Landlords' Remedies and Commercial Landlords' Remedies

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This is a general overview of the subject matter and should not be relied upon as legal advice or opinion. For specific legal advice on the information provided and related topics, please contact the author or any member of the Real Estate Law Group.

General Comments on Landlords' Remedies

- Before exercising any remedies, the LL will want to consider giving the TT extra time to comply, perhaps together with security for the payment of the rent or satisfaction of the obligations, modification of the lease term, sublease, etc. The LL should also consider whether the TT's difficulties in paying the rent are the result of short-term financial difficulties or may be an indication of impending bankruptcy.
- Always review the lease – the lease will set out what the LL's remedies are, in what circumstances they may be exercised and what the process will be for exercising them (notice periods, etc.).
- Don't act on every right that the lease purports to give to the LL – there are some provisions that are found in standard leases that are not enforceable. Don't assume the LL has the right to do everything the lease says it can.

  For example, the following lease provisions are not unenforceable:

  - "The Tenant further agrees that if it leaves the Leased premises, and any Rent is outstanding under this Lease, the Landlord may follow, seize, and sell such goods and property of the Tenant at any place to which the Tenant or any other person may have removed them, in the same manner as if such goods and property had remained upon the Leased Premises."
  - "The Landlord shall have the following rights and remedies, all of which are ***cumulative and not alternative and not to the exclusion of any other or additional rights and remedies*** in law or equity available to the Landlord by statute or otherwise…" – exercising some remedies, in fact, forever precludes the LL's ability to exercise others; therefore, the order in which a LL chooses to exercise the remedies is critical.
- Consider whether the lease has been made pursuant to the *Land Transfer Form Act*. If so, the provisions of that Act apply. Otherwise, they don't.
- Consider whether the LL's past conduct may constitute a waiver, such that a greater length of time must be given to a TT to comply before exercising a remedy – for example, if the LL has been in the habit of accepting late rent payments, the LL cannot one month suddenly turn around the day after the rent is due and exercise all its remedies for non-payment of that rent. The LL must give the TT reasonable notice in such a situation.
- LL should document every step taken in writing in case it needs to be proven in court later (e.g., negotiations with TT, efforts to mitigate – advertisements, correspondence, offers to lease, oral negotiations, "cold calls", listings with agents, etc.).
- Consider carefully the effect of each step taken – an inadvertent termination (e.g., changing the locks without the TT's express agreement that this is not a termination of the lease) can result in a lawsuit against the LL for terminating when it was not entitled to do so and may have the effect of releasing guarantors and indemnifiers from ongoing obligations of the tenant after the date of termination. It also precludes the LL from exercising certain other remedies.
- In giving notices, if the TT has vacated the premises and the LL knows where the TT is, in addition to following all the notice provisions in the lease (including sending a notice to a location set out in the lease where the LL knows the TT no longer is), the LL should send the notice to where the TT is currently located. Also, be sure to provide notice to any guarantors, covenantors or indemnitors under the lease and to any third parties to whom the LL has agreed to provide notice (e.g., under subordination or non-disturbance agreements). If the LL fails to do so, it may lose its right to pursue guarantors, covenantors or indemnitors or, in the case of third parties, be sued for failure to comply with its contractual obligations.

- Given that leases are generally drawn by LLs and that many of the remedies available to LLs are such that the TT can be put out of business, courts are sympathetic to TTs with regard to LLs' use of these remedies. A LL should carefully document all steps taken, all conversations, accommodations and negotiations with a TT to reach a resolution without resorting to such remedies in order to put itself in the most favourable light. When a remedy is exercised, all the requirements of that remedy should be followed meticulously.
- A TT make apply to the court for relief against forfeiture under the *Law and Equity Act*, s. 24, which provides:

> The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

However, the court will not grant relief more than once for a breach of the same covenant or condition – the *Law and Equity Act*, s. 28 provides:

> The court or judge does not have power under this Act to relieve the same person more than once in respect of the same covenant or condition, nor does it have power to grant any relief under this Act if a forfeiture under the covenant in respect of which relief is sought has been already waived out of court in favour of the person seeking the relief.

The court will examine the extent and the severity of the breach, whether the breach was willful, the pattern of the TT's conduct and the TT's ability to correct the particular breach. The court will probably be less likely to grant relief to a TT if the LL has been reasonable in negotiating with the TT and in the way it has exercised its remedies (by meticulous compliance with the law and the terms of the lease). If the LL has acted in a high-handed manner or precipitously, the court will probably grant relief.

- In addition to relief from forfeiture, there are defences a TT may advance in the face of a LL seeking to terminate a lease, including:
  - Breach of quiet enjoyment – i.e., the LL interfering with the TT's peaceful possession and use of the premises (e.g., LL failing to provide heat, doing construction work on adjacent premises, failing to repair, etc.)
  - Wrongful distraint
  - Derogation of grant – i.e., conduct by the LL that renders the premises less fit for the purpose for which they were leased
  - Other defences would include contractual defences, such as pre-contractual misrepresentations, collateral contracts, post-contractual variations of terms, waiver by the LL, estoppel, and "constructive surrender" (e.g., where the TT advises LL that it will be vacating the premises and turns over the keys and the LL accepts the keys and possession without objection).

