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

UNIFORM COMMERCIAL TENANCIES ACT -

REPORT OF THE WORKING GROUP (2017)

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1. Introduction

1.1 Background

[1] Commercial tenancies law in Canada is fragmented, outdated, and, in some respects, obsolete.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 However, much of it was copied from 18th and 19th Century English legislation and was originally enacted over 100 years ago or was patterned on statutes enacted at that time.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.

[2] The statutory measures that exist are often scattered among various enactments. In some jurisdictions, the right of distress[1] and the rights of landlords in bankruptcy of tenants[2] are contained in separate legislation. In some jurisdictions, aspects of leasing law are contained in land titles legislation,[3] and in others, in omnibus statutes.[4]

[3] 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, but also smaller landlords. Current commercial tenancy legislation is frequently so outdated as to be irrelevant, and is so scattered that it may be difficult to access.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.

[4] The Working Group has also concluded that a *Uniform Commercial Tenancies Act* (*UCTA*) 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.

[5] Several provincial law reform agencies have recommended ways to modernize aspects of commercial tenancies law.[5] However, no common law provincial legislature has enacted legislation that can be a modern precedent for reform.[6] 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.[7] 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.

[6] The overall context of the Working Group's work is important to keep in mind. Commercial leases cover a broad spectrum of relationships. Unlike residential tenancies, commercial tenancies involve relationships ranging from a large real estate investment trust leasing many floors to a national professional firm to the lease of a small shop in town by a small landlord. The

Working Group has been careful to consider the consequences of various proposed provisions so that they do not give rise to unintended consequences.

1.2 Project Status

[7] This report sets out the remainder of the Working Group's policy recommendations for the creation of a *Uniform Commercial Tenancies Act*. The Working Group has reviewed the first draft distress for rent provisions, and will continue to review the remaining draft provisions upon approval of the preliminary recommendations contained in this Progress Report by the ULCC.

1.3 Project Organization

[8] 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 presently composed of:

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

[9] The Working Group first met in May 2012 and has presented progress reports at the 2012-2016 Annual Meetings. Since the 2016 update, the Working Group has met monthly by conference call and discussed: re-entry; apportionment; acceleration clauses; *interesse termini*; the application of contractual principles to commercial leases; shopping centre provisions; and a summary dispute resolution procedure.

[10] 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 2016 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.

[11] Over the course of the past year, the Working Group also reviewed and provided comments on the first draft of the distress for rent provisions. The drafter has also provided a first draft of provisions incorporating the Working Group's recommendations in the first three progress reports. The Working Group will begin reviewing those provisions, and the revised distress for rent provisions in September 2017.

1.4 ULCC Working Group

[12] Members of the Working Group include practitioners, academics, and policy counsel form various provinces. Leah Howie, Director of Research at the Law Reform Commission of Saskatchewan chairs the Working Group.

[13] The Working Group reviews research carried out by the Chair of the Working Group. This research draws on research previously conducted by the British Columbia Law Institute for its 2009 *Report on Proposals for a New Commercial Tenancy Act.*[8] The Working Group also considers the decisions and reasoning of the BCLI Commercial Tenancy Act Reform Project Committee ("BCLI Committee").

1.5 Project Funding

[14] Research and administrative tasks are performed by the Law Reform Commission's Director of Research. The Law Reform Commission and the ULCC share the costs of report translation. Drafting services are provided by a legislative counsel at the British Columbia Ministry of Justice.

2. Policy Decisions

2.1 Re-entry

2.1.1 *Statutory Right of Re-entry*

[15] A landlord can enforce his or her right of possession in two ways: using the self-help remedy of re-entry and physically re-entering the premises, or by using legal proceedings and beginning an action in ejectment. At common law, re-entry is reserved for a breach of a condition and is typically not available for breach of a covenant, unless this is provided for in the lease or by statute. Most professionally drafted leases will provide that a breach of any condition or covenant by the tenant will give rise to a right of re-entry, referred to as a "proviso for re-entry".

[16] The majority of Canadian provinces and territories have legislation in place that gives the landlord a right of re-entry in specific circumstances, typically related to one of the following situations: arrears of rent, an ongoing breach of a covenant, failure to make repairs, and the keeping of a disorderly/bawdy house.[9] British Columbia does not have a statutory right or implied term of re-entry.

[17] Both the Law Reform Commission of British Columbia in 1989[10] and the British Columbia Law Institute in 2009 recommended the enactment of a provision creating a right of re-entry in certain circumstances.[11]

[18] The BCLI Committee proposed the following provision:

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

(d) if the tenant is in arrears of rent or has breached a material provision of the lease, the landlord may give the tenant notice in writing at the premises of the landlord's right to re-enter and resume possession of the premises as follows:

(i) 5 days' notice, if the tenant is in arrears of rent; or

(ii) 10 days' notice, if the tenant is in breach of any other material provision of the lease;

(e) if the tenant fails to cure a breach that is the subject of a notice under a provision implied by subsection (1)(d)(i) or fails to commence and diligently pursue curing a breach that is the subject of a notice under a provision implied by subsection (1)(d)(ii), the landlord may re-enter and resume possession of the premises;

(f) if the landlord exercises a right to re-enter and resume possession of the premises under a provision implied by subsection (1)(e), all rights of the tenant with respect to the premises, other than rights under section 9 [relief from forfeiture], are terminated;

[19] The Working Group preferred the term "breach of material consequence" to the term "breach of a material provision," because the former is more readily understood, and is used at common law, so reference can be made to case law. The majority of the Working Group agreed it would be easier to determine and advise when a breach of a material consequence had occurred as opposed to identifying which provisions of the lease constitute material provisions.

[20] The Working Group also discussed repetitive, less material breaches, and agreed that the *UCTA* should state that repetitive breaches of a minor nature can constitute a breach of material consequence. This type of a provision is contained in Article 1604 of the Quebec Civil Code. Article 1604 restricts the right to contract out of this provision, providing that parties may not terminate a contract in the case of a minor breach, notwithstanding any stipulation to the contrary.

[21] The Working Group decided to set two notice periods for breaches of material consequence and unpaid rent, based on the difference between these two breaches and what is required to remedy them.

RECOMMENDATION 1

The *UCTA* should contain a statutory right of re-entry if: (1) the rent is in arrears, and (2) there has been a breach of material consequence. This provision should be able to be contracted out of by the parties to the lease agreement.

RECOMMENDATION 2

The *UCTA* should state that repetitive breaches of a minor nature can constitute a breach of material consequence.

RECOMMENDATION 3

The notice period for breaches of material consequences should be 15 days. If the tenant has not remedied the breach, or has not commenced and diligently pursued remedying the breach within this time period, the landlord may exercise the right of re-entry. The notice period for unpaid rent should be 5 days.

RECOMMENDATION 4

The *UCTA* should not contain a statutory right of re-entry if the tenant is keeping a "disorderly/bawdy house" since the meaning of this phrase may no longer be clear without a *Criminal Code* prohibition against the keeping of brothels, and as some of these activities may no longer be criminalized.

2.1.2 *Re-entry Procedural Requirements*

[22] The Working Group also discussed whether the *UCTA* should create a statutory procedure for re-entry, or impose any other type of procedural requirement on the exercise of the right of re-entry.

[23] The Working Group discussed creating a statutory procedure for, and requiring court supervision of, the re-entry. The Law Reform Commission of British Columbia[12] and the BCLI Committee[13] both recommended retaining the self-help nature of re-entry. However, the Ontario Law Reform Commission recommended that re-entry should no longer be a self-help remedy, due to the potential unfairness associated with re-entry. The Ontario Law Reform Commission recommended a summary court procedure be created for re-entry.[14]

[24] The Working Group agreed with the recommendations of the Law Reform Commission of British Columbia and the BCLI Committee and has decided against requiring a court order prior to re-entry, as retaining re-entry as a self-help remedy ensures it remains a cost effective and expedient remedy. The Working Group noted that requiring court supervision could lead to lengthy delays.

[25] The BCLI Committee proposed requiring a landlord to engage an enforcement officer to carry out the re-entry.[15] The Working Group discussed requiring a landlord to use a bailiff to conduct the re-entry if the tenant is occupying the leased premises, and agreed with the BCLI Committee's recommendation. The Working Group noted that employing a bailiff - an experienced third party – to deal with the tenant can reduce the potential for conflict during the re-entry and protect both landlords and tenants. The Working Group agreed that a bailiff should only be required where the tenant continues to occupy the leased premises at the time of re-entry.

RECOMMENDATION 5

The *UCTA* should not create a statutory court-supervised procedure for re-entry. Re-entry should remain a self-help remedy.

RECOMMENDATOIN 6

The *UCTA* should contain a provision requiring a landlord to retain the services of a bailiff to conduct the re-entry if the tenant has not ceased to occupy the premises at the time of re-entry.

2.2 Apportionment

2.2.1 Apportionment in Respect of Time

[26] Apportionment in respect of time occurs if at the time the rent is payable, the landlord or the tenant no longer hold an interest in the lease. Apportionment in respect of time can typically occur in one of four ways:

1. Due to the death of the tenant or the landlord;
2. Due to re-entry on the part of the landlord;
3. Due to surrender;
4. Due to an assignment or other transfer of interest.

[27] Historically, at common law, rent was not apportioned in respect of time, which meant that if "a tenant for life granted a lease for years, and died on any day not being rent day, the whole rent from the last rent day become lost, and the lessee retained the land without paying anything for it until the rent day."[16] Put another way,

> Under common law rules, "rent neither accrued due nor was payable except on the day on which it was reserved. …" This rule was especially troubling in earlier times, when agricultural leases set the standard for commercial leasing. These agricultural leases often required rent to be paid quarterly, or even annually. When rent was payable annually, for instance, a tenant could be in possession of the leased premises or one year less a day and, if an event occurred that terminated the lease, then, under the common law, the landlord would be entitled to nothing. Over time, this rule was seen as operating unfairly to give the tenant a windfall.[17]

[28] Legislation governing apportionment in respect of time arose as a solution to the injustices inherent in rental payments at the time. Legislation was first enacted in 1737[18] to manage apportionment in respect of time, but dealt only with situations involving death of the landlord or a tenant under a lease for life. In 1834,[19] the 1737 legislation was expanded to apply to additional leasing situations, where the "approach was to try to list the various types of payments that would be embraced by the legislation and to provide simply that 'they shall be apportioned.'"[20]

[29] Both the 1737 and 1834 legislation were replaced by the 1870 Act.[21] Under this legislation, rent payments and other periodical payments in the nature of income were viewed as accruing from day to day and were apportionable in respect of time.[22] The 1870 Act provides as follows:

> 2 All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Manitoba,[23] Ontario,[24] Nova Scotia,[25] Prince Edward Island,[26] Newfoundland & Labrador,[27] and New Brunswick[28] have re-enacted the 1870 legislation. Many of these provisions are found in broader apportionment legislation, as opposed to in commercial tenancies legislation. Saskatchewan, Alberta and the territories did not re-enact any of the English legislation. The British Columbia provisions[29] originate from the 1737 and 1834 legislation. The Australian states also based their apportionment legislation on the 1870 Act.[30]

[30] It should be noted that most commercial leases require rent to be paid in advance, and therefore apportionment of rent is not a frequently litigated issue.

[31] The Law Reform Commissions of British Columbia and Ireland have both considered this issue. The Law Reform Commission of British Columbia recommended that British Columbia adopt provisions modelled from the 1870 legislation in its *Law and Equity Act*[31] and repeal the apportionment provisions in the *Commercial Tenancy Act*.[32] The Law Reform Commission of British Columbia model would thus be applicable to all types of periodic payments, and would provide a default position, which parties would be allowed to contract out of.[33]

[32] The model proposed by the Ireland Law Reform Commission applies only to rent, and also follows the model of the 1870 Act. This model also allows the parties to contract out of the default provisions. The Ireland model expressly does not apply to advance payments of rent.[34]

[33] The BCLI Committee chose not to adopt either model, instead recommending that the apportionment provisions in the *Commercial Tenancy Act* be removed and re-enacted in the *Law and Equity Act*, and that apportionment in respect of time should be considered in its own law reform project, due to the potential impact on areas of law outside of commercial leasing.[35]

[34] The Working Group agreed there was a need for an apportionment in respect of time provision in the *UCTA*, in order to consolidate the rules applicable to commercial tenancies.

[35] The Working Group discussed, at length, whether the apportionment provision should apply to advance payments. Some Working Group members felt it would be unjust to allow only rent to be apportioned for non-advance payment rental agreements, particularly in situations where a lease is terminated for valid reasons and rent has been paid in advance. In this type of situation, there would not be a claim for damages, and thus the advance payment of rent would not be addressed in the assessment of damages. One suggested solution would be to draft the apportionment provision to stipulate that if rent is paid in advance on a monthly basis, there is no apportionment, but if rent is paid in advance in terms longer than a month, there should be apportionment.

[36] However, some members of the Working Group suggested that allowing apportionment to apply to advance payments may complicate this area, and that apportionment ought not to be used to give a tenant an effective right to terminate a lease early. These members suggested that

claims regarding advance rent payments where the lease is subsequently terminated by either party could be dealt with by a court application for damages or unjust enrichment.

