UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

A JOINT PROJECT WITH THE LAW REFORM COMMISSION OF SASKATCHEWAN

UNIFORM COMMERCIAL TENANCIES ACT
PROGRESS REPORT #3

REPORT OF THE WORKING GROUP

Toronto, Ontario
August 2014

UNIFORM COMMERCIAL TENANCIES ACT – PROGRESS REPORT #3

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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) [on leave for 2013-14];
> James Leal (Nelligan O'Brien Payne);
> Richard Olson (McKechnie & Company); and,
> Catherine Skinner (Manitoba Law Reform Commission).

[2] The working group first met in May 2012 and has presented progress reports at the Annual Meetings in 2012 and 2013. Since the 2013 Progress Report #2, the working group has met eight times by conference call. Consensus was reached on most issues; however, a few 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 since the last Annual Meeting, 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[3] Commercial tenancies law in Canada is fragmented, outdated, and, in some respects, obsolete.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 However, much of it was copied from 18th and 19th Century English legislation and was originally enacted over 100 years ago or was patterned on statutes enacted at that time.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 legislation was designed for both residential and commercial tenancies, which are now separated. The archaic nature of much of this legislation is evident in the obsolete terminology in its provisions and its focus on matters that have little or no contemporary commercial significance.

[4] The statutory measures that exist are often scattered among various enactments. 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 and national professional firms that will be tenants across the country. Uniformity allows for greater ease in working within the legislation. Further, uniformity will, when the legislation is litigated, result in case law that may apply across Canada rather than in just one jurisdiction.

[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 guidance and, by way of comparison, raises interesting issues on several aspects of this area of law. The working group will consider the extent to which the law of Québec should be harmonized with that of the common law provinces. However the *Uniform Commercial Tenancies Act* will be designed for adoption in the common law provinces only. With Québec, the working group will recommend amendments to the *Civil Code* where they are thought necessary.

Formal Requirements of a Lease

Requirement for writing

[8] At common law, there were no formal requirements that had to be met for the creation of a lease. The writing requirement first appeared in the seventeenth-century English *Statute of Frauds*.[9] The common-law provinces and territories of Canada acquired this statute as part of their colonial inheritance. Several provinces have re-enacted the *Statute of Frauds* as provincial legislation.[10] British Columbia included the writing requirement

in section 59 of its *Law and Equity Act*.[11] Other provinces and territories rely on the original English Act as received legislation.[12] Manitoba repealed the *Statute of Frauds*,[13] partially implementing recommendations of the Manitoba Law Reform Commission.[14]

[9] The Manitoba Law Reform Commission concluded that "[a]s a result of the sophisticated nature of our present commercial and judicial systems, the compelling circumstances that produced the statute 300 years ago are either non-existent or of no consequence today."[15] However, the Law Reform Commission of British Columbia discussed three broad, contemporary purposes that the legislation still serves:

> (1) ensuring there is evidence of important transactions;
>
> (2) cautioning the parties they are entering into a significant legal transaction; and
>
> (3) creating certainty about which relationships are legally enforceable and which are not.[16]

[10] BCLI recommended retaining the writing requirement as found in section 59 of the *Law and Equity Act*.[17] It concluded that the formalities are not stringent and that they promote certainty among the parties to a commercial lease, which may help to resolve or limit disputes. BCLI also found it preferable to treat all interests in land the same respecting formal requirements, and not to carve out a special position for commercial leases. Finally, concerns about the writing requirement causing hardships were addressed in the last round of amendments to section 59 of the *Law and Equity Act*, which have dramatically reduced the possibility of the writing requirement operating in a manifestly unfair fashion. BCLI recommended the following wording be included in a new *Commercial Tenancy Act*:

> **3** (1) Subject to section 59 of the *Law and Equity Act*, no particular form is required for the creation of a lease.

[11] Section 59(3) of B.C.'s *Law and Equity Act* provides:

> (3) A contract respecting land or a disposition of land is not enforceable unless
>
> > (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
> >
> > (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or

> (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

[12] Section 1 of the English *Statute of Frauds* provides:

> 1. …all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of, any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making, or creating, the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding.

[13] Québec has no equivalent to the *Statute of Frauds*, and there is no requirement that a commercial lease be written;[18] the general rules of the law of contracts and evidence apply. However, Williams & Rhodes note that:

> [I]f the tenant under a commercial lease with a term of more than 12 months wishes his lease to be opposable to any person acquiring the premises from the landlord, the commercial lease must have been previously registered against the property: (1887)… Thus, one may wish to follow certain formal requirements upon its execution in order to ensure the lease's registrability.[19]

[14] The working group discussed four possibilities respecting including a requirement for writing in a *Uniform Commercial Tenancies Act*:

> (1) Not including any reference to a writing requirement for leases;
>
> (2) Providing that leases are not required to be in writing, regardless of the length of the term of the lease;
>
> (3) Requiring that most leases be in writing (subject to the discussion below on leases for less than three years); and,
>
> (4) Including a reference to the provincial statute that deals with the writing requirement (e.g. *Statute of Frauds*, *Law and Equity Act*).

[15] The working group could not agree on whether to not include any reference, or to include a provision similar to section 59 of British Columbia's *Law and Equity Act*. Some felt that unifying writing requirements for leases, which may cause the requirements for

leases to vary from requirements for other interests in land, was beyond a *Uniform Commercial Tenancies Act* and could be more detrimental than useful. Others thought that a writing requirement would encourage certainty and cause the parties to put their minds to the importance of a complex relationship. Certainty would limit the number of expensive and inefficient trials, which meets the purpose of this project.

