

Footnote: 57 UCC 2A-209. This provision was amended in 1990 to also extend to the lessee the benefit of manufacturers' warranties provided in connection with the supply contract.

Footnote: 58 UCC 2A-103(g) provides:

"Finance lease" means a lease in which ... (iii) either the lessee receives a copy of the contract evidencing the lessor's purchase of the goods on or before signing the lease contract, or the lessee's approval of the contract evidencing the lessor's purchase of the goods is a condition to effectiveness of the lease contract.

Footnote: 59 UCC 2A-102 provides that the Article applies to any transaction, regardless of form, that creates a lease. "Lease" is defined in 2A-103 in a manner that excludes a transaction involving the retention or creation of a security interest.

Footnote: 60 This approach is briefly criticized by Cuming, supra note 9 at 447.

Footnote: 61 Mooney, supra note 16 at 1610.

Footnote: 62 The amendments were made in 1987 to conform to Article 2A. For further discussion on this point, see infra at heading 3.4.

Footnote: 63 For a selection of cases on this point, see West Publishing Co., Uniform Laws Annotated, Volume 1 UCC Â§Â§1-101 to 2-210 (1999 Cumulative Annual Pocket Part) at 48-49.

Footnote: 64 Supra note 7. The terminology employed in the Convention is "financial leasing transaction", rather than "finance lease". However, the definitional provisions of Article 1 establish that the transaction addressed is substantially the same as that defined as a finance lease by Article 2A. Like the latter, the Convention contemplates knowledge and approval of the terms of the supply contract on the part of the lessee.

Footnote: 65 Article 1.

Footnote: 66 Article 10. That provision ensures that the supplier is not liable to both lessor and lessee in respect of the same damage.

Footnote: 67 Article 9.

Footnote: 68 Supra note 15.

Footnote: 69 This conclusion is subject to the discussion of consumer leasing, infra at heading 5.

Footnote: 70 Mooney, supra note 16 at 1610.

Footnote: 71 Supra note 19.

Footnote: 72 The lessee, like the lessor, is subject to certain obligations at common law. However, they are relatively few and appear to have raised little difficulty. Notably, the lessee must take reasonable care of the leased goods, must comply with the terms of the bailment or lease and must return the goods at the end of the term. For the duties of a bailee, see in general Palmer, supra note 20.

Footnote: 73 Supra note 19.

Footnote: 74 (1969), 3 D.L. R. (3d) 304, 67 W.W.R. 297.

Footnote: 75 For a comprehensive discussion of Keneric Tractor Sales Ltd. v. Langille and the British caselaw preceeding it, see Richard Best, The Availability of Loss of Bargain Damages (1994), 24 Vict. U. of Wellington L. Rev. 349.

Footnote: 76 See e.g. 32262 B.C. Ltd. v. See-Rite Optical Ltd., [1998] 9 W.W.R. 442

(Alta. C.A.), 32262 B.C. Ltd. v. 544006 Alberta Ltd., [1998] A.J. No. 281 (Alta. Q.B.), 32262 B.C. Ltd. v. Blackfoot Metals Ltd. [1997] A.J. No. 459 (Alta. Q.B. Master), Trexar v. Beckett, [1996] O.J. No. 1125 (Ont. C.t Just. Gen. Div.), 32262 B.C. Ltd. v. Cryer Holdings Ltd., [1996] B.C.J. No. 1996 (B.C.S.C.), 32262 B.C. Ltd. v. Mohawk Oil Co., [1995] B.C.J. No. 2892 (B.C. S.C.), Wallace Sign-Crafters West Ltd. v. Delta Hotels Ltd., [1994] B.C.J. No. 896 (B.C.S.C.).

Footnote: 77 The lessor should only be required to deduct the full resale value of the goods if it is claiming rental payments equivalent to the full value of the leased goods. If the goods would have had some meaningful residual value at the end of the lease, the lessor need only deduct the difference between the sum recovered on resale and that residual value, appropriately adjusted for early receipt of the sum representing that value. Further, it would seem that a lessor should not be obliged to deduct the amount realized on a sale or a re-leasing of repossessed goods if it can establish that it could have sold or leased other goods to the buyer or subsequent lessee and thus enjoyed the benefit of two contracts. Though a seller can recover "lost volume," the issue does not seem to have been addressed in the context of leases. Regarding the question of lost volume in the context of a sale, see Victory Motors Ltd. v. Bayda, [1973] 3 W.W.R. 747 (Sask. D.C.).