RECOMMENDATION 7

The *UCTA* should contain an apportionment in respect of time provision, using the Ireland Law Reform Commission's model provision as a template. The parties should be able to contract out of this provision.

CONSULTATION QUESTION 1

Should the apportionment in respect of time provision apply to advance payments?

2.2.2 Apportionment in Respect of Estate

[37] Apportionment in respect of estate occurs where the landlord or the tenant assigns only part of their estate or interest. Apportionment in respect of estate is not covered by statute and therefore is still governed by the common law.

[38] As stated in *Williams & Rhodes,*"[a]pportionment of rent by the common law takes place either by act of law or by act of the parties".[36] Apportionment of rent by act of law takes place at the death of the lessor "where lands demised at an entire rent become divided among different persons … [and] upon a demise of several parts of a reversion to several devisees, they can each bring debt for their respective portions of the rent".[37] Apportionment by act of the parties can occur when the tenant is evicted from, forfeits possession or surrenders possession of part of the leased premises. In this situation the common law dictates the tenant is responsible to pay only the apportioned rent to the value of the interest that the tenant retains in the premises.

> When the lessee surrenders part of the land to the lessor, the rent for the remainder is apportioned. It would seem that the rent should be apportioned, not according to the quantity, but according to the value of each part as improved by buildings etc.; and at the value at the time the severance takes place and not at the date of the granting of the lease.[38]

[39] The Law Reform Commission of Ireland recommended enacting legislation to provide a default position in relation to apportionment in respect of estate.[39]

[40] The BCLI Committee did not propose a provision addressing apportionment in respect of estate, on the basis that:

> In the committee's view, this legislation is not needed. In those rare cases where the common law is called upon, it is performing adequately. Any advantages to be gained by restating the common law should be weighed against the general tenor of the committee's

> proposals, which tend to be remedial in nature and not directed at creating a complete code for commercial leasing law.[40]

[41] The Working Group agreed with the comments of the BCLI Committee, noting that this issue arises infrequently, and that the common law is sufficient to address this issue

RECOMMENDATION 8
The *UCTA* should not contain a provision addressing apportionment in respect of estate.

2.3 Acceleration Clauses

[42] Acceleration clauses are provisions which provide that future rent is payable on the occurrence of a certain event, such as insolvency or a failure to pay rent. Accelerated rent provisions (for 3 months of rent) in the event of default are common in commercial lease agreements.

[43] Several Canadian common law jurisdictions prohibit acceleration clauses in residential leases.[41] Accelerated rent clauses in residential leases are also prohibited in Quebec.[42]

[44] Most Canadian common law jurisdictions allow for claims of up to 3 months of accelerated rent to be included in the claim of the landlord as a general creditor in the event of a tenant's bankruptcy.[43] Article 1504 of the Quebec Civil Code provides that acceleration may occur where a debtor "becomes insolvent, is declared bankrupt, or by his own act or omission and without the consent of the creditor, reduces the security he has given to him."

[45] British Columbia's *Law and Equity Act*[44] gives courts jurisdiction to relieve against acceleration provisions in mortgage agreements and agreements for sale of land. Several other jurisdictions have provisions allowing a mortgagor in default (or breach of a covenant) or a purchaser in default of payment or in breach of a covenant under an agreement of sale of land to avoid accelerated payment provisions by performing the covenant or paying the arrears that are in default.

[46] Both the BCLI Committee and the Law Reform Commission of British Columbia recommended that s. 25 of British Columbia's *Law and Equity Act* - which gives the courts jurisdiction to relieve against acceleration in mortgages and agreements for sale of land - be amended to include commercial leases. The Law Reform Commission of British Columbia made the following observations about acceleration clauses:

> Should the law provide the tenant some form of relief against the operation of an acceleration clause? On one view, the answer is no. It might be argued that the availability of relief would only encourage default by tenants - the landlord needs the threat of acceleration to stimulate the prompt payment of rent. On the other hand, acceleration can operate harshly. The tenant's default may be a relatively minor one and he may be able to remedy it before any serious inconvenience to the landlord has occurred. It seems unfair not to allow him to do so and some general power to relieve the tenant from the effect of the acceleration would appear to be desirable.[45]

[47] The Law Reform Commission of British Columbia believed abuse of the acceleration clause would be minimized by supervision of the courts. The BCLI Committee reached a similar conclusion, stating:

> The concern raised by acceleration clauses involves cases outside the scope of the current law on future rent. A defaulting tenant could remain in possession of the leased premises and face the "full rigor" of an acceleration clause. The LEA [*Law and Equity Act*] contains a section that grants the court a wide-ranging jurisdiction to relieve against penalties and forfeitures, but a decision of the Court of Appeal has held that this section does not apply to acceleration provisions. Shortly after this decision was rendered, section 25 was enacted, specifically to deal with acceleration provisions. But section 25 is limited in scope; it only applies to mortgages and agreements for sale of land. The courts have held that section 25 cannot be extended to cover other types of agreements, and that acceleration provisions in those agreements cannot be relieved against under section 24. In the committee's view, the protection afforded by section 25 of the LEA should be extended to commercial leases. As the LRCBC Report pointed out "[t]his provision, essentially, creates a right of reinstatement. . . The supervision of the court should minimize or eliminate abuse. The tenant who is chronically in default is unlikely to get a sympathetic hearing.[46]

[48] The BCLI Committee did not recommend that acceleration clauses in commercial leases be prohibited.

[49] The Working Group discussed two potential options for the *UCTA*: (1) a provision prohibiting acceleration clauses; and (2) a provision granting the courts jurisdiction to provide relief from acceleration clauses.

2.3.1 Prohibition

[50] While the Working Group noted that it could potentially be suggested that acceleration clauses are a type of unenforceable penalty clause, the Working Group was aware of recent cases from Alberta and Ontario wherein the courts have held that the application of acceleration clauses in commercial leases is not necessarily a penalty.[47] Further, the Working Group noted that the existence of an accelerated rent clause in a commercial lease creates an incentive for tenants to pay rent in a timely manner, and that prohibiting acceleration clauses would be a substantial change in the law of commercial leasing.

[51] In addition, the Working Group noted that a prohibition on acceleration clauses would limit the landlord's potential recovery if the tenant enters into bankruptcy. Section 136(1) of the *Bankruptcy and Insolvency Act*[48] sets out the priority of claims, and section 136(1)(f) provides as follows:

> (f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy <u>if entitled to accelerated rent under the lease</u>, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any

payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

RECOMMENDATION 9

The *UCTA* should not prohibit accelerated rent clauses in commercial leases.

2.3.2 Relief

[52] The Working Group agreed that the *UCTA* should contain a provision allowing a court to grant relief from an acceleration clause, given that acceleration clauses could in some cases provide for accelerated rent for longer than 3 months (this is likely to be a rare occurrence, as most landlords view acceleration clauses as a bankruptcy related issue). The Working Group agreed that the term "relief from penalty" should be incorporated into the provision in order to clarify that the relief provision does not affect bankruptcy, and to signal to the courts when relief should be granted, recognizing that acceleration clauses are not necessarily penal.

RECOMMENDATION 10

The *UCTA* should contain a provision that gives the courts jurisdiction to provide relief from penalty from the application of an acceleration clause.

2.3.3 Unsophisticated Lease Agreements

[53] In light of its conversation on the importance of acceleration clauses to establishing a priority for the landlord in the event of the tenant's bankruptcy, the Working Group discussed the impacts of this on unsophisticated lease agreements. In the Working Group's view, it appears unjust that only landlords with an accelerated rent clause in their lease would be able to establish a priority claim, however the Working Group noted that the *UCTA* cannot amend the federal *Bankruptcy and Insolvency Act*.

RECOMMENDATION 11

The implied terms portion of the *UCTA* should contain a provision that implies a term into all commercial leases stating that leases are deemed to have an accelerated rent provision providing for the payment of 3 months of rent upon default.

2.4 *Interesse termini*

[54] At common law, when a landlord and tenant enter into a lease, the tenant has only an *interesse termini* (or interest of a term) until the tenant physically enters the premises.[49] An interest of a term as opposed to an interest in estate has consequences for the tenant; there are

limited remedies available to a tenant that is prevented from taking possession of the premises by a third party or the landlord, the tenant cannot enforce any covenant that requires the tenant to be in possession of the premises, and the tenant cannot maintain an action for trespass or for use and occupation,[50] because these causes of action require the tenant to have entered into possession.[51]

[55] If the tenant is prevented from taking possession by the landlord, the tenant could sue for damages or for specific performance of the lease,[52] in which case the measure of damages would be: "the difference between the rent to be paid and the actual value of the premises at the time of the breach for the unexpired term."[53] However, there would not be any "recovery of prospective loss of profits from a business to be carried on upon the premises; nor is the landlord to be treated as trustee of the premises and so accountable for any increased rental he obtains by re-letting."[54]

[56] The doctrine of *interesse termini* has been abolished for residential tenancies in British Columbia,[55] Alberta,[56] Saskatchewan,[57] Manitoba,[58] Ontario,[59] New Brunswick,[60] Prince Edward Island, Newfoundland and Labrador,[61] Yukon,[62] the Northwest Territories,[63] and Nunavut.[64]

[57] The doctrine of *interesse termini* has been abolished in respect of commercial leasing in Alberta.[65] Australia,[66] England,[67] and New Zealand[68] have also abolished the doctrine. While the doctrine has not been legislatively abolished in the United States, there have been several court decisions allowing tenants who have not yet taken possession to bring an action for breach of the covenant of quiet enjoyment, which essentially eliminates any issues caused by the doctrine of *interesse termini* for the tenant.[69]

[58] The Ontario Law Reform Commission has recommended abolishing the doctrine, for the reason that tenants should have the same rights before taking possession as after taking possession.[70] The Manitoba Law Reform Commission has also recommended abolishing *interesse termini* for commercial tenancies, stating:

> The effect of abolition would be that a grant of a lease for a term to commence immediately or from a future date would vest in the tenant an estate in the land to take effect from the date fixed for the commencement of the term without actual entry by the tenant. After the date for commencement of the term, the tenant would be able to maintain an action for trespass or an action for a breach of the covenant without the necessity for entry. In addition, a tenant would be able to sue a landlord not only for damages but also for possession.[71]

[59] The British Columbia Law Reform Commission also recommended the doctrine of *interesse termini* be abolished.[72]

[60] However, the Real Property Section of the Canadian Bar Association (BC Branch) disagreed with the LRCBC's recommendation to abolish the doctrine, stating "the proposals concerning *interesse termini* go too far…simply providing that a tenant can seek specific performance of a tenant agreement should suffice." In addition, the Section argued that the proposal "reverted to bygone thinking of the uniqueness of land" and suggested that "in many instances, and especially amongst commercial entities, damages for non-delivery of possession of leased premises would be a wholly adequate remedy."[73]

[61] The BCLI Committee reached the same conclusion as these three law reform commissions, stating "*interesse termini* should be abolished…[it] is out of step with contemporary real estate practices. Abolishing it may provide some protection to tenants, who could be caught off guard by this very old legal rule."[74] Further, in the BCLI Committee's view, "the theory underlying this doctrine, which rests on the importance of actual possession of land, has been overtaken."[75]

[62] The Working Group agreed with the reasoning of the three law reform commissions and the BCLI Committee, and decided that the doctrine of *interesse termini* should be abolished with respect to commercial tenancies. In addition, the Working Group is of the view that additional wording should be added to the *UCTA* to make it clear that the tenant has the same remedies prior to possession as it would have had upon taking possession.

RECOMMENDATION 12
The *UCTA* should contain a provision abolishing the doctrine of *interesse termini* and stating that the tenant has the full range of remedies available to it prior to taking possession as it would have from the date of possession.

2.5 Application of Contractual Principles

[63] Commercial leases contain features of both property law and contract law. Generally, commercial leases have been dealt with in terms of property law principles and statutory reform has generally reinforced the property law principles behind these leases. In contrast, residential leases have experienced more statutory reform and evolved into "regulated contract[s]".[76]

[64] The case of *Highway Properties Ltd. v Kelly, Douglas & Co. Ltd.*[77] presented a change to the traditional property law view of commercial leases, although it has been noted "the revolution [the case] … seemed to promise has not yet appeared."[78] The Supreme Court of Canada held in *Highway Properties:*

> It is no longer sensible to pretend that a commercial lease, such as the one before this court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land …

[65] Cases dealing with commercial leases have been described as falling into one of five categories:

1. A leasehold interest is conveyance in the classical … sense, totally distinct from contractual doctrines …;
2. A lease is a conveyance in the traditional sense, subject to the addition of *one* "contractual" remedy that permits the landlord to accept the tenant's repudiation of the lease and … to sue the tenant for damages suffered as a result;
3. A lease is a conveyance, but the landlord can employ the full arsenal of contractual remedies to enforce its terms, either;

a. In addition to the traditional remedies for enforcement of a lease; or
b. In substitution for the traditional remedies.

