UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

A JOINT PROJECT WITH THE LAW REFORM COMMISSION OF SASKATCHEWAN

UNIFORM COMMERCIAL TENANCIES ACT
PROGRESS REPORT #2

REPORT OF THE WORKING GROUP

Victoria, British Columbia
August 2013

UNIFORM COMMERCIAL TENANCIES ACT – PROGRESS REPORT #2

August 2013[1]

Background

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

> Reché McKeague, Chair (Law Reform Commission of Saskatchewan);
> Brennan Carroll (Borden Ladner Gervais);
> Michelle Cumyn (Université Laval);
> Elizabeth Hall (Ontario Bar Association);
> James Leal (Nelligan O'Brien Payne);
> Richard Olson (McKechnie & Company); and,
> Catherine Skinner (Manitoba Law Reform Commission).

[2] The working group began meeting in May 2012 and presented the *Progress Report on a Uniform Commercial Tenancies Act* at the ULCC 2012 Annual Meeting in Whitehorse, YK. Regular meetings by conference call have occurred over the past year. Consensus has been reached on many issues. However, other identified issues require input from those who would be affected by the *Uniform Act* before recommendations can be finalized. This Progress Report sets out the results of the working group's discussions to date, including preliminary recommendations on the issues on which we have agreed, and setting out potential consultation questions for those issues on which we require input.

[3] Commercial tenancies law in Canada is fragmented outdated and, in some respects, obsolete.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 However, much of it was copied from 18th and 19th Century English legislation and was originally enacted over 100 years ago or was patterned on statutes enacted at that time.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

[4] Further, the statutory measures that exist are often scattered among various enactments. For example, in some jurisdictions, the right of distress[2] and the rights of landlords in bankruptcy of tenants[3] are contained in separate legislation. In some jurisdictions, aspects of leasing law are contained in land titles legislation,[4] and in others, in omnibus statutes.[5]

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

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

[7] Several provincial law reform agencies have recommended ways to modernize aspects of commercial tenancies law.[6] However, no common law provincial legislature has enacted legislation that can be a modern precedent for reform.[7] The *Civil Code of Québec* offers a comprehensive and up-to-date statement of the private law as it now stands in Québec, including provisions regarding commercial tenancies.[8] While the *Civil Code* cannot provide a direct model for reform in the common law provinces, it offers some guidance and, by way of comparison, raises interesting issues on several aspects of this area of law. The working group will consider the extent to which it is advisable to harmonize the law of Québec with that of the common law provinces. However the *Uniform Commercial Tenancies Act* will be designed for adoption in the common law provinces only. In the case of Québec, the working group will recommend specific amendments to the *Civil Code* where they are thought necessary.

Implied terms

[8] Historically, at common law, in the absence of express written terms, there are two fundamental implied terms to a lease:

(1) A covenant for quiet enjoyment by the landlord;[9] and
(2) A covenant by the tenant to use the premises in a "tenant-like" manner.[10]

The common law implies these terms into every lease as an incident of the landlord-tenant relationship. The purpose of implied terms is to fill in gaps in the lease that may

result if the parties fail to turn their minds to certain key issues. A term implied by the common law will be displaced by an express term of the lease touching on the same subject.[11]

[9] Neither the Law Reform Commission of British Columbia[12] nor the Ontario Law Reform Commission[13] recommended a statutory restatement of common law implied terms in commercial leases. More recently, however, the British Columbia Law Institute (BCLI) recommended implied terms for the tenant's quiet enjoyment, non-derogation from the landlord's grant of lease, payment of rent, re-entry, and repair of damage be included in that province's legislation.[14]

Quiet enjoyment

[10] At common law, a tenant's right to quiet enjoyment is considered a fundamental term of every lease agreement. If the lease does not expressly consider quiet enjoyment, it will be implied. Quiet enjoyment includes the tenant's right to exclusive possession of the leased premises, as well as a covenant that the landlord has the title to be able to lease the property to the tenant, referred to as "non-derogation from grant."[15] The common law implied covenant is restricted, which means it protects the tenant against interference from the landlord and anyone lawfully claiming under the landlord.

[11] Most commercial leases contain an express covenant of quiet enjoyment. However, for parties who do not turn their minds to the issue when drafting a lease, it is far simpler to refer to the legislation to see what is in place rather than have to research the case law.

[12] Canadian common law jurisdictions do not currently have legislated implied terms for quiet enjoyment. However, article 1854 of the *Civil Code of Québec* provides that:

> The lessor is bound to deliver the leased property to the lessee in a good state of repair in all respects and to provide him with peaceable enjoyment of the property throughout the term of the lease. …

[13] BCLI recommended the following implied term:

> 7 (1) Subject to subsection (2), a lease is deemed to contain the following provisions:
> (a) Subject to payment of the rent and performance of the covenants of the lease, the tenant, and anyone claiming lawfully under the tenant, may

> peaceably possess and enjoy the premises without any interruption or disturbance from the landlord or anyone claiming under the landlord.[16]

[14] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should include the BCLI implied term for quiet enjoyment.

Non-derogation of grant

[15] Non-derogation of grant is currently implied in every lease where it is not specifically contemplated by the common law as part of quiet enjoyment. However, it is possible that non-derogation of grant may apply in circumstances where the covenant of quiet enjoyment has not been breached.[17] The difference between the two is described by Richard Olson:

> A landlord may not derogate from its grant by using property adjoining the leased premises for a purpose that substantially interferes with the tenant's use of the premises. This concept in some respects is similar to the covenant of quiet enjoyment but has a substantial difference. The covenant of quiet enjoyment is a covenant of the landlord to not interfere with the tenant's possession of the premises, whereas derogation from grant requires an act that renders the premises substantially less fit for the purpose for which they were leased.[18]

[16] Because of this possibility, and in the interests of clarity, the working group suggests a specific implied term for non-derogation of grant. The *Civil Code* provides in article 1854:

> …[The lessor] is also bound to warrant the lessee that the property may be used for the purpose for which it was leased and to maintain the property for that purpose throughout the term of the lease.

[17] Although no Canadian common law jurisdiction currently implies non-derogation of grant in legislation, the working group does not believe it to be a controversial term. The New Zealand Law Commission[19] and BCLI recommended a non-derogation of grant implied term:

> 7 (1) Subject to subsection (2), a lease is deemed to contain the following provisions:
> …

> (b) The landlord may not derogate from a grant contained in the lease.[20]

[18] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should include the BCLI implied term for non-derogation of grant.

To pay rent

[19] BCLI notes that an implied term requiring payment of rent "is not intended as a dramatic change in the substantive law; rather it is intended to make that law more accessible by restating it in the statute."[21] Currently, most of the Western provinces (excluding British Columbia) and the territories have such an implied term, as does Québec.[22]

[20] Most of the implied terms regarding payment of rent that are now found in statute are similar to this term from the Yukon:

> 15 In every lease, unless a contrary intention appears therein, there shall be implied covenants by the lessee
> (a) that they will pay the rent thereby reserved at the times therein mentioned, and all rates and taxes which may be payable in respect of the demised land during the continuance of the lease;[23]

[21] The Saskatchewan implied term makes no mention of a contrary intention, and neither Saskatchewan nor Manitoba mention the rates and taxes that may be payable.[24] Both BCLI and the New Zealand Law Commission recommended a provision similar to this:

> 7 (1) Subject to subsection (2), a lease is deemed to contain the following provisions:
> …
> (c) the tenant must pay the rent payable under the lease when it falls due;[25]

[22] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should include the BCLI implied term to pay rent.

