Law Reform Commission of Saskatchewan

Implementation of the *Uniform Commercial Tenancies Act*: Tentative Proposals

February 2025

YOUR COMMENTS AND OPINIONS ARE WELCOME.

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission* (proclaimed in force in November 1973) and began operating in February 1974.

The Commission is incorporated by an Act of the Saskatchewan Legislature. Commissioners are appointed by Order in Council. The Commission's recommendations are independent and are submitted to the Minister of Justice and Attorney General of Saskatchewan for consideration.

Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice and Attorney General. After preliminary research, the Commission usually issues a background or consultation paper to facilitate consultation. Tentative Proposals may be issued if the legal issues involved in a project are complex. Upon completion of a project, the Commission's recommendations are formally submitted to the Minister of Justice and Attorney General as final proposals.

At present, the Commission is funded by grants from the Law Foundation of Saskatchewan and the Ministry of Justice.

The Commission can be contacted at:
Law Reform Commission of Saskatchewan
University of Saskatchewan
Room 184, College of Law
15 Campus Drive
Saskatoon, SK S7N 5A6
Telephone: (306) 966-1625
E-mail: director@lawreformcommission.sk.ca

This consultation report and other Law Reform Commission of Saskatchewan publications are available on the Commission's website (http://www.lawreformcommission.sk.ca) and on the Publications Saskatchewan website (http://www.publications.gov.sk.ca/department.cfm?d=72&cl=1).

ISBN 978-0-921923-55-8

Contents

Call for Responses

The Law Reform Commission of Saskatchewan is interested in your response to the tentative proposal to recommend Saskatchewan adopt a modified version of the *Uniform Commercial Tenancies Act (2019*). Your comments and opinions on the topic are welcome. Please allow the following questions to guide you in your response:

1. Is commercial tenancy law in Saskatchewan in need of modernization or reform?
2. If so, should the Commission's Modified UCTA which replaces the distress provisions in the UCTA with a rent obligation security interest regime be enacted in Saskatchewan?
3. If yes, should any other of the provisions of the UCTA, 2019 be modified or removed?
4. Should the optional landlord's duty to repair provisions included in the UCTA, 2019 be enacted in Saskatchewan and included in the Modified UCTA?
5. Are there any additional provisions that should be added into the Modified UCTA?

How to Respond

Responses may be sent by May 31, 2025

By email - director@lawreformcommission.sk.ca

By mail - Law Reform Commission of Saskatchewan
University of Saskatchewan
Room 184, College of Law
15 Campus Drive
Saskatoon, SK S7N 5A6

If you would like to contribute to the consultation process but are unable to give individual or written feedback, please contact the Director to discuss the possibility of providing feedback through alternate means. Any comments you provide in your written response may be included in the Commission's final report to the Ministry of Justice. Respondents may be identified by name in the final report, unless they expressly advise the Commission to keep their names confidential. Submissions and responses will generally not be posted on the Commission's website, however respondents should be aware that the Commission may be required to release information contained in consultation responses under the terms of *The Freedom of Information and Protection of Privacy Act.*

The Commission would like to thank summer students Hannah Jorgenson and Kathleen Stoneham for their research assistance on this project.

I. Introduction

[1] In 2019, the Uniform Law Conference of Canada (ULCC) approved and adopted the Uniform Commercial Tenancies Act (UCTA, 2019). To date, no provinces or territories have enacted the UCTA, 2019 – perhaps in part due to shifting government priorities arising from the COVID-19 pandemic. COVID highlighted and, in some cases, exacerbated existing issues in commercial tenancy throughout Canada, making now a potentially opportune time to implement a statute that would have positive impacts on Saskatchewan businesses.[1]

[2] The ULCC offers independent research in support of updating, reforming, and proposing uniform laws across Canada. The Law Reform Commission of Saskatchewan (the "Commission") is a provincial organization dedicated to modernizing and simplifying laws in Saskatchewan. The ULCC accepted the Commission's proposal to work on a uniform Act governing commercial tenancies in 2011 and established a Working Group for the project. Members of the Working Group included practitioners, academics, and policy counsel form various provinces.

[3] The UCTA, 2019 is a thoroughly researched and thoughtfully constructed legislative draft that intends to modernize and streamline commercial tenancy law across Canada. Commercial tenancies are dealt with by a multitude of statutes in any given province making the law inaccessible to unsophisticated parties. This can lead to disputes resulting from confusion about the law itself. Introducing a statute containing all relevant details related to processes, court orders, and remedies, would likely reduce confusion and therefore improve dispute resolution outside of courts.[2]

[4] Canadian commercial tenancy law is antiquated; many provincial statutes that address commercial tenancies are based on laws from 18th and 19th century England which governed both residential and commercial leases.[3] Residential tenancies are now governed mainly by separate and modernized legislation while existing statutes were left to deal with commercial tenancies. *The Residential Tenancy Act* is updated regularly which keeps the legislation relevant and

[1] Anita Agrawal & Gilleen Pearce, "Out of Control: Why Small Businesses Need Urgent Action on the Commercial Rent Crisis" (February 2022) at 3, online (pdf): <https://betterwayalliance.ca/wp-content/uploads/2022/02/BWA_Out-of-Control_-Why-Small-Businesses-Need-Urgent-Action-on-the-Commercial-Rent-Crisis.pdf>.

[2] The Australian Government notes that "[c]omplex legislation can create uncertainties about the law" which "can impose unnecessary burdens on business and restrict the ability of those affected by the law to understand their legal rights and obligations." Australian Government, "Reducing the complexity of legislation" (last visited 3 August 2023), online: <https://www.ag.gov.au/legal-system/access-justice/reducing-complexity-legislation>.

[3] Michelle Cumyn et al, *Uniform Commercial Tenancies Act Final Report of the Working Group* (Quebec City: Uniform Law Conference of Canada, 2018) at 1.

responsive to changing societal circumstances.[4] The same cannot be said about the *Landlord and Tenant Act*, which is the primary piece of legislation governing commercial tenancies in Saskatchewan.[5] The UCTA, 2019 would replace *The Landlord and Tenant Act* and *The Distress Act* by combining the relevant provisions, omitting irrelevant and outdated provisions, and modernizing the law.[6]

[5] Commercial tenancies in Saskatchewan are governed by multiple statutes and common law principles, making the process of determining the rights and obligations of parties to a commercial lease difficult and unnecessarily complex. A consolidated statute would streamline applicable laws and improve access to justice for affected parties, especially small business owners that contribute to Saskatchewan's economy.

[6] Leases are often prepared by landlords who, in some cases, hold significantly greater bargaining power compared to commercial tenants.[7] The UCTA, 2019 enables parties of a commercial lease to draft their own provisions and contract out of certain provisions while maintaining minimum standards that protect parties and establish uniform laws. It is the Commission's hope that other Canadian jurisdictions will enact the UCTA, 2019 in order to streamline commercial tenancy law across Canada for the benefit of legal professionals as well as landlords and tenants who operate in more than one province.

[7] The Commission believes that Saskatchewan residents and businesses would benefit from enacting most provisions of the UCTA, 2019 and is recommending that Saskatchewan consider implementing a version of the UCTA, 2019 with modifications to the UCTA's distress related provisions (Modified UCTA). The Modified UCTA includes different types of provisions; some that every commercial lease operating in Saskatchewan must include, and some that can be contracted out of if the parties wish. This structure creates a minimum standard while enabling more sophisticated parties some flexibility when drafting lease agreements. The Modified UCTA establishes procedural protections for commercial landlords and tenants, improves access to justice, and streamlines legal processes thus creating more efficient legal recourse which benefits commercial landlords and tenants as well as the justice system.

---

[4] "Versions, Residential Tenancies Act, 2006, SS 2006, c R-22.0001" (last modified 15 September 2021), online: <https://www.canlii.org/en/sk/laws/stat/ss-2006-c-r-22.0001/latest/ss-2006-c-r-22.0001.html?autocompleteStr=residential%20tena&autocompletePos=5#history.>.

[5] *The Landlord and Tenant Act*, RSS 1978, c L-6.

[6] *Ibid*; *The Distress Act*, RSS 1978, c D-31.

[7] Harvey M. Haber, *The Commercial Lease: A Practical Guide*, 5th ed (Toronto: Thomson Reuters Canada Limited, 2013) at v; "Bargaining Power: How To Tell If You Have An Advantage In Contract Negotiations" (14 February 2020), online (blog): <carboneattorneys.com/law-blog/bargaining-power-advantage-in-contract-negotiations>.

II. Project Background & Context

[8] The Commission identified commercial tenancy law as an area in need of reform and proposed a project on commercial tenancies to the ULCC. At their 2011 Annual Meeting, the ULCC accepted this project proposal and formed a Working Group to conduct research and draft a Uniform Commercial Tenancies Act. In August 2018, the Working Group submitted its final report to the ULCC. In 2019, the ULCC approved and adopted the UCTA, 2019. The UCTA, 2019 has not yet been implemented by any provincial government.

[9] Appendix A contains the UCTA, 2019 and commentaries as adopted by the ULCC in 2019. Appendix B contains the Modified UCTA that the Commission is recommending Saskatchewan implement. Appendix B contains green comment boxes which have been added by the Commission and are informed by recent trends and case law in support of the inclusion most of the original provisions in the UCTA, 2019. The most significant change in the Modified UCTA is that it replaces the distress provisions in the UCTA, 2019 with a proposed rent obligation security interest regime for Saskatchewan.

[10] The Commission is seeking public input on its proposal to recommend Saskatchewan implement the Modified UCTA containing the Commission's modifications to the distress related provisions.

III. History of Commercial Tenancy Law

[11] Commercial tenancy law in Saskatchewan is governed by *The Landlord and Tenant Act.*[8] *The Landlord and Tenant Act* was first enacted on January 27, 1919,[9] and much of the statute is a consolidation of English law.[10] English statutes were incorporated into Saskatchewan law through the doctrine of reception, an approach to lawmaking in which English law as of July 15, 1870 became part of the law of the province.[11] The doctrine of reception was a convenient tool used by Saskatchewan lawmakers, as legislators would have found it almost impossible to create a functioning legal system without it.[12] However, the utility of the English law has declined.[13] Sections of the current act can be traced back to now repealed pieces of English legislation,

[8] *The Landlord and Tenant Act*, *supra* note 5.
[9] *An Act respecting the Law of Landlord and Tenant*, SS 1918-19, c 79.
[10] Law Reform Commission of Saskatchewan, *The Status of English Statute Law in Saskatchewan*, 1990 at 89.
[11] Law Reform Commission of Saskatchewan, *Disposal of English Statute Law in Saskatchewan*, 2006 at 2.
[12] *Ibid.*
[13] *Ibid*.

including the *Grantees of Reversion Act, 1540*,[14] *Conveyancing and Law of Property Act 1881*,[15] and the *Real Property Act, 1845.*[16] The fact that these antiquated pieces of English legislation are still in force in Saskatchewan could be addressed through the implementation of the Modified UCTA in Saskatchewan.

[12] Commercial tenancy law has been critiqued for decades in many jurisdictions because it is rooted in outdated laws and principles and is seldom updated. Commercial tenancy reform projects have been a topic of discussion for law reform groups globally and throughout Canada for many years. In 1990, the Bar Admission Course in Saskatchewan delivered a paper titled "Commercial Leases", which highlighted a multitude of challenges to commercial tenancy agreements that exist to this day, over 30 years later.[17] The 57-page paper was written as an educational tool for lawyers to gain an understanding of commercial tenancy law in Saskatchewan. This highlights an access to justice issue; a specialized educational seminar was designed to train lawyers to understand commercial leases while many small tenants and landlords are likely to have trouble understanding this complicated area of law without the benefit of a lawyer's help. These same parties may not be able to afford the help of a lawyer with this specialized knowledge.

[13] Implementing a uniform statute to govern commercial tenancies has been a priority in British Columbia since at least 2007, when the British Columbia Law Institute published a document titled "Introduction to the Commercial Tenancy Act Reform Project."[18] This document acknowledges that B.C.'s *Commercial Tenancy Act* has undergone few changes since its enactment in 1897.[19] Additionally, in 2013, Manitoba's Law Reform Commission published a report highlighting inconsistencies in the province's legislation that governs commercial tenancies.[20] In 2022, the Government of New South Wales requested that their Business Commissioner review the *Retail*

[14] *An Act concerning Grantees of Reversions to take Advantage of the Conditions to be performed by the Lessees*, Public Act, 32 Henry VIII, c. 34, 1540.

[15] *An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes,* Public General Act, 44 & 45 Victoria I, c. 41, 1881.

[16] *Real Property Act, 1845*, 8 & 9 Vict. c. 106

[17] Dick Batten, "Commercial Leases" (paper and lecture topic, delivered at the Saskatchewan Bar Admission Program, May 2004) [unpublished].

[18] British Columbia Law Institute, "Backgrounder No. 1 – Introduction to the Commercial Tenancy Act Reform Project" (17 September 2007), online (pdf): <https://www.bcli.org/sites/default/files/Introduction_to_Commercial_Tenancy_Act_Reform_Project_(2007-09-17).pdf> [BCLI Backgrounder No. 1].