4. A lease is a conveyance in the sense that it operates to create an interest in land, but is subject to all principle of contractual law, insofar as those contractual principles do not conflict with the basic interest in land; or
5. A lease is purely a contract.[79]

Most Canadian cases decided before and after *Highway Properties* fit into category (3), whereas the *Highway Properties* decision itself fits into category (4).

[66] The Working Group discussed incorporating several contractual principles into the *UCTA*.

2.5.1 Statutory Declaration of the Contractual Basis for the Landlord-Tenant Relationship

[67] Section 3 of Ontario's *Commercial Tenancies Act* contains the following statement of the relationship between a landlord and a tenant:

> The relation of landlord and tenant does not depend on tenure, and a reversion in the lessor is not necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation; nor is it necessary, in order to give a landlord the right of distress, that there is an agreement for that purpose between the parties.

This provision is unique to Ontario, and is based on a similar provision still in force in Ireland's *Deasy's Act*:

> The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent.

Essentially, these provisions remove the requirement that a person hold a reversionary interest in the land in order to grant a lease, and using an expansive interpretation, could be argued to render the relationship between a landlord and tenant purely contractual.

[68] The Law Reform Commission of Ireland has stated that this section of *Deasy's Act* contains "apparently revolutionary language." However, in the 1896 decision in *Harpelle v Carroll*,[80] the Ontario High Court of Justice interpreted the Ontario provision modestly, stating:

> Now the section in question does not abolish the relation of landlord and tenant, and make the bargain by which one lets land to another a mere contract, but alters the manner of creating a long existing and well□known relation; it is hereafter not to be a matter depending on tenure or service, as it was under the feudal law, nor is it a reversion to be necessary to the relation, as it was under the statute *Quia Emptores*, but it is to be deemed to be founded on contract express or implied. It was always, I take it, necessary that in a certain sense the

> relation should be founded on contract, because there must have been an agreement express or implied by the tenant to hold, and as to the return to be made to the landlord; but it was also necessary that he under whom the tenant agreed to hold, should be either lord of the feud or owner of the reversion in order that the relation of landlord and tenant should be complete; and all that the section does is to render unnecessary hereafter the latter requisite, and to create the relation whenever, as it provides, there shall be an agreement to hold land from or under another "in consideration of any rent."

[69] Section 3 of Ontario's *Commercial Tenancy Act* has not been frequently referred to by Ontario courts. The next reported case referring to the provision is a 2002 decision by the Ontario Court in Appeal in *Goldman v 682980 Ontario Ltd*.[81] At trial, the appellant had unsuccessfully argued that s. 3 superseded the common law principle that a sublease that does not retain a reversion is actually an assignment, as the section states that a reversionary interest is not required to create the relationship of landlord and tenant. While the Ontario Court of Appeal reversed the decision of the trial judge on other grounds, the Court stated as follows at para 6:

> I would not be so dismissive of the legislative intent but do sidestep consideration of its application to the present facts…I leave resolution of any conflict between the statute and the common law for another day when the broader ramifications of altering the course of landlord and tenant law in Ontario alone can be adequately canvassed.

[70] The Law Reform Commission of Ireland[82] and the Ontario Law Reform Commission[83] have both recommended keeping an updated version of this provision in their landlord-tenant legislation, as the provision plays a small part in the evolution of commercial tenancy law from property to contractual principles.

[71] The hybrid nature of a commercial lease was arguably questioned to some degree by the British Columbia Court of Appeal in *Evergreen Building Ltd v IBI Leaseholds Ltd*.[84] In *Evergreen* the landlord wanted to evict the tenant with compensation in the middle of its term so that it could build a new property. The lease did not have a re-entry provision. The tenant obtained a permanent injunction against the landlord in Chambers, but the landlord successfully appealed. The decision was viewed by some as a "*Highways* Properties killer" that could propel commercial leasing law into the purely contractual sphere.[85] On the other hand, other commentators noted that *Evergreen* could create commercial problems by allowing landlords to terminate leases in good standing without lawful authority. Leave to the Supreme Court of Appeal was granted, however, the parties reached a resolution prior to the case being heard. *Evergreen* has not been followed in any reported cases in Canada

[72] The hybrid nature of commercial leases has, however, been affirmed in Ontario in cases such as *1465152 Ontario Ltd v Amexon Development Inc*.,[86] and *Re TNG Acquisition Inc*.[87] The facts in *Amexon* were nearly identical to the facts in *Evergreen*, however the Ontario Court of Appeal reached a different conclusion, dismissing an appeal from an award of an injunction.

[73] Some commentators have advocated for the "complete contractualization"[88] of a commercial lease, suggesting that doing so would reflect the modern realities of commercial leasing and meet the reasonable expectations of those in the commercial leasing sector.[89]

[74] In Quebec, leases are purely contractual, pursuant to Article 1851 of the Quebec Civil Code.

[75] The Working Group discussed whether the *UCTA* should contain a provision similar to s. 3 of Ontario's legislation (a reversion is not necessary to create a landlord and tenant relationship), or go even further and contain a more general provision stating that the relationship of landlord and tenant is founded on the contract between the parties and does not depend on tenure.

[76] The BCLI Committee recommended that neither type of a provision be included in BC's Commercial Tenancy Act:

> …it is not desirable for British Columbia. The broad interpretation would likely serve to take leases outside the land title system, which would create difficult transitional issues. The narrow interpretation addresses practical concerns that appear not to have arisen in British Columbia. It is preferable to address the application of contractual rules on an issue-by issue basis.[90]

The BCLI Committee's recommendation to not include legislative reforms to restate the landlord-tenant relationship on a purely contractual basis was supported by the majority of respondents to the consultation paper.[91]

[77] The BCLI Committee did, however, propose a provision affirming that contractual rules apply to leases. The proposed provision affirms that general contractual rules, and certain specific contractual rules (frustration, mitigation, and independence of covenants and fundamental breach), apply to commercial leases.[92]

[78] The Working Group agreed that neither a provision declaring that the relationship of landlord and tenant is founded on the contract between the parties and does not depend on tenure or a provision declaring that a reversion in the land is not necessary to create the relationship of landlord and tenant should be included in the *UCTA*. The Working Group was of the view that the "contractualization" of commercial leases can be dealt with by the courts on a case by case basis. Further, moving commercial leases away from a conveyance of a property interest solely into the realm of contract law would create potential problems around a tenant's security of tenure, and would mean that leases would no longer be registrable under land titles legislation. Finally, conceptualizing commercial leases as merely contracts, would have implications on other issues such as distress for rent and relief from forfeiture.

[79] The Working Group agreed that a provision confirming the hybrid nature (i.e. property/contract) of a commercial lease should be included in the *UCTA*. Such a provision would clarify the law, encourage the development of the common law and be consistent with the expectations of parties to a commercial lease. The Working Group noted that such a provision

will essentially be a codification of the Supreme Court decision in *Highway Properties*. The Working Group chose to include a provision confirming the dual nature of a lease as opposed to a provision affirming that contractual rules apply to commercial leases, in order to ensure the provision would not be interpreted to exclude the application of property law principles to commercial leases.

RECOMMENDATION 13
The *UCTA* should include a provision recognizing the hybrid nature of a lease.

2.5.2 Mitigation

[80] Traditionally, a landlord is not required to mitigate its losses in the event that a tenant abandons the premises. This is tied to viewing the lease as a conveyance, as opposed to a contract. Mitigation could, however, become an issue where a landlord affirms a lease and seeks to claim future rent from an abandoning tenant.

[81] *Highway Properties* was silent on the issue of mitigation, however, most subsequent cases in various jurisdictions have held landlords do not have a duty to mitigate where a tenant abandons the leased premises.[93] For instance, in *3709303 Manitoba Ltd v Maxer Ltd*,[94] the Court reviewed the case law and various commentaries on the issue of mitigation and concluded at para 35:

> … while the case law is not clear, the prevailing view is that if the landlord/tenant relationship survives, namely that the lease has not been terminated whether in fact or by operation of law, there is no duty to mitigate. However, if mitigation does occur it will be taken into account in the assessment of damages.

[82] A similar conclusion was recently reached in *7Marli Ltd v Pet Valu Canada Inc* by the Ontario Superior Court at para 27:[95]

> In the context of landlord and tenant law, the point of when, if at all, a landlord must accept a termination and mitigate, rarely arises because unlike the case at bar, most defaulting tenants have no financial means to pay accruing rent and so there is no advantage to the landlord in keeping the lease alive. The point, however, has arisen in some cases and the courts have consistently held that the landlord's choices are mutually exclusive and there is no duty to mitigate if the landlord chooses to keep the lease alive.

[83] Brock & Phillips reviewed the post-*Highway Properties* jurisprudence on mitigation and concluded:

> While *Highway Properties* effected a partial reform of the law relating to landlords' remedies in the face of tenant abandonment, it appears to have effectively done nothing in the related area of mitigation. Over the past three decades courts have alternatively assumed that there is such a duty; have believed that there was not such a duty but that there should be; have refused to say whether they are enunciating such a new doctrine; and have contented themselves with a conclusion that it does not matter, providing that mitigation has actually taken place. This uncertainty is in itself something that ought to

> be remedied combined with the fact that it does seem logical to give the landlord an obligation which ordinarily in the law corresponds to their new right….[96]

[84] The Law Reform Commission of British Columbia has recommended that landlords should have a duty to mitigate when making a claim for future rent when a tenant abandons the leased premises.[97] The reasoning behind this recommendation was that tenants who abandon their lease often do so because of financial problems so demanding future rent from a tenant in these circumstances, while allowing the landlord to keep their premises vacant, is unfair. In addition, the Commission noted the concern for economic waste, where there is an indirect negative impact on society when a landlord is permitted to have their premises sit vacant.[98]

[85] The Real Property Section of the Canadian Bar Association (BC Branch) was strongly opposed to the Law Reform Commission of British Columbia's proposal, arguing it gave tenants an unqualified right "unilaterally to terminate tenancy agreements."[99] The Section was of the view that the proposal would mischaracterize a claim in debt as a claim for damages (and no duty of mitigation arises in a debt action), and that it would be unfair to landlords.[100]

[86] The Ontario Law Reform Commission made similar recommendations to the Law Reform Commission of British Columbia:

> Section 92 of *The Landlord and Tenant Act,* which imposes an obligation upon the landlord to mitigate his damages in an abandonment of the premises by the tenant, should be made applicable to non-residential tenancies. The section … should be amended to give effect to the following requirements:
>
> (1) the existence of a right to prospective damages upon an abandonment of the premises by the tenant should be clarified;
> (2) "damages" should include a claim for prospective rent, whether the tenancy agreement is treated by the landlord as subsisting or he elects to bring it to an end; and
> (3) the obligation of a landlord to mitigate his damages should not be restricted to situations where a tenant has abandoned the rented premises, but should apply wherever a landlord has suffered damages as a result of a breach by the tenant of his obligations under a residential or non-residential tenancy agreement.[101]

[87] Some commentators have also suggested that a duty to mitigate should be imposed on landlords: "The failure to impose a duty to mitigate, in order to balance the benefits given to a landlord who may now sue for the whole benefit of the lease is strikingly inconsistent with the apparently general principle of treating the lease as contract and conveyance as enunciated in *Highway Properties*."[102]

[88] On the other hand, as was pointed out in *A Commercial Tenancy Handbook:*

> There are good reasons to support the view that a landlord ought not to be called upon to mitigate and entitled to insist on performance of the lease:
>
> 1. the parties made a bargain and the landlord should be entitled to rely upon the terms of the contract; and

2. it should not fall to the innocent party to act to reduce the consequence of the wrongdoer's breach.[103]

[89] The BCLI Committee recommended in its Consultation Paper that the law should be reformed to require landlords to mitigate their losses claimed as future rent, but that "this duty to mitigate should not extend so far as to require a landlord to lease the abandoned premises on terms that would undercut other similar premises owned by the landlord."[104] The responses to the BCLI's Committee Consultation Paper on the topic of mitigation were nearly equally divided.[105]

[90] In its subsequent Report on Proposals, the BCLI Committee tentatively recommended a subsection requiring a landlord to mitigate its losses if a tenant abandons and the landlord elects to affirm the lease and claim payment of rent. The BCLI Committee explained its reasoning as follows:

> Adopting this contractual rule will guard against the likelihood of economic waste resulting from abandoned premises standing empty. Further, it is worth noting that the onus of establishing mitigation in proceedings falls on the party in breach, which in cases covered by the proposed legislation would be the tenant. This onus is often characterized as being a particularly heavy one, because the courts are wary to reward a person who has breached a contract. Finally, the duty of a party to mitigate its losses has always been subject to a reasonableness requirement…
>
> These two elements of mitigation may not allay all concerns raised by the respondents to the consultation paper, but they do go a considerable distance in safeguarding against the overriding fear that making landlords subject to mitigation would expose them to undue prejudice.
>
> Since the doctrine of mitigation contains a reasonableness component, it was decided that a specific reference to landlords not being required to rent out the abandoned premises in favour of other premises (which was raised in the consultation paper) is not necessary.[106]

[91] The Working Group discussed whether the *UCTA* should contain a provision requiring landlords to mitigate when a tenant repudiates the lease and the landlord elects to affirm the lease. Members noted that as a practical manner, landlords will only typically elect to affirm the lease and sue annually for rent where the tenant has the resources to continue making payments. If the landlord has minimal chances of recovering rent from the abandoning tenant, in most cases the landlord will terminate the lease.

