

# Uniform Commercial Tenancies Act

Uniform Law Conference of Canada & the Law Reform Commission of Saskatchewan

August 13, 2018 Quebec City

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# PART 1 - DEFINITIONS AND APPLICATION

## Definitions

1 In this Act:

“**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;

“**enforcement officer**” means *[jurisdiction to identify persons who landlords must use to exercise the right of re-entry or the right of distress, e.g. a bailiff]*;

“**landlord**” means the party to a commercial lease, commonly referred to as the lessor, who is the owner of leased premises or other person granting the right of possession to leased premises, and includes the party’s heirs and assigns and legal representatives;

“**leased premises**” means the premises under a commercial lease;

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“**rent**” means the money that a tenant is required to pay to a landlord under a commercial lease for the use or occupation of leased premises, and includes the cost of any related service, area or thing that the landlord provides to the tenant under the commercial lease that is related to the use or occupancy of the leased premises, but does not include interest that a tenant is required to pay to a landlord under the commercial lease;

“**rent arrears**” means rent that is owing after the date for the payment of the rent under a commercial lease;

“**sublease**” means a commercial lease in which a landlord’s interest in the leased premises arises as a tenant under another commercial lease;

“**subtenant**” means a tenant under a sublease;

“**superior landlord**” means the landlord under a superior lease;

“**superior lease**” means a commercial lease that grants a tenant the right to possess leased premises that the tenant subleases in whole or in part;

“**tenant**” means a party to a commercial lease, commonly referred to as the lessee, who is granted the right to possess the leased premises, and includes the party’s heirs and assigns and legal representatives.

# PART 1 - DEFINITIONS AND APPLICATION

**Comment:** The *Uniform Commercial Tenancies Act* (UCTA) seeks to balance the rights and obligations between landlords and tenants, who both may or may not be “sophisticated” parties, in commercial leasing agreements. Many of the provisions in this Act can be modified or excluded by the terms of the lease; as a result, many of these provisions will primarily impact “unsophisticated” parties who may not have a written lease agreement or a lease agreement prepared by experienced legal counsel.

The UCTA is intended to be a complete uniform code for commercial tenancies in Canada’s common law jurisdictions. It consolidates, updates, clarifies, and simplifies where possible, statutory provisions affecting commercial tenancies found in several different statutes in each jurisdiction. Jurisdictions should consider revising or eliminating short form acts, as they are of minimal practical use in modern commercial leasing agreements.

The definition of “commercial lease” includes any lease unless the lease is specifically excluded. Jurisdictions should consider whether the types of relationships/agreements/arrangements excluded from application of their residential tenancies legislation should be subject to the UCTA or be specifically excluded.

The UCTA is based on the *Uniform Interpretation Act* which provides that the Crown is bound by an enactment. If the *Interpretation Act* of the enacting jurisdiction says that the Crown is not bound, then the enacting jurisdiction should add the following provision:

*The Crown is bound by this Act.*

# PART 1 - DEFINITIONS AND APPLICATION

## Application

- 2 (1) Subject to subsections (2) and (3), this Act applies to commercial leases entered into before, on or after the day this Act comes into force.
- (2) Part 2 does not apply to commercial leases entered into before the day this Act comes into force.
- (3) Parts 4 and 5 do not apply to goods seized under a right to distrain for rent if the goods were seized before the day this Act comes into force.

**Comment:** The Working Group considered that it would be unfair to imply terms into leases negotiated before the coming into force of the UCTA, given that adding in additional implied terms could have the effect of materially altering the bargain between the parties.

# PART 2 - GENERAL PROVISIONS RELATING TO COMMERCIAL LEASES

## Changing this Part by commercial lease

- 3 (1) A commercial lease must not modify or exclude a provision of this Part unless the provision of this Part states that it is subject to a commercial lease.
- (2) A term in a commercial lease that modifies or excludes a provision of this Part in contravention of subsection (1) has no effect.
- (3) If a provision of this Part states that the provision is subject to a commercial lease, the commercial lease may
  - (a) modify all or part of the provision, or
  - (b) exclude the application of all or part of the provision to the commercial lease.
- (4) A modification or exclusion referred to in subsection (3) operates whether or not the provision being modified or excluded is expressly mentioned in the commercial lease.

**Comment:** Several provisions of the UCTA can be contracted out of by the parties to a commercial lease. Section 3 describes how a commercial lease can contract out of the relevant provisions of the UCTA. Subsection 3(4) provides that the commercial lease does not have to specifically state that the parties agree certain provisions in the UCTA do not apply to, or are modified by, their commercial lease. Subsection 3(4) ensures that parties unaware of the legislation are not disadvantaged.

# PART 2 - GENERAL PROVISIONS RELATING TO COMMERCIAL LEASES

## Implied terms

- 4 (1) A commercial lease is deemed to contain the following terms relating to a tenant's rights and obligations:
  - (a) subject to the payment of rent and the performance of the terms of the commercial lease, a tenant, and anyone claiming lawfully under the tenant, is entitled to peaceful possession and enjoyment of the leased premises without any interruption or disturbance from the landlord or anyone claiming under the landlord;
  - (b) a tenant must pay the rent payable under the commercial lease when it is due;
  - (c) if any of the following events occur, a tenant must pay to the landlord an amount equal to 3 month's rent and the amount is due immediately after the event occurs:
    - (i) the tenant becomes insolvent;
    - (ii) the tenant commits an act of bankruptcy;
    - (iii) the tenant takes the benefit of any statute relating to bankrupt or insolvent debtors;
    - (iv) the tenant makes a proposal, assignment, compromise or arrangement with its creditors;
    - (v) a receiver is appointed for all or part of the business, property, affairs or revenues of the tenant;
  - (d) a tenant must repair, at the tenant's expense, any damage, other than reasonable wear and tear, caused by the tenant or a person for whom the tenant is responsible;
  - (e) a tenant must only use the leased premises for lawful purposes and in accordance with applicable laws.

# PART 2 - GENERAL PROVISIONS RELATING TO COMMERCIAL LEASES

**Comment:** This section sets out the implied provisions in commercial leases that relate to the tenant's rights and obligations. Subsection 4(1) refers to "terms" as opposed to "covenants", as the distinction between a term and a covenant is not as clear as it has been historically, given modern drafting practices. Using "terms" instead of "covenants" is a better fit with plain language.

Clause 4(1)(a) captures the meaning of "quiet enjoyment" using plain language.

Clause 4(1)(c) implies an accelerated rent provision into a commercial lease. As the majority of commercial leases will contain a provision providing for accelerated rent, this provision will generally apply to unsophisticated commercial lease agreements. The Working Group decided to add clause 4(1)(c) in order to establish a priority for the landlord in the event of a tenant's bankruptcy. Clause 136(1)(f) of the *Bankruptcy and Insolvency Act* creates a priority claim for 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 if entitled to accelerated rent under the lease."

Clause 4(1)(d) imposes an obligation on tenants to repair any damage they cause, and reflects statutory provisions found in several jurisdictions requiring tenants to use the premises in a "tenant like manner" and to keep the premises in good and substantial repair, excepting reasonable wear and tear and damage by fire and lightning.

Clause 4(1)(e) requires tenants to use the leased premises for lawful purposes and in accordance with all applicable laws. This provision could, for instance, allow a landlord to exercise their right of re-entry under section 5 if the tenant is using the premises unlawfully.



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- 4 (2) A commercial lease is deemed to contain the following terms relating to a landlord's rights and obligations:
  - (a) a landlord must not derogate from a grant contained in the commercial lease;
  - (b) a landlord has the right to re-enter and resume possession of the leased premises as set out in section 5;
  - (c) a landlord has the right to grant possession of the leased premises at the time a tenant is to take possession of the leased premises;
  - (d) if the commercial lease requires a tenant to obtain the consent of the landlord before assigning, subletting or otherwise disposing of the leased premises, the landlord
    - (i) must respond to the tenant's request for consent within a reasonable time, and
    - (ii) must not unreasonably withhold consent;
  - (e) if the commercial lease requires a tenant that is a corporation to obtain the landlord's consent before its shares are transferred or issued, the landlord
    - (i) must respond to the tenant's request for consent within a reasonable time, and
    - (ii) must not unreasonably withhold consent.
- (3) This section is subject to a commercial lease.

# PART 2 - GENERAL PROVISIONS RELATING TO COMMERCIAL LEASES

**Comment:** Subsection 4 (2) sets out the implied provisions in commercial leases that relate to the landlord's rights and obligations. Subsection 4(2) refers to "terms" as opposed to "covenants", as the distinction between the two is not as clear as it has been historically as a result of modern drafting practices. Using "terms" instead of "covenants" is a better fit with plain language.

Clause 4(2)(a) requires the landlord to not "derogate from a grant", which differs from the requirement to not interfere with a tenant's quiet enjoyment. The Working Group considered whether to remove the term of art "derogate from a grant" in favour of plain language, but ultimately decided that attempting to explain "derogate from a grant" in plain language would be difficult and may result in unintended consequences.

