LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON

DISTRESS FOR RENT

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The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
DISTRESS FOR RENT

In British Columbia the landlord of commercial premises has the right to seize and sell his tenant's goods to satisfy arrears of rent.

The origins and features of this remedy, commonly known as distress, are to be found in a body of common law developed over several centuries and in a number of Provincial enactments, the principal one being the *Rent Distress Act*. This body of law is badly in need of reform.

The common law aspects of distress are complex, highly refined and little understood. The *Rent Distress Act* is no less archaic. Parts of it are based on English legislation enacted as early as 1689 and reflect the language and concepts of that age. The whole of this body of law is badly out of touch with modern needs and practices.

In this Report we recommend legislation which restates the law of distress in a new and modern form, and provides needed protection to the interests of tenants and third parties while still providing a remedy which meets the legitimate expectations of commercial landlords.

CHAPTER I INTRODUCTION

A. Distress Defined

In common usage, the word "distress" conveys notions of pain, discomfort and anxiety. In law, however, distress is a term of art and refers to a particular method of enforcing a right. A definition cited in Halsbury describes it in the following terms:

> A distress is the taking of a personal chattel, without legal process, from the possession of a wrongdoer, into the hands of the party grieved; as a pledge, for the redress of an injury, the performance of a duty, or the satisfaction of a demand.

This remedy is not universally available to enforce every duty or demand. Distress is an exception to a more general legal policy that precludes remedies against property except under due process of law. Therefore, the person seeking to exercise the remedy of distress (to distrain) must demonstrate that the right sought to be enforced falls within one of the categories for which the law permits this exceptional remedy.

B. Legal Sources of Distress

A legal right to the remedy of distress may arise in three different ways: at common law, by statute or by agreement between the parties.

1. ___Common Law

The most familiar example of distress is the right of a landlord to seize the goods of his tenant to enforce the payment of arrears of rent. This right arises at common law and is of great antiquity. Another example is the right of an occupier of land to seize a trespassing chattel such as a stray animal and hold it as a pledge for the satisfaction of any damage it may have done.

2. ___Statute

A second source of the right of distress is statute. A statute may give a right, in particular circumstances or with respect to particular obligations, to levy distress where that would not be permitted at common law. It should be noted at this point that, in addition to enactments that create a right of distress, there are also statutes that *regulate* the exercise of this remedy. These are the subject of separate discussion later in this Report.

While a statutory right of distress for the enforcement of a private obligation is not unheard of, such rights are most commonly created in favour of government to assist in the enforcement of tax obligations. For example, section 43(1) of the *Corporation Capital Tax Act* provides:

> The Commissioner may, by himself or his agent, levy the amount of the tax that is due and payable, with costs, by distress of the goods and chattels of the corporation liable to pay the tax, or of any goods and chattels in its possession, wherever they may be found in the Province, or of any goods and chattels found on its premises the property of or in the possession of any other occupant of the premises, and that would be subject to distress for arrears of rent due to a landlord. The costs chargeable shall be those payable as between landlord and tenant.

Similar provisions may be found in other taxation acts.

3. ___Agreement

When parties enter into an agreement which creates an obligation, it is open to them to provide that one party shall have a right of distress against the goods of the other to secure performance of the obligation. Such security may be taken alone or in conjunction with other security.

An example of the latter is the socalled "attornment clause" frequently included in mortgages of real property. A widely adopted form of attornment clause is set out in Schedule 6 to the *Land Transfer Form Act*. Clause 14 of the Schedule provides:

> And it is further covenanted, declared, and agreed by and between the parties to these presents that if the said mortgagor, his heirs, executors, or administrators, shall make default in payment of any part of the said interest at any of the days or times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs or assigns, to distrain therefor upon the said land, tenements, hereditaments, and premises, or any part thereof, and my distress warrant to recover by way of rent reserved, as in the case of a demise of the said land, tenements, hereditaments, and premises, so much of such interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, as in like cases of distress for rent.

In practice, this right of distress is seldom invoked by mortgagees.