[16] The working group suggested a provision similar to section 59 of British Columbia's *Law and Equity Act*, if included, because enumerating grounds for equitable exceptions to the requirement is a challenging task. Section 59 is essentially a codification of the case law that has developed around interpretation of the *Statute of Frauds*. A reasonable statement of the law in most of Canada, including a provision similar to section 59 in the Uniform Act would not change the law, but clarify it.

[17] Consultation Question: Should a *Uniform Commercial Tenancies Act* include a writing requirement similar to section 59 of British Columbia's *Law and Equity Act*, or should the Uniform Act omit any reference to a writing requirement?

Application to leases for less than three years

[18] Whether the requirement for writing will apply to leases for less than three years only becomes relevant if a provision similar to section 59 of British Columbia's *Law and Equity Act* is included in the Uniform Act.

[19] Section 2 of the seventeenth-century *Statute of Frauds* excepted the following from the writing requirement:

> Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised.[20]

[20] The *Statutes of Frauds* in Ontario and Nova Scotia have the same exception, although Ontario specifies "lease, or an agreement for a lease." The New Brunswick Act excepts leases for a term of less than three years, but has no minimum rent requirement. B.C.'s *Law and Equity Act* excepts a "contract to grant a lease of land" and "a grant of a lease of land" for a term of 3 years or less.

[21] The reasons for exempting leases with terms of three years or less from the original *Statute of Frauds* appear to be lost to history.[21] The Law Reform Commission of British

Columbia concluded that the three-year exception should be retained because it "reflects the accepted practice of entering into commonplace transactions with less formality than would normally surround permanent arrangements," and short term leases are "of relatively minor importance, and accordingly need not be encumbered by formalities."[22]

[22] The Ontario Law Reform Commission recommended that the three-year period of this exception be reduced to one year.[23] Their rationale for reducing the length of the term was that it would promote certainty in commercial leasing.[24]

[23] The working group does not agree that short term leases are of minor importance. Three years is an arbitrary distinction on the basis of time. The time when such a distinction made sense has passed, and there is no longer any benefit to differentiating on the basis of length of term of lease. Parties seeking to enforce leases not in writing must prove the lease in the same way, regardless of the length of the lease. So it should be for leases in writing.

[24] Preliminary Recommendation: If a writing requirement is included in a *Uniform Commercial Tenancies Act*, the Uniform Act should provide that all leases must be in writing, regardless of the length of the term of the lease.

Registration of a Lease

[25] Lease registration is not contemplated by Canadian commercial tenancy acts. BCLI, in its 2009 report, recommended the following be included in a reformed *Commercial Tenancy Act*:

> 3 (2) A landlord who enters into a lease must deliver the instrument creating it to the tenant in a form registrable under the *Land Title Act*.
>
> (3) Subsection (2) does not apply if
>
> (a) the lease is a lease for a term not exceeding 3 years, if there is actual occupation under the lease, or
>
> (b) the parties otherwise agree in writing.[25]

[26] British Columbia is the only jurisdiction to require that a lease be provided in a registrable form.[26] Although no other jurisdictions require a lease to be provided in registrable form, many jurisdictions require a lease (usually over three years) to be registered to be protected in the land titles system. Alberta, Manitoba, Saskatchewan, Yukon, and Ontario (Land Titles System) imply an interest on title to provide that land is

subject to any lease or agreement for lease for less than three years where there is actual occupation. It is understood, therefore, that title will not be subject to any lease over three years not registered.[27]

[27] In Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, Prince Edward Island, and Nova Scotia leases not registered are deemed fraudulent, void, and ineffective against subsequent purchasers for valuable consideration whose conveyances are previously registered, except for a leasehold interest for three years or less and, in Ontario (Registry System), a leasehold interest for seven years or less.[28]

[28] The North West Territories and Nunavut require that

> Where land, for which a certificate of title has been issued, is intended to be leased or demised for a life or lives, or for a term of more than three years, the owner shall execute a lease in the prescribed form.[29]

The prescribed form includes the terms of payment of rent, the date and term of the lease, and any special covenants or powers or modifications of implied covenants.[30]

[29] Article 1852 of the *Civil Code of Québec* permits the rights resulting from a lease to be registered. Registering a lease protects the tenant from termination of the lease by a subsequent acquirer until the expiry of the term of the lease.[31] Williams & Rhodes note that registration also provides protection of rights under the lease, but do not indicate what the protection looks like.[32]

[30] British Columbia's requirement of a lease in registrable form is found in the *Property Law Act*, not in the *Commercial Tenancy Act*.[33] Having considered the issue, the working group prefers not to include lease registration in a *Uniform Commercial Tenancies Act*, as it could have varying impacts on the *Land Titles Acts* and *Registry Acts* in different jurisdictions. Requiring a landlord in jurisdictions other than British Columbia to provide a lease in registrable form would represent a major change for commercial practice. Such a provision in not appropriate in a *Uniform Commercial Tenancies Act*.

[31] Preliminary Recommendation: A *Uniform Commercial Tenancies Act* should not mention lease registration in land title systems.

Distress for Rent

[32] Distress for rent is a remedy that a landlord may employ to enforce a tenant's obligation to pay arrears of rent. Distress can be traced back to feudal times when, if a tenant failed to render services or pay dues to his lord, the tenant's land became forfeit to the lord, who then became entitled to retake it and to hold it as a pledge to compel the tenant to fulfil his obligations.[34] Over time, seizing personal property, as opposed to land or interests in land, became the focus of distress.