[92] The Working Group discussed the implications of requiring landlords to mitigate when a more powerful tenant has chosen to repudiate the lease, noting that in some situations (e.g. anchor tenants in shopping malls), abandoning the premises is often a commercial decision made by powerful tenants to ensure minimal competition if they chose to move their operations to a nearby location. The Working Group noted that in some cases, tenants are far more powerful than landlords, and imposing a duty to mitigate in these circumstances would be unfair to the landlord. In the Working Group's view, given the practical considerations mentioned in the

preceding paragraph, imposing a duty to mitigate in these circumstances, in many respects, only provides a benefit to a strong tenant.

RECOMMENDATION 14
The *UCTA* should not contain a provision requiring landlords to mitigate after electing to affirm the lease. Instead, the *UCTA* should include a provision stating that where a tenant has repudiated the lease, and the landlord has elected to affirm the lease, there is no duty on the landlord to mitigate.

RECOMMENDATION 15
Parties to a lease agreement should be able to contract out of this provision.

2.5.3 Frustration

[93] The doctrine of frustration arises when unanticipated circumstances occur after a contract is created, which makes performance of the contract impossible. When the frustrating event occurs, the parties are relieved of their duty to perform any future obligations.

[94] The doctrine of frustration was not traditionally applied to leases.[107] However, this position appears to be changing, and courts have begun applying the doctrine to commercial leases in some cases.[108]

[95] A professionally drafted lease will typically "specify the consequences of an unexpected event that occurs without either party's fault and that makes performance of the lease impossible".[109] Conversely, a lease that is not prepared by a professional is unlikely to identify the situation of what would occur, should the lease become impossible to perform.

[96] Several Canadian jurisdictions have enacted legislation that allows the doctrine of frustration to apply to residential leases[110] and British Columbia has enacted similar legislation for commercial leases.[111] Without legislation that specifically addresses the application of frustration to commercial leases, there exists uncertainty for both landlord and tenant.

[97] The Manitoba Law Reform Commission recommended that statutory reform should legislate that frustration can apply to leases, as this doctrine applies to other contracts. The MLRC commented: "In addition to the certainty which would result for commercial landlords and tenants whose leases do not address the issue of frustration, this approach would achieve uniformity between contract and commercial tenancy law."[112]

[98] The Ontario Law Reform Commission recommended that legislation relating to frustration:

> … should be amended to provide for the situation where the parties to a non-residential tenancy agreement have not agreed upon what provisions should govern in the event that, without the fault of the landlord or the tenant, destruction, damages or governmental action renders the premises wholly or

> partially unfit for the purposes of the tenant. In such cases the tenancy agreement should terminate, or the obligations of the tenant should be suspended or should abate, according to the following rules:
>
> (a) in the event of total destruction and if the premises are wholly unfit for occupancy, either the landlord or the tenant shall be entitled to terminate the tenancy agreement, in which event the rent shall cease, or, if neither should terminate, then the landlord shall re-build, and the rent shall abate in the meantime;
> (b) in the event of partial destruction of the premises and if the premises are wholly unfit for occupancy, then the landlord shall re-build, and the rent shall abate in the meantime; and
> (c) in the event of partial destruction and if the premises are capable of being partially used for the purposes for which they were rented, then the rent shall abate in the proportion that the part of the premises which is rendered unfit for occupancy bears to the entire premises and the landlord shall repair the damage with all reasonable speed.[113]

[99] British Columbia first enacted legislation in 1974,[114] which clarified the application of the *Frustrated Contract Act*[115] to leases. Section 30 of the current *Commercial Tenancy Act*[116] now applies the *Frustrated Contract Act* to commercial leases.

[100] The BCLI Committee recommended this section of the legislation be carried forward into new commercial tenancy legislation, because "although the doctrine of frustration is not commonly invoked, its availability is useful in preventing injustices."[117]

[101] The Working Group noted that including a doctrine of frustration provision in the *UCTA* would primarily be of benefit to unsophisticated parties, as most professionally drafted commercial leases will have frustration provisions.

RECOMMENDATION 16
The *UCTA* should contain a provision stating that the doctrine of frustration applies to commercial leases.

2.5.4 Independence of Covenants and Fundamental/Repudiatory Breach

[102] In a lease "[a] 'covenant' is a promise given by one of the parties to the lease to do or not do something … A 'condition' binds both parties and is often a qualification or a right or obligation."[118] Traditionally, at common law the covenants of a lease were independent from one another, which meant that breach of a covenant by one party to the lease did not relieve the other party from performing their covenants. Currently, breach of a covenant results in a penalty (e.g. termination of the lease), whereas breach of a condition can result in a party no longer being entitled to exercise a right (e.g. right to renew). Fundamental breach traditionally was not applicable to commercial leases.

[103] In general, "only if the breach is 'fundamental' may a landlord, or a tenant, treat the breach as entitling it to terminate the lease. To be fundamental a breach must deprive the innocent party of 'substantially the whole benefit of the contract'".[119] When the court finds a breach has been fundamental, the innocent party is permitted to walk away from the contract, free of any obligations under the contract, and will still have a claim for damages against the party who breached the contract.[120] The court will look at the following when determining whether a breach is fundamental:

1. the ratio of the party's obligation not performed to that party's obligations as a whole;
2. the seriousness of the breach to the innocent party;
3. the likelihood of repetition of such breach;
4. the seriousness of the consequences of the breach; and
5. the relationship of the part of the obligation performed to the whole obligation.[121]

[104] The use of the contractual principle of fundamental breach in commercial leasing has began to develop in the courts. Some examples of situations when the courts have applied fundamental breach to commercial leases include:

- Landlord's failure to respond to a tenant's request to sublease
- Landlord's breach of its covenant to allow the tenant peaceful enjoyment of its premises
- Landlord's failure to honour its tenant's right of first refusal option
- Landlord's breach of its tenant's restrictive covenant
- Landlord's failure to repair the tenant's premises
- Landlord's failure to heat the premises in the winter or cool the premises in the summer[122]

[105] Law reform organizations in Canada have recommended that legislation be enacted to declare that contractual principles apply to commercial leases.[123]

[106] The Working Group discussed whether the *UCTA* should contain a provision declaring that contractual principles will apply to a party's right to relief for breach of covenant and obligations to perform covenants under a commercial lease, and a provision allowing a party to elect to treat the lease as terminated upon a breach of a material provision after giving notice of the election. The Working Group noted that such a provision would essentially be a restatement of the law, and thus would provide a benefit for unsophisticated parties.

RECOMMENDATION 17

The *UCTA* should contain a provision declaring that contractual principles will apply to a party's right to relief for breach of covenant and obligations to perform covenants under a commercial lease, and a provision allowing a party to elect to treat the lease as terminated upon a breach of a material provision after giving notice of the election.

2.5.5 Rent Abatement or Diversion

[107] Providing for rent abatement or diversion would give a tenant an additional remedy upon a breach of a material covenant in the lease. Instead of the breach leading to a repudiation of the lease, the tenant could remain in possession of the leased premises and withhold rent payments.

[108] This issue has been examined by the Ontario, British Columbia and Manitoba Law Reform Commissions. The Ontario Law Reform Commission recommended that legislation be enacted to allow the tenant to withhold rent. The Law Reform Commission of British Columbia generally endorsed the Ontario Law Reform Commission's position, but suggested that the legislation should not include any suggestion that the tenant should in "appropriate" cases be able to withhold rent on a purely self-help basis.[124] The Manitoba Law Reform Commission generally agreed with the Ontario Law Reform Commission's proposal, but shared the same concern as the Law Reform Commission of British Columbia over potentially frivolous or unjustified rent diversion or abatement.[125]

[109] The BCLI Committee proposed the following provision:

> *6* (1) A tenant must not refuse to pay rent solely because the landlord has breached a provision of the lease
> (2) Subsection (1) does not affect the right of a tenant, if the right exists in circumstances other than those described in subsection (1),
> (a) to deduct from rent otherwise payable an amount in respect of a judgment in favour of the tenant against the landlord, or
> (b) to cease paying rent on electing to terminate the lease under subsection 5(2) [application of contractual rules to leases]
> (3) If a landlord breaches a material provision of a lease and the tenant does not wish to elect to terminate the lease under section 5(2) [application of contractual rules to leases], then the tenant may apply under Part 3 to the court for an order that the rent payable under the lease
> (a) be reduced
> (i) by an amount equal to the reduction in value of the premises to the tenant because of the breach or,
> (ii) by an amount sufficient to compensate the tenant for expenses incurred in repairing the breach, or
> (b) be diverted in whole or part to any person by or through whom the breach can be remedied.
> (4) Any order under subsection (3) may be made subject to any conditions that are fair and equitable in the circumstances.

[110] The Working Group discussed whether the *UCTA* should contain a provision allowing a tenant to apply to the court for rent abatement or diversion. Members noted that most professionally prepared commercial leases will contain a provision on rent abatement or diversion. The Group noted that in residential tenancies, typically a tenant must make a court application for rent abatement or diversion, and this prevents the remedy from being a self-help remedy. The Working Group members discussed whether the rent abatement or diversion should

be a self-help remedy, or whether the tenant should be required to obtain a court order prior to withholding rent payments. The Working Group discussed the BCLI provision with approval and noted that s. 6(2)(a) allows the tenant to withhold rent if they have an existing judgment against the landlord.

RECOMMENDATION 18
The *UCTA* should contain a provision similar to the BCLI Committee's proposed provision. Rent abatement or diversion should be a self-help remedy only when the tenant has already obtained judgment against the landlord. In all other circumstances, the tenant should be required to obtain a court order prior to withholding rent payments.

CONSULTATION QUESTION 2
Should the parties be able to contract out of this provision?

2.5.6 Enforceability of Covenants on Assignment

[111] Traditionally, an assignment of a lease retains the privity of contract but destroys the privity of estate between a landlord and tenant. This difference is relevant as the range of covenants that are enforceable is narrower by and against persons between whom there is only privity of estate, as opposed to both privity of estate and contract. The result of this is that enforceability of a lease after an assignment is subject to "a confusing web of statutory, common law and equitable rules."[126]

[112] The Law Reform Commission of British Columbia recommended enacting legislation to make lease covenants enforceable against an assignee of the tenant or of the landlord for the following reasons:

> Three important points can be made in support of such a change. The first is that its simplicity would make the law more easily intelligible to landlords and tenants and to their legal advisors. Second, if two parties arrive at an agreement as to the terms of a commercial tenancy, it is reasonable to presume that they consider those terms fair, and that each party is prepared to fulfill his or her obligations. There is no obvious reason why some of those obligations should cease to be enforceable, simply because the tenancy or the reversion has been assigned to the other party. Finally, such a reform measure is consistent with the broader evolution of the commercial tenancy from being a creature dominated by land-law, to one which incorporates a greater measure of modern contract law theory.[127]

[113] Both the Ontario[128] and Manitoba[129] Law Reform Commissions have made similar recommendations.

[114] The BCLI Committee proposed the following provision:

> 10 (1) In this section, "assignment" includes any disposition, whether consensual or by operation of law, but does not include

(a) the creation of a sublease, or
(b) an assignment made to secure the payment or performance of an obligation, so long as the assignee has not asserted rights associated with an estate in the premises to enforce the security;

(2) Subject to Part 5 [assignments in bankruptcy by the tenant], a person who takes an assignment of the interest of a landlord or a tenant has all the rights, and is subject to all the obligations, of the assignor arising under the lease.

(3) Subjection (2) applies to a right or obligation despite the fact that it
(a) does not touch, concern or have reference to the premises,
(b) become enforceable before the assignment, or
(c) relates to something not in existence at the time the lease was created.

(4) The parties to a lease may agree to modify, vary or exclude the application of subsection (2)

(5) Unless the parties otherwise agree, no assignor is relieved of liability for any breach of the lease, whether occurring before or after the assignment.

(6) If the interest of a landlord has been assigned, the tenant may continue to pay rent to the assignor until the landlord or the assignee gives the tenant notice in writing that the payment is to be made to the assignee.

[115] The Working Group discussed whether the *UCTA* should include a provision stating that a person who takes an assignment of the interest of a landlord or tenant should have all the rights, and is subject to all of the obligations, of the assignor arising under a commercial lease, unless the parties agree otherwise. Members of the Working Group noted that this issue often arises in insolvency situations and with respect to exclusivity issues, and that most sophisticated lease agreements will have assignment provisions. The Group agreed that a provision similar to the BCLI Committee's recommendation should be contained in the *UCTA*, as it will modernize and simplify the law, and provide a benefit to parties lacking a professionally prepared lease agreement.

RECOMMENDATION 19
The *UCTA* should provide that a person who takes an assignment of the interest of a landlord or tenant has all the rights, and is subject to all the obligations of the assignor arising under a commercial lease, unless the parties agree otherwise.

