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NON-PAYMENT OF RENT: A DEFAULTING TENANT UNDER A COMMERCIAL LEASE

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Landlords often have to deal with tenants defaulting under a commercial lease. The pattern of default is typical. It often begins with a series of late rent payments, then it progresses to payment of only a part of the rent due. Finally, there is a complete default in payment of rent. At this point, the landlord contacts his or her lawyer to advise that rent is in arrears and to seek advice on the appropriate remedy.

When a tenant defaults under a commercial lease by failing to make payment of rent, there are generally three main remedies available to the landlord:

(a) distrain for rent in arrears;

(b) re-enter and terminate the lease; or

(c) affirm the lease and sue for rent in arrears.

The landlord's best remedy will depend upon the circumstances of each case. The first portion of this paper will review the pros and cons of these remedies, and examine the practical considerations that should be discussed with a landlord before it makes a decision to engage any of these remedies.

All references to statutory provisions refer to the *Rent Distress Act*, R.S.B.C. 1996, c. 403 (the "*RDA*"), the *Commercial Tenancy Act*, R.S.B.C. 1996, c. 57 (the "*CTA*"), the *Law and Equity Act*, R.S.B.C. 1996, c. 253 (the "*LEA*") and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), unless otherwise indicated.

I. **RENT DISTRESS**[1]

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If the landlord wishes to preserve the lease, and if the tenant has sufficient goods on the premises to satisfy the rent arrears, then rent distraint, i.e. seizing goods as a pledge against the unpaid rent, may be the most appropriate solution.

A. **The Common Law Right To Distress**

1. **What is it?**

Distress for rent is a self-help remedy which allows a landlord to hold goods of a tenant, which are found on the leased premises, as a form of security for payment of rent arrears. A lien arises by operation of law, in favour of a landlord, once a landlord takes possession of the tenant's goods, pursuant to the right of distress. Distress is a right created at common law by the relationship of landlord and tenant. It is not a right given by statute although there are certain restrictions and limitations placed upon it by statute: *Commercial Credit Corp Ltd v. Harry D. Shields Ltd.* (1980), 112 D.L.R. (3d) 153, 15 R.P.R. 136; affirmed (1981), 122 D.L.R. (3d) 736 (Ont. C.A.)

The right of distress is the only basis on which a landlord may hold the goods of his tenant. The right arises upon the non-payment of rent. A landlord may distrain for non-payment of any amounts which the lease defines as rent (e.g. operating costs, property taxes, interest, legal fees and other expenses incurred to enforce the lease). A landlord cannot distrain for "damages" alleged to have been caused by the tenant.

At common law, a landlord had the right to seize and hold the goods of a tenant, but no power to sell the goods. The right of sale only arises by statute: *RDA* s. 7.

In British Columbia, the remedy of distress for rent is only available in a commercial tenancy. The right has been taken away with respect to residential tenancies: *Residential Tenancy Act,* R.S.B.C. 1996, c.406, s. 80(1).

Although a landlord's right of distress is not a right which is granted by contract, it is a right which can be taken away or restricted by contract: *Wallace v. Fraser* (1878), 2 S.C.R. 522. The courts will typically not enforce provisions in a lease which seek to preserve the right of distress after the landlord has exercised a right to forfeit the lease because those two rights are inconsistent with each other: *Re Lussier and Denison*, [1972] 3 O.R. 652 (Ont. Co. Ct.) at 655; *General Motors Acceptance Corp. of Canada Ltd. v. Arthur Bell Holdings Ltd.*, [1990] B.C.J. No.1725 (B.C.S.C.).

Distraint can take several forms. It can occur by removing goods and equipment from the premises. It can also take place by having the bailiff leave an agent on the premises in control of the goods and equipment. Alternatively, the distraint can take place by securing goods on the premises and obtaining an undertaking

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from the tenant to act as bailee and not to remove any of the goods: *Derby Reach Restaurant Ltd. v. Odyssey Holdings Ltd.* (1995), 10 B.C.L.R. (3d) 29 (C.A.) at 37-38.

2. **Who can use it?**

a. **the holder of the reversionary interest**

The right to distrain for rent is only available to the owner of the immediate reversion of a lease. If that party sells, assigns or transfers the reversionary interest, then he loses his remedy of distress.

A tenant who assigns his rights under a lease, without an express power of distress, cannot distrain for arrears of rent because he has no reversionary interest. The tenant/assignor's only remedy is an action on the contract against his assignee.

A tenant who sub-leases his premises may distrain for rent against his sub-tenant so long as he retains a reversionary interest in the original lease term.

See Williams & Rhodes, *Canadian Law of Landlord and Tenant*, (looseleaf) (6th ed.) (Toronto, Carswell: 1988), 8:1:3 to 8:1:8.

b. **a receiver**

A receiver may distrain for rent: *Wilkins v. Miner,* [1926] 3 W.W.R. 778 (Alta. C.A.). The receiver distrains in the name of the person (e.g. the landlord) who has the right of distraint. A lender who appoints a receiver of property under foreclosure may distrain for rent against the tenant of that property: *Wild Bill's Work & Western Wear (Fort St. John) Ltd. v. Central Trust Company*, [1985] B.C.J. 1549 (B.C.S.C.). Most mortgages also contain a contractual power of distress.

c. **a mortgagee**

Where a mortgage has priority over a lease, and the mortgagee forecloses and obtains title subject to the lease, then privity of estate is created between the mortgagee and the tenant, which gives the mortgagee the right to enforce the lease and the right to distrain for arrears of rent: *Manufacturers Life Insurance Co. v. J.K.P. Holding Co.* (1986), 44 Alta. L.R. (2d) 390 (Alta. C.A.).

d. **the landlord's agent**

While the actual distress may be made by the landlord, the usual practice is to retain a bailiff. Generally speaking a landlord will not be responsible for any illegal actions committed by his bailiff in carrying out the

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distress unless the landlord authorized the illegal acts or subsequently adopted or ratified them.

A bailiff will usually require a written indemnity from the landlord for any actions which could be brought against the bailiff in the event the landlord had no right to distrain. In circumstances where it should have been obvious to the bailiff that a distress was illegal, an indemnity may not protect the bailiff: *Rawlins v. Monsour* (1978), 88 D.L.R. (3d) 601 (Ont. C.A.). A sample Distress Warrant with such an indemnity clause is included as Appendix "A" to this paper.

3. **Against whom can it be used?**

At common law, distraint can only be used against a tenant with whom the landlord has privity of estate. For that reason, a tenant who has privity of estate with a sub-tenant may distrain against that sub-tenant but a tenant who merely has privity of contract with an assignee may not distrain against that assignee. An instrument will operate as a sublease, as distinguished from an assignment, so long as the transferor retains a reversion. In order to create a valid sublease, which gives the tenant the right to distrain against his subtenant, the sublease must be for a period less than the term of the head lease. If no reversionary interest is retained, then an assignment is created, rather than a sublease: *Damack Holdings Ltd. v. Saanich Peninsula Savings Credit Union* (1982), 19 B.L.R. 46 (B.C.S.C.); *Gamieson v. London & Canadian Loan & Agency Co.* (1897), 27 S.C.R. 435 (S.C.C.).

Section 3(2) of the *RDA* permits a landlord to distrain for rent against the tenant or the "person who is liable for the rent". The definition of tenant in section 3(1) of the *RDA* is broad enough to include a subtenant, a tenant's assignee or "any person in actual occupation of the premises under or with the assent of the tenant during the currency of the lease, or while the rent is due or in arrears, whether or not he or she has attorned to or become the tenant of the landlord".

The right of the landlord to distrain against goods of the tenant's assignee, for arrears of rent owed by the original tenant, applies even where the lease was assigned without the required consent of the landlord: *Smart Woman Ltd. v. Saleway Estates Ltd.* (1987), 44 R.P.R. 75 (Ont. H.C.).

Since the right of distraint arises out of the relationship of landlord and tenant, it cannot be used against a licensee who is liable only for use and occupation; *Traders Finance Corp. v. Primerano*, [1955] O.W.N. 553 (H.C.).

4. **How may entry be obtained?**

The landlord or his bailiff has no right to break into the leased premises to distrain for rent. A forced entry results in a forfeiture of the lease and makes the distraint illegal: *Beaver Steel Inc. v. Skylark Ventures Ltd.*

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(1983), 47 B.C.L.R. 99 (S.C.). The entry must be through the ordinary and natural means of entry to the leased premises, through an open or unlocked door or some other authorized means of access, such as an open window: *Tutton v. Darke* (1860), 157 E.R. 1338.

The distress will be void *ab initio*, and the landlord will be liable in trespass, if an unlawful entry is made: *Henderson v. McGugan*, [1933] 3 W.W.R. 230 (B.C.S.C.). An unlawful entry on the initial distress will not prohibit a subsequent valid distress: *Grunnell v. Welch*, [1906] 2 K.B. 555 (C.A.).

If goods are fraudulently or clandestinely removed from the leased premises, then section 15 of the *RDA* will permit a forcible entry, with the assistance of a peace officer, into the building or place to which the goods were moved.

