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Commission de réforme du droit

DISTRESS FOR RENT
IN COMMERCIAL TENANCIES

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CHAPTER 1

INTRODUCTION

Where a tenant of commercial premises (such as a retail store, office or warehouse) is in arrears of rent, the landlord can exercise the ancient remedy of "distress" and enter the rented premises, seize (or "distrain") the tenant's goods found there, and sell them to satisfy the rent arrears.[1] The landlord does not need any prior court approval to do this; distress is a private "self-help" remedy. It is an exception to the general rule that forbids remedies against property without due process of law.

While those basic elements of the law of distress can be stated very simply, the practical application of this remedy is far more intricate and involves "complex bodies of rules, to be found scattered through centuries of case law and statute books, governing the conditions for exercise and every step of the procedure . . . ."[2] Distress is best described as an area of arcane rules accessible only to specialized lawyers. Nor is this situation relieved by the often impenetrable language of the two Manitoba statutes (*The Landlord and Tenant Act* and *The Distress Act*) that restate some of those rules.

The antiquity, inaccessibility and problems of the law in this area were explored in great detail in the Commission's *Discussion Paper on Distress in Commercial Tenancies* issued in May, 1990. The Discussion Paper sought to elicit the opinions and concerns of the public on these problems and on possible options. It was distributed to various concerned individuals and organizations. Five written briefs were received in response and were invaluable to our deliberations. The Commission would like to thank the respondents for their thoughtful consideration of the issues and for taking the time to make their opinions known.

The chapters of this Report are arranged thematically by issue. Each chapter briefly recaps the current law and nature of the legal problem for the specific issue addressed,[3] outlines and explains the Commission's recommendations for reform, and comments on the statutory form given to each recommendation in the draft legislation accompanying this Report.

Chapter 2 considers whether the right of distress should be retained in commercial tenancies. It goes on to lay the foundations for the new statutory model proposed by the Commission. Chapters 3, 4 and 5 respectively examine the areas of seizure and sale, priorities and remedies. Chapter 6 contains a list of the recommendations made in this Report.

The draft legislation proposed by the Commission is contained in Appendix A. Appendix B contains a list of all recipients of, and respondents to, the previous Discussion Paper.

This Report is the first in a series of Commission Reports resulting from its long-term project of modernizing the legal response to the issues currently addressed by *The Landlord and Tenant Act.*

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[1]The remedy of distress has been abolished for residential and agricultural tenancies: see, respectively, *The Residential Tenancies Act*, C.C.S.M. c. R119, s. 192(1); *The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 76.

[2]The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 9.

[3]The Discussion Paper will continue to have the most comprehensive statement of the current law for those interested in its specific details.

CHAPTER 2

THE RIGHT OF DISTRESS

A. ABOLITION OR RETENTION?

After much debate, the Commission has decided not to recommend the abolition of the remedy of distress in commercial tenancies, but recommends instead its reform and modernization.

The numerous arguments in favour of abolition are usually elaborations on two basic objections.[1] First, the self-help nature of distress as a privately-executed remedy without prior judicial authorization is seen as a legal anachronism that "is difficult to reconcile with modern concepts of debtor protection."[2] Secondly, the traditional priority that distress affords landlords over other creditors (both secured and unsecured) is seen as a further anachronism that is no longer justifiable.

The arguments in favour of retaining distress are usually variations on the general theme that landlords occupy a uniquely vulnerable position among creditors and therefore need this special remedy. For example, landlords are often less able than other creditors to spread their credit risk. Also, while other creditors can quickly move to minimize their losses by withdrawing service from a problem debtor, landlords face hindrances in this regard because the rental of commercial space is an inherently more cumbersome, client-specific service than that provided by most other businesses.

While valid arguments are to be found on both sides, the Commission is ultimately most persuaded by the consideration that distress is fundamentally a pragmatic, workable remedy that, whatever its faults, is nevertheless an important and entrenched part of modern commercial reality. We believe that the commercial setting of this issue is a crucial factor that should not be underestimated. The standard arguments favouring the abolition of distress are most compelling for residential tenancies, where greater legal safeguards are required to offset the imbalances in bargaining power and commercial experience that commonly characterize landlord-tenant relationships in this area.

The commercial setting of this issue also results in a further consideration. Commercial landlords and tenants have, in reliance on the continued existence of distress, arranged their affairs accordingly in leases that often will extend well into the future. Settled expectations and vested interests should not lightly be disturbed except to remedy an indisputably obvious injustice.

Differential treatment of residential and commercial tenancies is the usual Canadian approach to this issue. The Law Reform Commission of Saskatchewan has, without

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[1] A full discussion of both sides of the issue of abolition or retention is found in Chapter 3 of Manitoba Law Reform Commission, *Distress in Commercial Tenancies* (Discussion Paper, 1990) 27-37.

[2] Property Law and Equity Reform Committee (New Zealand), *Final Report on Legislation Relating to Landlord and Tenant* (1986) 70.

equivocation, affirmed the view that there is a positive, continuing need for and importance of some form of distress remedy in commercial tenancies;[3] the Ontario and British Columbia Law Reform Commissions have also (albeit reluctantly) recommended against abolishing distress in commercial tenancies.[4] Abolition of residential distress coupled with retention of commercial distress is in fact the current legislative norm in most Canadian jurisdictions.[5]

While we certainly have some reservations about the remedy of distress, the Commission does not believe that these reservations are sufficiently compelling to warrant its abolition in commercial tenancies. However, the Commission also recognizes that the current law of distress is hopelessly encrusted with many archaic aspects, inconsistencies and oddities that hinder both its effectiveness in certain situations and its accessibility to the general public. There is a great need for the law in this area to be reformed, simplified and modernized. The remainder of this Report is concerned with that task.

RECOMMENDATION 1

The remedy of distress should be retained in commercial tenancies. It should, however, be reformed, simplified and modernized to suit current commercial needs.

In order to give effect to our recommendations, it will be necessary to enact new legislation. To facilitate this and to help explain and illustrate our proposals, Appendix A contains a draft statute that we have prepared, namely *The Distress in Commercial Tenancies Act*. It contains all the law that would be directly related to distress as a remedy. Other statutes would, however, still contain occasional provisions that relate to distress in a broader context -- for example, the provisions dealing with various rights of landlords, trustees and under-lessees on the bankruptcy of a tenant would continue to be found in *The Landlord and Tenant Act*.[6]

As an aid to our readers, all references to relevant sections of our draft statute appear in italics and square brackets throughout the text of this Report.

RECOMMENDATION 2

The recommendations contained in this Report should be implemented by enactment of a new statute similar to the draft Distress in Commercial Tenancies Act set out in Appendix A.

B. THE RIGHT OF DISTRESS

1. Role of Statute

A major accessibility problem exists for the current law of distress simply because its rules are spread across numerous statutes and centuries of case law. This problem is all the more acute

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[3]Law Reform Commission of Saskatchewan, *Proposals Relating to Distress for Rent* (1993).

[4]Ontario Law Reform Commission, *Landlord and Tenant Law* (Report, 1976); Law Reform Commission of British Columbia, *Distress for Rent* (Report #53, 1981). However, various law reform bodies in other parts of the Commonwealth have recommended abolition of distress in commercial tenancies: The Law Commission (England), *Distress for Rent* (Report #194, 1991); *Report of the Committee on the Enforcement of Judgment Debts* (1969) Cmnd. 3909 [The Payne Committee of England]; Law Reform Committee of South Australia, *Reform of the Law of Distress* (Report #66, 1983); Property Law and Equity Reform Committee (New Zealand), *supra* n. 2.

[5]*Williams and Rhodes Canadian Law of Landlord and Tenant*, vol. 1 (6th ed., 1988) 8-1.

[6]*The Landlord and Tenant Act*, C.C.S.M. c. L70, ss. 46-47. For further discussion, see Chapter 5 under "Consequential Amendments".

when one considers that the remedy is designed to be a self-help remedy exercisable by private persons not necessarily trained in finding finer points of law.

To resolve this problem, the Commission proposes that the law of distress be codified. In other words, the common law of distress should be abolished and the rules of distress should be set out only in legislation *[s. 6]*.[7]

RECOMMENDATION 3

The law of distress should be codified as a purely statutory remedy.

It should be noted that abolishing the common law of distress for rent will have an effect beyond landlords and tenants. Certain bodies are given the statutory ability to collect certain debts by a right of distress that is either explicitly[8] or implicitly[9] tied to and determined by the law of distress for rent. There seems to be no reason in principle why distress levied by these bodies could not be governed by our proposed legislation, but this should properly be the subject of discussion between those bodies and the provincial government. If a body prefers to retain all or part of the current law, the provincial government can make the appropriate amendments to its enabling statute.

2. Application of Statute

(a) Commercial tenancies only

Distress as a statutory remedy should continue (as now) to be available only in commercial tenancies. Our draft Act reiterates that distress does not apply to agricultural or residential tenancies *[s. 2]*.

(b) Limited contracting out

Sometimes parties to a tenancy agreement want to specify in their contract one or more rights or obligations about distress that differ from the statutory provisions. So long as the only people affected by any proposed change are the parties themselves (who will have mutually agreed on the alteration), they should continue to be free to restrict or waive the statutory rules. However, parties should not be able to alter the statute to the detriment of someone who is not a party to the contract and who has no opportunity to bargain for or challenge any change in the usual legal rules.

Therefore, the Commission's statutory model only forbids restriction or waiver of specified sections of the statute that involve third party rights *[s. 3]*.

RECOMMENDATION 4

Parties to a tenancy agreement should be able to restrict or waive any part of the distress statute unless it would affect the rights of third parties.

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[7]Of course the judiciary will continue to interpret the wording of such legislation as required.

[8]*The Manitoba Hydro Act*, C.C.S.M. c. H190, s. 27(1); *The Municipal Act*, C.C.S.M. c. M225, ss. 697(2) and (5); *The City of Winnipeg Act*, S.M. 1989-90, c. 10, ss. 549(1)(b) and (2). All concern collection of debt arising out of the provision of utilities.

[9]*The Municipal Act*, C.C.S.M. c. M225, s. 786(3); *The City of Winnipeg Act*, S.M. 1989-90, c. 10, s. 224(1). These concern the indirect collection of tax arrears through diversion of rent.

(c) Position of the Crown

Currently, the Crown (as a tenant) is immune from distress.[10] As well, the Crown (as a landlord) is unhindered by most statutory changes to the common law of distress since it is not bound by *The Landlord and Tenant Act*.[11]

While arguments may exist in favour of binding the Crown in the area of distress, the Commission believes that this issue cannot be resolved in isolation from the rest of Crown privilege. For example, the Crown is also immune from any form of execution issued by a court.[12] If Crown immunity to distress were statutorily removed, it would create the anomalous situation that a landlord could use extra-judicial "self-help" to distrain for arrears, but if the landlord instead sued for the arrears, no court could issue execution against the Crown to force payment of that judgment.

Therefore, until the entire question of Crown privilege is reviewed, the Commission does not recommend that the Crown be bound by the statutory codification of distress. For the Crown, the common law of distress and its traditional immunity and privilege should continue to exist.

RECOMMENDATION 5

The Crown should not be bound by any statutory codification of distress.

3. Nature of the Statutory Right of Distress

(a) Self-help or prior judicial authorization?

A common criticism of distress concerns its self-help nature as a privately-executed remedy without need for prior judicial authorization. This seems to give landlords an unjustifiable advantage over other creditors, who must obtain a slower and costlier court judgment before being able to attach or seize a debtor's goods. This criticism moved the Ontario Law Reform Commission to recommend replacing distress with a system of "rent execution" where an *ex parte* court order must be obtained before any goods are seized.[13]

On the other hand, some uphold the principle of self-help by drawing a parallel between landlords and secured creditors who also do not require prior judicial authorization to realize on their security. As stated by the British Columbia Law Reform Commission:

> We see distress as serving a security function and question whether it is necessary or desirable to subject the landlord to procedural requirements that are any more onerous than those imposed on a secured creditor who wishes to realize on collateral. We believe the tenant is sufficiently safeguarded if he has an adequate remedy if a wrongful seizure does occur.[14]

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[10] *Secretary of State for War* v. *Wynne*, [1905] 2 K.B. 845; *A.G. Canada* v. *Gordon*, [1925] 1 D.L.R. 654 (Ont. S.C.).

[11] *The Landlord and Tenant Act*, C.C.S.M. c. L70. Therefore, unlike other landlords, the Crown can distrain on goods located on any of its tenant's lands wherever they are situated: *Williams and Rhodes*, *supra* n. 5, at 8-56. The Crown is, however, bound by *The Residential Tenancies Act* so it too cannot distrain against residential tenants: *The Residential Tenancies Act*, C.C.S.M. c. R119, ss. 5 and 192(1).

[12] *The Proceedings Against the Crown Act*, C.C.S.M. c. P140, s. 16(6).

[13] Ontario Law Reform Commission, *supra* n. 4, at 217-218 and 225-226.

[14] Law Reform Commission of British Columbia, *supra* n. 4, at 37.

We concur with this approach. Moreover, maintaining distress as a self-help remedy seems especially pragmatic for our unique Manitoba situation where (unlike Ontario, British Columbia or any other Canadian jurisdiction) a landlord may not distrain for an unlimited amount of arrears but is restricted to collecting (in most cases) three months' arrears.[15] It makes little sense to slow down the process and increase costs when the landlord already has a quantitatively restricted remedy. Since this restriction will be continued in our proposed model *[s. 4(2)]*,[16] the self-help approach continues to be reasonable.

RECOMMENDATION 6

Distress should continue to be a self-help remedy, without the need to obtain prior judicial authorization.

(b) Basic nature of the remedy

The proposed statutory right of distress would continue to encompass both the right to seize goods of the tenant and the right to dispose of them to satisfy arrears *[s. 4(1)]*. The common law rule should also be statutorily continued that the act of distress suspends a landlord's right to sue for the same arrears until the seized goods are sold or redeemed *[s. 4(3)]*.[17] It would be unfair to tenants and other creditors to favour landlords with a special, extra-judicial self-help remedy and yet allow them a simultaneous court remedy.

The proposed statutory right of distress would also continue to be predicated on the existence of both a landlord-tenant relationship and arrears of rent, although some reforms are recommended within these categories.

(i) The landlord-tenant relationship

In our draft Act, the definitions of "landlord" and "tenant" make it clear that each includes heirs, assigns, personal representatives and successors in title. This continues statutory abrogation of certain negative common law rules.[18]

Currently, a Manitoba landlord may distrain after a tenancy agreement has terminated (whether by expiry or by eviction) only if the landlord retains an interest in the premises and the tenant remains in possession of the premises.[19] (It is perhaps also arguable that this ability to distrain is limited to the six month period following termination of the tenancy agreement.)[20] In any event, the requirement that the tenant must remain in possession means that a landlord cannot first terminate the tenancy agreement by padlocking the premises to retake possession and then distrain. A landlord must always distrain first and padlock second. This creates technical

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[15]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 29(1). Distress is limited to three months' arrears where the rent is payable quarterly or more frequently, or to one year where the rent is payable less frequently than quarterly.

[16]See the discussion concerning this restriction in Chapter 4.

[17]*Williams and Rhodes, supra* n. 5, at 7-25. The suspension does not depend on whether the value of the seized goods are sufficient to satisfy the arrears.

[18]Currently, see: *The Landlord and Tenant Act*, C.C.S.M. c. L70, ss. 29(3), 31 and 32. At common law, the right to distrain was not assignable, could not be held as security for a debt, could not apply to rent seck, and ceased upon the landlord's death.

[19]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 30.

[20]This depends on whether the English *Landlord and Tenant Act, 1709*, 8 Anne, c. 18, continues to be unsuperseded received law in Manitoba.

difficulty by forcing a petty and meticulous observance of the order in which rights are asserted -- an observance which serves only to elevate form over substantive rights.

The Commission recommends reform of this area by clarifying that a landlord must distrain within six months of the termination of the tenancy agreement and by removing the requirement that the tenant must remain in possession. Of course, no change should be made to the requirement that the landlord must continue to have an interest in the premises *[s. 7]*.

RECOMMENDATION 7

A landlord who continues to have an interest in the premises should be allowed to distrain within six months of the termination of a tenancy agreement even if the tenant is no longer in possession of those premises.

(ii) Arrears of rent

This area contains a number of issues.

The common law has traditionally characterized rent as compensation that is directly and strictly attributable to the use or enjoyment of land. This definition sometimes causes ambiguity in a modern commercial context. For example, some leases define service charges, insurance premium reimbursements and other tangential obligations as "rent". While the tenant's continued occupation would certainly depend on payment of those amounts, it is unclear whether a landlord could distrain at common law for such "tangential rent" as it is not, strictly speaking, directly attributable to the use or enjoyment of land.[21]

Like the Saskatchewan Law Reform Commission, we view this uncertainty as undesirable in a modern commercial context.[22] Yet any statutory definition must be careful not to be so wide that landlords could obtain the self-help remedy of distress for unrelated debts owed to them by tenants by the simple expedient of naming those payments as "rent" in the tenancy agreement.

Therefore, the Commission recommends that the cost of any service, area or thing that is provided by the landlord for the tenant under the terms of the tenancy agreement should be considered "rent" so long as it is related to the use or occupancy of the rented premises. In a similar vein, a statutory definition of "rent" should also clarify that it includes any interest that is payable on arrears under the terms of the tenancy agreement.

RECOMMENDATION 8

A landlord should be able to distrain for "tangential rent" that is related to the use or occupancy of the rented premises and for any interest on arrears specified by the lease.

