Enforcement of Commercial Leases: A Practical Guide

You will not find in this paper a detailed analysis of legal niceties. That kind of thing is well covered in the thorough and citation-filled texts and reporting services.

What you will find here is a summary of how a lawyer acting for a commercial landlord in Saskatchewan actually goes about enforcing the lease. From this summary it will not be difficult to extract ideas about what a lawyer acting for a tenant can do.

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1. Overview

In advising the commercial landlord you must bear in mind that your client seldom will have the sympathies of the Court, at least at first, if the matter ever gets to court.

This is not because there is any kind of plot among Saskatchewan Judges against commercial landlords. It is because the usual situation involves:

- A tenant who is a financial weakling compared to the landlord, and whose breach of the lease may be attributed in part to hard economic times beyond its control; and
- A landlord with apparently inexhaustible financial and legal resources, who has the benefit of a lease loaded with terms empowering the landlord to do anything and requiring the tenant to pay for it.

The Court's sympathy for the tenant will manifest itself most often in interpretation of the lease, which almost always has been prepared by the landlord. The Court has available to it the use of *contra proferentum*, and it will use it.

Even in the face of this, though, a landlord can accomplish much by being aggressive. This is because most landlord-tenant disputes do not end up in front of a Judge. The tenant can't afford to take it that far.

Frankly, the landlord has a real advantage in having time, money and the attitude that it will press a point in the courts if it has to. Many commercial landlords are sophisticated in the use of the courts, while many tenants regard the legal system as an expensive mystery.

In advising your commercial landlord client, then, often you will counsel taking the aggressive route, knowing that it likely won't be challenged in court, but always bearing in mind the hurdle you must overcome if the matter goes to trial.

I do not recommend advising a landlord to try something that can't be supported by a reasonable argument. If an approach can be supported, however, then a lawyer is justified in recommending that the landlord pursue it.

2. Default

- **Non-payment of Rent**

  Usually this is why the landlord comes to you. Usually it is clear whether the default exists.

  "Rent" often has a broader meaning than one might think. Many commercial leases expressly define it to include any payment for which the tenant is liable under the lease.

  The definition of "rent" is relevant when it comes to identifying the arrears of rent for the purposes of re-entry and distraint, especially in the context of the tenant's attempt to obtain relief from forfeiture or to redeem the goods distrained.

- **Breach of Other Covenants**

  The usual commercial lease contains a "Landlord's Remedies" section, setting out the circumstances in which the landlord may employ its remedies. While the section will contain a list of several specific breaches, it always provides that if the tenant fails to do anything that it promised to do, the landlord's remedies are triggered.

  At this point (identifying the breach), just about anything is enough. If the lease says that the tenant may not post signs on the windows, and if the tenant puts them up, the tenant is in breach and the landlord's remedies are triggered.

If there is a dispute, usually it is not over whether there has been a breach. It is over what the landlord can do about it.

In some cases, however, whether there has been a breach is in real question. Uncertainty such as this affects your advice regarding the remedy to be employed. Generally, the more uncertain the breach, or the more trivial the breach, the less severe and irreversible will be the remedy you recommend.

3. Remedies

- **Court action**

You hardly ever will recommend this.

It is slow and expensive. Your client wants swift action that will put money in its pocket or will free up the premises for a paying tenant.

Serving a Statement of Claim on the tenant doesn't put any pressure on the tenant at all, once the tenant has talked with its lawyer. The tenant knows that the action can proceed at a snail's pace while whatever it is doing (or not doing) continues.

Putting pressure on the tenant is one of the great advantages of distraint and re-entry, because it results in that immediate money or access to the premises.

There <u>are</u> circumstances in which bringing an action is the best course. For example, if the tenant is otherwise a good tenant, paying substantial rent and perhaps attracting business to the overall property, the landlord will not want to interrupt this source of income by distraining or re-entering.

Rather, the landlord will be prepared to forego any attempt at a quick resolution, and will take the matter to the courts for determination.

Another example is the case of abandonment. If the tenant presents the landlord with the *fait accompli* of abandoned premises, almost the only remedy available to the landlord is to sue the tenant.

When the tenant abandons, the landlord must elect whether to accept the abandonment. If it does, the lease is terminated. In these circumstances the landlord should deliver to the tenant a notice acknowledging the termination of the lease, and reserving the right to recover the value of the balance of the lease payments from the tenant. This is the reservation referred to by Laskin, J. in *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562.

