ULCC | CHLC

UNIFORM LAW CONFERENCE OF CANADA
A JOINT PROJECT WITH THE LAW REFORM COMMISSION OF SASKATCHEWAN

UNIFORM COMMERCIAL TENANCIES ACT
REPORT OF THE WORKING GROUP

Presented by
Leah Howie
Saskatchewan

Fredericton
New Brunswick
August, 2016

1. August 2016[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:

Leah Howie, Chair (Law Reform Commission of Saskatchewan);
Nigel Bankes (University of Calgary);
Brennan Carroll (Borden Ladner Gervais);
Christopher Cheung (Ontario Bar Association);
Michelle Cumyn (Université Laval);
James Leal (Nelligan O'Brien Payne);
Richard Olson (McKechnie & Company); and
Jonnette Watson-Hamilton (University of Calgary)

[2] The working group first met in May 2012 and has presented progress reports at the Annual Meetings in 2012, 2013 and 2014, and an update at the Annual Meeting in 2015. Since the 2015 update, the working group has met two times by conference call and discussed overholding tenants and relief from forfeiture. Consensus was reached on most issues; however, a few issues require input from those who would be affected by the *Uniform Commercial Tenancies 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[3] Commercial tenancies law in Canada is fragmented, outdated, and, in some respects, obsolete.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 However, much of it was copied from 18th and 19th Century English legislation and was originally enacted over 100 years ago or was patterned on statutes enacted at that time.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* (*Civil Code*) offers a comprehensive and up-to-date statement of the private law as it now stands in Québec, including provisions regarding commercial tenancies.[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.

Overholding Tenants

[8] If a tenant remains in possession after the expiration of the term of the lease without the landlord's consent, the tenant becomes an overholding tenant. Issues arising when a tenant overholds include the landlord's options for regaining possession, the availability of remedies such as compensation for use and occupation and double rent, and the implications of accepting rent from an overholding tenant.

[9] A landlord generally has three options for recovering possession of a leased premises from an overholding tenant:

1. Re-entry;
2. An action for possession and mesne profits, double rent, arrears of rent or other relief;
3. An application for possession under the summary procedure established in some provinces.[9]

[10] The working group's discussion on options for regaining possession was limited to the use of a summary procedure for regaining possession as the right of re-entry remains to be discussed.

Summary Procedure

[11] All of the Canadian common law provinces except Alberta and Newfoundland have a summary procedure in place for the ejectment of overholding tenants.[10] These provisions are based to a large extent on the *Common Law Procedure Act, 1852* (UK) c 76. Generally, under these types of summary procedures, only possession can be obtained; they do not allow a landlord to obtain any other relief such as double rent or compensation for use and occupancy.

[12] These provisions set out conditions which must be met in order for the landlord to bring the matter before a court, and then set out the procedure to be followed once the landlord has met these conditions. Generally, these conditions are:

1. The lease must have been determined by: a notice to quit, a notice under the lease, or some other act that terminates the tenancy;

2. The landlord must have subsequently delivered a written demand for possession to the tenant;[11] and
3. The tenant must wrongfully refuse to comply with the demand for possession.

Once these conditions are met, there is generally a two-step procedure: (1) the landlord must show it is *prima facie* entitled to an order for possession,[12] and if they are successful, a court date is set and the tenant must be notified; and (2) a summary hearing is held on the landlord's entitlement to the order for possession.

[13] There is no summary procedure for overholding tenants in Québec; the landlord must introduce a regular procedure based on article 1889 of the *Civil Code* requesting that the tenant be evicted. A landlord can include a claim for rent in arrears and damages in this procedure. In some instances, landlords have successfully obtained an interlocutory injunction to evict an overholding tenant, however several authorities dispute the availability of an injunction in this case, suggesting that an eviction is the appropriate remedy.