LANDLORD'S REMEDIES			
MAINTAIN LANDLORD-TENANT RELATIONSHIP			TERMINATE LL-TT RELATIONSHIP
DISTRAIN	AFFIRM AND SUE	RE-LET ON TT'S ACCOUNT	TERMINATE BY RE-ENTRY AND SUE FOR DAMAGES
NATURE OF REMEDY			
A "self-help" remedy allowing the LL to seize property on the leased premises and sell it to satisfy rent arrears	A remedy allowing the LL to keep the lease alive, thereby protecting its right to continue collecting rent, etc. for the remainder of the term	A remedy allowing the LL to keep the lease alive (and thereby keep the TT ultimately liable for rent, etc.), while putting another TT in possession on the same terms	A remedy allowing the LL to terminate and retake possession of the leased premises and sue the TT for damages for loss of rents for the remainder of the term (discounted for mitigation)
BASIS OF REMEDY			
Common law, as modified by the CTA and RDA	Common law – no need for provision in lease	Lease – arguable that without provision in lease, cannot exercise this remedy	Right to terminate comes from lease. Right to sue for damages is a contractual right.
REMEDY ONLY AVAILABLE IF			
Lease is still "alive" and rent is in arrears.	Lease is still "alive"	Lease is still "alive"	To re-Enter, Lease must contain a right of re-entry. To collect damages, Lease should provide for right to damages for loss of balance of tenancy.
ADVANTAGES			
	Lease is still "alive" and rent continues to accrue (which is an advantage if chances of recovering that rent are good)	If premises are not re-let, TT continues to be liable for accruing rent. Even if premises re-let, TT remains liable for any deficiency.	Terminates LL/TT relationship, allowing both parties to move on. LL can seek out a new TT and negotiate terms without regard to old lease. LL may be able to sue old TT for rent/damages accrued up until termination plus prospective damages.
DISADVANTAGES			
	If breaches persist, LL will have to wait until end of term or sue periodically for overdue rent – expensive and cumbersome. If TT unable to pay, LL likely not to be able to realize on judgement.	Term of new lease must "fit" within original lease. LL must account to TT re new lease, since made on TT's behalf. TT may not be able to recover deficiencies from TT.	To recover from the old TT, LL will likely to have to sue and may not be able to realize on its judgement if TT has no assets. Review whether any other lease requires this lease to be kept alive (e.g., anchor tenant in a shopping mall).
DO'S			
	Advise TT that lease is still in force and rent still accruing and LL intends to be paid on time for balance of term. LL should seek to mitigate damages by seeking out a new TT if breaches persist. Once new TT found, LL can exercise right to terminate and re-enter.	Review re-letting provisions in Lease and follow closely. Provide Notice to Re-Let to TT and make it clear that LL is not re-entering and terminating the lease or accepting a surrender by TT.	Review all terms of lease re termination/determination and re-entry – especially re grace periods and notices. Send unequivocal demand letter to TT re breach; follow up with necessary notices. Make sure TT's breach entitles LL to terminate (not all breaches do). If TT wrongfully terminates, LL

			may be liable in trespass and/or conversion and/or charged with forcible entry under *Criminal Code*.
DON'T'S			
	Don't accept a repudiation or surrender of lease from TT or change the locks or do anything that signals TT is no longer leasing the space.	Don't re-enter the premises without giving TT Notice to Re-Let.	Don't attempt to terminate lease unless ❖breach entitles LL to do so; ❖all grace periods elapsed; ❖provisions of lease re notices, etc. followed. Don't accept payment for rent accruing after termination date. Don't physically remove a TT who refuses to vacate (get a court order).
SPECIAL REMARKS			
	Recent cases indicate LL must mitigate its damages.	Make sure terms of new lease are the same as the original lease – otherwise may be construed as a surrender of the original lease.	If lease is made pursuant to *Land Transfer Form Act*, review those provisions too. TT may apply to court for relief from forfeiture. Accepting a surrender of lease is not the same and may not preserve LL's right to sue for prospective damages.
OTHER REMEDIES PRECLUDED			
	Once LL has affirmed the lease, LL cannot terminate the lease for the *same* default (i.e., must wait for a new default). Distress is still available.	LL can give a Notice to Re-Let and use this opportunity to assess the rental market for the premises. If defaults continue, LL can later terminate. Distress is still available.	If LL has exercised right to terminate and re-enter, it can no longer: ❖levy a distress; ❖re-let on TT's account; ❖affirm lease; or ❖accept rent payable after date of termination.
THINKING AHEAD WHEN NEGOTIATING LEASE			
	No provision required in Lease.	The lease should contain a provision allowing the LL to re-let on TT's account.	Lease should provide that LL entitled to terminate and re-enter for all breaches, not just breach of conditions (i.e., also breaches of covenants). Should also provide LL entitled to claim for prospective damages if lease terminated early.

LANDLORD'S REMEDIES

AFFIRMING THE LEASE AND SUE FOR RENT	
NATURE OF REMEDY	LL maintains the LL/TT relationship by keeping the lease "alive", thereby protecting its right to continue collecting rent, etc. for the remainder of the term (i.e., the LL continues to insist on full performance of the lease by the TT).
REMEDY ONLY AVAILABLE IF	A landlord-tenant relationship continues to exist (i.e., there has been no forfeiture or re-entry – no act by the LL that indicates an intention to terminate the lease).
BASIS OF REMEDY	Common Law. The lease does not need to provide that the LL has the right to affirm the lease and sue for rent. The LL is simply attempting to enforce compliance by the TT with the terms of the lease.
ADVANTAGES	LL is able to continue to recover rent from the TT during the term (subject to the LL's obligation to mitigate). However, if the TT has not been paying the rent, it is likely because the TT is not able to do so. Therefore, this remedy tends to be most valuable if there is a good chance of recovery against a guarantor or indemnitor (and if these obligations will likely be extinguished if the lease is terminated, making that remedy unattractive). This remedy is also worth considering if the balance of the term is valuable, the chances of the LL finding a new TT are small, and the lease does not provide for the LL being able to claim prospective damages for the balance of the lease term (if chances are good that the LL will be able to realize on any judgement against the TT, guarantor or indemnifier).
DISADVANTAGES	If breaches persist, to recover the rent accruing the balance of the term, the LL will have to either wait until the end of the term or sue periodically for the overdue rent, which will be expensive and cumbersome. Also, if the TT has been unable to pay (and there is no guarantor or indemnitor liable for the breaches), the LL may not be able to recover the judgement.
DO	❖ Advise the TT that the lease continues to remain in force and that the LL will expect rent to be paid on time in accordance with the lease for the remainder of the term. ❖ LL should mitigate its damages by seeking out a new TT. Once a new TT has been found, the LL can exercise its right to terminate and re-enter and enter into the new lease.
DON'T	❖ Accept a repudiation or surrender of the lease from the TT (e.g., do not accept a return of the keys by the TT). ❖ Change the locks or do anything else that signals that the TT is no longer renting the space
SPECIAL REMARKS	In older cases, the courts held that it was not necessary for a LL to mitigate its damages (e.g., by finding a new tenant). More recent cases indicate that it is not appropriate for a LL simply to wait out the balance of the term and expect to be compensated in full for the lost rent.
OTHER REMEDIES PRECLUDED	If the LL affirms the lease, it cannot then subsequently claim it is forfeiting the lease for the same default – there must be another default for that remedy to become available again. By affirming the lease, the LL has kept alive the landlord-tenant relationship and, therefore, maintains the right of distress for arrears of rent. **If the LL has already exercised its right to terminate or re-enter, this remedy is not available.**
THINKING AHEAD WHEN NEGOTIATING LEASE	No provision is required in the lease.