The landlord then sues the tenant.

If there is some chance that the landlord can pursue goods pursuant to Section 30 of *The Landlord and Tenant Act* (discussed below in Section 3(c) - Distraint), then the landlord should deliver to the tenant a notice refusing to accept the abandonment of the premises and insisting on the tenant's return to the premises to fulfill the terms of the lease.

Affirmation of the continuation of the lease is necessary to provide the framework within which to distrain.

A court action also is required in an injunction case. For example, if the lease contains a provision prohibiting a tenant from selling certain products (likely in protection of an exclusive right granted by the landlord to another tenant), and if the tenant sells those products, the landlord may seek an injunction restraining the tenant from that breach.

To obtain an injunction the landlord must first commence an action.

Cases such as these occur from time to time. For the most part, however, you will recommend to your client either a re-entry or a distraint.

- **Re-entry and Termination**

By re-entering and taking possession the landlord terminates the lease. Everybody knows this. It is a long-standing common law rule.

Some leases provide an exception to this rule. They provide that the landlord may take possession of the premises <u>on behalf of the tenant</u>. This is important because if the landlord exercises this right, the tenant is barred from the premises, but remains liable for payments under the lease, <u>and the tenant's assets remain available for distraint</u>.

Another well-known rule is that termination and distraint are mutually exclusive. A landlord may distrain only while the lease exists. If the lease ceases to exist (by re-entry, for example), the landlord may not distrain.

The provision allowing the landlord to enter on behalf of the tenant neatly gets around this rule. Effectively it allows the landlord to both re-enter and distrain, by characterizing the re-entry <u>not</u> as a termination of the lease. Since the lease remains in force, the landlord may distrain.

Will the courts enforce such a lease provision? What choice have they? It is a clear provision contained in a contract executed by both parties. (In reading this comment bear in mind that I represent commercial landlords).

The usual manner of terminating a lease by re-entry is to physically re-enter. The landlord moves in, changes the locks, and doesn't let the tenant return except under the landlord's supervision.

There are methods of re-entry other than physical re-entry. They are too esoteric for my liking. The landlord wants to know that it is in possession, and the sure way of accomplishing that is to hand the landlord the keys.

Here is how you re-enter and terminate:

- ***Give the appropriate notice.***

  Sections 9(1) and 10(2) of *The Landlord and Tenant Act* state:

  "9(1) In every lease, whether verbal or in writing and whenever made, unless it is otherwise agreed, there shall be deemed to be included an agreement that if the rent reserved, or any part thereof, remains unpaid for two calendar months after any of the days on which the same ought to have been paid, although no formal demand thereof has been made, or if default is made in the performance of any covenant or agreement on the part of the lessee, whether express or implied, and the default is continued for two calendar months, the landlord may at any time thereafter re-enter into and upon the demised premises, or any part thereof in the name of the whole, and again have, repossess and enjoy the premises as of his former estate.

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

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

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

  Many leases specify a time within which the rent must be paid, failing which the landlord may re-enter without notice to the tenant. In my view, this falls within the meaning of "unless it is otherwise agreed" in Section 9(1). The landlord may follow the time and notice provisions contained in the lease provision.

  Some leases require the landlord to give notice of the non-payment before re-entering. If the lease requires it, it must be done.

In the absence of a specific provision in the lease that shortens the time period for the notice or that removes its necessity, Section 9(1) must be obeyed in a re-entry for non-payment of rent. If it is not, the tenant surely will obtain relief from forfeiture (if the tenant applies for it), and the landlord will be liable to the tenant for damages for wrongful re-entry.

If the re-entry is for a breach other than non-payment of rent, the notice provisions of Section 10(2) must be obeyed. In my view, if the lease provides a time for notice, that amounts to agreement between the landlord and the tenant as to what is "a reasonable time" within the meaning of Section 10(2).

In short, every time you re-enter, read the lease and read Sections 9 and 10. Do what they say.

The overholding tenant poses an ugly problem for the landlord. Regardless of the lease provisions, you must obey the rules set out in Section 50 of *The Landlord and Tenant Act*. Be aware that the requirement of notice contained in Section 10(2) of the Act applies to proceedings to remove an overholding tenant pursuant to Section 50.