[14] In 1989, the Law Reform Commission of British Columbia recommended removing the summary procedure for recovery from an overholding tenant from the *Commercial Tenancy Act*, on the basis that the rules were more complex and technical than the general rules of civil procedure, and no longer accomplished their original purpose. The Commission recommended leaving all procedural matters to the *Rules of Court*, and suggested that a new Act "need go no further than to list possible orders the court may make in a commercial tenancy dispute."[13] The Real Property Section of the British Columbia branch of the Canadian Bar Association criticized this recommendation, on the basis that the existing summary procedure made it possible for a landlord to be seeking an order of possession before a court within two weeks.[14]

[15] The British Columbia Law Institute took a different approach, and recommended replacing the three existing summary dispute resolution procedures in the *Commercial Tenancy Act* with a single dispute resolution procedure, contained in a regulation.[15] The British Columbia Law Institute explained its decision to place the procedure in a regulation to the *Commercial Tenancy Act* as opposed to in the legislation itself, or in the *Rules of Court* as follows:

> This approach would make the rules governing disputes more accessible, particularly to members of the public who do not have legal training. The Act could serve as

> something of a code on this point, doing away with the need to consult other statutes, regulations, or rules. Setting out the procedure in the Rules of Court would require an extensive review of those rules, in order to ensure that the new commercial leasing procedure is in accord with the other rules and to determine which general rules should apply to the summary procedure and which should not. But these advantages are outweighed by the disadvantages of incorporating procedural provisions in the statute. It is comparatively difficult to amend legislation and, as a result, procedural rules set out in legislation tend to get out of date. The procedures currently in the CTA are a good example of this tendency. They have not been amended in any significant way since their first appearance in the nineteenth century. Incorporating procedural provisions would also make the legislation much longer, and would run counter to a clear trend in favour of locating procedural provisions in regulations. This draft regulation could be adopted under the Commercial Tenancy Act, or it could be incorporated in a future version of the Rules of Court.[16]

[16] The British Columbia Law Institute's proposed regulation is designed to ensure the dispute resolution procedure proceeds quickly. This is achieved by eliminating the cumbersome and repetitive steps contained in the existing summary procedure provisions, limiting the use of certain procedures, and shortening certain time limits.[17]

[17] Both the Law Reform Commission of British Columbia and the Law Reform Commission of Ontario have expressed concerns that the summary procedure provisions in their respective legislation are available only to the landlord. In the Law Reform Commission of British Columbia's view "the summary procedure provisions are archaic: they can only be invoked by the landlord…the Act does not achieve a fair balance between the interests of landlords and tenants so far as remedies and procedure are concerned. The interests of the former are clearly favoured."[18] The Law Reform Commission of Ontario recommended that tenants should be able to use the summary procedure when claiming that the tenancy agreement is terminated, and that tenants should be able to add a claim for damages for breach of covenant or for injunctive relief.[19]

[18] The working group discussed the importance of allowing landlords and tenants to solve overholding disputes using a summary type of procedure, as summary procedures are resolved faster than normal actions, minimize costs of commercial litigation, and allow parties to resolve disputes quickly. Several working group members noted that the summary procedure is used frequently by landlords in their jurisdictions to obtain possession.

[19] Preliminary Recommendation: The *Uniform Commercial Tenancies Act* should include a summary type of procedure to solve certain overholding tenant related disputes. Landlords should be able to use this procedure to obtain possession from an overholding tenant. Tenants should also be able to use this procedure to regain possession, and should also be able to raise a variety of defences when the landlord is using this procedure to gain possession.

[20] Preliminary Recommendation: The *Uniform Commercial Tenancies Act* should follow the approach suggested by the British Columbia Law Institute. The *Act* should contain an enabling provision in the broader dispute resolution provision, with the details of the procedure set out in a regulation. It may be possible for the working group to draft this regulation and set out a procedural template, however, each province would need to modify the procedural template to incorporate their own unique rules of court, including the timelines for each step in the procedure.

[21] Preliminary Recommendation: The summary procedure should be streamlined; it should no longer be a two-step procedure. The two-step procedure does not provide any substantial benefits and it increases the cost and length of the proceedings. In addition, the formalities required in the first step of the procedure should be removed, as they are unduly technical.

Availability of Other Remedies from the Summary Procedure

[22] Most provinces that have a summary procedure for regaining possession from an overholding tenant limit the remedy that can be obtained from the procedure to a writ of possession. If a landlord wishes to pursue other remedies, such as double rent, double value or arrears of rent, they must bring another action.