[33] A right to distrain against property arises in several circumstances. The right may find its origin in the common law, in a statute, or in an agreement between the parties. However, statutory distress is not common, and agreements containing distress provisions appear to be even less common. By far the most important contemporary form of distress is the common law distress for rent.

[34] Distress for rent is a self-help (summary or extrajudicial) remedy; it is not carried out under court supervision. This quality puts it at odds with most other civil enforcement procedures, which require a creditor either to obtain a judgment before enforcement (the writ of seizure and sale is only available to a judgment creditor) or to apply to court (obtaining a prejudgment garnishing order). The extrajudicial nature of distress for rent is faulted as a defect by the remedy's opponents and praised as a strength by its supporters.

[35] The common law nature of distress has been extended in places, modified in others, and restricted in still others by many statutes. The series of enactments relating to distress stretches all the way back to thirteenth century England.[35] Most of this legislation is procedural, but some of it extends or limits the right itself. For example, at common law a landlord could not sell the property it had distrained against. The property could only be held as a pledge for payment of the arrears of rent. Legislation has granted landlords the right to sell distrained property.[36]

[36] As a broader point these statutes, and the vast number of cases dealing with distress, make this area of the law very detailed and very complicated. Further, in some jurisdictions the legislation is not consolidated in one place,[37] and the legislation is not commonly named across jurisdictions.

Inclusion in Uniform Act

[37] The working group first considered the fundamental question of whether a *Uniform Commercial Tenancies Act* should include a comprehensive restatement of distress for rent. In one sense, the case for reform is straightforward. It is widely conceded that the law governing distress for rent is out of date, confusing, and fraught with pitfalls.[38] This area seems ripe for reform. It has been addressed by at least five Canadian law reform agencies, four of which focussed their attention on making recommendations for the procedural reform of distress for rent.[39] But the case for reform had to be weighed against other, more pragmatic concerns. It is noteworthy that, among the earlier Canadian law reform studies, three treated distress for rent as a freestanding project in its own right.[40] Including distress for rent in this project would significantly extend the timeline of a completed project. Despite this, the working group decided that modernizing distress for rent was an important aspect of modernizing commercial tenancies law and was a worthwhile use of its time.

Abolish or modernize

[38] The next question considered by the working group was whether distress for rent should be abolished or modernized. Many law reform agencies have addressed the subject of abolition of distress for rent, although only foreign agencies have recommended this approach to reform.[41] The arguments in favour of abolition have emphasized that "distress is a relic of feudalism"[42]—that is, it is hopelessly complex, out of touch with contemporary social and legal norms, and prone to being exercised in an oppressive matter.

[39] The first argument in favour of abolishment is that distress for rent confers an unjustified priority on landlords. Most Canadian legislation gives landlords priority over the claims of execution creditors and limits its scope to one year's rent.[43] The rationale for this priority appears to be historical, and can be traced back to an English law enacted in 1709.[44] This priority was a fair balancing of the interests of landlords and other creditors in a pre-industrial economy.[45] Further, distress for rent is not integrated into the provinces' personal property security regimes.[46] A distraining landlord's priority position vis-a-vis a typical *Personal Property Security Act* secured creditor can be described:

> In the case of general security interests, chattel mortgages and other non-title-retentive security interests, the landlord takes priority over the secured creditor if the landlord exercises its common law right to distrain along with its statutory right to sell under the *Rent Distress Act* before the secured creditor can seize and

> dispose of the same goods. Usually, the priority battle is determined by a "race of the swift."[47]

[40] The second argument in favour of abolishment is the potential for harm resulting from distress for rent being carried on outside the control of the courts. Distress for rent is levied in a summary fashion, often on the instructions of a landlord to a bailiff, but sometimes by the landlord itself.

[41] The third argument concerns the relation of walking possession arrangements and distress for rent. It is common for distraining landlords to enter into walking possession arrangements with tenants, which result after a landlord distrains a tenant's property and they agree to leave the distrained property in the tenant's possession. A walking possession arrangement is as legally effective as a seizure that results in the removal of the seized property. As it has the potential to confuse third parties, the goods subject to a walking possession arrangement are to be clearly marked to give notice to third parties. Despite efforts to limit confusion, these arrangements may give the impression to third parties that the tenant retains ownership of the goods, when this is not the case.

[42] Distress for rent has been abolished for commercial tenancies in four Australian jurisdictions,[48] nine American states,[49] and was abolished and replaced with a new statutory regime in the United Kingdom on April 4, 2014.[50] The working group reviewed the effect of abolishment in these jurisdictions, and found that most replaced distress with legislation of similar effect, or the courts interpreted replacement remedies that weren't significantly different.

[43] Québec, however, has successfully abolished its remedy in favour of landlords analogous to distress for rent: the lessor's privilege.[51] The privilege was abolished in 1994, when the *Civil Code of Québec* came into force. Landlords have found new ways to secure tenants' obligation to pay the rent which do not mimic distress:

> 1) a hypothec on the tenant's moveable property (similar to a PPSA security). Some landlords take a hypothec, but most practitioners do not advise them to do so: because of transaction costs; because lenders to tenants will usually require a cession to obtain a first ranking hypothec on tenants' property; and because a landlord's hypothec is useless if the tenant becomes bankrupt.[52]
> 2) a letter of credit;
> 3) a security deposit; or
> 4) a personal guarantee.

These are considered to provide landlords with sufficient protection against a tenant in default.