*The Working Group discussed, and the majority ultimately decided against, including a provision requiring either landlords or tenants to maintain the leased premises and a provision requiring landlords to repair the leased premises. The majority of the Working Group was of the view that both types of provisions would be complicated to draft in a manner that would fairly deal with this issue in all circumstances, given the wide range of both the nature of the parties to, and the premises subject to, a commercial lease. The Working Group was of the view that in most cases, the amount of rent agreed to between the parties to a commercial lease is likely reflective of the condition of the leased premises. In addition, the Working Group also noted that such a provision, if included, would be contracted out of in most sophisticated commercial leasing agreements. A minority of the Working Group was of the view that the UCTA should impose a duty on landlords to repair the leased premises, in a similar manner as the Quebec Civil Code, in order to fairly balance the rights and obligations of both parties to a commercial lease [NTD: to be discussed at the ULCC August meeting].*

**Comment:** Subsection 4(3) provides that commercial leases can modify, vary, or exclude the application of any of these implied provisions, in accordance with section 3.

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## Implied right of re-entry

- 5 (1) In this section, “**breach of material consequence**” means a breach of one or more terms in a commercial lease, other than a term that requires a tenant to pay rent, that has a material consequence, and includes a series of breaches of one or more terms in respect of which the accumulated effect has a material consequence.
- (2) The landlord’s right to re-enter and resume possession of the leased premises referred to in section 4 (2) (b) may be exercised if the tenant
  - (a) fails to pay the rent under the commercial lease when it is due, or
  - (b) commits a breach of material consequence.
- (3) Before exercising the right to re-enter and resume possession of the leased premises, the landlord must serve the tenant with a notice of default that
  - (a) sets out that the landlord intends to exercise the landlord’s right to re-enter and resume possession of the leased premises and the basis for exercising the right, and
  - (b) contains a copy of this section.
- (4) The notice of default must be served by
  - (a) personally serving it on the tenant, or
  - (b) sending it by regular mail to the tenant.
- (5) A notice of default that is sent by regular mail to a tenant is conclusively deemed to have been served 5 days after the date it is mailed.

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- 5 (6) If a tenant has failed to pay rent, the landlord must not re-enter the leased premises unless at least 5 days have passed after the day that the tenant was served with the notice of default.
- (7) If a tenant has committed a breach of material consequence, the landlord must not re-enter the leased premises unless at least 15 days have passed after the day that the tenant was served with the notice of default.
- (8) If a tenant who is served with a notice of default based on a failure to pay rent pays the rent arrears and any interest that is owing under the commercial lease on the rent arrears within 5 days after the day of being served with the notice, the landlord's right to re-enter with respect to the rent arrears is terminated.
- (9) If a tenant who is served with a notice of default based on a breach of material consequence remedies the breach within 15 days after the day of being served with the notice, the landlord's right to re-enter in respect of that material breach is terminated.
- (10) If a tenant who is served with a notice of default based on a breach of material consequence diligently takes action to remedy the breach within 15 days after the day of being served with the notice, the landlord's right to re-enter in respect of that breach is suspended and the right of re-entry is governed by the following rules:
  - (a) if the breach is remedied within 30 days after the day the tenant was served with the notice, or within a longer period allowed by an order under section 51, the right of re-entry in respect of that breach is terminated;
  - (b) if the breach is not remedied within 30 days after the day the tenant was served with the notice, or within a longer period allowed by an order under section 51, the landlord may re-enter and resume possession of the premises.

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- (11) A tenant who is served with a notice of default based on a breach of material consequence and who diligently takes action to remedy the breach within 15 days after the day of being served with the notice may apply under section 51 for an order allowing the breach to be remedied within a period that is longer than 30 days after the day the tenant was served with the notice.
  - (12) A landlord that re-enters and resumes possession of leased premises under this section must
    - (a) post a notice of re-entry in a prominent place on the leased premises, and
    - (b) personally serve a copy of the notice of re-entry on the tenant or send by regular mail a copy of the notice of re-entry to the tenant.
  - (13) If a landlord exercises the right to re-enter and resume possession of the premises in accordance with this section, all rights of the tenant with respect to the leased premises are terminated.
  - (14) This section is subject to a commercial lease.

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**Comment:** The UCTA refers to a “breach of material consequence” as opposed to a “breach of material provision” in subsection 5(1) because it is difficult to determine which provisions in a commercial lease are material. In addition, not all breaches of “material provisions” necessarily have consequences that are serious enough to warrant termination of the lease. The Working Group decided that attempting to further define or explain “breach of material consequence” would be futile, as determining whether a breach has had a material consequence will necessarily depend on the various circumstances of each case. The provision is designed to lead the courts to focus on evaluating the impact of the breach(es) in deciding whether a breach of material consequence has occurred.

Subsection 5(10) addresses a situation where a tenant starts to diligently remedy a breach within the 15 days but is unable to completely remedy the breach within the 15 day time period set out in subsection 5(9). Subsection 5(10) grants the tenant an additional 15 day time period to remedy the breach, and subsection 5 (11) allows for a court to order the time period to remedy the breach be extended.

Subsection 5(14) provides that commercial leases can modify, vary, or exclude the application of this provision in accordance with section 3.

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## Enforcement officer to carry out re-entry

- 6 (1) A landlord's right to re-enter and resume possession of leased premises under section 5 or under a commercial lease must be exercised only through an enforcement officer.
- (2) Subsection (1) does not apply if the tenant has ceased to occupy the leased premises when the re-entry takes place.
- (3) If a commercial lease provides the landlord with a right to re-enter and resume possession of the leased premises, the commercial lease must not modify or exclude the application of this section and any term in the lease that does so has no effect.

**Comment:** The Working Group considered creating a statutory procedure requiring a court order prior to re-entry and decided against doing so, as retaining re-entry as a self-help remedy will ensure it remains a cost effective and expedient remedy. However, the UCTA will require an enforcement officer be used to conduct the re-entry if the tenant is still in occupation in order to reduce the potential for conflicts between the landlord and tenant and to protect both parties. Requiring an enforcement officer to carry out the re-entry if the tenant is still occupying the premises balances the landlord's and tenant's competing interests. This provision cannot be contracted out of.

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## Overholding tenant

- 7 (1) If a tenant continues to occupy the leased premises without the consent of the landlord after the commercial lease has expired or been terminated in accordance with the commercial lease or this Act, the landlord may apply under section 51 for an order to
- (a) re-enter and resume possession of the leased premises, and
  - (b) recover from the tenant
    - (i) compensation for use and occupation of the premises, and
    - (ii) indemnity for any liability resulting from the landlord's inability to deliver vacant possession of the premises to a new tenant or purchaser.
- (2) A landlord's right to apply for an order under subsection (1)
- (a) is in addition to the landlord's rights under section 5, and
  - (b) replaces any common law right of the landlord to compensation or indemnity if a tenant continues to occupy the leased premises without the consent of the landlord after the commercial lease has expired or been terminated in accordance with the commercial lease or this Act.



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**Comment:** This provision creates a right of action for a landlord to obtain an order for possession against a tenant who remains in possession after the expiration of the term of the lease without the landlord's consent. Clause 7(1)(b) restricts landlords to claiming compensation for use and occupation of the premises and indemnity for any liability resulting from the landlord's inability to deliver vacant possession of the premises to a new tenant or purchaser. Landlords will no longer be able to claim double rent and double value against overholding tenants, as double rent and double value are difficult to claim and are both arguably penal in character. The Working Group was of the view that a restatement of the common law right of landlords to claim compensation for use and occupation of the premises, in combination with providing landlords with a new indemnity provision to protect them from third party claims relating to the failure to deliver vacant possession, will sufficiently address a landlord's potential harms arising from an overholding tenant. This provision cannot be contracted out of.

The Working Group discussed including a provision regarding the implications of the landlord accepting rent from an overholding tenant and what type of tenancy should arise if rent is accepted. Under the common law, acceptance of rent from a year to year overholding tenant creates a new yearly tenancy, and acceptance of rent from a term of years tenant creates a year to year tenancy. The Working Group considered including a provision deeming the acceptance of rent from an overholding tenant of any length of term to create a monthly tenancy, however, the Working Group ultimately decided not to include such a provision as the issue arises infrequently, and such a change may have unintended consequences on specialized leasing arrangements such as agricultural leases.

# PART 2 - GENERAL PROVISIONS RELATING TO COMMERCIAL LEASES

## Landlord's right to enter to deal with emergencies or structural problems

- 8 (1) This section applies if
- (a) a landlord needs to enter leased premises for the purposes of protecting life or property as a result of an emergency and the commercial lease does not provide the landlord with a right of entry on that basis, or
  - (b) a landlord needs to enter leased premises for the purposes of protecting life or property as a result of a structural problem in the building in which the leased premises are located and the commercial lease does not provide the landlord with a right of entry on that basis.
- (2) If, in the circumstances described in subsection (1) (a) or (b), the tenant does not permit the landlord to enter the leased premises or the tenant is absent, the landlord may apply for an order under section 51
- (a) directing the tenant to allow the landlord, or any person acting on the landlord's behalf, to enter the leased premises and take the actions necessary to protect life or property, and
  - (b) authorizing the use of force described in the order to enter the premises.
- (3) If force is used to enter the leased premises under the order and the tenant is absent when the landlord is leaving the premises, the landlord must take reasonable steps to ensure that the premises are secure from unauthorized entry.

