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UNIFORM LAW CONFERENCE OF CANADA

UNIFORM COMMERCIAL TENANCIES ACT
REPORT ON THE CIVIL CODE OF QUÉBEC

Presented by
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[1] At its annual meeting in Québec City on August 13-16, 2018, the Uniform Law Conference of Canada (ULCC) examined the *Uniform Commercial Tenancies Act* (UCTA). Work on the UCTA began in 2012, and the working group underwent several changes in membership. In its last year, the working group was composed of:

Leah Howie, Chair (Law Reform Commission of Saskatchewan)
Nigel Bankes (University of Calgary)
Michelle Cumyn (Laval University)
Doug Downey (Downey, Tornosky, Lassaline & Timpano Law)
Erin Eccleston (MLT Aikins)
Linda Galessiere (Camelino Galessiere)
James Leal (Nelligan O'Brien Payne)
Richard Olson (McKechnie & Company)
Jonnette Watson-Hamilton (University of Calgary)

[2] The working group's final report explains the background for the UCTA.[1] It observes that "[c]ommercial tenancies law in Canada is fragmented, outdated, and, in some respects, obsolete." It argues "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."[2] For the most part, the UCTA codifies the law and practice in Canada's common law provinces and territories. On occasion, new rules are crafted to modernize or improve the law. Some provisions of the UCTA will change the common law, but the act largely relies on its continued application.

[3] The *Civil Code of Québec* (Civil Code or CCQ) offers a comprehensive and up-to-date statement of the private law as it stands in Québec. It includes provisions regarding commercial tenancies.[3] Although the Civil Code did not provide a model for the UCTA, it offered some guidance and, by way of comparison, raised issues for discussion. The UCTA was designed for adoption in the common law provinces and territories. Where Québec is concerned, the working group decided that it would recommend amendments to the Civil Code, in accordance with provisions of the UCTA, if that is likely to improve the law in Québec or if greater uniformity appears desirable.[4]

[4] This report examines the principal discrepancies between the UCTA and the Civil Code and considers whether amendments to the Civil Code should be made. It also notes some points of convergence between the UCTA and the Civil Code, which was sometimes a source of inspiration. It concludes that the following provisions of the UCTA should be examined by the legislature in Québec:

- clause 4(1)(c): accelerated rent in case of bankruptcy or insolvency of the tenant
- sections 5 and 6: implied right of reentry
- part 3: bankruptcy of the tenant

[5] New provisions, if adopted, should apply only to the commercial lease of immovable property.

1. Scope and style of the UCTA

[6] The UCTA applies to leases of commercial premises. In Québec, "commercial lease" is a well-known category, but the Civil Code provisions are broader in scope. Articles 1851-1891 apply both to immovable and movable property, *i.e.* to real property and chattels. Moreover, they cover both commercial and residential leases, although more detailed provisions follow that apply exclusively to residential leases (arts 1892ff).

[7] The Civil Code is drafted very differently from the UCTA. Rules in the Civil Code resemble principles, whose phrasing is broad and abstract. The Code's provisions are relatively easy to read and to understand. It avoids technical or old-fashioned language and complex structures as much as possible. This drafting style is probably more accessible for "unsophisticated"[5] parties, *i.e.*, parties that are little informed about the law. However, the civilian drafting style lacks precision and relies on the courts to fill in the details.

[8] The Civil Code defines a lease as follows:

> **1851.** Lease is a contract by which a person, the lessor, undertakes to provide another person, the lessee, in return for a rent, with the enjoyment of movable or immovable property for a certain time.

[9] It is clearly an onerous contract: gratuitous enjoyment of property cannot be characterized as a lease. The term "rent" is not defined. It is generally considered that a service may qualify as "rent". Therefore, enjoyment of property in exchange for a service may be characterized as a lease.