5. **Against what property may the distraint be pursued?**

a. **goods found on the premises**

The general rule is that distraint may only be levied against goods found on the leased premises. That is a fairly easy rule to apply when dealing with tangible property which can be physically located but what about intangible property? Can intellectual property, or some other form of intangible property, be located on the premises? *Re Modatech Systems Inc.* (1998), 161 D.L.R. (4th) 449, leave to appeal refused, [1998] S.C.C.A. No. 386, a decision of B.C. Court of Appeal, suggests it cannot. The Court of Appeal was asked to consider the landlord's claim for a preference made under s. 136(1)(f) of the *BIA*. That section gives a landlord a preference for arrears of rent for a period of three months immediately preceding the bankruptcy (and accelerated rent for up to three months following the bankruptcy) provided that there is located sufficient "property on the premises under lease" from which the claim can be paid. As the Court of Appeal pointed out, the purpose of s. 136(1)(f) of the *BIA* is to substitute a preference for the right to distrain which is abrogated by the *BIA*. If a landlord distrains, then the landlord's recovery is limited to the value of the physical assets on the premises. In this particular instance, the tenant's main assets were intellectual property rights, including computer source code, intangible assets which gave monetary value to physical assets which themselves had minimal resale value. Given the limitation which the common law places on a landlord's right to distrain, restricting recovery to the value of physical assets found on the premises, the court interpreted the words "property on the premises under lease" to mean those goods and chattels which were capable of being physically located on the premises and not to include any intangible property such as intellectual property, share certificates and accounts receivable.

A landlord cannot distrain against goods which consist of a legal right only. For example, a landlord cannot distrain against a liquor licence: *Gastown Investment 21 Ltd. v. Purple Onion Cabaret Inc.*, [2005] B.C.J. No.

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1536 (B.C.S.C.).

A landlord cannot distrain against a thing that has become affixed to the property so as to become part of it, including a tenant's trade fixture: *85987 Ontario Ltd. v. Starmark Property Management Ltd.* (1998), 18 R.P.R. (3d) 201 (Ont. C.A.). A tenant's trade fixture is a thing which has become part of the property, is used by the tenant in the tenant's business and is removable at the instance of the tenant. A trade fixture may not be distrained against because it is as much a part of the land as any immovable fixture and "...as distraint runs against the tenant's property found on the land and not against the land itself, it follows that trade fixtures which are part of the land at the time of the purported distraint cannot be subject to distraint" (*85987 Ontario*, supra).

b. **goods fraudulently or clandestinely removed from the premises**

Sections 11 to 15 of the *RDA* create a statutory exception to the general rule that a distraint is limited to goods found on the premises. If a tenant fraudulently or clandestinely removes personal property from the leased premises, to prevent the landlord from distraining for arrears of rent, then the landlord may follow those goods for up to 30 days and seize them, wherever found: *RDA* s. 11.

A tenant who fraudulently removes or conceals his property from the landlord can be liable to pay to the landlord double the value of the property carried off or concealed: *RDA* s. 13; *Levinson-Viner Ltd. v. Gaudreau* (1984), 33 R.P.R. 34 (Ont. H.C.). Once the fraud has been established, the imposition of the penalty at an amount equal to double the value of the property removed is mandatory: *Park Street Plaza Ltd. v. Bhamber* (1992), 23 R.P.R. (2d) 288 (Ont. Gen. Div.) at 291.

In *Sun Life Assurance Co. of Canada v. Ritchie* (2000), 184 D.L.R. (4th) 635, leave to appeal refused, 2000 S.C.C.A. No. 247, the B.C. Court of Appeal considered whether goods subject to a security interest under s. 178 of the *Bank Act*, S.C. 1991 c. 46, fell within the meaning of "personal property" in s. 13 of the *RDA*. Section 178 of the *Bank Act* grants the bank legal title to the debtor's interest in all present and after acquired property. The debtor, however, retains an equitable right of redemption in the property. The B.C. Court of Appeal held that the tenant's remaining equitable right in the goods, combined with its possession of them and the right to sell the goods in the ordinary course of business, brought the goods within the meaning of "personal property" in s. 13 of the *RDA*.

The penalty for fraudulently removing or concealing property is not simply available against the tenant but is also available against "every person who wilfully and knowingly aids the tenant or lessee in doing so": *RDA* s. 13. In Ontario, a similar provision has been used to find the principal shareholder of a tenant personally liable for double the value of the stock removed: *General Leaseholds Ltd. v. 661255 Ontario Inc.*

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(1990), 15 R.P.R. (2d) 311 (Ont. Div. Ct.). A landlord was similarly successful against a company, including its "controlling mind", which purchased goods of a tenant to intentionally frustrate the landlord's right to distress: *CD Plus.Com Inc. v. Concorde Group Inc.*, [2002] 8 W.W.R. 478 (Sask. Q.B.), reversed in part on appeal, [2004] S.J. No. 4 (Sask. C.A.). On appeal, the Saskatchewan Court of Appeal reduced the amount of the judgment awarded to the landlord. A landlord can only recover double the value of those purchased goods which were properly subject to the landlord's right of distress. See also *Nebete Inc. v. Sanelli Foods Ltd.* (1999), 24 R.P.R. (3d) 114 (Ont. Gen. Div.).

In a case involving a provision similar to s. 13 of the *RDA*, the Ontario Superior Court of Justice was asked to consider what degree of probability is required to meet the civil burden of proof in cases of this nature. In *1268227 Ontario Ltd. (c.o.b. Seamus O'Briens) v. 1178605 Ontario Inc.*, [2001] O.J. No. 3642, affirmed by, [2003] O.J. No. 2002 (Ont. C.A.), the court lacked direct evidence linking the individual defendants to the fraudulent removal of goods from premises leased to a corporate tenant. There was, however, significant circumstantial evidence before the court which indicated that the individual defendants were the parties responsible for the fraudulent removal of the goods. In her reasons, Madame Justice Croll noted that the "penal nature" of the provision and its "stigma of dishonesty" required a "…degree of probability…commensurate with the occasion" (para. 37). A determination of whether the required degree of probability has been met should be made in light of the whole of the circumstances of the case.

If a landlord, or his bailiff, finds property which has been fraudulently or clandestinely removed and locked up or secured in another location then, after calling the police to assist, the landlord or bailiff may forcibly break in and seize the property fraudulently secured in that other location; *RDA* s. 15.

These sections of the *RDA* provide a limited and specific exception to the general rule that there is no right of distress for tenant's goods which are not located on the leased premises. It is a statutory right and landlords must comply strictly with its provisions in order to claim the benefit of this exception to the general rule; *Lawrence Ave. Group Ltd. v. Factory Carpet Co.* (1992), 23 R.P.R. (2d) 156 (Ont. Gen. Div.). In the *Lawrence Ave.* decision, the landlord purported to distrain in this manner outside the 30 day period permitted by the statute. On that basis, the distress was invalid and the tenant was entitled to a return of the goods distrained.

c. **the tenant's goods**

Section 3(2) of the *RDA* prohibits a landlord from distraining against goods found on the premises unless they are the goods of the tenant or the person who is liable for the rent. "Tenant" is defined in section 3(1) as including a sub-tenant, the tenant's assignee or any person occupying the premises with the tenant's

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assent. Prior to issuing a warrant to distrain, the landlord should be clear whether this party is a "tenant" within the meaning of section 3 of the *RDA*, otherwise the landlord risks a claim of illegal distraint: *BC Rail Ltd. v. Biro*, [2001] B.C.J. No. 279 (B.C.S.C., In Chambers).

A landlord was entitled to distrain against a company's computer equipment for unpaid rent where the tenant was its controlling shareholder, occupation of the premises was shared by the tenant with the company, and the company enjoyed the benefits of occupying the premises: *CriticalControl Solutions Corp. v. 954470 Alberta Ltd.*, [2005] A.J. No. 1364 (AB Q.B., In Chambers).

By virtue of s. 3(3) of the *RDA*, the general rule that "property of others is exempt from distress" does not apply to persons deriving title from the tenant: *J.E. Weatherhead Distributors Ltd. v. First Commercial Management Inc.* (1993), 33 R.P.R. (2d) 291 (B.C.S.C.).

Section 3(4) of the *RDA* stipulates that a landlord's distress has priority over a security interest in the goods of the tenant other than a purchase money security interest in goods under the *Personal Property Security Act* that is perfected as of the date of the distress. Section 3(1) of the *RDA* defines "purchase money security interest" as:

(a) a security interest taken in collateral to secure part of the purchase price, and

(b) a security interest taken to secure the value given to the tenant to acquire rights in collateral,

but does not include:

(c) the interest of a lessor "under a transaction of sale by and lease back to the seller".

At common law, there are certain exceptions to the general rule that goods of a tenant found on the premises are subject to distraint. In Williams & Rhodes, *Canadian Law of Landlord and Tenant*, (6th ed.), (looseleaf) (Toronto: Carswell 1988), at 8:22:2, the authors summarize some of the common law exceptions to the general rule:

(a) where an attempt to distrain against certain property would lead to a breach of the peace (e.g. distress against goods while they are being used),

(b) where goods are in the custody of the sheriff or a bailiff under a Writ of Execution (note, however, if the execution is abandoned then a subsequent distress is permitted), and

(c) where the goods are fixtures. Both landlord's and tenant's fixtures are exempt from distress, whether or not they are removable, and even though they may be the only chattels on the premises:

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Crossley Bros. Ltd. v. Lee, [1908] 1 K.B. 86. If a landlord distrains against leasehold fixtures then he will be liable in damages for that distress.

At common law, the general rule was that all goods and chattels on the leased premises may be distrained, whether they belong to a tenant or to a stranger. That rule has been modified by statute, however, so that goods of strangers are generally exempt: *RDA* s. 3(2). If the landlord distrains against goods belonging to a stranger, then the landlord will only be liable if the owner of the property gives a statutory declaration to the landlord or the bailiff, setting out the property owned, and the landlord persists with the distraint after receiving that statutory declaration: *RDA* s. 3(6).

Where it is reasonable for a landlord to assume that the goods belong to the tenant and no notice to the contrary has been given, a landlord will be entitled to enter the premises and levy distress for rent in arrears: *Alliance Marble and Granite Ltd. v. Molti Ventures Inc.*, [2003] B.C.J. No. 546 (B.C.S.C.).