CHAPTER II STATUTES REGULATING DISTRESS

A. Introduction

In the previous chapter we referred to the creation of a right of distress, where none exists at common law, either by statute or by agreement between the parties. In this chapter we consider some of the ways by which legislation has intervened to modify and regulate distress.

This area of law has long been a matter of concern to legislators as evidenced by the large number of English statutes touching on distress. As long ago as 1266, a statute was enacted limiting distress on "beasts of the plow and sheep." The applicable English statutes were received as part of the law of British Columbia at the time the colony was founded in 1858.

At the time of the 1897 British Columbia statute revision, the more important provisions of the English legislation relating to distress and to landlord and tenant matters generally were consolidated and reenacted as the *Landlord and Tenant Act*. At the time of the 1911 revision, most of the provisions of that Act that concerned distress were combined with earlier provincial legislation that regulated the costs of distress to form the *Distress Act*. Subject to minor modifications, this legislation remains in force as the *Rent Distress Act*.

The *Rent Distress Act* is the most important enactment concerning distress but it is not the only one. Before examining the features of the *Rent Distress Act*, the impact of certain other statutes will be noted.

B. Statutes other than the Rent Distress Act

1. Chattel Mortgage Act

In the previous chapter we referred to the possibility of the consensual creation of a right of distress to secure the performance of an obligation. It is this type of arrangement that is contemplated by section l(l)(1c) of the *Chattel Mortgage Act* which defines "chattel mortgage" to include:

> (k) for chattels that may be seized under a power of distress, an instrument or agreement, other than a mining lease,

(i) giving or agreeing to give a power of distress by way of security for a present, future or contingent debt or advance; and

(ii) reserving or making payable rent to provide for interest on the debt or advance, or for security only, if the document is not a mortgage of land that the grantee in possession has granted to the grantor its his tenancy at a fair and reasonable rent.

The significance of this provision is that agreements which create a right of distress are assimilated to chattel mortgages and all the other provisions of the Act prescribing the formalities of their creation, and providing for registration, apply with full vigour.

As a result of this assimilation, taking security through a right of distress offers no significant advantage over doing so through the more conventional chattel mortgage. It has, therefore, fallen into disuse. We have directed inquiries to officials of the Central Registry and are advised that no agreement creating a right of distress has been received for registration in recent memory.

It should be noted that the definition of chattel mortgage does not extend to an attornment clause in a mortgage of land.

2. ___Residential Tenancy Act

The landlord's right of distress has been abolished with respect to rent owing on residential premises occupied by the tenant. section 8 of the *Residential Tenancy Act* provides:

8. (1) Notwithstanding any other Act, the common law or an agreement to the contrary, a landlord shall not distrain for default in the payment of rent.

(1.1) Notwithstanding the common law or an agreement to the contrary, a landlord shall not seize a chattel of a tenant in satisfaction of a claim or demand, unless the seizure is made under an order of the rentalsman under Part 5, an order of a court or the authority of an enactment.

In the light of this prohibition, the landlord's right of distress is limited to tenancies of commercial premises.

3. ___Recovery of Goods Act

Where a tenant's goods have been wrongfully distrained by his landlord, the law provides a remedy known as "replevin" to assist him in their recovery. This remedy is regulated by the *Recovery of Goods Act* (formerly the *Replevin Act*). That Act was the subject of a Commission study in 1978 and in our Report thereon it was recommended that it be repealed and replaced by a new, more general, procedure under the Rules of Court for the speedy recovery of personal property.

4. ___Commercial Tenancy Act

As we pointed out earlier, most of the substantive provisions regulating distress were removed from the *Landlord and Tenant Act* in 1911. One section that remains, however, is section 1 of the *Commercial Tenancy Act*. It provides:

1. No chattels being in or on any land which is or shall be leased for life or lives, term of years, or at will, or otherwise, are liable to be taken by virtue of any execution, unless the party at whose suit the said execution is sued out, before the removal of such chattels from the premises, by virtue of such execution or extent, pays to the landlord of the premises or his bailiff such sum of money as is due for rent for the premises at the time of the taking of the chattels by virtue of the execution, if the arrears of rent do not

> amount to more than one year's rent; and in case the said arrears exceed one year's rent, then the party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done heretofore; and the sheriff or other officer is empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money.