**Comment:** Section 8 provides the landlord with the ability to obtain a court order to enter the leased premises in the event of an emergency or serious structural problem if the tenant is absent or prevents them from entering and the commercial lease does not otherwise provide the landlord with a right of entry on that basis.

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## Apportionment of rent

- 9 (1) A tenant is liable to pay rent apportioned in accordance with this section.
- (2) This section does not apply to rent that is payable in advance and is already due when
  - (a) an assignment referred to in subsection (4) or (5) occurs, or
  - (b) a termination referred to in subsection(7) occurs.
- (3) For the purposes of apportioning rent, rent accrues on a day-to-day basis.
- (4) If, before the date that rent is payable, the interest of the tenant is assigned, the assignor is liable to pay to the landlord the part of the rent apportioned to the assignor and the assignee is liable to pay to the landlord the part of the rent apportioned to the assignee.
- (5) If, before the date that rent is payable, the interest of the landlord is assigned to a new landlord, the tenant remains liable to pay the entire rent and the former and new landlord are entitled to the apportioned parts of the rent, unless the former and new landlord agree otherwise.

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- (6) When an assignment referred to in subsection (4) or (5) occurs, payment of the rent referred to in those subsections remains due on the date that the rent is payable under the commercial lease.
  - (7) If, before the date that rent is payable, the commercial lease is lawfully terminated by the landlord or the tenant, the tenant is liable to pay rent that is apportioned to the date of termination and payment of the apportioned rent is due
    - (a) in the case of termination by the landlord, within 15 days after the date of termination, and
    - (b) in the case of termination by the tenant, on the date of termination.
  - (8) This section is subject to a commercial lease.

**Comment:** This provision applies to apportionment in respect of time. It does not apply to advance payments of rent. The Working Group discussed including a provision dealing with apportionment in respect of estate and decided not to include such a provision as the issue arises infrequently and the common law sufficiently addresses the issue. Subsection 9(8) allows the parties to contract out of this provision in accordance with section 3.

# PART 2 - GENERAL PROVISIONS RELATING TO COMMERCIAL LEASES

## Effect of assignment

- 10 (1) In this section, “**assignment**” means a transfer of the interest of a landlord or a tenant in a commercial lease, whether by agreement or by operation of law, but does not include
- (a) 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 leased premises to enforce the security.
- (2) Subject to subsection (3), an assignee has all the rights-and obligations of the assignor under the commercial lease, including a right or obligation that
- (a) does not touch, concern or have reference to the leased premises,
  - (b) becomes enforceable before the assignment, or
  - (c) relates to something not in existence at the time the lease was entered into.
- (3) Subsection (2) does not apply to a right or obligation that becomes enforceable before the assignment with respect to rent arrears and any interest that is owing under the commercial lease on rent arrears.

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- 10 (4) Subject to subsection (5), an assignment does not release an assignor from any liability of the assignor under the commercial lease whether the liability arises from events occurring before or after the assignment.
- (5) If the interest of a tenant is assigned and the assignee renews the commercial lease, the assignor and any prior assignor is released from liability under the commercial lease arising from events occurring after the renewal.
- (6) If the interest of a landlord is assigned, the tenant may continue to pay rent to the assignor until the assignor or the assignee serves the tenant with a notice that the rent is to be paid to the assignee.
- (7) This section is subject to a commercial lease.

**Comment:** Subsection 10(2) makes all the rights and obligations of the assignor enforceable against an assignee, regardless of whether the rights and obligations touch and concern land or pertain to matters in existence at the time of the lease. This approach simplifies the law and ensures that all of the terms of a commercial lease to which the parties have agreed continue to be enforceable if the tenancy is assigned to another party. Subsection 10(5), however, relieves a tenant from continuing liability under a commercial lease that has been assigned if the commercial lease is renewed. Subsection 10(7) allows the parties to contract out of this subsection in accordance with section 3.

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## Tenant's right to withdraw request for landlord's consent

- 11 (1) In this section, “**termination for request to consent term**” means a term in a commercial lease that allows a landlord to terminate the commercial lease if a tenant requests the landlord's consent to
- (a) assign, sublease or otherwise dispose of the tenant's interest, or
  - (b) transfer or issue shares.
- (2) A commercial lease that contains a termination for request to consent term is deemed to contain a term providing that
- (a) the tenant may, within 5 days after being served with a notice of the landlord's election to terminate, serve the landlord with a notice that the tenant is withdrawing the request for the landlord's consent, and
  - (b) if the tenant has served the notice in accordance with clause (a), the landlord's election to terminate has no effect.

**Comment:** Section 11 protects the tenant's right to an assignment with the consent of the landlord. A right to assign or dispose is rendered illusory by provisions commonly found in commercial leases allowing landlords to elect to terminate the lease upon receiving such a request from the tenant

# PART 2 - GENERAL PROVISIONS RELATING TO COMMERCIAL LEASES

## Effect of surrender and merger on subtenancies

- 12 (1) In this section, “intermediate landlord” means a landlord under a sublease.
- (2) The rights and obligations of the parties to a sublease are not affected if the intermediate landlord
- (a) renews the superior lease, or
  - (b) surrenders the superior lease and enters into a new commercial lease with the superior landlord that covers the leased premises under the sublease.
- (3) Subsection (4) applies if
- (a) an intermediate landlord surrenders the superior lease and does not
    - (i) renew the superior lease, or
    - (ii) enter into a new commercial lease with the superior landlord, or
  - (b) the interest of an intermediate landlord arising under the superior lease is otherwise merged with the interest of the superior landlord.
- (4) In the circumstances described in subsection (3), the sublease of the intermediate landlord becomes a commercial lease between the superior landlord as landlord and the subtenant as tenant.

**Comment:** This provision ensures a subtenant continues to be bound by the sublease in the event of a merger or surrender of the head lease. Jurisdictions may have statutory provisions dealing with surrenders and mergers that need to be repealed or amended as a result of this provision.



# PART 2 - GENERAL PROVISIONS RELATING TO COMMERCIAL LEASES

## Relief against acceleration of rent

- 13 (1) If, because of non-compliance with a term in a commercial lease, the payment of rent is or may be required at an earlier time than would be the case if the non-compliance had not occurred, a tenant may apply under section 51 for an order granting relief from the requirement to pay the rent at an earlier time if the court considers such requirement to be a penalty.
- (2) An order granting relief under subsection (1) may award damages and compensation.

**Comment:** The Working Group decided against including a provision prohibiting accelerated rent provisions in commercial leases. While these types of provisions can be viewed as a penalty, this is not necessarily true in all circumstances, and several recent cases have reached the same conclusion. In addition, the Working Group recognized that the existence of an accelerated rent clause in a commercial lease may create an incentive for tenants to pay rent in a timely manner, and that prohibiting these types of provisions would be a substantial change in the law of commercial leasing.

Subsection 13(1) restates each jurisdiction's courts ability to grant relief from forfeiture if the application of the accelerated rent provision in a commercial lease would operate as a penalty.

# PART 2 - GENERAL PROVISIONS RELATING TO COMMERCIAL LEASES

## Interesse termini abolished

- 14 (1) The common law doctrine of interesse termini is abolished.
- (2) The rights and obligations of a landlord and tenant under a commercial lease take effect from the date the commercial lease is entered into whether or not the tenant ever occupies the leased premises.

**Comment:** Subsection 14(1) abolishes the common law doctrine of interesse termini, which states that tenants have only an interest of a term, as opposed to an interest in estate, until the tenant physically enters the premises. The doctrine limited the remedies available to a tenant prevented from taking possession of the premises by a third party or the landlord, prevented the tenant from enforcing any covenant requiring the tenant to be in possession of the premises, and prevented a tenant from maintaining an action for trespass or for use and occupation as these causes of action require the tenant to have entered into possession. The doctrine has been abolished for residential tenancies in most Canadian jurisdictions. Subsection 14(2) clarifies the effect of abolishing the doctrine.

# PART 2 - GENERAL PROVISIONS RELATING TO COMMERCIAL LEASES

## Interest in land and contract law

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- (1) For the purpose of interpreting the rights and obligations of the parties to a commercial lease, a commercial lease creates an interest in land and the general law of contract applies to the lease.
  - (2) The common law rules respecting the effect of a breach of a contract that deprives a party to the contract of substantially the whole benefit of the contract apply to a commercial lease, including a right to elect to treat the lease as terminated.
  - (3) If a breach of a commercial lease deprives a tenant of substantially the whole benefit of the commercial lease and the tenant does not elect to terminate the commercial lease, the tenant may apply for an order, under section 51, to
    - (a) reduce the rent by
      - (i) an amount equal to the reduction in value of the leased premises to the tenant because of the breach, or
      - (ii) an amount sufficient to compensate the tenant for expenses incurred in repairing the breach, or
    - (b) divert the rent in whole or in part to any person by or through whom the breach can be remedied.
  - (4) The doctrine of frustration of contract applies to a commercial lease.
  - (5) Subsection (4) is subject to a commercial lease.