- ***Prepare the documents.***

You will need a Warrant from the landlord to the bailiff. You need the Warrant because the bailiff wants it, for the indemnity it contains and for the express authorization it contains.

A form of Warrant is attached as Schedule "A".

You will need a letter from the landlord to the tenant. This letter informs the tenant of the re-entry and termination of the lease. It also advises the tenant to remove its assets.

The letter also notifies the tenant that the landlord reserves the right to pursue the tenant for the value of the rent owing for the balance of the lease term, notwithstanding the termination of the lease.

A form of the letter is attached as Schedule "B".

- ***Hire the bailiff.***

Phone him. Tell him what's going on, and make sure he understands. Tell him to hire a locksmith.

You will review with him the procedure for allowing the tenant access to remove its assets.

Make sure that the bailiff knows how to contact the landlord's property manager.

If your client doesn't want to use a bailiff, deliver to your client a letter detailing as much as possible the procedure that it should use in effecting the re-entry.

- ***Re-enter.***

The bailiff and the landlord's manager will have agreed on the best time to re-enter. Usually this will be early morning, before customers arrive, or at the end of the business day, when customers are gone.

The bailiff arrives, advises staff of the re-entry, has them leave, has the locksmith change the locks, and closes the door.

That's it. The re-entry is done, and the lease is terminated. There is no need to post notices.

Often the tenant's representative is present and the bailiff hands that person the letter from the landlord. If the representative is not present, the bailiff should give a copy of the letter to whomever is in charge at the time, and immediately the bailiff should find the tenant and give the tenant the letter.

If the landlord does not want to use a bailiff, the landlord (or its manager or other agent) must re-enter itself. I do not recommend that you volunteer, because you have been trained in the law, not in hand-to-hand combat.

- ***Allow the tenant to remove its assets.***

Because the lease is terminated, the landlord must allow the tenant to remove its assets. The landlord may not seize them.

Do not allow the landlord to give the key to the premises to the tenant for the purpose of removing its goods. In the face of the re-entry and the letter, giving the key probably does not imply a rescission of the re-entry, but what if the tenant decides to stay? Neither you nor your client needs the hassle.

The landlord must have someone present while the tenant removes its assets, both to avoid an inference of rescission of the re-entry and to prevent the tenant from retaking possession. If there is a lot of property to be removed, and it will take a long time, the bailiff may hire a commissionaire to save expense.

In the letter from the landlord (Schedule "B") you will note the time limit set out for removal of assets. This is included because sometimes a tenant loses interest once it has lost its lease.

The time limit is intended to protect the landlord from future action by the tenant. If the tenant does not remove its goods, what can the landlord do? The landlord wants to clean the place up and put in a new tenant. It can't do that while the former tenant's goods are in there.

The best that can be done is to include this "time limit" paragraph in the letter. If the tenant does not remove its assets, the landlord removes them. If there is something salvageable, the landlord salvages it, keeping the money obtained. If it is junk, the landlord throws it out.

This position is based on the premise that the tenant has abandoned the assets. If the tenant later accuses the landlord of wrongfully disposing of the assets, the landlord can point to the letter, which put the tenant on notice.

I have not had a tenant make this accusation, so I cannot say whether the letter is effective.

- ***Respond to the application for relief from forfeiture.***

If the tenant brings an application for relief from forfeiture you of course will research the area. The general rule you will find is that the Court will grant relief, returning the tenant to the premises and reinstating the lease, if the tenant remedies the breach and promises to conform to the lease thereafter.

In the case of a re-entry for non-payment of rent, the tenant must come to court, if it has not already paid the arrears, with money in hand to pay the arrears and whatever costs the Court assesses in connection with the re-entry.

Every case, of course, has its own quirks. If the tenant tenders the arrears and some money for costs once you have re-entered, the landlord may be prepared to voluntarily reinstate the lease. In other cases, the landlord will have hardened its heart to this particular tenant, and you will receive instructions to argument vehemently against relief from forfeiture.

In such a case you will file affidavit evidence indicating what a rotten person the tenant has been, and how the landlord has put up with late and missing payments far longer than reasonableness requires.

If the Court grants relief anyhow, you at least will have established a case sufficient to justify the payment of some substantial costs.

The relief from forfeiture applies only to the particular re-entry that triggered it. If the tenant breaches the lease the next day, you can do it all over again.

- ***Pursue the tenant.***

  As I mentioned previously, your notice to the tenant reserved the right to sue the tenant for arrears and future rent.