RE-LET PREMISES ON TENANT'S ACCOUNT	
NATURE OF REMEDY	If the TT has vacated the premises, one of the available remedies is for the LL to re-let the premises on behalf of the TT.
REMEDY ONLY AVAILABLE IF	TT has vacated the premises and the lease permits the LL to re-let on TT's account.
BASIS OF REMEDY	Lease – an argument can be made that without a contractual provision in the lease allowing the LL to re-let, a LL does not have this remedy.
ADVANTAGES	If the premises are not re-let (despite LL's reasonable attempts to do so), the TT continues to be liable for the rent as it accrues. Even if the premises are re-let, the TT remains liable for any deficiency in the rent collected from the new tenant.
DISADVANTAGES	The lease entered into must "fit" within the original lease – i.e., the term of the lease cannot go beyond the term of the original lease. LL must account to the TT regarding the lease, since it is made on the TT's behalf. If more rent is paid under the new lease made on TT's behalf, the TT is entitled to that money (and if less rent is paid, the TT is liable to the LL for that amount). The LL must keep the landlord-tenant relationship alive and, therefore, must continue to deal with the TT, rather than simply move on. If there are deficiencies (i.e., no sub-tenant or the sub-lease is for less rent) the TT may not be able to pay them.
DO	❖ Review the provisions of the lease regarding re-letting and follow it closely. ❖ Provide notice to the TT that the LL intends to re-let on the TT's behalf (a Notice to Re-Let). This notice must make it clear that the LL entry on to the premises has been for the purposes of re-letting for the TT, not a re-entry and termination of the lease or an acceptance of surrender by the TT.
DON'T	❖ Re-enter the premises without providing the TT with a Notice to Re-Let. By doing so, the LL may inadvertently have terminated the lease by re-entry, thereby precluding it from pursuing the remedy to re-let on the TT's account.
SPECIAL REMARKS	"In order to ensure that a re-letting is not found to be a surrender of the lease by operation of law, it is essential that the sub-lease be on exactly the same terms and conditions as the original lease" – *Pacific Centre Ltd. v. Micro Base Development Corp.* (1990) 43 BCLR (2d) 77 (BCSC)
OTHER REMEDIES PRECLUDED	If the LL has exercised its right to re-let the premises on the TT's account, the LL will be able later to terminate the lease if it determines that re-letting the premises on the TT's account is not practical or desirable. Therefore, the LL can give a notice to re-let in order to gain entry to assess the state of the premises and determine what the rental market is and also sue for existing arrears, then later terminate the lease. By affirming the lease, the LL has kept alive the landlord-tenant relationship and, therefore, maintains the right of distress against property left behind by the TT for arrears of rent. **If the LL has already exercised its right to terminate or re-enter, this remedy is not available.**
THINKING AHEAD WHEN NEGOTIATING LEASE	The lease should contain a provision allowing the LL to re-let on the TT's account.

TERMINATE/DETERMINE LEASE, RE-ENTER AND SUE FOR DAMAGES	
NATURE OF REMEDY	In 1972, the Supreme Court of Canada decided in the *Highways Properties* case that a lease not only creates an interest in land, but is also a contract. As a result, it is possible for a LL to sue a TT for damages. Therefore, while it was the case prior to 1972 that, once a LL terminated a lease it had no basis for claiming the rent for the balance of the term, because a lease is now also viewed as a contract, it is now possible for a LL to terminate the lease and sue for damages for the loss of the tenancy for the balance of the term of the lease.
REMEDY ONLY AVAILABLE IF	If the lease does not provide that the landlord has a right to terminate and re-enter, the LL will need a court order to do so [see CTA]. There is no common law or statutory right to terminate or re-enter, regardless of the breach by the TT. Furthermore, the TT's particular default must allow the LL to terminate under the Lease (i.e., if lease does not specifically provide which breaches entitle LL to terminate or re-enter, only the breach of a "condition" – and not a covenant – will be sufficient to allow LL to terminate). At common law a breach of covenant only entitles the LL to damages, not to repudiate.
BASIS OF REMEDY	The basis for the right to terminate the lease will be lease itself. The basis for the damages is in contract law. The SCC determined that the damages recoverable by the TT had two aspects: ❖ The present value of the unpaid future rent for the balance of the term of lease (subject to mitigation, see below); and ❖ Any other provable losses resulting from the repudiation (in the *Highway* case, for example, the repudiating TT was the anchor tenant in a shopping mall and the mall became a ghost town as a result of losing that tenant, meaning the LL could not rent out other space in the mall either). Because the right to recover damages is a contractual remedy, the LL has an obligation to mitigate its damages (e.g., by looking for a new TT). It is no longer prudent for a LL to terminate and not mitigate its damages by taking all reasonable steps to locate and new TT. Therefore, any rent a LL receives from a new TT will be deducted from the damages payable by the original TT (although the costs of finding the new TT should be recoverable as part of the damages). The lease should contain a provision that specifically provides for the LL's right to claim damages for the loss of the tenancy for the balance of the term. However, even if the lease does not, the LL should protect its potential position by advising the TT that it will be claiming prospective damages.
ADVANTAGES	This remedy has the advantage of terminating the landlord-tenant relationship for certain, thus allowing both the LL and TT to move on. The LL can then seek out a new TT and not be constrained in its negotiations for a new lease by the old relationship. Also the LL can claim the rent (and damages for other breaches) that accrues until the termination and make a claim for prospective damages. All this can be commenced at the time of termination, rather than waiting until the end of the term of the lease.
DISADVANTAGES	To recover the prospective damages, the LL will have to sue the TT and then realize on the judgement, which will be both time-consuming and expensive; therefore, it should only be pursued if chances are good that the TT will have the money or assets to satisfy such a judgement. Therefore, if the only significant assets of the TT are the assets on the premises, the LL should first pursue its right of distress before considering termination.
DO	❖ Review all the terms of the lease dealing with termination and determination of the lease. If the lease does not deal with termination and re-entry, it may be advisable to obtain a court order before taking any action. ❖ Send a demand letter to the TT regarding correcting the breach (most leases provide for a demand; if the lease is silent regarding demand, it is required; even if the lease states that no demand is required, the courts will look more favourably on a LL that has made a reasonable demand on the TT).