[19] *Ibid* at 2.

[20] Manitoba Law Reform Commission, "Commercial Tenancies: Section 17 of The Landlord and Tenant Act and Section 93 of The Real Property Act" (February 2013), online (pdf): <http://www.manitobalawreform.ca/pubs/pdf/127-full_report.pdf>.

Leases Act for opportunities to improve outcomes, reduce legislative redundancies, improve clarity, and improve availability of information to promote transparency.[21]

IV. Impacts of Adopting the UCTA on Parties to a Commercial Lease

1. Minimum Standards

[14] Commercial landlords and tenants are a diverse group. Commercial spaces are rented to a variety of tenants and may include large-scale chains or small, locally owned businesses. The Commission acknowledges that sophisticated tenants and landlords may prefer to draft and negotiate commercial leases on their own terms, and the Modified UCTA contemplates this. The Commission is of the view that some commercial tenants and landlords would, however, benefit from the minimum standards established in the Modified UCTA.

[15] If implemented, the Modified UCTA would benefit Saskatchewan residents and businesses by establishing minimum procedural protections for parties to a commercial lease. Court proceedings have a significant impact on tenants as well as landlords who may not have the resources to take a dispute through court, which supports the need for clear minimum standards to be set within the governing legislation.

[16] Courts and legislative bodies have made attempts to interpret acts and bring new statutes into force in efforts to protect weaker parties to commercial lease agreements. For instance, in a recent decision, the Ontario Court of Appeal interpreted a Force Majeure clause in a way that extended the lease for an "equivalent period" of usable time after the tenant was required by government-mandated restrictions to shut down its operations.[22] The tenant was paying rent while unable to operate during the onset of the pandemic. The ONCA determined that the specific wording of the Force Majeure clause entitled the tenant to extend its lease for a rent-free period equivalent to the time the tenant's business was closed due to government mandates. This rent-free lease extension was regarded as a win for commercial tenants and has set a precedent for disputes related to government-mandated closures during COVID and the effect on leases. However, this has also caused some warranted concern from landlords.

[17] In 2020 the Government of Ontario enacted the *Protecting Small Businesses Act* which amended the province's *Commercial Tenancies Act* to prohibit landlords who qualified for COVID-relief rent

[21] New South Wales Small Business Commission, "Discussion Paper: Review of the Retail Leases Act 1994" (2022), online (pdf): <https://www.haveyoursay.nsw.gov.au/81922/widgets/390155/documents/246576>.
[22] *Niagara Falls Shopping Centre Inc. v LAF Canada Company*, 2023 ONCA 159.

programs but chose not to participate, from evicting tenants or exercising their right of distraint in the case of non-payment of rent.[23] Ontario's provincial government then enacted the *Helping Tenants and Small Businesses Act* which further amends the *Commercial Tenancies Act* in order to implement similar protections for commercial tenants.[24] The enactment of this protective legislation highlights the necessity of procedural protections for tenants and the shortcomings of existing statutes. In this sense, provincial legislation has recognized that tenants are often more vulnerable than landlords and that legislative protections are necessary in certain contexts.

[18] While the pandemic was an unprecedented crisis, it undoubtedly resulted in tangible long-term effects on some commercial tenants. At its onset, COVID interrupted revenue streams for various commercial tenants. In its wake, COVID has impacted the affordability of commercial rental space. While businesses are recovering from a period of reduced revenues and a changing workplace environment, rent – one of the top operating expenses for most businesses – is becoming increasingly unaffordable in some jurisdictions.[25]

[19] Commercial tenants are unable to receive compensation for their loss of revenues resulting from the pandemic.[26] Commercial tenants have limited options by way of rent reduction or remedies available for lost revenue. For these reasons, the Commission believes it is time to implement new legislation governing commercial tenancies that will establish safeguards for weaker parties and establish appropriate and effective remedies for both tenants and landlords. Further, the Modified UCTA maintains equitable outcomes for both parties to a commercial tenancy agreement and would implement courses of action to address common disputes without relying solely on the courts, establishing a more efficient path through dispute resolution for commercial landlords and tenants.

2. Access to Justice

[20] Access to justice is a growing concern nationally and many jurisdictions are taking steps to contribute to the ongoing improvement of this area. According to the Department of Justice Canada, access to justice is a "fundamental value of the Canadian justice system, flowing from our country's respect for the rule of law."[27] Further, the Law Society of Saskatchewan has identified

[23] David Ionico, "Ten Issues in Commercial Leasing: Emerging Issues in Real Estate Seminar" (4 November 2020) The Hamilton Law Association; *Protecting Small Businesses Act, 2020* SO 2020, c 10, ss 79-82; *Commercial Tenancies Act*, RSO 1990, c L.7.
[24] *Helping Tenants and Small Businesses Act*, *2020*, SO 2020, c 23.
[25] Agrawal & Pearce, *supra* note 1.
[26] See e.g., *Workman Optometry Professional Corporation v Certas Home and Auto Insurance Company*, 2023 ONSC 3356.
[27] Department of Justice Canada, "Access to Justice" (1 September 2021), online: <https://www.justice.gc.ca/eng/csj-sjc/access-acces/index.html>.

that a core component of access to justice involves improving access to legal education and information so that residents may improve their awareness of legal matters without procuring the help of a lawyer.[28] Several studies suggest that many Canadians face barriers to the justice system and are not having their legal needs met, demonstrating a deficit in access to justice for many Canadians.[29]

[21] Access to justice is "concerned with peoples' ability to effectively navigate their justice-related problems and to access and utilize the services necessary to achieve sufficient resolution to these problems, whether it be through formal or informal systems and with appropriate legal and/or non-legal support."[30] In its current form, commercial tenancy law may be difficult for laypersons to understand. In Saskatchewan, the primary governing statute is a modified centuries-old piece of legislation that uses dated terminology and was written for a different purpose than the one it is currently serving. Implementing the Modified UCTA in Saskatchewan would make the law more accessible with modernized language and dispute resolution methods.

[22] Currently in Saskatchewan, commercial tenancy leases are governed by multiple statutes.[31] This makes it difficult for persons without legal experience to make sense of the applicable laws. It also makes it unnecessarily difficult for legal information providers to communicate information to residents. For example, the Public Legal Education Association of Saskatchewan does not have any resources related to commercial tenancies and/or leases.

[23] There is a shortage of accessible public information related to commercial tenancy law, but one of the documents that is available advises landlords to avoid court because it can be costly and slow.[32] This notion is further supported by data from a recent Saskatchewan-based survey asking lawyers for feedback related to legal needs, where 86% of respondents either agreed or strongly agreed that "people are less likely to take action to solve justice-related problems that have higher costs (e.g., financial, time, energy, etc.)."[33] Cost, time, availability of legal services, and availability of publicly available legal information are all barriers to access to justice.[34] In a 2017 survey,

---

[28] Law Society of Saskatchewan, "Saskatchewan Access to Legal Information" (2023), online: <https://www.lawsociety.sk.ca/initiatives/access-to-justice/saskatchewan-access-to-legal-information/>.

[29] Bryce Stoliker et al, *A Legal Needs Survey in the Province of Saskatchewan: Perspectives of Lawyers and Legal and Non-Legal Service Providers* (University of Saskatchewan: Centre for Forensic Behavioural Science and Justice Studies, 31 March 2023) at xvii.

[30] Stoliker et al, *ibid* at ii.

[31] *The Landlord and Tenant Act, supra* note 5 and *The Distress Act*, RSS 1978, c D-31 both apply to various aspects of commercial leasing.

[32] Robertson Stromberg Barristers & Solicitors, "Enforcement of Commercial Leases: A Practical Guide" (17 June 2007) at 3, online (pdf): <https://www.rslaw.com/wp-content/uploads/2011/12/1226000394Enforcement-of-Commercial-Leases-A-Practical-Guide.pdf>.

[33] Stoliker et al, *supra* note 22 at 64.

[34] *Ibid*.

Saskatchewan residents expressed that they felt the legal system could be improved by taking steps to reduce cost and complexity, as well as improving access to legal information for laypersons.[35] Implementation of the Modified UCTA would reduce these barriers by clarifying the law and enabling public legal education resources to be developed.

[24] The lack of publicly available information on commercial tenancy laws in Saskatchewan written in accessible language disadvantages unsophisticated parties. Saskatchewan addresses this need in some legal areas, for example, there are several accessible resources related to residential tenancies: the Public Legal Education Association (PLEA) has several helpful webpages explaining the *Residential Tenancies Act* in accessible language; the Office of Residential Tenancies fields questions and serves only residential tenants and landlords; and the Saskatchewan Landlord Association offers support and services for residential landlords (but not commercial landlords).[36]

[25] The UCTA, 2019 was drafted through a lens of protecting unsophisticated parties to a commercial lease; these parties are not necessarily going to hire legal support when drafting leases, so consolidation of laws and public education are key components to improving access to justice for these parties. A 2018 report of the Legal Services Task Team (facilitated by the Law Society of Saskatchewan) determined that "one of the greatest unmet public needs...was for more ways to obtain legal information about legal frameworks, legal processes, resolution options, and how to navigate the system."[37]

[26] Commercial leases are often complex, long, and full of legalese, making it difficult for unsophisticated parties to fully understand and negotiate the terms, especially against a more sophisticated party.[38] A typical commercial lease dispute involves a financially strong landlord and a financially weaker tenant, and often arises as a result of a tenant experiencing economic hardships and therefore becoming unable to make rent payments. Hiring a lawyer may not therefore be a viable route for tenants, especially during a time of economic hardship.

[27] Many Saskatchewan residents fall into a demographic where they are considered too wealthy for legal aid while still unable to financially support taking legal action.[39] Additionally, legal aid is a

[35] CREATE Justice, *Architects of Justice*, (Saskatoon: University of Saskatchewan, 2017) at 15.

[36] Resources of the Saskatchewan Landlord Association are "strictly residential" and commercial leases are "largely dealt with by real estate lawyers", per Hannah Jorgenson's phone call with the Saskatchewan Landlord Association (12 May 2023).

[37] Gerald Tegart et al, "Final Report of the Legal Services Task Team" (August 2018) at iii, online (pdf): <http://publications.gov.sk.ca/documents/9/107840-FINAL%20REPORT%20OF%20THE%20LEGAL%20SERVICES%20TASK%20TEAM.pdf>.

[38] Cuelenaere "Leases – Commercial" (2023), online: <https://cuelenaere.com/areas-of-law/leases-commercial/>.

[39] Jelaina Germain, "Legal Services Supply Gap in Saskatchewan: Temporarily Offering Tax Incentives to Lawyers for Providing Pro Bono Services" (22 October 2019), online: <https://www.lawsociety.sk.ca/saskatchewan-law-review-

resource limited to clients with family law or criminal problems and is not a viable resource for residents requiring supports for commercial real estate leases. Organizations such as Pro Bono Law Saskatchewan and CLASSIC Law Inc. have been created in order to offer additional legal services to low-income residents, however, neither organization facilitates legal advice on commercial tenancies.[40] The result of this is that financially weaker parties to a commercial lease do not have appropriate resources to help them navigate their commercial lease or commercial dispute; these individuals do not qualify for pro bono services and there are no accessible print or web resources with available, in part, due to the complicated myriad of applicable governing statutes.

[28] At present, the resources available to parties to a commercial lease recommend that tenants seek assistance from a real estate lawyer prior to negotiating a commercial lease. This is in part due to the significant costs associated with commercial leases, which are often long-term and expensive ventures. The Commission believes it is also due, in-part, to the complexity of commercial lease regulation throughout Canada; provinces and territories have anywhere between two and six statutes that apply to commercial leases. Inconsistency in the law among Canadian provinces reduces the usefulness of case law between jurisdictions and reduces the relevancy of publicly available resources. The complex and fragmented regulation of commercial leases makes entering a commercial lease challenging for unsophisticated parties who may not have access to professional legal services.

[29] It is the Commission's hope that the UCTA, 2019 will be implemented in other Canadian provinces. A uniform approach to commercial landlord and tenant relationships would improve efficiencies for parties acting in multiple jurisdictions and establish case law that applies more broadly. The UCTA, 2019 establishes clear and modern rules related remedies for both landlords and tenants and summary dispute resolution methods. Currently, *The Landlord and Tenant Act* has limited provisions related to summary dispute resolutions, and those provisions are not clearly stated and result in court proceedings in order to clarify the meaning of the provisions.[41]

articles/legal-services-supply-gap-in-saskatchewan-temporarily-offering-tax-incentives-to-lawyers-for-providing-pro-bono-services/>.

[40] Pro Bono Law Saskatchewan – Volunteer Lawyers, online: <https://pblsask.ca/volunteer/lawyers/>; CLASSIC Programs, online: <https://www.classiclaw.ca/menu/what-we-do/classic-programs.html>.

[41] *The Landlord and Tenant Act*, *supra* note 5 at Part IV.