  Now that the re-entry has been effected, and the landlord has relet or is trying to relet, the last piece of business is to decide whether to sue the tenant.

  This decision is no different from deciding whether to sue in other cases. You must consider whether you will be successful (almost certainly - there are arrears at least) and the amount of the potential judgment (arrears, future rent, costs). Most importantly under these circumstances, you must consider whether there is any chance of enforcing the judgment.

  Depending on the tenant, your re-entry on the business premises may well mean the end of that business. There may be no assets available. If this is a real possibility, your client wants to know about it.

  It is my experience that lawyers can derive great satisfaction from a judicial victory, regardless of whether it can be enforced. Clients, on the other hand, are odd ducks who fail to appreciate the beauty of a fine point of law. They tend not to be impressed by it until it translates into dollars.

- **Distraint**

  In addition to *The Landlord and Tenant Act*, in a distraint situation you must be aware of *The Distress Act*.

  The right of distraint arises from the common law. The right to sell the assets seized arises from *The Landlord and Tenant Act*.

  The right of distraint arises only if there are rent arrears. The idea is to pay the arrears by liquidating some of the tenant's assets. The tricky part, of course, is to sell off the tenant's assets without putting the tenant out of business.

  In fact, when the landlord elects to distrain, the writing is on the wall. The landlord does not choose distraint because it likes the tenant and wants to keep the tenant in the premises. Rather, the landlord sees an opportunity to get some money to pay some of those arrears before it re-enters and terminates.

  The plan, then, is to seize the goods, sell them, disburse the money, and then (assuming there are still arrears) re-enter and terminate the lease.

  Bear in mind these rules when you distrain:

A. Do not distrain on a Sunday (unless you want to test an old rule).

B. Distrain only during daylight hours.

C. Do not distrain the day the rent is due (it is not past due until midnight).

When you consider distraint, pay attention to rumours that the tenant is on the verge of an assignment in bankruptcy. If it does make an assignment your distraint proceedings, if not completely finished (money disbursed), are suddenly terminated and the assets you hold must be turned over to the Trustee in Bankruptcy.

Here is how you distrain:

- ***Identify the tenant.***

  This sounds too elementary, but consider: How many times does an individual start up a business, entering into a lease before the new corporation is incorporated? Lots.

  How many times does the corporation carry on the business in the premises as soon as it is incorporated? Lots.

  How many times does the landlord ensure that this change is documented? Few.

  What chance is there that the tenant is the individual, but the assets all belong to the corporation? Lots.

  On whose goods may the landlord distrain for rent? The tenant's.

  Who is out of luck? The landlord.

  Certainly, the landlord can point out that the tenant breached the lease by assigning without the landlord's permission. That doesn't help the landlord distrain, however.

- ***Search the Personal Property Registry.***

  There is no point in distraining if all the assets are subject to a true Purchase Money Security Interest: *The Landlord and Tenant Act*, Section 25.

  If the search comes back showing no PMSIs, you probably will not be bothered by any claims of PMSIs. If someone was astute enough to obtain a PMSI, almost invariably that person has been astute enough to register it. Bear in mind, though, that a true PMSI that happens not to be registered still could possible take priority over the landlord's distraint.

If the search shows a PMSI, then the guessing game begins. A creditor may have registered a PMSI, but that does not necessarily mean that the creditor really has one. The Personal Property Registry is loaded with claims for PMSIs that are not in fact backed by PMSIs.

You want to know whether the money that was given to the tenant by the creditor was used to purchase the assets that are encumbered by the PMSI that is registered. If the answer is "no", proceed.

You also want to know whether the assets purchased with the money remain in the possession of the tenant. If the assets are inventory, for example, it may well be that the tenant has sold that original inventory and used the proceeds to buy new inventory. In the circumstances of such a case, the new inventory has been found to be subject to the PMSI: *C.I.B.C. v. Marathon Realty Co. Ltd.* (1987), 57 Sask. R. 88 (Sask. C.A.). Note that there may be room for argument that this decision was based on facts peculiar to that case, and that the normal rule is that the current inventory is not subject to the PMSI.

Finally, you want to know how much remains owing on the debt secured by the PMSI.

It is very difficult to get the answers to these questions without tipping off the creditor who registered the PMSI.