# PART 2 - GENERAL PROVISIONS RELATING TO COMMERCIAL LEASES

**Comment:** Subsection 15(1) confirms the hybrid contract/conveyance nature of a commercial lease.

Subsection 15(2) is put in for the benefit of non-sophisticated parties to commercial leases. It indicates that the doctrine of “fundamental breach” applies to commercial leases, and prevents the landlord from attempting to include a provision preventing a tenant from terminating a lease on the basis of a fundamental breach.

The Working Group considered including a provision requiring the landlord to mitigate after a tenant repudiates the commercial lease. There are arguments both for and against requiring a landlord to mitigate, and the persuasiveness of both of these arguments depends on the circumstances. A provision requiring the landlord to mitigate in all circumstances could lead to an unjust result of shifting the burden of the tenant’s breach of the lease from a potentially sophisticated and capable tenant onto the landlord. Conversely, if a provision stated landlords have no duty to mitigate, this would prevent the development of the common law, and could also lead to arguably unjust results

The case law on the issue of whether a landlord has a duty to mitigate is evolving. The evolving nature of the case law and the fact that arguments exist on both sides of whether mitigation is required led the Working Group to conclude that no provision dealing with mitigation should be included. The Working Group was of the view that not including a provision on mitigation will allow the common law to evolve on a principled basis, and will allow the courts to consider the specific circumstances of each case.

# PART 2 - GENERAL PROVISIONS RELATING TO COMMERCIAL LEASES

## Tenant's ability to reduce or stop paying rent

- 16 A tenant's obligation to pay rent is subject to the following:
- (a) a tenant may deduct from rent an amount in respect of a judgment in favour of the tenant against the landlord;
  - (b) a tenant who elects to terminate a lease under section 15 (2) may stop paying rent;
  - (c) a tenant may deduct rent in accordance with a court order referred to in section 15 (3) allowing a tenant to reduce or divert rent.

**Comment:** Clause 16(b) clarifies the consequences of making an election under subsection 15(2). Clauses 16(a) and (c) provide tenant's the self-help remedy of rent abatement or diversion only if the tenant has already obtained a judgment or court order against the landlord.

# PART 3 - BANKRUPTCY OF TENANT

## Definitions

- 17 The definitions in section 2 of the *Bankruptcy and Insolvency Act* (Canada) apply to this Part.

**Comment:** The federal *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 (*BIA*) is the main federal statute governing insolvencies in Canada. The bankruptcy provisions in the UCTA are intended to supplement - and not conflict with - the relevant provisions in the *BIA*.

While the Working Group was of the view that a provision allowing landlords to terminate a lease upon the tenant's bankruptcy would be desirable, such a provision would be in direct conflict with the *BIA*. Subsection 84.2(2) of the *BIA* prohibits landlords from terminating a lease upon the tenant's bankruptcy and subsection 84.2(5) provides that any provision in a lease permitting anything that is contrary to section 84.2 is of no force and effect.

# PART 3 - BANKRUPTCY OF TENANT

## Retaining or disclaiming commercial lease by trustee

- 18
- (1) A trustee of a bankrupt tenant may elect to retain a commercial lease within 3 months after the date of the tenant's bankruptcy or before the expiry of the lease, whichever occurs first.
  - (2) If a trustee elects to retain a commercial lease, the trustee must serve a notice of the election on the landlord and any subtenant within the period specified in subsection (1), and the election is effective on the date that the notice is served on the landlord.
  - (3) If a trustee does not serve on the landlord a notice of the election to retain a commercial lease within the period specified in subsection (1), the trustee is deemed to have disclaimed the commercial lease at the end of that period.
  - (4) A trustee may serve on a landlord and any subtenant, within the period specified in subsection (1), a notice that the trustee disclaims the commercial lease, and the lease is disclaimed on the date that the notice is served on the landlord.
  - (5) If a trustee disclaims a commercial lease, the landlord is entitled to a priority claim as set out in the *Bankruptcy and Insolvency Act* (Canada) and may prove as a general creditor for the balance of any other amounts due under the commercial lease or arising as a result of the trustee disclaiming the commercial lease, subject to the landlord's duty to mitigate.
  - (6) A trustee who assigns a commercial lease must do so in accordance with the *Bankruptcy and Insolvency Act* (Canada).

**Comment:** This section sets out two options for a trustee of a bankrupt tenant: (1) retain the commercial lease, or, (2) disclaim the commercial lease.

# PART 3 - BANKRUPTCY OF TENANT

## Liability for rent

- 19 (1) Subject to subsection (2), if a trustee of a bankrupt tenant elects to retain a commercial lease, the trustee is liable to pay rent to the landlord, calculated and payable in accordance with the terms of the commercial lease, for the period
- (a) beginning on the date of the tenant's bankruptcy, and
  - (b) ending on the effective date of an assignment of the commercial lease by the trustee or, if there is no assignment, on the expiry of the lease.
- (2) The trustee's liability under subsection (1) for the first month's rent is limited to the value of the bankrupt tenant's property available for distribution.

**Comment:** Section 19 deals with a situation where the trustee has decided to retain the lease. Subsection 19(2) provides a one-month grace period for the trustee, and then removes the cap on the trustee's personal liability for rent that is typically imposed in legislation and case law in most of Canada which allows the landlord to claim "occupation rent" only from the estate of the bankrupt. The Working Group was of the view that this approach more appropriately balances the interests of the trustee and the landlord/creditor.

## Liquidation sales

- 20 A trustee of a bankrupt tenant is bound by a term in the commercial lease that prohibits or restricts the sale or liquidation of a bankrupt tenant's property on the leased premises.



# PART 3 - BANKRUPTCY OF TENANT

## Rights of subtenant

- 21
- (1) Subject to subsection (3), if a trustee of a bankrupt tenant does not elect to retain a commercial lease in the circumstances described in section 18 (3) and the commercial lease is a superior lease, a subtenant may, within 10 days after the lease is disclaimed, serve a notice on the landlord under the superior lease and on the trustee that the subtenant elects to become the tenant under the superior lease on the same terms as the superior lease.
  - (2) Subject to subsection (3), if a trustee of a bankrupt tenant disclaims the commercial lease in the circumstances described in section 18 (4) and the commercial lease is a superior lease, a subtenant may, within 10 days after being served with the trustee's notice to disclaim the superior lease, serve a notice on the landlord under the superior lease and on the trustee that the subtenant elects to become the tenant under the superior lease on the same terms as the superior lease.
  - (3) A subtenant may elect to become a tenant under the superior lease if
    - (a) the landlord of the superior lease consented to the sublease, and
    - (b) the leased premises under the sublease are substantially all of the leased premises under the superior lease.
  - (4) This section must not be modified or excluded by the sublease and any term of the sublease that does so has no effect.

**Comment:** Section 21 sets out the rights of a subtenant if the subtenant's landlord goes bankrupt. Section 21 essentially grants a right of first refusal and allows subtenants who occupy substantially all of the premises to step into the shoes of the subtenant's landlord. If there is value in the sublease, it is expected that the trustee will not disclaim. Subsection 21(4) provides that parties may not contract out of this provision.

# PART 4 - DISTRESS FOR RENT

## Definitions

22 (1) In this Part:

“**goods**” means tangible personal property, currency, standing crops and the unborn young of animals, but does not include fixtures, chattel paper, a document of title, an instrument or an investment property as those terms are defined in the *[insert jurisdiction’s Personal Property Security Act]*;

“**harvest**”, in respect of the produce of a plant, means

- (a) the produce has been separated from the plant for the purpose of gathering the produce, or
- (b) the plant has been cut down or removed from the medium in which it was growing for the purpose of gathering the plant or its produce;

“**occupant**” means a person who occupies leased premises with the consent of a tenant and provides consideration to the tenant in connection with the occupancy, but does not include a subtenant;

“**right of distress**” means the statutory right of distress referred to in section 24 (1);

# PART 4 - DISTRESS FOR RENT

“**security interest**” has the same meaning as in *[insert jurisdiction’s Personal Property Security Act]*;

“**seizure**” means a seizure under the right of distress;

“**standing crops**” means the produce of plants if the produce has not been harvested, and includes trees that have not been harvested if the trees

- (a) are being grown as nursery stock,
  - (b) are being grown for uses other than the production of lumber and wood products, or
  - (c) are intended to be replanted in another location for the purpose of reforestation.
- (2) A reference to a landlord seizing goods includes an enforcement officer seizing goods on behalf of the landlord.
- (3) A reference to leased premises in sections 30, 31, 32 (1) to (3), 33, 34, 36, 37, 39, 42 (3) and 43 includes a highway or easement referred to in section 28 (2).