[44] The Québec courts have also developed an important tool to protect a landlord who sues a tenant for arrears of rent. Landlords frequently apply to the court for a safeguard order compelling the tenant to deposit a portion of the rent to become due in the office of the Court, awaiting trial.[53] If the parties agree, such amounts may alternatively be deposited in trust with either party's attorney. In deciding whether to issue a safeguard order, the courts apply virtually the same test as for an interlocutory injunction. The order normally applies to future rent, not rent in arrears, although there have been exceptions. The courts consider a landlord's outlays and a tenant's revenues when determining the rent to be deposited by the tenant, and the seriousness of allegations on both sides.

[45] Ms. Cumyn surveyed several legal practitioners on abolishing the lessor's privilege, and none expressed any desire to see the lessor's privilege reinstated. All are satisfied with the law as it now stands in Québec regarding this issue.

[46] As discussed below, the working group recommends that distress for rent be modernized and included in a *Uniform Commercial Tenancies Act*. However, Québec has succeeded in abolishing the lessor's privilege and the working group does not suggest that the privilege should be reinstituted. If any common law jurisdiction abolished distress for rent rather than implementing the uniform provisions, distress would not be difficult to remove from the Uniform Act because it is a discrete part of the Act, and is not mentioned elsewhere. If a common law jurisdiction abolished distress for rent, the summary procedure to be included in the Uniform Act would be of even greater importance to resolve disputes over rent arrears.

[47] Although distress has been criticized, the working group felt that abolishment would cause even greater difficulties for all parties. In the working group's experience, few distress proceedings make it to a sale. This was borne out by the Law Commission of England which indicated that 2 – 3.5% of warrants for distress lead to removal and sale; and that the threat of distress results in payment in approximately 90% of cases.[54] As a practical matter, distress for rent is only effective when used for one or two months' arrears of rent. Anything beyond this amount is likely to indicate considerable financial difficulties, which have involved failing to pay other creditors. Many will have liens that afford them a super-priority by statute. These statutory creditors will have priority over a distraining landlord. If the threat of distress does not result in payment, it may instead crystallize a bankruptcy/insolvency which will terminate the distress.

[48] Abolishing distress for rent may have negative consequences for tenants, especially financially weak tenants. Landlords will likely be quicker to terminate leases after rent falls into arrears. Distress for rent can be a strategy to keep a lease going through a difficult period. Tenants may find that if landlords cannot rely on distress for rent, they will insist on obtaining general security agreements. This may interfere with other financing arrangements that are important to the tenant's business. Landlords may also require larger security deposits and may insist on taking a security interest in the tenant's fixtures, which are not subject to distress for rent.

[49] Abolishing distress for rent would mean a fundamental change in leasing relationships. Leases negotiated before abolishment would have been negotiated on the basis of distress being available, and so may leave parties vulnerable. The agencies that have recommended modernization, such as the Ontario Law Reform Commission, have emphasized the practical need for distress for rent within the jurisdiction.[55] The Ontario Commission also noted that modernizing the law of distress "would…assist those carrying out the seizure to know the requirements to which they are bound to adhere."[56] The working group prefers to modernize and codify distress for rent in a *Uniform Commercial Tenancies Act*.

[50] The working group considered various approaches to retaining and modernizing the remedy of distress for rent. Distress could be brought more directly under the supervision of the court, or a scheme more closely linked to the *Personal Property Security Act* could be developed. The working group decided to modernize distress for rent within its existing framework. Bringing distress more directly under the courts would cause decreased access to justice, in that landlords must pay court and legal fees to exercise a remedy now inexpensive and accessible. The working group was concerned that integrating distress with the PPSA would have effects far beyond distress in the industry which would be difficult to anticipate.

[51] The working group, therefore, recommends modernizing the remedy of distress for rent in its current framework. Canadian common law distress legislation was reviewed provision by provision to develop the following recommendations. Due to the number of recommendations, information on research and the decision-making process has not been included. Please contact the Chair if you are interested in the working group's minutes and memos on this subject.

Nature of distress remedy

[52] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should be the sole source of distress law in commercial tenancies. The working group wants to avoid inadvertently abolishing existing statutory sources of distress, but agrees that the practice and procedure of distress should be supplanted by statutory rules.

Contracting out

[53] Preliminary recommendation: Landlords should be permitted to restrict or waive their rights to distress under the Uniform Act in agreement with the tenant, but should not be permitted to expand on those rights. However, a landlord's right to retain a separate security interest should not be restricted by this provision.

Crown bound

[54] Preliminary recommendation: The Crown should be bound by any distress provisions in a *Uniform Commercial Tenancies Act.* This would not prejudice other remedies available to the Crown.

Self-help or judicial process

[55] Preliminary recommendation: Distress should remain a self-help remedy and leave of the court should not be required to begin distress.

[56] Preliminary recommendation: Distress should be included in the summary dispute resolution process to be included in a *Uniform Commercial Tenancies Act*.

[57] Preliminary recommendation: To further inform tenants of their rights absent court supervision, a prescribed form of distress notice should be required by a *Uniform Commercial Tenancies Act*. The notice should contain factual information (date and location of distress, rent arrears, etc.), a description of the seized goods sufficient to identify them (inventory), advice about the tenant's duties and rights (replevin, etc.), remedies available through the summary procedure, information on property exempt from seizure, and reasonable bailiff fees.

Distress for rent seck

[58] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should continue to provide for distress for rent seck, however, reference to 'rent seck' should be removed and modern language similar to that used by the Northwest Territories and Nunavut should be employed.