If the landlord seizes the assets, it has priority over other creditors to the proceeds of the assets, subject only to the holder of a PMSI. If you tip off the creditor, however, and the creditor seizes the assets, then it has priority over the landlord, whether it has a PMSI or just a simple security agreement.

Therefore, do not phone the bank manager and ask for the details of the loan. If you do, you may lose your client its one opportunity to recover some of its arrears from this tenant.

So what do you do? Your client asks you whether it should distrain. You describe the procedure, you estimate the costs, you tell your client that the bank has registered a PMSI but you don't know if there really is one, and you say that if there is one the landlord could go through the time and money of a distraint only to turn all the proceeds over to the bank.

Of course, that is no answer to your client's question. Again your client asks you what it should do.

All you can do is help your client analyze the chances. How much forced sale value is there in the assets? Could there be enough for both the landlord and the bank? If so, it may be worth the risk.

Is this the only chance to recover money from this tenant? If so, it may be worth the risk.

Ultimately, your client must decide whether to chance it. If it does decide to proceed, I recommend that while your bailiff is in the premises doing the inventory of the assets he has just seized, you notify the creditor who registered the PMSI. By then you have established your priority over anything but a PMSI. You are in a position to find out if the creditor truly has one.

If it has, you may turn the proceedings over to the creditor (depending on the value of the goods seized), probably with the creditor agreeing to pay most or all of the landlord's expenses to date because it is getting the benefit of them. In any event, you have incurred as little expense as possible before finding out about the PMSI.

- ***Give the proper notices.***

Normally, prior notice is not required. Ensure that this rule is not modified by the lease.

- ***Prepare the documents.***

You need a Warrant to the Bailiff, to be signed by the landlord. A form is attached as Schedule "C".

You need a Notice of Distress, which will be signed by the bailiff. A form is attached as Schedule "D".

The Notice of Distress contains a statement of the arrears. Make sure that you include only those arrears properly described as "rent", and only those arrears properly included according to the relevant time requirements.

You may need an Undertaking. This is discussed under item (vii) - "Walk-in distraint", below. A form is attached as Schedule "E".

- ***Hire the bailiff.***

Phone him. Discuss the case. Advise him of the results of your PPSA search. Tell him what is subject to a PMSI, and what seems unencumbered.

He will want to know what kinds of assets he will be seizing so he can plan for tools, workers and trucks.

As with the re-entry, you will sort out with the bailiff and the property manager the best time to move in.

- ***Distrain.***

The common law rule is that you may distrain the day after the rent is due. Ensure that this rule is not modified by the lease. For some reason, many commercial leases require the landlord to allow the tenant more time to pay the rent before the landlord may distrain.

Do not make an error on the timing. Any error in distraint can be disastrous for the landlord. The courts view distraint as a powerful tool to be exercised only in strict compliance with the rules. If the landlord has not dotted every "i" and crossed every "t" the Court will be pleased to find the entire process improper.

To this I must add that Sections 37 and 39 of *The Landlord and Tenant Act* provide a certain amount of flexibility to the distraining landlord, provided the distraint is well-founded in the first place.

The bailiff arrives at the premises and locates the person in charge of them. He hands to that person the Notice of Distress and he identifies the assets he is seizing.

Immediately the bailiff conducts an inventory of the assets he is seizing. Once the inventory is complete he gives a copy to the tenant. It forms a part of the Notice of Distress.

Provided the Notice of Distress has been delivered to the tenant, there is no need to post a notice. If the bailiff cannot locate the tenant to serve the Notice of Distress, he must post it at the premises.

Section 22 of *The Landlord and Tenant Act* requires the landlord to be reasonable in levying distress. Thus the landlord should seize only so much as is sufficient to cover the arrears and the costs of the distraint.

This necessarily requires some estimation, both as to the forced sale value of the goods and as to the costs of the distraint. Generally, the forced sale value of retail goods (as opposed to equipment) is 1/4 to 1/3 of retail value.

The forced sale value of equipment must be estimated according to the equipment itself and the industry involved.

Section 24 of *The Landlord and Tenant Act* deals with levying distress on cattle, livestock and standing crops. Section 24(3) requires the landlord to notify the tenant of the location of the goods "so distrained". In my view, this requirement applies only in the case of seizure of cattle, livestock and standing crops. It may be that a court would take a different view, however. I say this in light of the comments of the Court in *Saskatoon Tan Centre Ltd. v. Budget Rent-A-Car of Saskatoon Ltd.*, [1985] Sask. D. 2324-01 (Sask. Q.B.).