The prohibition against distraining against goods of strangers is well illustrated in *Tridont Leasing (Canada) Ltd. v. Saskatoon Market Mall Ltd.*, [1995] 6 W.W.R. 641 (Sask. C.A.). In that decision, a landlord leased space in a shopping mall to Tridont Health Care which in turn sublet the premises to a dental partnership. The rent fell into arrears and the landlord distrained against the dental equipment. The equipment was actually owned by Tridont Leasing (Canada) Ltd. which was a wholly owned subsidiary of the tenant. The tenant's subsidiary had paid for the equipment in the dental partnership. Since the tenant itself had no title or interest in the equipment, it was exempt from distraint.

Pursuant to section 3(2) of the *RDA*, a landlord may only distrain against goods of the tenant or the "person who is liable for the rent". Section 3(1) of the *RDA* defines "tenant" as including a subtenant, an assignee or "any person in actual occupation of the premises under or with the assent of the tenant during the currency of the lease, or while the rent is due or in arrears, whether or not he or she has attorned to or become the tenant of the landlord".

A landlord's conduct will amount to conversion where that landlord knowingly and intentionally distrains for rent against goods owned by a third party: *Pop N'Juice Inc. v. 1203891 Ontario Ltd.*, [2004] O.J. No. 3085. In assessing damages, the court should not unfairly depreciate the value of the third party's goods which were wrongfully distrained for the benefit of the landlord: *Pop N'Juice Inc. v. 1203891 Ontario Ltd.* (supra).

The definition of "tenant" in section 3(1) of the *RDA* was considered in *Chan v. Farrell Estates Ltd.* 2001 BCCA 92, varying [1999] 7 W.W.R. 377 (B.C.S.C.) in a claim for wrongful distraint. The plaintiff stored equipment at premises leased by a shell company. The plaintiff participated in the creation of the shell company in that his solicitor created the company, but he was never an owner. The shell company fell in

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arrears of rent, and the landlord distrained against the plaintiff's equipment. The defendants submitted that the distraint was lawful because the equipment was the property of the shell company. The British Columbia Supreme Court pointed out, however, that the mere fact of storing its equipment at the premises did not put the plaintiff in "actual occupation" of the premises. Further, the shell company had no title or interest in the equipment. In support of this contention, Mr. Justice Owen-Flood cited *Knoll Cedar Inc. v. Johnston Industrial Real Estate Ltd.*, [1991] B.C.J. No. 786 (B.C.S.C.). The defendants were equally unsuccessful in their argument that the shell company was an agent for the plaintiff such that the plaintiff was in actual occupation of the premises. As a finding of fact, Mr. Justice Owen-Flood held that the shell company was not an agent of the plaintiff for the purpose of entering into the lease.

6. **When is it available?**

At common law, distress could only be carried out during the term of the lease. No distress could be levied against an overholding tenant because the lease under which the tenant had originally occupied the lands, had been determined.

This common law rule has been changed in British Columbia by sections 3 and 4 of the *CTA* which grants an extension of the right of distress for six months after the lease has been determined provided that the landlord's title or interest continues and the tenant remains in possession (i.e. an overholding tenant). Sections 3 and 4 of the *CTA* only apply where the tenancy has expired by lapse of time. They have no application where the tenancy was terminated by forfeiture. This statutory exception is the only exception to the common law rule that says distress can only be carried out during the term of the lease. If the landlord distrains against an overholding tenant more than six months after the lease term has expired then the distress is illegal: *Dick v. Winkler* (1899), 12 Man. R. 624.

Most commercial leases used today contain a clause to characterize an overholding tenant as a month-to-month tenant, bound by the terms of the lease which were in effect on the date the original lease term expired. On that basis, it is usually not necessary for a landlord to have to rely upon sections 3 and 4 of the *CTA*. An example can be found in *Mundell v. 796586 Ontario Ltd.* (1996), 3 R.P.R. (3d) 277 (Ont. Gen. Div), where the court upheld the landlord's right to distrain seven months after the original term of the lease had expired. The court relied upon a clause in the lease which stipulated that if the tenant continued in possession after the expiry of the term, and the landlord accepted rent, then a month to month tenancy will be deemed to have been created. On that basis, the court concluded the tenant was a month-to-month tenant, and not an overholding tenant to whom the statutory provision limiting distress would apply.

The distraint can only be carried out within six years of the date when the rent fell due or when the tenant

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acknowledged the debt in writing: *Limitation Act*, R.S.B.C. 1996, c. 266, sections 3(5) and 5.

If there is no rent in arrears at the time of making the distress, then it is illegal; *International Knitwear Architects Inc. v. Kabob Investments Ltd.* (1995), 17 B.C.L.R. (3d) 125, 49 R.P.R. (2d) 268 (B.C.C.A.) at 276. If a landlord has agreed to accept a lower rent payment than is stipulated by the lease then the doctrine of promissory estoppel may prevent the landlord from distraining for the full amount of rent stipulated by the lease: *International Knitwear* (supra).

A clause in the lease which triggers accelerated rent upon the happening of a particular event will permit the landlord to distrain for that accelerated rent provided the triggering event has occurred to place that accelerated rent in arrears at the time of the distress.

The right of distraint ends upon forfeiture or termination of the lease. Once a landlord re-enters, the tenancy is at an end and the right of distraint is lost. If the landlord persists in distraining then he becomes a trespasser: *McCloy v. Cox,* [1921] 2 W.W.R. 790 (Man. K.B.); *Dubien v. Beechwood Promenade Inc.* (1992), 22 R.P.R. (2d) 88 (Ont. Gen. Div). Changing the locks on the tenant's premises may be considered to be a termination of the lease*; Dubien v. Beechwood Promenade Inc.* (supra); *Coopers and Lybrand Ltd. v. Royal Bank*, [1982], 5 W.W.R. 156 (Sask. Q.B.); *Beaver Steel Inc. v. Skylark Ventures Ltd.* (supra); *Mybrie Investments Ltd. v. Icana Techno. Corp.*, [1997] B.C.J. No. 2475 (B.C.S.C.). An illegal distress constitutes a trespass but it will not bar a subsequent lawful distress for the same rent: *Grunnel v. Welch* (supra).

At common law, a distress could only take place during day light hours. The reason for the rule is that, unless the tenant is aware that a distress is taking place, he is denied the possibility of tendering his rent to stop the distress: *Mundell v. 796586 Ontario Ltd.* (supra).

Although a distress must commence during daylight hours, it may continue after sundown without offending the common law rule: *Kamloops Hotel Ltd. v. Bino's Restaurant Ltd.*, [1986] B.C.J. No. 2027 (B.C.S.C.).

A distress cannot be made on the day the rent falls due because it does not become overdue until the next day: *Urbach v. McClarty*, [1953] 1 D.L.R. 316 (Ont. C.A.); *Sawyer-Massey Co. v. White* (1915), 8 W.W.R. 493 (Sask. C.A.). Once rent is in arrears then a distress can be carried out: *Childs v. Edwards*, [1909] 2 K.B. 753; *Albert v. Storey*, [1925] 4 D.L.R. 374 (N.B.C.A.).

7. **When is it lost or brought to an end?**

The right to distrain can be brought to an end by agreement, a termination of the lease, the expiry of the lease term (or six months after the end of the lease if the tenant remains in possession), tender of rent, the tenant's bankruptcy or taking judgment for the amount in arrears.

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The courts will enforce an express or implied agreement which takes away, or suspends, a landlord's right of distress: *Wallace v. Fraser* (1878), 2 S.C.R. 522. In that decision, a furniture supplier was not prepared to supply goods to a tenant on credit without the landlord's express agreement not to distrain for rent against the furniture. The landlord agreed not to distrain and the Supreme Court of Canada held the landlord to his agreement.

The tender of the full amount of the rent to the landlord or his bailiff will render any subsequent distress illegal.

If distraint for rent has started, but not completed, before a tenant makes an assignment into bankruptcy then the bailiff must release the property seized, or the proceeds of sale (less the costs of distress and sale), to the tenant's trustee: *BIA* s. 73(4). The costs of distress and sale are deemed to be a secured claim of a landlord pursuant to that section of the *BIA*. In *Re Target Liquidators Inc.*, [2003] A.J. No. 409 (AB Q.B.), however, the court denied the landlord's claim for costs of distress where there was already an order in place authorizing the sale of the bankrupt's goods and distribution to the secured creditors, and because there was no inequity in refusing to pay the landlord's costs of distress. The key for the landlord is to receive the net proceeds of sale from the bailiff to complete the distraint before the tenant's assignment into bankruptcy. After the date of an assignment into bankruptcy, a landlord is not entitled to distrain the goods of the bankrupt tenant: *CTA* s. 29(8).

If a landlord takes judgment for rent arrears, then the right to distrain for those rent arrears is lost, although the landlord will have the right to execute on the judgment as a judgment creditor. By taking judgment, the rent arrears become a judgment debt deemed to merge into the judgment obtained, and they are no longer considered to have the character of rent: *Potter v. Bradley & Co.* (1894), 10 T.L.R. 445 at 446; *Davies v. Regent Holdings Ltd.*, [1976] B.C.J. No. 1102 (B.C.S.C.).

8. **Where can it take place?**

At common law, the general proposition is that the distress must be made on the leased premises: *Martin v. Hutchinson* (1891), 21 O.R. 388 (C.A.). If distraint is levied on land other than the leased premises, then a distraint is void *ab initio*, unless it falls within one of the exceptions to the general rule: *Burrell v. Watt*, [1928] 2 W.W.R. 482 (Sask. C.A.).

The two main exceptions to this general rule are where the landlord and tenant expand the rights of distraint by agreement or in a case of a fraudulent removal of goods from the leased premises. If the landlord and the tenant agree that distress may be made on lands of the tenant other than the leased premises, then the distraint will be lawful: *Daniel v. Stepney* (1874), L.R. 9 Ex. 185.