Footnote: 78 At least one commentator has suggested that there is an ambivalence in the decision that may leave an opening for future courts to refuse enforcement of a liquidated damages clause. It is not entirely clear that the court in Keneric Tractor fully appreciated the distinction made by Dickson J. in his award of damages in Regent Park Butcher Shop. His view was that rental to the end of the lease term could not be taken into consideration when the lessee's non-payment of rent did not amount to a repudiation of the lease. If it were a repudiation - that is, a refusal to render any further performance - then the lessor would be entitled to recover damages for the future performance that it was thereby denied. However, if the non-payment could not be viewed as an indication that the lessee was repudiating the lease in its entirety, the lessor who chose to terminate the contract could not claim that the breach had caused it loss of the balance of the rental due. Had the lessor kept the lease open for performance, the lessee might very well have made the remaining payments. Though the judgment might have been clearer on this point, the view that Keneric Tractor leaves room for a refusal to enforce a liquidated damages provision if the default relied upon does not constitute a repudiation of the contract is not compelling. Although the facts before her involved a repudiation of the lease, Wilson J. appears to have quite clearly answered in the negative the question she poses in these terms, "The question at hand is whether the assessment of damages in a case of termination based on breach of a term of the contract should be any different from the assessment of damages in a case of termination based on repudiation." Supra note 19 at 180. After some discussion, she concludes (on the same page) that "There is no conceptual difference between a breach of contract that gives the innocent party the right to terminate and the repudiation of a contract so as to justify a different assessment of damages when termination flows from the former rather than the latter. General contract principles should be applied in both cases."

Footnote: 79 Supra note 76.

Footnote: 80 Sign-O-Lite v. David Henry and Bowlacade (1984) Ltd., [1993] O.J. No. 1138 (Ont. Ct. Just. Gen. Div.), Wallace Sign Crafters West Ltd. v. Delta Hotels Ltd., [1994] B.C.J. No. 896 (B.C.S.C.). Similarly, in 32262 B.C. Ltd. v. Mohawk Oil Co., [1995] B.C.J. No. 2892 (B.C.S.C.), the court refused to interfere with a liquidated damages clause on the ground that it did not discount the sum recoverable from the lessee to reflect the lessor's potential savings on servicing for the unexpired balance of the term.

Footnote: 81 See 32262 B.C. Ltd. v. See-Rite Opticals Ltd., [1998] 9 W.W.R. 442 (Alta. C.A.), 32262 B.C. Ltd. v. Blackfoot Metals Ltd., [1997] A.J. No. 459 (Alta. Q.B.)

Footnote: 82 See G.H. Treitel, The Law of Contract, 9th edn. (London: Sweet & Maxwell, 1995) under the heading "Rescission for Failure to Perform" at 674 et seq.

Footnote: 83 See e.g. Saskatchewan PPSA s. 3(1), which provides that the Act applies:

(a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and

(b) without limiting the generality of clause (a), to a ... lease ... that secures payment or performance of an obligation.

"security interest" is defined in s. 2(qq) as an interest in personal property that secures payment or performance of an obligation.

Footnote: 84 Ibid. ss. 58, 59.

Footnote: 85 Ibid. s. 60.

Footnote: 86 Ibid. s. 61.

Footnote: 87 See e.g. Ibid. s. 55(7).

Footnote: 88 For an explanation of the operation of this provision, see Ronald C.C. Cuming and Roderick J. Wood, supra note 41 at 398-99.

Footnote: 89 Saskatchewan PPSA s. 62.

Footnote: 90 Ibid.

Footnote: 91 Ibid. s. 65(3).

Footnote: 92 The question of application of the PPSA inter partes enforcement provisions to true leases has been considered by Professor Ziegel, supra note 9 at 413-15. He suggests that it may be impossible to do so, and not particularly desirable if the need to maintain this distinction cannot be overcome. A number of approaches to the problem are suggested, though none ultimately endorsed as the solution.