The basic rule for distraint is that only goods belonging to the tenant and found in the leased premises may be distrained. Section 30 of *The Landlord and Tenant Act* extends the remedy beyond this.

If the tenant fraudulently or clandestinely removes goods from the leased premises to prevent them being distrained on, the landlord may within 60 days of the removal distrain on them, wherever they are. As well, by way of court action the landlord may recover from the tenant (and anyone who assisted) double the value of the goods removed.

It is important to note that the removal must be fraudulent or clandestine.

In unusual circumstances the landlord will leave the distrained goods in the premises, but will change the locks to the premises to secure them. In such a case you should deliver to the tenant a notice (if it is not contained in the Notice of Distress) clarifying that this is the reason, that it is not a re-entry, and that the tenant may approach the landlord for access to the premises.

- ***Consider the "walk-in distraint".***

Two major expenses associated with distraint are the cost of removing the goods to another location and the cost of advertising and conducting the sale. At least the first, and sometimes the second, can be avoided with the "walk-in distraint".

In a "walk-in distraint" the tenant signs an undertaking in the form of the attached Schedule "E". The tenant acknowledges that the distraint has occurred, and that the goods are in the possession of the landlord. This is important because if the landlord gives up possession of the goods to the tenant, the distraint is deemed to have been abandoned.

Specifically, the tenant acknowledges that it is a bailiff of the landlord, and that it holds the goods on the landlord's behalf.

There are two case in which the landlord agrees to this procedure. In both cases the landlord must trust the tenant sufficiently that it doesn't think the tenant will ship the goods out the back door the first time it is alone.

In the first case the tenant thinks it can raise the arrears and costs within a few days. The landlord has no particular wish to increase the costs by removing and storing the goods, and so it agrees to this procedure. If the tenant does not raise the money, the landlord subsequently may remove the goods and proceed with the sale.

In the second case the tenant is prepared to co-operate to the point of selling the goods for the landlord. Usually this arises when the tenant for some time has been robbing Peter (the landlord) to pay Paul (some other creditor). The tenant still has confidence in the viability of its business, if it can just buy a little more time.

Now Peter comes to the fore. The tenant agrees to hold the goods (usually inventory) for the landlord. It agrees to sell the goods in the normal manner, and to deliver the proceeds of the sales to the landlord each day. The money is applied to the arrears that triggered the distraint.

If the tenant is right, and his business has some viability, this can work to pay off the arrears and costs without destroying the tenant's business. It has the added benefit (to the tenant, in this case) of keeping the costs of distraint as low as possible.

Alas. Often relations between landlord and tenant are strained. By the distraint stage, they are characterized by mistrust. Under these circumstances the landlord is unlikely to risk the "walk-in distraint".

- ***Wait five days.***

  Of course, every time you are about to distrain you will review both *The Landlord and Tenant Act* and *The Distress Act* to ensure that neither they, nor your memory of them, have changed.

  In that review you will be reminded that you must allow the tenant five days to redeem the assets before you sell them.

- ***Accept the tenant's redemption of the goods.***

  Sometimes the tenant finds the money it just couldn't find before you distrained.

  "How much?" the tenant will ask, noting that your Notice of Distress refers to the arrears (which are specified) and to the costs (which are not).

"Everything," says the landlord. "The arrears, the bailiff's fees, the moving and storage costs, and especially those [darned] legal fees."

Well, maybe.

Section 2.1 and the First Schedule of *The Distress Act* limit the amount the landlord may recover for the costs of the distraint. One might argue that the Schedule provides for recovery of less than the actual costs.

Here is where the landlord's advantage comes into play again. There is some uncertainty as to how the Schedule is interpreted. What are amounts "actually and reasonably incurred"? One may argue that they are what the landlord actually pays, including all those things listed above.

So you tell the tenant that this is what it must pay to recover its goods and (in its view) to save its business.

The tenant counters that the landlord can't do that because it is restricted by *The Distress Act*.

Your reply is that this is the landlord's interpretation of *The Distress Act*, and the landlord will not return the goods unless the tenant pays the full amount.

What will the tenant do? It has three choices.

First, the tenant may give up on the whole business. The landlord then proceeds with the sale and disbursements of proceeds, then re-enters (or more likely accepts the tenant's abandonment).