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The exception for goods fraudulently or clandestinely removed from the leased premises is set out in sections 11 to 15 of the *RDA*. Section 11 allows the landlord to follow such goods for up to 30 days. Section 12 prevents the landlord from distraining against such goods if the goods are sold to a bona fide purchaser for value, without notice of the fraud, before the seizure is made. Section 13 allows for the imposition of a penalty against the tenant or anyone involved in the fraudulent removal, equal to double the value of the property carried off or concealed. Section 14 outlines a summary procedure for recovering this penalty in cases where the property is worth not more than $250.00. Section 15 allows for the forcible entry, with the assistance of the police, into a building where any such property is found.

9. **When does it become illegal?**

Subject to certain limited exceptions, it is generally illegal to distrain, or to continue with a distraint, when:

(a) no rent is due;

(b) entry is obtained by force or some other unlawful means;

(c) entry is made during a prohibited period (e.g. at night);

(d) the distraint is made against goods not found on the leased premises or against exempt goods;

(e) the tenant is bankrupt;

(f) the tenant is no longer in possession;

(g) the distraint is made more than six months after the expiry of the lease term;

(h) the landlord/tenant relationship has ended;

(i) the lease has been terminated by forfeiture; or

(j) the tenant has tendered the full rent arrears plus costs of the distraint.

Probably the most common example of an illegal distress is when a landlord sends in the bailiff after the lease has been terminated. Courts will not enforce a clause in a lease which purports to preserve the right of distress even after the landlord has exercised his right to terminate. Since the landlord's right to terminate is optional, once the landlord exercises that right by re-entering, the right to distrain is lost: *McCloy v. Cox* (supra); *Stanley v. Willis* (1914), 6 W.W.R. 498 (Man. C.A.).

One of the most common mistakes made by landlords or bailiffs during a distraint is changing the locks

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without the tenant's agreement. The forfeiture of the lease, achieved by changing of the locks, and distraint are mutually exclusive remedies: *Excellent Fashions v. Namdev Property Management* (2003), 7 R.P.R. (4th) 252 (Ont. S.C.J.). Since changing the locks is inconsistent with the tenant's right of possession, the landlord or his bailiff will have to prove that the tenant has not been denied access to the premises. If a tenant consents to having the locks on the premises changed, then the landlord will not lose the right to distrain by changing the locks: *Cisakowski v. Fekete*, [1985] 2 W.W.R. 691 (Alta. Q.B.).

Although section 17 of the *RDA* allows property to be secured and sold on the premises, it is generally advisable to get the tenant's written authorization to change the locks and to secure the premises. A sample form of authorization is included with this paper as Appendix "B", together with a form of bailee's agreement commonly used in walk in seizures. The use of this form of authorization and bailee's agreement has been endorsed by the B.C. Court of Appeal in *Derby Restaurant Ltd. v. Odyssey Holdings Ltd.* (supra) at 36-37. Usually the authorization and bailee's agreement are printed on the back of the distress warrant itself. At p. 37 of *Derby Restaurant Ltd.*, Macfarlane J.A. cautions that, "to avoid an excessive seizure it is essential that before the tenant endorses the warrant the bailiff must write in the space for inventory the actual goods on which distress is levied".

Beaver Steel Inc. v. Skylark Ventures Ltd. (supra) is a typical example of the problems which can be caused by changing the locks while distraining. The landlord's bailiff entered the premises by picking the locks. After seizing the tenant's goods, the locks were changed and the goods were sold at auction. The tenant sued for illegal entry, wrongful distress, and conversion of goods. The landlord counterclaimed for amounts owing under the lease. The tenant recovered judgment against both the landlord and the bailiff. The landlord was entitled to indemnity from the bailiff because the landlord had not authorized the unlawful entry. By changing the locks the tenancy was terminated which had the effect of limiting the tenant's liability for rent to the date when the locks were changed.

If the locks are changed solely to secure possession of the tenant's goods (as permitted by section 17 of the *RDA*) then the lease will not be terminated: *Fourrures Labrador Furs Limitée v. Imperial Assurance Co. of Canada* (1993), 31 R.P.R. (2d) 175 (N.B.Q.B.).

If the nature of the goods on the premises, and the design of the premises, won't allow for goods to be secured in a separate area, then the landlord is going to have to prove that changing the locks to secure the entire premises was the only manner in which the goods could be secured. In *Clarkson Co. Ltd. v. Consortium Group Ltd.* (1983), 40 O.R. (2d) 771 (Ont. H. Ct.), the landlord purported to distrain and seize goods by changing the locks to the premises. Given the layout of the premises there was no separate room into which the goods could have been secured for the purposes of the distraint. As a result, the bailiff

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changed the locks and secured the entire premises. The court concluded that changing the locks to the entire premises amounted to a forfeiture because the landlord failed to lead evidence to prove that there was no other way to secure the goods. Presumably the landlord could have avoided this result if the bailiff had obtained the tenant's written authorization to change the locks and secure the premises.

Even if the only manner in which to secure the goods is to change the locks to the premises, if the landlord denies access of the tenant to the premises, then the landlord will be deemed to have effected a forfeiture of the lease: *Re Compscan Inc.* (1983), 27 R.P.R. 121 (Ont. S.C.) at 126.

If a tenant considers a distress to be illegal, then the tenant should commence an action of replevin in which he may also claim damages. Replevin is an action which may be brought by the owner of the goods which have been wrongfully taken under a distress for rent. An action in replevin is appropriate where no rent is due, or where rent was tendered in time or where goods are seized which are exempt from distress by law. If the owner of the goods has not taken steps to replevy the goods within 5 days of the distress and notice of the distress, then the bailiff may proceed with the appraisal and sale: *RDA* s. 7.

Since the 1982 repeal of the *Recovery of Goods Act*, R.S.B.C. 1979, c. 357, the procedure for recovery of goods, or replevin, is governed by section 57 of the *LEA*. Under that section of the *LEA*, the court may order a return of the property to the tenant (usually on terms of security) pending the outcome of the tenant's action against the landlord.

An illegal distress constitutes a trespass by the landlord for which the tenant may recover compensatory damages. If distress and sale is made at a time when no rent is due, then the owner of the property distrained and sold may also sue for recovery of double the value of the property distrained and sold, together with costs of the proceedings: *RDA* s. 10; *Chan v. Farrell Estates Ltd.* (supra).

An illegal distress may also result in termination of the lease. In that event, the landlord's claim is restricted to the rent arrears as of the date of termination and he will not be entitled to claim the prospective loss for the rent that would have fallen due over the balance of the lease term, had it not been terminated.

In *Rawlins v. Monsour* (supra), the Ontario Court of Appeal discussed the distinction between illegal and irregular distress. Actions which relate to the manner in which the distress and subsequent sale were exercised, or other failures to conform to statutory procedure, merely render the distress irregular. When a landlord has no right to distrain at all, however, an attempted distress will be considered illegal.

If a distress is not unlawful, but merely irregular, then the landlord is not a trespasser and the tenant cannot recover damages for a trespass but may recover any special damages sustained plus costs of the action:

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RDA s. 19. This section has no application where the distress is unlawful and improper from the outset. An irregular distress is generally one in which the landlord fails to comply with the statutory procedure for sale, after having seized the goods. For instance, it is an irregular distress to sell the goods before the five-day hold period has expired under section 7(2) of the *RDA*. An irregular distress gives rise to a cause of action for damages in conversion.

10. **When does it become excessive?**

A distraint is considered to be excessive if more goods are seized than is required to satisfy the rent due or where a distress is made for more rent than is actually due: *Derby Reach Restaurant Ltd. v. Odyssey Holdings Ltd.* (supra) at 34. As long as there is some rent in arrears, then a distress is lawful: *Tancred v. Leyland* (1851), 117 E.R. 1036 (Ex. Ch.) at 1040-1041; *Pettit v. Kerr* (1889), 5 Man. R. 359 (C.A.) at 363.

The fact that the landlord may have claimed more rent in the distress warrant than is actually due is not actionable provided that the distress is lawful (i.e. some rent is due) and the quantity of goods taken is not excessive: *Tancred v. Leyland* (supra); *Owen v. Taylor* (1876), 39 U.C.Q.B. 358 (C.A.) at 359-361; *International Knitwear* (supra).

When faced with a distress warrant claiming more than the amount of rent actually due, the tenant should tender the right amount, taking action to replevy if his tender is refused: *Glynn v. Thomas* (1856), 156 E.R. 1085, 11 Ex. 870; *Owen v. Taylor* (supra) at 360-361.

If a landlord distrains for rent by seizing more property than is reasonably necessary to satisfy the rent due, plus the expenses, then the landlord has three days within which to abandon the excess. If the landlord abandons the excess goods within three days, then section 18 of the *RDA* releases the landlord from any liability for excessive distress.

It is not a prerequisite for the tenant to tender the full amount of the rent being claimed before the tenant can maintain an action against the landlord for excessive distress: *Derby Reach Restaurant v. Odyssey Holdings Ltd.* (supra) at 35. In that decision, the restaurant tenant was in arrears for one month's basic rent and one-twelfth of the year's taxes. The landlord distrained for an excessive amount which improperly included taxes for the balance of the year. The tenant tendered payment of one month's basic rent and one-twelfth of the year's taxes but did not tender any amount for the bailiff's costs, which had not been itemized in the rent distress warrant. The B.C. Court of Appeal concluded that tender was not a prerequisite to an action for excessive distress.

If the only asset on the leased premises is worth far in excess of the amount for arrears, then the landlord

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will not be responsible for excessive distress by seizing that asset. In support of this proposition, Williams & Rhodes (supra) at 8:24:2 cite: *Avenell v. Crocker* (1828), 173 E.R. 1120; *Roden v. Eyton* (1848), 136 E.R. 1315.

