UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

PROPOSAL FOR A PROJECT ON COMMERCIAL TENANCY LAW

REPORT OF THE WORKING GROUP

Winnipeg Manitoba
August 2011

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I. BACKGROUND

[1] At the 2010 Uniform Law Conference, the Saskatchewan Law Reform Commission agreed to accept leadership of a potential project on commercial tenancy law.

II. PROPOSAL

[2] The Saskatchewan Delegation to the Uniform Law Conference of Canada (ULCC) and The Law Reform Commission of Saskatchewan jointly propose that the ULCC authorize a study of Canadian commercial tenancy law designed to assess the need for and feasibility of a Uniform Commercial Tenancy Act.

III. LEGAL CONTEXT

[3] The law of Canadian jurisdictions dealing with commercial tenancies is fragmented, outdated and, in some respects, obsolete. While law reform agencies in a few jurisdictions have issued reports recommending modernization of aspects of this area of the law,[1] no provincial legislature has enacted legislation that can be a modern precedent for reform.[2]

[4] All jurisdictions have legislation dealing with aspects of commercial tenancies. However, much of it was copied from 18th and 19th Century English legislation and was originally enacted over 100 years ago or was patterned on statutes enacted at this time. For example, the current *Ontario Commercial Tenancies Act* R.S.O. 1990, c. L 7 is very similar to the Ontario *Landlord and Tenant Act*, 1 Geo. V, 1911, c. 37. Landlord and tenant legislation of several other common law jurisdictions contain similar provisions. The British Columbia *Commercial Tenancies Act* R.S.B.C. 1996 c. 57, "first appeared in 1897 and it has only been amended sparingly since then."[3] The archaic nature of much of this legislation is displayed in some of the obsolete

terminology contained in its provisions and its focus on matters that have little or no contemporary commercial significance.[4]

[5] The statutory measures that exist are often scattered among various statutes. For example, in some jurisdictions, the right of distress (*e.g.*, British Columbia *Rent Distress Act* R.S.B.C. 1996, c. 403; and Alberta *Civil Enforcement Act*, R.S.A. 2000, c. C-15, ss. 104-105) or the rights of landlords in bankruptcy of tenants (*e.g.*, Alberta *Landlord's Rights on Bankruptcy Act,* R.S.A.2000, c. L-5) are contained in separate legislation; and in some jurisdictions, aspects of leasing law are contained in land titles legislation (*e.g.*, Saskatchewan *The Land Titles Act, 2000*, S.S. 2000, c. L-5.1, ss. 137-146; and Alberta *Land Titles Act*, R.S.A. 2000, c, L-4, ss. 95-101) or in omnibus statutes (e.g., British Columbia, *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 45).

[6] There is one feature of leasing law that has received legislative attention in recent years. This involves the creation or refinement of priority rules dealing with competitions between secured creditors who hold security interests in tenants' personal property and landlords exercising rights of distress against that property (*e.g.*, Saskatchewan *The Landlord and Tenant Act*, R.S.S. 1978, c. L-6, s. 25). Modernization of this area of the law was induced, not by recognition of the need to modernize the law of distress, but by the need to provide an appropriate interface between the law of distress and modern secured financing law.

IV. COMMERCIAL CONTEXT

[7] Commercial leasing is a very important feature of the Canadian economy. Many business organizations, not engaged in the real estate market, decide not to tie up their working capital in real estate. They prefer to lease manufacturing, warehouse or sales facilities. Many retail businesses located in shopping centres or malls do not have the option of owning their business premises. Other business owners do not have capital that can be used to acquire business premises. As a result, the law relating to commercial tenancies is called upon to address the wide range of issues that arise in the context of modern commercial leasing arrangements. Given the archaic nature of most commercial tenancy legislation, it is reasonable to conclude that the law in its current form does not adequately address these issues. Consequently, for the most part it is irrelevant.

V. STRUCTURE OF THE PROPOSED PROJECT

[8] It is proposed that, should the ULCC decide to undertake this project, a structure very similar to that employed in other similar projects (*e.g.,* Project on Transactions at Undervalue and Preferential Transfers) be employed. This would entail appointing Saskatchewan (The Law Reform Commission of Saskatchewan) as the lead jurisdiction. The project would be carried out with the direct involvement of a working group composed of representatives from at least four other jurisdictions.

[9] The Law Reform Commission of Saskatchewan has allocated sufficient human resources to provide leadership and financial resources to cover administrative costs.