Second, the tenant may try to rush into court for a ruling. It must do this by commencing an action, likely of replevin. Alternatively, it might try an action for damages for some wrong committed by the landlord, coupled with an application for an interim injunction restraining the landlord from breaching *The Distress Act* by overcharging.

Third, and most likely, the tenant may pay up. Possibly this will be followed by an application against the landlord to recover what the tenant views as excess costs. Again, though, the tenant's financial and intestinal resources come into play. The tenant may just pay up and hate the landlord.

If your landlord client wants to be aggressive, be aware of Section 5 of *The Distress Act*. It provides that a tenant may apply to a Judge in Chambers for a ruling that the costs it paid to redeem its goods were excessive. If the Judge so finds, he or she may order the landlord to pay three times the excess.

- ***Sell the goods.***

  The landlord is obliged to be reasonable in disposing of the goods. There are various methods of selling the goods. The nature of the goods will dictate what you do.

  An experienced bailiff will have good ideas.

  If the goods are restaurant equipment, for example, you may advertise to all persons in the industry, asking for offers.

  If the goods are clothing, you may advertise to the public a liquidation sale to be conducted over the course of a few days at a location that is readily accessible to the public.

  If the goods are miscellaneous articles, you may simply put them in the hands of an auctioneer.

  The landlord may take what it can get for the goods, but it must get all it can.

- ***Disburse the proceeds.***

  The money goes first to the costs of the distraint, then towards the arrears. If there is money left over it goes to the tenant: *The Landlord and Tenant Act*, Section 35. This may be complicated by the intervention of a creditor.

  If a creditor claims the excess, to protect you and your client you should release the excess only upon agreement of the parties. If there is no agreement as to payment, try to get the parties to agree to your paying it into the trust account of one of their lawyers so they can fight over it while you and your client get out of the picture.

  Section 36 of *The Landlord and Tenant Act* provides to employees of the tenant a claim in priority over the landlord with respect to their wages, to a maximum of $500.00 each. To obtain that priority the employees must file a claim with the Sheriff before the sale of the distrained goods occurs.

  If a claim is filed, other employees have an extended period of 60 days from the sale within which to file.

  If a claim is filed the landlord is obliged to pay all of the sale proceeds to the Sheriff, who will hold them for up to 70 days, pay the claims, take a fee equal to 5 percent of the employees' claims, and return the balance to the landlord.

In the alternative, if the landlord elects not to pay the Sheriff, the landlord is liable directly for the payment of the amounts that the employees would have obtained through the Sheriff.

You might consider not paying the Sheriff, and paying the employees directly, provided you can verify the employees and their status at an early stage. This will be the landlord's preference, for it will have the use of the money earlier.

- ***Carry on.***

  As I mentioned before, once the proceeds are disbursed, the distraint proceedings are completed. If the landlord is in a position to terminate the lease, it may do so without interfering with the distraint.

4. Conclusion

Curiously, I have found that words printed in a statute or a text change position and meaning if I haven't looked at them for a while. Also, the law does change from time to time. Because of this I suggest that, whenever a commercial lease case comes to you, you should check the appropriate sections of the following references:

a) The lease;
b) The Landlord and Tenant Act;
c) The Distress Act;
d) Texts and reporting services; and
e) Case law.

5. Schedules

SCHEDULE "A"

WARRANT TO BAILIFF

TO: THE BAILIFF COMPANY

I, being the Landlord of the premises known as Dale's Widget Store, Unit #16, Centre Shopping Plaza, 300 Main Street, Saskatoon, Saskatchewan, leased to Dale Smith by agreement in writing dated March 10, 1985, hereby engage you as Bailiff on my behalf and authorize and require you or your servants or agents to re-enter the premises and take possession of them on my behalf because of the Tenant's breach of the lease by failing to pay rent, now in arrears in the amount of $4,500.00.

I hereby agree to indemnify you, your bailiff or agents against any and all claims which may be made against you under this authority and to defend any action brought against you in respect thereof.

AND FOR SO DOING, this shall be your full and sufficient warrant and authority.

DATED at Saskatoon, Saskatchewan this 7th day of November, 1988.

LANDLORD HOLDINGS LTD.