B. **The Statutory Procedure For Selling Goods Seized**

Although the landlord's right to take and hold the tenant's goods is a common law remedy, the right to sell the tenant's goods to pay the rent arrears is only given to a landlord by the provisions of the *RDA* s. 7. Since the right to sell the goods is only given to a landlord by this statute, the statutory procedure for selling those goods must be followed meticulously.

It is a criminal offence to resist or wilfully obstruct any person in making a lawful distress: *Criminal Code*, R.S.C. 1985, c. C-46, s. 129(c).

The basic steps for a commercial landlord to follow in seizing and selling goods under a distress warrant are as follows:

(a) Determine the amount of rent in arrears. If no rent is due, then the distress is illegal: *International Knitwear* (supra.) at p. 276. If the distress is illegal then it amounts to a trespass by the landlord against the tenant, for which the landlord would be liable in damages. If distress and sale is made when no rent is due then the owner of the property distrained and sold may recover double the value of the property distrained and sold: *RDA* s. 10.

(b) Do not give the tenant advance notice of your intention to distrain for rent. There is no requirement by statute or at common law to give prior notice of distraint: *McCloy v. Cox*, [1921] 2 W.W.R. 790 (Man. K.B.) at 797; *Godbolt v. White*, [1949] 1 W.W.R. 1037, 1 D.L.R. 748 (B.C.S.C.).

(c) Hire a bailiff to carry out the distress on your behalf. Make sure the bailiff has experience in rent distraint. Remember, the bailiff is an agent of the landlord for the purpose of the distraint so the landlord will bear the consequences of using an inexperienced bailiff. The bailiff will ask the landlord to sign the rent distress warrant which typically includes an express indemnity from the landlord to the bailiff: see Appendix "A". The bailiff will need information on the arrears of rent and the location of the premises. It is good practice to give the bailiff a copy of the lease. While it is not necessary to have a specific clause in the lease saying that the landlord is entitled to distrain for rent, most commercial leases contain that clause. It is helpful if the bailiff has a copy of that clause to show to the tenant when the distress is carried out.

(d) Instruct the bailiff to only seize goods belonging to the tenant or to the "person who is liable for the rent": *RDA* s. 3(2). Remember that the definition of "tenant" under section 3(1) of the *RDA* includes "a

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subtenant, the assign of the tenant or any person in actual occupation of the premises". If you know of specific goods belonging to the tenant, then give the bailiff a list of those goods. Conduct PPSA searches in the tenant's name and consider whether there is a purchase money security interest ("PMSI") in the tenant's goods which would have priority over a landlord's distress: *RDA* s. 3(4). If you know that certain goods on the premises are subject to a PMSI or do not belong to the tenant, then instruct the bailiff to avoid those goods. If you do not know which goods on the premises belong to the tenant, and which goods belong to someone else, then simply instruct the bailiff to seize sufficient goods to satisfy the amount in arrears.

(e) Instruct the bailiff to seize only sufficient goods as are needed to satisfy the amount in arrears. Do not seize an excess amount of goods. If the only asset available on the premises is worth more than the rent in arrears it is permissible to seize that asset.

(f) Consider a walk-in seizure at first to give the tenant time to pay: *RDA* s. 17. A walk-in seizure is often recommended if you want to keep the expenses of the distraint to a minimum. Although these expenses can be recovered out of the proceeds of the goods sold, the landlord usually has to cover the bailiff's expenses up front. If you are content that the risk of goods disappearing from the premises is small, then a walk-in seizure may be a good idea. If you chose to go with a walk-in seizure, then get the tenant to sign the bailee's agreement and authorization to change the locks which typically appears on the back of the rent distress warrant: see Appendix B.

(g) Leave written notice of the distress on the leased premises. Although there is no common law duty to inform the tenant what the arrears of rent are, for which the landlord distrains (*International Knitwear* (supra)), there is a statutory requirement to leave notice of the distraint on the leased premises: *RDA* s. 7(1)(b). Have the bailiff attach an inventory of the goods seized to the distress notice. Also give a copy of the distress warrant to the tenant: *RDA* s. 22.

(h) Secure the goods on the premises and sell them from that location (*RDA* s. 17) or remove the goods to a secure area off the premises (usually the bailiff's storage yard). If goods are secured on the premises then do not exclude access to the premises by the tenant unless you want to risk forfeiture of the lease.

(i) Release from the distress any goods which do not belong to the tenant. If a statutory declaration, sworn by an owner of the goods, is served on the landlord or bailiff by an owner who swears the goods do not belong to the tenant, then the bailiff must release those goods: *RDA* s. 3(6). If the owner of distrained goods, or some other person, seizes the goods while they are impounded by the landlord, then the landlord is entitled to recover triple damages against that person: *RDA* s. 9.

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(j) Within three days of taking distress, abandon any excess which is not needed to pay the arrears of rent and the expenses associated with the distraint: *RDA* s. 18. Hold only those goods which are reasonably necessary to pay the arrears of rent and the expenses associated with the distress.

(k) Five days after the notice of distress has been given, have the distrained property appraised by two appraisers: *RDA* s. 7(2). Failure to comply with this provision may make the distress illegal: *Boitano Properties Ltd. v. Downtown Pizza Limited*, [1991] B.C.J. No. 3220 (B.C.S.C.). Where the landlord (or the landlord's bailiff) fails to have the necessary appraisals made, or is somehow negligent in disposing of the distrained goods, then the landlord may be required to compensate the tenant for the difference between the amount which should have been received for the distrained goods and the total of the rent arrears and the cost of distraint: *Cameron v. Eldorado Properties Ltd.* (1980), 22 B.C.L.R. 175, 113 D.L.R. (3d) 141 (B.C.S.C.).

(l) After the appraisal, have the goods sold to an arm's length purchaser, preferably at an open auction. The landlord cannot buy the goods or have a non-arm's length purchaser buy them, even if they are sold at an open, public auction because the landlord cannot be both a seller and a buyer: *Barlow v. Breeze*, [1917] 1 W.W.R. 270 (B.C.C.A.). In *Re Gasthof Schnitzel House Ltd.*, [1978] 2 W.W.R. 756 (B.C.S.C.) at 761, Ruttan J. concluded that the rule applies where the landlord is a wholly-owned subsidiary of the buyer. See also *Baywest Properties Ltd. v. Stratheden Properties Ltd.*, [1992] B.C.J. No. 2573 (B.C.C.A.). A landlord may be liable in damages if the bailiff's sale is imprudent or not to an arm's length purchaser: *Falwyn Investors Group Ltd. v. GPM Real Property (6) Ltd.*(1998), 22 R.P.R. (3d) 1 (Ont. Gen. Div.), affirmed by, (2000) O.J. No. 2877 (Ont. C.A.). There is no obligation to sell the goods after appraisal: *RDA* s. 8(3).

(m) Apply the sale proceeds against the rent arrears, the distress charges and the cost of appraisal and sale. Only the items specified in the Schedule to the *RDA* are recoverable as distress costs under section 21: *Sizzling Wok Food Systems Inc. v. Able Bailiffs Ltd.* (1990), 51 B.C.L.R. (2d) 368 (S.C.). Any surplus remaining must be paid to the tenant: *RDA* s. 7(4).

(n) If, at any time, the tenant pays the full amount of the arrears and the expenses associated with the distress, then immediately abandon the distress and release the goods.

(o) Complete the distress before suing for the balance of any rent arrears. At common law, a landlord cannot commence an action for the rent so long as the distress is still outstanding: *Naylor v. Woods*, [1950], 1 D.L.R. 649 (N.S. Co. Ct.) at 650. Note, however, that a landlord can commence an action and then distrain: *Naylor* (supra) at 652.

C. **Basic Do's And Don'ts of Rent Distress**

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Rent distress, or distraint, allows a landlord to take personal chattels from a defaulting tenant and keep them until the tenant pays the rent arrears. If the landlord wishes, then he or she can sell those chattels to recover the arrears and the cost of distraint, by following the procedure for notice, appraisal and sale under the *RDA*.

Rent distress is one of the quickest, cheapest and most effective remedies available to a landlord against a defaulting tenant. It is a self-help remedy which does not require any Court proceeding.

Since the penalties for wrongful or excessive distress can be severe (see *RDA* ss. 10 and 18), it is a good idea for a landlord to consult his or her lawyer before instructing the bailiff to seize a tenant's goods.

It is also helpful for a landlord to keep in mind a few cardinal rules about distraint. While the chart below is by no means exhaustive, it sets out a few common tips on what a landlord can and cannot do in rent distress situations:

CAN DO	***CANNOT DO***
1. A landlord **can** distrain for rent in commercial tenancies. You do not need a distraint clause in lease although the right may be taken away by an express or implied agreement not to distrain.	1. A landlord **cannot** distrain for rent in residential tenancies: *Residential Tenancy Act*, R.S.B.C. 1996, c. 406, s. 80(2).
2. A landlord **can** distrain while the landlord/tenant relationship is in place.	2. A landlord **cannot** distrain after the landlord/tenant relationship has been terminated.
3. A landlord **can** sue for rent arrears **or** distrain for rent arrears.	3. A landlord **cannot** sue for rent so long as the distress remains outstanding.
4. A landlord **can** distrain against goods belonging to the tenant.	4. A landlord **cannot** distrain against goods belonging to strangers (subject to certain specific exceptions): *RDA* s. 3(2).
5. A landlord **can** distrain against goods or chattels (e.g. stock and inventory).	5. A landlord **cannot** distrain against fixtures (e.g. items which are physically secured to the premises).
6. As long as the tenant continues in possession, the landlord **can** distrain for rent for up to six months after the expiry of the lease: *CTA* ss. 3 and 4.	6. A landlord **cannot** distrain for rent after the lease has been surrendered or forfeited because the lease and the landlord-tenant relationship no longer exist. No clause in a lease which tries to get around this prohibition will be upheld.
7. Rent which is payable in advance **can** be included in the distraint provided it is deemed to be in arrears under the terms of the lease (i.e. accelerated rent which falls due upon the happening of an event).	7. Rent which has not yet fallen due **cannot** be included in the distraint.