[10] Section 1 of the UCTA contains 11 definitions. They are not definitions in the usual sense of the word; that is, their purpose is not to help the "unsophisticated" reader understand the meaning of defined terms. Their function is to determine precisely the scope of the Act and its constituent parts. This requires prior knowledge of the common law and of other statutes. For instance, the question whether the UCTA applies to an agreement for the gratuitous possession of premises is not clearly answered by definitions found in section 1 of the Act. It is also unclear whether possession in exchange for something other than money constitutes a commercial lease:

> "**commercial lease**" means an express, implied, written or oral lease for the possession of premises, but does not include
> (a) a lease to which the [*name of residential tenancy Act*] or [*name of manufactured home park tenancy Act*] applies,
> (b) a prescribed class of lease, or
> (c) a lease of a prescribed class of premises;
>
> "**rent**" means the amount that a tenant is required to pay to a landlord under a commercial lease for the possession of leased premises, and includes amounts payable for any related service, area or thing that the landlord provides to the tenant under the commercial lease, but does not include interest that a tenant is required to pay to a landlord under the commercial lease;

[11] It appears that a gratuitous grant of possession may qualify as a lease under the common law and under the UCTA. Presumably, the same would hold true of a grant of possession in

exchange for services, although services would not be characterized as "rent." The definition of "rent" does not contribute to the definition of a commercial lease, but its purpose is to control the scope of certain rules, in particular distress for rent (see below). Note that tenancies falling outside the scope of the residential tenancies act in a given province or territory are covered by the UCTA, unless excluded. The UCTA could catch leases that are not commercial (as normally understood), *e.g.* student accommodation in a university residence.

[12] Several other provisions of the UCTA are likely to puzzle "unsophisticated" parties. In an attempt to cover every angle, they tend to be detailed and complex. UCTA provisions considered for enactment in Québec would take the form of amendments to the Civil Code and would need to be redrafted using a civilian approach.

2. General Provisions

2.1 Tenant's Right of Quiet Enjoyment

[13] Clause 4(1)(a) sets out a tenant's rights and obligations. A tenant "is entitled to the peaceful possession and enjoyment of the leased premises without any interruption or disturbance from the landlord or anyone claiming under the landlord." This essential right of the tenant is not developed further in the UCTA. The Civil Code is much more explicit at articles 1854-1862.

[14] Tenants' right of enjoyment is more extensive in Québec than in the common law. In Québec, if tenants' enjoyment of the leased premises is diminished, they may obtain a remedy of the landlord even if the person causing a disturbance is not under the landlord's control. Tenants may apply for a rent reduction or, in case of serious injury, resiliation (*i.e.* termination) of the lease. However, tenants are not entitled to damages if the landlord is not personally at fault and if the situation is not within the landlord's control (arts 1859, 1863 CCQ).

[15] In Québec, the landlord must also "warrant the lessee that the property may be used for the purpose for which it was leased and […] maintain the property for that purpose throughout the term of the lease" (art 1854 CCQ). The landlord has a positive and continuous obligation to provide enjoyment of the premises to the tenant.[6] In the UCTA and according to the common law, the landlord appears to have merely a negative obligation not to interrupt or disturb the tenant.

[16] The difference between the civil law and the common law may be explained in part by alternative conceptions of the nature of a tenant's interest in the leased premises. The tenant obtains an interest in land in the common law, and a contractual right of enjoyment in the civil law, that is a claim against the landlord and not a right in the leased premises (compare s 15(1) UCTA and art 1851 CCQ). It is a matter of debate whether one approach is preferable to the other. One shouldn't forget that the extent of a tenant's rights is also a matter of policy.

2.2 Accelerated Rent in Case of Bankruptcy

[17] Clause 4(1)(c) provides that a landlord is entitled to three months accelerated rent if a tenant becomes insolvent or bankrupt, or files a proposal with their creditors. This allows a landlord to benefit from the priority provided by clause 136(1)(f) of the *Bankruptcy and Insolvency Act.*[7] Many commercial leases already provide for accelerated rent. The UCTA makes this an implied term,

offering better protection for "unsophisticated" landlords who are not familiar with the legal consequences of a tenant's bankruptcy.