VI. SOME AREAS OF COMMERCIAL TENANCIES TO BE ADDRESSED IN THE PROJECT

[10] The scope of the project would be determined by the ULCC based on recommendations of the Working Group. However, it is expected that the project would address a wide range of conceptual and functional features of commercial tenancies law. Set out below is a short list of matters that the project could be expected to consider.

1. *The need for statutory regulation of some or all aspects of commercial leases*. Is there sufficient demand for modern commercial tenancies law from stakeholders? What aspects of commercial leasing are best left to *inter partes* negotiation and contract law?

2. *The extent to which there is a social need to balance rights between parties to commercial leases.* Should the law relating to *inter partes* aspects of modern commercial tenancies be considered for guidance (implied terms only – *e.g.,* Ontario *Short Form of Leases Act,* R.S.O. 1990, c. S.11) or should there be mandatory features?

3. *If a new commercial tenancy law is to be enacted, should it be a "code" (e.g., Personal Property Security Act) or remain as legislation that addresses only "problem areas" and leaves all other matters to the common law*?

4. *The extent to which the change from "conveyance" to contract as the basis for leasing law affects the need for or nature of new statutory provisions*.

5. *The approach to balancing a landlord's interest in selecting a reliable tenant and a tenant's right to protect its economic interest in a lease through an assignment*.

6. *The appropriate method of establishing a landlord's damages for breach of a lease agreement*.

7. *The role of acceleration of rental payments clauses*.

8. *The commercial justification for special "proprietary measures" (i.e., the right of distress) to enforce rental payments*. Why should a landlord be treated differently from any other creditor of a lessee? What priority rules should govern priority competitions involving judgment creditors of tenants and landlords?

9. *If proprietary measures are warranted, what scope should these measures have and what is the appropriate interface between the rights of landlords exercising these measures and holders of property rights (created voluntarily or involuntarily) in lessees' property*?

10. *The appropriate remedies of the landlord in cases of an overholding tenant*.

11. *The extent to which the interface between provincial or territorial landlord and tenant law and the Bankruptcy and Insolvency Act referred to in section 146 of the BIA*[5] *remains relevant in the light of changes to the BIA made after the provincial or territorial legislation was enacted*?

12. *The implications of permitting the creation of a landlord and tenant relationship as a feature of a mortgage*.

13. *The need for expeditious dispute resolution mechanisms that do not involve litigation*.

VII. NEXT STEPS

[11] With the approval of the conference, it is proposed that the Saskatchewan delegation and the Law Reform Commission of Saskatchewan proceed with the establishment of a Working Group to begin consideration of the issues that have been identified in this report. We would invite participation from all interested jurisdictions on this working group and encourage jurisdictional representatives to identify any further issues that may warrant review in this process. The Working Group would meet on an ongoing basis over the coming year with a view to providing a detailed progress report to the ULCC at the annual meeting in Whitehorse in 2012.

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[1] See, Ontario Law Reform Commission, *Landlord and Tenant Law* (Report, 1976); Law Reform Commission of British Columbia, *Distress for Rent*, (Report #53, 1981) and Report on the Commercial Tenancy Act, LRC 108, 1989; Manitoba Law Reform Commission, *Distress for Rent in Commercial Tenancies*, Report #81, 1993; Saskatchewan Law Reform Commission, *Proposals Relating to Distress for Rent*, 1993; British Columbia Law Institute, *Report on Proposals for a New Commercial Tenancy Act*, BCLI Report no. 55, October 2009.

[2] Bill 10 Commercial Tenancy Act, 2d Sess. 35th Parl. British Columbia, 1993 based on the Law Reform Commission of British Columbia, Report on the Commercial Tenancy Act, LRC 108, 1989 was not enacted.

[3] British Columbia Law Institute, above, note 1, Executive Summary, p. x and p. 18.

[4] The description of the British Columbia Commercial Tenancies Act contained in the report of the British Columbia Law Institute referred to in note 3 applies equally to similar legislation in other jurisdictions.

[5] Section 146 provides as follows:
Subject to priority of ranking as provided in section 136 and subject to subsection 73(4) and section 84.1, the rights of lessors are to be determined according to the law of the province in which the leased premises are situated.

This provision induced provincial legislation of which sections 42-49 of Saskatchewan *The Landlord and Tenant Act,* R.S.S. 1978 c. L-6 and Alberta *Landlord's Rights on Bankruptcy Act*, R.S.A.2000, c. L-5) are examples.