To keep in good repair

[23] One of the two implied terms at common law is to use the premises in a "tenant-like" manner.[26] However, this does not extend to a tenant's obligation to maintain or repair the premises.[27] The *Civil Code of Québec* requires a tenant to "use the property with prudence and diligence during the term of the lease,"[28] and six common law jurisdictions have "keep in good repair" implied terms,[29] all similar to Saskatchewan's:

> 145 The following covenants are implied by the lessee in every lease: …
> (b) that the lessee shall at all times during the continuance of the lease keep, and at the termination of the lease yield up, the leased land in good and tenantable repair, accidents and damage to buildings from fire, storm, tempest or other casualty and reasonable wear and tear excepted.

[24] Many common law jurisdictions have legislation which allows a short phrase, found in one column of the Act, to be used in a lease and have the extended meaning of a longer paragraph, found in an opposite column of the Act.[30] The short forms legislation in the varying jurisdictions consistently has two provisions regarding repair: "to repair,"[31] and "to leave the premises in good repair."[32] These all vary slightly in language, except for the Ontario and Nova Scotia short form provisions which are identical, and a good representation of the general contents of these "to repair" provisions:

> Column One
> 4. And to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted.
> Column Two
> 4. And also will, during the said term, well and sufficiently repair, maintain, amend and keep the said demised premises with the appurtenances in good and substantial repair, and all fixtures and things thereto belonging, or which at any time during the said term shall be erected and made by the lessor, when, where, and so often as need shall be, reasonable wear and tear and damage by fire, lightning and tempest only excepted. [33]

[25] The short forms provisions "to leave the premises in good repair" are all very similar with only a few minor differences. PEI's provision is a good example:

> 8. And that he will leave the premises in good repair.

> 8. And further the lessee will at the expiration or other sooner determination of the term peaceably surrender and yield up unto the lessor, the premises hereby demised, with the appurtenances, together with all buildings, erections

> and fixtures thereon, in good and substantial repair and condition, reasonable wear and tear and damage by fire, lightning and tempest only excepted.[34]

[26] Many standards to which repairs and maintenance can be measured exist: ""first class state of repair"; "good and substantial repair"; "as a reasonable and prudent landlord would repair"; "in good and tenantable repair"."[35]

[27] Most repair clauses provide an exception for "reasonable wear and tear."[36] All of the common law jurisdiction implied terms for repair include a "reasonable wear and tear" exception, as do all of the "to leave premises in good repair" short form clauses, and most of the "to repair" short form clauses. This exception was also included by both BCLI and the New Zealand Law Commission in their draft acts. As a result, there is a solid body of case law interpreting this phrase, and it makes sense to continue with the same exception.

[28] BCLI's provision is dissimilar, in terms of language, to those above, but it would appear to have a similar effect:

> 7 (1) Subject to subsection (2), a lease is deemed to contain the following provisions: …
> (g) the tenant must repair, at its expense, any damage caused by the tenant or a person for whom the tenant is responsible, except reasonable wear and tear.[37]

BCLI's provision is straight-forward and in plain language, but it does not use previously interpreted phrases like "good and tenantable repair" or "good and substantial repair," which could make interpretation of the term more difficult. However, the requirement to repair any damage includes the responsibility to both keep and leave the premises in good repair, and could make the absence of a commonly-used phrase a non-issue.

[29] No statutorily implied terms, or short form terms, require a landlord to repair the premises. The common law has not historically implied such an obligation. Therefore, currently, without an express covenant in the lease, a landlord is not required to repair the premises. However, there is a series of cases which has expanded the scope of quiet enjoyment to include an obligation to repair, even in the absence of an express covenant "on the basis that if the failure to repair is such that the tenant is deprived of "substantially the whole benefit of the contract", the covenant of quiet enjoyment is breached."[38]

[30] The working group was unable to agree on whether an implied term to repair should be included in a *Uniform Commercial Tenancies Act* and, if such a term were included, what the scope of the implied term would be.

[31] Consultation Question: Should a *Uniform Commercial Tenancies Act*:
1) include an implied obligation to repair on the tenant only;
2) include an implied obligation to repair on both the tenant and the landlord; or
3) exclude any implied obligation to repair?

Re-entry on non-payment or non-performance of covenant

[32] The existing implied terms for re-entry vary greatly respecting the time from default to re-entry. The shortest existing period for re-entry is in the Newfoundland and Labrador *Conveyancing Act* (short forms), which requires only 10 days from default with no formal demand being made. The longest notice period, two months, is found in the implied terms in Yukon, Alberta, Saskatchewan (twice), Manitoba (in one of the implied terms), Northwest Territories, and Nunavut. Other time periods include:

- Twenty-one days - PEI short forms
- Fifteen days – Manitoba (in the other implied term),[39] Ontario, PEI implied; BC, Manitoba, Ontario, Nova Scotia short forms.

[33] The language of all of the provisions varies slightly, although they are similar. Saskatchewan's *Land Titles Act, 2000*, presents the concepts in modern language and style:

> 146 The following powers of the lessor are implied in every lease, unless a contrary intention appears in the lease:
>
> (a) that the lessor or the lessor's agent may:
>
> (i) enter on the leased land and view the state of repair; and
>
> (ii) serve on the lessee, or leave at the lessee's last or usual place of residence or on the leased land, a notice in writing of any defect, requiring the lessee, within a reasonable period specified in the notice, to repair the defect to the extent that the lessee is bound to do so;
>
> (b) that the lessor may enter on and repossess and enjoy the leased land as the lessor's former estate where:
>
> (i) the rent reserved, or any part of the rent reserved, is in arrears for the space of two calendar months, although no formal demand for the rent has been made;

> (ii) the lessee defaults in the performance of any covenant, whether express or implied, and the default continues for two calendar months;
> (iii) the repairs required by the notice mentioned in subclause (a)(ii) are not completed within the period specified in the notice…[40]

[34] BCLI, in its proposed act, went with something quite different than what exists. It included a five day notice period for non-payment of rent, and a 10-day notice period for other material breaches. None of the current statutory terms require notice for non-payment of rent or breach of a covenant. However, BCLI has included a notice requirement for both of these in its provision:

> 7 (1) Subject to subsection (2), a lease is deemed to contain the following provisions: …
> (d) if the tenant is in arrears of rent or has breached a material provision of the lease, the landlord may give the tenant notice in writing at the premises of the landlord's right to re-enter and resume possession of the premises as follows:
> (i) 5 days' notice, if the tenant is in arrears of rent; or
> (ii) 10 days' notice, if the tenant is in breach of any other material provision of the lease;
> (e) if the tenant fails to cure a breach that is the subject of a notice under a provision implied by subsection (1)(d)(i) or fails to commence and diligently pursue curing a breach that is the subject of a notice under a provision implied by subsection (1)(d)(ii), the landlord may re-enter and resume possession of the premises;
> (f) if the landlord exercises a right to re-enter and resume possession of the premises under a provision implied by subsection (1)(e), all rights of the tenant with respect to the premises, other than rights under section 9 [*relief from forfeiture*], are terminated.[41]

[35] BCLI noted the following in its report: "Much of the commentary on the proposal for this implied provision, as it appeared in the consultation paper, focused on the issue of notice. Many of the comments made the point that the proposed 10 days' notice was too long. (On the other hand, a few felt that it was too short.)"[42] The working group favours requiring notice to start the timing before re-entry, and generally approves of the BCLI provision. However, the working group would change "a material provision of the lease"

to "any other provision implied in this Act" to protect the parties from enforcement of terms not expected to be material.