2.5.7 Future Rent

[116] Future rent arose as a result of the *Highway Properties* decision of the Supreme Court of Canada. In *Highway Properties*, the Court created a fourth remedy for a landlord when a tenant repudiates its lease: landlords can give notice to the tenant, terminate the lease, and claim

damages for breach of the lease, including for future losses. Justice Laskin stated as follows at p. 716 of the decision:

> The developed case law has recognized three mutually exclusive courses that a landlord may take where a tenant is in fundamental breach of the lease or has repudiated it entirely, as was the case here. He may do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force. Second, he may elect to terminate the lase, retaining of course the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of covenant. Third, he may advise the tenant that he proposes to re-let the property on the tenant's account and enter into possession on that basis. Counsel for the appellant, in effect, suggests a fourth alternative, namely that the landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term. One element of such damages would be, of course, the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period.

[117] Lower courts have broadly accepted the future rent principle set out in *Highway Properties*, however there has been some confusion in working on the details of future rent claims.[130]

[118] The Law Reform Commission of British Columbia suggested that commercial tenancies legislation should restate the law regarding future rent claims, in order to clarify a difficult and "fluid" area of the law.[131] The BCLRC proposed the following provision:

> Future rent
> 11 (1) Where a tenant ceases to occupy premises and the circumstances are such that the landlord is entitled to exercise a right to re-enter and repossess the premises, then, except as permitted by this section, no claim, however framed or pleaded, shall lie for
>
> (a) the value of rent in arrear at the time occupation ceased,
>
> (b) rent payable through the operation of an acceleration provision, or
>
> (c) damages or other compensation determined with reference to rent not in arrear at the time occupation ceased.
>
> (2) Subsection (1) applies whether or not the landlord
>
> (a) exercises the right to re-enter and repossess the premises, or
>
> (b) elects to affirm or to terminate the tenancy agreement
>
> (3) In the circumstances described in subsection (1) the landlord is entitled to compensation equivalent to the amount by which
>
> (a) the total, calculated without reference to the operation of an acceleration provision, of
>
> (i) the rent in arrear at the date of trial, and
>
> (ii) the present value of rent payable after the date of trial exceeds
>
> (b) the total of

> (i) to the extent that the premises have been re-rented, the present value of the rent paid or payable by the new tenant or tenants, and
> (ii) the present value (if any) of any portion of the premises which has not been re-rented for any part of the remaining term of the tenancy.

[119] The BCLI Committee, however, did not recommend that a new Commercial Tenancy Act should contain a restatement of the law governing claims for future rent, on the basis that the legislation required would be too complex.[132]

[120]] The Working Group discussed whether the *UCTA* should contain a restatement of the law governing a landlord's claim for future rent form a tenant who has abandoned the leased premises. While such a provision may help make the law more accessible and provide clarity, the Working Group members who practice in the area of commercial leasing indicated they have not experienced or seen much difficulty in this area, and suggested such a provision would not be necessary. The Working Group also agreed with the BCLI Committee's reasoning; including provisions restating the law on future rent would be too complex.

RECOMMENDATION 20

The *UCTA* should not contain any provisions restating the law on future rent.

2.5.8 Security of Tenure

[121] Security of tenure (or lack thereof) may become an issue if commercial leases are viewed as purely contractual. Brock & Phillips described this issue as follows:

> One of the principal incidents of the traditional property conceptualization of the lease is security of tenure for the tenant for the term of the lease. The tenant possesses an estate, and the landlord cannot recover that estate except on the happening of certain events, the most common of which is a forfeiture action for breach of condition. The landlord cannot simply "breach" the lease, recover possession, and pay damages. Indeed, the law has gone further to protect tenure: construing forfeiture clauses strictly, allowing for implied waiver of rights of forfeiture, and permitting tenants to apply for relief in appropriate circumstances, even where a condition has been breached. Security of tenure, of course, is only available because the law views the lease as an executed contract conveying an estate to the tenant.[133]

[122] Security of tenure was also an issue in *Evergreen.*[134] In *Evergreen* the British Columbia Court of Appeal substituted an interim injunction for the permanent injunction which had been granted to prevent a landlord from re-entering a leased building to demolish it. Part of the Court of Appeal's reasoning was based on the developing conception of the lease as a contract:

> [31] In this case, after reviewing the relevant law, the chambers judge appears to have been of the view that he had to choose between remedies related to the lease as a demise and remedies related to the lease as a contract. In effect, he treated these remedies as if they existed in water-tight compartments. He opted in favour of viewing the lease as a demise and concluded that because Evergreen had no right of re-entry it

> was unnecessary to discuss whether damages were an adequate remedy. He discounted Evergreen's attempt to use "'efficient breach" in aid of a remedy, noting that it would only apply, in any event, on a contractual view of the lease. (In my view, reference to this concept has served only to muddy the waters.) In the result, he declined to grant a declaration that damages, rather than specific performance, would be an effective remedy for the stipulated breach of the lease for, in his view, the question of damages never arose.
>
> [32] In my view, before determining the appropriate remedy, the chambers judge should have considered the equities between the parties, including any factors relating to the "uniqueness" of the property demised and the relative hardship, if any, of holding the landlord to the strict terms of the lease. There was an abundance of evidence before him in that regard. What he did instead was to reject damages out of hand and to impose injunctive relief tantamount to an award of specific performance. In adopting that approach, he erred.
>
> [33] Both injunctive relief and specific performance are equitable remedies. They are sufficiently linked in this case that the equities to be weighed would be similar for both. A consideration of the equities may, or may not, favour injunctive relief…

Leave to appeal to the Supreme Court of Canada was granted, however the parties settled their dispute prior to the case being heard.

[123] *Evergreen* has only been cited outside of BC in two provinces: Ontario and Alberta. In the Alberta decision of *Edmonton Flying Club v Edmonton Regional Airports Authority*, 2013 ABCA 91, it was listed among cases being cited as authority for the proposition that injunctions to compel "continuous" operations in a leasehold situation have largely been unsuccessful. In this case, the issue was an attempt to obtain an injunction to compel the appellants to keep an airport in operation.

[124] The Ontario Court of Appeal reached the opposite conclusion as the British Columbia Court of Appeal in *Evergreen* based on very similar facts in *1465152 Ontario Ltd v Amexon Development Inc*, 2015 ONCA 86. The landlord attempted to rely on *Evergreen*, but the Ontario Court of Appeal reached a different result, holding:

> [25] In the present case, the application judge turned his mind to the adequacy of an award of damages and then went on to observe, correctly, that "[i]njunctions remain a powerful arrow to preserve property rights and to restrain tortious misconduct." The Landlord sought to trespass by seeking to enter the leased premises without any authority, terminate the Lease and demolish the leased premises. Under those circumstances it fell within the discretion of the application judge to restrain the Landlord from committing such a trespass, and I see no error in his exercise of that discretion.
>
> [26] Second, the Landlord argues that the Tenant was seeking an injunction for an improper purpose, namely to enhance its bargaining position with the Landlord. Such a motivation, according to the Landlord, operated as a reason to deny granting an injunction. Certainly some courts have refused to grant an injunction where they have found that the request for injunctive relief was being used to force a hard bargain rather

than protecting the actual enjoyment of *bona fide* property rights: *Michael Santarsieri Inc. v. Unicity Mall Ltd.* (1999), 181 D.L.R. (4th) 136 (Man. C.A.), at para. 25 and *Denovan v. Lee* (1989), 65 D.L.R. (4th) 103 (B.C.C.A.), at p. 106. In the present case, however, the application judge made no such finding of improper purpose on the part of the Tenant and, by contrast, found that the Landlord had engaged in tortious misconduct.

[27] Finally, the Landlord submits that the permanent injunction constituted a disproportionate remedy in the circumstances, arguing that it was unreasonable to permit the Tenant to continue to occupy premises which amounted to less than three per cent of the building's total rental area when all other tenants had vacated the building. I would not accept that submission for two reasons. First, as pointed out in *Injunctions and Specific Performance*, at 4.590:

> Where there is a direct interference with the plaintiff's property constituting a trespass, the rule favoring injunctive relief is even stronger than in the nuisance cases. Especially where the trespass is deliberate and continuing, it is ordinarily difficult to justify the denial of a prohibitive injunction. A damages award in such circumstances amounts to an expropriation without legislative sanction … In trespass, there has been less concern than in nuisance with the problem of "extortion". Even if the plaintiff is merely holding out for the highest possible price, and suffers no out-of-pocket loss because of the trespass, the courts have awarded injunctions. Such orders may be said to vindicate the plaintiff's right to exploit the property for whatever it is worth to the defendant and prevent the defendant from circumventing the bargaining process. [Footnotes omitted.]

[28] In addition, the application judge balanced the parties' respective interests and tailored the scope of the injunction to that which was necessary to restrain the specific unlawful conduct of the Landlord – i.e. its intention to trespass onto the leased premises pursuant to the Notice to Vacate in order to terminate the tenancy…

[125] The BCLI Committee recommended that a new Commercial Tenancy Act should not contain provisions providing tenants with security of tenure, on the basis that:

> [I]t is premature to adopt legislation addressing this issue. The concept of security of tenure rests on keeping a tenant in place. The jurisprudence in relation to specific performance of contracts respecting land appears to be moving in the opposite direction. Not all tenants deserve the right to stay in place and it would be troublesome for the legislation to extend them this right.[135]

[126] The Working Group discussed whether the *UCTA* should contain a provision providing tenants with security of tenure. The Working Group noted that *Evergreen* has not been followed in other jurisdictions, and the courts should be able to determine on a case by case basis, whether tenants in particular circumstances are deserving of security of tenure. In addition, the Working Group noted that tenants have relief from forfeiture as a potential remedy available to them, and

a provision granting security of tenure is not necessary and would not be appropriate in each circumstance.

RECOMMENDATION 21

The *UCTA* should not contain a provision granting tenants security of tenure.

CONSULTATION QUESTION 3

Are there any additional contractual principles the Working Group should consider including in the *UCTA*?

2.6 Shopping Centre Leases

[127] Shopping centre leases can be distinguished from other commercial leases, due to the large quantity of retail tenants in one premises owned by a sole landlord. The Working Group discussed two issues specific to shopping centre leases: (1) issues faced when enforcing restrictive covenants in shopping centre leases and whether legislation on the topic would be useful, and (2) whether disputes between landlords and tenants in shopping centres relating to the landlord failing to fill vacancies should be covered within summary dispute resolution procedure.

2.6.1 Exclusive Use Clause and Restrictive Covenants in Shopping Centre Leases

[128] Conflicts can arise due to the distinct interests of the landlord and tenants in a shopping mall. For example, conflict can arise when the tenant wants the broadest scope of merchandise in an exclusive use clause and the landlord wants the narrowest scope in the clause, in order to avoid any overlap between other tenants in the shopping centre.[136] Some stores in a shopping centre may sell a variety of goods, making it increasingly difficult to negotiate the use clauses of various tenants:

> Today, in the context of commercial leases the most important and yet most contentious provisions in a shopping centre lease are those which limit or restrict a tenant's rights to operate a competing business within a designated area, and also, those which prohibit a landlord from leasing premises in a centre to a tenant in competition with an existing tenant's business operations in that centre. The clauses prohibiting the landlord's rights to lease the premises in favour of a particular tenant are sometimes referred to as "exclusives" and "exclusive rights clauses", referring to them in a positive way, or "restrictive covenants", referring to them in a negative way. The clauses limiting a tenant's right to operate a competing business are referred to as "radius clauses" or "non-competition clauses".[137]

[129] Since commercial leases are still treated as both a contract and a conveyance of property, parties to the lease are bound by privity of contract and privity of estate. Due to these rules, one

tenant cannot enforce a restrictive covenant against another tenant directly because there is no privity of contract and no privity of estate between them.

[130] To combat this matter the courts have been willing to imply the presence of "building schemes" or "communities of interest", which allows tenants to enforce restrictive covenants directly against one another without having privity of contract. If the requirements are not met for a community of interest, the courts will not use this doctrine to imply a restrictive covenant, so the only remedy available to the tenant will be for breach of the restrictive covenant against the landlord.[138] The issue has not been heavily litigated.

[131] This issue had not been considered by any law reform commissions prior to the BCLI's Working Group on the Commercial Tenancy Act. The BCLI Working Group recommended that the provincial commercial tenancies legislation not contain provisions that legislate on this area of law, as "these issues are best addressed by the evolution of the common law."[139]

[132] The Working Group discussed whether the *UCTA* should contain a provision permitting tenants in a shopping centre to directly enforce an exclusive use clause or restrictive covenant against another tenant in the shopping centre, regardless of the absence of contractual relationship between the tenants. The members agreed that the *UCTA* should not interfere in these types of situations, and that tenants should be able to rely on landlords to give them a use that is a permitted use. Further, the Working Group noted that some shopping centres are strata titled, in which case there is no landlord and restrictive use covenants are enforced in an entirely different manner. Including a provision such as this would be an unnecessary departure from the common law rules on privity of contract and privity of estate and their application to leases.

RECOMMENDATION 22

The *UCTA* should not contain a provision permitting a tenant in a shopping centre to directly enforce an exclusive use clause or restrictive covenant against another tenant in the shopping centre.