Another issue concerns the amount of arrears for which a landlord may distrain. As already mentioned, the proposed draft statute continues to limit the right of distress to the collection of three months' arrears where the rent is payable quarterly or more frequently, or to the collection of one year's arrears where the rent is payable less frequently than quarterly *[s. 4(2)]*.[23]

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[21]See discussion of this issue in The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 20-22.

[22]Law Reform Commission of Saskatchewan, *supra* n. 3, at 13-14.

[23]A full discussion of the Commission's reason for retaining this restriction is found in Chapter 4.

A third issue concerns arrears that accrue after the date of distress. Since a landlord may currently distrain only for rent that is in arrears at the date of distress, the landlord may not use any proceeds of that distress sale to satisfy arrears that arose after the original distress. In a situation where new arrears have accrued, the landlord must nevertheless return to the tenant any "overplus"[24] from the sale or any unsold seized goods and then must pursue a separate remedy to collect the new arrears. This could include making another distress. Due to the repetitive nature of rental obligations, a landlord could end up having to distrain repeatedly.

Although this process may appear to be cumbersome, the Commission does not recommend reform on this point. If a landlord could lawfully apply the proceeds of one seizure to arrears accruing later, it would simply encourage landlords to distrain "on speculation" -- that is, distrain excessively in the expectation of further arrears. It would carry the concept of "self-help" to ungovernable extremes. Therefore the Commission's statutory model makes no provision allowing sale proceeds to be applied to arrears arising after the date of distress.

RECOMMENDATION 9

A landlord should not be able to apply distress sale proceeds to arrears that accrue after the date of distress.

Finally, there is the issue of "set-off". At common law, a tenant was not allowed to make any deductions from rent before paying it. A landlord was therefore entitled to distrain for the entire amount of rent in arrears. A tenant is now given the statutory right to set-off against rent due any debt owing to the tenant by the landlord, provided that the tenant gives notice of set-off in the required form before or after the seizure.[25]

The right of set-off in this context is basically a self-help parallel to the right of a defendant in a court action to sue by counterclaim and thereby reduce the amount of the ultimate judgment. Where one party is allowed to use a self-help remedy, it seems only fair to allow the other party to assert a mitigating claim by self-help rather than having to sue in court.

Accordingly, our proposed statute continues a tenant's right of set-off. Written notice and particulars of the set-off must be given to the landlord before or after the seizure of goods *[s. 5]*. If a landlord disputes the set-off in whole or in part, the landlord can bring a court application to resolve the matter *[s. 27]*.[26]

RECOMMENDATION 10

Upon giving written notice and particulars before or after distress occurs, a tenant should continue to be able to set-off against the rent due any debt justly due to the tenant from the landlord.

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[24]Overplus means any sale proceeds that exceed the original arrears plus certain allowable costs.

[25]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 39.

[26]Court jurisdiction over distress disputes is discussed in Chapter 5.

CHAPTER 3

SEIZURE AND SALE

Complexity characterizes the current common law and statutory rules that specify what goods a landlord may seize, how those seized goods must be held, and how they must be sold. The Commission proposes to simplify and streamline this area.

A. GOODS SUBJECT TO DISTRESS

1. On the Premises

Currently, the general rule is that a landlord can distrain only upon goods that are located on the leased premises.[1] This general rule is retained in the proposed statutory model *[s. 1 ("premises") and s. 8(1)]*.

Sometimes factual ambiguity may arise about the extent of leased premises. For example, whether a landlord can seize a tenant's vehicle located on a parking lot adjacent to the demised premises will depend on the terms of the lease.[2] The Commission prefers to leave the resolution of such ambiguity to the lease or to the courts, given the unlikelihood of being able to anticipate and address all possible scenarios through a substantive statutory definition of "premises".

There are currently some exceptions to the general rule that result in a landlord being able to distrain elsewhere than on the leased premises. For example, the parties can contractually agree that distress can occur on lands of the tenant other than the leased premises. However, the Commission's proposed model would prevent the parties from restricting or waiving the statutory requirement that seizure must occur only on the rented premises *[s. 3]*.

Another exception to the general rule is that the Crown can distrain on any land of the tenant wherever situated. As previously discussed, this privilege will continue since the Commission does not propose to bind the Crown to any new statutory regime.[3]

The major practical exception to the general rule is contained in section 40 of *The Landlord and Tenant Act*. Where a tenant fraudulently or clandestinely removes goods from the premises, a distraining landlord has the right (within 30 days of the removal) to seize those goods wherever they might be, unless they have been sold to a purchaser in good faith for value.

Thus, goods may be seized off the leased premises from the tenant or third parties based on a landlord's personal assessment of fraud and good faith that is (at best) non-judicial or (at worst) self-interested. While self-help may be an expedient remedy between the parties themselves, the

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[1]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 35.

[2]The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 36.

[3]There are also other exceptions to the general rule that involve cattle on the highway but these would already be obsolete in Manitoba since distress in agricultural tenancies has been abolished.

methodology of self-help becomes more problematic when the rights of third parties are brought within its ambit. There is greater potential for both legal and physical conflict. The onus of challenging an unjust seizure is put on the third party, who becomes inappropriately drawn into a self-help dispute.

The Commission proposes a wholesale replacement of the landlord's tracing ability with an action for damages against any tenant who, with intent to defeat, hinder or delay the landlord's right of distress, removes goods from the rented premises or disposes of all or part of his or her interest in the goods *[s. 24(a)]*. This cause of action is included in the concept of "tenant misconduct", more fully discussed later in this Report.

RECOMMENDATION 11

A landlord should be able to distrain only upon goods that are located on the rented premises.

RECOMMENDATION 12

Every tenant commits tenant misconduct and should be liable in damages to the landlord where that tenant, with intent to defeat, hinder or delay the landlord's right of distress, removes goods from the rented premises or disposes of all or part of his or her interest in the goods. The landlord should have no ability to seize such goods off the rented premises.

2. What Goods May Be Seized?

The rules that currently govern this aspect of distress are highly technical and often confusing. The general statutory rule (overturning the common law) is that the landlord may seize only those goods on the premises that belong to the tenant; however, there are some exceptions that allow the seizure of goods technically belonging to third parties.[4]

There are also common law and statutory exemptions that prevent the seizure of certain types of goods belonging to a tenant. The common law exemptions tend to be quite arcane, accessible only to those well-versed in this area of the law.[5] The statutory exemptions are either irrelevant in a commercial context (being largely left over from the days when distress was available in residential and agricultural tenancies)[6] or are simply out of date in a modern commercial context.[7]

The Commission proposes that this area be greatly simplified; a landlord should be able to seize only the goods of the tenant. The concept of "goods" should be broadly defined as all tangible personal property, including money, but excluding tenant's fixtures *[s. 1]*.

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[4]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 37. For example, a landlord can seize goods on the premises that belong to the tenant's immediate family, or goods owned by third parties who have derived their title from the tenant by way of gift, mortgage, assignment or other method.

[5]For example, a tenant's money on the premises is not distrainable unless the tenant had placed it in a closed purse or bag prior to the distraint: *East-India Company* v. *Skinner* (1695), Comb. 342; 90 E.R. 516 (K.B.). The quaint rationale for this rule is that, if seized money is not thus distinguished from the landlord's own money and becomes mixed up with it, the *same* bills and coins which were seized could not be returned to the tenant in the event of an unlawful seizure. Nor is it sufficient for the landlord to put seized money in a closed purse or bag because, at the moment of distraint, the money was not already distinguishable.

[6]For example, exemptions like a family's bedding, ordinary wearing apparel, and cooking utensils: *The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 36(1)(a), (b) and (c).

[7]For example, *The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 36(1)(e), exempts the "tools, agricultural implements and necessaries used by the debtor in the practice of his trade, profession or occupation, to the value of $600." whereas a similar exemption in s. 23(1)(f) of *The Executions Act*, C.C.S.M. c. E160, is valued at $7,500.

"Tenant's fixtures" are chattels that a tenant affixes to the land for the purposes of trade, domestic convenience or ornament; unlike ordinary fixtures, they do not permanently become part of the land through immediate passage of title to the landowner. The tenant has the right to sever and remove, sell or encumber those chattels during the lease[8] and the right to remove and keep them upon the termination of the lease. An execution creditor can seize this interest of the tenant and sell the fixtures under execution just like any chattel.[9] Yet for the purposes of distress, tenant's fixtures are considered to be "land" and therefore cannot be distrained at common law[10] even if there are no other goods on the premises for a landlord to seize.[11]

Several Canadian law reform commissions have recommended (explicitly or by implication) that landlords should be allowed to seize tenant's fixtures.[12] However, after careful consideration, the Manitoba Law Reform Commission has decided to affirm the current law in this area. While we have recommended retaining distress as a remedy, we would not want any undue extension of its self-help reach. While there are (depending on the circumstances) valid arguments both for and against allowing distress of tenant's fixtures, it seems better, as a matter of policy, to retain this limitation on landlords' self-help power.

To enforce this limitation, the Commission's model provides that a landlord who seizes tenant's fixtures commits actionable wrongful distress and would be liable to the tenant in damages *[s. 22(1)(m)]*.

RECOMMENDATION 13

A landlord should not be allowed to distrain tenant's fixtures. Seizure of tenant's fixtures should constitute wrongful distress.

Distrainable "goods of the tenant" should mean any goods in which the tenant has any right or interest, with only two exceptions -- where the right or interest of the tenant is limited to:

(1) a temporary right to possession (for example, where goods are on loan from another), or

(2) a lien on the goods for their storage or for improvement or repairs made to them (such as a garagekeeper's lien).

There should be no list of exempted goods; this concept was more appropriate in the past to prevent personal hardship when residential distress was allowed.

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[8] *Argles* v. *McMath* (1894), 26 O.R. 224; aff'd (1896), 23 O.A.R. 44 (C.A.).

[9] *Id.* See also *Liscombe Falls Gold Mining Company* v. *Bishop* (1904), 35 S.C.R. 539 at 545, 547-48 (*obiter*).

[10] One case possibly suggests a gloss on this absolute rule: tenant's fixtures are "not liable to be distrained; that is, at all events, if not restorable in the plight in which it was before the distress. . . .": *Howell* v. *Listowell Rink and Park Co.* (1886), 13 O.R. 476 at 492 (C.A.).

[11] *Williams and Rhodes Canadian Law of Landlord and Tenant*, vol. 1 (6th ed., 1988) 8-65 to 8-66.

[12] The British Columbia and the Ontario Law Reform Commissions did not explicitly discuss the issue of tenant's fixtures in their Reports. However, since Ontario's proposed "rent execution" would allow a landlord to seize whatever goods would be exigible in an execution, it seems reasonable to conclude that their plan intends to reverse the current law preventing distress of tenant's fixtures: Ontario Law Reform Commission, *Landlord and Tenant Law* (Report, 1976) 218-219. British Columbia's proposals also incorporate execution law in this area and their draft statute's definition of "goods" includes "other things attached to or forming part of the land that may be severed and sold", which clearly contemplates tenant's fixtures now being subject to seizure: Law Reform Commission of British Columbia, *Distress for Rent* (Report #53, 1981) 42. The Saskatchewan Law Reform Commission, in proposing to amalgamate distress with *The Personal Property Security Act* by giving landlords a deemed security interest with super-priority under that statute, explicitly stated that tenant's fixtures would become distrainable since fixtures are already defined as "goods" under the PPSA and may be subject to a security interest: Law Reform Commission of Saskatchewan, *Proposals Relating to Distress for Rent* (1993) 16-17.

In the current law, it is not clear who bears the onus of identifying third party goods. There is no positive duty on the tenant, whose self-interest is not advanced by identifying these goods. Landlords are usually in no position to be able to identify third party goods. It seems unfair to make the third party owner responsible for coming forward when that person has no way to know that distress has occurred.

Our proposed statutory model resolves this issue by placing a duty on every tenant to identify as soon as possible to a landlord who is exercising a right of distress all goods that are not goods of the tenant *[s. 8(2)]*. A tenant who is not present when the distress occurs will be notified of the obligation in the notice of distress *[s. 12(2)(f)]*. A tenant who fails to identify commits tenant misconduct and becomes liable in damages to the landlord *[s. 24(c)]*.

RECOMMENDATION 14

A landlord should be able to seize only the goods of the tenant, meaning any tangible personal property in which the tenant has any right or interest except one that is limited to (1) a temporary right to possession or (2) a lien on the goods for their storage or for improvement or repairs made to them. There should be no list of exempted goods.

RECOMMENDATION 15

A duty should be placed on every tenant to identify third party goods as soon as possible to a distraining landlord. Failure to identify should constitute tenant misconduct.

3. What Quantity of Goods May be Seized?

The Commission proposes to retain the current rule that a landlord may only distrain sufficient goods to satisfy arrears and recoverable costs.[13] In the proposed scheme, it would constitute actionable wrongful distress for a landlord knowingly to seize goods that are unreasonably in excess of the amount required to satisfy the landlord's claim *[s. 22(1)(j)]*.

RECOMMENDATION 16

A landlord should be able to seize only enough goods to satisfy the landlord's claim. Excess seizure should constitute wrongful distress, entitling the tenant to damages.

B. DISTRESS PROCEDURE

1. Who May Distrain?

Currently, a landlord in Manitoba may distrain personally or by an agent. There is no requirement that a sheriff or other peace officer be used.[14] However, anyone "used by others to levy distress or seize goods" is a "collection agent" within the meaning of *The Consumer*

[13]*The Landlord and Tenant Act*, C.C.S.M. c. L70, ss. 29(2) and 51(1).

[14]See, *e.g.*, *The Landlord and Tenant Act*, C.C.S.M. c. L70, ss. 41 and 48; *The Distress Act*, C.C.S.M. c. D90, s. 6.

Protection Act[15] and must either be licensed in accordance with that Act or be an employee of the landlord.[16]

Because legal problems often arise due to inexperienced or overzealous landlords personally carrying out distress procedures, the suggestion is sometimes made that only a sheriff or other peace officer should be empowered to effect the distress.[17] This is realistic (and conceptually consistent) only if prior judicial authorization becomes a prerequisite to effecting distress. Otherwise, mandating the use of the sheriff results in employing a publicly-funded (and busy) arm of the court system to intervene in a private matter.

Nor does the Commission think it is realistic to prohibit landlords from effecting distress personally, thereby necessitating the use of a private agent. This simply adds expense to the distress process. Moreover, a tenant's right (in our proposed system) to sue for wrongful distress should act as a sufficient deterrent to an overzealous landlord.

The Commission therefore recommends retention of the current law in this area *[s. 1 ("collection agent") and s. 9]*. To enforce the use of collection agents only, use of an unauthorized agent should constitute actionable wrongful distress by both the landlord and the unauthorized agent *[s. 22(2)]*.

RECOMMENDATION 17

A landlord should be able to effect distress personally or by an agent who need not be a sheriff or peace officer but will be a "collection agent" within the meaning of The Consumer Protection Act, licensed and governed by that statute. It should constitute wrongful distress to use an unauthorized agent.

2. At What Hour May Distress Occur?

In Manitoba there is currently no general statutory rule governing the times of day during which distress may occur,[18] but the common law provides that distress cannot be made at night (which is defined as the hours between sunset and sunrise).[19] It has also been generally accepted that distress cannot be made on a Sunday.

Clearly, the common law does not accord with modern commercial reality, given that some businesses (like nightclubs, movie theatres and certain restaurants) are mainly or only open at night and all businesses may now stay open on Sundays.

The Commission recommends that distress should be made at any hour that is reasonable according to the use of the premises *[s. 10]*. This achieves for modern times the apparent purpose of the common law rules, namely that distress should ideally occur when the business is open and the tenant is present.

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[15]*The Consumer Protection Act*, C.C.S.M. c. C200, s. 1(1).

[16]*The Consumer Protection Act*, C.C.S.M. c. C200, s. 102(2).

[17]This was recommended by Ontario Law Reform Commission, *supra* n. 12, at 214-215 and 226, although it also contemplated the use of private bailiffs. The only province that has legislated such a requirement is Alberta: *Seizures Act*, R.S.A. 1980, c. S-11, s. 18(a).

[18]Section 41 of *The Landlord and Tenant Act*, C.C.S.M. c. L70, does, however, specify that a landlord may only "in the day time" enter into buildings off the leased premises to recover fraudulently or clandestinely removed goods.

[19]See, *e.g.*, *Tuton* v. *Darke* (1860), 5 H. & N. 647; 157 E.R. 1338 (Exch.); *Russell* v. *Buckley* (1885), 25 N.B.R. 264 (C.A.).

RECOMMENDATION 18

A landlord should be able to distrain at any hour that is reasonable according to the use of the premises.

3. Seizure

The current law provides that a landlord must take three physical steps to effect a proper seizure. First, the landlord must lawfully enter the premises. Second, the goods must be seized in a certain manner. Third, the goods must be impounded. Omitting or mishandling any of these steps currently renders the distress incomplete or illegal. This area is rife with technical and complex rules and is an area that the Commission proposes be greatly simplified and streamlined to suit modern conditions.