Extension past termination of lease if tenant still in possession

[59] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should continue to require that the tenant must be in possession of the premises if distress is to be levied within the six months following termination of the lease.

Right of persons entitled to rent during life of another to recover same after death

[60] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should provide that a person entitled to any rent or land for the life of another may recover by action or distress the rent due and owing at the time of the death of the person for whose life that rent or land depended as he or she might have done if the person by whose death the estate in that rent or land determined had continued in life.

Distress to be reasonable

[61] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should provide that only goods reasonably sufficient to satisfy the arrears and costs of distress shall be distrained. Excess seizure should give rise to a claim in damages against the landlord.

Amount of distress

[62] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should allow a landlord to distrain for 'tangential rent,' which would include the cost of any service, area or thing provided by the landlord for the tenant under the tenancy agreement, so long as it is related to the use or occupancy of the rented premises. A definition of "rent" should also include any interest payable on arrears under the tenancy agreement.

[63] Preliminary recommendation: Distress should not be restricted to arrears of a certain number of months.

Timing of distress

[64] Preliminary recommendation: A landlord should be permitted to distrain at any hour and on any day that is reasonable according to the use of the premises. A landlord should not be permitted to distrain if to do so would be a breach of the peace.

Agricultural provisions

[65] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should provide, in modernized language and structure, that:

> A person having rent due and in arrear upon a demise, lease or contract may seize and secure sheaves or cocks of grain, or grain loose, or in the straw, or hay, lying or being in a barn or granary or otherwise upon a part of the land charged with the

> rent, and may lock up or detain the same, in the place where the same is found, for or in the nature of a distress until the same is replevied; and, in default of the same being replevied, may remove and sell the same.[57]

[66] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should allow a landlord to seize standing crops as distress for rent. If the tenant pays the arrears and costs before the standing crops are cut, then the distrained standing crops should be returned to the tenant. The landlord should be permitted to "cut, gather, make, cure, thresh, carry and lay up the crops, when ripe" in a proper place on the premises or, if there is none, in a proper place that the landlord procures near to the premises. The tenant should be given notice within one week of the place where the harvested crops are located. The landlord should be permitted to sell the crops in convenient time. The standing crops may be sold before being harvested, and a person purchasing standing crops should be liable for the rent of the land upon which the crops are standing at the time of sale until the crops are removed.

[67] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should allow seizure, as distress for rent, of cattle or livestock pasturing on a highway or any way belonging or appertaining to the premises.

[68] Preliminary recommendation: If any part of the standing crops of the tenant are seized and sold under execution, those crops, as long as they remain on the premises, should be liable to distress accruing after the seizure and sale if other goods and chattels cannot satisfy the distress, regardless of any bargain and sale or assignment of the crops by the sheriff.

Goods to be distrained

[69] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should provide that only goods on the premises at the time of distraint may be seized.

[70] Preliminary recommendation: Only the goods of the tenant should be seized, even if other goods are on the premises.

[71] Preliminary recommendation: Goods belonging to a party *occupying the premises with the assent of the tenant* should also be available for seizure.

[72] Preliminary recommendation: Goods on the premises subject to PMSIs or conditional sales/leases may only be seized to the extent of the tenant's interest.

[73] Preliminary recommendation: Goods subject to general security agreements or chattel mortgages/debentures may be seized.

[74] Preliminary recommendation: Goods on the premises of a person claiming title under an execution against the tenant may be seized.

[75] Preliminary recommendation: Goods on the premises exchanged to defeat the landlord's claim may be seized.

[76] Preliminary recommendation: A landlord should not be liable for distress of property not belonging to the tenant on the premises unless the owner of the property serves a statutory declaration on the landlord before the distress or before the sale, and the landlord proceeds with distress after service.

Goods exempt from distress

[77] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should exempt personal effects from distress.[58]

Levying distress

[78] Preliminary recommendation: Distress should be levied by a bailiff, sheriff, collection agent, or other regulated, qualified third party in the jurisdiction.

[79] Preliminary recommendation: A distraining landlord should be permitted to use reasonable force against premises to gain entry.

[80] Preliminary recommendation: A court order should be available as a remedy if a tenant unreasonably prevents a distraining landlord from entering the premises.

[81] Preliminary recommendation: When entry is forced and the tenant is absent upon the landlord's departure, the landlord should be under a duty to take reasonable care that the premises are left secure against unauthorized entry.

[82] Preliminary recommendation: A landlord should be obliged to give a written notice of distress to the tenant by personal service at the time of distress or, where the tenant is absent or refuses service, by posting it in a prominent place on the premises.

[83] Preliminary recommendation: A landlord should have a duty to protect any goods seized.

Lodger may protect property from distress

[84] Preliminary recommendation: A lodger, for the purposes of next three recommendations, should be defined as an individual occupying the premises as a residence.

[85] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should provide that if a superior landlord levies distress on the property of a lodger for rent owed to the superior landlord by its immediate tenant, the lodger may serve the superior landlord with an affidavit/statutory declaration, with inventory attached, setting out that the property belongs to the lodger, not the immediate tenant, and that no money is owed by the lodger to the immediate tenant, or the amount owed. The lodger may pay the amount due, or as much as needed to satisfy the superior landlord's claim.

[86] Preliminary recommendation: Any amount paid by the lodger to the superior landlord should be deemed a valid payment on the amount owed by the lodger to the immediate tenant.