[18] Clause 4(1)(c) of the UCTA is most likely to help a landlord in the context of a proposal. A tenant who files a proposal must provide for the payment of certain claims, including those mentioned at s 136 BIA (s 60(1) BIA). Clause 4(1)(c) may disadvantage smaller tenants, because they will need to provide a larger amount in order to be eligible for a proposal.

[19] Clause 4 (1) (c) is less useful in the case of a tenant's bankruptcy. The priority provided by clause 136 (1) (f) BIA is subject to an order of priority where other secured or preferred claims rank ahead of the landlord's claim for accelerated rent. In addition, the priority is limited to "the realization from the property on the premises under lease." Such property often has little realizable value. Therefore, landlords usually do not obtain much from the priority provided by 136(1)(f) BIA in the context of a bankruptcy.

[20] Québec might consider adopting such a rule in the Civil Code. Harmonizing the application of bankruptcy and insolvency law across Canada appears to be a desirable goal.

2.3 Landlord's Consent to Assignment or Sublease

[21] In the common law and according to the UCTA, a tenant may assign the lease or sublet the premises without a landlord's consent, unless the agreement provides otherwise (s 4(2)(d) UCTA). In Québec, a tenant who wishes to assign or sublet must obtain the landlord's consent (art 1870 CCQ). This difference is consistent with the nature of a tenant's right: an interest in land in the common law and a contractual right of enjoyment in the civil law. However, both the Civil Code and the UCTA provide that a landlord whose consent is required may not unreasonably withhold it (art 1871 CCQ, s 4(2)(d) UCTA).

[22] Following the Civil Code's example, the UCTA includes a rule that a landlord is deemed to have consented if they do not respond to a tenant's request for consent within a specified time (21 days in the UCTA; 15 days in the Québec Civil Code) (s 4(2)(f) UCTA, art 1871 CCQ).

2.4 Landlord's Duty to Repair

[23] In the UCTA, there is an implied obligation of the tenant to repair damage "caused by the tenant or a person for whom the tenant is responsible" (s 4 (1)(d)). The Civil Code contains a similar provision at article 1862. The Civil Code also requires the landlord to repair the premises and to maintain them in good condition (arts 1854, 1864 CCQ). In Québec, landlords and tenants share responsibility for the maintenance and repair of premises: major repairs are attended to by the landlord, minor repairs by the tenant (art 1864). The Civil Code also provides rules to assist a party who is willing to repair the premises, but encounters resistance from the other party (art 1865-1869 CCQ) (also see art 8 UCTA concerning the landlord's right of reentry to effect urgent or necessary repairs).

[24] The working group was unable to reach a consensus concerning a landlord's implied duty to repair and maintain the premises.[8] It appears that the common law traditionally imposes no such duty on the landlord. However, some working group members felt that the UCTA should

include such a duty, because that would better balance the rights of both parties to a commercial lease. A landlord's duty to repair is also in the public interest, since it helps to prevent situations where premises become unsafe for occupants and members of the public.[9]

[25] The question was referred to the ULCC delegates, who decided to include in square brackets a set of provisions based on articles 1864-1869 of the Civil Code, which an enacting jurisdiction may choose to implement if it sees fit (s. 4.1-4.6 UCTA). As with the Civil Code, such provisions may be varied or contracted out of in the lease agreement.

2.5 Implied Right of Re-Entry

[26] Sections 5 and 6 of the UCTA set out the landlord's right of re-entry, which may be exercised if the tenant fails to pay the rent when it is due or commits a breach of material consequence. The landlord must serve the tenant with a notice of default indicating the intention to reenter the premises. The tenant has 5 days to pay the rent or 30 days to cure the breach, unless the tenant applies to a court for a longer term. The landlord must exercise the right of reentry through an enforcement officer, *i.e.* a bailiff.