The practical effect of this section is to give the landlord priority over a competing execution creditor to the extent of one year's arrears of rent.

5. ___Debt Collection Act

This Act regulates debt collection practices generally and section 15 applies specifically to seizures of goods. It provides:

> **Practices of bailiffs**
>
> 15. No person, whether on his own behalf or on behalf of another, directly, indirectly or through others, shall
>
> (a) unless there is a court order to the contrary, remove any chattel claimed under seizure, distress or repossession, in the absence of the debtor, his spouse, agent or an adult resident in the home of the debtor or employed by him;
>
> (b) seize, repossess or levy distress against at chattel that is not specifically charged or mortgaged, or to which legal claim may not be made under a statute, court judgment or court order; or
>
> (c) remove, seize, repossess or levy distress against a chattel during a day or during the hours of a day when removal, seizure, repossession or distress is prohibited by regulations made under this Act.

The implications of this provision are not totally clear. On a strict reading of paragraph (b), it might be argued that distress for rent has been abolished since the landlord's claim is not made "under a statute, court judgment or court order" but arises at common law. It has not, however, been interpreted this way in practice.

C. Rent Distress Act

The discussion set out below is not intended to be a comprehensive review and explanation of the meaning and effect of the *Rent Distress Act*. Rather, it is proposed only to identify some of the principal features of the Act and what they are intended to remedy or accomplish. A copy of the Act is set out as Appendix A to this Report.

1. Scope of the Act

The scope of the *Rent Distress Act* is somewhat broader than its title suggests. It potentially applies to distress taken by persons other than landlords. There is no provision that satisfactorily defines the scope of the Act and the applicability of particular provisions may turn on the nature of the obligation sought to be enforced by distress.

Some provisions refer simply to "distress." Others refer to distress for "rent" or by a "lessor or landlord." Still others refer to distress for "rent or penalty." The last form of words invokes section 1 of the Act which sets out an extended definition of "penalty":

> In this Act "penalty" includes all sums due for taxes or rates, all sums ordered to be paid by a justice and all other sums which are collected summarily distress or seizure and sale of goods.

The consequences of the apparently uneven application of the Act are not as serious as it might seem from a reading of the Act only. All provisions of the *Rent Distress Act* apply to distress by landlords and the tendency of most other statutes, or contracts, that create a right of distress is to assimilate the rights of the parties to those applicable to distress for rent.

2. ___A Right of Sale

At common law, goods distrained by a landlord were held as a pledge only. The law did not confer a right to sell the goods and apply the proceeds in satisfaction of the arrears of rent. The landlord's only course was to retain possession until he was paid.

The *Rent Distress Act* alters this position by conferring a right of sale on the landlord. This is done in section 8 which also provides for an appraisal of the goods and for the disposition of any surplus that may be realized on the sale.

3. *Property Amenable to Distress*

(a) Extensions

At common law, growing crops could not be distrained by a landlord. Section 17 of the Act provides for the seizure of these assets and goes on to confer a right to harvest and realize on them.

(b) Limitations

With some exceptions such as that noted with respect to crops, at common law a landlord had the right to seize all goods and chattels found on the rented premises. Subject to various common law exceptions, this right was exercisable without regard to whether the goods belonged to a third party or whether they were necessaries such as food and clothing. The *Rent Distress Act* has modified the common law in this respect.

(i) Exemptions

It is the policy of the Act that certain property be exempt from distress. A list of exemptions is set out in section 2 and includes a number of items that might have been regarded as "necessaries" at the turn of the century. For example, the tenant may retain, *inter alia*, an axe, a washboard and three smoothing irons. It is evident that the need for such exemptions was not reviewed at the time distress for rent was abolished in respect of residential premises.