[87] Preliminary recommendation: If, after service of the affidavit and payment, the landlord levies distress on the lodger's goods, the distress should be illegal, the lodger may start an action for recovery, and the landlord should be liable to an action for damages.

Right of set off

[88] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should provide that a tenant may set off a debt owed to the tenant by the landlord against the distress. Notice of the set off may be given before or after seizure of distress. The landlord may only distrain to the balance of the rent debt owed after set off.

Fraudulent removal

[89] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should provide that if the tenant fraudulently removes goods from the premises before distress, the landlord may, within 30 days, seize the goods wherever they are located and dispose of them as if they had been seized during the distress. However, the landlord may not seize goods sold in good faith for value to a bona fide purchaser before the distress.

[90] Preliminary recommendation: If goods are being fraudulently stored off the premises to avoid distress, the landlord may, after calling a peace officer to assist and at a time that is reasonable according to the use of the premises, break open the building in which the goods are stored and seize the goods as if they had been on the premises.

[91] Preliminary recommendation: If the place where the goods are fraudulently stored is a residence, the landlord must swear an oath that there are reasonable grounds to believe the goods are within.

[92] Preliminary recommendation: A tenant who fraudulently removes goods, and any person who knowingly assists the tenant to do so, must pay damages to the landlord, to be recovered by court action. Damages should be limited to the rent in arrears plus interest.

Impounding distress

[93] Preliminary recommendation: A distraining landlord should be obliged to handle seized goods in a commercially reasonable manner prior to sale.

[94] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should provide that the landlord may impound/secure the distress in any place or on part of the premises and may sell the distress from the premises, and any person may come and go from the premises to view/buy/remove the distrained goods.

[95] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should provide that distrained goods remaining on the premises must be grouped together, separate from goods not distrained, and be clearly marked.

Pound breach

[96] Preliminary recommendation: A landlord should have an action for damages against any tenant who, without tendering redemption, retakes possession of seized goods physically secured (impounded), or who disposes of his or her interest in seized goods.

[97] Preliminary recommendation: When a third party wrongly interferes with seized goods, a landlord should, in most cases, be statutorily deemed to have the necessary possessory or property interest in the goods to sue the wrongdoer in the common law torts of conversion, detinue or trespass.

Replevin / Power to sell

[98] Preliminary recommendation: Distrained goods should not be sold for at least five days following service of the statutory form of notice of distress on the tenant.

[99] Preliminary recommendation: Upon full payment, before a sale, of arrears and reasonable costs incurred by the landlord for the distress, the goods should be returned to the tenant.

[100] Preliminary recommendation: The tenant should be permitted to apply on reasonable grounds to postpone the sale, or to pay the funds into court, or to provide security if there is a dispute over the amount due.

[101] Preliminary recommendation: A landlord should be required to sell distrained goods in a commercially reasonable manner.

[102] Preliminary recommendation: Distrained goods should not be sold until the landlord has obtained one sworn appraisal of their value. Goods should then be sold for their best price.

[103] Preliminary recommendation: A landlord should only be able to purchase distrained goods with court approval.

Wrongful/irregular/excessive distress

[104] Preliminary recommendation: Any breach (by omission or commission) of a duty or obligation owed by a landlord under the distress part of a *Uniform Commercial Tenancies Act* should constitute "wrongful distress" for which a tenant may recover damages for reasonably foreseeable loss or damage, notwithstanding any provision to the contrary in the lease. The distress would not be unlawful, and the person performing the distress would not be a trespasser, but the aggrieved person could pursue damages by action.

Tenant misconduct

[105] Preliminary recommendation: Any breach (by omission or commission) of a duty or obligation owed by a tenant under the distress part of a *Uniform Commercial Tenancies Act* should constitute “tenant misconduct” for which a landlord may recover damages for reasonably foreseeable loss or damage, notwithstanding any provision to the contrary in the lease.

Distrainable goods taken in execution

[106] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should provide that goods on the premises may not be taken in execution unless the party executing, before removing the goods, pays to the landlord all money due for rent up to one year's rent arrears.

Executors and administrators of landlord

[107] Preliminary recommendation: Executors and administrators of the landlord should be permitted to stand in place of the landlord for distress.

Fees

[108] Preliminary recommendation: A *Uniform Commercial Tenancies Act* should require that fees charged for distress be "reasonable." Disputes arising over fees charged for distress may go to the registrar for review as part of the summary dispute resolution process to be included in a *Uniform Commercial Tenancies Act*.

Disputes as to right to distrain

[109] Preliminary recommendation: Disputes respecting distress should be heard following the summary dispute resolution procedure to be included in a *Uniform Commercial Tenancies Act*.

Transition

[110] Preliminary recommendation: Where a distraining landlord seizes goods before the new statutory scheme comes into effect, the disposition of those goods should be governed by the current common law/statutory regime. Where arrears have accumulated before the new statutory scheme comes into effect, but the landlord does not seize until after that date, the process should be governed by the new statutory scheme.

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[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] (UK), 29 Car 2, c 3 (1677).

[10] *Statute of Frauds*, RSO 1990, c S19, s 1; *Statute of Frauds*, RSNB 1973, c S-14, s 1, 7; *Statute of Frauds*, RSNS 1989, c 442, s 3.

[11] *Law and Equity Act*, RSBC 1996, c 253, s 59.