V. Law Reform Commission's Proposed Modification to the UCTA: Replace Distress with Rent Obligation Security Interests

1. Introduction

[30] A levy of distress involves a landlord, to whom rent or other obligation under a lease is owing, seizing and selling personal property of the tenant or of other persons located on the leased premises and applying the proceeds to the unpaid obligation. A right of distress can be a feature of a mortgage or agreement for sale when the mortgagor or buyer "attorns tenant" to the mortgagee or seller thereby creating a constructive tenancy between the parties.

[31] Distress originated as a medieval common law aspect of landlord and tenant law[42] that, for many years, has attracted law reform[43] and legislative[44] attention in common law jurisdictions.[45] Historically various aspects of distress have been the subject of frequently amended English statutory regulation.[46] While as a result of reception of English common law as of 1871 features of common law distress are technically part of the common law of Saskatchewan, most aspects of it are regulated through provisions of *The Landlord and Tenant Act*[47] and *The Distress Act.*[48] In 2006, distress was abolished other than pursuant to a court order in the context of residential tenancies.[49]

---

[42] Law Reform Commission of Saskatchewan*, Proposals Relating to Distress for Rent* (1993), pp. 5-6, CanLIIDocs 128.

[43] See, *e.g.,* Law Reform Commission of Saskatchewan, above, note 1; Manitoba Law Reform Commission, *Distress for Rent in Commercial Tenancies*, 1994 CanLIIDocs 111;Law Reform Commission of British Columbia, *Report on Distress for Rent*, 1981 CanLIIDocs 1; The Law Commission (UK), *Landlord and Tenant, Distress for Rent* (LAW COM No. 194, 1991.

[44] Generally, this legislation was designed to address features of distress such as fees payable to distraining landlords. It did not change the basic structure of common law distress. See e.g., *Rent Distress Act*, RSBC 1996, c 40; *Costs of Distress Act*, RSO 1990, c. C. 41*; Tenancies and Distress for Rent Act,* RSNS 1989, c 464; *The Distress Act* CCSM (Manitoba) C90; *Distress Act* RSY 2002, c. 58.

[45] The first of such Acts relating to Saskatchewan was enacted as *An Act respecting Distress for Rent and Extra Judicial Seizure* RSS 1909, c. 51 copied from Consolidated Ordinances of the Northwest Territories 1898 c. 34. Now see *The Distress Act ,* RSS 1978, c. D-31.

[46] "Although the right to distrain is of common law origin, it was subject to many exceptions and has since been subject to many statutory modifications and been extended by additional statutory powers. The exceptions are so many that scarcely an important absolute statement can be made in dealing with the law of distress - as it affects landlord and tenant. The law of distress as it stood before statutory alteration was perhaps simple and of easy application. Today it demands - by reason of statutory alterations, more knowledge of various branches of law than any other common law authority which is as frequently exercised. It calls for knowledge of law relating to fixtures, trespass, property in goods, specific performance, fraud, executions, and the obligations arising in respect of the sale of the goods distrained". Halsbury's Law of England, (1st ed, 1910).

[47] *Supra* note 5.

[48] *Supra* note 7.

[49] *The Residential Tenancies Act*, SS 2006, c R-220001, ss. 12(1).

[32] Currently, the approach to regulating compulsory enforcement of payment obligations under rental agreements is to supplement the common law with detailed statutory rules providing for the right of distress and the circumstances in which the right can be exercised. This approach is contained in the *Landlord and Tenant Act*.

[33] The right of distress was also incorporated in the UCTA, 2019. Many of the features contained in the former have direct parallels in the latter. However, other approaches that warrant consideration in the reform of this area of Saskatchewan law are:

1. Complete abolition of distress without replacement; and
2. Reformulation of the law of distress using enforcement measures contained in or that parallel those of *The Personal Property Security Act, 1993* (PPSA) along with unique priority rules and enforcement provisions that are integrated with those of the PPSA.

2. The Social and Economic Relevance of Distress

[34] It is relevant to question whether a medieval landlord's remedy should be viewed as an important aspect of the current Saskatchewan economic environment. Historically, the preferred position given to landlords by the law of distress had its origin in the political dominance of the land-owning (as opposed to commercial) classes in England during the time this area of the law developed.

[35] A starting point in developing legal policy relating to distress is to recognize that landlords are simply creditors of defaulting tenants who are given priority and enforcement rights that are much more effective and expeditious than rights available to other unsecured creditors of tenants. One might well conclude that there is nothing in the landlord and tenant relationship that necessarily induces the legal conclusion that a landlord should be given the equivalent of a charge on or security interest in a defaulting tenant's personal property and property located on the leased premises owned by someone else.

[36] The ancient right of distress developed as a feature of the common law when legal mechanisms for obtaining consensual security interests in personal property either did not exist or were very primitive. This is no longer the case. Like any potential or existing creditors, landlords can now enter security agreements falling within the PPSA with tenants or prospective tenants that give them the power to seize and sell or collect personal property of tenants in the event of non-payment of rent and other tenants' monitory obligations. Public disclosure of the security agreement is easy and inexpensive.

[37] Common law or statutory distress in its present form violates a fundamental principle of modern secured transactions law governed by the PPSA and *The Enforcement of Money Judgments Act* – the law should facilitate risk assessment in credit granting based on publicly available information. Distress is essentially a deemed security interest that is not publicized through registration in the Personal Property Registry. It gives priority with respect to personal property over not only unsecured creditors, but also most secured creditors of the tenant taken before the tenant has defaulted in making rental payments.[50] It gives to landlords special recovery rights over unsecured creditors of tenants.

[38] Except in cases of purchase-money security interests, a potential secured creditor of a tenant cannot establish a priority position with respect to a landlord to whom rent becomes owing by a tenant. This being the case, it is reasonable to assume that this near monopoly of recovery given to landlords induces at least some potential creditors to refrain from granting credit facilities to tenants on the security of tenants' personal property located or potentially located on the leased premises even though, at the date of application for the credit, the tenants are good credit risk because of the value of that property.

[39] Distress gives to landlords procedural and priority rights over the judgments of unsecured creditors of tenants such as small suppliers of services or goods with small unit value. Only when the value of goods supplied is sufficient to justify taking purchase money security interests can suppliers have priority over landlords in the event of non-payment by tenants.

[40] Balanced against this is the assertion that the availability of a right of distress is a factor in enhancing the availability of leased premises to small business enterprises that have few assets to offer other than personal property brought onto the premises. The elimination of this remedy for landlords may have negative consequences for small business owners. It is not uncommon for business credit grantors such as banks and credit unions to make small business loans secured by security interests in "all the present and after-acquired property" of the borrower. Registrations relating to these transactions are generally effected in the Personal Property Registry before or immediately after the loan transaction is signed. This gives to the credit grantor a monopoly priority position over any subsequent creditor of the borrower other than the holder of a purchase money security interest. This being the case, in the absence of the right of distress or its equivalent, a landlord of the borrower cannot effectively protect itself from loss in the event of the business insolvency by taking and perfecting a consensual security interest in the tenant's personal property before registration of the lender security interest.

[50] This priority does not extent to prior purchase money security interest. *The Landlord and Tenant Act*, RSS 1978, cL-6.above note 1, s. 25.

3. The 1993 Law Reform Commission Report: Proposals Relating to Distress for Rent

[41] In its 1993 Proposals Relating to Distress for Rent report to the Minister of Justice, the Law Reform Commission concluded:

> In the Commission's view, distress can most effectively be reformed only by abolishing it in its present form and replacing it with a new system integrated with The Personal Property Security Act….
>
> The need to rationalize distress with the personal property security regime would be reason enough to reform or replace the remedy. The archaisms and confusions that infect the law of distress provide additional reasons for over-hauling it. Some of the significant problems associated with the right of distress include:
>
> > (1) Current distress law is a confusing combination of common law and statute law. Much of the latter is derived from only partially digested English statutes, some as early as the 13th century. Many of the concepts associated with distress are obscure, betraying the ancient origins of the remedy.
> >
> > (2) The measures that a landlord can take to seize and sell distrained goods are inconsistent and unclear.
> >
> > (3) Constructive distress (distress without taking and retaining actual possession) is recognized at common law, creating conflicts with the rights of others who may deal with the goods.
> >
> > (4) Some aspects of the remedy are seriously out of step with contemporary realities. For example, … it is not possible under the present law to levy distress against trade fixtures.[51]

4. Conversion of Right of Distress into a Deemed Security Interest

[42] In its 1993 Report, the Law Reform Commission recommended that *The Landlord and Tenant Act* be amended to replace all of Part III of the present Act, entitled "Distress", and section 63. While the term “distress” would be retained, the right would become a deemed security interests governed by *The Personal Property Security Act.* Under this approach, when a landlord

[51] Law Reform Commission of Saskatchewan, “Proposals Relating to Distress for Rent” (May 1993) online(pdf): <https://lawreformcommission.sk.ca/distress.pdf> at 3 – 4 [1993 Report].

has distrained goods, (a) the landlord is deemed to be a secured party holding a non-purchase money security interest in the goods distrained perfected by possession, (b) the tenant is deemed to be a debtor who has given to the landlord a non-purchase money security interest in the goods distrained, (c) the amount of unpaid rent is deemed to be an obligation secured by the security interest, (d) the goods distrained are deemed to be collateral, (e) the deemed security interest is perfected for the purposes of section 24 of the PPSA when the landlord takes possession of the goods.

[43] The approach suggested in the 1993 Report would result in distress being deemed to be a non-purchase money security interest in the personal property of a tenant that has priority over any other prior or subsequent non-purchase money security interest in the distrained goods. This would perpetuate the priority monopoly that landlords have under current law. Public disclosure of the existence of the landlord's priority status would result from the landlord's "perfection" of its deemed security interest by possession. However, unlike other non-purchase money security interests perfected by possession, priority would, in effect, be retroactive.

[44] The Uniform Commercial Tenancies Act Working Group decided to retain the concept of distress. They concluded:

> 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…. 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' duty 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 reinstituted in Quebec.[52]

5. A Modified Approach

[45] A starting point in the development of an approach that provides a balance between the position of landlords and other credit grantors of small business tenants is to eliminate the legal concept of distress and, as recommended in the Commission's 1993 Report, employ the well-

[52] *Uniform Commercial Tenancies Act Final Report of the Working Group, supra* note 3 (Quebec City: Uniform Law at 7.

understood and precise concepts of the PPSA. This balance would involve giving to landlords a limited, deemed, statutory security interest in personal property and fixtures of the tenant securing rentals owing over a specified period. This security interest would be subject to any perfected purchase money security interests in the personal property or fixtures. It would have priority over prior security interests and, if it is registered in the Personal Property Registry, it would have priority over interests in the property acquired after the date of registration.

[46] Under this approach, landlords would have a deemed non-purchase money security interest (a "rent obligation security interest" hereinafter a ROSI) in tenants' personal property brought on to the leased premises[53] as well as accounts payable by subtenants to the tenant - cumulatively termed as "the property"). The ROSI would have priority over prior perfected security interests (other than perfected purchase money security interests in the goods and short term or registered leases of goods)[54] to the extent of unpaid lease payments over a specified period of time (e.g., three months for commercial property other than farmland) and for a percentage (e.g., 25%) of annual rental value of farmland). If the landlord perfects its ROSI as provided in the PPSA, the ROSI would have priority over any subsequently perfected non-purchase money security interest in the property for the full amount owing to the landlord.[55]

[47] The ROSI would affect goods held by the tenant under leases and consignments that are deemed to be security interests under the PPSA. The legal assumption is that the lessee (tenant) is the "owner" of the goods and the interest of the landlord is that of a secured party. While a consignor of goods may be treated under the common law as "owner" of the goods consigned to the tenant, "commercial consignments" are deemed to be security interests to which the PPSA applies.[56]

[48] The existence of a ROSI would not depend upon compliance with sections 9-11 of the PPSA (which require an agreement that grants a security interest). However, the perfection and priority rules of the Act would apply except to the extent of the limited priority given to the landlord over prior interests. The ROSI would be a security interest only in the property that the tenant has the power to charge including: (i) goods and fixtures located on leased premises and goods removed from leased premises during the currency of the lease or immediately after its termination; (ii) an account of a subtenant payable to a tenant; (iii) an account owing to the

[53] This includes fixtures as provided in the PPSA, ss.2(e), 2((s) and 36.

[54] The interest of a lessor under a short-term lease is not subject to the registration and priority provisions of the PPSA. Under these leases, the goods are not the property of the tenant and, accordingly, should not be subject to the ROSI. A different approach is warranted with respect to leases that are deemed to be security interests under the PPSA ss. 2(1)(qq).

[55] As to the priority position of a judgment creditor who has registered a judgment as provided by ss. 21 and 22 of The *Enforcement of Money Judgments Act,* SS 2010, c E-922 see text below..

[56] See PPSA ss. 2(1)(y), 2(1)(qq)(ii)(C), 2(1)(h), 2(1)(qq)((ii)(b).

tenant as a result of goods being stored on the leased premises; and (iv) an interest or claim that is payable pursuant to a policy of insurance as indemnity or compensation for loss of or damage to goods or fixture of a tenant. In this respect, its scope would be broader than distress in that it would include specified intangible property (accounts) of the tenant.