[36] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should include the BCLI implied term for re-entry on non-payment or non-performance of covenant, changing "a material provision of the lease" to "any other provision implied in this Act."

Opting Out

[37] A further consideration, when discussing statutorily implied terms, is whether and to what extent the parties may choose to contract out of the implied terms. There are four possible options:

(1) Allowing the parties to opt out by agreeing to "modify, vary or exclude the application" of any of the implied terms. This was the approach followed in the BCLI Report:

> 7(2) The parties to a lease may agree to modify, vary or exclude the application of any of the provisions implied by subsection (1).[43]

(2) Allowing the parties to opt out, but requiring a witnessed statement from the tenant, or both parties, that they are aware that the lease differs from the statutorily implied terms. If the lease differs but there is no signed statement, the Act would govern.

(3) Allowing the parties to opt out, but requiring them to make reference to each specific implied term in the agreement whenever the agreement derogates from the implied terms.

(4) Prohibiting opt out.

[38] The working group agrees with BCLI's comments:

> There are two opposed positions on contracting out of a statutory implied covenant: (1) emphasize freedom of contract and allow the landlord and the tenant maximum flexibility to vary or even exclude the implied covenant (this is the approach British Columbia law currently takes to terms implied at common law) and (2) emphasize the need for certain baseline protections for the party in the weaker position in negotiations and prevent the parties to a lease from varying or excluding the rules set out in the statute...

> The committee has decided that the first position is more appropriate for commercial leases. The consumer protection concerns that drive much of the [*Residential Tenancies Act*] are not present to the same degree in the commercial leasing sector. All of the respondents to the consultation paper agreed with this approach.
>
> The expression "modify, vary, or exclude the application" of any of the implied provisions is at the heart of subsection (2). This expression is intended to be very broad in scope. The intent of this provision is to fill in gaps in commercial leases, not to disturb agreements that landlords and tenants have reached with one another.[44]

[39] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should include BCLI's opt out subsection for implied terms.

Short forms of leases

[40] Eleven provinces and territories have acts that contain short form covenants for use in commercial leases (a *Short Form of Leases Act*).[45] The purpose of these Acts is to allow a short phrase, found in one column of the Act, to have the extended meaning of a longer paragraph, found in an opposite column of the Act, so long as the lease is captioned "Pursuant to the *Short Form of Leases Act*" or similar.

[41] There are several concerns expressed in the literature with use of a *Short Form of Leases Act*. A court is likely to determine that a provision taken from a *Short Form of Leases Act* will prevail when in conflict with other provisions in a lease.[46] This creates difficulty when the conflict is not apparent if only the short form of the provision is consulted. Some writers have suggested that the *Short Form of Leases Act* "commonly is used as a means of *not* revealing those of the extended provisions that are in a form likely to be objected to if revealed."[47]

[42] It appears that many leases still refer to the various short form acts, but then do not contain any of the triggering language that would actually engage the covenants in the acts. Further, most of the short form provisions have no relevance to modern day commercial life.

[43] Preliminary Recommendation: The commentary to a *Uniform Commercial Tenancies Act* should suggest that jurisdictions consider revising or eliminating short form acts: "With modern word processing capability the *Short Form of Leases Act* has little practical use and it would be better that commercial leases did not use the phrase "Made Pursuant to the *Short Form of Leases Act*."[48]

Assignment and subletting – Landlord's consent

[44] There is a distinction between assignment and subletting:

> [An assignment] in effect substitutes the assignee in the place of and invests him with all the rights and liabilities of the lessee. On the other hand a sub-lessee has no rights or direct liabilities under the original lease, since there is no privity of contract or estate between him and the original lessor. He is merely the tenant of the original lessee, between whom and himself the ordinary relationship of landlord and tenant exists.[49]

Assignment and subletting are discussed together under this heading because the issues respecting the landlord's consent to each are the same.

Duty to act reasonably

[45] Eight Canadian common law jurisdictions and Québec have legislation limiting the ability of a landlord to unreasonably refuse consent for an assignment or sublease by the tenant.[50] These provisions are all very similar in expression. The Law Reform Commission of British Columbia recommended adoption of such a provision in British Columbia, noting: "Where the consent requirement is not tempered by the need for reasonable behavior it can become an instrument for unfair and oppressive conduct of a kind that the law should not tolerate."[51] BCLI included a duty to act reasonably in its draft commercial tenancy legislation.[52]

[46] The *Civil Code of Québec* does not provide for parties to contract out of its reasonableness requirement.[53] All of the Canadian common law jurisdictions which impose a reasonableness requirement qualify the requirement with words like "unless the lease contains an express provision to the contrary." The BCLI 2009 proposed *Commercial Tenancy Act* permits the landlord and the tenant to override the reasonableness presumption.[54] The Ontario Law Reform Commission recommended

retaining this principle in new commercial tenancy legislation, and based its conclusion on a distinction between trends in residential and commercial leasing:

> . . . a fundamental difference between residential and commercial tenancies [is] apparent. In the commercial sector, the changing nature of landlord and tenant relations has not been toward increasing impersonality. While there may be scant grounds for withholding consent to an assignment or subletting by a residential tenant where the assignee or subtenant is financially stable, of good character, and does not intend to alter the use to which the premises have previously been put, the basis for assessment in the case of a commercial lease is far more complex. Landlord and tenants of commercial premises who made their views known to the Commission generally felt that individual business judgment should not be subject to review by a judge, unless the parties have not contracted out of the [reasonableness requirement].[55]

[47] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should imply a term requiring landlords to act reasonably in approving or disapproving a request to assign or sublet a tenancy, which term the parties may override by an express term in the lease.

[48] The BCLI proposed *Commercial Tenancy Act* also addresses a distinct, but related, situation:

> Some commercial leases contain prohibitions on the transfer of a corporate tenant's shares without the landlord's consent. These provisions are usually intended to prevent the tenant from making an end run around a prohibition on assignment or subletting without the landlord's consent. This manoeuvre could be accomplished by transferring enough shares of a closely held company to change the controlling interest in that company. In the committee's view, this situation is functionally similar to an assignment or a subletting, but it would not be caught by subsection (1), because it involves a disposition of shares, rather than a disposition of the premises. The purpose of subsection (2) is to put a disposition of shares on the same footing as a disposition of the premises. [56]

[49] Subsection 8(2) of the BCLI proposed Act reads:

> If a lease contains a provision against the transfer of shares of the tenant without the consent of the landlord, this provision is deemed to be subject to a provision that such consent is not to be unreasonably withheld.[57]

[50] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should provide that consent to the transfer of shares of a tenant should not be unreasonably withheld by the landlord.