2.6.2 Dispute Resolution – Landlord Failing to Fill Vacancies

[133] A common problem encountered by tenants is where the landlord seeks to redevelop its premises:

> A landlord may decide, as a result of changing economic factors or the age of a development to simply demolish the entire development and build something new. If a landlord has not anticipated this possibility, some tenants may not be willing to agree to surrender their leases and will have rights to continue to occupy their premises. A landlord runs the risk of substantial damages by simply evicting tenants without a valid breach of the lease.[140]

[134] The BCLI Committee recommended that due to the frequency of disputes of this nature, legislation should clearly state that these disputes will fall within the scope of the summary dispute resolution procedure.

[135] The Working Group discussed whether the *UCTA* should include within the summary dispute resolution procedure provisions, a provision which accommodates disputes that take place in shopping centres or multi-tenant properties arising when a landlord does not fill vacancies as a means to begin a redevelopment. The Working Group agreed not to recommend such a provision, on the basis that this type of dispute would be too complex for summary dispute resolution, and such a provision may encourage landlords to treat a leasehold property right as a non-property right.

2.7 Summary Dispute Resolution

[136] Disputes arise out of landlord-tenant relationships, and there are various procedures (i.e. court procedures, self-help procedures, summary procedures) available to settle these disputes across the jurisdictions in Canada. The scope and process of these procedures vary and may overlap. Consolidating overlapping statutory and common law procedures into one procedure would simplify and streamline the law.

[137] One dispute resolution procedure, as opposed to the current mix of procedures, would be quicker for resolving commercial landlord and tenant disputes. It would also be much simpler and cost-effective for unrepresented landlords and tenants to navigate, and may thus increase their access to justice.

[138] The Working Group considered this issue in some depth during its May 2016 discussion on overholding tenants, and made several recommendations relating to a summary dispute procedure in the 4th Progress Report (2016):

> 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.
>
> Preliminary Recommendation: The summary procedure [for overholding tenants] 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.
>
> 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.

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.

[139] In previous progress reports, the Working Group has made the following recommendations regarding a summary dispute procedure:

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

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

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*.

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

[140] As the Working Group has already recommended that a summary dispute procedure be included in the *UCTA* to deal with the above-mentioned disputes (overholding tenants, distress, assignment and subletting), and that the details of the procedure, if any, should be contained in a regulation, all that remained for the Working Group to discuss this year was:

- Whether any additional disputes should be listed as being covered by the summary procedure; and
- Whether to adopt or modify the BCLI's proposed summary dispute procedure regulation, or leave it to each jurisdiction to create their own regulation, reflecting their unique court rules.

2.7.1 Scope of Procedure

[141] The BCLI Committee created a list of disputes that could be dealt with via its summary procedure.[141]

[142] The Working Group started discussing the types of disputes that should be subject to resolution under the summary dispute resolution procedure, and quickly determined that the more fundamental underlying issue is whether the summary dispute resolution should be aimed at providing immediate or urgent relief to one party, or whether the summary dispute resolution procedure should be focusing on limiting a multiplicity of proceedings. Once this fundamental question is addressed, the specific types of disputes to be dealt with under the summary dispute resolution procedure will be more readily identified.

CONSULTATION QUESTION 4

What should the overarching purpose of the summary dispute resolution procedure be?

2.7.2 Procedure

[143] The BCLI Committee recommended that procedural rules for the summary dispute resolution procedure be included in a regulation, as opposed to being directly incorporated into the legislation. The BCLI Committee also drafted a proposed procedural regulation, setting out rules on various matters, such as affidavits, and timelines.[142]

[144] The Working Group agreed that drafting a procedure in the *UCTA* would be too complex given each jurisdiction's own unique procedural requirements.

RECOMMENDATION 23

The *UCTA* should not contain any rules of procedure for the summary dispute resolution process.

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[1] See e.g. *Rent Distress Act,* RSBC 1996, c 403; *Civil Enforcement Act,* RSA 2000, c C-15, ss 104-105.
[2] See e.g. *Landlord's Rights on Bankruptcy Act,* RSA 2000, c L-5.
[3] 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.
[4] See e.g. *Law and Equity Act,* RSBC 1996, c 253, s 45.
[5] 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) [BCLRC 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) [MLRC Report No. 86], Fundamental Breach and Frustration in Commercial Tenancies (Report #92)(Winnipeg: The Commission, 1996) [MLC Report No. 92], Commercial Tenancies: Miscellaneous Issues (Report #95)(Winnipeg: The Commission, 1996) [MLRC Report No. 95]; Law Reform Commission of Saskatchewan, Proposals Relating to Distress for Rent (1993); Report on Proposals for a New Commercial Tenancy Act (BCLI, 2009) (Vancouver, the BCLI: 2009) at 53 [BCLI Report on Proposals]..
[6] Bill 10, *Commercial Tenancy Act,* 2nd Sess 35th Leg, British Columbia, 1993, based on the LRCBC Report, *ibid*, was not enacted.
[7] 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.
[8] BCLI Report on Proposals, *supra* note 5.
[9] The provincial statutory provisions are as follows:

- In Alberta, for leases for life or lives, or for terms longer than 3 years, the *Land Titles Act* implies a right to terminate, in the absence of a contrary provision, if: (1) the rent is in arrears for two months; (2) the tenant defaults in the fulfillment of any covenant, whether express or implied in the lease and the default continues for 2 months; and (3) if certain repairs are not completed within the time set out in the landlord's notice of defect.
- In Saskatchewan the *Landlord and Tenant Act* implies a right to terminate, in the absence of a contrary provision, if the rent is in arrears for two calendar months, or if the tenant is convicted of keeping a disorderly house.
- In Manitoba the *Landlord and Tenant Act* provides a right to terminate, in the absence of a contrary provision, if the rent is in arrears for 15 days, or if the tenant is convicted of keeping a bawdy house. *The Real Property Act* further provides a landlord can re-enter if: (1) the rent is in arrear; or (2) the tenant defaults in the fulfillment of a covenant, whether express or implied in the lease, and the default continues for 2 months; or (3) in case the repairs required by the notice have not been completed within the time specified.
- In Ontario the *Commercial Tenancies Act* implies a right to terminate, in the absence of a contrary provision, if the rent is in arrears for 15 days or if the tenant is convicted of keeping a disorderly house.
- In New Brunswick the *Landlord and Tenant Act* implies a right to terminate, in the absence of a contrary provision, if the rent is in arrears for 15 days, or if the tenant is convicted of keeping a bawdy house.
- In Prince Edward Island the *Landlord and Tenant Act* implies a right to terminate, unless it is otherwise agreed, if the rent is in arrears for 15 days, or if the tenant is convicted of keeping a bawdy house.
- In the Northwest Territories, the *Commercial Tenancies Act* implies a right to terminate, in the absence of a contrary provision, if (1) the rent is in arrears for two calendar months; (2) the tenant defaults in the fulfillment of any covenant in the lease, whether express or implied, and the default continues for 2 months, or (3) repairs are not completed within the time specified in the notice, or (4) the tenant is convicted of keeping a common bawdy house.
- In Nunavut, the *Commercial Tenancies Act* implies a right to terminate, in the absence of a contrary provision, if (1) the rent is in arrears for two calendar months; (2) the tenant defaults in the fulfillment of any covenant in the lease, whether express or implied, and the default continues for 2 months, or (3) repairs are not completed within the time specified in the notice, or (4) the tenant is convicted of keeping a common bawdy house.
- In the Yukon, the *Commercial Landlord and Tenant Act* implies a right to terminate, in the absence of a contrary provision, if (1) the rent is in arrears for two calendar months; (2) the tenant defaults in the fulfillment of any covenant in the lease, whether express or implied, and the default continues for 2 months, or (3) repairs are not completed within the time specified in the notice, or (4) the tenant is convicted of keeping a common bawdy house.

[10] In BCLRC, *supra* note 5 at 126, the BCLRC recommended that a statutory right of re-entry be enacted for the non-payment of rent.
[11] BCLI Report on Proposals, *supra* note 5 at 53.
[12] BCLRC Report, *supra* note 5 at 94.
[13] BCLI Report on Proposals, *supra* note 5 at 68.
[14] OLRC Report, *supra* note 5 at 168.
[15] BCLI Report on Proposals, *supra* note 5 at 68.
[16] Lionel A. Blundell and V.G. Wellings, Property and Conveyancing Library, No. 8 - Woodfall's Law of Landlord and Tenant, vol. 1 (London: Sweet & Maxwell Limited, 1968) at 326 [Woodfall's].
[17] Consultation Paper on Proposals for a New Commercial Tenancy Act (BCLI, 2008) (Vancouver, the BCLI: 2008) at 59-60 [BCLI Consultation Paper].
[18] *Distress for Rent Act* 1737 (UK), 11 Geo. 2, c 19 (1737).
[19] *Apportionment Act 1834* (UK), 4 & 5 Will. 4, c 22 (1834).
[20] BCLI Consultation Paper, *supra* note 17 at 60.
[21] *Apportionment Act, 1870* (UK), 33 & 34 Vict., c 35.
[22] Joseph Haworth Redman, The Law of Landlord and Tenant including the Practice in Ejectment, 6th ed. (London: Butterworth & Co., 1912) at 408.
[23] *The Apportionment Act,* CCSM c A100
[24] *Apportionment Act,* RSO 1990, c A.23

[25] *Apportionment Act*, RSNS 1989, c 16
[26] *Apportionment Act*, RSPEI 1988, c A-14
[27] *Apportionment Act*, RSNL 1990, c A-11
[28] *Property Act,* RSNB 1973, c P-19, ss. 4-8.
[29] *Commercial Tenancy Act*, RSBC 1996, c 57 at ss. 10-13.
[30] New South Wales: *Conveyancing Act 1919* (NSW), ss. 142 & 144; Queensland: *Property Law Act 1974* (Qld.), ss. 231-233; South Australia: *Law of Property Act 1936* (SA), ss. 63-68; Tasmania: *Apportionment Act 1871* (Tas.); Victoria: *Supreme Court Act 1986* (Vic.), ss. 53-56; Western Australia: *Property Law Act 1969* (WA), ss. 130-134.
[31] RSBC 1979, c 224.
[32] BCLRC Report, *supra* note 5.
[33] The British Columbia Law Reform Commission's model provision provided as follows:

> (1) In this section "recurring entitlement" includes salary, annuity, rent or other amount payable periodically.
> (2) For the purpose of ascertaining rights or obligations under a recurring entitlement at a time when the right to a particular payment has not fully matured, the entitlement shall be deemed to accrue from day to day and is apportionable in respect of time accordingly.
> (3) Subsection (2) does not apply to a recurring entitlement if the agreement, instrument or authority under which is arises stipulates
>
> (a) that no apportionment is to take place, or
> (b) that a different apportionment rule is to apply.

[34] Report on the Law of Landlord and Tenant (LRC 85-2007) (Dublin: The Commission, 2007) [LRCI Report]. The Ireland Law Reform Commission's model provision provides as follows:

> (1) The tenant has a default obligation to pay an apportioned rent in accordance with this section.
> (2) Rent accrues from day to day and is apportionable accordingly.
> (3) Subject to subsections (4) and (5), where between the dates when rent is payable:
>
> (a) the tenancy s assigned, the landlord is entitled to the apportioned parts of the rent from the assignor and the assignee respectively;
> (b) the landlord's interest is assigned, the tenant remains liable to pay the entire rent only when it is due, but that rent is apportionable as between the landlord at that date and the previous landlord;
> (c) the tenancy is lawfully terminated in any way by either the landlord or the tenant, the tenant is liable for an apportioned rent accruing to the date of termination.
>
> (4) In each of the events specified in subsection (3) the tenant's liability to pay the apportioned or entire rent arises only on the date when the entire rent would otherwise be payable under the tenancy.
> (5) Subsection (3) does not arise where rent is payable in advance and is already due when the event in question occurs.

[35] BCLI Consultation Paper, *supra* note 17 at 62.
[36] Christopher Bentley, John McNair & Mavis Butkus, eds., Williams & Rhodes Canadian Law of Landlord and Tenant, loose-leaf 6th ed., vol. 2 (Toronto: Carswell, 1988) at 6:10:1 [Williams & Rhodes].
[37] Ibid at 6:10:2.
[38] Woodfall's, *supra* note 16 at 323
[39] LRCI Report, *supra* note 24 at 56. The recommended provision provides as follows:

> 18(1) Subject to subsection (2), upon the landlord's or tenant's interest under a tenancy being severed, whether by assignment or otherwise, as to the premises, the rent and other payments under the tenancy and all other obligations and provisions relating to that interest are
>
> a) apportioned, as appropriate to the several parts of the premises, between those parts,
> b) enforceable accordingly by or against the parties in whom the severed interests or parts are vested
>
> as if the apportioned rents, other payments and other obligations and provisions had originally been entered into separately in respect only of each severed interest or part.
> (2) Any dispute as to the application of subsection (1) to a particular case may be referred to the court for determination and, on such application, the court may order such apportionment as it thinks fit.
> (3) This section applies –
>
> a) to tenancies whenever created,
> b) subject to

i. any agreement to the contrary between the parties to the severance or other interested parties,in the case of a severance by the tenant, any covenant relating to a necessary consent to be granted by the landlord.