(a) Entry power

With a couple of limited exceptions, a landlord has no right at common law to use force to enter premises in order to distrain.[20] A landlord cannot even use his or her own key to gain entry to locked premises because it would constitute "force". This common law rule is not changed by statute in Manitoba.[21]

This prohibition has resulted in a series of esoteric and bizarre rules about entry. For example, a landlord may lawfully open an outer door that is simply closed but not locked.[22] Once lawfully inside, a landlord can force open locked inner doors.[23] Although a landlord cannot break open a locked gate, the landlord is free to scale the wall or fence in order to gain entry.[24] While a landlord would not be allowed to open a closed but unlocked window to gain entry,[25] it is perfectly lawful for a landlord to enter through any window that is open the slightest bit, even if the landlord opens it wider to facilitate entry.[26]

The Commission recommends that a distraining landlord should simply be allowed to use reasonable force against premises in order to enter *[s. 11(1)]*. What is "reasonable" will depend on the circumstances and can, if necessary, be defined by the courts. Often it will simply mean the landlord will use his or her own key. It is important to remember that, since our proposed system removes a landlord's ability to trace fraudulently removed goods, the landlord will never be forcing entry to premises that he or she does not own.

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[20]A landlord who does not abandon the distress after being ejected by the tenant may, with the assistance of a peace officer, forcibly re-enter the premises: *Eagleton* v. *Gutteridge* (1843), 11 M. & W. 465; 152 E.R. 888 (Exch.). The second exception allows a landlord to force entry without the assistance of a peace officer where the landlord has made an initial lawful entry, leaves temporarily and is then locked out by the tenant: *Bannister* v. *Hyde* (1860), 2 El. & El. 627; 121 E.R. 235 (K.B.).

[21]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 41, empowers a landlord with the assistance of a peace officer to force entry only to third party or other premises to seize fraudulently or clandestinely removed goods.

[22]*Ryan* v. *Shilcock* (1851), 7 Ex. 72; 155 E.R. 861.

[23]*Browning* v. *Dann* (1735), Cas. T. Hard 167; 95 E.R. 107 (K.B.).

[24]*Eldridge* v. *Stacey* (1863), 15 C.B. (N.S.) 458; 143 E.R. 863 (C.P.).

[25]*Attack* v. *Bramwell* (1863), 3 B. & S. 520; 122 E.R. 196 (Q.B.); *Nash* v. *Lucas* (1867), L.R. 2 Q.B. 590.

[26]*Miller* v. *Tebb* (1893), 9 T.L.R. 515 (C.A.); *Crabtree* v. *Robinson* (1885), 15 Q.B.D. 312.

RECOMMENDATION 19

A distraining landlord should be allowed to use reasonable force against premises to gain entry.

However, a landlord should not be empowered to use force against the tenant; that scenario carries greater potential for unfortunate escalation. Where entry is impossible without the use of force against the tenant or without the use of unreasonable force against the premises, a landlord will have to apply for a court order of entry *[s. 27]*.[27] To discourage tenants from forcing unnecessary court applications in order to "buy time", it should be actionable tenant misconduct to unreasonably prevent a distraining landlord from entering the premises *[s. 24(b)]*.

RECOMMENDATION 20

A tenant who unreasonably prevents a distraining landlord from entering the premises should be liable for tenant misconduct.

Giving landlords a new right to use reasonable force to enter also entails a new responsibility. When entry is forced and the tenant is absent upon the landlord's departure, the landlord should be obliged to take reasonable care that the premises are left secure against unauthorized entry *[s. 11(2)]*. In other words, the premises should be left as secure as in the beginning. Of course, if the tenant is present when the landlord departs, the landlord should not have that obligation. A landlord who fails in this duty commits wrongful distress under the Commission's proposed scheme and would be liable to the tenant for any damages resulting therefrom *[s. 22(1)(f) and s. 23]*.

RECOMMENDATION 21

When entry is forced and the tenant is absent upon the landlord's departure, the landlord should be under a duty to take reasonable care that the premises are left secure against unauthorized entry. Failure to do so should constitute wrongful distress for which damages may be sought by the tenant.

(b) Manner of seizure

The Commission's model does not specify any special, technical rules or procedures about the manner in which goods should be seized (unlike the common law's concern with the technicalities of how to "lay hands on" goods).[28] We believe that modern courts would give a common sense definition to the statutory concept of "seizure" as comprising any word, action or gesture that makes manifest the intention to seize. Different behaviours can often evidence the same intention and should not be used as a technical excuse to defeat legal rights or remedies.

There is currently no clear requirement in Manitoba that a tenant need receive notice of the seizure itself, independently of any other purpose. The Commission regards this as a deficiency in the fair operation of this remedy.

The Distress Act specifies that any person levying distress must provide to the person whose goods are being seized a simple written demand for payment of the amount owing and of all costs and charges of the distress. A copy or extract of the regulation that sets the allowable

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[27]See the discussion in Chapter 5 about court applications in distress disputes.

[28]See, *e.g.*, *Cramer and Company, Ltd.* v. *Mott* (1870), L.R. 5 Q.B. 357; *Dod* v. *Monger* (1704), 6 Mod. 215; 87 E.R. 967 (Q.B.); *Swann* v. *Earl of Falmouth* (1828), 8 B. & C. 456; 108 E.R. 1112 (K.B.).

fees and charges must be printed on the demand or attached to it.[29] There is no requirement to give any details concerning the fact of seizure. There is also no specified time frame for the delivery of this demand, although the implication is that it should occur simultaneously with the distress.

The Landlord and Tenant Act apparently requires a notice to be given only where the landlord wants to sell the goods (not simply hold them to force payment).[30] Thus, this notice is functionally a notice of sale. However, its form is that of a notice of distress: it states the fact of seizure and "the cause of the taking" (presumably a statement of arrears) rather than giving any details about the proposed sale. The Commission believes that this confusion of form and function does not suffice as clear or adequate notice about either seizure or sale.

The Commission proposes that a distraining landlord should in every case be obliged to give a written notice of distress to the tenant *[s. 12(1)]*. This notice would state:

- particulars of identification such as the names of the landlord and tenant, the date of the seizure, the premises' address, and the amount of arrears of rent;
- a description of the seized goods sufficient to identify them;
- the tenant's obligation to identify as soon as possible to the landlord all third party goods. Thus, an absent tenant is not relieved of this previously-discussed duty;
- the tenant's statutory right to redeem the goods before sale *[s. 12(2)]*.

The notice of distress should be personally served on the tenant when the goods are seized; if the tenant refuses service or is absent when distress occurs, the notice should be posted in a prominent place on the premises *[s. 12(3)]*. Where distress by forced entry occurs in the absence of the tenant and any employees, the posted notice will prevent anyone from jumping to the conclusion that a break and enter theft has occurred.

RECOMMENDATION 22

A landlord should be obliged to give a written notice of distress to the tenant by personal service at the time of distress or, where the tenant is absent or refuses service, by posting it in a prominent place on the premises. The notice will contain factual information, a description of the seized goods sufficient to identify them, and advice about the tenant's duties and rights.

(c) Impounding of goods

There currently exists an extensive body of law concerning how a landlord must secure seized goods for safe custody pending replevy by the tenant or sale.[31] Impounding may occur on or off the rented premises, each scenario having its own set of rules and obligations.

The Commission believes that statutory codification of an elaborate set of impounding rules will not be necessary. Our proposed model has no mandatory impounding requirement; the

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[29]*The Distress Act*, C.C.S.M. c. D90, s. 1.

[30]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 45.

[31]The statutory basis for impounding is now found in *The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 43, which also makes special provision for the impounding of animals.

landlord is simply obliged to handle the goods in a commercially reasonable manner prior to and at sale *[ss. 14(1)-(2)]*. A distraining landlord would continue to have the current options of removing seized goods from the premises, physically securing them on the premises, or agreeing with the tenant to leave them in the tenant's possession and control.

Removing the impounding requirement will also modify a current rule concerning the location of the distress sale. A landlord now has the right to impound and sell the goods right on the rented premises,[32] although a commercial tenant can veto this and require the sale to be held elsewhere so long as the tenant bears the "costs and charges attending the removal and any damage to the goods and chattels arising therefrom . . . ."[33] Since a landlord need not impound under our model, the landlord could not unilaterally demand to hold the distress sale on the rented premises without breaching the covenant of quiet enjoyment owed to the tenant.

RECOMMENDATION 23

A distraining landlord should be obliged to handle seized goods in a commercially reasonable manner prior to sale. There should be no technical "impounding" rules.

(i) Rescue and pound breach

If there is no impounding requirement, what happens to the traditional landlord remedies of "rescue" and "pound breach"?

Any tenant or other person who takes goods that have been seized but not yet impounded commits "rescue" and will be liable to the landlord for damages even if the original distress was irregular or excessive. However, rescue is justified where the original distress was illegal.[34] Once goods are impounded, any tenant or other person who takes them despite knowing that they are impounded[35] commits "pound breach" and will be liable to the landlord for damages. However, here it is no defence that the original distress was illegal.[36]

Traditionally, pound breach and rescue are the only causes of action available to landlords to enforce their claim to seized goods. Although distrained goods are "in the custody of the law", legal possession and property rights technically remain vested in the tenant until the sale.[37] Therefore a landlord cannot sue in torts dealing with wrongful interference with goods, like trespass, detinue or conversion, where a certain property or possessory right in the goods is necessary.

Removing the impounding requirement does not remove the need to deter the retaking of seized goods by tenants or others or the need for landlords to have a remedy in that situation. Since the common law cannot serve in this instance, statutory solutions must be provided.

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[32]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 43(4).

[33]*The Distress Act*, C.C.S.M. c. D90, s. 7(2).

[34]An illegal distress occurs where the landlord was never entitled to distrain or there was some irregularity at the outset. Examples of the former include the non-existence of arrears or a valid tender by the tenant of any amount owing. Examples of the latter include such prohibited behaviour as forced entry or seizure of privileged goods. An irregular distress is one which begins lawfully but goes astray after entry because of things like a faulty notice or an improper appraisal. An excessive distress occurs where the landlord seizes goods whose value is manifestly in excess of the amount of arrears and allowable costs.

[35]*Abingdon R.D.C.* v. *O'Gorman*, [1968] 2 Q.B. 811 (C.A.); *Westchester Equities* v. *Thorne Riddell Inc.* (1988), 57 Alta. L.R. (2d) 241 (Q.B.).

[36]*Cotsworth* v. *Betison* (1696), 1 Ld. Raym. 104; 91 E.R. 965 (K.B.).

[37]*Williams and Rhodes*, *supra* n. 11, at 8-91, citing *King* v. *England* (1864), 4 B. & S. 782; 122 E.R. 654 (Q.B.).

Our model provides that a landlord may sue and recover damages from any tenant who, without tendering redemption, retakes possession or control of seized goods that have been physically secured by the landlord (either on or off the premises in such a way that the tenant has no control over or use of those goods and the landlord has unrestricted access to them) *[s. 24(d)(i)]*. Moreover, the landlord has a further cause of action against any tenant who, without tendering redemption, disposes of all or part of his or her interest in seized goods *[s. 24(d)(ii)]*. This last cause of action would also serve to protect the landlord who chooses not to physically secure the seized goods but agrees to leave them with the tenant under a walking possession agreement. (Walking possession agreements are discussed more fully in the next section.)

In both rescue and pound breach, a landlord also recovers punitive damages statutorily set at the outdated amount of $20.[38] The Commission sees no need to continue such a provision; the general law of damages is sufficient to address that issue where required.

Where a third party interferes with seized goods, our model simply deems the landlord to have the necessary property or possessory interest in the seized goods in order to be able to sue the wrongdoer at common law *[s. 26]*. So, for example, a landlord would be able to sue a third party thief.

There is one exception to this deemed interest. Where a landlord has left goods on the premises under a walking possession agreement, the landlord would not be able to sue a third party who purchases those goods from the tenant in the ordinary course of the tenant's business.

RECOMMENDATION 24

A landlord should have an action for damages in tenant misconduct against any tenant who, without tendering redemption, retakes possession of seized goods that have been physically secured or who disposes of his or her interest in seized goods.

RECOMMENDATION 25

When a third party wrongly interferes with seized goods, a landlord should, in most cases, be statutorily deemed to have the necessary possessory or property interest in the goods to sue the wrongdoer in the common law torts of conversion, detinue or trespass.

(ii) Walking possession

What effect does abolishing the impounding requirement have on the special circumstance of "walking possession" agreements? Traditionally, this is where a landlord agrees to leave seized goods in the tenant's possession and control in return for an undertaking not to remove or dispose of them.

Such agreements are popular in commercial tenancies because they allow the tenant to continue in business, increasing the possibility of payment of arrears or at least the prevention of new arrears. Their popularity also illustrates that the effectiveness of distress as a remedy does not necessarily lie in the ability to seize and sell goods but, rather, in the ability to coerce fiscal responsibility from the tenant.

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[38] *The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 44.

However, walking possession agreements currently face a couple of potential legal problems precisely because of their ambiguous relationship with the impounding requirement. There is case law to suggest that these agreements are not effective against third parties because the goods are not manifestly impounded.[39] Moreover, some judicial dicta go further and suggest that goods subject to a walking possession agreement are not even legally impounded at all, which (if true) would produce two negative results. First, anyone could take or buy the goods without committing pound breach.[40] Secondly, the landlord could not pass good title to a purchaser in a distress sale, because the lack of impounding would render the distress unlawful.[41]

Removing the impounding requirement handily resolves these potential problems. However, the statute itself must now specify the legal consequences that flow from leaving seized goods with the tenant (both in regard to the tenant and to the rights of third persons) since the landlord's inchoate claim is no longer protected by impounding.

The proposed statutory model provides that it is tenant misconduct for a tenant to dispose of all or part of his or her interest in seized goods *[s. 24(d)(ii)]*. This would give an action to the landlord for damages for breach of a walking possession agreement *[s. 25]*.

In addition to holding the tenant liable, should the landlord be able to reclaim the seized goods from a third party purchaser?

The Commission proposes that, in a walking possession situation where (by definition) seized goods have not been physically secured so as to remove a tenant's control or possession,[42] the seizure should not be effective against a third party purchaser who purchases seized goods in the ordinary course of the tenant's business, regardless of whether the purchaser knows of the seizure. Commercial third party purchasers in the ordinary course of business should not be put to the onerous burden of having to make inquiries into the "distress status" of commercial sellers in order to protect themselves. Also, allowing inventory to continue to be sold so the business can carry on may help to promote payment of arrears or at least the prevention of new arrears.

However, a landlord should be able to obtain protection against a third party who buys seized goods other than in the ordinary course of the tenant's business. The Commission's model provides that a landlord can get this protection by registering a copy of the notice of distress in a public registry *[ss. 13(1)(b) and 13(2)]*. This registration makes the seizure effective against a third party who purchases distrained goods otherwise than in the ordinary course of the tenant's business. People who contemplate purchasing goods otherwise than in the ordinary course of a tenant's business may protect themselves by the simple expedient of checking the public registry. This would not be burdensome because purchasers in these circumstances would commonly be checking various public registries in any event.

Two things should be noted about this proposal. First, the protection for landlords is not automatic; a landlord must choose to obtain it by the act of registration. A landlord who neglects or chooses not to register will not be able to trace the seized goods.

Secondly, a special registry need not be established; the government could use an already-existing public registry to receive these registrations. For example, either the Personal Property

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[39]*Abingdon R.D.C.* v. *O'Gorman*, *supra* n. 35; *Westchester Equities* v. *Thorne Riddell Inc.*, *supra* n. 35.

[40]A recent Alberta decision dealing with walking possession agreements held that a third party would have to have actual or implied knowledge of the impounding in order to be guilty of pound breach: *Westchester Equities* v. *Thorne Riddell Inc.*, *supra* n. 35.

[41]The Law Commission (England), *supra* n. 2, at 58-60.

[42]It should be noted that the same legal consequences would follow under our model even for a landlord who, without a tenant's agreement, simply leaves seized goods in the tenant's control or possession rather than physically securing them.

Registry (PPR) or the Sheriff's Office could serve the purpose (in our draft statute, we have, simply for the sake of exposition, named the Sheriff's Office as the public registry).

Both the PPR and the Sheriff's Office are visible, easily accessible and ideal locations for such a registry. While the Commission acknowledges that each serve very different purposes than the private, self-help interests to be protected here, nevertheless we are satisfied that the creation and maintenance of this registry within either of those existing offices would not require a large investment of time or money by either that office or the public purse. The registry would not need to be structurally complex. Costs may be recouped by an appropriate fee structure for registration; our draft statute vests regulatory power in the provincial cabinet for that purpose *[s. 28]*.

Where a landlord registers a notice of distress and the tenant redeems the seized goods, the landlord should be obliged to serve the tenant with a notice confirming the redemption, with failure to do so constituting actionable wrongful distress *[s. 22(1)(h)]*. The tenant could then register this notice of satisfaction in the same public registry in order to cancel the effect of the notice of distress *[ss. 13(3)-(6)]*.

RECOMMENDATION 26

Where a distraining landlord leaves seized goods on the rented premises subject to a walking possession agreement, the seizure should not be effective against a third person who purchases any of those goods in the ordinary course of the tenant's business despite any knowledge that the goods are distrained.

RECOMMENDATION 27

Where a distraining landlord leaves seized goods on the rented premises subject to a walking possession agreement and registers a copy of the notice of distress in a designated public registry, the seizure should be effective against a third person who purchases any of those goods otherwise than in the ordinary course of the tenant's business. Failure to register would mean that the seizure is not effective against those third persons.

RECOMMENDATION 28

Where a landlord registers a notice of distress and the tenant redeems the goods, the landlord should be obliged to serve the tenant with a notice confirming the redemption. Registration of this notice of satisfaction in the designated public registry would cancel the effect of the notice of distress.

C. SALE OF SEIZED GOODS

1. The Right of Sale

(a) Sale is not discretionary

Currently, a landlord has a discretion, but no obligation, to sell seized goods.[43] A landlord can simply hold the goods to force payment. Since this collection strategy usually proves less effective than sale, it is used much less today than it may have been in the past.