[51] The common law provides that not unreasonably withholding consent includes responding within a reasonable time. Article 1871 of the *Civil Code of Québec* provides that if the landlord does not reply within 15 days after notice of the assignment, the landlord is deemed to have consented to the assignment. The working group discussed including a provision similar to article 1871 in a *Uniform Commercial Tenancies Act*, but was concerned with the further intrusion on parties' freedom to contract, and that such a provision would not be accepted by landlords. However, the working group agreed that the common law principle requiring a response within a reasonable time should be included in the *Uniform Act* to bring it to the attention of the parties.

[52] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should require a landlord to respond within a reasonable time after receiving a request for consent to an assignment or subletting.

[53] If a landlord does not act reasonably in considering a request for consent to an assignment or subletting, or does not respond within a reasonable time to the request, the tenant's remedy is an application to the court under the summary dispute resolution procedure that is expected in the *Uniform Act*. The remedy would not appear in the "assignment" section, but would be found in the general summary dispute resolution procedure available for the Act. The availability of a summary process to allow the landlord and tenant to deal with disputes on the question of "reasonable" in an expeditious fashion will benefit both parties.

[54] Preliminary Recommendation: The remedy for breaching the duty to act reasonably respecting assignment and subletting should be found in the summary dispute resolution procedure of a *Uniform Commercial Tenancies Act*.

Administrative charges by landlord

[55] In most cases, landlords will incur costs in order to determine whether to grant consent to an assignment or subletting. Landlords will naturally seek to pass these costs along to the tenant. The Law Reform Commission of British Columbia noted that this practice raises two concerns: a landlord could seek to obtain more than it was reasonably out-of-pocket; enshrining the reasonableness standard in legislation could possibly result in all administrative charges imposed in these circumstances being characterized as unreasonable.[58]

[56] The Law Reform Commission of British Columbia recommended spelling out in the legislation that landlords are entitled only to "reimbursement of reasonable expenses." BCLI did not recommend a provision regarding the payment of expenses related to consent. Five of twelve common law Canadian jurisdictions prohibit the payment of a fine in exchange for consent, but do "not preclude the right to require the payment of a reasonable sum," unless the lease contains an express provision to the contrary.[59] The *Civil Code of Québec*, article 1872 provides:

> A lessor who consents to the sublease of the property or the assignment of the lease may not exact any payment other than the reimbursement of any reasonable expenses resulting from the sublease or assignment.

[57] The working group concluded that limiting administrative charges by a landlord was too complicated to address in a *Uniform Act*. Issues as described in this section could be resolved through the summary dispute resolution process that is expected in the *Uniform Commercial Tenancies Act*. Additionally, the problems that a legislative provision would be intended to address appear to be speculative, and omitting a section on administrative charges would maintain the status quo in a majority of jurisdictions.

[58] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should not provide that landlords may only claim reimbursement of reasonable expenses incurred in connection with considering a proposed assignment or subletting.

Prohibition on assignment and subletting

[59] Anecdotal evidence suggests that some landlords in jurisdictions with reasonableness requirements will insist on leases that prohibit assignment and subletting. Prohibiting assignment and subletting is not banned by legislation in any province or territory. The Law Reform Commission of British Columbia concluded that "[t]his is an issue on which, we believe, the *Commercial Tenancy Act* should speak clearly—any

purported prohibition of this kind should be void and unenforceable."[60] BCLI did not recommend an equivalent provision.

[60] The working group concluded that prohibition of assignment and subletting is an issue to be negotiated and decided by the parties before entering a lease. If a landlord insists on prohibiting assignment and subletting, the tenant may choose not to sign the lease. Members of the working group were concerned that lawyers would find a way around the ban and the result would be worse than that which the ban was meant to address.

[61] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should not declare that any purported attempt to prohibit an assignment or a subletting of the term of a commercial lease is void and unenforceable.

Termination on request to assign or sublet

[62] A clause permitting a landlord to terminate a lease upon receipt of a request to assign or sublet has become increasingly common. In some instances, the clause will allow a tenant to withdraw the request if the landlord decides to terminate; in others there is no ability to withdraw. These clauses may be seen as an attempt by landlords to get around the duty to be reasonable when considering a request for assignment or subletting.

[63] The working group discussed prohibiting termination upon request at some length, but was unable to come to a consensus. Members of the working group were concerned that the practical reaction in the marketplace of such an attempt to protect tenants from the draconian practices of landlords would result in even more draconian practices. Assignment clauses in leases are already onerous: members suggested that the termination upon request clause appearing in the lease is sufficient to bring it to the attention of the tenant. Parties to a contract have a responsibility to know what they are signing.

[64] Other members of the working group argued that if parties may choose under the *Uniform Act* to completely prohibit assignment and subletting and to unreasonably withhold consent in their leases, then why not disallow termination on request? If, as a result, a landlord elects to prohibit assignment and subleasing in the lease, the parties may later agree to allow an assignment even if prohibited by the original lease.

[65] However, allowing termination on request for assignment could benefit tenants: if a tenant cannot maintain a lease, the tenant will want to assign or terminate. With a

termination upon request provision, the tenant would not suffer any termination penalties, as it would be the landlord terminating the lease. Prohibiting termination upon request, which could cause landlords to entirely exclude assignment, could also prejudice creditors of a bankrupt because a trustee would have no ability to deal with the lease.

[66] A compromise solution may be to include a provision in the *Uniform Act* which would imply a right to the tenant to withdraw if the landlord opts to terminate upon a request to assign or sublet.

[67] Consultation Question: Should termination upon a request to assign or sublet be prohibited by a *Uniform Commercial Tenancies Act*? Should an implied term allowing a tenant to withdraw its request for assignment or subletting if the landlord chooses to terminate the lease be included in a *Uniform Commercial Tenancies Act*?

Transition

[68] The Law Reform Commission of British Columbia's recommendations on landlord's consent to assignment or subleasing would have applied to leases made before or after the legislation implementing them came into force. This aspect of those recommendations received criticism from landlords' groups. BCLI recommended that this provision apply only to leases entered into after the legislation comes into force.[61] The legislation in two jurisdictions, Ontario and Manitoba, specifically provide the date after which the provision is effective.[62]

[69] There are several policy concerns at issue here. In general, legislation applies prospectively, as it is considered unfair to impose obligations or alter arrangements that were entered into at a time when the legislation was not in force and the parties could not have taken it into account in arranging their affairs. However, if the rationale for enacting a reasonableness requirement is largely to protect tenants, then broad availability of the protection may be preferable. In this case, the working group favours certainty for parties who have already entered leases.

[70] Preliminary Recommendation: The implied term requiring landlords to act reasonably in approving or disapproving a request to assign or sublet a tenancy should only apply to leases that are entered into after a *Uniform Commercial Tenancies Act* comes into force.