[12] *Supra* note 9: received in Alberta, Saskatchewan, Yukon, Northwest Territories, Nunavut, Newfoundland and Labrador, and Prince Edward Island. Prince Edward Island has re-enacted the *Statute of Frauds*, except for the provisions dealing with leases. *See Statute of Frauds*, RSPEI 1988, c S-6. This has been interpreted to mean that the English Act is in force in Prince Edward Island with respect to leases. See Christopher Bently et al, *Williams & Rhodes Canadian Law of Landlord and Tenant*, (looseleaf consulted on 17 April 2013), 6th ed (Toronto: Carswell, 1988) vol 1 at § 2:1:1 [Williams & Rhodes].

[13] *An Act to Repeal the Statute of Frauds*, CCSM c F158. The *Statute of Frauds* has been repealed in Manitoba since October 1, 1983.

[14] Manitoba Law Reform Commission, *Report on the Statute of Frauds* (Report #41) (Winnipeg: The Commission, 1980). In addition to this major recommendation to repeal the writing requirement, the Manitoba Law Reform Commission also made several subsidiary recommendations, which would have re-imposed modified formalities of writing on commercial leases. These subsidiary recommendations were not implemented.

[15] *Ibid* at 1.

[16] Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (LRC 33) (Vancouver: The Commission, 1977) at 50–53.

[17] BCLI Report, *supra* note 1 at 36.

[18] Williams & Rhodes, *supra* note 12 at §16:4:8.

[19] *Ibid*.

[20] *Supra* note 9, s 2

[21] See Law Reform Commission of British Columbia, *supra* note 16 at 58.

[22] *Ibid* at 59.

[23] Ontario Law Reform Commission, *supra* note 6 at 14.

[24] *Ibid.* The Ontario Law Reform Commission also noted that this recommendation would promote harmonization with "[m]ost American statutes."

[25] BCLI Report, *supra* note 1 at 34.

[26] *Property Law Act*, RSBC 1996, c 377, s 5(2).

[27] *Land Titles Act*, RSA 2000, c L-4, s 61(1)(d); *The Real Property Act*, CCSM, c R30, s 58(1)(d); *The Land Titles Act, 2000*, SS 2000, c L-5.1, s 18(2); *Land Titles Act*, RSY 2002, c 130, s 67(d); *Land Titles Act*, RSO 1990, c L.5, s 44(1) para 4.

[28] All require actual possession except for Nova Scotia: *The Registry Act*, CCSM, c R50, s 2, 56; *Registry Act*, RSO 1990, c R.20, s 70(1)-(2); *Registry Act*, RSNB 1973, c R-6, s 19(1) – (3)**;** *Registration of Deeds Act*, RSNL 1990, c R-10, s 10; *Registry Act*, RSPEI 1988, c R-10, s 43; *Registry Act*, RSNS 1989, c 392, s 25.

[29] *Land Titles Act*, RSNWT 1988, c 8 (Supp), s 107(1).

[30] *Land Titles Forms Regulations*, NWT Reg 063-93, Form 7.

[31] Art 1887 CCQ. If the lease is not registered and more than 12 months remain to the end of the term, the subsequent acquirer may terminate the lease upon expiry of 12 months by giving the tenant six months written notice.

[32] Williams & Rhodes, *supra* note 12 at §16:4:10.

[33] *Commercial Tenancy Act*, RSBC 1996, c 57.

[34] *Interim Report on Distress for Rent* (London: The Commission, 1966) at 5.

[35] See *Statute of Marlborough* (UK), 52 Hen III, c 4, s 4 (1267).

[36] See e.g. *The Landlord and Tenant Act*, RSS 1978, c L-6, s 35 (best price); *Commercial Tenancies Act*, RSO 1990, c L.7, s 53 (appraised); *Rent Distress Act*, RSBC 1996, c 403, s 7 (appraised). This provision may be traced back to the *Distress for Rent Act* (UK), 2 Will & Mary, c 5, s 1 (1689).

[37] See e.g. British Columbia: *Rent Distress Act*, *supra* note 36 and *Commercial Tenancy Act*, *supra* note 33, s 1, 3–4; Manitoba: *The Distress Act*, CCSM c D90, and *The Landlord and Tenant Act*, CCSM c L70, s 29-45.

[38] See, e.g. Law Reform Commission of British Columbia, *Report on Distress for Rent* (LRC 53) (Vancouver: The Commission, 1981) at 14 ("The *Rent Distress Act*, in fact, suffers from a number of technical deficiencies."); Richard Olson, *A Commercial Tenancy Handbook*, looseleaf (Toronto: Thomson Carswell, 2004) at 8-1 ("Distress has many arcane rules and limitations which arose at a time when tenancies were primarily agricultural and trade and commerce were considerably different than today."). But see H Scott MacDonald, "Non-Payment of Rent: A Defaulting Tenant Under a Commercial Lease," in H Scott MacDonald et al, eds, *Commercial Leasing Disputes* (Vancouver: The Continuing Legal Education Society of British Columbia, 2007) 2.1 at 2.1.15 ("Rent distress is one of the quickest, cheapest and most effective remedies available to a landlord against a defaulting tenant.").

[39] BCLI Report, *supra* note 1; Law Reform Commission of British Columbia, *Report on Distress for Rent*, *supra* note 38; Law Reform Commission of British Columbia, *Report on the Commercial Tenancy Act supra* note 6; Manitoba Law Reform Commission, *Distress for Rent in Commercial Tenancies*, *supra* note 6; Ontario Law Reform Commission, *supra* note 6; Law Reform Commission of Saskatchewan, *supra* note 6.