[43]No action lies against a landlord who chooses not to exercise the right of sale: *Philpott* v. *Lehain* (1876), 35 L.T. 855 (C.P.).

The Commission's proposed statutory right of distress recognizes modern practice by simply authorizing a landlord to seize goods and to dispose of them *[s. 4(1)]*. Technically, therefore, sale of (unredeemed) seized goods would be mandatory. However, a landlord would also have the discretion to hold seized goods in whole or in part for such period of time prior to sale as may be commercially reasonable *[s. 14(2)(a)]*. This discretion (in combination with factors like notice periods) means that mandatory sale will often, in reality, effect only a technical change to a landlord's ability to force payment by holding goods.

(b) Commercial reasonableness

The most significant reform proposed by the Commission concerning the sale of seized goods is that the concept of commercial "reasonableness" should replace any attempt to dictate rigid and complex statutory rules to ensure fair sales. Our model proposes that a landlord may sell seized goods in whatever manner, at any time and place, and on any terms so long as every aspect of the disposition is reasonable *[s. 14(1)]*.[44] This allows maximum flexibility for the landlord while preserving a safeguard for the tenant against unreasonable actions.

One result of using the simple criterion of "reasonableness" is the removal of an explicit appraisal rule. The present Manitoba statute requires two sworn appraisals with a memorandum of oath endorsed on the written inventory.[45] Whether an appraisal should occur under our model would depend on whether it is reasonable in the given commercial circumstances.

Although there appears to be no statutory or common law requirement that seized goods must be sold only by public auction, this method has proved to be the usual and safest way to proceed in practice.[46] Our model clarifies that a landlord may sell by public or private sale so long as it is conducted reasonably *[s. 14(1)]*.

The Commission is confident that the familiarity of both business people and courts with the concept of commercial reasonableness as a standard of conduct (for example, through experience with *The Personal Property Security Act* where that standard is also used) will offset, respectively, any potential great surge of litigation and any difficulty resolving whatever issues that may be litigated.

RECOMMENDATION 29

A landlord should be allowed to sell seized goods in whatever manner (including public or private sale), at any time and place, and on any terms so long as every aspect of the disposition is reasonable.

2. Tenant's Right of Redemption

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[44]In drafting our model statute, we have simply used the word "reasonable" to express the concept of "commercially reasonable", viewing the adjective "commercially" as redundant (since "reasonable" connotes "reasonable in the circumstances", it will always import commercial considerations in a commercial setting). In this, we follow the new, as-yet-unproclaimed version of *The Personal Property Security Act*, S.M. 1993, c. 14, which uses the term "reasonable" in place of the phrase "commercially reasonable" found throughout the current statute, *The Personal Property Security Act*, C.C.S.M. c. P35.

[45]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 45. The appraisers apparently need not be professionals, so long as they are reasonably competent: *Roden* v. *Eyton* (1848), 6 C.B. 427; 136 E.R. 1315 (C.P.); *Clarke* v. *Holford* (1848), 2 Car. & K. 540; 175 E.R. 224. Of course, the distraining landlord cannot act as one of the appraisers: *Westwood* v. *Cowne* (1816), 1 Stark. 172; 171 E.R. 436 (K.B.).

[46]*Crossley Vaines' Personal Property* (5th ed., 1973) 500; *Woodfall's Law of Landlord and Tenant*, vol. 1 (28th ed., 1978) para. 9.152.

Our model explicitly preserves the tenant's right, before the landlord contracts to dispose of seized goods, to have those goods returned where the tenant tenders full payment of the arrears together with any reasonable expenses incurred by the landlord in seizing, holding, repairing, processing, and preparing the goods for disposition *[s. 16]*. A tenant will receive ample notice of this right via both the notice of distress and the notice of sale (discussed shortly).

RECOMMENDATION 30

At any time before the landlord contracts to dispose of seized goods, the tenant should be able to redeem them by tendering full payment of arrears and any reasonable expenses incurred by the landlord in connection with the distress.

3. The Sale Process

(a) Retention and preparation of goods

The Commission's model states that a landlord may retain seized goods in whole or in part for such period of time as is reasonable *[s. 14(2)(a)]*. This confirms, for example, a landlord's right to sell when conditions are most favourable or to sell the goods together or in lots. As well, a landlord should have the discretion to do any reasonable repair, processing or preparation of the goods for sale *[s. 14(2)(b)]* and should be able to recoup those costs (together with the costs of seizure and holding) as a first charge on the proceeds of disposition *[s. 19]*.

RECOMMENDATION 31

A landlord should be able to retain seized goods in whole or in part for such period of time as is reasonable before selling them.

RECOMMENDATION 32

A landlord should have the discretion to do any reasonable repair, processing or preparation of goods for sale and should be able to recoup those costs (together with the costs of seizure and holding) as a first charge on the sale proceeds.

(b) Notice of sale

Although obscurely and tortuously worded, *The Landlord and Tenant Act* currently requires a landlord to give five clear days' notice to the tenant before seized goods may be sold.[47] This impliedly written notice is not really notice of the sale itself but is, rather, a notice to indicate distress has occurred and "the cause of the taking" (presumably a statement of arrears). As previously discussed, its form is that of a notice of distress but its function is really that of a notice of sale because a landlord cannot dispose of the goods without having given it. It is unclear how much or how little detail the notice need contain to constitute adequate notice.

The Commission suggests the separation and re-alignment of these two forms and functions. In addition to the proposed notice of distress to be given in all cases, a landlord should be obliged to give a written notice of sale to the tenant. We have designed a notice based on the analogous notice obligations of creditors who sell goods in which they have a personal property security interest.

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[47] *The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 45.

While the holder of a security interest must generally provide 15 days' notice of sale,[48] the Commission's model retains for landlords the current requirement of 5 days' notice *[s. 14(3)]*. A shorter period is crucial in a distress situation where the landlord can often not afford to delay and risk the tenant going bankrupt in the interim, which will alter priorities to the landlord's disadvantage.

A landlord should be able to give less than 5 days' notice where the goods are perishable or where the landlord believes on reasonable grounds that they will quickly depreciate in value *[s. 14(4)]*.

The notice of sale should contain the following information:

- the name of the landlord and tenant;
- a description of the goods sufficient to identify them;
- the amount of arrears of rent;
- the amount of any reasonable expenses incurred by the landlord in seizing, holding, repairing, processing, and preparing the goods for disposition;
- the tenant's right to redeem the goods; and
- the date, time and place of any public sale or the date after which private sale is to be made *[s. 14(5)]*.

The notice of sale would be personally served on the tenant or, if the tenant is absent or refuses service, it would be sent by ordinary mail to the tenant's last known address *[s. 14(6)]*.

RECOMMENDATION 33

A landlord should give the tenant no less than 5 days' written notice of sale (unless the goods are perishable or the landlord reasonably believes they will quickly depreciate).

RECOMMENDATION 34

The notice of sale should contain identifying information, the landlord's claim for expenses related to the sale, advice about the tenant's right to redeem, and full particulars about the date, time and place of any public sale or the date after which private sale will occur.

RECOMMENDATION 35

The notice of sale should be personally served on the tenant or, in case of absence or refusal, should be sent by ordinary mail to the tenant's last known address.

[48] *The Personal Property Security Act*, C.C.S.M. c. P35, s. 60(5). In the unproclaimed new statute, this has been increased to 20 days: *The Personal Property Security Act*, S.M. 1993, c. 14, s. 59(6).

(c) Purchase of seized goods by landlord

Currently a landlord may not (personally or by an agent)[49] purchase any seized goods even by making the highest bid at a public auction.[50] It seems to the Commission that, given the protections inherent in a public auction process, this limitation may safely be removed,[51] giving landlords the same abilities as secured creditors who wish to purchase those secured goods upon default.[52] However, as in personal property security law, our proposed model makes it clear that a landlord cannot purchase seized goods by private sale where abuses may more readily go undetected *[s. 15]*.

RECOMMENDATION 36

A landlord who sells seized goods should be able to purchase all or part of the goods but only at a public sale.

(d) Passage of title

As previously discussed, the tenant retains all interest and title in seized goods until sale. The law of distress provides that, at sale, the landlord can pass good title to a purchaser of the goods even where the distress was excessive or irregular. Only if the distress was illegal will the purchaser not receive good title.[53]

Our model retains this basic formulation by providing that (subject only to the priority of any purchase-money security interest)[54] a landlord who sells seized goods can confer good title even if "wrongful distress" has occurred *[s. 17]*. However, because our model does away with the distinction between illegal, irregular and excessive distress and replaces all of them with the single concept (and cause of action) of "wrongful distress", this in fact technically changes the law by allowing good title to pass in circumstances where once it would not. The tenant's new remedy in these circumstances will be to sue the landlord, not to trace the goods to, and seize them from, the third party purchaser.

RECOMMENDATION 37

A landlord who sells seized goods should be able, subject only to the priority of any purchase-money security interest, to pass good title to the purchaser despite the occurrence of wrongful distress.

(e) Costs of distress

A landlord in Manitoba is currently entitled to recoup the costs of "the distress, appraisement and sale".[55] The amount of recoverable costs of distress is established by

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[49]*Barlow* v. *Breeze* (1916), 31 D.L.R. 280 (B.C.C.A.).

[50]*King* v. *England*, *supra* n. 37.

[51]This reform was also recommended by the Law Reform Commission of British Columbia, *supra* n. 12, at 46.

[52]*The Personal Property Security Act*, C.C.S.M. c. P35, s. 60(7).

[53]The Law Commission (England), *supra* n. 2, at 63. See *supra*, n. 34 for a discussion of the legal distinctions between the concepts of illegal, excessive and irregular distress.

[54]This priority is discussed and explained in Chapter 4.

[55]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 45.

regulation under *The Distress Act*.[56] It is unlawful to charge or receive costs other than those specified in the regulation[57] unless the parties have expressly made an agreement to vary those costs.[58]

Unless frequently revised, however, a regulation can become unresponsive to fluctuations in actual costs (for example, the current regulation was last revised eleven years ago). On the other hand, a regulation does promote certainty by forcing parties either to observe its terms or to contract out and establish their own scale.

The Commission does not believe it is necessary to regulate costs so formally. Under *The Personal Property Security Act*, for example, the secured party is simply allowed to recoup "reasonable expenses", without further attempt to define or regulate that amount.[59] Modern commercial practice should also be able to accommodate this method in the area of distress *[s. 19]*.

RECOMMENDATION 38

A landlord should be able to recoup any reasonable expenses incurred by the landlord in seizing, holding, repairing, processing, preparing for disposition and disposing of the seized goods.

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[56]*A Regulation Under The Distress Act Prescribing Costs and Charges on a Distress or Seizure*, Man. Reg. 56/82; re-enacted as *Distress Charges Regulation*, Man. Reg. 316/87R.

[57]*The Distress Act*, C.C.S.M. c. D90, s. 2.

[58]*The Distress Act*, C.C.S.M. c. D90, s. 5.

[59]*The Personal Property Security Act*, C.C.S.M. c. P35, s. 60(1).

CHAPTER 4

PRIORITIES

A. INTRODUCTION

When seized assets are sold by a creditor, there are usually a number of competing claims to the sale proceeds. The complex issue of who gets priority (in whole or in part) over another claimant is crucially important because a creditor's place in the priority structure essentially determines the effectiveness of the remedy for that class of creditors.

Traditionally, the claim of a distraining landlord has enjoyed an extremely high priority against most other claimants. This priority has often come under attack as being anachronistic, illogical and unfair. In Canada, acceptance of this view has led both the Ontario and the British Columbia Law Reform Commissions[1] to recommend reducing a landlord's priority to the level of an execution creditor's.

B. PRIORITY BETWEEN LANDLORDS AND SECURED CREDITORS

1. The Current Law

Priority of claim between a distraining landlord and the holders of perfected security interests in the tenant's goods (secured creditors) is not governed by the rules of *The Personal Property Security Act* (PPSA) because the landlord's interest in the goods is excluded from the ambit of that Act.[2] Instead, priority of claim is determined according to the criteria contained in section 37 of *The Landlord and Tenant Act*, which in its expression and concepts pre-dates the modern security system created by the PPSA.[3]

At common law, a landlord could distrain upon any goods present at the rented premises, regardless of who owned them. The effect of section 37 of *The Landlord and Tenant Act* is to restrict this rule so that landlords may distrain only upon those goods to which the tenant has title.[4]

One statutory exception to this rule is found in subsection 37(b) of *The Landlord and Tenant Act*.[5] It provides that a landlord may nevertheless distrain upon goods where a person

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[1]Ontario Law Reform Commission, *Landlord and Tenant Law* (Report, 1976); Law Reform Commission of British Columbia, *Distress for Rent* (Report #53, 1981).

[2]*C.I.B.C. v. 64576 Manitoba Ltd.* (1991), 2 C.B.R. (3d) 4 (Man. C.A.); *Household Trust Co. v. Leslie-Gowers Hotels Inc.* (1991), 81 D.L.R. (4th) 343 (Man. C.A.); *Commercial Credit Corp. Ltd. v. Harry D. Shields Ltd.* (1981), 122 D.L.R. (3d) 736 (Ont. C.A.).

[3]*Commercial Credit Corp. Ltd. v. Harry D. Shields Ltd.*, *supra* n. 2. The relevant section of the Ontario *Landlord and Tenant Act* is worded similarly to our section 37.

[4]*Williams and Rhodes Canadian Law of Landlord and Tenant*, vol. 1 (6th ed., 1988) 8-70 and 8-73.

[5]*The Landlord and Tenant Act*, C.C.S.M. c. L70.

other than the tenant has title, if that person's title is "derived by purchase, gift, transfer or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise".[6] Before the advent of the PPSA, it was clear that this provision gave a distraining landlord priority over any chattel mortgage, even if made prior to the term of the tenancy,[7] because the mortgagee's title was derived from the tenant as a security arrangement. A distraining landlord also had priority over a debenture holder, whose right was held to be no higher than that of a chattel mortgagee.[8]

Another statutory exception concerns conditional sales agreements, where the creditor retains title to the goods in the tenant's possession until the last installment of the purchase price has been paid. Here, the creditor's title is not derived from the tenant, making these goods untouchable by the general rule of section 37. However, subsection 37(c) allows the landlord to distrain on "the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase or by which he may or is to become the owner thereof upon performance of any condition". In other words, while the creditor/owner has priority for any outstanding purchase price, the landlord may nevertheless distrain upon the tenant's equity (the value of the goods in excess of the indebtedness).[9]

The effect of section 37 continuing to govern priorities in a post-PPSA world is that, with one exception, a distraining landlord has priority over the holder of any prior security interest perfected under the PPSA.[10] The landlord would not have priority over any security interest where the secured party retains title to the secured goods pending full payment.

The odd result of this situation is that, while retention of title continues to have an important effect on priorities between distraining landlords and secured creditors, the PPSA itself treats the concept of title retention as irrelevant between secured parties themselves[11] since priority is derived (generally speaking) from registration.

Because the concept of title is now obsolete and irrelevant in the PPSA scheme, the use of title to resolve priority disputes with landlords forces a conceptual comparison of apples and oranges. The obsolescence of form and title in the PPSA means that, in practice, some modern security instruments cannot be easily analogized to their pre-PPSA counterparts.[12]

For example, one outstanding question in the current law appears to be the status of "purchase-money security interests" (PMSIs). A PMSI can arise in two situations. The first is where a creditor sells an asset to a debtor and takes a security interest to secure the payment of the purchase price; this security interest may, but need not, be in the form of title retention. The second is where a creditor lends money which is used to buy an asset from a third party and that asset serves as security for the loan; clearly, the creditor cannot retain title in this case. In both cases, the PPSA gives a superior priority to the holder of the PMSI over all other creditors since the PMSI holder made the asset's acquisition possible. In neither case does this priority depend on whether the creditor has title to the asset. However, the law of distress places crucial

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[6]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 37(b).

[7]*Stott* v. *Heninger*, [1935] 3 D.L.R. 700 (S.C.C.).

[8]*Re Dominion Chocolate Co.*, [1931] 2 D.L.R. 813 at 817 (Ont. S.C.).

[9]See, *e.g.*, *Theatre Amusement Co.* v. *Reid* (1920), 54 D.L.R. 35 (S.C.C.) per Idington and Brodeur, JJ.; *Ogilvie Flour Mills Co.* v. *Becker*, [1931] 2 D.L.R. 445 (Alta. C.A.); *J.R. Auto Brokers Ltd.* v. *Hillcrest Auto Lease Ltd.*, [1968] 2 O.R. 532 (H.C.).

[10]*Commercial Credit Corp. Ltd.* v. *Harry D. Shields Ltd.*, *supra* n. 2; *C.I.B.C.* v. *64576 Manitoba Ltd.*, *supra* n. 2. In both cases, the prior perfected security interest was in the form of a chattel mortgage.

[11]*The Personal Property Security Act*, C.C.S.M. c. P35, s. 2(a).

[12]R. McLaren, *Personal Property Security: An Introductory Analysis* (5th ed., 1992) 5-152.

importance on whether a creditor has title to the asset. A creditor with a PMSI who is able to retain title (such as a conditional seller) gains priority over the landlord; a creditor with a PMSI who is not able to retain title (such as the lender whose funds are used to buy the asset from a third party) does not gain priority over the landlord.