[40] BCLI Consultation Paper, *supra* note 17 at 63

[41] *Residential Tenancies Act*, SNB 1975, c R-10.2, s. 22; *Residential Tenancies Act,* 2006, SS 2006, c R-22.0001, s. 41; *The Residential Tenancies Act,* CCSM c R119, s. 15; *Residential Tenancies Act*, 2006, SO 2006, c 17, s. 15; *Residential Tenancies Act*, RSNWT 1988, c R-5, s. 13; *Residential Tenancies Act,* RSNWT (Nu) 1988, c R-5, s. 13; *Residential Tenancy Act,* SBC 2002, c 78, s. 22; *Residential Landlord and Tenant Act,* SY 2012, c 20, s. 21.

[42] Article 1905 of the Civil Code provides as follows: A clause in a lease stipulating that the full amount of the rent will be payable in the event of the failure by the lessee to pay an instalment is without effect.

[43] *Commercial Tenancy Act,* RSBC 196, c 57, s. 29(6); *Landlord's Rights on Bankruptcy Act*, RSA 2000, c L-5, s. 3(b); *The Distress Act,* CCSM, c D90, s. 8(4); *Commercial Tenancies Act,* RSO 1990, c. L-7, s. 38; *Commercial Tenancies Act, RSNWT* (Nu) 1988, c C-10, s. 24(2); *Commercial Tenancies Act*, RSNWT 1988, c C-10, s. 24(2); *Commercial Landlord and Tenant Act,* RSY 2002, c 131, s. 36(1); *Winding-up Act, RSPEI* 1988, c W-5, s. 38; *Landlord and Tenant Act*, RSNB 1973, c L-1, s. 43.

[44] *Law and Equity Act, supra* note 4 at s. 25.

[45] BCLRC Report, *supra* note 5 at 50.

[46] BCLI Report on Proposals, *supra* note 20 at 81.

[47] See *Bodkin Leasing Corporation v Mighty Moose Holdings Ltd,* 2014 ABQB 280:

> [20] Certainly one can see how accelerating the lease payments simply awards the lessee the amount of lease payments to which the lessee is entitled, albeit somewhat early as the lessor does not have to wait until the end of the lease. I agree that accelerated rent alone is not a penalty. The problem here is that the lessor will recover not only the accelerated rent payments, which contain a 'return on money over time' factor, but also interest on that interest. It is no coincidence here that the lessor will be entitled to a judgment, when combined with amounts already received, which will exceed the amount that the lessee would have received if the lease had been fully performed. It cannot be said that the payment of the amount required under the default provisions in this lease, to quote from Hav-a-Kar Leasing, "merely puts the plaintiff in the position it would have been in if the lessee had performed his obligations under the contract"?
>
> [27] The Alberta Court of Appeal upheld a lease similar to the one in question in 32262 B.C. Ltd. v See-Rite Optical Ltd., 1998 ABCA 89 (CanLII), 60 Alta. L.R. (3d) 223. However, the majority judgment of the Court did not directly address the issue I am considering here. This is apparent from the observation made, at para. 38 of the decision, that the lessor was entitled to accelerated rent "(less, perhaps, a discount because the remaining payments were being made earlier ...)".

See also, *Hav-a-Kar Leasing Ltd v Vekselshtein,* 2012 ONCA 826, wherein the Court rejected the tenant's argument that an accelerated rent provision was an enforceable penalty clause:

> [49] The trial judge concluded in this case that the accelerated amount provided for in the challenged provision of the Lease, clause 16, "is not excessive or unconscionable" and that it "merely puts [HAK] in the position it would have been in if [ZV] had performed his obligations under the contract" (at para. 48). These findings accord with the standard measure for compensatory damages in contract, under which the plaintiff is entitled to the value of the promised performance of the contract. As held in the seminal case of Wertheim v. Chicoutimi Pulp Co., [1911] A.C. 301, at p. 307, the damages awarded to the plaintiff for breach of contract should place the plaintiff in the same position as if the contract had been performed.
>
> [50] That is what occurred in this case. The accelerated provision in clause 16 of the Lease reflects the parties' bargain at the time the Lease was entered into regarding the reasonably anticipated damages that HAK would probably suffer if ZV were to breach the terms of the Lease. This is consistent with the basic principles underlying expectation damages in contract set out inHadley v. Baxendale (1854), 9 Exch. Rep. 341, 156 E.R. 145 (Eng. Ex. Div.), at p. 151.
>
> [51] I note that ZV pointed to no evidence at trial suggesting that the accelerated rent provision of the Lease was unfair or unconscionable, or that it did not reflect the parties' reasonable estimate, at the time the Lease was executed, of the probable damages that would arise upon ZV's breach of the Lease.
>
> [52] I therefore agree with the trial judge that the challenged provision is enforceable as against ZV.

[48] RSC 1985, c B-3.

[49] Kim Lewison, Nicholas Dowding, Justice Morgan, Martin Rodger & Edward Peters, eds., Woodfall's Law of Landlord and Tenant, looseleaf, vol. 1 (London: Sweet & Maxwell, 2013) at 6/14.

[50] *Isaacs v Ferguson* (1886), 26 NBR 1 (CA).
[51] Christopher Bentley, John McNair & Mavis Butkus, eds., Williams & Rhodes Canadian Law of Landlord and Tenant, looseleaf 6th ed., vol. 2 (Toronto: Carswell, 1988) at 13:10:1 [Williams & Rhodes].
[52] Richard Olson, A Commercial Tenancy Handbook, looseleaf, vol. 1 (Toronto: Thomson Carswell, 2004) at 2-16.
[53] Williams & Rhodes, *supra* note l51 at 3:10:2.
[54] *ibid.*
[55] *Residential Tenancy Act*, SBC 2002, c 78, s. 16.
[56] *Law of Property Act*, RSA 2000, c L-7, s. 66.
[57] *The Residential Tenancies Act, 2006*, SS 2006, c R-22.0001, s. 13.
[58] *The Residential Tenancies Act*, CCSM, c—R119, s. 192(2).
[59] *Residential Tenancies Act, 2006*, SO 2006, c 17, s. 13.
[60] *Residential Tenancies Act,* SNB 1975, c R-10.2, s. 10(1).
[61] *Residential Tenancies Act,* 2000, SNL 2000, c R-14.1, s. 7(1).
[62] *Residential Landlord and Tenant Act*, SY 2012, c 20, s. 11.
[63] *Residential Tenancies Act*, RSNWT 1988, c R-5, s. 2(3).
[64] *Residential Tenancies Act,* RSNWT (Nu) 1988, c R-5, s. 2(3).
[65] *Law of Property Act*, RSA 2000, c L-7, s. 66(1).
[66] Adrian J. Bradbrook & Clyde E. Croft, Commercial Tenancy Law in Australia (Sydney: Butterworths 1990) at 1.10.
[67] *Law of Property Act,* 1925 (UK), 15 & 16 Geo. 5 c 20, ss. 149(1).
[68] *Property Law Act,* 2007 (NZ), 2007/91 at s. 60.
[69] BCLI Consultation Paper, *supra* note 17 at 34
[70] ONLR Report, *supra* note 5 at 61.
[71] Report on Commercial Tenancies: Miscellaneous Issues (No. 95) (Manitoba Law Reform Commission, 1996) at 5 [MLRC Report].
[72] BCLRC Report, *supra* note 5 at 10.
[73] BCLI Consultation Paper, *supra* note 17 at 35.
[74] *ibid.* at 36.
[75] BCLI Report on Proposals, *supra* note 5 at 39
[76] Jason Brock and Jim Phillips, "The Commercial Lease: Property or Contract?" (2001) 38(4) Alta. L. Rev. 989 at 990 [Brock & Phillips].
[77] [1971] SCR 562, 17 DLR (3d) 710 [*Highway Properties*].
[78] Brock and Phillips, *supra* note 76 at 991.
[79] Gordon Sustrik, "Highway Properties - Look Both Ways Before Crossing" (1986) 24(3) Alta. L. Rev. 477 at 481.
[80] (1896), 27 OR 240 (HCJ).
[81] (2002), 62 OR (3d) 21 (ONCA).
[82] LRCI Report, *supra* note 34 at 34.
[83] OLRC Report, *supra* note 5 at 5-8.
[84] 2005 BCCA 583.
[85] Jeffrey W. Lem, "The Amexon Answer to the Evergreen Question" (2017) online: https://www.building.ca/features/1003732955/.
[86] 2015 ONCA 86.
[87] 2011 ONCA 535.
[88] Brock & Phillips, *supra* note 76 at 1025 ("…all aspects of lease law, not just the areas of abandonment and independence of covenants…ought to be contractualized; partial contractualization should be expanded to complete contractualization"), 1039 ("…the complete assimilation of the lease within contract law is both desirable and, with a little imagination, possible").
[89] *ibid*. at 1016-23.
[90] BCLI Consultation Paper, *supra* note 17 at 75
[91] BCLI Report on Proposals, *supra* note 5 at 41.
[92] The BCLI Committee's proposed provision provides as follows:
Application of contractual rules to leases
5

(1) Subject to section 6 [rent reduction or diversion], the general law of contract applies with respect to the effect which one party's breach of a provision of a lease has on another party's right to relief and obligation to perform.
(2) Without limiting subsection (1),
    a. Subject to section 9 [relief from forfeiture], if a landlord or tenant breaches a material provision of the lease, unless the lease otherwise provides, the other party may elect to treat the lease as terminated, but the lease is not terminated until the other party is given notice of the election.
    b. If a tenant abandons the premises, and the landlord elects to affirm the lease an claim payment of rent, the landlord has a duty to mitigate its losses.
(3) The Frustrated Contract Act and the doctrine of frustration of contract apply to leases.

[93] *Transco Mills Ltd v Percan Enterprises Ltd* (1993), 100 DLR (4th) 359, 76 BCLR (2d) 129 (CA) :"There is in my view no basis on which a landlord of commercial premises can be required to mitigate its loss where it maintains the lease in existence and claims for rent due."; *607190 Ontario Ltd v First Consolidated Holdings Corp* (1992), 26 RPR (2d) 298 (Ont. Div. Ct). But see *Ma v UI,* 2007 BCPC 275 where Dyer Prov Cr. J. stated: "mitigation is in fact involved where there is (as in the case before me) re-letting on the tenant's account").
[94] 2008 MBQB 219 (aff'd 2009 MBCA 118).
[95] 2017 ONSC 1796.
[96] Brock & Phillips, *supra* note 76 at 1003.
[97] BCLRC Report, *supra* note 5 at 61.
[98] *ibid.*
[99] 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 B.C. Branch of the Canadian Bar Association (Vancouver: Canadian Bar Association (BC Branch), 1988) at 5.
[100] *ibid.* at 6-7.
[101] OLRC Report, *supra* note 5 at 281-282. The OLRC's draft legislation provided as follows:

> Future rent
>
> 11 ….
>
> (4) In the circumstance described in subsection (1), the landlord is under a duty to make reasonable efforts to re-rent the premises to a suitable tenant at a reasonable rent and where the landlord fails to do so the compensation to which he is entitled under subsection (3) is reduced to the extent that the failure contributed to the loss for which compensation is claimed.
>
> (5) For the purposes of subsection (4), the making of reasonable efforts to re-rent the premises does not require a landlord to re-rent the premises in preference to other property.

[102] Brock & Phillips, *supra* note 76 at 999.
[103] Olson, *supra* note 52 at VI.g..
[104] BCLI Consultation Paper, *supra* note 17 at 88.
[105] BCLI Report, *supra* note 5 at 38.
[106] *ibid.* at 39 – 40. The proposed provision reads as follows:

> 5(2)(b) if a tenant abandons the premises, and the landlord elects to affirm the lease and claim payment of rent, the landlord has a duty to mitigate its losses.

[107] *Leightons Investment Trust Ltd v Cricklewood Property and Investment Trust Ltd*, [1943] KB 493 at 496 (Eng CA), aff'd on other grounds, [1945] AC 221 (UKHL).
[108] For instance, in *224981 Ontario Inc v Intact Insurance Company,* 2016 ONSC 642, the plaintiff landlord argued that the tenant must continue to pay rent for a building destroyed by fire. The Court disagreed with the plaintiff, stating that its position was not the law in Ontario. The Court cited *Capital Quality Homes Ltd v Colwyn Construction Ltd,* [1975, (1976), 9 OR (2d) 617), where the Court of Appeal stated:

> [30] The doctrine of frustration has been applied to commercial contracts since *Taylor et al v Caldwell et al.*…In *Cricklewood v Leighton's*…Viscount Simon, L.C. and Lord Wright held against the accepted view that leases were outside the doctrine since a lease in addition to being a contract creates an estate in the land demised for the period of the agreed term. I adopt the reasoning of Viscount Simon, L.C., and his conclusion that there is no binding authority precluding the application of the doctrine of frustration to

> contracts involving the lase of lands. I am also in accord with his observations that the doctrine is flexible and ought not to be restricted by any arbitrary formula.
>
> [38]…there is no binding authority in England precluding the application of the doctrine of frustration to contracts involving a lease of land. I believe the situation to be the same in Ontario and I am unable to distinguish any difference between leases of land and agreements for the sale of land, so far as the application of the doctrine is concerned.