Assignment – Enforcing covenants

[71] Leases are conceived of as both a conveyance of property and a commercial contract. As a result, landlords and tenants are considered to be bound by both privity of estate and privity of contract. Under the traditional rules, the privity of contract between a landlord and a tenant continues until the end of the term of the lease, even if one or both of the parties assign their lease interest.[63] However, an assignment does away with privity of estate between the original landlord and tenant. Enforceability of the covenants in the lease, once assigned, turns only on privity of estate as between the current landlord and tenant. As the Law Reform Commission of British Columbia notes, this approach has caused problems in practice:

> It is a curiosity of the law that the range of covenants that are enforceable by and against persons between whom there is only privity of estate is much narrower than the range of covenants that may be enforced where both privity of estate and privity of contract exists. The true position of the parties can only be determined with reference to a confusing web of statutory, common law and equitable rules.[64]

Rights/liabilities of assignee

[72] At common law, there was a distinction between covenants that ran with the reversion (the landlord's interest) and covenants that ran with the land (the tenant's interest). Only covenants that ran with the land were enforceable after assignment. An English statute,[65] enacted in the 16th century and re-enacted exactly or in similar form in seven provinces,[66] gave assignees of the landlord's lease interest the right to entry for non-payment of rent or forfeiture, and the same remedies by action for non-performance of conditions or covenants against the tenant as the original landlord had. The Act gave the tenant the same remedies against assignees of the landlord's lease interest as against the original landlord.

[73] The common law continued to develop following the enactment. The most important development was the formulation and refinement of a test for determining whether or not a covenant will be enforceable after assignment. If the covenant "touches and concerns the land" then it is enforceable on an assignment; if the covenant does not touch and concern the land, it cannot be enforced. A further refinement holds that covenants that relate to a subject matter in existence at the time of the lease will be enforceable, but those relating to matters not yet in existence at the time of the lease (e.g. a building yet to be built) are not. Finally, the equitable courts

provided some relief in the rare cases where the first condition (that the covenant touch and concern the land) was met but there was neither privity of contract nor privity of estate.

[74] The Law Reform Commission of British Columbia recommended enacting legislation that would make lease covenants enforceable against an assignee of the tenant or of the landlord, regardless of whether the covenants touch and concern the land or pertain to matters in existence at the time of the lease. The Commission gave the following reasons for recommending this change, which were subsequently adopted by the Manitoba Law Reform Commission:

> Three important points can be made in support of such a change. The first is that its simplicity would make the law more easily intelligible to landlords and tenants and to their legal advisors. Second, if two parties arrive at an agreement as to the terms of a commercial tenancy, it is reasonable to presume that they consider those terms fair, and that each party is prepared to fulfill his or her obligations. There is no obvious reason why some of those obligations should cease to be enforceable, simply because the tenancy or the reversion has been assigned to another party. Finally, such a reform measure is consistent with the broader evolution of the commercial tenancy from being a creature dominated by concepts of land-law, to one which incorporates a greater measure of modern contract law theory.[67]

[75] BCLI,[68] the Ontario Law Reform Commission,[69] and the Manitoba Law Reform Commission[70] made recommendations for legislation similar to the Law Reform Commission of British Columbia.

[76] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should provide that a person who takes an assignment of the interest of a landlord or tenant has all the rights, and is subject to all the obligations, of the assignor arising under a commercial lease.

Rights/liabilities of assignor

[77] Since privity of contract exists between the original landlord and tenant, their potential liability to each other for breaches of covenants does not end on assignment. The obligations of an original party to the lease may eventually become greater than the

covenants contained in the original lease. An assignee may alter the lease by agreement with the remaining party to the lease. The alterations bind the assignor, even if the assignor did not consent to the changes and the changes result in greater obligations.[71] The obligation of an original landlord and tenant is primary, which means that the remaining original party can *first* seek performance of a covenant from the assignor rather than the assignee.[72]

[78] The Law Reform Commission of British Columbia noted that it was not aware of any problems caused by the continuing liability of an assignor, and concluded "that no departure from the common law consequences of privity of contract is called for."[73] The Ontario Law Reform Commission made a similar recommendation, [74] and BCLI included continuing liability in their draft legislation.[75]

[79] The Manitoba Law Reform Commission suggested that the continuing liability principle has a much greater impact on tenants than on landlords.[76] Concerned that complete abolition of the continuing liability of tenants would make it more difficult for tenants to assign their lease interests (respecting landlord's consent), the Commission recommended limiting the liability of the original tenant to that of a guarantor on assignment, only to the end of the term or extended term agreed to by the original tenant.[77] The Commission recommended no change to the landlord's continuing obligation.[78]

[80] The *Civil Code of Québec* provides, in article 1873, that "[t]he assignment of a lease acquits the former lessee of his obligations, unless, where the lease is not a lease of a dwelling, the parties agree otherwise."

[81] Generally, the working group agrees that a *Uniform Commercial Tenancies Act* should limit the liability of the original tenant to that of a guarantor on assignment only to the end of the term or extended term agreed to by the original tenant, unless the assignor is discharged immediately, but should not change the landlord's continuing obligation. However, the working group would like to include this issue in the consultation document.

[82] Consultation Question: Should an assignor's liability end? When? Is this feasible in practice?

Personal service covenants

[83] Personal service covenants are provisions in which one party covenants to perform a service which is directly related to the party's individual personality or expertise. The Ontario Law Reform Commission recommended that personal service covenants be excepted from its recommended general rule that covenants run with the land, and continue to be governed by the law of contracts as it has developed in relation to them.[79] The Law Reform Commission of British Columbia, and the Manitoba Law Reform Commission,[80] disagreed:

> We are not convinced that such an exception is necessary or desirable. One of the aims of reform in this area is to eliminate distinctions that serve no clear or useful purpose. It is our impression that "true" personal service covenants have become something of a rarity and to preserve a highly technical distinction in the law to accommodate them achieves little. In any event…the original covenantor remains in privity of contract with the other party, and thus remains obligated. The other party has his remedy if the result of the assignment is unsatisfactory.[81]

[84] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should not differentiate personal service covenants.

Subtenancies

[85] All of the law reform agencies which considered enforcement of covenants on assignment recommended that subtenancies be excluded from application of the relevant sections.[82] The Manitoba Law Reform Commission suggested that "[t]he parties to a lease may sometimes prefer the lack of enforceability of the lease covenants which is possible through a subtenancy relationship" and that parties should be free to structure their relationship as they wish.[83] The working group agrees that a subtenancy should not be a *de facto* assignment, and that parties require options to structure their relationships.

[86] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should exclude subtenancies from application of any sections respecting enforcement of covenants on assignment.

Opting out

[87] Most of the law reform agencies who considered this topic specifically recommended that parties be free to contract out of the provisions of this section,

although the Manitoba Law Reform Commission would not have permitted the parties to increase the liability of the original tenant from that of a guarantor after assignment.[84] Permitting contracting out of the provisions allows freedom of contract to the parties, and prevents creative solutions around the legislation, which may be more draconian than what currently exists.

[88] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should allow parties to modify, vary, or exclude the application of sections respecting enforcement of covenants on assignment.