The criticism in this area is really a conflict about form, not substance. It could easily be resolved by amending distress law so that it uses PPSA concepts and terminology to express the traditional priority scheme. Three provinces with PPSAs (Saskatchewan, Alberta and British Columbia) have in fact harmonized their statutes in this way, so as to clarify (but not alter) the landlord's traditional priority.[13] Thus, for example, Saskatchewan case law is clear that a landlord has priority over any perfected security interest in the tenant's goods except for a PMSI.[14]

(It should be noted that Manitoba is also set to harmonize our two statutes in the near future. The Legislature has passed, but not yet proclaimed, a new version of *The Personal Property Security Act*[15] that consequentially amends *The Landlord and Tenant Act* so that the landlord's traditional priority is restated as priority over PPSA security agreements except for PMSIs.)[16]

2. Should Landlords' Priority Be Reduced?

A separate, more substantive conflict concerns whether the landlord should continue to enjoy this traditional priority at all or whether it should be reduced so that a landlord's claim would be subject to prior PPSA interests in the seized goods.

The Commission recommends that Manitoba landlords' traditional priority be retained in reformed distress law, albeit harmonized in form with PPSA terminology. We have two main reasons for this view.

First, the whole point of the remedy of distress is to enable landlords to recoup or force payment of arrears in a situation where they cannot easily take conventional security (among other reasons, because commercial tenants almost always have all their assets previously secured to banks). Commercial reality is usually such that, if holders of perfected security interests are given absolute priority, most landlords (like other unsecured creditors) will rarely be able to recoup any arrears out of the tenant's remaining equity. Landlords would essentially be in the same priority position as if they sued on the broken promise to pay rent, obtained judgment, and executed -- so the practical point of maintaining the remedy of distress would then simply be to save some time and court costs.

In other words, the traditional priority system of distress is tantamount to the remedy itself. Without that priority scheme, distress is largely useless as a remedy and would be abolished in

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[13]*The Landlord and Tenant Act*, R.S.S. 1978, c. L-6, ss. 25(1)-(2); *Seizures Act*, R.S.A. 1980, c. S-11, ss. 19(1)-(2); *Rent Distress Act*, R.S.B.C. 1979, c. 362, ss. 4(1)-(3). Three Canadian jurisdictions with PPSA's do not harmonize the terminology of their statutes: Manitoba, Ontario [*Landlord and Tenant Act*, R.S.O. 1990, c. L.7, s. 31(2)] and the Yukon [*Landlord and Tenant Act*, R.S.Y. 1986, c. 98, s. 28].

[14]*Dubé* v. *Bank of Montreal* (1986), 7 P.P.S.A.C. 223 (Sask. C.A.), leave to appeal to S.C.C. refused (1986), 27 D.L.R. (4th) 718n (S.C.C.); *DCA Canada Inc.* v. *Mark*, [1983] 6 W.W.R. 118 (Sask. Q.B.); *Re C.I.B.C. and Marathon Realty Co. Ltd.* (1987), 40 D.L.R. (4th) 326 (Sask. C.A.); *C.I.B.C.* v. *Nelson* (1988), 68 Sask. R. 278 (Q.B.); *Royal Bank* v. *Concorde Investments Corp.* (1991), 2 P.P.S.A.C. (2d) 314 (Sask. Q.B.).

[15]*The Personal Property Security Act*, S.M. 1993, c. 14.

[16]*The Personal Property Security Act*, S.M. 1993, c. 14, s. 83.

all but name.[17] Therefore, having recognized a continuing need for the remedy of distress and having recommended its retention as a self-help remedy, the Commission must be conceptually consistent and recommend the retention of landlords' favoured priority position.

The Commission's second reason for this recommendation arises out of Manitoba's unique law in this area. Only the Manitoba *Landlord and Tenant Act* limits the amount of arrears for which distress may be levied to three months (where rent is payable quarterly or more frequently) or to one year (where rent is payable less frequently than quarterly).[18] Therefore, the landlord's priority over security holders is in fact quite limited in this province. This is a very significant factor in assessing policy options.

In the absence of such a limitation, the policy choices appear to be between two equally unsatisfactory extremes, namely:

(1) where a landlord has priority for an unlimited amount of arrears (which could run into large sums of money), there is the very real danger that displaced secured creditors will petition the debtor/tenant into bankruptcy, where federal legislation ensures absolute priority to the secured creditors;[19]

(2) where the secured creditors have absolute priority, the landlord may have an unlimited claim but runs the very real risk of getting nothing.

The current Manitoba legislation appears to have already achieved the desirable middle ground between these two "all or nothing" extremes, simply by allowing landlords enough of a priority over secured creditors to make the remedy of distress worthwhile in practice, but limiting that priority to a small enough amount so secured creditors (a) can plan for it when giving credit and (b) do not feel so threatened by it that they would rush to petition into bankruptcy solely to improve their priority position. What the Commission is recommending, therefore, is really the continuation of this admirable compromise.

The Commission was not persuaded by the main argument in favour of lowering landlords' priority. This argument maintains that the effectiveness of distress as a remedy really "lie[s] more in the threat of its use than in the use itself. Many landlords know, as a result of experience, that if they are compelled to carry out the threat, the final results are, in a great many instances, disappointing. . . ."[20] This argument's logic is that, since a landlord can still threaten to distrain even where the landlord's priority position is lowered, the remedy will remain effective (from the tenant's perspective). This argument was persuasive both to the Ontario and British Columbia Law Reform Commissions.[21]

The strength of this argument depends on the accuracy of whether actual use of the remedy is usually "disappointing". This may indeed often be the case where (as in Ontario or B.C.) a landlord is attempting to recover a large sum of unlimited arrears from an insufficient amount of

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[17]This viewpoint also proved persuasive to the Saskatchewan Law Reform Commission in its decision to retain both this remedy and its traditional priority structure, albeit incorporating it directly into the PPSA as a deemed security interest: Law Reform Commission of Saskatchewan, *Proposals Relating to Distress for Rent* (1993) 23-24.

[18]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 29(1). Moreover, this limited amount of distrainable arrears must arise immediately preceding the distress, making prompt action vital: *Wrightmar Industries Ltd.* v. *Assiniboia Downs 81 Ltd.* (1983), 148 D.L.R. (3d) 760 (Man. C.A.).

[19]This was an important factor stated by the Ontario Law Reform Commission in its 1976 *Report on Landlord and Tenant Law* that recommended lowering the landlord's traditional priority. The OLRC's reasoning is less compelling where the traditional priority is limited.

[20]Ontario Law Reform Commission, *supra* n. 1, at 215.

[21]Ontario Law Reform Commission, *supra* n. 1, at 215; Law Reform Commission of British Columbia, *supra* n. 1, at 37.

goods or from goods largely subject to conditional sales agreements, but it logically should be less so in Manitoba, where distrainable arrears are limited and thus, being a smaller sum, are more likely to be realizable.

In our opinion, having to brandish a threat that (from the landlord's perspective) is hollow would simply make it easier for a tenant, knowing the landlord's vulnerable priority position, to argue for even more time to pay on the basis that the prospect of "something" in the future is a better gamble than "nothing" right now.

3. Recommendation

Our proposed model retains the limitation on how many months' of arrears may be collected *[s. 4(2)]*. This would (as now) serve to limit quite dramatically the extent of the landlords' continued priority over secured interests. The statutory expression of this priority would be harmonized with PPSA concepts and terminology. Therefore, a distraining landlord should have priority over the holder of any "security interest" (defined in PPSA terms) *[s. 1]* that is perfected at the date of distress, *[s. 20(1)]* except in the case of a "purchase-money security interest" (again defined in PPSA terms) *[s. 1]* that is perfected at the date of distress or within 10 days after the debtor obtained possession of the collateral *[s. 20(2)]*.[22]

We believe it is better to harmonize a new, separate distress statute with the PPSA rather than (as recommended by the Saskatchewan Law Reform Commission) making landlords directly subject to the PPSA and giving them special priority under that statute as deemed security holders.[23] It is true that the Saskatchewan approach allows landlords access (with a minimum of statutory duplication) to such beneficial provisions as the sale and notice sections of the PPSA. Yet both the Saskatchewan approach and our recommended model equally disturb the "seamless code" of the PPSA scheme because, in both models, a claim that has priority to perfected security interests will not appear in a search of the register, thus contradicting the whole purpose of a centralized registry of personal property claims.

Moreover, the Saskatchewan approach would (it seems to us) produce an undesirable consequence in a bankruptcy scenario: landlords elevated to the status of (deemed) secured parties would obtain unseemly priority over employees' wage claims, in contrast to their currently lower bankruptcy status as preferred creditors only.

RECOMMENDATION 39

A distraining landlord should continue to have a limited priority of claim over the holder of any prior PPSA security interest, but should not have priority over a purchase-money security interest that is perfected at the date of distress or within 10 days after the debtor obtained possession of the collateral.

C. PRIORITY BETWEEN LANDLORDS AND EXECUTION CREDITORS

A landlord cannot distrain upon goods that have already been legally attached by another (*in custodia legis*) -- for example, goods that are bound by a writ of execution that has been

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[22]This corresponds to the 10-day perfection period currently provided in *The Personal Property Security Act*, C.C.S.M. c. P35, s. 22(3). The period has been increased to 15 days in the new, unproclaimed statute: *The Personal Property Security Act*, S.M. 1993, c. 14, s. 22(1).

[23]This deemed security interest will arise when a landlord distrains; it is perfected by actual possession of the seized goods, not by registration: Law Reform Commission of Saskatchewan, *supra* n. 17, at 4.

delivered to a sheriff,[24] or goods that have been seized under the terms of a chattel mortgage in default.[25]

However, *The Landlord and Tenant Act* does currently provide a landlord with a limited priority for a certain number of months' rent[26] as against an execution creditor who has bound the goods.[27] While an execution creditor is obliged to pay out the landlord's priority before proceeding with the execution, the statute allows an additional levy to be made upon the tenant's goods for this amount.[28] Therefore, the cost will ultimately be borne by the tenant, although any shortfall in the value of the goods will cause the loss to fall on the execution creditor.

A landlord cannot claim this statutory priority against a person realizing on a security because such realization is not "execution".[29] Nor can this priority be claimed against a person attaching the goods of an absconding debtor because "execution" means post-judgment attachment, not pre-judgment attachment.[30]

For the same reasons of remedial effectiveness and conceptual consistency as discussed above, the Commission also recommends retention of this priority over execution creditors *[s. 18]*. Again, it is a significantly limited priority and already reflects a compromise position. It would also make no sense to allow landlords a limited priority over prior secured creditors yet subordinate them to execution creditors.[31]

RECOMMENDATION 40

A distraining landlord should continue to have a limited priority of claim over an execution creditor who may then recoup the amount of this priority from an additional levy on the debtor/tenant's goods.

D. OTHER PRIORITY ISSUES

Nothing in the Commission's proposed model would alter any priority issue or relationship that currently exists between landlords and claimants other than those already discussed. Examples of other claimants who may seek statutory priority to landlords include the Crown or its agencies (where the tenant, for example, was obliged to collect sales tax, forward contributions to unemployment insurance or Canada Pension Plan, etc.) and the tenant's employees (up to three months' worth of unpaid wages are deemed to be held in trust).[32] Resolving issues of priority often depends on a difficult and complex interaction of statutes that

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[24]*Re Wilson and the Queen in Right of Canada* (1979), 106 D.L.R. (3d) 645 at 652-53 (Man. C.A.).

[25]*Re Bank of Nova Scotia and Neufeld* (1985), 22 D.L.R. (4th) 145 at 147-48 (Alta. Q.B.).

[26]Subsection 48(1) creates a priority for 3 months' arrears when the rent is payable quarterly or more frequently, or for 1 year's arrears when the rent is payable less frequently than quarterly.

[27]*Circa 1880 Imports Ltd.* v. *Antique Photo Parlour Ltd.*, [1983] 6 W.W.R. 752 (Alta. Q.B.). In this situation, a sheriff acting on behalf of the execution creditor can seize the goods but cannot remove or sell them until the execution creditor pays the appropriate amount of rent: *Locke* v. *McConkey* (1876), 26 U.C.C.P. 475 (C.A.).

[28]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 48(3).

[29]*Re Bank of Nova Scotia and Neufeld*, *supra* n. 25, at 149-151.

[30]*Miller* v. *Ling* (1883), 16 N.S.R. 135 (C.A.).

[31]The Law Reform Commission of Saskatchewan has similarly recommended retaining landlords' traditional priority over execution creditors: Law Reform Commission of Saskatchewan, *supra* n. 17, at 26.

[32]*The Payment of Wages Act*, C.C.S.M. c. P31, s. 3(4).

each jockey for position. Streamlining this area would require a project in its own right and is beyond our present scope.

E. AFTER THE SALE

The Commission's proposed model explicitly states the legal ramifications of sale. When a purchaser for value acting in good faith buys goods at a distress sale, the purchaser should obtain clear title except where the goods are subject to a purchase-money security interest that has priority. Apart from a PMSI, however, the sale should extinguish any interest in or claim to the goods by the tenant or any other person *[s. 17]*. The claim of these secured or unsecured interest holders should attach to the proceeds of disposition and be paid out by the landlord according to the established priority scheme.

Any claimant should have the right to obtain a written statement from the landlord concerning the disposition of the goods and the distribution of their proceeds *[s. 21]*. This will aid parties in deciding whether the sale and its proceeds have been handled properly.

F. A NOTE ABOUT STATUTORY BANKRUPTCY PROVISIONS

The Landlord and Tenant Act and *The Distress Act* contain provisions that regulate rights and obligations between landlords and tenants in a bankruptcy or winding-up situation (establishing rules in such areas as the rights of under-lessees, payment of occupation rent and surrender, disclaimer, retention or assignment of a lease by a trustee or liquidator).[33] They also contain provisions that purport to set a landlord's priority of claim;[34] those provisions would now (in the case of bankruptcy) be superseded by the federal legislation of priorities in this area,[35] although in a rare case of winding-up, the provincial legislation would still be relevant.

In any event, this area is an impenetrable mix of bad drafting, jurisdictional and conceptual overlap, and historical anachronism. Parts of these provisions need to be repealed, parts need to be retained, and everything needs to be re-conceptualized and streamlined. Strictly speaking, however, none of those reforms are consequentially dependent on a reform of the law of distress. This area is, therefore, outside the scope of our current Report and will not be addressed in substance.

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[33]*The Landlord and Tenant Act*, C.C.S.M. c. L70, ss. 46(2), 47(1)-(4); *The Distress Act*, C.C.S.M. c. D90, s. 8.

[34]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 46(1) (bankruptcy and winding-up); *The Distress Act*, C.C.S.M. c. D90, ss. 8(3) and (4) (bankruptcy).

[35]*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 136(1)(f).

CHAPTER 5

REMEDIES AND REMAINING MATTERS

A. REMEDIES

Remedies which are currently available under the law of distress to a wronged tenant or owner of goods are dependent on complex law that characterizes an act of distress as either illegal, excessive or irregular.

An illegal distress occurs where the landlord was never entitled to distrain or there was some irregularity at the outset. Examples of the former include the non-existence of arrears or a valid tender by the tenant of any amount owing. Examples of the latter include such prohibited behaviour as forced entry or seizure of privileged goods. An irregular distress is one which begins lawfully but goes astray after entry because of things like a faulty notice or an improper appraisal. An excessive distress occurs where the landlord seizes goods whose value is manifestly in excess of the amount of arrears and allowable costs.

Characterization of distress as illegal, excessive or irregular determines whether the wronged party may employ self-help to retake the goods (before impounding), sue for return of the goods, or sue for damages. Characterization even affects the kind and amount of damages available.[1] The matter is further complicated where only part of the distress was illegal.

The Commission believes that such complex rules are not necessary, especially in a model that is no longer based on impounding. We propose to simplify and streamline this area by creating a statutory cause of action between landlords and tenants and by having third parties resort to their adequate remedies from other areas of the common law.

1. Interaction of Statute and Common Law

As discussed in Chapter 2, our proposed model codifies the law of distress and abolishes the common law "respecting distress for rent" *[s. 6(1)]*. While this is designed to abolish remedies and causes of action created specifically by the common law of distress for rent, our model clarifies that it is not meant to abolish any concurrent causes of action created by completely different areas of the common law (such as negligence or wrongful interference with property rights) even if distress forms the factual circumstances in which the wrongful acts occur *[s. 6(2)]*.

Third parties who are wronged by a tenant or landlord in the course of a distress will make the most use of unrepealed common law causes of action, especially the torts of wrongful interference with goods (conversion, detinue, trespass, damage to reversionary interest). However, there are a couple of common law remedies that may (in certain circumstances) prove

[1] *The Landlord and Tenant Act*, C.C.S.M. c. L70, ss. 50-51. Subsection 51(2) even distinguishes between types of illegal distress for the purpose of damages.

useful to tenants as well, like the tort of malicious execution[2] or the remedy of an interim order for the recovery of personal property.[3]

2. Tenant's Statutory Remedy against Landlords: Wrongful Distress

The Commission proposes that any tenant who sustains reasonably foreseeable loss or damage from a "wrongful distress" should have a statutory cause of action for damages against the landlord or collection agent *[s. 23]*. "Wrongful distress" should be statutorily defined in such a way that it encompasses any breach (by omission or commission) of a duty or obligation owed by the landlord under the new legislative model.

Our draft statute contemplates thirteen instances of wrongful distress *[ss. 22(1)(a)-(m) and 22(2)]*. The substantive basis for each duty or obligation has been discussed elsewhere (largely in Chapter 3) and will not be repeated here. However, it should be noted that, while each of these breaches would cause varying degrees of serious or less serious harm to tenants (depending on the nature of the duty or obligation and the circumstances of each case), this relativity would be reflected in the size of the damage award.