[27] In Québec, there is no right of re-entry. Before a tenant may be evicted, the landlord must terminate the lease, a remedy called "resiliation." It is necessary to apply to a court to resiliate a lease in Québec, except if the agreement expressly provides that the lease may be resiliated without recourse to a court.[10] Resiliation is only allowed if there is serious injury, a requirement that closely parallels the "breach of material consequence" (s 5(1) UCTA). When a lease is terminated or resiliated, a landlord may not evict a tenant who refuses to leave the premises. Instead, a landlord must apply to a court for an order of eviction (art 1889 CCQ). [11]

[28] Québec might consider adding rules similar to sections 5 and 6 of the UCTA to the Civil Code. The notice requirement, the ability for a tenant to apply to a court and the use of a bailiff provide significant safeguards. It would then be necessary to modify the Civil Code 1) to make resiliation an extrajudicial remedy, in conformity with the general principle stated by article 1605 CCQ; and 2) to allow re-entry by the landlord, after a lease is terminated or resiliated, through the services of a bailiff.

2.6 Overholding Tenant

[29] Section 7 of the UCTA repeals a common law rule that imposed a harsh monetary sanction on tenants that did not vacate the leased premises after termination of the lease. The old common law rule, which was penal in character, is replaced by one that entitles the landlord to damages and an indemnity for use and occupation of the leased premises, where a tenant continues to occupy them without the landlord's consent.

[30] Considering the following articles of the Civil Code, there is an issue whether the lease may be implicitly renewed in cases where the tenant continues to occupy the premises without opposition from the landlord:

> **1853.** […]

> The lease of immovable property is presumed where a person occupies the premises by sufferance of the owner. The term of the lease is indeterminate; the lease takes effect upon occupancy and entails the obligation to pay a rent corresponding to the rental value.
>
> **1879.** A lease is renewed tacitly where the lessee continues to occupy the premises for more than ten days after the expiry of the lease without opposition from the lessor.
>
> In that case, the lease is renewed for one year or for the term of the initial lease, if that was less than one year, on the same conditions. The renewed lease is also subject to renewal.

[31] In the common law, it appears that acceptance of rent from an overholding tenant would create a new tenancy.[12] The working group decided not to include a provision to that effect in the UCTA, since the issue "arises infrequently, and such a change may have unintended consequences on specialized leasing arrangements such as agricultural leases."[13]

[32] The landlord's right to apply for an order under section 7 of the UTCA is not limited in time. What is the relationship of the parties in the interim? Is there a lease? When is there consent? The Civil Code generates less uncertainty; however, a landlord must act swiftly to evict an overholding tenant, in order to avoid tacit renewal of the lease under article 1879 CCQ.

2.7 Apportionment of Rent

[33] It the lease comes to an end before the rent becomes due, the landlord is entitled to a portion of the rent based on the duration of the tenant's occupation of the premises, calculated on a day-to-day basis (s 9 UCTA). Perhaps surprisingly, this rule does not apply in favour of a tenant whose rent is payable in advance, in similar circumstances. The working group decided against making the rule bilateral.[14] The Civil Code does not contain a precise rule, but a court would likely apportion the rent both ways, to avoid unjust enrichment of the landlord or the tenant.

3. Bankruptcy of Tenant

[34] In addition to clause 4(1)(c) mentioned above, the UCTA contains several sections regarding a tenant's bankruptcy or insolvency (part 3). They are designed to complete the federal *Bankruptcy and Insolvency Act* without conflicting with it. As with the federal statute, parties cannot contract out of these sections (s 18 UCTA). Part 3 replaces provisions from several provincial statutes enacted at the beginning of the 20th century in order to fill a gap in the law resulting from a decision of the Québec Superior Court. The decision declared a section of the BIA regarding the effects of a tenant's bankruptcy to be *ultra vires*, because it did not follow the constitutional division of powers.[15] Accordingly, the federal legislature adopted section 146 BIA that reads: "the rights of lessors are to be determined according to the law of the province in which the leased premises are situated." Contrary to the common law provinces, Québec did not adopt provisions such as those found in part 3 of the UCTA, and no gap seems to have manifested itself in the province. Therefore, it is probably unadvisable for Québec to implement part 3, although this part should be examined carefully before any decision is made.