(ii) Third Party Rights

The rights of third parties in goods receive limited recognition in the *Rent Distress Act*. Section 4(1) purports to except from seizure the property of a person other than the tenant, but then creates a number of exceptions to this rule. One such exception is the interest of a mortgagee of goods. Another exception is the interest of a person who has purchased the goods from the tenant. In both of these cases the third party interests are subordinate to the claim of the distraining landlord. The interest of a conditional seller of goods to the tenant is, on the other hand, protected. Section 4(4) sets out the machinery whereby a person, whose interest is protected from seizure under subsection (1), may assert his rights of ownership.

One kind of third party interest that is singled out for special treatment is that of a lodger with the tenant. His rights and remedies are set out in sections 5 and 6.

4. Tenant Misconduct

The *Rent Distress Act* attempts to fortify the rights of a distraining landlord through provisions aimed at discouraging tenant misconduct. One concern is that the tenant may fraudulently remove property from the rented premises with the intent of defeating the landlord's right of seizure. In such a case, the Act empowers the landlord to seize the property wherever it may be found and to claim a penalty equal to twice its value from the tenant and from any person that may have assisted him.

Another possibility is that once property has been seized, the tenant may wrongfully attempt to retake possession. Such a retaking is known as "rescue" or "pound breach." In such cases the Act permits the party aggrieved to claim treble damages and costs against the offender.

5. Costs of Distress

The Act limits the fees, charges and expenses that may be claimed in respect of levying distress. A scale of fees is set out in a Schedule to the Act and no greater amount can be claimed. A dispute as to fees may be resolved by taxation before a registrar of the County Court.

CHAPTER III THE NEED FOR REFORM: THE RENT DISTRESS ACT

A. Introduction

In the previous chapter some of the principal features of the *Rent Distress Act* were reviewed. It emerges that the Act is basically remedial and designed to correct what were perceived as deficiencies in the common law. The mere fact, however, that the Act deals with a particular common law deficiency does not necessarily mean that it does so in a satisfactory fashion. Nor does it mean that a solution or result that suited the needs of the community when it was enacted retains its virtue as useful policy in the 1980's.

The *Rent Distress Act*, in fact, suffers from a number of technical deficiencies. Some, but by no means all, of these are described briefly below. Beyond the technical defects of the Act are major policy considerations that call the continued existence of the remedy of distress into question. These are considered in a later chapter.

B. Deficiencies of the Rent Distress Act

1. The Act is Archaic in Language and Concept

As we pointed out earlier, most provisions of the *Rent Distress Act* are based on English legislation inherited at the time the Colony of British Columbia was founded. Sections 8 to 11, for example, are based on legislation first enacted in 1689 while sections 12 to 21 are based on an Act of 1737. Until 1979 the provisions of that early legislation were reproduced almost verbatim in the *Distress Act*. In the 1979 Revised Statutes, the language of the legislation has been slightly modernized but, over all, the drafting of the Act remains closer in spirit to the 17th century than the 20th.

We also pointed out that, at the time distress was abolished with respect to residential premises, the Act was not amended to reflect this change. A number of provisions of the *Rent Distress Act* were rendered redundant by that abolition. These include section 2, which exempts certain necessaries from distress.

The penal provisions of the Act are anachronistic. The notion that a private party should be able to sue for a penalty is one that has all but disappeared from other provincial statutes. In modern statutes, if certain behaviour is sought to be discouraged, it is simply prohibited and a breach is made an offence punishable on summary conviction.

Under the *Rent Distress Act*, however, there are three different ways that a private action for a penalty may arise. Section 14 provides:

> 14. A tenant or lessee who fraudulently removes and conveys away his personal property and every person who wilfully and knowingly aids the tenant or lessee in doing so, or in concealing it, shall pay to the landlord or lessor double the value of the property carried off or concealed, which may be recovered by action in a court of competent jurisdiction.

This penalty is irrational. The value of the goods may bear in relationship to the amount of rent owing, or the potential harm to the landlord. Moreover, the Act does not make it clear whether the liability of the tenant and the persons assisting him is joint, several, or both.