Briefly, therefore, a landlord or collection agent commits "wrongful distress" where that person:

(1) seizes goods when no arrears of rent exist;

(2) does not return seized goods after the tenant tenders redemption for them;

(3) seizes goods at an hour that is unreasonable according to the use of the premises;

(4) exercises a right of distress more than six months after the termination of the tenancy agreement;

(5) uses unreasonable force to enter premises;

(6) fails to leave the tenant's premises secure where the landlord has forced entry and the tenant is absent when the landlord departs;

(7) fails to give a notice of distress;

(8) fails to give a notice of satisfaction when the tenant has redeemed the seized goods by paying the arrears and costs;

(9) disposes of seized goods in an unreasonable manner, including any failure to give a notice of sale as required by the statute;

(10) seizes goods that are unreasonably in excess of the amount required to satisfy the landlord's claim;

(11) seizes goods that are not located on the rented premises;

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[2]See, *e.g.*, *Feinstein* v. *Paulin-Chambers Co. Ltd.*, [1921] 1 W.W.R. 554 (Man. K.B.).

[3]This remedy (formerly known in Manitoba as replevin) can be used pending a court resolution of entitlement to distrained goods. Goods are returned in the interim to the party who obtains that order in exchange for posting a bond for their value: J. Fleming, *The Law of Torts* (8th ed., 1992) 74-75.

(12) seizes tenant's fixtures;

(13) uses an unauthorized agent instead of a collection agent to exercise a right of distress.

RECOMMENDATION 41

Any breach (by omission or commission) of a duty or obligation owed by a landlord under the distress statute should constitute "wrongful distress" for which a tenant may recover damages for reasonably foreseeable loss or damage.

3. Landlord's Statutory Remedy against Tenant: Tenant Misconduct

Traditionally, a distraining landlord's main remedies against wrongdoing tenants consist of actions in rescue or pound breach and the statutory ability to trace and seize fraudulently or clandestinely removed goods. As extensively discussed in Chapter 3, these traditional remedies are considered to be either inappropriate under our proposed statutory model or obsolete (because of the abolition of the impounding requirement).

The Commission proposes (for the reasons explored in Chapter 3) to replace these traditional remedies with a single remedy consisting of a statutory cause of action for any reasonably foreseeable damages arising out of "tenant misconduct" *[ss. 24-25]*.

Tenant misconduct would be committed where a tenant:

(1) with intent to defeat, hinder or delay a landlord's right of distress, removes distrainable goods from the premises or disposes of all or part of his or her interest in such goods;

(2) unreasonably prevents a landlord from entering the premises to exercise a right of distress;

(3) fails to identify third party goods as soon as possible to the distraining landlord;

(4) without tendering redemption, retakes possession of seized goods that have been physically secured either on or off the premises so that the tenant has no control over or use of them and the landlord has unrestricted access to those goods; or

(5) without tendering redemption, disposes of all or part of his or her interest in seized goods.

RECOMMENDATION 42

Any breach (by omission or commission) of a duty or obligation owed by a tenant under the distress statute should constitute "tenant misconduct" for which a landlord may recover damages for reasonably foreseeable loss or damage.

4. Third Party's Common Law Remedies

(a) Against a landlord

Where a distraining landlord seizes goods that belong to a third party, the common law affords adequate remedies to aid the third party in retrieving the goods or obtaining damages for their loss.

Third parties who own goods in the possession of a tenant will fall into two categories: those who have an immediate right to possession of the goods and those who do not (notable in this latter category will be lessors -- the type of third party most likely to be present in a commercial setting). Those third parties who have an immediate right to possession can maintain a cause of action in detinue[4] or conversion,[5] and possibly in trespass to goods.[6] Third parties who do not have an immediate right to possession cannot maintain an action in detinue, trespass or conversion,[7] but would have a cause of action arising out of "damage to the reversionary interest"[8] or in the more modern tort of negligently inflicted economic loss.[9]

(b) Against a tenant

Where a tenant has failed to identify a third party's goods to a distraining landlord or otherwise allowed the landlord to seize these inexigible goods, adequate remedies exist for the third party at common law.

The third party could sue the tenant in breach of contract (if applicable) or possibly for negligent infliction of economic loss. A third party who has an immediate right to possession could also maintain an action for detinue against the tenant,[10] although a suit in conversion could not be brought for a mere failure to identify because conversion must occur by a positive act, not a passive failure to act.[11]

Where a landlord takes goods not knowing of the third party's ownership due to the tenant's breach of the duty to identify, the third party would even have a common law cause of action against the innocent landlord because in torts of intentional interference with chattels (detinue, trespass, conversion and damage to reversionary interest), honest but mistaken belief about ownership is no defence.[12] At common law, therefore, a third party may now sometimes end up with two causes of action against two separate defendants in regard to the same loss of

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[4]Law Reform Commission of British Columbia, *Wrongful Interference with Goods* (Working Paper #67, 1992) 9-10.

[5]*Id.*, at 15.

[6]*Id.*, at 11. The contrary view is expressed in Fleming, *supra* n. 3, at 53.

[7]Law Reform Commission of British Columbia, *supra* n. 4, at 4.

[8]This action requires that there be "permanent injury" to the chattel of a kind not likely in the ordinary course of things to be repaired before the reversionary right to possession arises. This concept includes not only physical injury but also situations where the chattel is untraceable due to theft or where someone is able to obtain title that is good as against the holder of the reversionary interest: Ontario Law Reform Commission, *Wrongful Interference with Goods* (Study Paper, 1989) 33. Thus, in a distress situation under our statutory model, simply seizing the third party's goods from the tenant would not give rise to this cause of action but selling them and statutorily passing good title would.

[9]*Id.*, at 30.

[10]Fleming, *supra* n. 3, at 59.

[11]Law Reform Commission of British Columbia, *supra* n. 4, at 15; Fleming, *supra* n. 3, at 56.

[12]Fleming, *supra* n. 3, at 56 and 77; Law Reform Commission of British Columbia, *supra* n. 4, at 8; Ontario Law Reform Commission, *supra* n. 8, at 10.

the same chattel. Although this scenario can complicate suit procedures, mechanisms exist so that the third party cannot recover double damages.[13]

5. Disputes about Distress

From time to time during the distress process, issues and disputes will arise between landlords and tenants that need to be resolved. For example, where a tenant refuses to let a distraining landlord enter the premises so that entry cannot be effected without using force against the tenant or unreasonable force against the premises, what recourse should a landlord have? If a tenant disputes the amount of arrears that a landlord claims is owing, what recourse should the tenant have?

Part II of *The Landlord and Tenant Act*[14] currently provides a procedure for a summary hearing and disposition of such disputes in the Court of Queen's Bench. There would obviously be a continuing need for such a mechanism and, for that purpose, the Commission recommends its retention, albeit in harmony with modern practice and procedure in the Queen's Bench *[s. 27(1)]*.

Therefore, parties should be able to apply to court using the more summary method of issuing a notice of application rather than having to issue a statement of claim.[15] This procedure also moves more quickly to trial, since pre-trial procedures are comparatively limited. *The Queen's Bench Act* may be relied upon to govern such matters as procedures and appeal route.

The Commission's model allows an application to be brought by either a landlord or a tenant and it may concern any issue of fact or law or mixed fact and law arising under the statute. A right of distress must arise before the application is brought, but the application can be made before the right of distress is actually exercised by seizing goods -- thus, where a tenant is willing to pay arrears but simply disputes the amount, the issue can be resolved without seizure. However, to ensure that tenants cannot avoid the exercise of distress by the simple expedient of initiating a court application, the model expressly states that commencing an application does not halt the distress process unless a court so provides *[s. 27(2)]*.

The court should be empowered to grant whatever relief may, in its opinion, be necessary to resolve an issue, including declaratory, injunctive or interim relief.

RECOMMENDATION 43

The Court of Queen's Bench should continue to be empowered to hear and resolve disputes about distress using that court's quickest procedural route.

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[13]Where two people commit independent tortious acts that result in one damage, they are severally liable. Each is liable for the total damage but, due to *The Tortfeasors and Contributory Negligence Act*, the plaintiff is entitled only to a single satisfaction of the claim. As between themselves, the two defendants have a claim for contribution. The plaintiff is entitled to join both defendants in a single suit even though two causes of action are involved; this also enables the issue of contribution to be litigated at the same time. But if the plaintiff sues only one defendant, that defendant can give a third party notice to the other tortfeasor and thus join a claim for contribution: Fleming, *supra* n. 3, at 200-201, 257, 266-267; *The Tortfeasors and Contributory Negligence Act*, C.C.S.M. c. T90, ss. 2(1)(b)-(c) and 2(2).

[14]*The Landlord and Tenant Act*, C.C.S.M. c. L70, ss. 59-66.

[15]*Queen's Bench Rules*, R. 14.05.

B. TRANSITIONAL

In designing a transitional provision, we have designated the act of seizure as the event that determines whether the "old" or the "new" law applies, rather than the date upon which the arrears originate *[s. 29]*. Since arrears accumulate daily, some arrears during the initial transitional period will "straddle" the date upon which the statute comes into effect. If the date of origin of the arrears were determinative of choice of law, a landlord would have to collect part of those arrears by the former common law/statutory rules and part by the new statutory rules, a situation that would clearly be undesirable.

Thus, where arrears exist before the statute comes into effect and the landlord has seized goods, the entire process (rights, remedies, sale, distribution of proceeds) will be governed by the former common law/statutory regime; it will not matter that the rest of the process following seizure will occur after the new statute is effective. However, if arrears exist before the statute comes into effect but the landlord has not yet seized goods, then the entire process, including seizure, must be conducted according to the new statute (of course, it goes without saying that the new statute will govern any situation where arrears arise after it comes into effect).

RECOMMENDATION 44

Where a distraining landlord seizes goods before the new statutory scheme comes into effect, the disposition of those goods should be governed by the current common law/statutory regime. Where arrears have accumulated before the new statutory scheme comes into effect, but the landlord does not seize until after that date, the process should be governed by the new statutory scheme.

C. CONSEQUENTIAL AMENDMENTS

Enacting a new statute to govern distress in commercial tenancies would necessitate repeal of or amendment to the statutory provisions that currently regulate this area.

1. *The Distress Act*

The Distress Act[16] applies to any extra-judicial right to seize and sell goods in satisfaction of unsecured debt. For example, cities and municipalities often enjoy the right to collect unpaid taxes by distress. Since this Act's ambit is in fact broader than landlord distress, it cannot simply be repealed. Yet to the extent that its general provisions apply to landlord distress, its operation must be statutorily narrowed so that it will not conflict with any statutory codification of that remedy.

So, for example, the scale of costs set by regulation and authorized by section 2 of *The Distress Act* would have to be excluded from governing landlord distress, while continuing to govern other forms of distress. This scale is also incorporated by reference in other statutes[17] and so must be maintained for that purpose.

One section of *The Distress Act* would have continued relevance to landlords. As previously discussed in Chapter 4, provincial bankruptcy provisions that affect landlords would

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[16]*The Distress Act*, C.C.S.M. c. D90.

[17]*The Consumer Protection Act*, C.C.S.M. c. C200, ss. 39(2), 46(1)(c), 47(3); *The Mortgage Act*, C.C.S.M. c. M200, s. 5(2); *The Farm Machinery and Equipment Act*, C.C.S.M. c. F40, s. 25(7)(c); *The Municipal Act*, C.C.S.M. c. M225, s. 790(2); *The City of Winnipeg Act*, S.M. 1989-90, c. 10, s. 227(5).

not be included in the codification of distress. Section 8 of *The Distress Act* deals with that area and therefore will be left to apply to landlords *[s. 30]*.

2. *The Landlord and Tenant Act*

All provisions in *The Landlord and Tenant Act*[18] which relate to distress would have to be repealed, with a few exceptions. One exception would be the current section 31; although this provision mentions distress, its fundamental purpose relates more to the law concerning leases of life estates because it is designed to ensure that a landlord's claim for arrears will survive the death of the person whose life measures the term of the life estate. It is more appropriate to keep this provision in *The Landlord and Tenant Act* than to re-enact it in a codification of distress.

For technical reasons, section 36 (the list of tenants' chattels exempted from seizure by distress) cannot simply be repealed. This statutory list of exemptions has been incorporated by reference into several other Manitoba statutes dealing with seizures in unrelated areas.[19] If the list is repealed in *The Landlord and Tenant Act*, all these other statutes would have to be amended to have the list re-enacted directly in their texts. Therefore, it is easier simply to retain the list in *The Landlord and Tenant Act* and add a new subsection in that Act to clarify that the list no longer applies to landlord distress for rent *[s. 31(5)]*.

Section 38 of *The Landlord and Tenant Act* also deals only incidentally with distress and more fundamentally concerns the regulation of rights of mortgagees and vendors of land. It should be retained, with only minor amendments to clarify that any question concerning distress in this context would be governed by the new codified statute *[ss. 31(6) and (7)]*.

Sections 46 and 47 of *The Landlord and Tenant Act* concern landlords' rights upon bankruptcy of a tenant and accordingly would be excluded from any codification of distress for the reasons already discussed.

It should also be noted that the statutory sources of abolition of distress in agricultural tenancies and in residential tenancies would continue to be *The Landlord and Tenant Act*[20] and *The Residential Tenancies Act*[21] respectively.

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[18]*The Landlord and Tenant Act*, C.C.S.M. c. L70.

[19]*The Crown Lands Act*, C.C.S.M. c. C340, s. 24(2); *The Municipal Act*, C.C.S.M. c. M225, ss. 786(3), 790(3) and Form 15; *The City of Winnipeg Act*, S.M. 1989-90, c. 10, s. 224(1).

[20]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 76.

[21]*The Residential Tenancies Act*, C.C.S.M. c. R119, s. 192(1).

CHAPTER 6

LIST OF RECOMMENDATIONS

The following is a list of the recommendations contained in this Report.

1. The remedy of distress should be retained in commercial tenancies. It should, however, be reformed, simplified and modernized to suit current commercial needs. (p. 3)

2. The recommendations contained in this Report should be implemented by enactment of a new statute similar to the draft Distress in Commercial Tenancies Act set out in Appendix A. (p. 3)

3. The law of distress should be codified as a purely statutory remedy. (p. 4)

4. Parties to a tenancy agreement should be able to restrict or waive any part of the distress statute unless it would affect the rights of third parties. (p. 4)

5. The Crown should not be bound by any statutory codification of distress. (p. 5)

6. Distress should continue to be a self-help remedy, without the need to obtain prior judicial authorization. (p. 6)

7. A landlord who continues to have an interest in the premises should be allowed to distrain within six months of the termination of a tenancy agreement even if the tenant is no longer in possession of those premises. (p. 7)

8. A landlord should be able to distrain for "tangential rent" that is related to the use or occupancy of the rented premises and for any interest on arrears specified by the lease. (p. 7)

9. A landlord should not be able to apply distress sale proceeds to arrears that accrue after the date of distress. (p. 8)

10. Upon giving written notice and particulars before or after distress occurs, a tenant should continue to be able to set-off against the rent due any debt justly due to the tenant from the landlord. (p. 8)

11. A landlord should be able to distrain only upon goods that are located on the rented premises. (p. 10)

12. Every tenant commits tenant misconduct and should be liable in damages to the landlord where that tenant, with intent to defeat, hinder or delay the landlord's right of distress, removes goods from the rented premises or disposes of all or part of his or her interest in the goods. The landlord should have no ability to seize such goods off the rented premises. (p. 10)

13. A landlord should not be allowed to distrain tenant's fixtures. Seizure of tenant's fixtures should constitute wrongful distress. (p. 11)

14. A landlord should be able to seize only the goods of the tenant, meaning any tangible personal property in which the tenant has any right or interest except one that is limited to (1) a temporary right to possession or (2) a lien on the goods for their storage or for improvement or repairs made to them. There should be no list of exempted goods. (p. 12)

15. A duty should be placed on every tenant to identify third party goods as soon as possible to a distraining landlord. Failure to identify should constitute tenant misconduct. (p. 12)

16. A landlord should be able to seize only enough goods to satisfy the landlord's claim. Excess seizure should constitute wrongful distress, entitling the tenant to damages. (p. 12)

17. A landlord should be able to effect distress personally or by an agent who need not be a sheriff or peace officer but will be a "collection agent" within the meaning of *The Consumer Protection Act*, licensed and governed by that statute. It should constitute wrongful distress to use an unauthorized agent. (p. 13)

18. A landlord should be able to distrain at any hour that is reasonable according to the use of the premises. (p. 14)

19. A distraining landlord should be allowed to use reasonable force against premises to gain entry. (p. 15)

20. A tenant who unreasonably prevents a distraining landlord from entering the premises should be liable for tenant misconduct. (p. 15)

21. When entry is forced and the tenant is absent upon the landlord's departure, the landlord should be under a duty to take reasonable care that the premises are left secure against unauthorized entry. Failure to do so should constitute wrongful distress for which damages may be sought by the tenant. (p. 15)

22. A landlord should be obliged to give a written notice of distress to the tenant by personal service at the time of distress or, where the tenant is absent or refuses service, by posting it in a prominent place on the premises. The notice will contain factual information, a description of the seized goods sufficient to identify them, and advice about the tenant's duties and rights. (p. 16)

23. A distraining landlord should be obliged to handle seized goods in a commercially reasonable manner prior to sale. There should be no technical "impounding" rules. (p. 17)

24. A landlord should have an action for damages in tenant misconduct against any tenant who, without tendering redemption, retakes possession of seized goods that have been physically secured or who disposes of his or her interest in seized goods. (p. 18)