[49] A ROSI would be a security interest[57] and, as such, would attach only to the interest of the debtor or to an interest that the debtor has power to charge. It can affect property of someone other than the tenant only in circumstances in which the property can be subject to a security interest given by a debtor. Consequently, unlike distress, it would not affect a property interest of someone other than the debtor even though the property is located on the leased premises. It would attach to any payments owing to the tenant by someone who is obligated to the landlord as a result of storage of the property on the leased premises.

6. Distress under The Enforcement of Money Judgments Act

[50] *The Enforcement of Money Judgments Act*[58] provides priority rules designed to address a priority competition between a judgment creditor and a landlord in cases where the sheriff has seized personal property of a judgment debtor that is subject to distress. When an enforcement charge affecting a tenant's personal property comes into conflict with a landlord's right of distress for unpaid rent as provided in *The Landlord and Tenant Act,* section 23 of *The Enforcement of Money Judgments Act* does not apply to give the charge the same priority status as a security interest in the distrained property. Clause 25(2)(b) of *The Landlord and Tenant Act* gives the right of distress priority over a non-purchase money security interest in the goods subject to the distress, even though the security interest affecting the goods came into existence before the distress occurred. Subsection 27(5) makes clause 25(2)(b) of *The Landlord and Tenant Act* inapplicable to charges. A right to distress that has been exercised before an enforcement charge affecting the distrained property comes into existence gives priority to the landlord for the amount of rent owing at the date of distress. When the right of distress is exercised after the date the enforcement charge comes into existence, it is subject to the charge. However, in any event, as a result of subclause 41(5)(a)(ii), the landlord is guaranteed priority to an amount of one year's rent. This feature of the Act replicates the long-standing policy choice favouring a limited priority for the claims of landlords being enforced through distress.

[57] As a security interest, a ROSI would be subject to *The Crop Payments Act*, Part IV of *The Saskatchewan Farm Security Act, 1988-89,* c. S-17.1 or Sections 19-36 of *The Limitation of Civil Rights Act RSS 1978,c L-16.* It would also be subject to section 2-66 of *The Saskatchewan Employment Act* SS 2013, c. S-15.1.

[58] *The Enforcement of Money Judgments Act,* SS 2010, c E-922.

[51] Under the approach contained in *The Enforcement of Money Judgments Act* applicable to distress, the relevant factors determining priority are the date when the enforcement charge comes into effect affecting property and the date when the landlord seizes the property. Apart from the one-year priority for unpaid rent, a prior enforcement charge takes priority over the landlord's later exercise of distress.

[52] An enforcement charge has the same priority as a non-purchase money security interest.[59] Under the approach suggested in this study, the relative priorities of the charge and the landlord's ROSI would be addressed on the same basis as if a charge under *The Enforcement of Money Judgments Act* were a consensual non-purchase money security interest. Generally, the result would be that the ROSI would have priority over a prior or subsequent charge to the same extent that it would have priority over a prior or subsequent security interest. If this approach were adopted, the one-year guaranteed priority currently given to distress over enforcement charges would be eliminated.

7. Protection of Employees of Tenants

[53] Section 36 of *The Landlord and Tenant Act* provides a special priority for wages of unpaid employees. This policy would be maintained. Since a ROSI would be a security interest, it would be subject to section 2-66 of *The Saskatchewan Employment Act*:[60]

> 266(1) Wages due or accruing due to an employee are deemed to be secured by a security interest on the property and assets of the employee's employer, whether or not that property or those assets are subject to other security interests.
>
> (2) Subject to subsection (6), the security interest for wages mentioned in subsection (1) is payable in priority to any other claim or right in the property or assets, including any claim or right of the Crown, without registration or other perfection of the deemed security interest for wages.
>
> (3) Without limiting the generality of subsection (2), the priority mentioned in that subsection extends over every security interest, lien, charge, enforcement charge, judgment, encumbrance, mortgage, assignment, including an assignment of book debts, debenture or other security, whether perfected within the meaning of *The Personal Property Security Act, 1993* or not, made or given, accepted or issued before or after the wages accrued due.

[59] *Ibid*, ss. 22(2)(a) and 23.
[60] SS 2013, c. S-15.1

(4) Notwithstanding subsection (2), the charge mentioned in that subsection does not take priority over the following:

(a) a purchase money security interest that is:
(i) taken before the wages' accruing due; and
(ii) registered in accordance with the requirements of The Personal Property Security Act, 1993;

(5) Without limiting the application of subsections (1) to (3), a security interest for wages may be registered in the Personal Property Registry continued pursuant to *The Personal Property Security Act, 1993.*

8. Effect of Conceptual Change on Application of Bankruptcy and Insolvency Act

[54] *The Bankruptcy and Insolvency Act* contains specific measures applicable to distress.

73(4) Any property of a bankrupt under seizure for rent or taxes shall on production of a copy of the bankruptcy order or the assignment certified by the trustee as a true copy be delivered without delay to the trustee, but the payment of the costs of distress or, in the Province of Quebec, the costs of seizure, is secured by a security on the property ranking ahead of any other security on it, and, if the property or any part of it has been sold, the money realized from the sale less the costs of distress, or seizure, and sale shall be paid to the trustee.

136 (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(f) the landlord 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, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

[55] The effect of these provisions is to reject the conclusion that the right of distress (seizure for rent) is a security interest. Property that has been seized is to be treated as property of the bankruptcy that vests in the trustee. However, the costs of seizure are treated as being secured by a security interest in property seized. This section has been interpreted as applying only when the property of the tenant is in the possession of the landlord. If the property has been sold by the landlord before the date of bankruptcy, the section is inapplicable.[61] Section 136(f) gives to a landlord a

[61] *Re Southern Fried Food Ltd* (1976), 67 DLR (3d) 599 (Ont SC).

"preference" for three months rent and three months accelerated rent but the total amount cannot exceed the value of the property on the premises against which the right of distress may be exercised.

[56] Should the approach suggested in this report be implemented, a landlord would have a deemed security interest in place of a right of distress. The important issue as to whether this type of security interest will be recognized as such in bankruptcy. There is no clear guidance in the case law. Charges created under provincial judgment enforcement law are not viewed as security interests in bankruptcy.[62] However, the statutory "lien" on a depositor-debtor account given to credit unions results in the credit union being treated as a secured creditor.[63]

[57] There is another feature associated with the treatment of distress as a security interest. As noted above, a landlord would have a deemed security interest in the tenant's property that would give priority over prior interests without registration. Otherwise, the security interest would have to be registered to take advantage of the general priority rules of the PPSA. In the absence of registration, the security interest would be subordinate to the trustee in bankruptcy as provided in subsection 20(2)(a) of the PPSA.

9. The Distress Act

[58] *The Distress Act* is a catch-bag of provisions dealing with:

1. fees that can be charged when carrying out distress and other "extra-judicial seizures" of consumer goods: ss. 2.1-5
2. seizure to enforce a security interest in a "house trailer" used or intended for use as living quarters: ss. 2, 6.1-6.4
3. recognition of a right of distress by a mortgagee or vendor under an agreement for sale to recover interest in arrears or principal due upon the mortgage or agreement of sale when the mortgagor or buyer has attorned to the mortgagee or vendor: s. 7;
4. implied right of distress by a mortgagee or vendor to recover from a tenant or person n possession of the land to the extent of the interest due, and of all taxes or levies and premiums of insurance payable by the mortgagor or vendee under the mortgage or agreement of sale and paid by the mortgagee or vendor, and of all moneys that the mortgagee or vendor has paid upon or in respect of a prior mortgage or charge upon the land and for payment of which the mortgagor or vendee is liable: ss. 8(1)-(2);

[62] *Re Sklar* (1958)37 CBR 187 (Sask CA).
[63] *Ecarnot v. Western Credit Union,* [1991] 5 WWR 268 (Sask CA).

5. protection of the interests of a company or association established for the purpose of carrying on the business of buying, selling and marketing agricultural products on the non-profit co-operative plan, and distribution of the proceeds of the sale of such property after seizure and sale by a mortgagee or seller where an order *nisi* for sale, foreclosure or cancellation has been obtained: s. 10.

[59] The provisions dealing with distress in the context of mortgages and agreements for sale are based on the law of distress. Distress is used as a legal mechanism through which the arrears of principal and interest owing under the mortgage or agreement for sale are collected without seeking enforcement of the mortgage through foreclosure of the mortgage or cancellation of the agreement for sale. In this context, the distress is exercised against the personal property of the owner of land that is subject to the mortgage or the buyer under an agreement for sale. Distress in this context is recognised at common law when the owner of land "attorns" to the mortgagee or vendor thereby creating a lessor-lessee tenancy by estoppel that is the basis for distress. This is recognized in the context of mortgages by section 137 of *The Land Titles Act 2000*.[64]

[60] There are reasons to conclude that *The Distress Act* is an anachronism that should be repealed. The provisions dealing with seizure of a house trailer to enforce a security interest should be updated and added to the PPSA or *The Limitation of Civil Rights Act*. The provisions dealing with fees that can be collected when carrying out distress or enforcement of a security interest were last updated in 1985. To the extent that they apply to enforcing security interests, they conflict with section 59(1)(a) of the PPSA which provides for recovery of "the reasonable expenses of seizing, repossessing, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party." The policy of statutory control of fees applicable to the enforcement of security interests in consumer goods is a matter not examined in this paper. However, should the policy be retained, its implementation would be more logically found in the PPSA or *The Limitation of Civil Rights Act.*

[61] There is basis for doubt as whether section 8 of *The Distress Act* is of much value to mortgagees holding purchase money mortgages or to vendors under agreements for sale. Subsection 2(1) of *The Limitation of Civil Rights Act* restricts the "vendor's or mortgagee's right to recover the unpaid balance due shall be restricted to the land sold or mortgaged and to cancellation of the agreement for sale or foreclosure of the mortgage or sale of the property, and no action shall lie on the covenant for payment contained in the agreement for sale or mortgage."[65]

[64] SS 2000, c. L-5.1.
[65] *Larsen v Martin* [1978] 1WWR 90 (Sask QB).

[62] If, as proposed, distress is abolished and replaced by a deemed security interest, sections 46-61 of *The Saskatchewan Farm Security Act* would apply.

[63] If section 10 is to be retained, it should be moved to *The Limitation of Civil Rights Act*.

10. Demonstration Scenarios

[64] **Basic Pattern:**

- New potential tenant of urban property obtains a revolving line of credit from Bank and grants a security interest in "all present and after-acquired property" of tenant. Bank registers a financing statement.
- Tenant enters into lease agreement with Landlord providing for monthly lease payments.
- Tenant occupies the leased premises for 12 months before becoming insolvent during which Tenant pays only 2 monthly rental payments.
- While occupying the lease premises, Tenant sells equipment owned by tenant to a Buyer out of the ordinary course of business. Buyer does not take possession of the equipment prior to insolvency.
- Unsecured Creditor of the tenant obtains and registers a judgment resulting in an enforcement charge on all of the Lessee's non-exempt personal property.
- Tenant becomes insolvent and does not pay amounts owing to Bank, Landlord and Unsecured Creditor and does not deliver equipment to Buyer. At the date of the insolvency, Tenant owned unsold property that was located or had been located on the leased premises.

[64] **Situation A- Priorities**

- Landlord does not register its ROSI.
- Landlord has priority over Bank on the basis of its ROSI to the extent of (3) months unpaid rental payments. Bank has priority with respect of the value of the "property" in excess of this amount that secured all advances made by the Bank to Tenant.
- Unsecured Creditor has priority over Landlord.
- Buyer has priority over Landlord with respect to the item purchased from Tenant.
- Bank and Unsecured Creditor have priority over Buyer with respect to the item purchased from Tenant.

[66] **Situation B – Priorities**

- Landlord registers its ROSI.

- Landlord has priority over Bank on the basis of its ROSI to the extent of (3) months unpaid lease payments. Bank has priority with respect of the value of the "property" in excess of this amount that secured all advances made by the Bank to Tenant.
- Buyer is subordinate to Landlord with respect to the item purchased from Tenant.
- If the enforcement charge arose before the ROSI was registered, it is subject to priority of Landlord to the extent of (3) months unpaid lease payments.
- If the enforcement charge arose after the ROSI was registered, it is subject to the ROSI (full amount owing to Landlord).

11. Enforcement

[67] Enforcement of the ROSI through seizure and sale of goods of the tenant raises an issue of public policy. The application of relevant provisions of Part V of the PPSA as recommended in the Commission's 1993 Report would result in leaving enforcement to the landlord as is currently the case under the current *Landlord and Tenant Act.* This parallels the approach contained in the section 59 of the PPSA. However, there is precedent in Saskatchewan law for the involvement of a public official in enforcing security interests. When a house trailer[66] is the collateral, section 6.1(1) of *The Distress Act* provides that seizure must be "by a sheriff or a person duly authorized by a sheriff for the purpose." Section 6.2 provides: "The secured party may, using the services of a sheriff or a person duly authorized by a sheriff for the purpose, repossess the house trailer and, subject to section 3 of this Act, sections 58 and 59 of *The Personal Property Security Act* apply, *mutatis mutandis*, to any such seizure and sale."