If the value of the property concealed or carried off is less than $250, the double value penalty may be enforced summarily under section 15 before two justices who may make an order for its payment. Section 15(3) provides that such an order may itself be collected through distress or, "for want of distress," six months imprisonment. While imprisonment as a sanction for enforcing the payment of a debt has not entirely disappeared from the law of the Province, its use is very carefully regulated and in practice is available only in limited circumstances. Section 15(3) seems mandatory in its terms and stands in doubtful contrast to the general trend to restrict the use of imprisonment for debt.

Section 10 of the Act sets out the penalty for pound breach:

> 10. On pound breach or rescue of personal property distrained for rent, the person aggrieved is entitled to recover triple damages and costs of action against the offender, or against the owner of the property distrained, if the property later comes into his possession.

In the context of this provision, what is the damage that is trebled? The amount of the arrears? The value of the property retaken? The Act provides no answer.

Finally, section 11 provides a penalty for wrongful distress:

> 11. In case distress and sale is made for rent alleged to be due, and no rent is due to the person distraining, or to the person in whose name or right the distress is taken, then the owner of the property distrained and sold, or his personal representatives, may, by proceeding against the person distraining, or his personal representatives, recover double the value of the property distrained and sold, together with full costs of the proceedings.

Why, as a matter of policy, should this provision apply only when no rent is due but do nothing to discourage a landlord from unnecessarily distraining goods of a value that grossly exceeds the arrears?

> ... distresses shall be reasonable and not too great and he that take great and unreasonable distresses shall be grievously amerced for the excess of such distresses.

That provision may be in force by virtue of section 2 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224, but it must be read subject to section 19 of the *Rent Distress Act* which provides that the landlord is not liable if he abandons the excess of his distress within 3 days. The disparity in penalties should also be noted. Tenant misconduct is thought to warrant a penalty of treble damages, while landlord misconduct is penalized by double damages only.

The *Rent Distress Act* also provides extraordinary rights with respect to the entry upon property to which goods have been removed. Section 16 provides:.

16. (1) Where personal property fraudulently or clandestinely conveyed or carried away by a tenant or lessee, or other person acting for or aiding him, is put or found in a building or place, and is locked up or secured to prevent the property from being taken or seized as distress for arrears of rent, the landlord or his employee, bailiff or other person may take and seize as distress for rent that property, after calling to his assistance the peace officer of the district or place where it is suspected to be concealed.

(2) The peace officer is required to aid and assist, but in the case of a dwelling house, an oath shall be sworn before a justice showing reasonable grounds to suspect that the property is inside it.

(3) The entry and seizure shall be in the daytime and those persons may take and seize property for the arrears of rent as might have been done if the property had been found in an open field or place.

While section 16 does not confer an explicit right to break into and enter a locked building, such a right may be inferred.

Such a power goes far beyond what we understand to be the powers of sheriffs in enforcing ordinary writs of execution. In the Commission's Report on the *Replevin Act*, a similar provision was the subject of comment:[8]

> Extraordinary powers of search and entry, without judicial order, should be conferred only where the need for them is demonstrated in the clearest possible way. No such case has been made out for [Replevin] Rules 10 and 11.

That comment applies with equal force in the present context.

8. LRC 23 (1975).

2. The Priority Structure of the Act is Irrational

The landlord's right to seize property to satisfy arrears of rent may conflict with the rights of another person who may also look to that property to satisfy a debt owing by the tenant. Such a person may either be an execution creditor who wishes to seize the property under legal process or a secured creditor who has advanced money on the security of the property (already owned by the tenant) or who has given value to enable the tenant to acquire the property in question.

There are a number of legal devices a party may employ to take such security. A conventional mortgage is available in all cases, but if the lender has provided purchasemoney, a security interest may also be created through retention of title by allowing the transaction to take the form of a conditional sale, lease or consignment. The tendency of modern personal property security legislation is to ignore distinctions between these various security devices and concentrate on the central notion of a "security interest." Where distinctions must be drawn, the legislation does this on a functional basis. This was explored at length in the Commission's Report on Personal Property security.