Footnote: 93 The Draft Uniform Consumer Leasing Act, supra note 6, subjects lessors to a procedural realization regime similar in many respects to that of the PPSA. However, the drafting committee chose not to include a pre-disposition notice requirement on the ground that such notices are of doubtful utility in a lease setting. The Reporter's Notes to Â§404 of the Act express that view, with the following rationale:

The lessee has no right to redeem the collateral, nor any "equity interest" that may produce a surplus for the lessee, and it is unrealistic to think that lessees can effectively monitor the commercial reasonableness of what are usually private resales. If the holder pursues a deficiency claim, the holder will need to justify that claim in some manner.

Footnote: 94 See Ziegel, supra note 92.

Footnote: 95 Supra note 83.

Footnote: 96 Ibid.

Footnote: 97 The issue of characterization is discussed, with references to authority, by Cuming & Wood, supra note 41 at 41-47.

Footnote: 98 For an annual review of caselaw developments in the United States, see Stephen T. Whelan, Lawrence F. Flick & Robert D. Strauss, Leases (annual review of developments in leasing law) at (1997), 52 Bus. Law. 1517, (1996), 51 Bus. Law. 1381, (1995), 50 Bus. Law. 1481, (1994), 49 Bus. Law. 1857.

Footnote: 99 Supra note 19.

Footnote: 100 Problems in the quantification of damages payable to a lessee in the event of the lessor's breach are outlined by Professor Boss, supra note 16 at 90-91.

Footnote: 101 "Repudiation" is generally taken as synonymous with anticipatory breach. It refers to the situation in which one party has expressly or implicitly declared her refusal to perform her contractual obligations. See G.H.L. Fridman, The Law of Contract, 3rd edn. (Carswell, 1994) at 600-22.

Footnote: 102 Ibid. at 557-600.

Footnote: 103 Numerous Canadian courts addressing the enforceability of exclusionary

provisions in contracts of lease fall prey to the unfortunate habit of declaring a "fundamental breach", without defining which contractual term is the subject of breach, or considering the characterization of the term.

Footnote: 104 See e.g. Saskatchewan Sale of Goods Act, supra note 23, ss. 13, 35.

Footnote: 105 Goode, supra note 12 at 450.

Footnote: 106 For a more comprehensive discussion of the hirer's rights upon breach by the owner in a contract of hire, see Goode, ibid., Chapter 20 "Remedies of the Hirer for Breach" at 447-468.

Footnote: 107 Martin B. Robbins, Come Hell or High Water or Article 2A: How Legislatures and Practitioners Can Cope with Several Drafting Anomalies in Article 2A of the Uniform Commercial Code (1996), 101 Comm. L.J. 357 at 362. The author provides an example of such a provision as follows:

This Lease provides for a net lease, and the Rent due hereunder from Lessee to Lessor shall be absolute and unconditional, and shall not be subject to any abatement, recoupment, defense, claim, counterclaim, reduction, set-off or any other adjustment of any kind for any reason whatsoever.

Footnote: 108 Ibid. at 362-63.

Footnote: 109 As to all of the foregoing, see UCC 2A-523.

Footnote: 110 The right to possession is defined in UCC 2A-525. Rights of disposition are addressed in UCC 2A- 527.

Footnote: 111 "Default" is defined as, inter alia, the failure to pay or otherwise perform the obligation secured when due. See e.g. Saskatchewan PPSA s. 2(n).

Footnote: 112 UCC 2A-527.

Footnote: 113 UCC 2A-528.

Footnote: 114 UCC 2A-528.

Footnote: 115 UCC 2A-528.

Footnote: 116 UCC 2A-529.

Footnote: 117 UCC 2A-504.

Footnote: 118 One noted American commentator suggests that the remedial regime introduced through the 1990 revisions to Article 2A is for the most part "coherent, sensible and workable". See Michael J. Herbert, Getting Better all the Time: The Official (Revised) Remedy Provisions of The Uniform Commercial Code's Article 2A (1990), 96 Comm. L. J. 1. The coherence of the Article 2A provisions to an the mind of an American practitioner or academic may have a great deal to do with the fact that they echo in many respects the long established remedial regime of Article 2.

Footnote: 119 UCC 2A-407.

Footnote: 120 Unidroit Convention, Article 13.

Footnote: 121 Ronald C.C. Cuming, Legal Regulation of International Financial Leasing: The 1988 Ottawa Convention (1989), Arizona J. of Int'l and Comp. Law 39 at 61.

Footnote: 122 Ibid.

Footnote: 123 Unidroit Convention, Article 12.

Footnote: 124 UCC 2A-508.

Footnote: 125 UCC 2A-517.