[68] While these provisions of *The Distress Act* are not relevant in the context of enforcement of a ROSI, they raise the policy issue as to whether seizure of goods to enforce a ROSI should be by or under the control of a public official in order to avoid breaches of the peace which may occur when a landlord goes on to premises occupied by a defaulting tenant. The long experience with distress under the current *Landlord and Tenant Act* suggests that involvement of a public official in the seizure and sale of goods under a ROSI is not warranted.

[69] While wholesale adoption of Part V of the PPSA is inappropriate, most of its provisions can be applied to enforcement of ROSI. However, there are a few provisions of the PPSA that will require modification to accommodate the features proposed in this report.

[66] Defined in s. 2(c) of *The Distress Act,* RSS 1978, c D-31, as a "mobile home that is used or intended to be used as living quarters".

VI. Consultation Questions

[70] The Commission is seeking feedback on its tentative proposal to recommend Saskatchewan implement the Modified UCTA. The following questions are posed for your consideration, but the Commission would welcome any feedback related to this topic. Feedback may be submitted to Leah Howie, Director of the Law Reform Commission of Saskatchewan, at director@lawreformcommission.sk.ca.

1. Is commercial tenancy law in Saskatchewan in need of modernization or reform?
2. If so, should the Commission's Modified UCTA which replaces the distress provisions in the UCTA, 2019 with a rent obligation security interest regime be enacted in Saskatchewan?
3. If yes, should any other of the provisions of the Modified UCTA be modified?
4. Should the optional landlord's duty to repair provisions included in the UCTA, 2019 be enacted in Saskatchewan and included in the Modified UCTA?
5. Are there any additional provisions that should be added into the Modified UCTA?

Appendix A: *Uniform Commercial Tenancies Act* (2019)

ULCC | CHLC

UNIFORM LAW CONFERENCE OF CANADA

UNIFORM COMMERCIAL TENANCIES ACT (2019)

As adopted – March 1, 2019

UNIFORM COMMERCIAL TENANCIES ACT (2019)

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 an executor, administrator, guardian, trustee, liquidator, receiver or other person on whom the right to grant possession has devolved by operation of law, legal process or order of a court;

"leased premises" means the premises under a commercial lease;

"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;

"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 an executor, administrator, guardian, trustee, liquidator, receiver or other person on whom the right to possess has devolved by operation of law, legal process or order of a court.

Comment: The *Uniform Commercial Tenancies Act* (UCTA) seeks to balance the rights and duties 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 (or Government if there is no Crown in the enacting jurisdiction) is bound by this Act.

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

Contracting out of 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.

(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.

Implied terms

4 (1) A commercial lease is deemed to contain the following terms relating to a tenant's rights and duties:

(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) in addition to any other duties respecting accelerated rent under the commercial lease, if any of the following events occur, a tenant must pay accelerated rent to the landlord in an amount equal to the rent that would become due during the remainder of the term of the lease after the event occurs, up to a maximum amount of 3 months' 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 the tenant's 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 to the leased premises, 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.

Comment: This section sets out the implied provisions in commercial leases that relate to the tenant's rights and duties. 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 4(1)(c) incorporates terms contained in the *Bankruptcy and Insolvency Act* (Canada). Clause 136(1)(f) of the *Bankruptcy and Insolvency Act* (Canada) 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 a duty 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.

(2) A commercial lease is deemed to contain the following terms relating to a landlord's rights and duties:

(a) a landlord has the right to grant possession of the leased premises on the date that a tenant is to take possession of the leased premises;

(b) a landlord must not derogate from a grant contained in the commercial lease;

(c) a landlord has the right to re-enter and resume possession of the leased premises as set out in section 5;

(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 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 must not unreasonably withhold consent;

(f) if a landlord who is served with a tenant's request for consent referred to in clause (d) or (e) does not respond to the request within 21 days after the day of being served with the request, the landlord is deemed to have given consent.

Comment: Subsection 4 (2) sets out the implied provisions in commercial leases that relate to the landlord's rights and duties. 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) (b) 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.

Clauses 4 (2) (d) and (e) prohibit a landlord from unreasonably withholding consent to the tenant's request to either (i) assign, sublet or otherwise dispose of the leased premises or (ii) transfer or issue shares. Clause 4 (2) (f) deems the landlord to have consented to either request if the landlord does not respond to the request within 21 days after being served with the request.

(3) This section is subject to a commercial lease.

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.

[Division X - Landlord's Duty to Repair

Necessary repair

4.1 (1) This section sets out, for the purposes of this Division, the meaning of **"necessary repair"** in respect of leased premises.

(2) A necessary repair is a repair of a serious defect or deterioration of leased premises that

(a) affects the preservation or enjoyment of leased premises, taking into account

(i) the condition of the leased premises on the date the commercial lease was entered into, and

(ii) the intended use of the leased premises on the date the commercial lease was entered into and

(b) is commercially reasonable.

(3) For the purposes of determining the condition of leased premises under subsection (2) (a) (i), the leased premises are, subject to contrary evidence, deemed to have been in a condition suitable for the intended use of the leased premises.

(4) The intended use of leased premises under subsection (2) (a) (ii) is

(a) the use set out in the commercial lease, or

(b) if the use is not set out in the commercial lease, a use, permitted by law, that is reasonable based on the type and location of the leased premises.

(5) A necessary repair does not include a repair to fix damage caused by

(a) reasonable wear and tear, or

(b) the tenant or a person for whom the tenant is responsible.

Implied duty to repair

4.2 A commercial lease is deemed to contain a term that a landlord has a duty

(a) to make a necessary repair, at the landlord's expense, to the leased premises in accordance with this Division, and

(b) after starting a necessary repair, to complete the repair within a reasonable time.

Right of entry to make necessary repair

4.3 (1) A landlord may enter leased premises for the purposes of making a necessary repair

(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,

(ii) hiring a licensed locksmith to open locked doors, or

(iii) if a licensed locksmith is not readily available, using force to open locked doors.

(2) If a tenant obstructs or threatens a landlord who is attempting to enter leased premises for the purpose of making a necessary repair, the landlord may apply under section 52 for an order

(a) directing the tenant to allow the landlord, or any person acting on the landlord's behalf, to enter the leased premises for the purpose of making the necessary repair, and

(b) authorizing the use of force described in the order to enter the premises for the purpose of making the repair.

(3) If a landlord opens a locked door, or force is used, to enter leased premises for the purposes of making a necessary repair and the tenant is absent when the landlord leaves the premises, the landlord must take reasonable steps to ensure that the premises are secure from unauthorized entry.

Vacant possession to make necessary repair

4.4 (1) A landlord who requires vacant possession of leased premises to make a necessary repair may apply under section 52 for an order requiring the tenant to vacate the leased premises for a specified period.

(2) After receiving an application under subsection (1), the court may grant an order that

(a) requires the tenant to vacate the leased premises for a specified period and may provide for one or both of the following:

(i) a reduction in the amount of rent payable by the tenant during the period;

(ii) a requirement that the landlord pay compensation to the tenant, or

(b) on the request of the tenant, terminate~~s~~ the lease.

Tenant giving landlord a notice to repair

4.5 (1) A tenant must, within a reasonable time after becoming aware that a necessary repair is required, serve a notice to repair on the landlord that describes the defect or deterioration to be repaired and, subject to subsections (2) and (3), the landlord must make the repair.

(2) If, after a landlord has been served with a notice to repair, the landlord and tenant agree that the landlord will not make the repair set out in the notice, the landlord's duty to make the repair under this Division ends on the date of the agreement.

(3) A landlord may, within 30 days after the day of being served with a notice to repair, serve a response notice on the tenant that states that the landlord does not intend to repair the defect or deterioration because the repair is not a necessary repair.

(4) A response notice must include the landlord's justification for the repair not being a necessary repair and, if the justification is based on the repair not being commercially reasonable, the justification must include a detailed estimate of the costs to make the repair.

(5) If the landlord serves a response notice on the tenant in accordance with subsection (3) or fails to begin the repair of the defect or deterioration within 30 days after the day of being served with a notice to repair, the tenant may apply under section 52 for an order that

(a) directs the landlord to make a repair specified in the order,

(b) on the request of the tenant, directs the tenant

(i) to make a repair specified in the order, and

(ii) to withhold from rent the tenant's costs to make the repair up to a maximum amount specified in the order, or

(c) on the request of the tenant, terminates the lease.

(6) The court may grant the order referred to in subsection (5) after being satisfied that the repair is a necessary repair.

(7) If the landlord serves the tenant with a response notice in accordance with subsection (3) or fails to begin the repair of the defect or deterioration within 30 days after the day of being served with a notice to repair, the tenant may, instead of applying for an order under subsection (5), make the repair at the tenant's expense.

(8) If the tenant begins a repair under subsection (7), the landlord may intervene to complete the repair and, if this intervention occurs, the tenant must stop making the repair.

Subject to commercial lease

4.6 This Division is subject to a commercial lease.**]**

Comment:

The Working Group discussed including a provision requiring either landlords or tenants to maintain the leased premises and a provision requiring landlords to repair the leased premises. The Working Group was unable to reach consensus as to whether such a provision should be included in the UCTA. Some members of the Working Group were of the view that a landlord's duty to repair provision would be difficult 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. In addition, some members were 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. Other members of the Working Group were 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 duties of both parties to a commercial lease The Working Group was, however, in agreement that such a provision, if included in the UCTA, should be able to be contracted out of by the parties.

The proposed Division in square brackets is based on the Quebec Civil Code and could be added if the enacting jurisdiction wants to establish a landlord's duty to repair. If the proposed Division is added, Part 2 should be redrafted into Divisions and the table of contents updated.

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) (c) 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

(a) post a notice of default in a prominent place on the leased premises, and

(b) personally serve the notice of default on the tenant or send it by regular mail to the tenant.

(4) The notice of default referred to in subsection (3) must

(a) set 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) contain a copy of this section.

(5) A notice of default that is sent by regular mail is conclusively deemed to have been served 5 days after the date it is mailed.

(6) If a tenant has failed to pay rent, the landlord must not re-enter the leased premised 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 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 52, 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 52, the landlord may re-enter and resume possession of the premises.

(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 52 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 the notice of re-entry on the tenant or send it by regular mail 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.

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.

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.

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 52 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 that occurs after the commercial lease has expired or been terminated, 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.

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.

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

8 (1) This section applies if a landlord needs to enter leased premises for the purposes of protecting life or property as a result of

(a) an emergency, or

(b) a structural problem in the building in which the leased premises are located.

(2) In the circumstance described in subsection (1), the landlord may enter the leased premises and take the actions necessary to protect life or property

(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,

(ii) hiring a licensed locksmith to open locked doors, or

(iii) if a licensed locksmith is not readily available, using force to open locked doors.

(3) If a tenant obstructs or threatens a landlord who is attempting to enter the leased premises under subsection (2), the landlord may apply under section 52 for an order

(a) directing the tenant to allow the landlord, or any person acting on the landlord's behalf, to enter the leased premises to take the actions necessary to protect life or property, and

(b) authorizing the use of force described in the order to enter the premises to take the actions necessary to protect life or property.

(4) If a landlord opens a locked door, or force is used, to enter leased premises for the purposes of taking actions necessary to protect life or property and the tenant is absent when the landlord leaves the premises, the landlord must take reasonable steps to ensure that the premises are secure from unauthorized entry.

(5) Subsections (1) to (3) are subject to a commercial lease.

Comment: Section 8 provides the landlord with the ability to enter the leased premises in the event of an emergency or serious structural problem for the purpose of protecting life or property if the commercial lease does not otherwise provide the landlord with a right of entry on that basis.

Subsection 8 (2) allows the landlord to enter without the consent of the tenant by using the landlord's passkey or other entry device, or by hiring a licensed locksmith to open lock doors, If a licensed locksmith is not readily available, the landlord may use force to open locked doors. If the tenant obstructs or threatens the landlord who is attempting to enter the leased premises, subsection 8 (3) allows the landlord to apply for a court order. Subsection 8 (4) requires a landlord who enters by opening locked doors or by using force to take reasonable steps to ensure that the premises are secure from an unauthorized entry if the tenant is absent when the landlord is leaving the premises.

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.

(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.

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 a duty, 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 duties of the assignor under the commercial lease, including a right or duty 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 duty that becomes enforceable before the assignment with respect to rent arrears and any interest that is owing under the commercial lease on rent arrears.

(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 duties of the assignor enforceable against an assignee, regardless of whether the rights and duties touch and concern land or pertain to matters in existence at the time of the lease. This approach simplifies the law and ensures that the 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.

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 the day of 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.

Effect of surrender and merger on subleases

12 (1) In this section, **"intermediate landlord"** means a landlord under a sublease.

(2) The rights and duties 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.

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 52 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.

(3) This section does not apply to a tenant's duty under an implied or express term in a lease to pay accelerated rent in the circumstances referred to in section 4 (1) (c).