# PART 4 - DISTRESS FOR RENT

**Comment:** Distress for rent is a remedy available to landlords to enforce a tenant's obligation to pay rent, allowing the landlord to seize and sell goods to address arrears of rent. While distress for rent can be based on statutory provisions or in an agreement between the parties, the most important contemporary form of distress is the common law distress for rent.

The Working Group considered and decided against abolishing the common law right of distress in relation to commercial tenancies in the UCTA. Distress for rent has been abolished for commercial tenancies in four Australian jurisdictions and nine American states. The UK abolished the common law distress for rent and replaced it with a new statutory regime in 2014. The Working Group was of the view, however, that the right to distrain remains an important remedy available to landlords and abolishing distress would result in a fundamental change in leasing relationships.

The Working Group decided instead to modernize distress for rent and to codify it in the UCTA. Distress remains a self-help remedy in the UCTA; landlords are not required to obtain leave of the court to begin the process. However, the UCTA requires the actual seizing of goods to be carried out by a qualified third party.

Quebec abolished its analogous remedy to distress for rent - the lessor's privilege - in 1994. Landlords in Quebec have since found new ways to secure tenants' obligation to pay rent, and these mechanisms are considered to provide sufficient protection for landlords against a defaulting tenant. The Working Group is not recommending that the lessor's privilege be reinstated in Quebec.

# PART 4 - DISTRESS FOR RENT

## Changes to this Part

- 23** (1) A commercial lease cannot modify or exclude a provision of this Part except in accordance with subsection (2).
- (2) A commercial lease may waive or restrict the landlord's right of distress.
- (3) A term of a commercial lease that modifies or excludes a provision of this Part in contravention of subsection (1) has no effect.

**Comment:** Section 23 allows landlords to restrict or waive their rights to distrain for rent, but prevents landlords from expanding their right to distrain.

# PART 4 - DISTRESS FOR RENT

## Right of distress

- 24 (1) A landlord has a right of distress governed by this Part.
- (2) A landlord may, under the right of distress, seize goods referred to in section 28 and sell those goods to recover
- (a) rent arrears, and
  - (b) the landlord's reasonable costs in exercising the right of distress.
- (3) A landlord may, under the right of distress, seize goods referred to in section 28
- (a) during the term of the commercial lease, and
  - (b) within 6 months after the termination of the commercial lease if the tenant still occupies the leased premises and the landlord continues to hold the reversion.
- (4) The common law respecting distress for rent does not apply to goods seized under the landlord's right of distress.
- (5) Nothing in this Part affects a landlord's ability to have a security interest in goods subject to the landlord's right of distress.

**Comment:** Subsection 24(4) abolishes the common law respecting distress for rent in relation to commercial tenancies, replacing it with the provisions of the UCTA. Jurisdictions should consider whether to require relationships other than commercial tenancies where the right of distress is currently available at common law to be subject to the distress for rent provisions in the UCTA, which clarify and improve the exercise of the distress for rent remedy. These relationships may include rent seck and rent charge arrangements.

Subsection 24(5) clarifies that a landlord's right to retain separate security interests from those liable to the landlord's right of distress is not restricted by this provision.

# PART 4 - DISTRESS FOR RENT

## Death of landlord

**25** If a landlord dies, the landlord's executors and administrators may exercise the landlord's right of distress.

## Limitations on landlord's rights

- 26** (1) A landlord who sues a tenant for rent arrears or has obtained a judgment for rent arrears must not exercise the right of distress to recover those rent arrears.
- (2) A landlord who seizes goods under the right of distress must not sue the tenant to recover any of the amounts referred to in section 24 (2) until the seized goods have been sold.

**Comment:** Section 26 requires landlords to choose to either sue or distrain to collect the debt. If a landlord chooses to distrain, they may sue to recover any amounts left owing after the sale of the seized goods.

# PART 4 - DISTRESS FOR RENT

## Tenant's right of set off

- 27 (1) In determining the amount of rent arrears, a debt of a landlord owing to a tenant must be set off against rent that is owing if the tenant serves on the landlord, before the goods of the tenant have been sold under the right of distress, a notice that sets out the amount and particulars of the landlord's debt.
- (2) Subject to subsection (3), the landlord may apply for an order under section 51 to determine the existence of the debt or its amount and, after making the application, the landlord must not sell any goods seized to recover the rent arrears until the order is made.
- (3) The landlord may sell perishable goods before the order under section 51 is made if the sale is necessary to preserve the value of the goods.

**Comment:** Section 27 provides a tenant with a right of set off in respect of any debts owed to it by the landlord. A right of set off is not currently provided for at common law.



# PART 4 - DISTRESS FOR RENT

## Goods that may be seized

- 28** (1) Subject to subsection (3), a landlord may seize the following goods located on the leased premises under the right of distress:
- (a) goods of a tenant;
  - (b) goods of a subtenant;
  - (c) goods of an occupant;
  - (d) goods of a person if the person receives goods of the tenant in exchange and the exchange of goods is intended to defeat the landlord's right of distress.
- (2) Subject to subsection (3), if the leased premises is a farm, in addition to livestock located on the leased premises, a landlord may seize under the right of distress livestock of the tenant or subtenant
- (a) on a highway adjacent to the leased premises, or
  - (b) on a right of way or other easement the benefit of which belongs to land that is all or part of the leased premises.
- (3) A landlord must not seize under the right of distress goods that are exempt from seizure under *[jurisdiction to insert Act that establishes general exemptions from seizure under writs of execution]*.
- (4) A landlord must not seize more goods than are reasonably necessary to satisfy rent arrears and the landlord's reasonable costs in exercising the right of distress.

**Comment:** Subsection 28(1) prescribes the goods that can be seized by a landlord under the right of distress. Subsection 28(4) limits the amount of goods that can be seized to those reasonable necessary to satisfy the rent arrears and the landlord's reasonable costs in exercising the right of distress. Subsection 28(3) allows jurisdictions to exempt from distress the same goods exempted from writs of execution. The Working Group chose to take this approach rather than attempting to create a list of specific exempted items in order to allow each jurisdiction to maintain their current exemptions, which may reflect unique policy considerations in each jurisdiction.

# PART 4 - DISTRESS FOR RENT

## Restriction on goods that may be seized

- 29 (1) This section applies to
- (a) a subtenant whose goods are located on leased premises and who is not in arrears in payment of rent,
  - (b) an occupant of leased premises whose goods are located on the leased premises and who is not in arrears with respect to any payment required to be paid by the occupant to the tenant for the use or occupation of the leased premises, and
  - (c) an owner of goods located on the leased premises who is not a tenant, subtenant or occupant of leased premises or a person described in section 28 (1) (d).
- (2) A person to whom subsection (1) applies may serve on the landlord a statutory declaration that
- (a) identifies the goods referred to in subsection (1),
  - (b) declares that the person is the owner of those goods,
  - (c) in the case of a subtenant, declares that the payment of rent is not in arrears,
  - (d) in the case of an occupant, declares that any payment required to be paid by the occupant to the tenant for the use or occupation of the premises is not in arrears, and
  - (e) in the case of an owner of goods described in subsection (1) (c), sets out why the goods are located on the leased premises.

# PART 4 - DISTRESS FOR RENT

- 29 (3) Subject to an order referred to in subsection (5), a landlord who is served with a declaration referred to in subsection (2) before the landlord has seized goods located on the leased premises must not seize the goods identified in the declaration.
- (4) A landlord who is served with a declaration referred to in subsection (2) after the landlord has seized goods located on the leased premises, but before the goods have been sold under the right of distress, must release the goods identified in the declaration and return them to the person who made the declaration unless
- (a) the landlord applies for an order referred to in subsection (5) in accordance with that subsection, and
  - (b) the court directs that the goods may be sold.
- (5) A landlord may, within 5 days after being served with a statutory declaration under subsection (2), apply under section 51 for an order determining whether the contents of the statutory declaration are true, and, if the contents are not true, directing that the landlord may seize and sell the goods.

**Comment:** Section 29 allows individuals whose goods may be, or have been seized, to serve a statutory declaration on the landlord to prevent the seizure or sale of the goods in certain circumstances.

# PART 4 - DISTRESS FOR RENT

## Tenant's duties before seizure

**30** Before a landlord seizes a tenant's goods, the tenant must not do the following with intent to defeat, hinder or delay the landlord's right of distress:

- (a) remove the tenant's goods from the leased premises;
- (b) dispose of all or part of the tenant's interest in goods on the leased premises.

**Comment:** If a tenant commits either of the actions set out in section 30, the tenant will have committed tenant misconduct. Section 48 of the UCTA provides that a person other than the tenant who knowingly assists a tenant to contravene section 30 also commits tenant misconduct. Section 49 provides landlords with a right of action in respect of tenant misconduct.

# PART 4 - DISTRESS FOR RENT

## When goods may be seized

- 31 A landlord must not seize goods from leased premises unless the seizure takes place on a day and at an hour that is reasonable according to the use of the premises.