Footnote: 126 Nevertheless, one commentator notes that "The right to cancel is more limited for the lessee than it is for the lessor, because the lessee usually loses the right to cancel the contract once the lessee has accepted the goods." See Herbert, supra note 118 at 3.

Footnote: 127 UCC 2A-516(2), 517(1)(b).

Footnote: 128 Admittedly, an American lawyer familiar with the intricacies of the Article 2 remedial regime would likely find them much more accessible than her Canadian counterpart.

Footnote: 129 See Robbins, supra note 107.

Footnote: 130 UCC 2A-518.

Footnote: 131 UCC 2A-519.

Footnote: 132 This point is noted by Ziegel, supra note 9 at 401.

Footnote: 133 Unidroit Convention Article 12. For a discussion of the lessee's rights under the Convention, see Cuming, supra note 121 at 55-61.

Footnote: 134 Unidroit Convention Article 10.

Footnote: 135 Remedies and enforcement issues are more problematic in the consumer context, as will be seen infra, at heading 5.

Footnote: 136 Palmer, supra note 20 at 82.

Footnote: 137 Ibid. at 81.

Footnote: 138 Steven L. Harris, The Rights of Creditors Under Article 2A (1988), 39 Ala. L. Rev. 803.

Footnote: 139 Supra note 8.

Footnote: 140 "Lease for a term of more than one year" is defined to as to include leases that have the potential to extend beyond one year. See eg. Saskatchewan PPSA s.2(y). The definition does not catch leases in which the lessor is not regularly engaged in the business of leasing goods. Query whether it should be amended to extend to lessors who, though not ordinarily involved in the leasing of goods, are involved in the business of selling goods of the kind subject to the lease. For a discussion of this provision see Ronald C.C. Cuming and Roderick J. Wood, supra note 41 at 51-52.

Footnote: 141 The Personal Property Security Act, S.M. 1993, c. 14.

Footnote: 142 All of the other Canadian PPSAs bring leases for a term of more than one year within the scope of their priorities provisions.

Footnote: 143 A special rule addresses the right of a lessor to damages when, having failed to register its interest, it loses the leased goods to the lessee's trustee in bankruptcy or judgment creditors. The lessor is deemed, as against the lessee, to have suffered damages in an amount equal to the value of the leased goods at the date of the bankruptcy or seizure and the amount of additional loss resulting from the termination of the lease. See British Columbia Personal Property Security Act, S.B.C. 1989, c. 36 as am., s. 21.

Footnote: 144 See the exchange between Professors Ziegel and Mooney on this point in Ziegel, supra note 9 and Charles W. Mooney, Filing Requirements for Personal Property Leases: A Comment and Response to Professor Ziegel (1990), 16 C.B.L.J. 419.

Footnote: 145 A lease for a term of less than one year would fall within the PPSA if it is "in substance" a security agreement. See supra at heading 3.4. However, short term leases will virtually always be true leases.

Footnote: 146 See eg. Saskatchewan PPSA s. 30.

Footnote: 147 Ibid. s. 41.

Footnote: 148 Pertinent provisions include UCC 2A-303 to 310.

Footnote: 149 Consumer Leasing Act, 15 U.S.C. Â§Â§ 1667 et seq.

Footnote: 150 12 C.F.R. Part 213.

Footnote: 151 See Joseph W. Gelb and Peter N. Cubita, An Overview of State Automobile Leasing Legislation (1997), 52 Bus. Law. 1087, and The Advent of Comprehensive State Automobile Leasing Legislation (1995), 50 Bus. Law. 1171, Thomas B. Hudson, Consumer Leasing and Personal Property Financing Developments: Motor Vehicle Leasing Statutes (1995), 50 Bus. Law. 1171. Note that the latter two articles were referred to by and appended to the National Conference of Commissioners on Uniform State Laws, Report of the Study Committee on a Proposed Uniform Consumer Leasing Act, July 1995 (available through NCCUSL).

Footnote: 152 NCCUSL, ibid. at 8.

Footnote: 153 The current draft is that prepared for the July 1999 annual meeting of the NCCUSL. The most recent previous working draft was number 7, dated March of 1999. The annual meeting draft is the subject of references hereafter to the UCLA.

Footnote: 154 It is anticipated that a second and final reading will occur at the Commission's annual meeting in the year 2000.