[23] In contrast, New Brunswick allows landlords to add claims for payment of rent and double value when using the summary procedure to obtain possession.[20] Nova Scotia also allows a landlord to claim for arrears of rent and for the value of the tenant's use and occupation, however the court is only able to award a maximum of $500.[21]

[24] The Law Reform Commission of Ontario suggested that judges hearing a summary application for a writ of possession should be entitled to make a number of

different orders in order to deal comprehensively with the matters raised by the parties upon an application.[22]

[25] The Law Reform Commission of British Columbia was similarly critical of the narrow scope of the summary procedure in British Columbia's legislation, stating:

> The court has no jurisdiction to hear an application under any of the summary provisions of the Act unless all procedural requirements have been satisfied. Where an irregularity occurs, it cannot be corrected. The landlord must bring a new application. At the hearing of a summary application for possession, the court can only decide which party has the immediate right to the rented premises. Where complicated matters of fact or law arise, the parties must commence an ordinary action. The court cannot refer an application under one of the summary procedure provisions to the trial list, or make any of the other orders usually available in Chambers.[23]

[26] The British Columbia Law Institute's proposed *Commercial Tenancy Act* would allow a landlord to obtain compensation for use and occupation, and an indemnity for any liability resulting from the landlord's inability to deliver vacant possession to a new tenant, by use of the summary dispute resolution procedure.

[27] Preliminary Recommendation: The remedies available in the summary proceeding should not be restricted to a writ of possession. Courts should be able to deal fully with the matter; the *Uniform Commercial Tenancies Act* should state that the court can make any order necessary to resolve the dispute before it. If parts of the dispute are too complex to be dealt with in a summary proceeding, they can be severed and dealt with in a trial.

Double Rent, Double Value and Use and Occupation

[28] Double rent and double value are available for landlords to claim against overholding tenants in BC,[24] Manitoba, Ontario, New Brunswick, PEI, the Northwest Territories, the Yukon and Nunavut.

[29] The requirement to pay double rent is based on the provisions in the English *Distress for Rent Act, 1737* providing that if a tenant gives notice of intention to quit but fails to deliver up possession on the stated date, then the tenant is required to pay double rent so long as they remain in possession. Double rent only applies where the

tenant has the power of determining the tenancy by notice, and does not apply where the tenant is holding over in good faith. The acceptance of a single rent after the notice has been held to be a waiver of the landlord's right to double rent.[25]

[30] The ability to claim double value is based on the English *Landlord and Tenant Act,* which applies where a tenant for life, lives or years continues in possession after determination of the term. If the tenant remains in possession following the landlord's written demand for possession, then the tenant is liable to pay double the yearly value of the property so long as they remain in possession. Double value only applies if the tenant for life, lives or years, "willfully" holds over, following a written demand for possession.[26]

[31] Neither penalty appears to apply where a tenant fails to give up possession after a periodic tenancy is terminated by notice from the landlord.[27] If the landlord is not entitled to double rent or double value, the landlord may sue for the common law remedy for "use and occupation" for the period of overholding.

[32] Section 68 of the *Law of Property Act*, RSA 2000, c L-7 directs the courts in Alberta to consider the nature of the use and occupation by the overholding tenant and the rent payable under the prior tenancy in determining the amount of compensation recoverable by a landlord for the use and occupation of the premises by an overholding tenant.

[33] The Law Reform Commission of British Columbia recommended removing the double rent and double yearly value from British Columbia's legislation:

> The double rent remedy…is essentially penal in character. It represents an approach to the enforcement of private rights which is disappearing from the statute book and which we have recommended be abolished in other contexts.
>
> This conclusion does not, however, imply a view that the landlord's compensation should be confined to the value of use and occupation in all cases. A failure to receive vacant possession of the rented premises when expected may involve the landlord in costs or liability much greater than the rent at stake – greater even than double rent.[28]

[34] The British Columbia Law Institute's proposed *Commercial Tenancy Act* adopted the recommendations of the Law Reform Commission of British Columbia, limiting

the landlord to obtaining compensation for use and occupation, and indemnity for any liability resulting from the landlord's inability to deliver vacant possession to a new tenant:

> If a tenant continues to occupy the premises after the lease has expired or been terminated in accordance with the lease or this Act, the landlord may recover from the tenant
>
> a) compensation for use and occupation of the premises, and
> b) indemnity for any liability resulting from the landlord's inability to deliver vacant possession of the premises to a new tenant or purchaser.