**Comment:** At common law distress could only be levied during daylight hours (and for a long time not on Sundays). A landlord could only enter premises through an unlocked door, and distress could still be carried out in residential premises. This limitation was to ensure there was no breach of the peace.

In Canada, there are, however, a number of problems with this restriction. In some areas of Canada, where there is little or no daylight or nighttime for periods of the year. In addition, modern commercial practice is no longer restricted or controlled by natural light and some businesses (nightclubs for example) are not open in the daytime at all, while others are open 24 hours a day. This provision replaces the common law rule with a practical approach on when distress may be levied which recognizes the substantial change in commercial practice.

# PART 4 - DISTRESS FOR RENT

## Process for seizure

- 32
- (1) A seizure of goods on leased premises must be carried out by an enforcement officer on behalf of the landlord.
  - (2) An enforcement officer may enter leased premises for the purposes of seizing goods
    - (a) with the consent of the tenant, or
    - (b) without the consent of the tenant by
      - (i) using the landlord's pass key or other entry device, or
      - (ii) hiring a licensed locksmith to open locked doors.
  - (3) If a tenant obstructs or threatens an enforcement officer who is attempting to enter the leased premises for the purpose of seizing goods, the landlord may apply under section 51 for an order
    - (a) directing the tenant to allow the officer to enter the leased premises for the purpose of seizing goods, and
    - (b) authorizing the officer to use force described in the order to enter the premises for the purpose of seizing goods.
  - (4) If an enforcement officer opens a locked door to enter leased premises for the purposes of seizing goods and the tenant is absent when the officer leaves the premises, the officer must take reasonable steps to ensure that the premises are secure from unauthorized entry.

**Comment:** Section 32 prescribes the methods by which an enforcement officer may enter the leased premises to seize goods. At present, the common law only allows a landlord to enter through an unlocked door. If the tenant is not present, subclause 32(2)(b)(ii) authorizes an enforcement officer to enter the leased premises by using the landlord's pass key or other entry device, or by hiring a licensed locksmith to open the lock. If, however, the tenant obstructs an enforcement officer from entering the leased premises, or threatens an enforcement officer during an attempt to enter the leased premises, subsection 32(3) allows a landlord to apply for a court order. Subsection 32(4) requires the enforcement officer to take reasonable steps to ensure the premises are secure prior to leaving the premises if the tenant is absent and the officer has opened a locked door to enter the premises.

# PART 4 - DISTRESS FOR RENT

## Notice of seizure

- 33** (1) In this section, “**notice of seizure**” means a notice that meets the requirements of subsection (3).
- (2) An enforcement officer who enters leased premises and seizes goods must
- (a) post a notice of seizure in a prominent place on the leased premises, and
  - (b) within one day after leaving the premises,
    - (i) personally serve a copy of the notice on the tenant or send by regular mail a copy of the notice to the tenant, and
    - (ii) send by regular mail a copy of the notice to any person whom the enforcement office has reasonable grounds to believe may have an interest in the goods seized.
- (3) The notice of seizure must be in the prescribed form and contain the following information:
- (a) date and location of the seizure;
  - (b) the amount of the rent arrears;
  - (c) an estimate of the landlord’s reasonable costs in exercising the right of distress;
  - (d) a description of the seized goods that is sufficient to identify them;
  - (e) a copy of sections 36, 37, 38 and 47.
- (4) A notice of seizure that is sent by regular mail to a tenant is conclusively deemed to have been served 5 days after the date it is mailed.

**Comment:** Section 33 requires the enforcement officer to provide a prescribed form of distress notice in order to ensure tenants are adequately informed of their rights absent court supervision.

# PART 4 - DISTRESS FOR RENT

## Landlord's duties respecting seized goods

- 34
- (1) A landlord who seizes goods must handle the goods in a commercially reasonable manner prior to their sale.
  - (2) A landlord who seizes goods, other than Canadian currency, and removes them from the leased premises must protect those goods in a commercially reasonable manner until
    - (a) the goods are redeemed under section 36,
    - (b) the landlord releases the goods in compliance with an order issued section 37 (2) (b), or
    - (c) the landlord sells the goods and the purchaser takes possession of them.
  - (3) A landlord who seizes Canadian currency and removes the currency from the leased premises may use the currency to cover the rent arrears and the landlord's reasonable costs in exercising the right of distress.
  - (4) If the landlord uses the currency for the purposes described in subsection (3), the landlord must
    - (a) provide the tenant with an accounting showing whether the currency seized covers the rent arrears and the landlord's reasonable costs in exercising the right of distress and whether there are any surplus funds, and
    - (b) advise the tenant that, if there are surplus funds, the tenant must provide the landlord with instructions on how to pay the surplus funds to the tenant.
  - (5) If a landlord leaves seized goods, other than standing crops or livestock, on leased premises, the landlord must
    - (a) group the seized goods together, separate them from goods that are not seized and mark the seized goods as being seized, or
    - (b) enter into a written agreement with the tenant or occupant that makes the tenant or occupant the landlord's bailee of the seized goods and allows the tenant or occupant to continue to make use of the goods.



# PART 4 - DISTRESS FOR RENT

- 34 (6) If a landlord seizes standing crops, the landlord must
- (a) take any action that is necessary to maintain the standing crops and harvest them when it is commercially appropriate to do so, and
  - (b) store the harvested crops in suitable buildings on the leased premises or, if there are no suitable buildings, at any other suitable place determined by the landlord that is as close to the leased premises as is feasible.
- (7) A landlord who stores harvested crops in a location that is not on the leased premises must, within 7 days after moving the crops to the location, personally serve on the tenant or send to the tenant by regular mail a notice that sets out the location.
- (8) If a landlord leaves seized livestock on the leased premises, the landlord must
- (a) group the seized livestock together in an enclosure on the leased premises other than on a highway, a right of way or other easement referred to in section 28 (2), exclude any other livestock from the enclosure, post a sign on the enclosure identifying the livestock as being seized and ensure that the livestock are cared for and maintained, or
  - (b) enter into a written agreement with the tenant that makes the tenant the landlord's bailee of the livestock and allows the tenant to continue to possess the livestock.

**Comment:** Section 34 prescribes a landlord's duties regarding seized goods. Subsection 34(1) creates a general duty on the landlord to handle seized goods in a commercially reasonable manner. This section allows a landlord to choose to physically remove the seized goods, or to leave them on the leased premises. If the goods are left on the leased premises, they must be separated from goods that are not seized in order to provide third parties with notice the goods have been seized, unless the landlord enters into a written agreement with the tenant or occupant making the tenant or occupant bailee of the seized goods, thereby allowing the tenant or occupant to continue to use the goods. Subsection 34(3) provides a specific rule if Canadian currency is seized and removed from the leased premises, and subsections 34(6) - (8) provide specific rules pertaining to the seizure of livestock and standing crops.

# PART 4 - DISTRESS FOR RENT

## Seizing goods that the tenant has removed

- 35 (1) In this section, “removed goods” means
- (a) goods removed in contravention of section 30 (a), and
  - (b) goods removed in contravention of section 30 (b) other than goods acquired by a bona fide purchaser in good faith for value.
- (2) Subject to subsections (3) and (4), a landlord may, within 30 days after the date of removal of the goods, seize removed goods from the place where the removed goods are located.
- (3) A landlord must not enter premises where removed goods are located for the purposes of seizing removed goods unless the entry and seizure are authorized by a warrant issued under subsection (4).
- (4) A justice *[or other authorizing authority selected by the enacting jurisdiction]* may issue a warrant authorizing an enforcement officer to enter premises described in subsection (2) and seize and take away removed goods if satisfied by evidence given under oath that there are reasonable grounds to believe that removed goods are located in the premises.

**Comment:** Section 35 allows a landlord to seize any goods the tenant, or a person knowingly assisting the tenant, has removed from the leased premises for the purposes of defeating or hindering the landlord’s right of distress within 30 days of the removal of goods. The landlord must, however, first obtain a warrant authorizing an enforcement officer to enter the non-leased premises to seize the goods.

# PART 4 - DISTRESS FOR RENT

## Redeeming seized goods

- 36 (1) This section applies to goods seized by a landlord that
- (a) the landlord has not sold, or
  - (b) in the case of Canadian currency, the landlord has not used for the purposes set out in section 34 (3).
- (2) A tenant may redeem goods seized by a landlord by paying the landlord
- (a) the rent arrears,
  - (b) the landlord's reasonable costs in exercising the right of distress, and
  - (c) if the landlord removes the seized goods from the leased premises to a new location, the landlord's reasonable costs to transport the goods back to the leased premises, unless the tenant elects to receive the goods at the new location.
- (3) A subtenant may redeem their goods seized by a superior landlord by paying to the superior landlord
- (a) the lesser of the following amounts:
    - (i) all amounts that the subtenant owes to the subtenant's landlord;
    - (ii) all amounts that the subtenant's landlord owes to the superior landlord, and
  - (b) if the superior landlord removes the seized goods from the leased premises to a new location, the superior landlord's reasonable costs to transport the goods back to the leased premises, unless the subtenant elects to receive the goods at the new location.