25. When a third party wrongly interferes with seized goods, a landlord should, in most cases, be statutorily deemed to have the necessary possessory or property interest in the goods to sue the wrongdoer in the common law torts of conversion, detinue or trespass. (p. 18)

26. Where a distraining landlord leaves seized goods on the rented premises subject to a walking possession agreement, the seizure should not be effective against a third person who purchases any of those goods in the ordinary course of the tenant's business despite any knowledge that the goods are distrained. (p. 20)

27. Where a distraining landlord leaves seized goods on the rented premises subject to a walking possession agreement and registers a copy of the notice of distress in a designated public registry, the seizure should be effective against a third person who purchases any of those goods otherwise than in the ordinary course of the tenant's business. Failure to register would mean that the seizure is not effective against those third persons. (p. 20)

28. Where a landlord registers a notice of distress and the tenant redeems the goods, the landlord should be obliged to serve the tenant with a notice confirming the redemption. Registration of this notice of satisfaction in the designated public registry would cancel the effect of the notice of distress. (p. 20)

29. A landlord should be allowed to sell seized goods in whatever manner (including public or private sale), at any time and place, and on any terms so long as every aspect of the disposition is reasonable. (p. 21)

30. At any time before the landlord contracts to dispose of seized goods, the tenant should be able to redeem them by tendering full payment of arrears and any reasonable expenses incurred by the landlord in connection with the distress. (p. 22)

31. A landlord should be able to retain seized goods in whole or in part for such period of time as is reasonable before selling them. (p. 22)

32. A landlord should have the discretion to do any reasonable repair, processing or preparation of goods for sale and should be able to recoup those costs (together with the costs of seizure and holding) as a first charge on the sale proceeds. (p. 22)

33. A landlord should give the tenant no less than 5 days' written notice of sale (unless the goods are perishable or the landlord reasonably believes they will quickly depreciate). (p. 23)

34. The notice of sale should contain identifying information, the landlord's claim for expenses related to the sale, advice about the tenant's right to redeem, and full particulars about the date, time and place of any public sale or the date after which private sale will occur. (p. 23)

35. The notice of sale should be personally served on the tenant or, in case of absence or refusal, should be sent by ordinary mail to the tenant's last known address. (p. 23)

36. A landlord who sells seized goods should be able to purchase all or part of the goods but only at a public sale. (p. 24)

37. A landlord who sells seized goods should be able, subject only to the priority of any purchase-money security interest, to pass good title to the purchaser despite the occurrence of wrongful distress. (p. 24)

38. A landlord should be able to recoup any reasonable expenses incurred by the landlord in seizing, holding, repairing, processing, preparing for disposition and disposing of the seized goods. (p. 25)

39. A distraining landlord should continue to have a limited priority of claim over the holder of any prior PPSA security interest, but should not have priority over a purchase-money security interest that is perfected at the date of distress or within 10 days after the debtor obtained possession of the collateral. (p. 30)

40. A distraining landlord should continue to have a limited priority of claim over an execution creditor who may then recoup the amount of this priority from an additional levy on the debtor/tenant's goods.

41. Any breach (by omission or commission) of a duty or obligation owed by a landlord under the distress statute should constitute "wrongful distress" for which a tenant may recover damages for reasonably foreseeable loss or damage.

42. Any breach (by omission or commission) of a duty or obligation owed by a tenant under the distress statute should constitute "tenant misconduct" for which a landlord may recover damages for reasonably foreseeable loss or damage.

43. The Court of Queen's Bench should continue to be empowered to hear and resolve disputes about distress using that court's quickest procedural route.

44. Where a distraining landlord seizes goods before the new statutory scheme comes into effect, the disposition of those goods should be governed by the current common law/statutory regime. Where arrears have accumulated before the new statutory scheme comes into effect, but the landlord does not seize until after that date, the process should be governed by the new statutory scheme.

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 4th day of January 1994.

Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

APPENDIX A

THE DISTRESS IN COMMERCIAL TENANCIES AND CONSEQUENTIAL AMENDMENTS ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

INTERPRETATION AND APPLICATION

Definitions

1 In this Act,

"collection agent" has the same meaning as in The Consumer Protection Act;

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

"goods" means all tangible personal property except tenant's fixtures and includes money;

"goods of the tenant" means those goods in which a tenant has any right or interest except a right or interest that is limited to

(a) a temporary right to possession, or

(b) a lien on the goods for their storage or for improvement or repairs made to them;

"landlord" means a person to whom arrears of rent are owed under a tenancy agreement and includes his or her heirs, assigns, personal representatives and successors in title;

"notice of distress" means a notice under section 12;

"notice of sale" means a notice under section 14;

"notice of satisfaction" means a notice under subsection 13(3);

"premises" means the premises in respect of which arrears of rent are owed;

"purchase money security interest" means

(a) a security interest taken or reserved in collateral to the extent that it secures all or part of its purchase price, or

(b) a security interest taken or reserved in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire the rights.

and for the purpose of this definition, "purchase price" and "value" include credit charges or interest payable in respect of the purchase or loan;

"rent" means monetary consideration that is due and in arrear of payment from a tenant to a landlord for the use or occupancy of premises and includes

(a) the cost of any related service, area or thing that the landlord provides for the tenant under the terms of the tenancy agreement, and

(b) any interest payable on arrears of rent under the terms of the tenancy agreement;

"right of distress" means the right granted under section 4 of this Act;

"security interest" means an interest in goods that secures payment or performance of an obligation;

"tenant" means a person who owes arrears of rent under a tenancy agreement and includes his or her heirs, assigns and personal representatives.

Non-application
2 This Act does not apply to any tenancy of farm property or to any tenancy governed by The Residential Tenancies Act.

Limitation on restriction and waiver
3 No party to a tenancy agreement may agree with another party to that agreement to restrict or waive the following provisions of this Act and any agreed term that purports to do so is void:

(a) subsection 4(2);

(b) sections 1, 2, 6, 8, 13, 17, 18, 19, 20, 21 and 27.

THE RIGHT OF DISTRESS

Statutory right of distress
4(1) Subject to subsection (2), a landlord has a right of distress against a tenant that enables the landlord to seize the goods of that tenant and to dispose of them in accordance with this Act for the purpose of satisfying arrears of rent.

Limitation on arrears
4(2) No landlord has a right of distress for more than

(a) the next preceding three month's arrears of rent where the rent is payable quarterly or more frequently; or

(b) the next preceding one year's arrears where the rent is payable less frequently than quarterly.

Right to sue suspended
4(3) A landlord who exercises a right of distress shall not sue the tenant to recover a judgment for the same arrears until the seized goods are sold.

Tenant's right of set-off
5(1) Upon giving notice to the landlord before or after the landlord seizes goods, a tenant may set-off against rent any debt justly due to the tenant by the landlord and the landlord shall exercise a right of distress only for the balance of the rent.

Form of notice
5(2) A notice under subsection (1) must be in writing and must state the amount and particulars of the debt owed by the landlord sufficient to identify it.

Service of notice
5(3) A notice under subsection (1) shall be served by giving it directly to the landlord or, where the landlord is absent or refuses service, by sending it by ordinary mail to the last known address of the landlord.

Common law abolished
6(1) The common law respecting distress for rent is no longer the law of Manitoba and the provisions of this Act apply in its place.

Saving
6(2) Nothing in subsection (1) abolishes any other common law cause of action or remedy that a person may have.

Additional six-month period
7 A landlord continues to have a right of distress against a tenant despite the termination of a tenancy agreement with that tenant where the landlord exercises the right of distress within six months after the termination of the tenancy agreement.

SEIZURE OF GOODS

Goods on rented premises only
8(1) A landlord acting under a right of distress may seize only goods that

(a) are goods of the tenant; and

(b) are located on the premises.

Tenant to identify ineligible goods
8(2) A tenant shall as soon as possible identify to a landlord who is exercising a right of distress all goods that are not goods of the tenant.

Use of collection agent
9 A landlord may exercise a right of distress personally or through a collection agent.

When distress may occur
10 A landlord may exercise a right of distress at any hour that is reasonable according to the use of the premises.

Entry power
11(1) A landlord may use reasonable force against the premises to enter for the purpose of exercising a right of distress.

Premises to be left secure
11(2) A landlord who uses reasonable force under subsection (1) shall, upon departure from premises where the tenant is absent, take reasonable care to leave the premises secure against unauthorized entry.

Notice of distress
12(1) A landlord who exercises a right of distress shall give notice of the seizure to the tenant whose goods have been seized.

Contents of notice
12(2) A notice of distress shall be in writing and shall state

(a) the name of the landlord and of the tenant;

(b) the date of the seizure;

(c) the location of the premises;

(d) the amount of arrears of rent;

(e) a description of the seized goods sufficient to identify them;

(f) the obligation of the tenant under subsection 8(2) to identify as soon as possible to the landlord all goods that are not goods of the tenant; and

(g) the right of redemption of the tenant under section 16.

Service of notice
12(3) A notice of distress shall be served on the tenant when the goods are seized by giving it directly to the tenant or, where the tenant is absent or refuses service, by posting it in a prominent place on the premises.

Effect of seizure on third persons
13(1) Where a landlord acting under a right of distress seizes goods, the seizure is not effective against third persons unless

(a) the landlord physically secures the goods so that the tenant has no control over or use of those goods and the landlord has unrestricted access to them; or

(b) the third person purchases the goods from the tenant otherwise than in the ordinary course of business of the tenant and the landlord has registered prior to that sale a notice of distress as provided in subsection (2).

Landlord may register
13(2) A landlord may register a notice of distress in the Sheriff's Office for the judicial centre nearest the place where the premises are located.

Notice of satisfaction
13(3) Where a landlord registers a notice of distress under subsection (2) and the seized goods are redeemed under section 16, the landlord shall forthwith serve the tenant with a notice of satisfaction confirming the redemption.

Service of notice
13(4) The notice of satisfaction shall be served by giving it directly to the tenant or, where the tenant is absent or refuses service, by sending it by ordinary mail to the last known address of the tenant.

Notice may be filed
13(5) A notice of satisfaction may be registered in the Sheriff's Office where the notice of distress is registered.

Effect of registration
13(6) Registration of a notice of satisfaction cancels the registration of a notice of distress.

DISPOSITION OF SEIZED GOODS

Methods of disposition
14(1) Subject to section 16, a landlord who exercises a right of distress shall dispose of seized goods by public or private sale at any time and place and on any terms so long as every aspect of the disposition is reasonable.

Discretion of landlord
14(2) A landlord acting under subsection (1)

(a) may retain the goods in whole or in part for such period of time as is reasonable; and

(b) may dispose of the goods either before or after the occurrence of any reasonable repair, processing or preparation for their disposition.

Notice to be given
14(3) Subject to subsection (4), a landlord shall give not less than 5 days' notice of the sale to the tenant.

Exception
14(4) Where the goods are perishable or where the landlord believes on reasonable grounds that the goods will quickly depreciate in value, the landlord may give less than 5 days' notice.

Notice of sale
14(5) A notice of sale shall be in writing and shall state

(a) the name of the landlord and of the tenant;

(b) a description of the goods sufficient to identify them;

(c) the amount of arrears of rent;

(d) the amount of any reasonable expenses incurred by the landlord in seizing, holding, repairing, processing, and preparing for disposition of the goods;

(e) the right of redemption of the tenant under section 16; and

(f) the date, time and place of any public sale of the goods or the date after which any private sale of the goods is to be made.

Service of notice of sale
14(6) The notice of sale shall be served by giving it directly to the tenant or, where the tenant is absent or refuses service, by sending it by ordinary mail to the last known address of the tenant.

When landlord may buy goods
15 A landlord acting under subsection 14(1) may purchase the seized goods in whole or in part only at a public sale.

Redemption of goods
16 At any time before the landlord disposes or contracts to dispose of seized goods of the tenant, the tenant may redeem them by tendering to the landlord a sum sufficient to satisfy

(a) the arrears of rent; and

(b) any reasonable expenses incurred by the landlord in seizing, holding, repairing, processing, and preparing for disposition of the goods.

Clear title to purchaser except for PMSI
17 Notwithstanding any contravention of section 22, where a landlord disposes of goods seized under this Act to a purchaser for value acting in good faith, the disposition terminates any interest in those goods held by the tenant or any other person unless the interest is a purchase-money security interest having priority under subsection 20(2).

PRIORITIES

Arrears before execution
18(1) No sheriff or bailiff acting under a writ of execution shall seize any goods of the tenant located on the premises until the execution creditor pays to the landlord any arrears of rent not exceeding

(a) three month's arrears of rent where the rent is payable quarterly or more frequently; or

(b) one year's arrears of rent where the rent is payable less frequently than quarterly.

Additional collection
18(2) The sheriff or bailiff shall collect by seizure and sale from the goods of the tenant and pay to the execution creditor any amount paid under subsection (1).

Expenses are first charge
19 Notwithstanding any Act of the Legislature, a landlord who sells seized goods shall first apply the proceeds of their disposition to the satisfaction of any reasonable expenses incurred by the landlord in seizing, holding, repairing, processing, preparing for disposition and disposing of those goods.

Priority over security interests
20(1) A landlord who exercises a right of distress has priority of claim with respect both to the seized goods and to their proceeds of disposition over any security interest in those goods that is perfected at the date of distress.

Exception for PMSI
20(2) Notwithstanding subsection (1), a perfected purchase-money security interest has priority to the claim of a landlord if the purchase-money security interest was perfected

(a) at the date of distress; or

(b) within 10 days after the debtor obtained possession of the collateral.

Provision of statement
21 If requested in writing by the tenant or any person interested in seized goods, the landlord shall provide a written statement of the disposition of the goods and the distribution of the proceeds of the disposition.

Wrongful Distress

Wrongful distress
22(1) A landlord or a collection agent commits a wrongful distress if that person

(a) seizes goods when no arrears of rent exist;

(b) fails to return seized goods after the tenant has tendered redemption under section 16;

(c) seizes goods at a time that is unreasonable according to the use of the premises;

(d) exercises a right of distress under section 7 more than six months after the termination of the tenancy agreement;

(e) uses unreasonable force to enter premises for the purpose of exercising a right of distress;

(f) fails to comply with subsection 11(2);

(g) fails to comply with section 12;

(h) fails to comply with subsection 13(3);

(i) fails to comply with section 14;

(j) seizes goods that are unreasonably in excess of the amount required to satisfy the claim of the landlord;

(k) seizes goods that are not located on the rented premises; or

(m) seizes tenant's fixtures.

Use of unauthorized agent
22(2) Where a right of distress is exercised through an agent who is not a collection agent, the landlord and the agent commit a wrongful distress.

Definition of "plaintiff"
23(1) In this section, "plaintiff" means a person who was a tenant when the wrongful distress was committed.

Damages for wrongful distress
23(2) A plaintiff has a right to recover damages by action in court against a landlord or collection agent who commits a wrongful distress where the plaintiff sustains loss or damage that was reasonably foreseeable as likely to result from the wrongful distress.

Tenant Misconduct

Tenant misconduct
24 Every tenant commits tenant misconduct who

(a) with intent to defeat, hinder or delay the right of distress of the landlord,

(i) removes goods of the tenant from the premises, or

(ii) disposes of all or part of his or her interest in goods of the tenant;

(b) unreasonably prevents a landlord from entering the premises to exercise a right of distress;

(c) fails to comply with subsection 8(2); or

(d) without tendering redemption under section 16,

(i) retakes possession or control of seized goods that have been physically secured in accordance with clause 13(1)(a), or

(ii) disposes of all or part of his or her interest in seized goods.

"Plaintiff" defined
25(1) In this section, "plaintiff" means a person who was a landlord when the tenant misconduct was committed.

Damages for tenant misconduct
25(2) A plaintiff has a right to recover damages by action in court against a tenant who commits tenant misconduct where the plaintiff sustains loss or damage that was reasonably foreseeable as likely to result from the tenant misconduct.

Other Actions

Deemed possession for certain purposes
26 Subject to section 13, a landlord who exercises a right of distress is deemed, from the date of seizing goods to the date when the tenant redeems them under section 16 or the landlord disposes of them,

(a) to be in actual possession of those goods for the purpose of maintaining an action in conversion or trespass to goods against a person other than the tenant; and

(b) to have an immediate right to possession of those goods for the purpose of maintaining an action in detinue against a person other than the tenant.

Disputes about Distress

Application to court
27(1) Upon application by a landlord or tenant before or after a right of distress is exercised, a court may determine any issue of fact or law or mixed fact and law arising under this Act and for that purpose may make any order it considers just, including declaratory, injunctive or interim relief.

Application does not halt process
27(2) The commencement of an application under subsection (1) does not for that reason alone prevent the exercise of any right or duty under this statute unless a court so orders.

REGULATIONS

Regulations
28 The Lieutenant Governor in Council may make regulations prescribing fees for registration under clause 13(1)(b) and subsection 13(3).

TRANSITIONAL

Transitional
29 Where a distraining landlord seizes goods before this Act comes into force, the disposition of those goods shall proceed as if this Act had not come into force.

CONSEQUENTIAL AMENDMENTS

The Distress Act

C.C.S.M. c. D90 amended
30 *The following is added after section 9 of The Distress Act:*

Application of Act
10 This Act does not, except for section 8, apply to any distress made under The Distress in Commercial Tenancies Act.

The Landlord and Tenant Act

C.C.S.M. c. L70 amended
31(1) *The Landlord and Tenant Act is amended by this section.*

31(2) *All headings are repealed that appear*

(a) following section 28 and preceding section 45; and

(b) following section 47 and preceding section 50.