The British Columbia Law Institute provided the following rationale for removing penal sanctions for overholding tenants:

> These sections were intended to punish overholding tenants by requiring payment of rent "at the rate of double the yearly value of the land" (section 15) or payment of "double the rent or sum which [the tenant] shall otherwise have paid" (section 16). The application of these sections is not as straightforward as similar provisions that sometimes crop up in leases, because the sections contain a convoluted series of conditions to be met before they can be applied and because, given their penal character, they are interpreted very strictly by the courts.[29]

[35] The British Columbia Law Institute also proposed adding a new remedy for landlords – an indemnity for any liability the landlord faces resulting from its inability to provide vacant possession to a new tenant:

> In addition to compensation for use and occupation, this section also provides for an indemnity to the landlord for any liability that results from its inability to deliver vacant possession of the premises. This provision is not found in the common law. It may be of use in cases where the landlord suffers a loss to a third party (such as an incoming purchaser or tenant) as a result of the inability to deliver vacant possession of the premises. Orders under this section may be obtained by use of the summary dispute resolution procedure.[30]

[36] Preliminary Recommendation: Double rent and double value should no longer be available, as both are arbitrary and punitive, and further, are rarely sought. The *Uniform Commercial Tenancies Act* should restate the common law right to compensation for use and occupation.

[37] Preliminary Recommendation: The *Uniform Commercial Tenancies Act* should include an indemnity provision similar to the provision proposed by the British Columbia Law Institute ("indemnity for any liability resulting from the landlord's inability to deliver vacant possession of the premises to a new tenant or purchaser").

Deemed Term Upon Acceptance of Rent

[38] Under the common law, if the landlord accepts rent from the tenant after a lease is expired, the presumption is that a new tenancy has been created. If the original tenancy was a tenancy of years, a tenancy from year to year is deemed to have been created (which results in a further one year term and requires six months' notice to terminate). If the original tenancy was for a shorter term, a tenancy of month to month is created.

[39] Under article 1879 of the *Civil Code*, if a lessee continues to occupy the premises for more than 10 days after the expiry of the lease without opposition from the lessor, the lease is renewed tacitly. The lease will be renewed for one year or for the term of the initial lease, if that term was less than one year, on the same conditions. This article does not require that rent or compensation be paid and accepted.

[40] Most professionally prepared commercial lease agreements will contain a provision overriding the common law rule regarding the type of tenancy created, stating that an overholding tenancy is a month to month tenancy.

[41] The British Columbia Law Institute considered adding a provision that would deem an overholding tenant to be a tenant under a month to month tenancy, absent an agreement to the contrary. It ultimately decided against adding this type of provision on the basis that some types of leases, such as agricultural leases, may implicitly intend to operate on a long-term basis. The Institute was concerned that overriding the existing common law rule could lead to confusion and uncertainty on such implicit understandings.[31]

[42] The Law Reform Commission of Ontario also proposed including a provision stating that the acceptance of arrears of rent or compensation for use and occupation by a landlord from an overholding tenant does not operate as a waiver of the notice to quit or as a reinstatement of the tenancy or as the creation of a new tenancy unless the parties agree.[32]

[43] In Alberta, pursuant to s 67 of the *Law of Property Act*, RSA 2000, c L-7, the acceptance of payments by a landlord for use and occupation or as arrears of rent from an overholding tenant does not operate as a waiver of the notice to quit or the creation of a new tenancy.

[44] The working group was unable to agree whether the *Uniform Commercial Tenancies Act* should contain a provision altering the common law rule that acceptance of rent from a year to year overholding tenant creates a new yearly tenancy. The working group noted that this type of provision would typically only apply to unsophisticated parties, as most commercial lease agreements have an overholding tenant provision that deems the resulting tenancy to be a month to month tenancy. Some members supported including a provision that would deem a tenancy to be a month to month tenancy upon acceptance of rent form a year to year tenant. Other members were of the view that *Uniform Commercial Tenancies Act* should not deal with this issue at all, and instead, the common law should determine what type of tenancy arises.

[45] Consultation Question: Should the *Uniform Commercial Tenancies Act* include any provisions altering the common law rules regarding deemed terms upon acceptance of rent for an overholding tenant?