# PART 4 - DISTRESS FOR RENT

- 36 (4) An occupant may redeem their goods seized by a landlord by paying to the landlord
- (a) the lesser of the following amounts:
    - (i) all amounts that the occupant owes to the tenant who permitted the occupant to occupy the leased premises;
    - (ii) all amounts that the tenant owes to the landlord, and
  - (b) if the landlord removes the seized goods from the leased premises to a new location, the landlord's reasonable costs to transport the goods back to the leased premises, unless the occupant elects to receive the goods at the new location.
- (5) If the tenant, subtenant, or occupant has redeemed goods under this section, the landlord must
- (a) release the goods from seizure, and
  - (b) if the landlord has removed the goods from the leased premises to a new location, transport the goods back to the leased premises unless the tenant, subtenant, or occupant elects to receive the goods at the new location.

**Comment:** Section 36 describes what a tenant or occupant must do in order to redeem their seized goods. Tenants are required to pay the rent arrears, the landlord's reasonable costs associated with the distress, and any costs incurred to transport goods back to the leased premises if the landlord removed them and the tenant does not elect to receive the goods at their new location. If a superior landlord has seized a subtenant's goods, the subtenant can redeem its goods by paying to the superior landlord the amount the subtenant owes to its landlord (i.e. the tenant/immediate landlord), or the amount the tenant/immediate landlord owes to the superior landlord, whichever is less. Occupants can redeem their goods by paying all amounts it owes to the tenant who granted the occupation, or all amounts owed to the landlord, whichever is less. The subtenant and occupant must also pay the costs incurred by the landlord to transport goods back to the leased premises unless the subtenant or occupant chooses to receive the goods at their new location. Once seized goods have been redeemed, the landlord must release the goods from seizure and return them if they have been removed from the leased premises.

# PART 4 - DISTRESS FOR RENT

## Disputing rent arrears or costs

- 37 (1) This section applies if a landlord has seized goods and a tenant, subtenant, or occupant disputes one or more of the following:
- (a) that there are rent arrears;
  - (b) the amount of the rent arrears;
  - (c) the landlord's reasonable costs in exercising the right of distress;
  - (d) if the tenant, subtenant, or occupant wants to redeem seized goods under section 36 and the landlord removed the goods from the leased premises to a new location, the landlord's reasonable costs to transport the goods back to the leased premises.
- (2) If subsection (1) applies, the tenant, subtenant or occupant may
- (a) apply under section 51 for an order postponing the sale of the seized goods, or
  - (b) pay the amounts claimed by the landlord as rent arrears and reasonable costs into [*name of court*] and apply under section 51 for an order directing the landlord
    - (i) to release the goods from seizure, and
    - (ii) if applicable, to return the goods to the leased premises.
- (3) If an order is granted releasing the goods from seizure based on an application under subsection (2) (b), the money paid into court may be released with the agreement of the landlord and tenant or by order of the court.

**Comment:** Section 37 allows a tenant, subtenant, or occupant who disputes the amount of rent arrears or the landlord's determination of their reasonable costs in exercising the right of distress, to either apply under section 51 of the UCTA for an order postponing the sale of the seized goods, or to pay into court the amount claimed by the landlord and apply for an order requiring the landlord to release and return the goods.

# PART 4 - DISTRESS FOR RENT

## Tenant's, subtenant's and occupant's duties after goods seized

- 38 (1) A tenant, subtenant or occupant must not do the following with respect to seized goods:
- (a) take possession and control of the seized goods, unless the tenant, subtenant, or occupant has entered into a bailee's agreement referred to in section 34 (5) (b) or (8) (b) with the landlord;
  - (b) dispose of the tenant's, subtenant's or occupant's interest in the goods.
- (2) Subsection (1) does not apply if the tenant, subtenant or occupant has redeemed the goods under section 36 or obtained an order of the court under section 37 (2) (b).

**Comment:** If a tenant, subtenant, or occupant commits either of the actions set out in section 38, they will have committed tenant misconduct as defined in section 48. Section 49 provides landlords with a right of action in respect of tenant misconduct.

# PART 4 - DISTRESS FOR RENT

## Process for sale

- 39
- (1) A landlord must not sell seized goods except in a manner that is commercially reasonable.
  - (2) A landlord must not sell seized goods unless at least 5 days have passed after the day that the tenant was served with the notice of seizure in accordance with section 33.
  - (3) If seized goods are located on the leased premises, the landlord may sell the goods from the leased premises and the tenant must allow persons to enter the leased premises for the purposes of the sale or for the removal of goods after they have been sold by the landlord.
  - (4) If a tenant refuses to allow persons to enter the leased premises for the purposes of the sale or for removing the goods after they have been sold, the landlord may apply under section 51 for an order
    - (a) requiring the tenant to allow persons to enter the leased premises, or
    - (b) allowing the landlord to remove the goods from the leased premises to conduct the sale from an alternate location.
  - (5) If a landlord obtains an order under clause (4) (b), the tenant is liable for any additional costs resulting from the relocation of the goods.

# PART 4 - DISTRESS FOR RENT

- 39 (6) A landlord must not purchase goods that the landlord has seized unless the landlord
- (a) purchases the goods at a public auction,
  - (b) before purchasing the goods, obtains the consent of the tenant, or
  - (c) before purchasing the goods, applies under section 51 for and is granted an order approving the purchase.

**Comment:** Section 39 contains several rules pertaining to the sale of the seized goods. Landlords must wait until 5 days after the notice of seizure has been served before selling the goods in a commercially reasonable manner. Subsection 39(3) requires tenants to allow persons on the leased premises for the purposes of sale or to remove the goods they have purchased. If the tenant refuses to allow persons on the leased premises for this purpose, subsection 39(4) allows the landlord to apply for an order requiring the tenant to allow persons to enter the leased premises or allowing the landlord to remove the goods to conduct the sale from an alternate location. Subsection 39(6) prohibits a landlord from purchasing the seized goods unless they are purchased at a public auction, or the tenant consents to the purchase, or the landlord obtains court approval to purchase the goods.



# PART 4 - DISTRESS FOR RENT

## Termination of interest in seized goods

- 40 (1) If a landlord sells seized goods to a purchaser for value acting in good faith, the sale terminates any interest in those goods held by the tenant, subtenant or occupant.
- (2) The goods referred to in subsection (1) are subject to a security interest in the goods over which, by operation of section 45, the landlord's right of distress does not have priority.

## Sale of standing crops - liability for rent

- 41 If a landlord sells standing crops that have been seized, the landlord is entitled to credit a portion of the purchase price for rent in respect of the land on which the standing crops were located for the period between seizure and sale.

# PART 4 - DISTRESS FOR RENT

## Duties after sale

- 42 (1) After a landlord sells seized goods, the landlord must
- (a) prepare a notice that
    - (i) sets out an accounting showing whether the amounts received covered the rent arrears and the landlord's reasonable costs in exercising the right of distress and whether there are any surplus funds, and
    - (ii) advises the tenant that, if there are surplus funds, the tenant must provide the landlord with instructions on how to pay the surplus funds to the tenant,
  - (b) within one day after the sale, post the notice in a prominent place on the leased premises, and
  - (c) within 10 days after the sale,
    - (i) personally serve a copy of the notice on the tenant, or
    - (ii) send a copy of the notice to the tenant by regular mail.
- (2) The landlord must pay any surplus funds to the tenant within 10 days after receiving the payment instructions from the tenant.
- (3) If the amounts received from the sale of seized goods covers the rent arrears and the landlord's reasonable costs in exercising the right of distress and there are remaining seized goods that have not been sold, the landlord must
- (a) immediately release the remaining goods from seizure, and
  - (b) if the landlord removed the goods from the leased premises, transport the goods back to the premises.

**Comment:** Following the sale of seized goods, the landlord is required to provide an accounting of the sale to the tenant, and if there are surplus funds, request the tenant to provide instructions on how to pay the surplus funds to the tenant. If the sale amounts cover the rent arrears and the landlord's costs, the landlord must immediately release any remaining seized goods.

# PART 4 - DISTRESS FOR RENT

## Execution creditors

- 43** An execution creditor must not, under a writ of execution, seize the goods of a tenant located on the leased premises unless the execution creditor pays to the landlord any rent arrears up to a maximum of one year's rent.

**Comment:** Section 43 gives the landlord a priority claim to the tenant's seized goods of up to one year's rent against an execution creditor. The one year's rent priority claim for the landlord reflects the priority claim set out in existing landlord and tenant legislation in several common law jurisdictions.

## Standing crops

- 44** A landlord's right of distress with respect to a tenant's standing crops has priority over the interest of a person who purchased the crops in a sale under a writ of execution if
- (a) the standing crops remain on the leased premises, and
  - (b) other goods that may be seized by the landlord are not sufficient to cover the tenant's rent arrears and the landlord's reasonable costs in exercising the right of distress.