	❖ Make sure that all demands and notices are very clear and unequivocal. They must also be precise (e.g., the LL's name, the TT's name, the date of the lease, the description of the premises must be exactly right, because these things may invalidate the notice, even if there is no basis for confusion). ❖ Make sure that all demands and notices are served on guarantors, covenantors, indemnitors and any third parties entitled to receive notice under the lease or any other agreement (such as lenders, sub-tenants or assignees). Even if a LL does not have an agreement with a sub-tenant to provide notice, by only providing notice of termination to the TT and not to the sub-tenant, the LL may be waiving the TT's forfeiture by indicating the sub-tenant may stay on the premises. ❖ Provide notice either before or concurrently with the acts taken to determine the lease of the LL's intention to claim prospective losses (i.e., the damages for the balance of the term): e.g., "*We would further advise you that our client intends to hold your client responsible for any damages suffered by them as a result of your client's breach and wrongful repudiation of the said lease, such damages to include the loss of benefit of the balance of the lease term*." ❖ Review the lease to determine whether it was made pursuant to the Land Transfer Form Act, in which case the rent must be outstanding 15 days before LL is entitled to re-enter ❖ Once the demand period has expired, if the TT has not complied, send out a notice of termination to the tenant (and any guarantors, covenantors, indemnitors or third parties entitled to notice). It too must be clear and unequivocal (Note: a demand for payment that states that if it is not made the LL will terminate the lease and re-enter is not a notice of termination). ❖ If the lease allows termination upon giving of notice, the notice should be called a Notice of Termination. If the lease does not provide for termination upon giving of notice, the notice should be called a Notice of Re-Entry. ❖ The LL should serve a Notice to Quit concurrently with the Notice of Termination of Notice of Re-Entry. ❖ It may be advisable for the LL to serve the notice of termination or re-entry concurrently with the physical act of re-entry. A notice of termination of re-entry should be for immediate delivery of the premises (not for some future date, because they may amount to a waiver of the LL's rights). ❖ If the TT still occupies the premises at the time the notice of termination or re-entry is given, a Notice to Quit should be given to the TT (and all other parties entitled to notice) concurrently. ❖ If the TT does not quit the premises, a Demand for Possession should then be served (demanding immediate possession). To exercise the right of re-entry, the LL must retake physical possession of the premises (i.e., change the locks). ❖ If the TT still does not quit the premises after a Demand for Possession has been served, the LL should seek a court order. With such a court order, if the TT still refuses to vacate, the LL must retain a sheriff.
DON'T	❖ Terminate the lease unless it has been determined that the breach by the TT entitles the LL to terminate. ❖ Terminate unless all the provisions of the lease have been followed with respect to that termination ❖ Terminate unless a demand for payment has been made, with at least as much time as the lease requires ❖ Accept a payment for rent that accrues after the date of the termination – that is a waiver of the termination. The LL can collect rent that accrued prior to the date of the termination. ❖ Physically remove a TT who refuses to deliver up the premises – get a court order.
SPECIAL REMARKS	❖ It is very important to follow all the procedures set out in the lease (including, if applicable, the *Land Transfer Form Act*) regarding termination very closely. The courts do not look favourably on LL's who terminate a lease without following the lease or who act unreasonably in doing so. ❖ A TT, under the *Law & Equity Act*, is entitled to apply to court for relief from forfeiture. ❖ The right of re-entry is usually exercised by changing the locks. ❖ Accepting a surrender of the lease is not the same as terminating it (e.g., accepting the keys

	from the TT as its act of surrendering the lease) and may not preserve the LL's right to claim prospective damages. ❖ A LL should also consider whether any other lease to which it is a party requires that the lease in question be kept alive (e.g., an anchor tenant in a shopping mall).
OTHER REMEDIES PRECLUDED	If the LL has exercised its right to terminate and re-enter, it will no longer be able to: ❖ Levy a distress (or carry out to completion a distress in progress) ❖ Re-let the premises on the TT's account ❖ Affirm the lease ❖ Accept rent payable after the date of the termination
CONSEQUENCES IF WRONGFULLY EXECUTED	If the LL terminates the lease and re-enters when it is not entitled to do so, the LL may be: ❖ Liable in trespass and/or conversion to the TT (and liable for the consequential damages) ❖ Charged with forcible entry under the Criminal Code (unlikely)
THINKING AHEAD WHEN NEGOTIATING LEASE	A standard form lease should provide that: ❖ LL is entitled to terminate and re-enter for all breaches, not just breach of conditions (i.e., also breach of covenant); and ❖ LL can claim for prospective damages if the lease is terminated early.