[35] Section 19 UCTA sets out the manner in which a trustee may retain or disclaim the lease, a power that flows from clause 30(1)(k) BIA. Section 20 UCTA concerns the trustee's liability for

payment of rent to the landlord. Section 21 states that a trustee must comply with a term in the lease that prohibits liquidation sales on the leased premises. Section 22 allows a subtenant to become a tenant under the principal lease, if the trustee disclaims it.

[36] There is an important issue concerning the validity of a termination clause in case a tenant becomes bankrupt or insolvent. According to the BIA, such a clause is of no effect if a tenant files a proposal (s 65.1 BIA). A similar rule applies if the tenant becomes bankrupt, but only if the tenant is an individual (s 84.2 BIA). The BIA does not invalidate a termination clause where the bankrupt tenant is a corporation, an association or a partnership, although a landlord must not abuse the right to terminate the lease.[16] Sections 18 and 19 UCTA go further than the BIA, because they imply that a termination clause in case a tenant becomes bankrupt is ineffective, whether the tenant is an individual or not. This solution is in accordance with the statutory provisions of most Canadian jurisdictions, but it does not represent the state of the law in Québec, where termination clauses are valid within the bounds of the BIA.[17]

[37] To conclude, Québec should examine carefully the UCTA provisions regarding a tenant's bankruptcy before deciding if it should implement similar rules.

4. Distress for rent

[38] More than half the UCTA provisions are dedicated to distress for rent. The new provisions seek to clarify, rationalise and modernise the common law on this topic.

[39] In Québec, there used to be a remedy in favour of landlords analogous to distress for rent: the lessor's privilege.[18] The privilege allowed the landlord to be preferred to ordinary creditors in the distribution of the proceeds of sale of assets of the tenant covered by the privilege. A landlord could invoke the privilege in order to recover rent in arrears, an additional six months' rent and most other debts pertaining to the lease. The privilege ranked ahead of most other security interests. The privilege was abolished in 1994, when the Civil Code came into force. The following reasons were given to explain why the Québec legislature decided to put an end to it:

- assets found on the leased premises usually have little realizable value;
- there were difficult-to-resolve conflicts between the privilege and other security interests, for example a Bank Act security, or in cases of insolvency or bankruptcy;
- there were other contentious issues regarding eligible claims and the identification of assets covered by the privilege; and
- the privilege was abused by some landlords who knowingly seized assets belonging to a third party or who exercised it in circumstances where the tenant had good reason not to pay the rent.

[40] Since 1994, the following security is used instead:

- a movable hypothec on the tenant's property (similar to a personal property security);
- a letter of credit;
- a security deposit; or
- a personal guarantee.

It should be noted that a movable hypothec is not an ideal solution because of transaction costs.

Lenders to tenants often insist on a first ranking hypothec on tenants' property. Moreover, a landlord's hypothec is useless if the tenant becomes insolvent or bankrupt.[19]

[41] We asked Québec practitioners and experts in the field of commercial tenancies whether they felt that the decision to abolish the privilege had been a mistake. The answer was no. The decision has brought about a welcome simplification of the law. While the working group decided to maintain distress for rent in the UCTA, it is not recommending that the lessor's privilege be reinstated in Québec.[20]

5. Summary Dispute Resolution

[42] Part 5 of the UCTA provides a summary dispute resolution procedure for parties to a commercial lease. In Québec, the *Code of Civil Procedure* (CCP), which was revised and re-enacted as recently as 2014, normally covers such matters. Are disputes arising under a commercial lease deserving of special treatment? Are they more urgent than other disputes? It is a difficult case to make.