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8. A landlord **can** sell the goods seized by following the procedure for notice, appraisal and sale outlined in the *RDA* s. 7
9. A landlord **can** distrain before bankruptcy.
10. A landlord **can** claim compensation for the cost of an incomplete distress, if the tenant becomes bankrupt: *BIA* s. 73(4).

8. A landlord **cannot** sell the goods seized to itself, or to a non-arm's length purchaser, even at an open auction.
9. A landlord **cannot** distrain after the date of the bankruptcy: *CTA* s. 29(8).
10. A landlord **cannot** keep property or proceeds of sale from a distress which has not been completed prior to the date of bankruptcy: *BIA* s. 73(4).

II. RE-ENTRY AND TERMINATION OF THE LEASE

Preservation of the lease may not always be the best solution for a landlord when its tenant defaults for non-payment of rent. Where a landlord has potential tenants interested in the premises or the tenant does not have sufficient goods on the premises to satisfy the arrears, the landlord's better solution may be to terminate the lease. To terminate the lease before the term of the lease expires, a landlord must exercise its right of re-entry.

A. What is the Right of Re-Entry?

The right of re-entry is a self-help remedy given to a landlord, in specific circumstances, which allows it to re-enter and retake possession of the premises before the term of the lease has expired. It is a right which arises upon a default which is considered to be so serious, that it gives the landlord the option to bring an end to the lease agreement.

B. When Does the Right of Re-Entry Arise?

1. When a lease grants the right

For serious defaults, most commercial leases stipulate that the landlord has the right to treat the lease as at an end and take back possession of the premises. Commercial leases generally provide that a breach of covenant gives rise to a claim for damages, whereas a breach of condition entitles a landlord to terminate the lease. A well-drafted lease will stipulate that a breach of any covenant or condition gives rise to a right of re-entry. Payment of rent is typically considered to be a condition of the continuation of the lease and failure to pay rent will usually entitle the landlord to re-enter and treat the lease as having come to an end.

If, however, the wording of the lease does not specifically provide a right of re-entry, then the landlord may not be able to re-enter the premises until the term of the lease expires. If the lease provides a right of re-entry for non-payment of rent and is made pursuant to the *Land Transfer Form Act*, R.S.B.C. 1996, c. 252 (the "*LTFA*") then section 14 of Schedule 4 allows for re-entry without a formal demand after rent remains

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unpaid for 15 days. Landlords often require reminders of this 15 day grace period under the *LTFA*.

2. **When a Statute Permits It**

There is no statutory right of re-entry in British Columbia. The right of re-entry only arises at common law or by virtue of a provision in the lease entitling the landlord to re-enter.

While the right of re-entry is a self-help remedy, a landlord may want a court to sanction or authorize the re-entry in some circumstances. For example, where the event of default giving rise to the right of re-entry is not clear cut, or when the consequences of a wrongful termination could be significant, it is good practice to obtain a court order for possession of the premises. The landlord should be mindful that it could be liable to a tenant for damages, including punitive damages, if the lease is wrongfully terminated. Obtaining a court order for possession is also a prudent measure when, after a re-entry, a tenant has forcibly regained possession of the premises.

In British Columbia, there is a summary procedure which can be followed under the *CTA* to obtain an order for possession. The *CTA* outlines two separate procedures which are available to the landlord to obtain possession of the premises. The choice of procedure depends upon whether the lease has expired or been terminated prior to the commencement of the court proceedings. Sections 18 to 21 of the *CTA* provide the procedure most commonly used to obtain possession. This summary procedure for possession may only used where the lease has already expired or been terminated. Further, there are a number of statutory prerequisites to obtaining an order pursuant to sections 18 to 21 of the *CTA* with which the landlord must strictly comply.

The second, less common, procedure for obtaining possession under the *CTA* is found in sections 25 to 28. This summary procedure is used when the tenant is in default of the lease agreement, but the lease has not yet expired or been terminated. The second procedure is rarely used because it has one key disadvantage. Even if the landlord incurs the time and expense of bringing an application pursuant to sections 25 to 28 of the *CTA*, the process can be reversed at any prior to the eviction by payment of the rent arrears and costs by the tenant: section 26(3) of the *CTA*.

C. **How is the Right of Re-Entry Exercised?**

Landlords often view re-entry and termination as a single course of action where re-entry and termination take place simultaneously. Generally, however, re-entry and termination should be treated as two separate steps under the lease. Where a landlord treats re-entry and termination as one measure, there is a greater likelihood that pre-conditions to the rights contained in the lease will be overlooked by the landlord:

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Burlington Northern Railroad Co. v. Baseline Industries Ltd., [1993] B.C.J. No. 1882 (B.C.C.A.). A failure to follow the contractual pre-conditions (i.e. giving a notice of default and time to cure a default) can be fatal to a landlord's right to re-enter: *Francis v. Clarke*, [1999] N.S.J. No. 289 (N.S.S.C.).

1. **Notice of default**

Most commercial leases contain specific default notice provisions that must be strictly followed before a landlord is given the right to re-enter and terminate. The provisions of the lease generally provide that a notice of default be issued to the tenant requiring the tenant to cure the default within a specified time, failing which the landlord's right of re-entry may be exercised. Some commercial leases and third party agreements, such as indemnity agreements, will also require landlords to give notice of default to third parties in addition to the tenant. The *Interpretation Act*, R.S.B.C. 1996, c. 238, provides guidelines which will assist the landlord in calculating the grace period stipulated in the notice of default.

Where a landlord fails to comply with the notice provisions under the lease, its tenant may be awarded both general and punitive damages for wrongful termination: *Tsoukalas v. Domgroup Properties Ltd.*, [1993] O.J. No. 4378 (Ont. Gen. Div.).

2. **Notice of re-entry and termination of lease**

Upon the landlord's confirmation that the tenant has not remedied its breach within the time specified by the lease and notice of default, the landlord may then deliver the notice of re-entry and termination of lease to the tenant. The landlord may also give notice, at this time, of its intention to claim for damages or loss of prospective rent: *Highway Properties Ltd. v. Kelly Douglas & Co. Ltd.* (1971), 1 D.L.R. (3d) 710 (S.C.C.). Once proper notice of termination has been given to the tenant, the landlord must then re-enter the premises. The re-entry cannot take effect by simply delivering a notice: *Burlington Northern Railroad Co. v. Baseline Industries Ltd.* (supra).

Re-entry is effected by taking physical possession of the premises or by commencing an action in court claiming possession of the premises as previously outlined in this section of the paper. The landlord can effect re-entry itself or employ an experienced bailiff. The use of a bailiff will generally reduce conflict that may arise in situations of this nature. The landlord should always be mindful, however, that it will be liable for damage to the tenant which is caused by the conduct of the bailiff. In any event, the landlord should give to the bailiff clear and specific instructions for effecting the re-entry.

Richard Olson, at section VIII.C.f of his manual, *A Commercial Tenancy Handbook*, summarizes what a bailiff or landlord should do when carrying out a re-entry of the leased premises:

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(a) carry out the re-entry at night or at any other time the tenant is least likely to resist or interfere;

(b) enter the premises and change the locks at all points of entry;

(c) de-activate any security system;

(d) post a notice of termination at the front entrance;

(e) turn off all utilities except those which are necessary to maintain the tenant's perishable goods; and

(f) supervise the tenant's removal of its goods from the premises.

D. **Position of a Sub-Tenant on Re-Entry**

At common law, a sublease is automatically terminated upon the termination of the head lease. Unlike other provinces, there is no statutory provision in British Columbia which protects a sub-tenant where the head lease is terminated. The landlord should always consider, however, whether there is a "non-disturbance" agreement in place between the landlord and a sub-tenant which requires the landlord to give notice of the tenant's default to the sub-tenant. The "non-disturbance" agreement may contemplate the right of the sub-tenant to either remedy the default, assume the head lease in place of the tenant, or even terminate the head lease and compel the landlord to enter into a new lease. For an example of such a provision in a "non-disturbance" agreement see *McDonald's Restaurants of Canada Ltd. v. Grall Corp.*, [2007] O.J. No. 526 (Ont. S.C.J.).

E. **Claims against Guarantors and Indemnitors**

Some commercial leases may contain provisions which require a guarantor or indemnitor to enter into a new lease if the lease is terminated prior to the expiration of the term of the lease. Generally, such provisions will stipulate that the guarantor or indemnitor enter into a new lease for the remaining balance of the term. Where a commercial lease contemplates such a right, the landlord must strictly comply with the conditions precedent to the exercise of its right. A landlord who fails to properly exercise its right to enter into a new lease risks losing that right altogether: *365175 B.C. Ltd. v. Malmute Recreation Ltd.*, [2000] B.C.J. No. 904. For example, in *365175 B.C. Ltd.*, the contract stipulated that the landlord must give notice of its intention to enter into a new lease with the guarantor for the balance of the term contemporaneously with the termination of the lease. Accordingly, the notice which the landlord gave to the guarantor three months post-termination was deemed unreasonable and unenforceable.

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F. **The Problem with Abandoned Goods**

When a landlord re-enters and takes back possession of the premises, a common problem arises when the landlord finds itself in possession of goods which have been left behind by the tenant. In these circumstances, the landlord generally becomes an "involuntary bailee". Involuntary bailment arises when somebody accidentally comes into possession of goods belonging to another or where the person having possession of the goods holds those goods under such circumstances that the law imposes upon him the obligation to deliver those goods to another.