[46] Preliminary Recommendation: The *Uniform Commercial Tenancies Act* should not contain a provision stating that the acceptance of rent or compensation for use and occupation from an overholding tenant does not operate as a reinstatement of the tenancy unless both parties agree.

Relief from Forfeiture

[47] Relief from forfeiture is an equitable remedy that tenants – and landlords, although this is not as common – may seek to prevent a lease from terminating following a breach of certain terms.[33] In the leasing context, the typical situation will involve a tenant seeking relief from forfeiture to prevent the landlord from exercising their right of re-entry and termination of the lease. When a court is deciding whether to grant relief it will examine "whether or not the default was wilful, the gravity of the breaches, and the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach."[34] Traditionally, courts

have also granted relief from forfeiture when there has been fraud, accident, surprise, or mistake.[35]

[48] Provisions relating to relief from forfeiture started appearing in English legislation in the 19th century. These provisions are the source of contemporary Canadian legislative provisions on relief from forfeiture. There are three types of provisions relating to relief from forfeiture that arise from these historical statutes, found in various combinations across the provinces and territories:

1. Provisions dealing with relief from forfeiture due to breach of a covenant to insure;
2. General relief from forfeiture provisions; and
3. Relief from forfeiture provisions in the leasing context.

[49] Civil law does not distinguish between legal and equitable remedies, and as such, relief from forfeiture does not exist per se in Québec. Traditionally Québec law has discouraged self-help remedies and has required remedies to be sought before a court. However, this position has been altered somewhat due to the influence of the common law, as demonstrated by article 1605 of the *Civil Code* which applies to contracts in general and provides:

> 1605. A contract may be resolved or resiliated without judicial action where the debtor is in default by operation of law for failing to perform his obligation or where he has failed to perform it within the time set in the demand putting him in default.

[50] In a 1995 decision,[36] the Québec Court of Appeal held that article 1605 did not apply to tenancies because of articles 1863 and 1883 which specially apply to leases and provide:

> 1863. The nonperformance of an obligation by one of the parties entitles the other party to apply for, in addition to damages, specific performance of the obligation in cases which admit of it. He may apply for the resiliation of the lease where the nonperformance causes serious injury to him or, in the case of the lease of an immovable, to the other occupants.

> 1883. A lessee against whom proceedings for resiliation of a lease are brought for non-payment of the rent may avoid the resiliation by paying, before judgment, in addition to the rent due and costs, interest at the rate fixed in accordance with section 28 of the Tax Administration Act (chapter A-6.002) or any other lower rate agreed with the lessor.

[51] However, in a 2003 decision,[37] the Québec Court of Appeal held that resiliation of a commercial lease should be possible without recourse to the courts if resiliation is provided for in the lease. As a result, most commercial leases in Québec now contain a clause allowing a party to resiliate the lease without recourse to the courts if the other party is in default. The following two restrictions continue to apply to resiliation of a commercial lease:

1. The lease may not be resiliated if the debtor's default is of "minor importance" (article 1604(2)); or the default must cause "serious injury" (article 1863);
2. The credit must ensure that the debtor is in default and must grant the debtor a reasonable delay in which to cure his/her default.[38]

Neither of these restrictions can be contracted out of.

[52] The working group noted that the restrictions on resiliating a commercial lease in Québec bear some resemblance to the factors the court will consider when deciding to grant relief from forfeiture.

Relief from Forfeiture Due to Breach of Covenant to Insure

[53] This type of provision arises from the *Law of Property Amendment Act, 1859*[39] (also called *Lord St Leonard's Act*), which authorized a court to grant relief from forfeiture for a breach of a covenant to maintain fire insurance on the premises. British Columbia,[40] Saskatchewan,[41] Alberta,[42] and New Brunswick[43] have provisions allowing a court to grant relief from forfeiture on this basis. These provisions are not often litigated.

[54] The Law Reform of British Columbia decided there would be equally little harm resulting from retaining the provision as there would be from removing it, and thus recommended retaining the provision.[44] The British Columbia Law Institute also

decided against reforming these provisions during its *Commercial Tenancy Act* project.[45]

[55] The working group decided against including this type of a provision in the *Uniform Commercial Tenancies Act* on the basis that it is rarely used and unnecessary.