31(3) *The following sections are repealed:*

(a) sections 29 to 30;

(b) sections 32 to 35;

(c) section 37;

(d) sections 39 to 45; and

(e) sections 48 to 51.

31(4) *The heading* "MISCELLANEOUS DISTRESS ISSUES" *is added preceding section 31.*

31(5) *The following is added after subsection 36(3):*

Commercial distress excluded
36(4) This section does not apply to any distress made under The Distress in Commercial Tenancies Act.

31(6) *Subsection 38(1) is amended by striking out* "this Act" *and substituting* "The Distress in Commercial Tenancies Act".

31(7) *Subsection 38(4) is amended by striking out* "Part II, and that Part" *and substituting* "The Distress in Commercial Tenancies Act, and that Act".

31(8) *Part II is repealed.*

31(9) *Form 1 of the Schedule is repealed.*

GENERAL PROVISIONS

C.C.S.M. reference
32 This Act may be cited as The Distress in Commercial Tenancies Act and referred to as Chapter D-- of the Continuing Consolidation of the Statutes of Manitoba.

Coming into force
33 This Act comes into force on a day fixed by proclamation.

APPENDIX B

LIST OF PERSONS AND ORGANIZATIONS WHO RESPONDED TO THE DISCUSSION PAPER

Edward Brown, lawyer, Winnipeg

Credit Union Central of Manitoba

Manitoba Hydro

Pratt McGarry Inc., Winnipeg

Edward Tawkin, lawyer, on behalf of Kenneth Burdyny Bailiff and Process Service, Winnipeg

Marjorie Webb, Crown Counsel, Civil Legal Services, Department of Justice, Province of Manitoba

LIST OF PERSONS AND ORGANIZATIONS WHO RECEIVED COPIES OF THE DISCUSSION PAPER

Hon. James C. McCrae, Minister of Justice and Attorney General, Province of Manitoba

Graeme Garson, Q.C., Deputy Minister of Justice and Attorney General, Province of Manitoba

Ron Perozzo, Assistant Deputy Minister of Justice, Province of Manitoba

Tom Hague, Director, Legal Services Branch, Department of Justice, Province of Manitoba

Sharon Carstairs, Leader of the Official Opposition, Province of Manitoba

Gary Doer, Leader of the New Democratic Party, Province of Manitoba

Manitoba Insolvency Association

Canadian Bankers' Association (Winnipeg Branch)

Canadian Creditors Association for the Revision of Rights and Legislation, Montreal

Canadian Federation of Independent Business (Manitoba Office)

Manitoba Landlords Association

Cadillac Fairview Corporation Ltd., Winnipeg

Bachman & Associates, Winnipeg

John A. Flanders Ltd., Winnipeg

Pratt McGarry Inc., Winnipeg

Downtown Winnipeg Association

Retail Merchants Association of Canada (Manitoba) Inc.

Credit Union Central of Manitoba

Dylex Corp., Legal Department, Toronto

A-1 Repossession Specialists, Winnipeg

Affiliated Credit Adjusters Ltd., Winnipeg

Central Collection Service Ltd., Winnipeg

Concord Collection Agencies Ltd., Brandon

International Bailiffs and Process Servers, Winnipeg

Richards T. Bailiff Services, Winnipeg

Crown Collection Bailiffs, Winnipeg

Scott Process Service, Winnipeg

Superior Collection/Bailiffs Ltd., Winnipeg

Kenneth Burdyny Bailiff and Process Service, Winnipeg

Building Owners and Managers Association (Manitoba) Inc.

Credit Grantors Association, Winnipeg

Manitoba Chamber of Commerce

Old Market Square Association, Winnipeg

Sargent Avenue Merchants Association, Winnipeg

Winnipeg Chamber of Commerce

Bank of Montreal, Winnipeg

Bank of Nova Scotia, Winnipeg

Canadian Imperial Bank of Commerce, Winnipeg

National Bank, Winnipeg

Royal Bank of Canada, Winnipeg

Toronto Dominion Bank, Winnipeg

Great West Life Assurance Company, Winnipeg

Trust Companies Association, Winnipeg

Chartier & Associates Inc., Winnipeg

Manitoba Hydro

S.A.M. (Management) Inc., Winnipeg

Prof. A. Burton Bass, Faculty of Law, University of Manitoba

Edward Brown, Chairperson, Real Property Law Subsection, Manitoba Bar Association

Dana Nelko, lawyer, Winnipeg

Tim Taylor, lawyer, Winnipeg

Bruce King, lawyer, Winnipeg

Jan Lederman, lawyer, Winnipeg

Larry Nasberg, lawyer, Winnipeg

Jim Ripley, lawyer, Winnipeg

Barry Effler, lawyer, Winnipeg

John Toone, lawyer, Winnipeg

Shawn Hughes, lawyer, Winnipeg

Ursula Goeres, lawyer, City of Winnipeg Law Department

R.S. Chipman, lawyer, Winnipeg

Ron Dearman, lawyer, Flin Flon

John Stefaniuk, lawyer, Winnipeg

Murray Trachtenberg, lawyer, Winnipeg

Edward Tawkin, lawyer, Winnipeg

Robert Dawson, lawyer, Winnipeg

Bruce Parker, lawyer, Winnipeg

Richard Swystun, lawyer, Winnipeg

Mark Newman, lawyer, Winnipeg

Matt Turner, lawyer, Winnipeg

Lyndon Schindel, lawyer, Flin Flon

Dave Lane, Property Manager, Winnipeg

T.B. Martin, Property Manager, Air Canada, Winnipeg

Harvey Davis, Winnipeg

Richard Literovich, lawyer, Winnipeg

Lawrence Steinberg, lawyer, Winnipeg

EXECUTIVE SUMMARY OF

REPORT ON DISTRESS FOR RENT IN COMMERCIAL TENANCIES

EXECUTIVE SUMMARY

The Manitoba Law Reform Commission's Report on *Distress for Rent in Commercial Tenancies* recommends that the remedy of distress for rent be retained in commercial tenancies. However, its rules should be reformed, simplified and modernized to suit current commercial needs.

BACKGROUND

Where a tenant of commercial premises (like a retail store, office or warehouse) is in arrears of rent, the landlord can exercise the ancient remedy of distress by entering the rented premises, seizing the tenant's goods and selling them to satisfy the arrears. No prior court approval is necessary for this process because distress is a private, "self-help" remedy. A commercial landlord's claim for arrears receives priority of payment even over the claim of most secured creditors, although in Manitoba this priority is limited to a maximum of three months' arrears (or, in a few cases, a maximum of one year's arrears).

The remedy of distress operates by means of intricate and complex rules created both by legislation and the common law -- rules that are largely inaccessible except to lawyers and that often work simply to produce technical pitfalls for their users, diminishing the usefulness of this remedy.

In 1990, the Commission distributed a Discussion Paper that outlined various options for reform and that sought public comment and input on all aspects of commercial distress. Several helpful briefs were received.

RECOMMENDED REFORMS

Retention of self-help and priority

Distress remains a pragmatic, workable remedy for commercial landlords. The Commission does not recommend any significant alteration of the two fundamental characteristics that make it so, namely, its status as a self-help remedy for which prior judicial authorization is not needed, and its high (albeit limited) priority of claim status against secured and other creditors.

Codification and modernization

However, the law of distress should be codified as a purely statutory remedy to improve its accessibility to its users. The language and concepts used in that statute to express the landlord's traditional priority should also be harmonized with *The Personal Property Security Act* in order to remove confusion. The Commission's proposed model also clarifies such matters as a landlord's ability to distrain for "tangential rent" (a payment or charge that is only indirectly or partially attributable to the use or enjoyment of land).

Entry powers

A landlord's entry powers (currently a source of many technical pitfalls) should be clarified in the new statute. A landlord should be able to distrain at any hour that is reasonable according to the use of the premises. Moreover, a landlord should be allowed to use reasonable force against the premises to gain entry. Of course, no force may be used against the tenant.

Seizure

A landlord should be able to seize only those goods of the tenant located on the rented premises, being any tangible personal property in which the tenant has any right or interest except one that is limited to a temporary right to possession or a storage, artisan's or repairer's lien. Nor should a landlord be able to seize "tenant's fixtures" (goods of the tenant affixed to the land for the purposes of trade, domestic convenience or ornament). There should be no list of exempted goods. The Commission proposes that a statutory duty be placed on the tenant to identify goods belonging to third parties.

The Commission further recommends that the rules regarding impounding of seized goods be abolished and replaced with a simple requirement that a landlord handle seized goods in a commercially reasonable manner. Where a "walking possession" agreement exists (so that seized goods are, by agreement, left at the rented premises in the control and possession of the tenant), the statute should clarify the rights of third parties against the landlord. If a third party purchases seized goods in the ordinary course of the tenant's business, the seizure should not be effective against the third party regardless of any knowledge about the distress. However, by registering a copy of the notice of distress in a designated public registry, a landlord should be able to make the seizure effective against any third party who buys seized goods other than in the ordinary course of the tenant's business.

Sale

The concept of commercial reasonableness has also been used to simplify sale procedure. The Commission recommends that a landlord be allowed to sell seized goods in whatever manner (including public or private sale), at any time and place, and on any terms so long as every aspect of the disposition is reasonable. A landlord should be able to retain goods prior to sale, repair or process them for sale, and recoup these costs as a first charge on the sale proceeds. Except in the case of perishable goods, a landlord should continue to provide 5 days' notice of sale. A landlord should be able to purchase seized goods, but only at a public sale.

Remedies

The Commission recommends that two statutory causes of action ("wrongful distress" and "tenant misconduct") be created for landlords and tenants to use against each other to recover damages for reasonably foreseeable loss or damage arising out of the distress process. As between landlords, tenants, and third parties, causes of action from other areas of the common law should continue to serve.

Any breach (by omission or commission) of a duty or obligation owed by a landlord under the distress statute should constitute "wrongful distress" (for example, where a landlord does not return seized goods after the tenant pays the arrears, or where a landlord fails to give the notice of distress required by the statute). One effect of this reform is to abolish the complex categorization and differing legal consequences of "illegal", "excessive" and "irregular" distress.

Similarly, any breach (by omission or commission) of a duty or obligation owed by a tenant under the distress statute should constitute "tenant misconduct" (for example, where a tenant removes distrainable goods from the premises with intent to defeat, hinder or delay distress, or disposes of all or part of his or her interest in seized goods).

SOMMAIRE DU

RAPPORT SUR

DISTRESS FOR RENT IN COMMERCIAL TENANCIES

(SAISIE-GAGERIE DANS LES LOCATIONS COMMERCIALES)

SOMMAIRE

Dans son rapport intitulé *Distress for Rent in Commercial Tenancies*, la Commission de réforme du droit du Manitoba recommande de conserver le recours judiciaire qu'est la saisie-exécution contre les locataires commerciaux n'ayant pas payé leur loyer. Cependant, elle estime qu'il faut en réformer, simplifier et moderniser les règles pour les adapter aux besoins commerciaux actuels.

CONTEXTE

Lorsque le locataire d'un établissement commercial (magasin de détail, bureau ou entrepôt, par exemple) ne paie pas son loyer à temps, le locateur peut faire appel à un ancien recours appelé "saisie-gagerie" en entrant dans les locaux loués, en saisissant des biens du locataire, et en les vendant pour recouvrer le loyer non payé. Aucune sanction judiciaire préalable n'est nécessaire pour cela, car la saisie-gagerie constitue une forme d'"auto-protection" privée. En pareille situation, le locateur a préséance même sur les créanciers bénéficiant des meilleures garanties, bien qu'au Manitoba, ce privilège soit limité à trois mois de loyer arriéré (ou, dans quelques cas, à un an).

Le recours qu'est la saisie-gagerie repose sur des règles compliquées créées tant par des lois que par la *common law*; pour la plupart, ces règles ne sont qu'à la portée des avocats et elles ont souvent pour effet d'engendrer des difficultés techniques pour quiconque s'en sert, ce qui diminue l'utilité du recours.

En 1990, la Commission a diffusé un document de travail dans lequel elle proposait diverses réformes et demandait au public son opinon sur tous les aspects de la saisie-gagerie commerciale. Elle a reçu plusieurs mémoires utiles.

RÉFORMES RECOMMANDÉES

Conserver l'auto-protection et le droit de préséance

La saisie-gagerie demeure un recours pratique pour les locateurs commerciaux. La Commission recommande de n'apporter aucune modificiation importante aux deux caractéristiques fondamentales lui conférant sa qualité pragmatique: d'une part, le fait qu'il s'agit d'un moyen d'auto-protection applicable sans autorisation judiciaire préalable et, d'autre part, le degré élevé (quoique limité) de préséance qu'il confère au locateur par rapport à tout autre titulaire de créances garanties ou non.

Codification et modernisation

Il conviendrait, cependant, de codifier la loi sur la saisie-gagerie comme un recours purement réglementaire pour la rendre plus accessible à ses utilisateurs. Il faut harmoniser le libellé et les concepts employés dans cette loi pour exprimer la préséance traditionnelle du locateur avec ceux de la *Loi sur les sûretés relatives aux biens personnels*, afin de dissiper toute confusion. Dans le modèle qu'elle propose, la Commission précise aussi des aspects tels que la capacité du locateur d'opérer une saisie relativement à un "loyer tangentiel" (paiement ou frais n'étant dus qu'indirectement ou partiellement à l'utilisation ou à la jouissance du terrain).

Accès de droit

Il conviendrait de clarifier dans la nouvelle loi le droit d'accès du locateur (droit qui est, à l'heure actuelle, source de nombreuses difficultés techniques). Le locateur doit pouvoir opérer une saisie à n'importe quelle heure raisonnable, tout dépendant de l'utilisation étant faite des lieux. En outre, il devrait pouvoir forcer l'entrée des lieux, dans les limites de la raison. Bien sûr, aucune force ne peut être employée contre le locataire.

Saisie-exécution

Le locateur ne doit pouvoir saisir que les biens du locataire se trouvant dans les locaux loués, c'est-à-dire tout bien personnel matériel sur lequel le locataire a des droits ou des intérêts, sauf tout bien sur lequel il n'exerce qu'un droit temporaire de propriété ou l'égard duquel un entrepôt, un artisan ou un réparateur bénéficie d'un droit de rétention. Le locateur ne doit pas non plus pouvoir saisir des "accessoires du locataire" (biens que le locataire a fixés au terrain pour accroître son chiffre d'affaires, pour des raisons pratiques, ou pour le décorer). Il ne doit y avoir aucune liste de biens insaisissables. La Commission propose que la loi oblige le locataire à désigner les biens appartenant à des tiers.

La Commission recommande par ailleurs d'abolir les règles sur la garde des biens saisis et de les remplacer par une simple disposition obligeant le locateur à disposer desdits biens d'une manière raisonnable du point de vue commercial. S'il existe une entente de "prise de possession sans confiscation" (les biens saisis sont laissés dans les locaux loués, le locataire en ayant toujours le contrôle et la possession), la loi doit préciser les droits que les tierces parties ont contre le locateur. Si, à la faveur d'une transaction commerciale normale avec le locataire, un tiers achète des biens saisis, le locateur ne devrait avoir aucun droit de saisie contre ledit tiers, peu importe que celui-ci fût ou non au courant de la saisie-gagerie. Cependant, s'il dépose officiellement un avis de saisie-gagerie dans un registre public désigné, le locateur doit pouvoir exercer son droit contre tout tiers qui achète des biens saisis autrement qu'à la faveur d'une transaction commerciale normale avec le locataire.

Vente

Afin de simplifier la procédure de vente, on a aussi invoqué le concept de la "raison" commerciale. La Commission recommande d'autoriser le locateur à vendre les biens saisis de la manière (par des moyens publics ou privés), au lieu, au moment et aux conditions qui lui paraîtront appropriés, dans la mesure où, à tous ces égards, il suit une démarche et des méthodes raisonnables. Le locateur doit pouvoir garder les biens avant la vente, les réparer ou les préparer en vue de les vendre, et recouvrer en priorité à même les fruits de la vente les frais ainsi subis. Sauf pour les biens périssables, le locateur doit toujours donner avis de la vente cinq jours d'avance, et il doit pouvoir acheter des biens saisis, mais uniquement dans le cadre d'une vente publique.

Recours

La Commission recommande d'intégrer à la loi deux motifs de poursuite ("saisie-gagerie illégale" et "inconduite du locataire") que le locateur et le locataire pourront utiliser l'un contre l'autre pour obtenir réparation en cas de pertes ou de dommages raisonnablement prévisibles et découlant du processus de saisie-gagerie. En ce qui concerne les litiges entre locateurs, locataires et tierces parties, les motifs de poursuite prévus par ailleurs dans la *common law* doivent demeurer en vigueur.

Il y aurait "saisie-gagerie illégale" chaque fois qu'un locateur manquerait (par omission ou par perpétration) à ses devoirs ou obligations (par exemple, en ne rendant pas les biens saisis après que le locataire a payé ses arriérés, ou en ne signifiant pas l'avis de saisie-gagerie exigé par la loi). La réforme aurait notamment pour effet d'abolir la catégorisation complexe et les diverses conséquences légales des saisies-gageries qualifiées d'"illégales", d'"excessives" et d'"irrégulières".

De même, il y aurait "inconduite du locataire" chaque fois qu'un locataire manquerait (par omission ou par perpétration) à ses devoirs ou obligations (par exemple, en enlevant des biens saisissables des lieux dans l'intention d'empêcher, d'entraver ou de retarder la saisie, ou en liquidant en totalité ou en partie ses intérêts dans les biens saisis).