Most landlords assume that the goods left behind have been abandoned and are of no particular value to the tenants. In general, the landlords often assume that the goods can be sold or disposed of as it deems fit. Accordingly, landlords are often surprised to learn that there is a responsibility not to damage or destroy the goods left behind by tenants. On learning of its responsibility, the landlord's natural instinct is to tell the tenant that the goods will be placed in storage at the tenant's expense. Charging the tenant to care for its goods, however, may simply bring a higher level of responsibility to the landlord by creating a contract of bailment.

Timely legal advice, including an explanation of a landlord's responsibilities and options, may reduce the risk of litigation to a landlord .

1. **What is the landlord's responsibility?**

As an involuntary bailee, the landlord cannot simply sell or dispose of the goods left behind by a tenant in the premises. But, the landlord is not obligated to leave the tenant's goods in the premises either. The landlord may actually remove the goods from the premises, but must act "reasonably" in doing so. For example, it is likely not reasonable to leave the tenant's goods outside where they are exposed to the elements and vulnerable to theft or vandalism. A landlord's more prudent approach would be to store the goods in a protected area, until the tenant claims the goods or some other solution is found. The standard of care owed by an involuntary bailee is one of due care and diligence for the goods: *Booy v. Genstar Development Co.*, [1998] B.C.J. No. 1074 (B.C.S.C.). Generally then, a landlord will not be held responsible for mere negligence in handling the goods. But, a landlord should be cautious not to wilfully damage the tenant's abandoned goods.

2. **What are the landlord's options?**

A number of options are available to a landlord who has become an involuntary bailee. The best option will depend on the particular circumstances which the landlord faces. If a landlord intends to re-enter and

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terminate the lease, it should first read the lease to determine whether its provisions contemplate the landlord claiming ownership of certain goods on termination. Remember that fixtures, unless removed by the tenant, become the property of the landlord upon termination of the lease.

When a landlord has not yet taken possession of the premises, there are ways the landlord can try to avoid taking responsibility for a tenant's abandoned goods. For example, the landlord could negotiate a surrender of the lease by which the tenant will remove all of its goods from the premises by a specified date failing which ownership in those goods passes to the landlord. Once ownership of the goods has passed to the landlord, it can sell or dispose of the goods left behind in any manner. The landlord could also distrain for rent arrears against the tenant's goods before taking back possession of the premises.

When a landlord re-enters and finds itself in possession of the tenant's abandoned goods, the landlord should take an inventory of the goods that have been left behind. It is also a good idea to take picture of the goods before they are moved by the landlord. Some circumstances may warrant the landlord obtaining an appraisal of the abandoned goods. A landlord might also benefit from a quick search of the personal property security registry to determine whether any of the goods are subject to security. A secured creditor may be willing to seize the goods and remove them from the premises.

The landlord should also immediately give notice to the tenant requiring the tenant to remove its property from the premises. The notice should clearly state that the tenant will have every opportunity to claim its abandoned goods. Where the tenant ignores the landlord's notice to remove its goods, the landlord should issue a subsequent notice requiring that the tenant claim its good by a specified date failing which the property will be disposed of by the landlord. The landlord may be able to protect itself against a potential claim by the tenant, if the landlord can demonstrate that it issued the above-noted notices, and subsequently, received no response from the tenant.

A landlord must remember, though, that it cannot sell a tenant's abandoned goods until the landlord has either: obtained a court order, received the consent of the tenant, or given reasonable notice to the tenant that the goods will be sold or disposed of if not removed.

G. The Tenant's Options on Re-Entry and Termination of the Lease

Where a landlord has effected a re-entry and terminated the lease, a tenant may commence an action claiming either that the termination was wrongful or seeking relief from forfeiture. A tenant may also seek an order granting an interim or interlocutory injunction which permits the tenant to return to the premises and take back possession until a court rules on the matter.

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1. **Relief from forfeiture**

The tenant will commonly raise the defence of relief from forfeiture to a landlord's claim for possession. Section 24 of the *LEA*, grants a discretionary power to the court to relieve against all penalties and forfeitures. Generally speaking, the power of the court to grant relief under this section is discretionary and no party is entitled to relief from forfeiture as a matter of right. The courts readily grant relief from forfeiture where the only breach is the tenant's failure to pay rent and the tenant is ready, willing and able to pay the arrears. In these circumstances, relief from forfeiture is often granted to the tenant on the proviso that it will pay the arrears (and likely, costs).

Where the court has previously granted a tenant relief from forfeiture, the court cannot grant the tenant relief a second time for breach of the same covenant: section 28 of the *LEA*. For instance, if the court grants the tenant relief from forfeiture as a result of that tenant's failure to pay rent, then the court cannot later grant that same tenant relief for breach of that same condition to pay rent.

As a practical matter, where a tenant defaults for non-payment of rent, the best course of action may be to grant the tenant relief from forfeiture on the condition that the tenant pay the arrears of rent. The landlord can then use that waiver to prevent the tenant from seeking relief from forfeiture in the event it defaults in the payment of rent again at some later date. If the landlord decides to give the tenant a second chance, then it is crucial that the event be properly documented and acknowledged in writing by the tenant. The landlord should seek legal advice in the preparation of the proper documentation. By granting relief from forfeiture itself for the first default in the payment of rent and then properly documenting the event, the landlord saves the time and expense of a court application granting relief from forfeiture to the tenant.

III. AFFIRMING THE LEASE AND SUING FOR RENT ARREARS

A. Suing for Rent in Arrears: When Does the Right Arise?

When a tenant refuses or neglects to pay rent, the landlord may simply take the position that the lease remains in full force and effect. By affirming the lease, the landlord preserves the relationship of landlord and tenant and holds the tenant to its obligations under the lease contract. By keeping the lease in force, the landlord can either distrain for rent or sue for arrears as rent falls due. The landlord has no claim for future or prospective rent until it actually falls due. It is important to remember that rent only becomes due while the tenant remains in occupation of the premises. Once a lease has been terminated, the landlord has a claim for rent arrears to the date of termination, and a claim in damages for breach of the lease, such as loss of future rent for the unexpired portion of the lease term. The right to sue for rent arrears and contract damages is subject to a six year limitation period in British Columbia.

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The landlord's remedies on affirming the lease – to distrain for rent or to sue for arrears – are mutually exclusive. By electing to sue for arrears, a landlord gives up its right to distrain. By the same token, a landlord may not sue for arrears so long as a distress remains outstanding. If post-distraint, a portion of the arrears remains outstanding and the tenant remains in possession of the premises, the landlord may sue for the balance of the rent arrears: *Hoyes v. Creery* [1918] 1 W.W.R. 873 (B.C.C.A.).

A landlord who considers an offer to sub-lease, when its tenant has breached the covenant to pay rent, is practicing good commercial sense, and does not waive its right to affirm the lease and insist on payment of rent: ***First Place Tower Inc. v. Borneo Gold Corp*., [2000] O.J. No. 4294 (Ont. H.C.).**

B. **Mitigation**

Traditionally, in British Columbia, so long as the landlord affirms the lease it does not have a duty to mitigate its loss or damages: *Transco Mills Ltd. v. Percan Enterprises Ltd. et al* (1993), 76 B.C.L.R. (2d) 129 (B.C.C.A.). In *Transco Mills Ltd.*, Mr. Justice Taylor wrote: "There is in my view no basis on which a landlord of commercial premises can be required to mitigate its loss where it maintains the lease in existence and claims for rent due" (p. 140). The refusal to impose an obligation on the landlord to mitigate its damages has been criticized in several cases, but it remains the law in British Columbia and will likely require legislation to change it. While the landlord has no duty to mitigate upon its election to affirm the lease, the tenant is still generally entitled to look for a sub-tenant: *Almad Investments Ltd. v. Mister Leonard Holdings Ltd.*, [1996] O.J. No. 4074 (Ont. C.A.).

C. **Practical Considerations: To Affirm or Terminate**

A landlord's decision to affirm or terminate the lease is a business decision that each landlord must make weighing both legal and marketplace factors. Affirming the lease and suing for rent as it falls due might be the best option for a landlord where the value of the future rent is high, the chances of finding a replacement tenant are low and the prospects of recovering on a judgment against the tenant are good.

To properly weigh both legal and marketplace factors, the landlord should consider how a termination or affirmation of the lease may affect other tenants. For example, with respect to commercial shopping centres, an anchor lease may stipulate that a specified percentage of the tenants be in operation otherwise an "innocent" tenant may be entitled to either terminate its lease or suspend its obligations under the lease. Also, agreements with third parties, such as lenders of the tenant or mortgagees of the lease, may also affect a landlord's decision to affirm or terminate a tenancy. Such agreements may contain provisions which grant a right to the third party to rectify the default.

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IV. ANTICIPATORY REFUSAL TO PAY RENT: A REPUDIATION BY THE TENANT?

A tenant commits an anticipatory breach when it gives notice that it will not perform its future obligations under the contract. If the breach is fundamental, then the landlord may elect to either affirm the lease contract and require performance by the tenant or accept the anticipatory breach as a repudiation which brings the lease to an end and gives rise to a right to claim damages. What is not clear, however, is whether a statement from the tenant that it will not pay rent at some future date amounts to a repudiation which brings the lease contract to an end. Technically speaking, until the rent falls due, the tenant has not breached its obligation under the lease to pay rent. The majority of a landlord's remedies, both statutory and contractual, on non-payment of rent do not even arise until the rent is "unpaid". For example, a landlord cannot distrain for rent which is not yet due and not yet in arrears. At present, given this uncertainty, the landlord's best strategy may be to clearly contemplate the consequences of an anticipatory refusal to pay rent in the lease contract.