[56] Preliminary Recommendation: The *Uniform Commercial Tenancies Act* should not contain a specific relief from forfeiture provision due to a breach of a covenant or condition to insure.

General Relief from Forfeiture Provisions

[57] This type of provision, giving the court jurisdiction to relive "against all penalties and forfeitures" was first enacted in 1886 in Ontario's *Judicature Act*. Similar provisions are found in every province and territory except Québec.[46]

[58] The working group noted that all of the common law provinces and territories have a general relief from forfeiture provision (or a more general provision regarding equitable remedies) in legislation pertaining to the jurisdiction of their courts. While these provisions may be applicable to commercial leasing disputes, they have a much broader application than the commercial leasing context and the working group determined it cannot make any recommendations regarding these types of provisions.

Specific Relief from Forfeiture Provisions

[59] These types of provisions setting out rules for relief from forfeiture or re-entry in the leasing context are based on the English *Conveyancing and Law of Property Act, 1881*. Saskatchewan,[47] Manitoba,[48] Ontario,[49] New Brunswick,[50] Prince Edward Island,[51] the Yukon,[52] the Northwest Territories,[53] and Nunavut[54] all have these types of provisions, and they are substantially similar.

[60] The British Columbia Law Institute did not recommend that British Columbia add similar provisions in its proposed *Commercial Tenancy Act*. Instead, they proposed a new section stating:

9. A tenant has the right to seek relief from forfeiture under the *Law and Equity Act* irrespective of the character of the breach on which the forfeiture is based and despite:

a) the landlord's exercise of a right of re-entry under a provision implied by section 7(1)(e) [*provisions implied in leases*] or of a similar right given by the lease, or
b) the landlord's election to treat the lease as terminated under section 5(2) [*application of contractual rules to leases*].

The Institute commented that this section would not change the law on relief from forfeiture, but instead it confirms the tenant's right to seek relief under already existing provisions.[55]

[61] The working group discussed whether the *Uniform Commercial Tenancies Act* should contain specific relief from forfeiture provisions, similar to those found in several jurisdictions in Canada. The working group agreed that the *Uniform Commercial Tenancies Act* should not contain these types of provisions as these types of provisions are essentially a codification of the common law principles relating to the equitable remedy of relief from forfeiture and thus they are unnecessary. Further, codifying these principles may limit the remedies that a tenant may otherwise be entitled to under the common law.

[62] Preliminary Recommendation: The *Uniform Commercial Tenancies Act* should not contain specific provisions regarding relief from forfeiture in the commercial leasing context

Court's Jurisdiction to Grant Relief from Forfeiture Affirmed in Dispute Resolution Section

[63] The working group discussed including a provision in the dispute resolution section of the *Uniform Commercial Tenancies Act* affirming the court's jurisdiction to grant relief from forfeiture. In recognition of the fact that there is not a distinction between equitable and other remedies in Québec, a potential solution would be to include a provision stating that the court can grant relief from forfeiture, and then have a subsection of that provision referring to the specific provisions of the *Civil Code* that are similar in principle to relief from forfeiture.

[64] The working group discussed whether the *Uniform Commercial Tenancies Act* should set out specific situations where relief from forfeiture might be granted. The advantage of setting out specific situations is that tenants (and landlords) would be able to have some understanding based on a reading of the legislation whether they might have a chance of a successful claim for relief from forfeiture. The disadvantages of this approach include: it may be difficult to set out all of the scenarios where relief from forfeiture may potentially be available; it may limit the common law development of the equitable remedy in relation to commercial leasing; and it may create confusion as to whether the statute is amending or simply restating the common law.

[65] Consultation Question: Should the dispute resolution provisions in the *Uniform Commercial Tenancies Act* affirm the court's jurisdiction to grant relief from forfeiture to either the landlord or the tenant?

[66] Consultation Question: Should the *Uniform Commercial Tenancies Act* set out specific situations where relief from forfeiture could be granted?

---

[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) [OLRC Report]; Law Reform Commission of British Columbia, *Distress for Rent* (LRC 53)(Vancouver: The Commission, 1981) and *Report on the Commercial Tenancy Act* (LRC 108) (Vancouver: The Commission, 1989) [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] Christopher Bentley, John McNair & Mavis Butkus, eds., *Williams & Rhodes Canadian Law of Landlord and Tenant*, looseleaf 6th ed., vol. 2 (Toronto: Carswell, 1988) at 13:7.