[43] It should be noted that Québec courts have allowed a special remedy to develop in cases where commercial landlords sue tenants for arrears of rent. It stems from the common law power of the courts to grant special orders safeguarding the parties' rights, codified by the *Code of Civil Procedure* as follows:

> **49.** The courts and judges, both in first instance and in appeal, have all the powers necessary to exercise their jurisdiction.
>
> They may, at any time and in all matters, even on their own initiative, grant injunctions or issue protection orders or orders to safeguard the parties' rights for the period and subject to the conditions they determine. As well, they may make such orders as are appropriate to deal with situations for which no solution is provided by law.

[44] A landlord suing a tenant for arrears of rent and/or resiliation of the lease will typically apply to the Court for a safeguard order awaiting trial, thus compelling the tenant to deposit a portion of the rent to become due in the office of the Court. If the parties agree, such amounts may alternatively be held in trust with either party's attorney (art. 158(8) CCP). In deciding whether to issue a safeguard order, a court uses virtually the same test as for an interlocutory injunction. If granted, the safeguard order often leads to a transaction amongst the parties.

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[1] Leah Howie et al, *Uniform Commercial Tenancies Act. Final Report of the working group*, Uniform Law Conference of Canada, Québec City, August 2018 [ULCC, *Final Report*].
[2] *Ibid* at para 3.
[3] The *Civil Code of Québec* was enacted in 1991 and entered into force in 1994 [Civil Code]. 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, began in the 1950s and took four decades to complete. The provisions relating to commercial tenancies are found at articles 1851 and following.

[4] Leah Howie et al, *Uniform Commercial Tenancies Act. Report of the working group*, Uniform Law Conference of Canada, Regina, August 2017, at para 5.

[5] See UCTA, comment under s 1, where this expression is used.

[6] See *e.g. Aéroports de Montréal* c *Hôtel de l'Aéroport de Mirabel Inc*, [2003] RJQ 2479 (CA), online : <http://canlii.ca/t/613s>.

[7] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA]. I wish to thank Professor Cinthia Duclos, whose helpful comments on Section 2.2 and Part 3 of the UCTA made an important contribution to this report.

[8] See ULCC, *Final Report*, at paras 15–21 and UCTA, comment under s 4.6 for a more detailed discussion.

[9] The Algo Centre Mall roof collapse that took place in Elliot Lake in 2012, killing two persons, is an example that comes to mind. See "Elliot Lake fatal mall collapse comes down to 'human failure,' report says", *CBC News* (15 October 2014), online: <www.cbc.ca/news/canada/sudbury/elliot-lake-fatal-mall-collapse-comes-down-to-human-failure-report-says-1.2799021>.

[10] *Place Fleur de Lys* c *Tag's Kiosque inc*, [1995] RJQ 1659 (CA), online: <http://canlii.ca/t/gnswz>; *9051-5909 Québec inc* c *9067-8665 Québec inc*, [2003] RDI 225 (CA), online : <http://canlii.ca/t/1stdr>.

[11] See also arts 660(3), 685 para 3, 692 CCP.

[12] See UCTA, comment under s 7.

[13] *Ibid*.

[14] See UCTA, comment under s 9.

[15] British Columbia, British Columbia Law Institute, *Report on Proposals for a New Commercial Tenancy Act*, BCLI Report No 55, Vancouver: BCLI, October 2009) at 70, citing *Re Stober* (1923), 4 CBR 34 (QCS).

[16] See ss 84.2(1)–(2) *a contrario*, 84.1, 146 BIA.

[17] *91133 Canada Ltée c Groupe Thibault Van Houtte & Associés Ltée*, [2003] RJQ 753 (CA), online: <http://canlii.ca/t/1bzwm>.

[18] See arts 1637, 1639, 1640, 1994(8), 2005 CCLC.

[19] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 136(f); also see *Re Restaurant Ocean Drive inc*, [1998] RJQ 30 (CA), online: <http://canlii.ca/t/1nb1x>.

[20] See UCTA, comment under s 23.