The decision was affirmed on appeal (2016 ONCA 870), however the Ontario Court of Appeal did not take as strong as a position on frustration as the lower court, stating:

> [17] …Even assuming that Eco-Lux remained legally obligated to pay rent following the destruction of the premises – an assumption that may be questionable given the doctrine of frustration – …. [Emphasis added].

In *Canadian Western Bank v 702348 Alberta Ltd,* 2009 ABQB 271 the Alberta Court of Queen's Bench stated as follows regarding the applicability of frustration to commercial leases:

> [54] If one applies this test [the test for frustration] to commercial leases, it should come as no surprise that frustration is seldom found to have been made out. However, there may be come room for application of the doctrine where the premises were not in existence at the time the lease was entered into and the tenant did not go into possession.

In 2001, the New Brunswick Court of Appeal in *Raymond v Byrapaneni,* 2001 NBCA 8, gave the following description of the applicability of frustration to commercial leases:

> [11] As a general proposition, the doctrine of "frustration" applies to all contracts, except leasing contracts. It is for this reason that a tenant remains obligated at common law to pay rent even though the leased premises are destroyed by fire through no fault of the tenant. This is true even if the premises are located on the top floor of a 15 story building. The legal rationale invoked to support that conclusion is tied to the understanding that as the tenant retains an estate in land there can never be a "total failure of consideration". In other words, the tenant is in receipt of what he bargained for – an estate in land.
>
> [12] I must acknowledge that, as far as I am aware, New Brunswick is the only province in which the doctrine of frustration has been applied to relieve a tenant of the obligation to pay rent where premises have been destroyed by fire. The tenant is also entitled to recover that portion of prepaid rent that relates to the period that the premises were unavailable for occupation…

[109] MLRC Report No.92, *supra* note 5 at 23.

[110] *Residential Tenancy Act,* SBC 2002, c 78 at s. 92; *Residential Tenancies Act,* SA 2004, c R-17.1 at s. 40; *Residential Tenancies Act,* 2006, SS 2006, c R-22.0001 at s. 11; *The Residential Tenancies Act*, CCSM, c R119 at s. 105(1); *Residential Tenancies Act,* 2006, SO 2006, c 17 at s. 19; *Residential Tenancies Act,* SNB 1975, c R-10.2 at s. 11(2); *Rental of Residential Property Act*, RSPEI 1988, c R-13.1 at s. 5(3); *Residential Tenancies Act,* 2000, SNL 2000, c R-14.1 at s. 7(2); *Residential Tenancies Act,* RSNWT 1988, c R-5 at s. 7(1); *Residential Tenancies Act*, RSNWT (Nu) 1988, c R-5 at s. 7(1); *Residential Landlord and Tenant Act,* SY 2012, c 20 at s. 102.

[111] *Commercial Tenancy Act,* RSBC 1996, c 57 at s. 30.

[112] MLRC Report No. 92, *supra* note 5 at 23.

[113] OLRC Report, *supra* note 5 at 210-211.

[114] *Landlord and Tenant Act,* SBC 1974, c 45 at s. 61(1)(e).

[115] RSBC 1996, c 166.

[116] RSBC 1996, s 57.

[117] BCLI Consultation Paper, *supra* note 17 at 76.

[118] Olson, *supra* note 52 at I.B.b.

[119] *ibid.* at VI.c.

[120] Fundamental Breach: Digging to the "Root" of the Lease. March 8, 2011 at 1.

[121] Olson, *supra* note 52 at VI.c.

[122] Fundamental Breach: Digging to the "Root" of the Lease. March 8, 2011 at 2.

[123] BCLI Consultation Paper, *supra* note 17 at 79; BCLRC Report, *supra* note 19 at 19; MLRC Report, *supra* note 30 at 13.

[124] The Law Reform Commission of British Columbia suggested the following provision:

> Rent abatement or diversion
>
> 10 (1) Notwithstanding section 4(1) [application of contractual rules], a tenant shall not refuse to pay rent by reason only of a breach by the landlord of a material provision of the tenancy agreement.
>
> (2) Nothing in subsection (1) affects the right of a tenant

(a) to deduct from rent otherwise payable, an amount in respect of

(i) a judgment against the landlord for damages or compensation for a breach of the tenancy agreement, or

(ii) any obligation that arises independently of the landlord and tenant relationship, or

(b) to cease paying rent on electing to terminate the tenancy agreement under section 4(2) [application of contractual rules].

(3) Where a landlord breaches a material provision of the tenancy agreement and the tenant does not wish to elect to terminate the agreement under section 4(2) [application of contractual rules], then the tenant may apply to the court for an order that the rent payable under the tenancy agreement

(a) be abated

(i) by an amount equal to the diminution in value of the premises to the tenant owing to the breach, or

(ii) by an amount sufficient to compensate the tenant for expenses incurred in repairing the breach, or

(b) be diverted in whole or part to any person by or through whom the tenancy agreement can be resorted to, and maintained in, good standing.

(4) An order under subsection (3) may be made subject to any conditions that are fair and equitable in the circumstances.

[125] The Manitoba Law Reform Commission proposed the following provision:

Interim diversion of rent

17.7 (1) Upon motion, a court may order that, until an action for declaration of fundamental breach is determined, a tenant shall pay into court, on such terms and conditions as the court considers just, any rent or any specific part of the rent due under the lease.

(2) An order under subsection (1) takes precedence over any attornment or assignment of rent in respect of the premises.

[126] BCLRC Report, *supra* note 5 at 43
[127] *Ibid.* at 43-48.
[128] OLRC Report, *supra* note 5 at 33 – 35.
[129] MLRC Report No. 86 *supra* note 5.
[130] Brock & Phillips, *supra* note 20 at 995-998.
[131] BCLRC Report, *supra* note 5 at 106-107.
[132] BCLI Consultation Paper, *supra* note 17 at 85.
[133] Brock & Phillips, *supra* note 20 at 1030.
[134] *supra* note 34.
[135] BCLI Consultation Paper, *supra* note 17 at 90.
[136] Harvey M. Haber, *The Commercial Lease: A Practical Guide,* 3rd ed. (Aurora, ON: Canada Law Book, 1999) at 139.
[137] Stephen J. Messinger and Christina Kobi, "Exclusive Rights and Non-Competition Clauses" in *Shopping Centres Leases,* 2nd ed. Harvey M. Haber Editor (Aurora, ON: Canada Law Book, 2008) at 552.
[138] Olson, *supra* note 52 at 3-56.3.
[139] BCLI Consultation Paper, *supra* note 17 at 130.
[140] Olson, *supra* note 52 at 7-35.
[141] The BCLI Committee's proposed list of disputes provides as follows:

Summary dispute resolution

12 (1) The court may, on application under the prescribed summary dispute resolution procedure, make one or more of the following orders:

(a) an order that the landlord or the tenant recover

(i) possession of the premises, or

(ii) damages or other relief resulting from a breach of a material provision of the lease;

(b) an order that the landlord recover

(i) arrears of rent,
(ii) compensation for use and occupation under section 14 (a) [compensation from overholding tenant], or
(iii) indemnity under section 14 (b) [compensation from overholding tenant];

(c) if a landlord or a tenant has not delivered an executed copy of the lease to the other party in accordance with this Act or a provision of an agreement between the parties within 21 days of being given notice in writing, an order that that party deliver an executed copy of the lease to the other party;

(d) an order

(i) declaring that the landlord's consent to an assignment or the creation of a subtenancy has been unreasonably withheld,
(ii) declaring that a lease has been validly terminated under section 5 (2) [application of contractual rules to leases],
(iii) allowing the landlord, or any person acting on the landlord's behalf, access to the premises for the purpose of

(A) enabling the landlord to carry out such repairs to the premises that the landlord is obliged to carry out under the lease or an enactment, or
(B) enabling the landlord to carry out such repairs to the premises that tenant is obliged to carry out under the lease or an enactment, but has failed to carry out after reasonable notice by the landlord,

(iv) for the diversion or abatement of rent under section 6[rent reduction or diversion],
(v) for the relief of a tenant under section 24 or 26 of the Law and Equity Act, or
(vi) permitting the landlord to dispose of the property of a tenant or other person if

(A) a tenant has abandoned the premises, or
(B) the tenancy has expired or been terminated in accordance with this Act or a lease, and
the tenant or another person has left property behind on the premises and
(C) the tenant or other person has failed, after 5 days written notice from the landlord, to remove the property, or
(D) if the owner of the goods, whether the tenant or another person, cannot be found with reasonable efforts, or if the owner of the goods is unknown, on such terms as to notice and the application of the proceeds of the disposition as the court considers appropriate.

(2) In making an order under this section, the court may impose such terms as it considers appropriate.

(3) Nothing in this section affects the jurisdiction of the Provincial Court to hear any claim, otherwise within its jurisdiction, for the payment of rent or damages.

(4) Nothing in the section affects the rights of a landlord and tenant to agree in the lease to submit disputes to arbitration.

[142] The BCLI's draft procedural regulation provides as follows:

Object

1. The object of this summary dispute resolution procedure is to provide a speedier and less expensive determination of a number of disputes that commonly arise with respect to commercial leases.

Interpretation

2. (1) In this regulation:

"Act" means the *Commercial Tenancy Act*;
"court" means the Supreme Court;
"petitioner" means a person who files a petition under section 11;
"respondent" means a person who files a response to a petition

(2) A reference to a rule in this regulation is a reference to that rule in the Rules of Court

Application

3. (1) Subject to subsection (2), this regulation applies to the disputes listed in section 12 of the Act involving leases entered into before or after this regulation comes into force.

(2) This regulation does not apply to proceedings commenced before this regulation comes into force

Conflicts with Rules of Court

4. (1) Except as provided by this regulation, the *Rules of Court* apply to all applications under the Act and this regulation.

(2) In the event of a conflict between this regulation and the *Rules of Court*, this regulation applies.

Court may dispense

5. The court may dispense with compliance with the whole or any pat of this regulation of the court considers it just and convenient to do so.

Venue

6. (1) Unless the court otherwise orders, every proceeding under this regulation must be commenced,
   a. If the premises that is the subject of the proceeding is located in a municipality and there is a registry of the court located in that municipality, at that registry, or
   b. If the premises that is the subject of the proceeding is not located in a municipality or, if it is located in a municipality but there is no registry of the court located in that municipality, at any registry located in the judicial district in which the land is located,

   and all application in the proceedings must be heard at the location of that registry.

   (2) For the purposes of subsection (1), the Vancouver and New Westminster registries are deemed to be the same registry.

   (3) If the subject of a proceeding is more than one parcel of land, each of which may be closer to different registries of the court, the party commencing the proceeding has the right to decide in which of those registries to commence the proceeding.

   (4) This section does not apply if the parties agree that the proceeding may be commenced at a registry other than the registry referred to in subsection (1) or (3).

Election to use summary procedure

7. This regulation applies to an application authorized by the Act if an endorsement in the prescribed form is added or attached to the petition or response.

When regulation ceases to apply

8. This regulation ceases to apply to a proceeding if
   a. The parties to the proceeding file a consent order to that effect, or
   b. The court, on its own motion or on the application of any party, so orders.

Considerations of court

9. In exercising its discretion under subsection 8(b), the court must take into account
   a. The likelihood that the proceeding can be resolved in a timely manner, consistent with the object of this regulation, and
   b. Whether it is reasonable in the circumstances to continue the proceeding under this regulation

Style of proceeding

10. The style of a proceeding under this regulation must include the words "Subject to the *Commercial Tenancy Act Summary Dispute Resolution Procedure Regulation*" immediately below the listed parties.

Petition

11. A person wishing to bring an application under this regulation must file a petition in the form set out in Schedule 1.

Service

12. (1) Unless the court orders otherwise, a copy of the petition and of each affidavit in support must be served on all persons whose interests may be affected by the order sought.
(2) Service may be effected in any manner permitted by section 21 of the Act

Response

13. A person who has been served with a copy of a filed petition under section 12 [*service*] and who wishes to receive notice of the time and date of the hearing of the petition or to respond to it must, deliver to the petitioner 2 copies, and to every other party of record one copy, of
    a. A response in the prescribed form, and
    b. Each affidavit on which the respondent intends to rely

Time for response

14. A respondent must deliver the documents referred to in section 13 [*response*] on or before the 4th day after the date on which the respondent entered an appearance.

Reply by petitioner

15. A petitioner who wishes to respond to any document provided under section 13 [*response*] must, no later than the date on which the notice of hearing is delivered to the respondent in accordance with Rule 51A, deliver any affidavits in reply to each respondent who delivered a response under section 13.

No additional affidavits

16. Unless all parties of record consent, a party must not deliver any affidavits additional to those delivered under sections 12 [*service*], 13 [*response*], and 15 [*reply by petitioner*].

Orders

In the hearing of a petition under this regulation the court may make any order under Rule 18A or Rule 52