Merger and surrender

Release of subtenant from obligations

[89] A concise distinction between the concepts of merger and surrender can be found in the Ontario Law Reform Commission's *Report on Landlord and Tenant Law*:

> A surrender arises where a tenant surrenders his tenancy agreement to his immediate landlord, who accepts the surrender. If, on the other hand, the tenant retains the term and acquires the reversion, there is a merger. In both instances the tenancy agreement is absorbed by the reversion and destroyed.[85]

[90] The two concepts are distinct, but, as the last sentence of the quotation makes clear, in practice they often lead to the same result—the destruction of the landlord–tenant relationship. This result is based on the real property foundations of commercial tenancy law. When a merger or surrender occurs, there is no longer privity of estate between the parties in a commercial leasing arrangement. This conclusion has the most legal significance when there has previously been a subletting of a tenancy agreement. At common law, the surrender of a head lease left the subtenant without a reversion expectant on the termination of the sublease, and the subtenant could enjoy the property without payment of rent or performance of covenants until the end of the current term.[86] This situation was altered in England by legislation in 1845,[87] and similar provisions have been enacted in eight common law jurisdictions in Canada.

[91] The Law Reform Commission of British Columbia,[88] the Ontario Law Reform Commission,[89] and the British Columbia Law Institute (BCLI)[90] have all recommended retaining such a provision in a reformed commercial tenancy statute.

[92] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should contain a provision providing that any subtenant will continue to be bound by the sublease in the event of a merger or surrender of the head lease. The working group favours the plain language of the BCLI provision.

[93] The working group will investigate whether a modification to the *Civil Code of Québec* should be recommended to make the *Code* consistent with this provision in the *Uniform Act*. In Québec, a lease is entirely based on contractual principles so there are no proprietary interests to be merged or surrendered. However, the *Code* is not clear on which contract would govern between a landlord and subtenant if a superior lease is resiliated. The working group could suggest that the provisions of the sublease should govern in such a situation, which would produce a consistent result with the *Uniform Commercial Tenancies Act*.

Surrender on renewal

[94] Eight of the common law jurisdictions have legislation addressing the related issue of a tenant surrendering a lease with a view to obtaining a new lease from the head landlord.[91] At common law, this act would have the effect of releasing any subtenant from its obligations to the tenant. The legislation is designed to ensure that the obligations will continue and that the new head lease will become the reversion, without the need for surrender of any sublease. The Law Reform Commission of British Columbia, the Ontario Law Reform Commission, and BCLI recommended that this issue continue to be addressed in commercial tenancies legislation.[92]

[95] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should provide that a subtenant will continue to be bound by its obligations in the event that the head lease is surrendered with a view to its renewal. The working group favours the plain language of the BCLI provision.

Summary of preliminary recommendations

Implied terms

Quiet enjoyment

A *Uniform Commercial Tenancies Act* should include the BCLI implied term for quiet enjoyment.

Non-derogation of grant
A *Uniform Commercial Tenancies Act* should include the BCLI implied term for non-derogation of grant.

To pay rent
A *Uniform Commercial Tenancies Act* should include the BCLI implied term to pay rent.

Re-entry on non-payment or non-performance of covenant
A *Uniform Commercial Tenancies Act* should include the BCLI implied term for re-entry on non-payment or non-performance of covenant, changing "a material provision of the lease" to "any other provision implied in this Act."

Opting Out
A *Uniform Commercial Tenancies Act* should include BCLI's opt out subsection for implied terms.

Short forms of leases
The commentary to a *Uniform Commercial Tenancies Act* should suggest that jurisdictions consider revising or eliminating short form acts: "With modern word processing capability the *Short Form of Leases Act* has little practical use and it would be better that commercial leases did not use the phrase "Made Pursuant to the *Short Form of Leases Act*."

Assignment and subletting – Landlord's consent
Duty to act reasonably
A *Uniform Commercial Tenancies Act* should imply a term requiring landlords to act reasonably in approving or disapproving a request to assign or sublet a tenancy, which term the parties may override by an express term in the lease.

A *Uniform Commercial Tenancies Act* should provide that consent to the transfer of shares of a tenant should not be unreasonably withheld by the landlord.

A *Uniform Commercial Tenancies Act* should require a landlord to respond within a reasonable time after receiving a request for consent to an assignment or subletting.

The remedy for breaching the duty to act reasonably respecting assignment and subletting should be found in the summary dispute resolution procedure of a *Uniform Commercial Tenancies Act*.

Administrative charges by landlord

A *Uniform Commercial Tenancies Act* should not provide that landlords may only claim reimbursement of reasonable expenses incurred in connection with considering a proposed assignment or subletting.

Prohibition on assignment and subletting

A *Uniform Commercial Tenancies Act* should not declare that any purported attempt to prohibit an assignment or a subletting of the term of a commercial lease is void and unenforceable.

Transition

The implied term requiring landlords to act reasonably in approving or disapproving a request to assign or sublet a tenancy should only apply to leases that are entered into after a *Uniform Commercial Tenancies Act* comes into force.

Assignment – Enforcing covenants

Rights/liabilities of assignee

A *Uniform Commercial Tenancies Act* should provide that a person who takes an assignment of the interest of a landlord or tenant has all the rights, and is subject to all the obligations, of the assignor arising under a commercial lease.

Personal service covenants

A *Uniform Commercial Tenancies Act* should not differentiate personal service covenants.

Subtenancies

A *Uniform Commercial Tenancies Act* should exclude subtenancies from application of any sections respecting enforcement of covenants on assignment.

Opting out

A *Uniform Commercial Tenancies Act* should allow parties to modify, vary, or exclude the application of sections respecting enforcement of covenants on assignment.

Merger and surrender

Release of subtenant from obligations

A *Uniform Commercial Tenancies Act* should contain a provision providing that any subtenant will continue to be bound by the sublease in the event of a merger or surrender of the head lease. The working group favours the plain language of the BCLI provision.

Surrender on renewal

A *Uniform Commercial Tenancies Act* should provide that a subtenant will continue to be bound by its obligations in the event that the head lease is surrendered with a view to its renewal. The working group favours the plain language of the BCLI provision.

Summary of consultation questions

Implied Terms

To keep in good repair

Should a *Uniform Commercial Tenancies Act*:

1) include an implied obligation to repair on the tenant only;

2) include an implied obligation to repair on both the tenant and the landlord; or

3) exclude any implied obligation to repair?

Assignment and subletting – Landlord's consent

Termination on request to assign or sublet

Should termination upon a request to assign or sublet be prohibited by a *Uniform Commercial Tenancies Act*? Should an implied term allowing a tenant to withdraw its request for assignment or subletting if the landlord chooses to terminate the lease be included in a *Uniform Commercial Tenancies Act*?

Assignment – Enforcing covenants

Rights/liabilities of assignor

Should an assignor's liability end? When? Is this feasible in practice?

---

[1] The working group would like to thank the British Columbia Law Institute, which generously shared its working memos for the *Report on Proposals for a New Commercial Tenancy Act* (Report No 55) (October 2009) [BCLI Report] with us. Some of the content of this progress report was originally found in those memos.

[2] See e.g. *Rent Distress Act*, RSBC 1996, c 403; *Civil Enforcement Act*, RSA 2000, c C-15, ss 104-105.

[3] See e.g. *Landlord's Rights on Bankruptcy Act*, RSA 2000, c L-5.

[4] See e.g. *The Land Titles Act, 2000*, SS 2000, c L-5.1, ss 137-146; *Land Titles Act*, RSA 2000, c L-4, ss 95-101.