# PART 4 - DISTRESS FOR RENT

## Security interests

- 45 (1) In this section, “**purchase money security interest**” has the same meaning as in *[insert jurisdiction’s Personal Property Security Act]*.
- (2) A landlord who exercises a right of distress has priority, with respect to the seized goods and their proceeds of disposition, over any security interest in those goods other than the following security interests if the security interests were perfected under the *[insert jurisdiction’s Personal Property Security Act]* before the seizure occurs:
- (a) a purchase money security interest;
  - (b) *[jurisdictions to insert other statutory security interests having priority over the landlord’s right of distress]*.

**Comment:** There are a number of provincial and federal statutes that create specific liens or charges against personal property, some of which may have priority over a landlord’s right of distress. Jurisdictions should consider whether to refer to specific liens or charges created by other statutes in this provision, in order to assist the lay reader.

The Working Group is not making any recommendations as to which federal or provincial, charges, liens, or interests should or should not have priority over a landlord’s right of distress, as such a recommendation would be outside of the scope of this project.

# PART 4 - DISTRESS FOR RENT

## Wrongful distress

- 46 (1) A landlord who does not comply with a provision of this Part or purports to seize or sells goods under the authority of this Part when not entitled to do so commits wrongful distress.
- (2) An enforcement officer who does not comply with a provision of this Part in exercising a right of distress on behalf of a landlord commits wrongful distress.
- (3) If an enforcement officer acting on behalf of a landlord commits a wrongful distress, the landlord is deemed to have committed wrongful distress.

## Action based on wrongful distress

- 47 (1) In this section, “**plaintiff**” means a person who was a tenant, subtenant or occupant when wrongful distress was committed.
- (2) A plaintiff has a right to recover damages by action in *[name of court]* against a landlord or enforcement officer who commits wrongful distress if those damages were reasonably foreseeable as a result of the wrongful distress.
- (3) In an action under subsection (2), the landlord and enforcement officer are severally liable.

**Comment:** The Working Group considered, and decided against, abolishing actions for trespass in the context of commercial tenancies. There could be circumstances of wrongful landlord conduct that would not meet the definition of wrongful distress; in these situations, the tenant should still have the possibility of an action for trespass. The wrongful distress remedy is intended to be an additional right of action for tenants to any other additional common law remedies that might be available.

# PART 4 - DISTRESS FOR RENT

## Tenant misconduct

- 48 (1) A tenant who does not comply with a provision of this Part commits tenant misconduct.
- (2) A person who knowingly assists a tenant to contravene section 30 *[removal of goods]* or 38 *[duties after goods are seized]* commits tenant misconduct.

## Action based on tenant misconduct

- 49 (1) In this section, “**plaintiff**” means a person who was a landlord when tenant misconduct was committed.
- (2) A plaintiff has a right to recover damages by action in *[name of court]* against a tenant or person referred to in section 48 (2) who commits tenant misconduct if those damages were reasonably foreseeable as a result of the tenant misconduct.
- (3) In an action under subsection (2), the tenant and person referred to in section 48 (2) are jointly and severally liable.

## Other actions by landlord

- 50 (1) Subject to the rights of a person who has a security interest that has priority under section 45, a landlord who seizes goods is deemed for the period described in subsection (2) to have possession of those goods sufficient to maintain an action for trespass, conversion or detinue against a person who seizes the goods during that period.
- (2) The period for the purposes of subsection (1) is from the date of seizure by the landlord to the earlier of the following:
- (a) the date that the landlord releases the goods from seizure;
  - (b) the date that the landlord disposes of the seized goods.

# PART 5 - SUMMARY DISPUTE RESOLUTION

**Comment:** This section lists a variety of disputes that may arise in connection with a commercial lease. The section is intended to allow the parties to utilize their jurisdiction's summary proceeding procedures, in order to ensure disputes are resolved in a timely and cost-effective manner.

Section 53 of the UCTA grants regulation making power to create specific procedures for the summary dispute resolution procedure for commercial leases.

- 51 (1) If a provision in Part 2 or 4 provides that a person may apply under this section for an order, the *[name of superior court]* may, under a summary process in accordance with the *[jurisdictions to insert reference to summary rules of civil procedure]* and any regulations under section 53, make one or more of the following orders:
- (a) if the provision in Part 2 or 4 specifies the type or content of the order that may be applied for under this section, an order that accords with that provision;
  - (b) an order determining, for the purposes of a set off by a tenant under section 27, whether there is a debt of a landlord owing to the tenant and, if the debt exists, its amount;
  - (c) any other order that the court considers necessary to resolve the dispute brought before it under this subsection.

# PART 5 - SUMMARY DISPUTE RESOLUTION

- 51 (2) If a landlord and tenant have a dispute with respect to a commercial lease, other than a matter referred to in subsection (1) or a matter dealing with the landlord's right of distress under Part 4, the landlord or tenant may apply to the *[name of superior court]* for one or more of the following orders under a summary process in accordance with the *[jurisdictions to insert reference to summary rules of civil procedure]* and any regulations made under section 53:
- (a) an order that the landlord or tenant recover possession of the leased premises;
  - (b) an order declaring that a commercial lease has been validly terminated;
  - (c) an order that the landlord is entitled to rent arrears, interest, damages, compensation or indemnity from a tenant;
  - (d) an order that the tenant is entitled to damages, compensation or indemnity from a landlord;
  - (e) an order declaring that the landlord
    - (i) did not respond to the tenant's request for consent under section 4 (2) (d) or (e) within a reasonable time, or
    - (ii) has unreasonably withheld consent referred to in section 4 (2) (d) or (e);
  - (f) if an order making a declaration under clause (e) (i) or (ii) is granted, an order authorizing the tenant to assign, sublet or otherwise dispose of the leased premises or transfer or issue shares;
  - (g) an order permitting a landlord to dispose of abandoned property on the leased premises;
  - (h) an order granting relief from forfeiture or penalty;
  - (i) an order allowing the landlord, or any person acting on the landlord's behalf, to enter the leased premises for a purpose permitted under the commercial lease;
  - (j) an order that a party deliver an executed copy of the commercial lease or agreement to the other party if the lease or agreement provides an executed copy will be delivered;
  - (k) any other order that the court considers necessary to resolve the dispute brought before it under this subsection.



# PART 5 - SUMMARY DISPUTE RESOLUTION

- 51 (3) In making an order under this section, the court may
- (a) impose such terms as it considers appropriate, and
  - (b) award costs and expenses.
- (4) Nothing in this section affects the jurisdiction of the *[name of Provincial Court]* to hear any claim, otherwise within its jurisdiction, for the payment of rent or damages.
- (5) Nothing in this section restricts the jurisdiction of the *[name of superior court]* to grant an order.
- (6) Nothing in this section affects the rights of a landlord and tenant to agree in a commercial lease to submit disputes to arbitration.
- (7) If the basis for any of the orders referred to in subsection (1) or (2) is tied to a provision of this Act that can be modified by a commercial lease, the order must take into account any modification of the provision of this Act by the commercial lease.
- (8) If the basis for any of the orders referred to in subsection (1) or (2) is tied to a provision of this Act that can be excluded by a commercial lease, the order must not be made if the commercial lease has excluded the provision of this Act.

# Part 6 - General

## Service of documents

- 52 (1) When this Act refers to a landlord being served with a document and does not specify a method of service, any of the following methods of service are sufficient:
- (a) any method by which the landlord may be served as set out in the commercial lease;
  - (b) *[jurisdiction to set out other methods]*.
- (2) When this Act refers to a tenant or subtenant being served with a document and does not specify a method of service, any of the following methods of service are sufficient:
- (a) any method by which the tenant or subtenant may be served as set out in the commercial lease;
  - (b) *[jurisdiction to set out other methods]*.
- (3) When this Act refers to any other person being served with a document and does not specify a method of service, any of the following methods of service are sufficient:
- (a) *[jurisdiction to set out methods]*.

# Part 6 - General

## Regulations

- 53 (1) The *[regulation-making authority for the jurisdiction]* may make regulations as follows:
- (a) prescribing classes of leases or leased premises that are excluded from the definition of commercial lease;
  - (b) prescribing the form of the notice of seizure referred to in section 33 (3);
  - (c) respecting the summary dispute resolution procedure for the purposes of Part 5, including, without restricting that power, regulations
    - (i) respecting the service of documents,
    - (ii) establishing time limits,
    - (iii) prescribing fees, and
    - (iv) *[jurisdiction to add other matters]*;
  - (d) respecting when documents served under this Act are conclusively deemed to have been served if this is not already provided for in the Act.
- (2) If there is a conflict between the *[jurisdiction's rules of court]* and regulations made under subsection (1) (c), the regulations prevail.

## Coming into force

- 54 This Act comes into force by *[jurisdiction to insert method to bring Act into force]*

The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. These shapes are primarily located on the left and right sides of the frame, leaving a large white central area. The shapes are layered, creating a sense of depth and movement.

Thank you