Footnote: 155 The list of topics identified by the study committee as among the most important to be considered in the preparation of draft legislation is attached hereto as Appendix A.

Footnote: 156 They include the interest rate disclosure suggestion (ALR), mandatory GAP coverage, "burdensome" procedures regarding end-of-term charges, the requirement for provision of lease forms prior to the transaction, and the prohibition of open-end leases, all discussed below. See the National Vehicle Leasing Association, Vehicle Leasing Today, "Uniform Consumer Leases Act Update" (Spring 1999 - Volume 21, No. 2).

Footnote: 157 See Joseph W. Gelb and Peter N. Cubita, Toward a Uniform Consumer Leases Act? (1998), 53 Bus. Law. 1041, John J. A. Burke and John M. Cannel, Leases of Personal Property: A project for Consumer Protection (1991), 28 Harv. J. Legis. 115.

Footnote: 158 Regulation M, supra note 150 Â§213.2. The "gross capitalized cost" is the total value of the leased property (ie., total anticipated depreciation and estimated residual value at the end of the lease term) plus any items that are capitalized or amortized during

the lease term, such as taxes, insurance and service agreements. The "capitalized cost reduction" is the total amount of any rebate, cash payment, trade-in or other credit deducted from the gross capitalized cost. The "adjusted capitalized cost" is the gross capitalized cost net of the capitalized cost reduction, representing the amount used by the lessor in calculating the base periodic payment.

Footnote: 159 See Draft UCLA Â§Â§201, 207.

Footnote: 160 An ALR can only be used in connection with leases that state a lease-end purchase option price as a specific dollar figure. See the Reporter's Notes to Draft UCLA Â§203.

Footnote: 161 Professor Michael Greenfield of Washington University, who served as one of the advisors for the NCCUSL study committee on consumer leasing, supra note 151, is quoted in the committee's report (at 5) as follows:

Regulation M and a dozen states have disclosure requirements. A critical shortcoming of existing disclosure regulation is the failure to require disclosure of the capitalized cost and the failure to create and require disclosure of a figure analogous to APR. They will be unable to compare one potential lease with another, and they will be unable to compare leasing with purchasing... The Fed may revise Regulation M to require disclosure of capitalized cost, but until Regulation M creates an APR concept for leases, disclosure regulation will be inadequate.

Footnote: 162 See Gelb & Cubita, supra note 157 at 1048. An ALR provision is apparently opposed by United States vehicle lessors. A recent update on the UCLA in a newsletter published by the United States National Vehicle Leasing Association, indicates that "In its present form, the UCLA is extremely problematic for vehicle lessors. Among the more troubling provisions is an interest rate disclosure suggestion for leases with a fixed price purchases option." See The National Vehicle Leasing Association, supra note 156. The same newsletter refers to successful efforts to block Kansas legislation that would have required an interest rate disclosure. Association members lobbying the Kansas legislature relied on the existing protections included in Regulation M of the federal Consumer Leasing Act ("NVLA Members Stop Kansas Legislation"). See also the UCLA Reporter's Note 1 under heading C. Key Issues in the Draft, indicating strong industry opposition to the ALR provisions.

Footnote: 163 Since disclosure and advertising using an annual lease rate is currently prohibited by federal Regulation M, the ALR provisions of the UCLA cannot become operative without modification of Regulation M.

Footnote: 164 For a discussion of the various approaches that have been adopted, see Gelb and Cubita, An Overview of State Automobile Leasing Legislation, supra note 151.

Footnote: 165 Draft UCLA 406.

Footnote: 166 For a discussion of the potential unfairness inherent in early termination provisions, see Burke & Cannel, supra note 157 at 119-125. The authors suggest at 120 that "The combined penalties and damages imposed upon default and early termination of the lease can often exceed the amount the consumer would have paid under the lease had the consumer completed performance."

Footnote: 167 See Draft UCLA, Part 2. Disclosures relating to insurance address the lessee's obligation to procure insurance coverage for loss or damage to the leased goods and, in the context of motor vehicle leases, liability insurance. In addition, the Act addresses the provision of insurance by the lessor. See Â§204.

Footnote: 168 Gelb & Cubita, supra note 157 at 1049.

Footnote: 169 For the treatment of "gap" liability in state legislation, see Gelb & Cubita, An Overview of State Automobile Leasing Legislation, supra note 151 at 1095-97.