[10] Sections 18 – 24 of the *Commercial Tenancy Act*, RSBC 1996, c 57; ss. 50 – 52 of *The Landlord and Tenant Act*, RSS 1978, c L-6; ss. 67 – 72 of *The Landlord and Tenant Act*, CCSM c L70; ss. 74-76 of the *Commercial Tenancies Act*, RSO 1990, c L7, ss. 78 – 79 of the *Landlord and Tenant Act*, RSPEI 1998, c L-4; ss. 61 – 66 of the *Landlord and Tenant Act*, RSNB 1973, c L-1; ss. 3 – 9 of the *Overholding Tenants Act*, RSNS 1989, c 329; s. 33 of the *Commercial Tenancies Act*, RSNWT 1988, c C-10; s. 45 of the *Commercial Landlord and Tenant Act*, RSY 2002, c 131; ss. 32 – 40 of the *Commercial Tenancies Act*, RSNWT (Nu) 1988, c C-10.

[11] Ontario, PEI and Nova Scotia do not require the landlord to make a written demand for possession.

[12] The legislation in Manitoba, British Columbia, PEI, New Brunswick, the North West Territories and the Yukon explicitly sets out what material must be provided to the Court in this initial application step.

[13] LRCBC Report, *supra* note 6 at 91-94.

[14] Victoria Gray & Robert D. Holmes, *Comments upon the Law Reform Commission of British Columbia Working Paper No. 61 on the Commercial Tenancy Act Prepared for the Real Property Subsection of the BC Branch of the Canadian Bar Association* (Vancouver: Canadian Bar Association (BC Branch), 1988) at 9-10.

[15] BCLI Report, *supra* note 1 at 89.

[16] *Ibid* at 89 – 90.

[17] *Ibid* at 91.

[18] *Ibid* at 92.

[19] OLRC Report, *supra* note 6 at 190.

[20] Section 62 of the *Landlord and Tenant Act*, RSNB 1973, c L-1.

[21] Section 9 of the *Overholding Tenants Act*, RSNS 1989, c 329.

[22] These orders are set out as follows in OLRC Report, *supra* note 6 at 176:

a) In favour of the landlord:
   i. An order declaring that the tenancy agreement is terminated;
   ii. An order directing that a writ of possession issue;
   iii. Judgment for any arrears of rent, compensation for use and occupation…and damages for breach by the tenant or an express or implied covenant or term of the tenancy agreement; and
   iv. An order that the tenant refrain from the continuation or repetition of any act or acts found to constitute a breach of an express or implied covenant or term of the tenancy agreement.

b) In favour of the tenant:
   i. An order declaring the tenancy agreement to be in force;
   ii. Judgment for damages for breach by the landlord of an express or implied covenant or term of the tenancy agreement, which can be set off against any amount found due to the landlord under subclause (a)(iii);
   iii. Judgment for any surplus by which the amount found due to the tenant exceeds the amount found due to the landlord;
   iv. An order that the landlord refrain from the continuation or repetition of any act or acts found to constitute a breach of an express or implied covenant or term of the tenancy agreement; and

v. An order forever staying the proceedings under this section, or an order relieving the tenant from forfeiture or from termination of the tenancy agreement upon a breach of covenant or term.

[23] LRCBC Report, *supra* note 6 at 91.

[24] Sections 15 and16 of the *Commercial Tenancy Act*, RSBC 1996, c 57; ss. 52 and 53 of *The Landlord and Tenant Act*, CCSM c L70; ss. 58 and 59 of the *Commercial Tenancies Act*, RSO 1990, c L7; s. 56 of the *Landlord and Tenant Act*, RSNB 1973, c L-1; ss. 76 and 77 of the *Landlord and Tenant Act*, RSPEI 1998; s. 31 of the *Commercial Tenancies Act*, RSNWT 1988, c C-10; ss. 42 and 43 of the *Commercial Landlord and Tenant Act*, RSY 2002, c 131; ss. 31 and 32 of the *Commercial Tenancies Act*, RSNWT (Nu) 1988, c C-10.