USE COMMERCIAL TENANCY ACT PROCEEDINGS TO EVICT AND SUE FOR DAMAGES	
NATURE OF REMEDY	The *Commercial Tenancy Act* proceedings to terminate the lease and retake possession of the premises are entirely statutory. The proceedings are as follows: ❖ CTA, sections 5 and 6: applies in very limited circumstances and only if rent has been in arrears for a whole year and has abandoned the premises – a notice is posted and if TT does not bring lease into good standing within 14 days, lease is at an end and LL is entitled to possession (this provision is rarely used) ❖ CTA, sections 18-21: used if the lease has expired, rent is outstanding or the lease has been properly terminated for breach and the TT wrongfully refuses, on written demand, to vacate the premises ❖ CTA, sections 25-28: this is an action for possession and can be used if rent is 7 days in arrears or TT has defaulted in observing the lease in a way that entitles the LL to terminate the lease
REMEDY ONLY AVAILABLE IF	The *Commercial Tenancy Act* only applies to commercial tenancies.
BASIS OF REMEDY	*Commercial Tenancy Act* (BC)
ADVANTAGES	Every action taken by the LL against TT is sanctioned by a court order. Therefore, there can be no allegations by a TT that the LL has acted outside of its rights. In a situation in which there has been a great deal of tension between the LL and the TT, having a court order may be helpful.
DISADVANTAGES	Because it involves applications to court, it involves additional time and expense. Therefore, if simply serving a Demand for Possession on the TT may work, that should be the first course of action.
DO	Follow all the provisions of the CTA carefully.
DON'T	
SPECIAL REMARKS	
OTHER REMEDIES PRECLUDED	Section 22 of the CTA specifically provides that "Section 18 to 21 do not prejudice or affect any other right or right of action or remedy that landlords possess in any of the cases provided for." It should be noted, however, that once the LL has taken the position that the lease has been determined (which is required to make this application), other remedies are precluded (see the discussion of termination of lease).
CONSEQUENCES IF WRONGFULLY EXECUTED	As long as all the court orders are complied with, there should be no liability for the LL.
THINKING AHEAD WHEN NEGOTIATING LEASE	There is no need to include a provision in the lease, since these remedies are contained in the *Commercial Tenancy Act*. However, in order to use these remedies, the LL must be entitled to terminate the lease, so the lease should be carefully drafted to indicate what defaults will allow the LL to terminate and when.

DISTRESS	
NATURE OF REMEDY	Distress is a self-help remedy allowing a LL to seize goods **belonging to the TT** located on the leased premises and hold them as security for past due rent. Upon following the steps set out in the *Rent Distress Act*, the LL may sell these goods and apply the proceeds to the overdue rent.
REMEDY ONLY AVAILABLE IF	TT's default is failure to pay rent – this remedy is only for recovery of rent, not for any other default (therefore, only amounts characterized as rent under the lease can be recovered in this way and not, for example, any "damages" the LL alleges TT has caused). Also, a distress can only be levied while the lease is "alive" (i.e., once the LL has terminated the lease, it has lost its right to levy a distress). If a TT is overholding, the Rent Distress Act should be reviewed for the rules in this regard.
BASIS OF REMEDY	Distress is a common law right created by the landlord-tenant relationship. It has been modified to some extent, however, by statute (*Commercial Tenancy Act* and *Rent Distress Act*). One of these modifications, however, is to limit the right of distress to commercial tenancies. There is no complete code to the law of distress. Although there does not need to be a provision in the lease allowing for the LL to levy a distress, such a provision may limit the LL's rights or set out the way in which the remedy can be exercised. The LL should also ensure that its rights to distrain are not curtailed by any other agreements with third parties (non-disturbance agreements, etc.).
ADVANTAGES	The LL has a priority right against the **TT's personal property** (subject to a few exceptions). There is immediate satisfaction of outstanding rent (provided there is enough property to satisfy the obligations) – as opposed to have to start an action against the TT. No court proceedings are required to levy a distress (although, if the distress is not properly or lawfully levied, court proceedings are sure to follow).
DISADVANTAGES	If the LL does not exercise this remedy in accordance with all the rules (i.e., is not entitled to exercise the remedy or does it in a way that is not correct) there are steep penalties.
DO	❖ Engage a professional to levy the distress and provide the bailiff with full information about the overdue rent. It can also be helpful to give the bailiff a copy of the lease, especially if it specifically authorizes a distress (even though such authorization is not required to exercise this remedy). It is not legally required to retain a bailiff to levy the distress, but bailiffs are typically more familiar with the many rules governing distress. ❖ Follow the provisions of the *Rent Distress Act* and *Commercial Tenancy Act* to the letter, otherwise the distress may be unlawful and the LL may be subject to stiff penalties, even though the TT defaulted in paying rent. ❖ Review the lease to determine whether any accelerated rent is due because of a default. Accelerated rent can be distrained for as long as it is properly characterized as rent in the lease. ❖ Seize only such goods as should reasonably yield the amount of the rent past due (i.e. don't "over" distrain). This will not apply, for example, if there is only good that will satisfy the amount of rent outstanding, but its value is much greater than the amount of overdue rent. ❖ Promptly release any goods for which the LL receives a statutory declaration from a third party stating that they do not belong to the TT. ❖ Promptly release the goods if the TT pays the full amount of the arrears and distress costs. ❖ Consider a "walk-in" or "walking" seizure (i.e., a seizure in which the goods are left on the premises), as opposed to physical seizure of the goods, if the chances of the TT removing the goods are small (or if the TT agrees to changing the locks in writing for the purpose of securing the goods). Such a seizure costs less and will likely be less damaging to the landlord-tenant relationship. ❖ Consider before levying the distress whether the TT has enough goods to make it worthwhile and whether there are any priority claims against the proceeds of the distress – a secured creditor with a PMSI takes priority, some *Bank Act* security takes priority, and some Crown claims also takes priority (WCB and SST).
DON'T	❖ Levy a distress if there is no rent overdue (and in some leases rent is not overdue until a certain number of days have passed after the due date or until after a demand is made).