Footnote: 170 Draft UCLA Â§402.

Footnote: 171 Ibid., Reporter's Notes.

Footnote: 172 See Gelb & Cubita, An Overview of State Automobile Leasing Legislation, supra note 151 at 1097.

Footnote: 173 15 U.S.C. Â§1667b(a); 12 C.F.R. Â§ 213.4(g)(8).

Footnote: 174 Draft UCLA Â§407. Motor vehicle leases are given separate treatment. An excess milage provision is also subject to a reasonableness standard, referable to the expected diminution in value of the vehicle on account of the excess milage.

Footnote: 175 See Burke & Cannel, supra note 157.

Footnote: 176 Draft UCLA Â§306.

Footnote: 177 The table of contents of the Draft UCLA is attached hereto as Appendix B by way of outline of the scope of its coverage.

Footnote: 178 Draft UCLA Â§108.

Footnote: 179 The law of contract ordinarily penalizes only unconscionable conduct occurring prior to formation of the contract. The UCLA departs from tradition in attaching sanctions to identified forms of post- contract behavior.

Footnote: 180 Draft UCLA Â§109. UCC 2A-108 contains similar unconscionability provisions, including a provision for recovery of attorneys fees.

Footnote: 181 Draft UCLA Â§201

Footnote: 182 Infra note 216.

Footnote: 183 In its current draft form, the UCLA includes a section number to accommodate provisions referable to warranties of quality and title, but indicates "no text pending review of UCC Articles 2 and 2A."

Footnote: 184 A precedent may be found in some of the provincial consumer protection legislation applicable to consumer purchases. For example, the Saskatchewan Consumer Protection Act, S.S. 1996, c. C- 30.1, defines rights of rejection in relation to the seriousness and remediability of the seller's breach. See ss. 57-60.

Footnote: 185 Note that the statutory "hell or high water" provision of Article 2A does not apply to consumer leases. See UCC 2A-407(1).

Footnote: 186 Draft UCLA Â§305(b).

Footnote: 187 Draft UCLA Â§302.

Footnote: 188 Draft UCLA Â§304. Pyramiding refers to the practice of adding a late charge to subsequent on-time payments, on the grounds of non-payment of the late charge arising from a prior default - ie., the imposition of a late charge on payment of the original late charge.

Footnote: 189 Draft UCLA Â§301.

Footnote: 190 See Proposed Comments to Â§301.

Footnote: 191 Draft UCLA Â§403.

Footnote: 192 Draft UCLA Â§404 - 405. Lessors may elect to retain repossessed goods rather than dispose of them, in which event "realized value" is determined as prescribed. The the Draft differs from the PPSA in that it does not currently require the giving of notice prior to disposition. The Reporter's Notes to the realization provisions query strongly whether a pre-disposition notice comparable to that required under UCC 9-614 is appropriate.

Footnote: 193 Draft UCLA Â§405.

Footnote: 194 This approach stands in contrast to that adopted under the British

Columbia PPSA, supra note 143. A lessor who repossesses consumer goods leased under a security lease is precluded from enforcing the personal covenant to pay. However, this "seize or sue" regime does not appear to have obstructed consumer leasing in that province, or added appreciably to its cost. Further empirical investigation of the impact of such legislation may therefore be worthwhile.

Footnote: 195 E.g. see Saskatchewan PPSA, s.65(8). For a discussion of the provision, see Ronald C.C. Cuming and Roderick J. Wood, supra note 41 at 470-71.

Footnote: 196 Draft UCLA Â§501.

Footnote: 197 UCC 2A-216.

Footnote: 198 See e.g. Saskatchewan Consumer Protection Act, supra note 184, Part III, s. 64.

Footnote: 199 Draft UCLA Â§102, "consumer lease", "lessee".

Footnote: 200 The $150,000 sum is exclusive of the residual value of the goods, payments for options to renew or purchase and payments to third parties (eg. for insurance or service).

Footnote: 201 See Draft UCLA Â§102(3), Reporter's Notes.

Footnote: 202 UCC 2A-103(j).

Footnote: 203 Draft UCLA Â§303. The Reporter's Notes imply that the reference is to a lessor under a true lease, who is permitted to take a security interest limited to the leased goods to secure the payment obligations owed by the lessor. Conceptually, it is difficult to understand how a lessor, who by definition holds title to the leased goods, may take a security interest in those goods.