In the *Rent Distress Act*, the old technical distinctions continue to be used in defining the priority of the distraining landlord. Section 4(1) of the Act specifies that the property of persons other than the tenant is not liable to seizure and then creates three exceptions to this rule in respect of competing creditors:

> 4. (1) A landlord shall not distrain for rent the personal property of a person except the tenant or person who is liable for the rent, although that property is found on the premises; but this restriction does not apply
>
> (a) in favour of a person claiming title under an execution against the tenant;
>
> (b) in favour of a person whose title is derived by purchase, gift, transfer or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise;

(c) subject to section 3, to the interest of the tenant in any personal property 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 on performance of a condition.

Thus far the competing interests are treated equally all are subordinated to the landlord's right of distress. It will be noted, however, that the exception with respect to conditional sale and hire purchase is made subject to section 3. Section 3 provides:

3. Where a landlord distrains for rent or personal property in the possession of his tenant, which is held by the tenant under a duly filed agreement for hire, contract or conditional sale, the landlord shall sell only the interest of the tenant in the property.

The effect of this is to preserve the conditional seller's priority a favoured position denied the mortgagee.

The exception concerning the position of the execution creditor is also qualified by another provision. Section 1 of the *Commercial Tenancy Act* appears to limit the landlord's priority to one year's arrears of rent.

This priority structure raises the possibility of "circular priorities" in certain situations. Such a situation might arise if a tenant's goods had been seized by an execution creditor, those goods being subject to a security interest in favour of a mortgagee, and the landlord seeks to assert a right of distress for rent in excess of one year. On these facts, the mortgagee would assert priority over the execution creditor by virtue of his security agreement, the landlord would assert priority over the mortgagee under section 4(1)(b) of the *Rent Distress Act* and the execution creditor would assert priority over the landlord under section 1 of the *Commercial Tenancy Act*.

3. ___Third Party Interests are Inadequately Protected

Although the *Rent Distress Act* purports to protect the interests of third parties, it does so in a most haphazard fashion. First, there may be certain third parties who, in fairness, ought to have the protection of the Act but are denied it. Secondly, even where a third party right is clearly protected by the Act, the machinery by which he may assert that right is cumbersome and ineffective.

One group of persons who are excluded from the general rule that the property of persons, other than the tenant, may not be seized are those "whose title is derived by purchase ... transfer or assignment from the tenant." The aim of this exclusion seems to be to discourage fraudulent assignments and transfers but it is so wide that it will catch *bona fide* transactions for value as well.

A situation where this exclusion may create injustice is where a dealer has sold a chattel but retains possession (say of a motor vehicle) to prepare it for delivery. In the absence of any provisions with respect to such goods that gives an exemption that is independent of the *Rent Distress Act*, if the goods remain in the possession of the dealer, the buyer is totally vulnerable to a distress by the dealer's landlord for arrears of rent. He would seem to be equally vulnerable if, at a later date, he returns the goods to the dealer for repair.

Precisely that situation provoked a complaint to "Action Line" in the Vancouver Province newspaper:

> THE STEREO I BOUGHT for almost $1,300 was sold out from under me by an auctioneer when the store went bankrupt. The unit was in the shop for repairs. Since I was out of town, I knew nothing about the store going out of business and when I arrived back in Vancouver a month later, I discovered that all the goods in the store including my stereo receiver had been auctioned off by the bailiff service to pay for back rent.

> Since then I have been to several places in an attempt to have something done. Everyone says I will have to get a lawyer. There is something wrong about this. Why should I have to get a lawyer to try to get something that's mine in the first place? And exactly what right did the bailiff service have to sell my unit?

The response of the bailiff service was that they did all the law required of them. On the facts set out, the legal position of the complainant is not free of doubt. Although there is no modern authority, older case law suggests that there is a common law exemption from distress for "things delivered to a person exercising a public trade, to be carried, wrought or manufactured in the way of his trade." This exemption was said to be "for the sake of trade and commerce, which could not be carried on if things under these circumstances could be distrained." The modern scope and application of this exemption is not clear but, arguably, it is broad enough to cover goods delivered for repairs and the seizure was unlawful. On the other hand it might be argued that because section 4(1) creates an exemption that partially overlaps the common law restrictions, it must be taken as showing a legislative intention to cover the field.