	Rent is never overdue on the same day that it is due. The penalty for levying a distress when no rent is overdue is double the value of the distrained goods. [RDA, s. 10] ❖ Give the TT advance notice that the LL is about to levy a distress – there is no requirement to do so and it may tip the TT off and lead to removal of goods from the premises. ❖ Change the locks unless it is clearly agreed (and documented in writing) that the TT has agreed to the change to the locks and that changing the locks is not a termination of the lease. Otherwise, changing the locks will likely be viewed as a termination of the lease, with all the consequences attached to that remedy. ❖ Levy a distress if the LL has done anything that could be construed as forfeiture of the lease or a re-entry (e.g., changing the locks, etc.). ❖ Levy the distress except during daylight hours. ❖ Levy the distress by forcibly entering the leased premises (not only will it make the distress unlawful, but it is a criminal offence). Breaking or picking the lock to enter is not OK. ❖ Seize any goods other than physical personal property located on the leased premises (the courts have found that intangible property, such as intellectual property or accounts receivable do not qualify). In certain limited circumstances, the LL may be able to seize goods the TT has fraudulent or clandestinely removed from the premises, but this is a special case, and the statute must be carefully followed to make such a distress valid. ❖ Seize "fixtures" (whether the LL's or the TT's), which are exempt from distress (whether removable or not). ❖ Sell the seized property unless all the rules in the *Rent Distress Act* have been followed (regarding timing, etc.). ❖ Levy a distress for any rent that has been overdue for more than 6 years (unless, in the meantime, the TT has acknowledged the rent is due in writing) – *Limitation Act*. ❖ Levy a distress against a bankrupt TT – after the date of an assignment into bankruptcy, the LL can neither begin nor complete (i.e., sell previously distrained goods) a distress. The LL must receive the net proceeds from the bailiff before the assignment into bankruptcy. ❖ Levy a distress if the LL has made an agreement with a third party not to do so. ❖ Levy a distress if the LL has obtained judgement from the court for the rent due – then, it is no longer rent due, but a judgement against the TT and it must be enforced by execution proceedings against the TT. ❖ Seize goods if the TT tenders payment for the rent and costs of the distraint when the LL attempts to levy the distress. ❖ Seize more goods than are required to satisfy the rent due. ❖ Seize goods that you know **do not belong to the TT** or are subject to a purchase money security interest ("PMSI"). If the LL does not know which goods may or may not belong to the TT, then the bailiff should simply be instructed to seize enough goods to satisfy the outstanding rent. ❖ Sue for rent arrears while a distress is ongoing. ❖ Buy goods at the sale of the seized goods – the LL may not buy any of the distrained property, even at fair market value. ❖ Distrain twice for the same outstanding rent. If the goods sold are insufficient, the LL must sue for the balance.
SPECIAL REMARKS	❖ The rules relating to how a distress can be levied are very complex and, in many cases, the distinction between what constitutes a lawful distress and what constitutes an unlawful distress are small and counter-intuitive. ❖ Only a LL who holds the reversionary interest in the lease may levy a distress. Therefore, a tenant can levy a distress against a sub-tenant if the original tenant retains a reversionary interest in the original lease term, but not against an assignee of the entire lease. A receiver or a mortgagee who steps into the shoes of a LL entitled to levy a distress may also exercise this remedy. Also, an assignee of the LL's reversionary interest cannot levy a distress for rent accruing prior to the assignment. ❖ There are some exemptions to chattels that can be seized on distress (trade and other fixtures; things delivered to a tradesman to be worked on – e.g., shoes in a shoe repair shop; perishable items; money, unless it is in a bag or other closed receptable). ❖ The distress can be levied against the goods of the "tenant" or a person who is "liable for the rent". Under the *Rent Distress Act*, the definition of "tenant" includes "a subtenant, the

	assign of the tenant 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" [s. 1], subject to an exception regarding lodgers in s. 4.
OTHER REMEDIES PRECLUDED	If the LL has exercised its right to distress for overdue rent, it cannot exercise any right to terminate until a further default has occurred. Also, the LL has no right to take action for possession as long as it holds distrained goods. Nor can a LL sue for past due rent while a distress for that same rent is in progress. **If the LL has already exercised its right to terminate or re-enter, this remedy is not available. It is also unavailable if the LL has accepted a surrender of the lease by the TT.**
THINKING AHEAD WHEN NEGOTIATING LEASE	❖ Be sure that all amounts payable under the lease are characterized as rent (basic rent, operating expenses, taxes, interest, etc.) and that the lease says they are "recoverable" as rent. ❖ Consider an accelerated rent clause upon default that is characterized as rent, and therefore recoverable by distress. ❖ When negotiating a sub-lease, only by retaining a reversionary interest in the lease does the original tenant acquire the right of distress. This should be considered when determining whether to sub-lease or assign a lease.