Footnote: 204 Other provisions of Draft UCLA reflect a similarly divided approach. While a person with a security interest in a lease as chattel paper is not a "holder" by virtue of that interest, the assignee of a lessor is. This is an extremely fine if not incomprehensible distinction. Nevertheless, if a person who holds a security interest in chattel paper undertakes collection, she becomes de facto an assignee, and thus subject to the Act as "holder". See the Reporter's Notes to Â§102(8).

Footnote: 205 Manitoba Consumer Protection Act, R.S.M. 1987, c. C200 as am., Northwest Territories Consumer Protection Act, R.S.N.W.T. 1988, c. C-17, Yukon Consumer Protection Act, R.S.Y. 1986, c..

Footnote: 206 Motor Dealer Leasing Regulation, B.C. Reg. 391/94, under the Motor

Dealer Act, R.S.B.C. 1996, c. 316.

Footnote: 207 S.A. 1985, c. C-22.5, ss. 32,33.

Footnote: 208 Consumer purchasers and borrowers are protected in the other provinces under the following legislation: Ontario Consumer Protection Act, R.S.O. 1990, s. 31 as am., New Brunswick Cost of Credit Disclosure Act, R.S.N.B. 1973, c. C-28 as am., Nova Scotia Consumer Protection Act, R.S.N. 1989, c. 92 as am., Newfoundland Consumer Protection Act, R.S.N. 1990, c. C-31 as am., Prince Edward Island Consumer Protection Act, R.S.P.E.I. 1988, c. C-19 as am., Saskatchewan Cost of Credit Disclosure Act, R.S.S. 1978, c. C-41 as am.

Footnote: 209 British Columbia Sale of Goods Act, supra note 15, Saskatchewan Consumer Protection Act, S.S. 1996, c. C-30.1, Part III, New Brunswick Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1.

Footnote: 210 Manitoba Consumer Protection Act, Northwest Territories Consumer Protection Act, Part VI, Yukon Consumer Protection Act, Part VI, all supra note 205.

Footnote: 211 Consumer Protection Act, supra note 184, Part III.

Footnote: 212 Motor Dealer Leasing Regulation, supra note 206, s. 3(d).

Footnote: 213 Consumers who lease automobiles for a term greater than twelve months may look to the Canadian Motor Vehicle Arbitration Plan (CAMVAP) for resolution of disputes involving manufacturers, subject to the agreement of the lessor to submit to the Plan. There are, however, a number of limitations on the scope of CAMPVAP.

Footnote: 214 E.g. see P.E.I. Consumer Protection Act, supra note 208, s.3, which prohibits a "person" from engaging in an unfair practices.

Footnote: 215 A number of statutes prohibit a "supplier" from engaging in unfair practices. Supplier is generally defined as a person who is engaged in the business of selling or leasing, manufacturing or distributing goods. See e.g. Manitoba Consumer Protection Act, supra note 205, s. 1.

Footnote: 216 R.S.C. 1985, c. C-34, ss. 2 "supply", 36, 52-54, 60.

Footnote: 217 Most of this legislation also provides for administrative intervention and penalties at the instance of designated government officials. However, there is little evidence of active administrative enforcement practices in today's cash-strapped provincial beauracracies.

Footnote: 218 See the discussion of lessors' remedies, supra at heading 3.

Footnote: 219 Supra note 206.

Footnote: 220 See e.g. Saskatchewan PPSA, Part V.

Footnote: 221 E.g. Saskatchewan PPSA s. 65(8) and (5).

Footnote: 222 Ibid., s. 65(6).

Footnote: 223 British Columbia PPSA, supra note 143, s. 67.

Footnote: 224 See e.g. Saskatchewan PPSA, s. 55(2), providing that Part V does not apply to transactions referred to in s. 3(2), which include a lease that does not secure payment or performance of an obligation. For a discussion of the "substance" test, see Cuming and Wood, supra note at 42-47, Ronald C.C. Cuming, True Leases and Security Leases Under Canadian Personal Property Security Acts (1982- 83, 7 Can. Bus. L.J. 251.

Footnote: 225 In the context of open-end leases, such liabilities may accrue at the end of the lease term, even where there has been no early termination.

Footnote: 226 This point is made quite forcefully by Professor Cuming, supra note 9 at 424-44.

Footnote: 227 See Ziegel, Cuming, both supra note 9.

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