[25] Christopher Bentley, John McNair & Mavis Butkus, eds., *Williams & Rhodes Canadian Law of Landlord and Tenant*, looseleaf 6th ed., vol. 2 (Toronto: Carswell, 1988) at 13-39.

[26] *Ibid* at 13-40.

[27] BCLI Report *supra* note 1 at 68.

[28] *Ibid.*, at 69 - 70.

[29] *Ibid.*, at 69.

[30] *Ibid.*

[31] *Consultation Paper on Proposals for a New Commercial Tenancy Act* (BCLI, 2008) (Vancouver, the BCLI: 2008) at 107 [BCLI Consultation Paper].

[32] OLRC Report *supra* note 6 at 336.

[33] As explained by the Law Reform Commission of British Columbia in the LRCBC Report, *supra* note 6 at 73-704, only breaches of certain terms will result in forfeiture:

> When a tenant breaches a provision of a lease he may forfeit his right to the tenancy and give the landlord a right of re-entry. This will not occur on the breach of any provision. The landlord will have a right of re-entry in only three cases: where the provision that is breached is a condition; where a right of re-entry is clearly attached to a provision; and where a right of re-entry is conferred by statute.

[34] Darrell M. Gold & Robert Choi, "Forfeiture of the Lease - Understanding the Remedy and the Tenant's Right to Relief" at 327 in *Tenant's Rights and Remedies in a Commercial Lease: A Practical Guide*, 2nd ed. (Toronto: Canada Law Book, 2016).

[35] *Ibid.*

[36] *Place Fleur de Lys c Tag's Kiosque Inc.*, [1995] RJQ 1659 (QB CA).

[37] *90515909 Quebec Inc. c 90678665 Quebec Inc.*, [2003] RDI 225, 228 (QBCA).

[38] *Houle v Canadian National Bank*, [1990] 3 SCR 122.

[39] (UK) 22 & 23 Vict., c 35, ss 4-6.

[40] Sections 26 – 28 of the *Law and Equity Act*, RSBC 1996, c 253.

[41] Section 49 of *The Queen's Bench Act, 1998*, SS 1988, c Q-10.

[42] Section 77 of the *Law of Property Act*, RSA 2000, c L-7.

[43] Sections 29 – 34 of the *Property Act*, RSNB 1973, c P-19.

[44] LRCBC Report, *supra* note 6 at 77.

[45] BCLI Consultation Paper, *supra* note 31 at 112.

[46] Section 24 of the *Law and Equity Act*, RSBC 1996, c 253; s. 10 of the *Judicature Act*, RSA 2000, c J-2; s. 13 of *The Queen's Bench Act, 1988*, SS 1988, c Q-10; s. 35 of the *Court of Queen's Bench Act*, CCSM, c L 70; s. 98 of the *Courts of Justice Act*, RSO 1990, c C.43; s. 26(3) of the *Judicature Act*, RSNB 1973, c J-2; s. 31 of the *Supreme Court Act*, RSPEI 1988, c S-10; ss. 91-93 of the *Judicature Act*, RSNL 1990, c J-4, s. 41 of the *Judicature Act*, RSNS 1989 c 240; s. 13 of the *Judicature Act*, RSY 2002, c 128; s. 28 of the *Judicature Act*, RSNWT 1988, c J-1; s. 26 of the *Judicature Act*, SNWT (Nu) 1998, c 34 s 1.

[47] Section 10 of *The Landlord and Tenant Act*, RSS 1978, c L-6.

[48] Section 19 of *The Landlord and Tenant Act*, CCSM c L 70.

[49] Section 20 of the *Commercial Tenancies Act*, RSO 1990, c L-7.

[50] Section 14 of the *Landlord and Tenant Act*, RSNB 1973, c L-1.

[51] Section 15 of the *Landlord and Tenant Act*, RSPEI 1998, c L-4.
[52] Section 57 of the *Landlord and Tenant Act*, RSY 2002, c 131.
[53] Section 45 of the *Commercial Tenancies Act*, RSNWT 1988, c C-10.
[54] Section 45 of the *Commercial Tenancies Act*, RSNW (Nu) 1988, c C-10.
[55] BCLI Report, *supra* note 1 at 58.