SPECIAL CIRCUMSTANCE: INSOLVENCY & BANKRUPTCY OF TENANT	
Special considerations arise when a TT is insolvent or bankrupt. Because of the effect of the *Bankruptcy and Insolvency Act* (Canada) and the *Commercial Tenancy Act* (BC), the LL is unable to exercise many of the remedies otherwise available to it. The law that applies upon the insolvency or bankruptcy of a TT can be quite harsh for the LL: "*The effect of the trustee's right to occupy, retain, assign or disclaim can be quite harsh on the landlord. For as long as three months from the date of the assignment or receiving order, the landlord has no control over the occupation of the premises, is only entitled to a subordinated preferential claim to any surplus assets on the property after the claims of secured and prior preferred creditors have been paid in full, and has no personal claim against a trustee who does not occupy the premises.*" [CCH]	
EFFECT OF LL'S USUAL REMEDIES	If a TT is bankrupt, none of the usual remedies are available to the LL: 1. Affirming the Lease and Suing for Rent – the CTA and BIA contain specific provisions regarding what the LL is entitled to recover from the TT 2. Re-let Premises on TT's Account 3. Terminate/Determine Lease, Re-Enter and Sue for Damages – the CTA and BIA contain specific provisions regarding what the LL is entitled to recover from the TT; also the TT cannot re-enter while the trustee is entitled to occupy the premises 4. Use the CTA to Evict – cannot evict while the trustee is entitled to occupy the premises 5. Distress – cannot levy a distress ["*The landlord is not entitled to distrain the goods of the lessee after the date of the receiving order or assignment, and all goods distrained before that date shall on demand be delivered by the person holding them to the custodian or trustee*." CTA, s. 29(7)]
CIRCUMSTANCES OF TT	
TRUSTEE'S RIGHTS DURING 3-MONTH "GRACE PERIOD"	**Occupy the Premises for 3 Months**: Notwithstanding any provision in the lease, the Trustee may enter into possession of the premises and retain them for 3 months: "*where a receiving order is made against or by a lessee under the Bankruptcy and Insolvency Act (Canada), the custodian or trustee, notwithstanding a condition, covenant or agreement in a lease, has the right to hold and retain the leased premises for a period not exceeding* ***3 months from the date of the receiving order or assignment****, or until the expiration of the tenancy, whichever happens first,* ***on the same terms and conditions as the lessee might have held the premises*** *had no receiving order or assignment been made*." [CTA, s. 29(2)] During this 3-month "grace period", the trustee is entitled to "tie up" the leased premises, whether it occupies them or not. The trustee only becomes liable for occupational rent if it physically occupies the space – and then its obligation to pay occupation rent only exists to the extent that assets of the tenant come into its hands (but this is not limited to assets on the leased premises and is a personal liability of the trustee, and therefore has "super-priority" – i.e., it does not rank 7th out of the preferred claims as the arrears do). During this 3-month period, the trustee must decide whether to disclaim the lease or keep the lease alive so it can assign it. **Assigning the Lease**: The CTA, s. 29(3) gives the custodian or trustee a right to assign the unexpired term of the lease "to as full an extent as could have been done by the lessee had the receiving order or assignment not been made." Such an assignment would likely be part of a sale of the TT's business as a going concern. This, however, puts the trustee in control of who the LL's next tenant will be, instead of the LL. Even though the Lease contains restrictions on assignment, the trustee will be free to assign to any tenant, unless the court considers that the proposed assignee will not be responsible and respectable, personally and financially. In BC, it

	is not a requirement of the assignment that the lease be brought into good standing by paying the arrears. Furthermore, the assignee of the bankrupt TT does not become responsible for those arrears (see BIA, ss. 69 and 178). **Disclaiming the Lease**: Under the BIA, prior to or at the time the Tenant files a proposal, it may disclaim the lease (to do so, the Tenant must also give the Landlord 30 days' notice of the disclaimer). There is a process whereby the Landlord may object to the disclaimer (within 15 days of receiving notice of the disclaimer from the Tenant). If the Tenant does disclaim the Lease (and the Landlord does not successfully contest it), the Landlord has a claim for compensation as set out in the BIA.
OCCUPATION RENT FROM TRUSTEE	The Landlord will be entitled to receive "occupation rent" from the trustee for the time it actually occupies the leased premises: "*the trustee shall pay to the Landlord for the period during which the trustee or the custodian actually occupies the premises from and after the date of the receiving order or assignment* ***a rental calculated on the basis of the lease and payable in accordance with its terms****, except that any payment already made to the landlord as rent in advance in respect of that period,* ***and any payment to be made by the landlord in respect of accelerated rent, shall be credited against the amount payable by the trustee for that period***." [CTA, s. 29(7)] However, under s. 29(9), the trustee will not be personally liable beyond the assets of the TT that actually come into the trustee's hands.
LL'S RIGHT TO ARREARS & ACCELERATED RENT – LL'S RANKING IN BANKRUPTCY SCHEME	If the TT becomes bankrupt, the TT's assets that are subject to security interests will first be realized upon and distributed among the secured creditors in accordance with their security interests. Once the secured assets have been realized upon, other assets are realized upon and distributed first among the preferred creditors of the Tenant. The Landlord ranks 7th in the list of preferred creditors set out in BIA, s. 136, for the following amounts: "*the landlord for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled thereto under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent*" To collect accelerated rent, the lease must provide for it. CTA, s. 29(5) provides that the Landlord only has a preferred claim with respect to 3 months' rent accrued due prior to the receiving order being made and that, with respect to accelerated rent of up to 3 months, the Landlord may prove as a general creditor. To the extent these provisions are inconsistent, the BIA will apply. The trustee cannot recover prepaid rent or a security deposit from the LL, nor can either be set off against accelerated rent or occupation rent payable by the trustee. If the LL does not file a Proof of Claim, the LL will not be entitled to participate in a distribution from the estate of the bankrupt. ***The Landlord's claims for arrears and accelerated rent are subject to there being sufficient property on the leased premises to satisfy those amounts (after secured creditors have realized on the assets in which they hold security interests on the leased premises)***.
DO	If there are sufficient assets (and there never are), the LL may recover up to 3 months of arrears and 3 months of accelerated rent – no more. So stay on top of rental arrears and watch for changes in payment patterns by the TT that may indicate financial difficulties. If necessary,

	levy a distress and complete the distress by sale of the seized assets expeditiously (if a receiving order is made while the distress is still in progress, the seized assets will all have to be turned over the trustee).
DON'T	
THINKING AHEAD WHEN NEGOTIATING LEASE	Include provisions for: ❖ 3 months' accelerated rent upon default; ❖ interest to be payable on rental arrears (so this can be charged on the occupational rent payable by the trustee); and ❖ a GSA over the TT's assets (if the LL is successful in getting this GSA, the security interest created by it must be registered in order to benefit the LL)

Commercial Landlord's Remedies
Special Circumstance – Bankruptcy of Tenant

Special considerations arise when a tenant is insolvent or bankrupt. Because of the effect of the *Bankruptcy and Insolvency Act* (Canada) and the *Commercial Tenancy Act* (BC), a landlord is unable to exercise many of the remedies otherwise available to it.