[5] See e.g. *Law and Equity Act*, RSBC 1996, c 253, s 45.

[6] See Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (Toronto: The Commission, 1976); Law Reform Commission of British Columbia, *Distress for Rent* (LRC 53)(Vancouver: The Commission, 1981) and *Report on the Commercial Tenancy Act* (LRC 108) (Vancouver: The Commission, 1989) [LRCBC Report]; Manitoba Law Reform Commission, *Distress for Rent in Commercial Tenancies* (Report #81) (Winnipeg: The Commission, 1994), *Covenants in Commercial Tenancies* (Report #86)(Winnipeg: The Commission, 1995), *Fundamental Breach and Frustration in Commercial Tenancies* (Report #92)(Winnipeg: The Commission, 1996), *Commercial Tenancies: Miscellaneous Issues* (Report #95)(Winnipeg: The Commission, 1996); Law Reform Commission of Saskatchewan, *Proposals Relating to Distress for Rent* (1993); BCLI Report, *supra* note 1.
[7] Bill 10, *Commercial Tenancy Act*, 2nd Sess 35th Leg, British Columbia, 1993, based on the LRCBC Report, *supra* note 6, was not enacted.
[8] The *Civil Code of Québec* was enacted in 1991, and entered into force in 1994. Québec's previous code, the *Civil Code of Lower Canada*, was enacted in 1866. Complete revision and restatement of the private law of Québec leading up to the enactment of the *Civil Code of Québec* began in the 1950s and took four decades to complete. The provisions regarding commercial tenancies are found at articles 1851 and following.
[9] *Geary v Clifton Co.*, [1928] 3 DLR 64, 62 OLR 257 (SC); Robert D Malen, "The Landlord's Covenant for Quiet Enjoyment in a Shopping Centre Lease" in Harvey M Haber, QC (ed), *Shopping Centre Leases* (2d ed) (Aurora, Ontario: Canada Law Book, 2008) at 624.
[10] Richard Olson, *A Commercial Tenancy Handbook* (2010-Release 1) (Toronto: Thomson Reuters Canada Limited, 2004) at 3-2 citing *Marsden v Edward Hayes Ltd.*, [1927] 2 KB 1 (Eng CA); H Scott MacDonald, "Repair, Restoration, and Remediation Issues" in H Scott MacDonald *et al*. (eds) *Commercial Leasing Disputes* (Vancouver: Continuing Legal Education Society of British Columbia, 2007) 4.1 at 4.1.6.
[11] *Malzy v Eichholz*, [1916] 2 KB 308 at 314 (Eng CA).
[12] LRCBC Report, *supra* note 6.
[13] Ontario Law Reform Commission, *supra* note 6.
[14] BCLI Report, *supra* note 1 at 21.
[15] Olson, *supra* note 10 at 3-20.1.
[16] BCLI Report, *supra* note 1.
[17] See Charles Harpum et al, eds, *Megarry & Wade The Law of Real Property*, 6th ed (London: Sweet & Maxwell, 2000) at 14-208.
[18] Olson, *supra* note 10 at 7-14.
[19] New Zealand Law Commission, *A New Property Law Act* (NZLC Rep No 29) (Wellington: The Commission, 1994).
[20] BCLI Report, *supra* note 1 at 50.
[21] *Ibid* at 51.
[22] *Landlord and Tenant Act*, RSY 2002, c 131, s 15; *Land Titles Act*, RSA 2000, c L-4, s 96; *Land Titles Act 2000*, SS 2000, c L-5.1, s 145; *Real Property Act*, CCSM, c R30, s 92; *Commercial Tenancies Act*, RSNWT 1988, c C-10, s 15; art 1855 CCQ.
[23] *Landlord and Tenant Act*, RSY 2002, c 131, s 15.
[24] *Land Titles Act 2000*, SS 2000, c L-5.1, s 145; *Real Property Act*, CCSM, c R30, s 92.
[25] BCLI Report, *supra* note 1. See also New Zealand Law Commission, *supra* note 19, s 1(1). Note that s 1(2) of the New Zealand draft legislation makes exceptions for premises destroyed by an act of God.
[26] Olson, *supra* note 10.
[27] Olson, *supra* note 10 [footnotes omitted].
[28] Art 1855 CCQ.
[29] *Supra* note 22: Yukon, s. 15(b); Alberta, s. 96(b); Saskatchewan, s. 145(b); Manitoba, s. 92(b); Northwest Territories and Nunavut, s. 15(b).
[30] *Land Transfer Form Act*, RSBC 1996, c 252, Schedule 4; *Land Titles Act*, RSY 2002, c 130, s 86, Form 9; *Land Titles Act*, RSA 2000, c L-4, s 99, Schedule 1; *Land Titles Act*, RSS 1978, c L-5.1, s 142, in concert with *Land Titles Regulations*, RSS 2001, c L-5.1, section 110, Appendix 1; *Short Forms Act*, CCSM, c S120, Schedule 3; *Short Form of Leases Act*, RSO 1990, c S 11, Schedule B; *Conveyancing Act*, RSNS 1989, c 97, Schedule E; *Real Property Act*, RSPEI 1988, c R-3, s 55, Schedule 3; *Conveyancing Act*, RSNL 1990, c C-34, s 22; *Land Titles Act*, RSNWT 1988, c 8, s 111, Schedule A.
[31] *Supra* note 30: British Columbia, clause 3; Manitoba, clause 3; Ontario, clause 4; Nova Scotia, clause 3; PEI, clause 3; Newfoundland, clause (iii).