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. Subsection 13 (3) prevents a court from granting relief from forfeiture against the implied accelerated rent provision contained in clause 4 (1) (c).

Interesse termini abolished

14 (1) The common law doctrine of interesse termini is abolished.

(2) The rights and duties 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.

Interest in land and contract law

15 (1) For the purpose of interpreting the rights and duties 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 52, 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.

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.

Reduction in rent to offset judgment

16 A tenant may deduct from rent an amount to offset a judgment in favour of the tenant against the landlord.

Comment: Section 16 grants tenants the self-help remedy of rent abatement or diversion if the tenant has already obtained a judgment 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 conflict with existing provincial commercial tenancies legislation in most Canadian jurisdictions, the *BIA* in certain circumstances, and may also be in conflict with the common law. The Working Group understands that the position in Quebec differs; in Quebec termination clauses in case of a tenant's bankruptcy or insolvency are generally enforceable, within the limits set out by the *BIA.*

Contracting out of this Part by commercial lease

18 (1) A commercial lease must not modify or exclude a provision of this Part.

(2) A term in a commercial lease that modifies or excludes a provision of this Part in contravention of subsection (1) has no effect.

Retaining or disclaiming commercial lease by trustee

19 (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.

Liability for rent

20 (1) Subject to subsection (2), a trustee of a bankrupt tenant 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 earlier of

(i) the date the trustee disclaims the commercial lease,

(ii) the effective date of an assignment of the commercial lease by the trustee, and

(iii) if the trustee does not assign the lease, 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 20 deals with a situation where the trustee has decided to retain the lease. Subsection 20 (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

21 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.

Rights of subtenant

22 (1) Subject to subsection (3), if a trustee of a bankrupt tenant disclaims a commercial lease in the circumstances described in section 19 (3) and the commercial lease is a superior lease, a subtenant may, within 10 days after the day that 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 a commercial lease in the circumstances described in section 19 (4) and the commercial lease is a superior lease, a subtenant may, within 10 days after the day of 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.

Comment: Section 22 sets out the rights of a subtenant if the subtenant's landlord goes bankrupt. Section 22 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. Under section 18, parties may not contract out of this provision.

PART 4 – DISTRESS FOR RENT

Division 1 – Definitions

Definitions

23 (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 25 (1);

"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 31, 32, 33 (1) to (3), 34, 35, 37, 38, 40, 43 (3) and 44 includes a highway or easement referred to in section 29 (2).

Comment: Distress for rent is a remedy available to landlords to enforce a tenant's duty 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' duty 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 reinstituted in Quebec.

Division 2 – Contracting Out of this Part by Commercial Lease

Contracting out

24 (1) A commercial lease must not 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 24 allows landlords to restrict or waive their rights to distrain for rent, but prevents landlords from expanding their right to distrain.

Division 3 – Right of Distress

Right of distress

25 (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 29 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 29

(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 that are subject to the landlord's right of distress.

Comment: Subsection 25 (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 25 (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.

Death of landlord

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

Limitations on landlord's rights

27 (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 25 (2) (a) and (b) until the seized goods have been sold.

Comment: Section 27 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.

Tenant's right of set off

28 (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 52 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 granted.

(3) The landlord may sell perishable goods before the order under section 52 is granted if the sale is necessary to preserve the value of the goods.

Comment: Section 28 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.

Division 4 – Seizure of Goods

Goods that may be seized

29 (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 29 (1) prescribes the goods that can be seized by a landlord under the right of distress. Subsection 29 (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 29 (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.

Restriction on goods that may be seized

30 (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 29 (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 outs why the goods are located on the leased premises.

(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 the day of being served with a statutory declaration under subsection (2), apply under section 52 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 30 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.

Tenant's duties before seizure

31 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 31, the tenant will have committed tenant misconduct. Section 49 of the UCTA provides that a person other than the tenant who knowingly assists a tenant to contravene section 31 also commits tenant misconduct. Section 50 provides landlords with a right of action in respect of tenant misconduct.

When goods may be seized

32 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.

Process for seizure

33 (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,

(ii) hiring a licensed locksmith to open locked doors, or

(iii) if a licensed locksmith is not readily available, using force 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 52 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 use of force described in the order to enter the premises for the purpose of seizing goods.

(4) If an enforcement officer opens a locked door, or force is used, 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 33 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 33 (2) (b) 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 locked doors. If a licensed locksmith is not readily available, the landlord may use force to open locked doors. If, the tenant obstructs or threatens an enforcement officer who is attempting to enter the leased premises, subsection 33 (3) allows a landlord to apply for a court order. Subsection 33 (4) requires the enforcement officer who enters by opening locked doors or by using force to take reasonable steps to ensure that the premises are secure from an unauthorized entry if the tenant is absent when the officer is leaving the premises.

Notice of seizure

34 (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 24 hours after leaving the premises,

(i) personally serve the notice of seizure on the tenant or send it by regular mail to the tenant, and

(ii) send the notice of seizure by regular mail 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 37, 38, 39 and 48.

(4) A notice of seizure that is sent by regular mail is conclusively deemed to have been served 5 days after the date it is mailed.

Comment: Section 34 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.

Landlord's duties respecting seized goods

35 (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 37,

(b) the landlord releases the goods in compliance with an order referred to in section 38 (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.

(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 the day of 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 29 (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 35 prescribes a landlord's duties regarding seized goods. Subsection 35 (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 35 (3) provides a specific rule if Canadian currency is seized and removed from the leased premises, and subsections 35 (6) – (8) provide specific rules pertaining to the seizure of

livestock and standing crops.

Seizing goods that the tenant has removed

36 (1) In this section, **"removed goods"** means

(a) goods removed in contravention of section 31 (a), and

(b) goods removed in contravention of section 31 (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 36 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.

Redeeming seized goods

37 (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 35 (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) the rent arrears that the subtenant owes to the subtenant's landlord under the sublease;

(ii) the rent arrears that the subtenant's landlord owes to the superior landlord under the superior lease, 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.

(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 under the occupancy agreement;

(ii) the rent arrears 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 37 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.

Disputing rent arrears or costs

38 (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 37 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 52 for an order postponing the sale of the seized goods, or

(b) pay any undisputed amounts or costs to the landlord and pay any disputed amounts or costs into *[name of court*] and apply under section 52 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) Subject to subsection (4), if the tenant, subtenant or occupant applies for an order under subsection (2), the landlord must not sell the goods of the tenant, subtenant or occupant who made the application until the court makes a decision with respect to the application.

(4) The landlord may sell perishable goods before the court makes a decision with respect to the application if the sale is necessary to preserve the value of the goods.

(5) 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 38 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 52 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. Subsections 38 (3) and (4) prevent the landlord from selling the goods – unless they are perishable - until the court has made a decision with respect to the tenant's application.

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

39 (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 35 (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 37 or obtained an order of the court referred to in section 38 (2) (b).

Comment: If a tenant, subtenant, or occupant commits either of the actions set out in section 39, they will have committed tenant misconduct as defined in section 49. Section 50 provides landlords with a right of action in respect of tenant misconduct.

Division 5 – Sale of Seized Goods

Process for sale

40 (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 34.

(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 52 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.

(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 52 for and is granted an order approving the purchase.

Comment: Section 40 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 40 (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 40 (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 40 (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.

Termination of interest in seized goods

41 (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 any security interest in the goods over which, by operation of section 46, the landlord's right of distress does not have priority.

Sale of standing crops – liability for rent

42 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.

Duties after sale

43 (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 24 hours 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 the notice on the tenant, or

(ii) send it by regular mail to the tenant.

(2) The landlord must pay any surplus funds to the tenant within 10 days after the day that the landlord receives the tenant's payment instructions.

(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.

Division 6 – Priorities

Execution creditors

44 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 44 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. If the enacting jurisdiction has implemented the Uniform Civil Enforcement of Money Judgments Act, section 44 of the UCTA may need to be modified to reflect sections 54, 57 and 184 of the Uniform Civil Enforcement of Money Judgments Act. Enacting jurisdictions should also ensure section 44 is compatible with the jurisdiction's general civil enforcement legislation.

Standing crops

45 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.

Security interests

46 (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.

Division 7 – Remedies

Wrongful distress

47 (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

48 (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.

Tenant misconduct

49 (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 31 or 39 commits tenant misconduct.

Action based on tenant misconduct

50 (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 49 (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 49 (2) are jointly and severally liable.

Other actions by landlord

51 (1) Subject to the rights of a person who has a security interest that has priority under section 46, 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

Orders granted under summary process

52 (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 54, grant 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 28, 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.

(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 54:

(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 has unreasonably withheld consent referred to in section 4 (2) (d) or (e);

(f) if an order making a declaration under clause (e) 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.

(3) In granting 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.

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

PART 6 – GENERAL

Service of documents

53 (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].*

Regulations

54 (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 34 (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

55 This Act comes into force by *[jurisdiction to insert method to bring Act into force]*.

Appendix B: Modified *Commercial Tenancies Act* Recommended for Adoption in Saskatchewan

Note: White comment boxes are from the original ULCC 2019 report. Green comment boxes have been added by the Commission.

Provisions added by the Commission are in blue.

Division X [Landlord's Duty to Repair] is optional and the Commission is seeking feedback as to whether to recommend it be included in the modified UCTA. These provisions are in italics.

Modified Commercial Tenancies Act

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;

"court" means the Court of King's Bench;

"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 an executor, administrator, guardian, trustee, liquidator, receiver or other person on whom the right to grant possession has devolved by operation of law, legal process or order of a court;

"leased premises" means the premises under a commercial lease;

"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;

"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 an executor, administrator, guardian, trustee, liquidator, receiver or other person on whom the right to possess has devolved by operation of law, legal process or order of a court.

Comment: The *Uniform Commercial Tenancies Act* (UCTA) seeks to balance the rights and duties 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 (or Government if there is no Crown in the enacting jurisdiction) is bound by this Act.

Comment

The definitions of landlord and tenant in *The Landlord and Tenant Act* are similar to those in the UCTA. A "landlord" is defined as a "lessor, owner, the person giving or permitting the occupation of the premises in question, and includes his and their assigns and legal representatives, and in Part IV [overholding tenants] also includes the person entitled to the possession of the premises." A

"tenant" is defined as "includes lessee, occupant, subtenant, under tenant, and his or their assigns and legal representatives."

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.

(4) The Crown is bound by this Act.

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.

Comment

The Crown is not bound by *The Landlord and Tenant Act* (*Seewalt v Saskatchewan,* 2024 SKCA 100).

PART 2 – GENERAL PROVISIONS RELATING TO COMMERCIAL LEASES

Contracting out of 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.

(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.

Implied terms

4 (1) A commercial lease is deemed to contain the following terms relating to a tenant's rights and duties:

(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) in addition to any other duties respecting accelerated rent under the commercial lease, if any of the following events occur, a tenant must pay accelerated rent to the landlord in an amount equal to the rent that would become due during the remainder of the term of the lease after the event occurs, up to a maximum amount of 3 months' 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 the tenant's creditors;

(v) a receiver is appointed for all or part of the business, property, affairs or revenues of the tenant;

only to the extent of the actual value of the tenant's property that is subject to the landlord's deemed security interest at the time of the event;

(d) a tenant must repair, at the tenant's expense, any damage to the leased premises, 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.

Comment: This section sets out the implied provisions in commercial leases that relate to the tenant's rights and duties. 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 4(1)(c) incorporates terms contained in the *Bankruptcy and Insolvency Act* (Canada). Clause 136(1)(f) of the *Bankruptcy and Insolvency Act* (Canada) 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."

However, the preference given by clause 136(1)(f) provides that the amount so payable "shall" not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent." This has been interpreted as meaning that the amount of the accelerated rent is dependent upon the value of the bankrupt's property that is subject to distress under provincial law. If there is no such property, there is no preference. If the role of clause 4(1)(d) is parallel to the acceleration provisions of the *Bankruptcy and Insolvency Act*, the clause should provide for acceleration only to the extent of the actual value of the tenant's property that is subject to the landlord's deemed security interest as provided in Part 4.

Clause 4 (1) (d) imposes a duty 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.

(2) A commercial lease is deemed to contain the following terms relating to a landlord's rights and duties:

(a) a landlord has the right to grant possession of the leased premises on the date that a tenant is to take possession of the leased premises;

(b) a landlord must not derogate from a grant contained in the commercial lease;

(c) a landlord has the right to re-enter and resume possession of the leased premises as set out in section 5;

(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 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 must not unreasonably withhold consent;

(f) if a landlord who is served with a tenant's request for consent referred to in clause (d) or (e) does not respond to the request within 21 days after the day of being served with the request, the landlord is deemed to have given consent.

Comment: Subsection 4 (2) sets out the implied provisions in commercial leases that relate to the landlord's rights and duties. 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) (b) 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.

Clauses 4 (2) (d) and (e) prohibit a landlord from unreasonably withholding consent to the tenant's request to either (i) assign, sublet or otherwise dispose of the leased premises or (ii) transfer or issue shares. Clause 4 (2) (f) deems the landlord to have consented to either request if the landlord does not respond to the request within 21 days after being served with the request.