V. CLAIMING ARREARS ARISING DUE TO LANDLORD'S ERROR

Situations may arise where a landlord learns that a tenant has paid less rent than required by the lease as a result of the landlord's own error. These situations typically arise due to a landlord's erroneous or mistaken calculation of a tenant's share of operating costs or property taxes as additional rent. In general, where the lease permits it, a landlord will have a good claim for the arrears. A landlord should always consider, however, whether it has waived payment or is estopped from seeking payment of the past rent.

A. Interpretation of the Lease and the Landlord's Right to Claim Arrears

Upon the discovery of such an error, a landlord should first read the whole lease to determine whether the past rent amounts are recoverable by the landlord. The lease provisions will generally specify whether a landlord is restricted from seeking, in whole or in part, an adjustment or readjustment of the rent paid by the tenant in the past. In British Columbia, a landlord has six years to pursue a claim for rent arrears before the limitation period expires. But, a landlord should be mindful of any sunset provisions contained in the lease which limit the landlord's right to recover rent arrears prior to the expiration of the limitation period.

A landlord and tenant may not always agree as to whether the lease grants the landlord a right to recover past rent. In those circumstances, it may be necessary to obtain a judicial interpretation of the language of the lease. For example, see *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.*, 2002 BCSC 934. In *Vancouver City Savings*, the tenant unsuccessfully argued that the lease precluded the landlord from recovering past rent in those lease years which the landlord did not provide a reconciliation statement to the tenant within ninety days of the end of the lease year. Mr. Justice Sigurdson disagreed

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with the tenant's argument. Based on his reading of the lease as a whole, Mr. Justice Sigurdson held that, at most, the lease restricted the landlord from claiming readjustments of "Additional Rent" two years from the date the statement in question ought to have been delivered to the tenant. In other words, the landlord was entitled to recover a readjustment of past rent up to two years and ninety days from the end of each lease year.

The landlord should endeavour to bill out costs for operating expenses, taxes or other additional rent within a reasonable period of time. The case law indicates that an unreasonable or unnecessary delay in billing operating costs will generally hinder a landlord's right to recover arrears: *Concorde Centres Inc. v. Tundra Mechanical Contractors Ltd.*, [1985] S.J. No. 736 (Sask. Q.B.); *Matharu v. Mid-West Sportswear Ltd.*, [2002] S.J. No. 750 (Sask. Q.B.). Although, the failure of the landlord to submit a yearly estimate of operating costs does not remove the right to make such as a claim: *Pellerin v. Bayleaf Real Estate Ltd.*, [1993] N.S.J. No. 272 (N.S.S.C.); *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.* (supra).

B. Defences to a Claim for Arrears Arising Due to Landlord's Error

The following defences may be invoked by a tenant against a claim for rent arrears arising due to a landlord's error: the lease, properly interpreted, does not allow the claim; waiver; or estoppel.

1. Interpretation of the Lease

If the wording of the lease does not specifically permit a landlord to recover arrears, then the landlord may be barred from making such a claim against the tenant. As noted earlier, the lease should be read as a whole for any provisions which expressly limit or exclude the landlord's right to claim arrears at all or after a certain period of time.

2. Waiver

Where a landlord is fully aware that its tenant has paid less rent than required by the lease and that it has a right to recover such rent arrears under the lease, the landlord may voluntarily waive its right to payment. The landlord must unequivocally communicate to the tenant its intention to relinquish its right to payment of the past rent. The landlord's intention may be expressed in writing, either formally or informally, or inferred from its conduct.

A landlord relinquished its right to recover operating cost arrears by its failure to make any demand to the tenant for payment of the operating costs over an eighteen-year period of the lease: *Scotia Centre Ltd. v. EBJ Investments Ltd.*, [1994] A.J. No. 607. An unknown error of the landlord on a simple invoice and a statement of the landlord's representative was not conduct sufficient enough to amount to a waiver of the

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landlord's right to payment: *Meadowvale Industrial Mall Ltd. v. Becquerel Laboratories Inc.* (supra).

A landlord, who has waived payment of past rent, will generally be entitled to restore its right to payment upon reasonable notice to the tenant. In *Scotia Centre Ltd.*, Justice McMahon of the Alberta Court of Queen's Bench held that thirty days' notice was reasonable to re-instate the landlord's right to payment of the tenant's proportionate share of operating costs.

3. **Estoppel**

A landlord may be estopped from demanding payment of past rent from the tenant. An in-depth discussion of the law relating to estoppel is beyond the scope of this paper. Landlords and tenants, however, should be mindful that estoppel may present a defence to the landlord's claim for rent arrears. The following categories of estoppel may be raised as a defence: estoppel *per rem judicatem*; estoppel by representation or conduct; estoppel by convention; promissory estoppel; and proprietary estoppel: Richard Olson, *Scotia Centre Ltd. v. EBJ Investments Ltd.* (supra); *Meadowvale Industrial Mall Ltd. v. Becquerel Laboratories Inc.* (supra), *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.* (supra).

C. **Grounds for Termination: Non-Payment of Rent Arrears**

In the face of a tenant's non-payment of past rent, the landlord may be entitled to terminate the lease. As previously noted, the procedure on re-entry and termination is set out in the default provisions of the lease. The landlord must ensure that it meets the requirements of identifying the default and giving appropriate notice to the defaulting tenant before the landlord proceeds with the remedy of re-entry and termination. A tenant, who disagrees with the landlord's right to recover past rent, can pay the rent arrears to the landlord "under protest" to avoid the landlord's use of the non-payment as grounds for termination. A tenant who elects to pay "under protest" is entitled to compensation from the landlord for any rent paid beyond that which the lease required the tenant to pay: section 62(2) of the *LEA*. A tenant forced to pay an amount in dispute should give notice that payment is made "under protest" pursuant to section 62(3) of the *LEA*.

Where a landlord's recovery of past rent is statute barred, the tenant's non-payment will not serve as grounds for termination as such an act is an attempt by the landlord to avoid the consequences of its own failure to properly calculate or demand payment of rent: *Scotia Centre Ltd. v. EBJ Investments Ltd.* (supra). Further, as noted by Justice McMahon in *Scotia Centre Ltd.*, a landlord's termination for non-payment of rent in these circumstances likely presents an appropriate case for relief from forfeiture.

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APPENDIX "A"
RENT DISTRESS WARRANT

TO: THE BAILIFF

YOU are hereby authorized and required to distrain the goods and chattels of _____ (the "Tenant") located at _____ _____, _____, (the "Premises"), for the sum of $_____ being the rent due to the Landlord for the Premises as of the _____ day of _____, ____.

YOU are authorized to distrain for the recovery of the said rent and your lawful fees as the law directs. In consideration of you acting on our behalf as our agent to impound the aforementioned property, the Landlord will at all times hereafter indemnify you against any loss, costs, damages or out-of-pocket expenses which you may incur by reason of or in consequence of acting as the Landlord's agent and bailiff to take possession of the aforementioned property.

Dated at _____, British Columbia, this _____ day of _____, ____.

Landlord_____

LIST OF GOODS SEIZED

_____

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_____

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_____

_____

and any such goods, chattels and effects, not exempt under the *Rent Distress Act*, but sufficient to cover all arrears of rent and costs, charges and expenses.

Dated at _____, British Columbia, this _____ day of _____, ____.

_____

Bailiff for the Landlord

SCHEDULE OF AMOUNTS PAYABLE

Rent:

Levying:

Man in Possession:

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Mileage:

Appraisal:

Auctioneer:

Insurance:

Cartage, Towing:

Locks:

Settling Commission:

GST:

TOTAL:

APPENDIX "B"

TO: THE BAILIFF

BAILEE'S AGREEMENT

In consideration of you withdrawing the man in possession of the goods and chattels now under seizure by you and mentioned in the Rent Distress Warrant, a copy of which I have received, I agree to act as your Bailee without remuneration and to hold the goods and chattels in my possession and on the premises, and agree to deliver those goods and chattels over at any time upon request. I agree that the withdrawal of the man in possession does not constitute an abandonment or a withdrawal of the distress by the Landlord. I agree that you may use a key or any other means to gain re-entry.

Dated at _____, British Columbia, this _____ day of _____, ____.

_____ _____

Witness (sign then print name) Tenant (sign then print name)

_____

Address

_____

Phone

TENANT'S AUTHORIZATION TO CHANGE LOCKS AND SECURE PREMISES

In consideration of you not removing the goods and chattels now under seizure by you, on behalf of the

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Landlord, at _____

__

(the "Premises") and listed in the inventory on the Rent Distress Warrant, a copy of which I have received on behalf of the Tenant, I hereby authorize you to change the locks and padlock the Premises containing the said goods and chattels. This authorization and request is made to allow the Tenant time to arrange funds to clear the distress and avoid the costs of removal and storage of the said goods and chattels.

If, within _____ days, the Tenant does not pay the costs of seizure and make satisfactory arrangements with your office regarding the arrears of rent, then the Tenant understands and appreciates that you will proceed at once without further notice to the Tenant to sell the said goods and chattels to satisfy the arrears of rent and the costs of this distress.

These instructions are given by the Tenant and not by the Landlord. The Tenant agrees not to treat such padlocking as a forfeiture of the lease and that it will not constitute an abandonment of the distress by the Landlord. The Tenant acknowledges that it may continue to use and occupy the premises and conduct its business from the premises and to recover its goods upon payment of the arrears of rent and the costs of this distress.

Dated at _____, British Columbia, this _____ day of _____, ____.

_____
Witness (sign then print name)

_____
Tenant (sign then print name)

_____
Address

_____
Phone

---

[1] The section of this paper dealing with rent distress has been updated from the author's original paper, *Rent Distress: A Commercial Landlord's Rights and Obligations*, which was published by the CLE in, *Commercial Leasing Disputes*, December, 1998.

Non-Payment-of-Rent-A-Defaulting-Tenant-Under-a-Commercial-Lease(May07)

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