[40] Law Reform Commission of British Columbia, *Report on Distress for Rent*, *supra* note 38; Manitoba Law Reform Commission, *Distress for Rent in Commercial Tenancies*, *supra* note 6; Law Reform Commission of Saskatchewan, *supra* note 6.

[41] The Law Commission (England), *Distress for Rent* (Report #194, 1991); *Report of the Committee on the Enforcement of Judgment Debts* (1969) Cmnd 3909 [The Payne Committee of England]; Law Reform Committee of South Australia, *Reform of the Law of Distress* (Report #66, 1983); Property Law and Equity Reform Committee (New Zealand), *Final Report on Legislation Relating to Landlord and Tenant* (1986).

[42] *Interim Report on Distress for Rent*, *supra* note 34 at 6.

[43] *Commercial Tenancies Act*, *supra* note 36 s 56; *Tenancies and Distress for Rent Act*, RSNS 1989, c 464, s 20(1)-(2); *Landlord and Tenant Act*, RSNB 1973, c L-1, s 39; *Landlord and Tenant Act*, RSY 2002, c 131, s 33; *Commercial Tenancy Act*, *supra* note 33, s 1. In Manitoba, the party executing must pay rent up to three months' rent arrears if paid quarterly or more frequently, or one year's arrears if rent is paid less frequently than quarterly: *The Landlord and Tenant Act*, *supra* note 37, s 48. In Prince Edward Island, payment of up to one year's rent for rental terms of less than a year, or up to two years' rent for rental terms of a year or more, is required: *Landlord and Tenant Act*, RSPEI 1988, c L-4, s 67.

[44] *An act for the better security of rents, and to prevent frauds committed by tenants*, (UK), 8 Anne, c 14 (1709), s 1.

[45] See *Distress for Rent*, *supra* note 41 at 19.

[46] See e.g. *Rent Distress Act* (BC), s 3(4); *The Landlord and Tenant Act* (SK), s 25(2)(b); *Commercial Tenancies Act* (ON), s 31. *See also Commercial Credit Corp. Ltd. v. Harry D Shields Ltd.* (1980), 29 OR (2d) 106, 112 DLR (3d) 153 (HCJ), aff'd (1981), 32 OR (2d) 703, 122 DLR (3d) 736 (CA).

[47] Richard H McLaren, *Secured Transactions in Personal Property in Canada*, looseleaf, 2d ed, vol 2 (Toronto: Carswell, 1989) at § 5.05(3)(a) [footnotes omitted].

[48] New South Wales: *Landlord and Tenant Amendment (Distress Abolition) Act 1930*, s.2; Western Australia: *Distress for Rent Abolition Act 1936*, s.2; Queensland: *Property Law Act 1974*, s.103; Victoria: *Landlord and Tenant (Amendment) Act 1948*, s.18 (Although this Act and its successor have since been repealed, it is accepted that the repeal of that legislation does not revive the old law of distress for rent: Peter Windrow, *Distress for Rent* (October 27, 2013), online: Inside Retail http://www.insideretail.com.au/2013/10/27/distress-rent).

[49] District of Columbia, New York, Oregon: *Corpus Juris Secundum*, vol 52B (West, 2012) at §1435; Nevada, Rhode Island, Utah, District of Columbia, New York: *American Jurisprudence 2d – Landlord and Tenant*, vol 49 (Thomson West, 2006) at §814; Alaska, Minnesota, Wisconsin: *Restatement (Second) of the Law of Property – Landlord and Tenant*, § 12.1 statutory note 5(c), (1977). However, Shane J Osowski, "Alaska Distress Law in the Commercial Context: Ancient Relic or Functional Remedy?" (1993) 10 Alaska L Rev 33 at 53, argues that distress remains a valid remedy in commercial leasing in Alaska, and that the remedy was only abolished for residential tenancies. However, no statutory provisions governing distress exist in Alaska: *ibid* at 59.

[50] *Tribunals, Courts and Enforcement Act 2007,* (UK), c 15.

[51] The discussion of remedies in Québec is drawn from Michelle Cumyn's November 12, 2013 Memo to the working group on the subject, with thanks.

[52] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 136(f); *Re Restaurant Ocean Drive Inc.*, [1998] RJQ 30 (QCCA).

[53] Art 46 CCP.

[54] *Supra* note 41 at para 3.10, fn 12, 13.

[55] See Ontario Law Reform Commission, *supra* note 6 at 213 ("In the first place, we could find no marked sentiment among either landlords or tenants of commercial premises favouring the abolition of the remedy of distress…. Secondly, landlords of commercial premises are, in one sense, more vulnerable than landlords of residential tenancies in that they ordinarily experience greater difficulties in reletting than do landlords of residential premises."). See also Manitoba Law Reform Commission, *Distress for Rent in Commercial Tenancies*, *supra* note 6 at 2 ("While valid arguments are to be found on both sides, the Commission is ultimately most persuaded by the consideration that distress is fundamentally a pragmatic, workable remedy that, whatever its faults, is nevertheless an important and entrenched part of modern commercial reality. We believe that the commercial setting is a crucial factor that should not be underestimated.").

[56] Ontario Law Reform Commission, *supra* note 6 at 214.

[57] Saskatchewan *Landlord and Tenant Act*, *supra* note 36, s 23. A "cock of grain" is a cone shaped pile of straw or hay.

[58] Not all "residential tenancies" are caught by residential tenancy statutes. For example, in British Columbia, co-ops and not-for-profit cooperative housing are not covered by the *Residential Tenancy Act*, SBC 2002, c 78, s 4, and so would fall under a *Uniform Commercial Tenancies Act*.