Per: _____

SCHEDULE "B"

November 7, 1988

Dale Smith
c/o Dale's Widget Store
Centre Shopping Plaza
SASKATOON, SK

Dear Ms. Smith:

Re: Premises leased at Centre Shopping Plaza

Today we have re-entered your leased premises and terminated your lease.

We have done this because of the arrears of rent totally $4,500.00 calculated as follows:

September 1, 1988	Rent	$1,000.00
September 1, 1988	CAM	500.00
October 1, 1988	Rent	1,000.00
October 1, 1988	CAM	500.00
November 1, 1988	Rent	1,000.00
November 1, 1988	CAM	500.00
TOTAL		$4,500.00

You have some personal property in the premises. You must remove that property within five days of today.

You may make arrangements for access to the premises to remove the property by calling the writer at 555-1234.

If you do not remove your property within five days, we will consider that you have abandoned your interest in the property and we will dispose of it.

We further inform you that, notwithstanding the termination of the lease by this re-entry, we continue to hold you liable for the arrears of rent, for our costs incurred in connection with the re-entry and for the payments you would have made pursuant to the lease for the balance of the lease term.

Shortly we will provide you a statement totalling these amounts, along with a demand that you pay them forthwith.

Yours truly,

LANDLORD HOLDINGS LTD.

Per:

Chris Jones
Shopping Centre Manager

SCHEDULE "C"

DISTRESS WARRANT

TO: THE BAILIFF COMPANY

I, being the Landlord of the premises known as Dale's Widget Store, Unit #16, Centre Shopping Plaza, 300 Main Street, Saskatoon, Saskatchewan, leased to Dale Smith by agreement in writing dated March 10, 1985, hereby engage you as Bailiff on my behalf and authorize and require you or your servants or agents to **distrain** such of the goods and chattels as may be lawfully distrained for rent now and lately due upon the above premises in the amount of $4,500.00 being the amount of rent in respect of such premises due to the undersigned as of November 1, 1988, and to proceed thereon for the recovery of the said rent as the law allows or directs.

You may give up the said goods and chattels upon payment of the sum of $4,500 together with your own lawful fees and charges.

I hereby agree to indemnify you, your bailiff or agents against any and all claims which may be made against you under this authority and to defend any action brought against you in respect thereof.

AND FOR SO DOING, this shall be your full and sufficient warrant and authority.

DATED at Saskatoon, Saskatchewan, this 7th day of November, 1988.

LANDLORD HOLDINGS LTD.

Per: _____

SCHEDULE "D"

NOTICE OF DISTRESS

TO: DALE SMITH

Pursuant to the provisions of ***The Landlord and Tenant Act*** of Saskatchewan and the common law of the Province of Saskatchewan, I [name of individual bailiff], as Bailiff for Landlord Holdings Ltd., the landlord of the premises known as Dale's Widget Store, Unit #16, Centre Shopping Plaza, 300 Main Street, in Saskatoon, Saskatchewan, leased to Dale Smith by lease dated March 15, 1988, hereby give you notice that I have this day **distrained** the goods and chattels described on the annexed inventory upon the above premises for $4,500.00 being the amount of rent in respect of such premises due to the said landlord as of November 1, 1988 and still unpaid.

UNLESS the sum of $4,500.00, being the rent now overdue, is paid together with the cost of this Distress within 5 days of this Notice, the goods and chattels described below will be sold and the proceeds thereof applied towards payment of the rent and costs.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 7th day of November, A.D. 1988.

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_____

Bailiff for the Landlord,

Landlord Holdings Ltd.

LIST OF GOODS AND CHATTELS IS ATTACHED

SCHEDULE "E"

TO: LANDLORD HOLDINGS LTD.

In consideration of your withdrawing from the immediate possession of the chattels owned by me, which you have seized under a distress against me for rent, and which goods and chattels you have put me in possession of, as your bailiff, to hold the same for you pursuant to the distress for rent, and subject to your order and direction, I hereby agree with you as follows:

I agree to act as bailee and keep in my possession all items seized under distraint and to deliver to you all seized items upon demand by you, whenever and wherever required.

I authorize and empower you to re-enter onto the premises so occupied by me and to retake possession of the distrained items, and you are entitled to follow such items to any place where the same have been removed.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 7th day of November, A.D. 1988.

_____

Dale Smith

6. Contacting a Lawyer on This Subject

For more information on this subject or specific legal advice, contact Robertson Stromberg Pedersen LLP at (306) 652-7575.