Consider the worst case scenario: The Tenant is 3 months overdue in paying its rent (the Landlord has been patient and agreed not to terminate the lease and hasn't levied a distress) when a receiving order is issued. The lease does not provide for 3 months' accelerated on default. The trustee does not occupy the premises, but waits the full 3-month "grace period", at the end of which it assigns the balance of the lease to a third party it has chosen to be the Landlord's new tenant. After distribution of the Tenant's assets to its secured creditors, no proceeds remain. Result: The Landlord has lost 6 months of rent (and additional rent) and now has a new tenant it did not approve itself. Could this have been prevented? By the time the receiving order was issued, it was too late.

Remedies Precluded to the Landlord once Receiving Order Issued

Once a receiving order under the *Bankruptcy and Insolvency Act* has been issued/a trustee in bankruptcy has been appointed, a landlord is no longer able to exercise any of the following usual remedies (or there will be no practical benefit in doing so):

6. Affirming the lease and suing for the rent (suing for the rent and obtaining a judgement will not further the landlord's position in relation to other creditors)
7. Re-letting the premises on the tenant's account
8. Terminate/Determine Lease, re-enter and sue for damages (cannot terminate while the trustee is entitled to occupy; suing for the rent and obtaining a judgement will not further LL's position in relation to other creditors)
9. Use the *Commercial Tenancy Act* to evict (a landlord cannot evict while the trustee is entitled to occupy)
10. Distress (a distress, including sale, must be completed before a receiving order is issued; otherwise goods must be returned)

Trustee's Rights During 3-month "Grace Period" – Occupation of the Premises

Notwithstanding any provision in the lease, the trustee may enter into possession of the premises and retain them for 3 months "on the same terms and conditions as the lessee might have held the premises" [CTA, s. 29(2)].During this time, the trustee is entitled to "tie up" the premises, whether it occupies them or not. The trustee only becomes liable for occupational rent if it physically occupies the space – and then its obligation to pay occupation rent only exists to the extent that assets of the tenant come into its hands (but this is not limited to assets on the leased premises and is a personal liability of the trustee, and therefore has "super-priority" – i.e., it does not rank 7th out of the preferred claims as the arrears do).

During this 3-month period, the trustee must decide whether to disclaim the lease or keep the lease alive so it can assign it:

a) **Assigning the Lease**: The CTA, s. 29(3) gives the custodian or trustee a right to assign the unexpired term of the lease "to as full an extent as could have been done by the lessee had the receiving order or assignment not been made." This puts the trustee in control of who the LL's next tenant will be. Even if a lease contains restrictions on assignment, the trustee will be free to assign to any tenant, unless the court considers that the proposed assignee will not be responsible and respectable, personally and financially. In BC, it is not a requirement of the assignment that the lease be brought into good standing by paying the arrears. Furthermore, the assignee of the bankrupt TT does not become responsible for those arrears (see BIA, ss. 69 and 178).

b) **Disclaiming the Lease**: Under the BIA, prior to or at the time the Tenant files a proposal, it may disclaim the lease (to do so, the Tenant must also give the Landlord 30 days' notice of the disclaimer). There is a process whereby the Landlord may object to the disclaimer (within 15 days of receiving notice of the disclaimer from the Tenant). If the Tenant does disclaim the Lease (and the Landlord does not successfully contest it), the Landlord has a claim for compensation as set out in the BIA.

Trustee's Obligation to Pay Occupation Rent to the Landlord

The Landlord will be entitled to receive "occupation rent" from the trustee for the time it actually ***occupies*** the leased premises (any accelerated rent the landlord receives will be deducted, however). The rent is calculated in accordance with the lease [CTA, s. 29(7)]. However, under s. 29(9), the trustee will not be personally liable beyond the assets of the TT that actually come into the trustee's hands.

Landlord's Right to Share in Bankruptcy Payout

If the TT becomes bankrupt, the TT's assets that are subject to security interests will first be realized upon and distributed among the secured creditors in accordance with their security interests.

Once the secured assets have been realized upon, other assets are realized upon and distributed first among the preferred creditors of the Tenant. The Landlord ranks 7th in the list of preferred creditors set out in BIA, s. 136, for the following amounts:

> "*arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled thereto under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent*"

To collect accelerated rent, the lease must provide for it.

CTA, s. 29(5) provides that the Landlord only has a preferred claim with respect to 3 months' rent accrued due prior to the receiving order being made and that, with respect to accelerated rent of up to 3 months, the Landlord may prove as a general creditor. To the extent these provisions are inconsistent, the BIA will apply.

The trustee cannot recover prepaid rent or a security deposit from the LL, nor can either be set off against accelerated rent or occupation rent payable by the trustee.

If the LL does not file a Proof of Claim, the LL will not be entitled to participate in a distribution from the estate of the bankrupt.

The Landlord's claims for arrears and accelerated rent are subject to there being sufficient property on the leased premises to satisfy those amounts (after secured creditors have realized on the assets in which they hold security interests on the leased premises).

Do's for the Landlord

- File a Proof of Claim – if the LL does not file a Proof of Claim, the LL cannot share in the distribution of proceeds of the bankrupt's estate
- If there are sufficient assets (and there never are), the LL may recover up to 3 months of arrears and 3 months of accelerated rent – no more. So stay on top of rental arrears and watch for changes in payment patterns by the TT that may indicate financial difficulties. If necessary, levy a distress and complete the distress by sale of the seized assets expeditiously (if a receiving order is made while the distress is still in progress, the seized assets will all have to be turned over the trustee).

Thinking Ahead when Negotiating Lease

Include provisions in leases for:

- ❖ 3 months' accelerated rent upon default;
- ❖ interest to be payable on rental arrears (so this can be charged on the occupational rent payable by the trustee); and
- ❖ a GSA over the TT's assets (if the LL is successful in getting this GSA, the security interest created by it must be registered in order to benefit the LL)

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These comments are an outline of some general legal points with respect to the rights of landlords against defaulting commercial tenants. We would be pleased to discuss particular tenancies and issues of concern with you as they arise.

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