(3) This section is subject to a commercial lease.

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.

[Division X - Landlord's Duty to Repair]

Necessary repair

4.1 *(1) This section sets out, for the purposes of this Division, the meaning of* ***"necessary repair"*** *in respect of leased premises.*

(2) A necessary repair is a repair of a serious defect or deterioration of leased premises that

(a) affects the preservation or enjoyment of leased premises, taking into account

(i) the condition of the leased premises on the date the commercial lease was entered into, and

(ii) the intended use of the leased premises on the date the commercial lease was entered into and

(b) is commercially reasonable.

(3) For the purposes of determining the condition of leased premises under subsection (2) (a) (i), the leased premises are, subject to contrary evidence, deemed to have been in a condition suitable for the intended use of the leased premises.

(4) The intended use of leased premises under subsection (2) (a) (ii) is

(a) the use set out in the commercial lease, or

(b) if the use is not set out in the commercial lease, a use, permitted by law, that is reasonable based on the type and location of the leased premises.

(5) A necessary repair does not include a repair to fix damages caused by

(a) reasonable wear and tear, or

(b) the tenant or a person for whom the tenant is responsible.

Implied duty to repair

4.2 *A commercial lease is deemed to contain a term that a landlord has a duty*

(a) to make a necessary repair, at the landlord's expense, to the leased premises in accordance with this Division, and

(b) after starting a necessary repair, to complete the repair within a reasonable time.

Right of entry to make necessary repair

4.3 *(1) A landlord may enter leased premises for the purposes of making a necessary repair*

(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,

(ii) hiring a licensed locksmith to open locked doors, or

(iii) if a licensed locksmith is not readily available, using force to open locked doors.

(2) If a tenant obstructs or threatens a landlord who is attempting to enter leased premises for the purpose of making a necessary repair, the landlord may apply under section 52 for an order

(a) directing the tenant to allow the landlord, or any person acting on the landlord's behalf, to enter the leased premises for the purpose of making the necessary repair, and

(b) authorizing the use of force described in the order to enter the premises for the purpose of making the repair.

(3) If a landlord opens a locked door, or force is used, to enter leased premises for the purposes of making a necessary repair and the tenant is absent when the landlord leaves the premises, the landlord must take reasonable steps to ensure that the premises are secure from unauthorized entry.

Vacant possession to make necessary repair

4.4 *(1) A landlord who requires vacant possession of leased premises to make a necessary repair may apply under section 52 for an order requiring the tenant to vacate the leased premises for a specified period.*

(2) After receiving an application under subsection (1), the court may grant an order that

(a) requires the tenant to vacate the leased premises for a specified period and may provide for one or both of the following:

(i) a reduction in the amount of rent payable by the tenant during the period;

(ii) a requirement that the landlord pay compensation to the tenant, or

(b) on the request of the tenant, terminates the lease.

Tenant giving landlord a notice to repair

4.5 *(1) A tenant must, within a reasonable time after becoming aware that a necessary repair is required, serve a notice to repair on the landlord that describes the defect or deterioration to be repaired and, subject to subsections (2) and (3), the landlord must make the repair.*

(2) If, after a landlord has been served with a notice to repair, the landlord and tenant agree that the landlord will not make the repair set out in the notice, the landlord's duty to make the repair under this Division ends on the date of the agreement.

(3) A landlord may, within 30 days after the day of being served with a notice to repair, serve a response notice on the tenant that states that the landlord does not intend to repair the defect or deterioration because the repair is not a necessary repair.

(4) A response notice must include the landlord's justification for the repair not being a necessary repair and, if the justification is based on the repair not being commercially reasonable, the justification must include a detailed estimate of the costs to make the repair.

(5) If the landlord serves a response notice on the tenant in accordance with subsection (3) or fails to begin the repair of the defect or deterioration within 30 days after the day of being served with a notice to repair, the tenant may apply under section 52 for an order that

(a) directs the landlord to make a repair specified in the order,

(b) on the request of the tenant, directs the tenant

(i) to make a repair specified in the order, and

(ii) to withhold from rent the tenant's costs to make the repair up to a maximum amount specified in the order, or

(c) on the request of the tenant, terminates the lease.

(6) The court may grant the order referred to in subsection (5) after being satisfied that the repair is a necessary repair.

(7) If the landlord serves the tenant with a response notice in accordance with subsection (3) or fails to begin the repair of the defect or deterioration within 30 days after the day of being served with a notice to repair, the tenant may, instead of applying for an order under subsection (5), make the repair at the tenant's expense.

(8) If the tenant begins a repair under subsection (7), the landlord may intervene to complete the repair and, if this intervention occurs, the tenant must stop making the repair.

Subject to commercial lease

4.6 *This Division is subject to a commercial lease.**]***

Comment: The Working Group discussed including a provision requiring either landlords or tenants to maintain the leased premises and a provision requiring landlords to repair the leased premises. The Working Group was unable to reach consensus as to whether such a provision should be included in the UCTA. Some members of the Working Group were of the view that a landlord's duty to repair provision would be difficult 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. In addition, some members were 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. Other members of the Working Group were 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 duties of both parties to a commercial lease The Working Group was, however, in agreement that such a provision, if included in the UCTA, should be able to be contracted out of by the parties.

The proposed Division in square brackets is based on the Quebec Civil Code and could be added if the enacting jurisdiction wants to establish a landlord's duty to repair. If the proposed Division is added, Part 2 should be redrafted into Divisions and the table of contents updated.

Comment

The Commission is seeking feedback from consultees as to whether to recommend that a landlord's duty to repair be enacted in Saskatchewan.

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) (c) 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

(a) post a notice of default in a prominent place on the leased premises, and

(b) personally serve the notice of default on the tenant or send it by regular mail to the tenant.

(4) The notice of default referred to in subsection (3) must

(a) set 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) contain a copy of this section.

(5) A notice of default that is sent by regular mail is conclusively deemed to have been served 5 days after the date it is mailed.

(6) If a tenant has failed to pay rent, the landlord must not re-enter the leased premised 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 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 52, 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 52, the landlord may re-enter and resume possession of the premises.

(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 23 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 the notice of re-entry on the tenant or send it by regular mail 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.

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.

COMMENT

At common law, re-entry is reserved for a breach of condition and is typically not available for breach of a covenant unless this is provided for in the lease or legislation. As it can be difficult to distinguish a condition from a covenant, most professionally drafted leases will provide that a breach of any condition or covenant by the tenant will give rise to a right of re-entry, referred to as a "proviso for re-entry."

Most Canadian provinces provide a landlord with a statutory right of entry in specific circumstances. In Saskatchewan, sections 9(1) and 9(2) of *The Landlord and Tenant Act* provide a right of re-entry, in the absence of a contrary provision, if the rent is in arrears for two calendar months, if there has been a default in the performance of any covenant or agreement on the part of the lessee for two calendar months, or if the tenant is convicted of keeping a disorderly house.

The procedure required in Saskatchewan to exercise the right of re-entry for non-performance of a covenant or agreement differs from the procedure required to exercise the right of re-entry for non-payment of rent (*McDougall v 101048690 Saskatchewan Ltd.,* 2004 SKCA 11). Section 10(2) of *The Landlord and Tenant Act* sets out restrictions on exercising the right of re-entry upon the breach of a covenant or agreement and provides as follows:

10(2) A right of re-entry or forfeiture under a proviso or stipulation in a lease, for a breach of any covenant or condition in the lease other than a proviso in respect of the payment of rent, shall not be enforceable by action or otherwise, unless and until:

(a) the lessor serves on the lessee a notice specifying the particular breach complained of and if the breach is capable of remedy requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach; and

(b) the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy and to make reasonable compensation in money to the satisfaction of the lessor for the breach.

Section 10(8) provides that section 10 applies to all leases, notwithstanding any stipulation in the lease to the contrary.

The UCTA creates a procedure, including explicit timelines to be followed, for exercising the right of re-entry due to non-payment of rent and for breach of material consequence (note that the timelines differ slightly between these two situations).

This provision is an important component within the UCTA as it would reduce instances of cases such as *8573123 Canada Inc. (Elias Restaurant) v Keele Sheppard Plaza Inc.* [*Keele*] from going through courts.[67] In *Keele*, the tenants owned an Afro-American grocery store. The tenants wanted to renew their lease but failed to "strictly adhere" to the structure set out within their lease in order to renew it. The tenants made sustained and significant efforts to contact the landlord to communicate their desire to extend their term. Instead of accepting communication from the tenants, the landlord kept them in an overholding position for approximately three years, then issued a notice of termination to the tenants. The tenant succeeded in their application for relief from forfeiture.

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.

[67] *8573123 Canada Inc. (Elias Restaurant) v Keele Sheppard Plaza Inc.*, 2021 ONCA 371.

(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.

COMMENT

The *Landlord and Tenant Act* does not require that an enforcement officer be used to conduct the re-entry if the tenant is still in occupation. Section 50(1) allows a landlord to apply to the Court of King's Bench for an order for a writ of possession directed to the sheriff.

Note that the Commission has recommended that seizure of goods should not be required to be carried out by an enforcement officer.

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 23 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 that occurs after the commercial lease has expired or been terminated, 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.

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.

COMMENT

Sections 50 – 52 of *The Landlord and Tenant Act* contain a summary procedure for ejecting overholding tenants. Landlords are limited to obtaining a writ of possession under these provisions – if a landlord wishes to pursue other remedies such as mesne profits or arrears of rent, they must bring a separate action. Unlike most other Canadian jurisdictions, double rent against an overholding tenant is not a remedy provided for in *The Landlord and Tenant Act* (double rent as a possible remedy was removed from *The Landlord and Tenant Act* in 1947).

A restatement and clarification of the law as it relates to overholding tenants is imperative to commercial tenancy reform. Both landlords and tenants require improved procedural protections in this area. This proposed UCTA provision restricts landlords to claiming compensation for the actual use and occupation of the premises. This provision also codifies indemnity for liability resulting from an overholding tenant who refuses to vacate a space if it impacts a new tenant or purchaser's ability to take possession of that premises and creates a right of action for a landlord to obtain an order for possession against an overholding tenant.

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

8 (1) This section applies if a landlord needs to enter leased premises for the purposes of protecting life or property as a result of

(a) an emergency, or

(b) a structural problem in the building in which the leased premises are located.

(2) In the circumstance described in subsection (1), the landlord may enter the leased premises and take the actions necessary to protect life or property

(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,

(ii) hiring a licensed locksmith to open locked doors, or

(iii) if a licensed locksmith is not readily available, using force to open locked doors.

(3) If a tenant obstructs or threatens a landlord who is attempting to enter the leased premises under subsection (2), the landlord may apply under section 52 for an order

(a) directing the tenant to allow the landlord, or any person acting on the landlord's behalf, to enter the leased premises to take the actions necessary to protect life or property, and

(b) authorizing the use of force described in the order to enter the premises to take the actions necessary to protect life or property.

(4) If a landlord opens a locked door, or force is used, to enter leased premises for the purposes of taking actions necessary to protect life or property and the tenant is absent when the landlord leaves the premises, the landlord must take reasonable steps to ensure that the premises are secure from unauthorized entry.

(5) Subsections (1) to (3) are subject to a commercial lease.

Comment: Section 8 provides the landlord with the ability to enter the leased premises in the event of an emergency or serious structural problem for the purpose of protecting life or property if the commercial lease does not otherwise provide the landlord with a right of entry on that basis.

Subsection 8 (2) allows the landlord to enter without the consent of the tenant by using the landlord's passkey or other entry device, or by hiring a licensed locksmith to open lock doors, If a licensed locksmith is not readily available, the landlord may use force to open locked doors. If the tenant obstructs or threatens the landlord who is attempting to enter the leased premises, subsection 8 (3) allows the landlord to apply for a court order. Subsection 8 (4) requires a landlord who enters by opening locked doors or by using force to take reasonable steps to ensure that the premises are secure from an unauthorized entry if the tenant is absent when the landlord is leaving the premises.

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.

(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.

COMMENT

The Landlord and Tenant Act does not provide for apportionment of rent. Saskatchewan, unlike some other Canadian jurisdictions, does not have apportionment legislation in force. Commercial leases typically require rent to be paid in advance.

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 a duty, 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 duties of the assignor under the commercial lease, including a right or duty 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 duty that becomes enforceable before the assignment with respect to rent arrears and any interest that is owing under the commercial lease on rent arrears.

(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 duties of the assignor enforceable against an assignee, regardless of whether the rights and duties touch and concern land or pertain to matters in existence at the time of the lease. This approach simplifies the law and ensures that the 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.

COMMENT

Section 3 of *The Landlord and Tenant Act* addresses the remedies available to assignees of reversion and provides:

All grantees or assignees of land under lease and their executors, administrators and assigns shall have and enjoy like advantage against the lessees, their executors, administrators and assigns, by entry for non-payment of rent or for doing of waste or other forfeiture, and also shall have and enjoy the same advantage, benefit and remedies, by action, for the non-performance of other conditions, covenant, or agreements, contained and expressed in the indentures of their leases, demises or grants against the said lessees, their executors, administrators and assigns, as the lessors or grantors themselves or their legal representatives might have had and enjoyed at any time.