[32] *Supra* note 30: British Columbia, clause 13; Manitoba, clause 8; Ontario, clause 9; Nova Scotia, clause 8; PEI, clause 8; Newfoundland, clause (vi).
[33] *Supra* note 30: Ontario, clause 4. See also Nova Scotia, clause 3.
[34] *Supra* note 30: PEI, clause 8.
[35] Olson, *supra* note 10 [footnotes omitted].
[36] *Ibid* at 3-60.1.
[37] BCLI Report, *supra* note 1, s 7(1)(g).
[38] Olson, *supra* note 10 at 7-20, citing *Hong Kong Fir Shipping Co. v Kawasaki Kisen Kaisha Ltd.* (1961), [1962] 2 QB 26, [1962] 2 All ER 474 (Eng QB); *Syncrude Canada Ltd. v Hunter Engineering Co.*, [1989] 1 SCR 426; *Wesbild Enterprises Ltd. v. Pacific Stationers Ltd.* (1990), 52 BCLR (2d) 317 (BCCA); *Firth v BD Management Ltd.* (1990), 73 DLR (4th) 375 (BCCA); but see the cautionary view in *Broadway Melody Music Ltd. v. Ho* (1991), 14 RPR (2d) 190 (BCSC).
[39] The Manitoba Law Reform Commission released *Commercial Tenancies: Section 17 of The Landlord and Tenant Act and Section 93 of The Real Property Act* (Report #127)(February 2013) identifying the inconsistency between the two implied terms for re-entry in Manitoba as a result of the working group's discussion on this topic.
[40] *Supra* note 22: Saskatchewan, s 146.
[41] BCLI Report, *supra* note 1.
[42] *Ibid* at 53.
[43] *Ibid.*
[44] *Ibid* at 54.
[45] *Supra* note 30.
[46] *592123 Ontario Ltd. v Captiva Investments Ltd.* (1987), 23 OAC 364, 61 OR (2d) 793 (Ont CA).
[47] Walter H Posner, *The Leasing Process: A Guide for the Commercial Tenant*, (3d ed) (Concord: Captus Press, 2002) at 233 [original emphasis]. See also Olson, *A Commercial Tenancy Handbook*, *supra* note 10 at 3-16.
[48] Olson, *supra* note 10 at 2-6.
[49] Christopher Bentley, John McNair & Mavis Butkus, eds, *Williams & Rhodes Canadian Law of Landlord and Tenant*, looseleaf, 6th ed, vol 1 (Toronto: Carswell, 1988) at §3:9:3 [Williams & Rhodes].
[50] *The Landlord and Tenant Act*, RSS 1978, c L-6, s 1; *The Landlord and Tenant Act*, CCSM c L-70, s 22; *Commercial Tenancies Act*, RSO 1990, c L.7, s 23; *Landlord and Tenant Act*, RSNB 1973, c. L-1, s 11; *Landlord and Tenant Act*, RSPEI 1988, c L-4, s 12; *Landlord and Tenant Act*, RSY 2002, c 131, s 11; *Commercial Tenancies Act*, RSNWT 1988, c C-10, s 11; *Commercial Tenancies Act*, RSNWT 1988, c C-10, s 11, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SV 1993, c 28; art 1871 CCQ.
[51] LRCBC Report, *supra* note 6 at 38.
[52] BCLI Report, *supra* note 1 at 56.
[53] Art 1871 CCQ.
[54] BCLI Report, *supra* note 1 at 55, 57.
[55] *Supra* note 6 at 202.
[56] BCLI Report, *supra* note 1 at 57 [footnotes omitted].6
[57] *Ibid* at 55.
[58] *Supra* note 6 at 40-41.
[59] *Landlord and Tenant Act*, RSNB 1973, c L-1, s 11(1)(b); *Landlord and Tenant Act*, RSPEI 1988, c L-4, s 12(1)(b); *Landlord and Tenant Act*, RSY 2002, c 131, s 11(1)(b); *Commercial Tenancies Act*, RSNWT 1988, c C-10, s 11(1)(b); and *ibid* as duplicated for Nunavut by s 29 of the *Nunavut Act* SV 1993, c 28.
[60] *Supra* note 6 at 42 [footnote omitted].
[61] BCLI Report, *supra* note 1 at 55, 57-58.
[62] *The Landlord and Tenant Act*, CCSM c L-70, s 22(1), "after April 1, 1931"; *Commercial Tenancies Act*, RSO 1990, c L.7, s 23(1), "after the 1st day of September, 1911."
[63] Manitoba Law Reform Commission, *Covenants in Commercial Tenancies*, *supra* note 6 at 3.
[64] LRCBC Report, *supra* note 6 at 43.
[65] *Grantees of Reversions Act, 1540* (U.K.), 32 Hen 8, c 34.
[66] Re-enacted: *Landlord and Tenant Act* RSS 1978, c L-6, s 3, 5; *Landlord and Tenant Act*, CCSM, c L70, s 3, 6; *Commercial Tenancies Act*, RSO 1990, c L.7, s 4, 7; *Commercial Tenancies Act*, RSNWT 1988, c C-10, s 2,3. Similar legislation: New Brunswick, *Landlord and Tenant Act*, RSNB 1973, c L-1, s 2-4; Prince

Edward Island, *Landlord and Tenant Act*, RSPEI 1988, c L-4, s 2-5; Yukon *Landlord and Tenant Act*, RSY 2002, c 131, s 2-4. It has been suggested that the original Act is likely in force in British Columbia by virtue of the *Law and Equity Act*, RSBC 1996, c 253, s 2.The same is likely true under similar legislation in other Canadian jurisdictions that have not re-enacted the provisions.

[67] LRCBC Report, *supra* note 6 at 48; Manitoba Law Reform Commission, *Covenants in Commercial Tenancies*, *supra* note 6 at 36.

[68] BCLI Report, *supra* note 1 at 59. See also, LRCBC Report, *supra* note 6 at 133-134.

[69] Ontario Law Reform Commission, *supra* note 6 at 33-35.

[70] Manitoba Law Reform Commission, *Covenants in Commercial Tenancies supra* note 6 at 50-62.

[71] *Ibid* at 10.

[72] *Ibid*.

[73] LRCBC Report, *supra* note 6 at 49-50.

[74] Ontario Law Reform Commission, *supra* note 6 at 35: "the original landlord and tenant should be liable for breaches of the provisions of the tenancy agreement throughout the term of the tenancy agreement, even after assignment, in accordance with the common law rules of contract."

[75] BCLI Report, *supra* note 1 at 59.

[76] Manitoba Law Reform Commission, *Covenants in Commercial Tenancies*, *supra* note 6 at 28.

[77] *Ibid* at 32: i.e. secondary liability limited to the obligations contained in the original lease.

[78] *Ibid* at 33.

[79] Ontario Law Reform Commission, *supra* note 6 at 34.

[80] Manitoba Law Reform Commission, *Covenants in Commercial Tenancies*, *supra* note 6 at 37.

[81] LRCBC Report, *supra* note 6 at 50.

[82] Manitoba Law Reform Commission, *Covenants in Commercial Tenancies*, *supra* note 6 at 47; LRCBC Report, *supra* note 6 at 50-51; Ontario Law Reform Commission, *supra* note 6 at 34; BCLI Report, *supra* note 1 at 59.

[83] *Supra* note 6 at 46.

[84] Manitoba Law Reform Commission, *Covenants in Commercial Tenancies*, *supra* note 6 at 47-48; Ontario Law Reform Commission, *supra* note 6 at 32; BCLI Report, *supra* note 1 at 59, 61.

[85] Ontario Law Reform Commission, *supra* note 6 at 37 [footnote omitted].

[86] Williams & Rhodes, *supra* note 49 at 12-15, 12-16.1.

[87] *Real Property Act*, 1845 (UK), c 106, s 9.

[88] LRCBC Report, *supra* note 6 at 25.

[89] Ontario Law Reform Commission, *supra* note 6 at 39.

[90] BCLI Report, *supra* note 1 at 61.

[91] *Commercial Tenancy Act*, RSBC 1996, c 57, s 8; *Landlord and Tenant Act* RSS 1978, c L-6, s 61; *Landlord and Tenant Act*, CCSM, c L70, s 57; *Commercial Tenancies Act*, RSO 1990, c L7, s 63; *Landlord and Tenant Act*, RSNB 1973, c L-1, s 47; *Landlord and Tenant Act*, RSPEI 1988, c L-4, s 23; *Commercial Tenancies Act*, RSNWT 1988, c C-10, s 28; *Landlord and Tenant Act*, RSY 2002, c 131, s 40.

[92] LRCBC Report, *supra* note 6 at 25; Ontario Law Reform Commission, *supra* note 6 at 39; BCLI Report, *supra* note 1 at 61.