Section 5 of *The Landlord and Tenant Act* addresses actions against assigns of grantors and lessors and provides:

All lessees and grantees of lands, tenement, rents or any other hereditaments for term of years, life or lives, their executors, administrators and assigns, shall and may have like action, advantage and

remedy against every grantee or assignee of the reversion of the same lands, tenements and other hereditaments so let, or any parcel thereof, for any condition, covenant or agreement contained or expressed in the indentures of their leases, as the same lessees or any of them might and should have had against their said lessors and grantors or their legal representatives.

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 the day of 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.

Effect of surrender and merger on subleases

12 (1) In this section, **"intermediate landlord"** means a landlord under a sublease.

(2) The rights and duties 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.

COMMENT

Section 8 of *The Landlord and Tenant Act* addresses the effect of surrender or merger on a lease and provides as follows:

Where the reversion expectant on a lease of land merges or is surrendered, the estate which for the time being confers as against the tenant under the lease the next vested right to the land shall, to the extent of and for preserving such incidents to and obligations on the reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the lease.

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 52 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.

(3) This section does not apply to a tenant's duty under an implied or express term in a lease to pay accelerated rent in the circumstances referred to in section 4 (1) (c).

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. Subsection 13 (3) prevents a court from granting relief from forfeiture against the implied accelerated rent provision contained in clause 4 (1) (c).

COMMENT

The Landlord and Tenant Act – unlike *The Residential Tenancies Act, 2006*, SS 2006 - does not prohibit accelerating rent. Section 10(4) of *The Landlord and Tenant Act* allows a court to grant relief from forfeiture to a lessee "on such terms as to payment of rent, costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like

breach in the future, as it or he deems just having regard to the proceedings and conduct of the parties under the foregoing provisions of this section and to all the other circumstances."

Interesse termini abolished

14 (1) The common law doctrine of interesse termini is abolished.

(2) The rights and duties 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.

Interest in land and contract law

15 (1) For the purpose of interpreting the rights and duties 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 23, 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.

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.

COMMENT

While the doctrine of frustration was not traditionally applied to commercial leases, courts in some Canadian jurisdictions have recently begun applying the doctrine to leases in some cases. *The Landlord and Tenant Act* – unlike *The Residential Tenancies Act, 2006*, SS 2006 (s. 11) – does not contain a provision stating that the doctrine of frustration of contract and *The Frustrated Contracts Act,* SS 1994, c F-22.2 apply to tenancy agreements. Most professionally drafted commercial leases will contain provisions describing the consequences of an unexpected event occurring that prevent the parties from performing their obligations under the lease.

Reduction in rent to offset judgment

16 A tenant may deduct from rent an amount to offset a judgment in favour of the tenant against the landlord.

Comment: Section 16 grants tenants the self-help remedy of rent abatement or diversion if the tenant has already obtained a judgment 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 conflict with existing provincial commercial tenancies legislation in most Canadian jurisdictions, the *BIA* in certain circumstances, and may also be in conflict with the common law. The Working Group understands that the position in Quebec differs; in Quebec termination clauses in case of a tenant's bankruptcy or insolvency are generally enforceable, within the limits set out by the *BIA*.

Contracting out of this Part by commercial lease

18 (1) A commercial lease must not modify or exclude a provision of this Part.

(2) A term in a commercial lease that modifies or excludes a provision of this Part in contravention of subsection (1) has no effect.

Retaining or disclaiming commercial lease by trustee

19 (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.

Liability for rent

20 (1) Subject to subsection (2), a trustee of a bankrupt tenant 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 earlier of

(i) the date the trustee disclaims the commercial lease,

(ii) the effective date of an assignment of the commercial lease by the trustee, and

(iii) if the trustee does not assign the lease, 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 20 deals with a situation where the trustee has decided to retain the lease. Subsection 20 (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

21 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.

Rights of subtenant

22 (1) Subject to subsection (3), if a trustee of a bankrupt tenant disclaims a commercial lease in the circumstances described in section 19 (3) and the commercial lease is a superior lease, a subtenant may, within 10 days after the day that 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 a commercial lease in the circumstances described in section 19 (4) and the commercial lease is a superior lease, a subtenant may, within 10 days after the day of 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.

Comment: Section 22 sets out the rights of a subtenant if the subtenant's landlord goes bankrupt. Section 22 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. Under section 18, parties may not contract out of this provision.

Orders granted under summary process

23(1) If a provision in Part 2 provides that a person may apply under this section for an order, the Court may, under a summary process in accordance with the Rules, grant one or more of the following orders:

(a) if the provision in Part 2 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, 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.

(2) If a landlord and tenant have a dispute with respect to a commercial lease, other than a matter referred to in subsection (1), the landlord or tenant may apply to the Court under a summary process in accordance with the Rules for one or more of the following orders:

(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 has unreasonably withheld consent referred to in

section 4(2)(d) or (e);

(f) if an order making a declaration under clause (e) 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 granting relief from forfeiture or penalty;

(h) 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;

(i) 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;

(j) any other order that the court considers necessary to resolve the dispute brought before it under this subsection.

(3) In granting 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:

(a) affects the jurisdiction of the Small Claims Court to hear any claim, otherwise within its jurisdiction, for the payment of rent or damages;

(b) restricts the jurisdiction of the Court of King's Bench to grant an order;

(c) affects the rights of a landlord and tenant to agree in a commercial lease to submit disputes to arbitration; or

(c) limits the power of the court under sections 63 and 66 of *The Personal Property Security Act, 1993.*

(5) 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.

(6) 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.

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. The orders referred to in this section relate to relations between a landlord and tenant prior to the time the landlord seeks to enforce a rent obligation security interest. After this point, sections 63 and 66

of *The Personal Property Security Act, 1993* apply.

Comment

This section was formerly section 52 in the original UCTA.

The Landlord and Tenant Act allows for summary proceedings to recover possession against overholding tenants by virtue of sections 50 and 52(2) (*McDougall v 101048690 Saskatchewan Ltd*, 2004 SKCA 11). Section 50(1) allows a landlord to "apply by notice of motion to a judge of the Court of King's Bench…for an order for as writ of possession." Section 52(2) provides that "[i]f the tenant appears the judge shall, in a summary manner, hear the parties and their witnesses, and examine into the matter, and if it appears to the judge that the tenant wrongfully holds against the right of the landlord and that the right to possession may properly be determined in a proceeding under this Part, he may order the issue of the writ."

Saskatchewan courts will decide whether to deal with an application for a writ of possession pursuant to s. 52(2) in a summary manner depending on the circumstances of the case (*Walkington Estate v 102087390,* 2024 SKKB 50 at para 19). Summary proceedings are typically not used when the application involves "involved questions of fact...involved questions of law, or there is doubt as to whether there would be complete justice between the parties" (*101142191 Saskatchewan Ltd. v Gustafson*, 2011 SKQB 76 at para 44).

Rule 7-5 of The King's Bench Rules allows the court to grant summary judgment if the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.

PART 4 – RENT OBLIGATION SECURITY INTEREST

Division 1 – Definitions

Definitions

24 (1) In this Part:

(a) **"rent obligation security interest"** is a security interest in property that secures payment or performance of the tenant's obligation to pay rent as provided in a lease;

(b) **"property"** means:

(i) goods, including crops and fixtures of a tenant located on leased premises and goods removed from leased premises during the currency of the lease or within two months after its termination whether or not the tenant remains in possession of the premises;

(ii) goods with respect to which a debtor has the power to grant a security interest;

(iii) livestock located upon a road or highway adjacent to the leased premises;

(iv) an account of a subtenant payable to a tenant;

(v) an account owing to the tenant as a result of goods being stored on the leased premises;

(vi) an interest or claim that is payable pursuant to a policy of insurance as indemnity or compensation for loss of or damage to goods or fixtures of a tenant;

but does not include:

(vii) goods located in a building that is used as living quarters by the tenant located on land otherwise used for commercial purposes; and

(viii) an account of a subtenant of a residence referred to in (vii).

(2) Except as provided in any other Act, the right of distress for enforcing a rent obligation is terminated.

(3) Nothing in this Part affects rights and obligations provided in *The Crop Payments Act,* RSS 1978, c. C-48, Part IV of *The Saskatchewan Farm Security Act, 1988-89,* c. S-17.1 or Sections 19-36 of *The Limitation of Civil Rights Act RSS 1978,c L-16* section 2-66 of *The Saskatchewan Employment Act* SS 2013, c. S-15.1.

(4) Except as otherwise provided in this Act, the provisions of *The Personal Property Security Act,* 1993 apply to a rent obligation security interest to the extent that the context permits.

(5) For the purposes of subsection (4), a landlord to whom a rent obligation is owing is a secured party and a tenant owing the obligation is a debtor.

(6) A commercial lease must not modify or exclude a provision of this Part except in accordance with subsection (7).

(7)A commercial lease may waive or restrict the landlord's rights under this Part.

(8) Nothing in this Part precludes a landlord from taking and perfecting a security interest other than a rent obligation security interest in property of a tenant under a security agreement.

25(1) A landlord to whom a rent obligation is owing by a tenant has a rent obligation security interest in property that secures the rent obligation.

(2) Sections 10,12(1)(c), 61 and sections applicable to receivers of *The Personal Property Security Act, 1993* do not apply to a rent obligation security interest.

(3) Regardless of section 35(1) of *The Personal Property Security Act, 1993*, a rent obligation security interest has priority over a registered or perfected security interest in the property that otherwise has priority over the rent obligation security interest to the amount of [three] months for commercial property other than farmland) and (25) percentage of annual lease value of farmland.

(4) Subsection (3) does not apply to a perfected purchase money security interest in the property.

(5) Subsection 65(9) of *The Personal Property Security Act, 1993* shall be read as applying to goods seized pursuant to a tenant obligation security interest.

(6) For the purposes of this Act, the term "deficiency" in *The Personal Property Security Act, 1993* when used in the context of enforcement of a rent obligation security interest shall mean the amount of lease owing by a tenant to a landlord after deducting the amount secured by the tenant obligation security interest including the expenses referred to in subsection 57(4) and 59(2) of *The Personal Property Security Act, 1993.*

(7) When applied in the context of enforcement of a rent obligation security interest, subsection 61(7) and subsection 59(14) of *The Personal Property Security Act 1993,* shall provide:

> Where a secured party disposes of collateral to a purchaser who acquires the interest for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from:
>
> (a) the interest of the debtor;
>
> (b) an interest subordinate to that of the debtor; and
>
> (c) an interest subordinate to that of the secured party; and
>
> (d) a prior interest that is subordinated to that of the secured party as provide in The Commercial Tenancies Act
>
> whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by interests referred to in (a)-(c) the subordinate interests are deemed to be performed for the purposes of sections 49 and 50.

(8) When applied in the context of a rent obligation security interest, clause 59(1)(a) of *The Personal Property Security Act 1993* shall state: In this Part, "surplus" means the amount of proceeds of disposition or collection of collateral remaining after deducting

the amounts referred to in subsection 59(1)(a) and the amount to which the secured party has priority.

60(2) Where a security agreement secures an indebtedness including the indebtedness is secured as provided in The Commercial Tenancies Act and the secured party has dealt with the collateral pursuant to section 57 or has disposed of it in accordance with section 59 or otherwise, any surplus shall, unless otherwise provided by law or by the agreement of all interested parties, be accounted for and paid in the following order to:

(a) a person who has a security interest in the collateral that has priority over the interest of the secured party as provided in *The Commercial Tenancies Act*, to the extent of that priority;

(b) a person who has a subordinate security interest in the collateral and:

(i) who, before the distribution of the surplus, registers a financing statement using the name of the debtor or according to the serial number of the collateral if the goods are of a kind that is prescribed as serial numbered goods; or

(ii) whose interest was perfected by possession at the time when the collateral was seized;

(c) any other person with an interest in the surplus, if that person has given a written notice of the interest to the secured party prior to the distribution; and

(d) the debtor or any other person who is known by the secured party to be an owner of the collateral;

but the priority of the claim of any person mentioned in clauses (a), (b) or (c) is not prejudiced by payment to anyone pursuant to this section.

Comment: A rent obligation security interest is a security interest falling within the PPSA. However, since it is a deemed statutory security interest its existence does not depend upon a security agreement between the landlord and the tenant. The landlord and tenant may enter into a security agreement that provides for a generic security interest that is not within the scope of the Commercial Tenancies Act.

There are features of the PPSA that will require modification to reflect the priority structure applicable to rent obligation security interest. As noted above, it is proposed that a rent obligation security interest, whether or not registered, would have priority over a prior registered security interest to the extent of a specified amount of unpaid rental. This is reflected in proposed subsections 25(3) and (4).

There are a few features of the Part V of the PPSA that require clarification in the context of enforcement of a rent obligation security interest. These are set out above.

PART 6 – GENERAL

Service of documents

26 (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].*

Regulations

27 (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 34 (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

28 This Act comes into force by *[jurisdiction to insert method to bring Act into force]*.