Even where it is beyond doubt that the goods of a third party are exempt from distress, the way in which his rights may be asserted against a landlord who has seized them is cumbersome. Section 4(4) of the Act provides:

> (4) A landlord is not liable for the distress of personal property to which the restriction in subsection (1) applies, unless
>
> > (a) the owner of the property makes a statutory declaration containing an inventory of the property and alleging that it is his property, and that the person who is liable for the rent has no right or interest in the property;
> >
> > (b) the owner serves the declaration on the landlord or the bailiff or person employed by him to levy the distress before the distress is levied, or before the property has been appraised and sold; and
> >
> > (c) the landlord distrains or proceeds with the distress after the service of the declaration.

This procedure may place a significant burden on an innocent, third party. Moreover, under section 8, the minimum time which must elapse between the distress and sale (five days) is so short that the third party nay not learn of the distress until after the goods have been disposed of to an equally innocent purchaser.

If the landlord is insulated from liability by section 4(4) then the contest may resolve itself into one between the owner and the person that bought the goods from the landlord. Both are innocent parties and one must lose.

A further remedy of the third party who has lost his goods is to claim reimbursement from the tenant whose failure to pay the rent led to the distress. This is a rather hollow right since a tenant against whom distress has been levied is unlikely to have the means to satisfy a claim for reimbursement.

CHAPTER IV THE NEED FOR REFORM: OTHER ISSUES

A. Does Distress Provide an Unjustified Priority?

In the previous chapter we considered the relationship between the landlord's right to distrain his tenant's goods and the interests of other creditors in those goods. We concluded that the priority structure provided by the *Rent Distress Act* is irrational. There remains the question of why the claim of the landlord has been singled out for particularly favourable treatment and whether this should continue to be the case.

The landlord's right of distress is of great antiquity and appears to have been derived from ancient feudal law. Distress emerged in an agriculturebased economy at a time when socalled selfhelp remedies were a widely accepted method of enforcing legal rights. The evolution of a remedy of this kind is not surprising. In a feudal agricultural economy, it is the landlord who provides the most important item of capital that enables the tenant to conduct a farming operation. A law which recognizes the special position of the landlord in this context and provides a special remedy to assist him in the collection of his rent seems a natural consequence. Moreover, since competing creditors are likely to be few, and alternative means of securing the landlord's position through agreement rather than operation of law had not yet developed, distress could be perceived as a fair and reasonable balancing of interests.

It is doubtful if the conditions that may once have justified distress hold true today. While, no doubt, agricultural tenancies continue to exist, the vast majority of commercial tenancies which are amenable to distress involve the manufacture or sale of goods or the provision of services. It cannot be said on an *a priori* basis that the most important component of such enterprises is their business premises and that the creditor who makes that component available, the landlord, deserves a favoured legal position denied to other creditors. In a labour intensive service industry, the most important component may be the line of credit made available by a financer to enable the entrepreneur to meet his payroll. In a capital intensive manufacturing industry, the most important component may be heavy equipment. In a large retail or wholesale operation, the most important component may be the trader's inventory. Various permutations and combinations are possible in which it may be fairly said that the creditor(s) who makes available the most important component of an enterprise is a person other than the landlord. It is, therefore, difficult to justify a body of law that invariably gives the landlord a preferred legal position.

A second condition noted in connection with the evolution of distress and the absence or inadequacy of alternative legal means whereby the landlord could acquire rights to his tenant's property through agreement. Today chattel mortgages and secured debentures are widely used in the creation of security interests in personal property. If a landlord is in any doubt as to a prospective tenant's ability to meet his rent obligations, it is open to the landlord to take a security interest as part of the rental agreement. This supports a view that the right of distress is obsolete and unnecessary.

B. Is the Selfhelp Nature of Distress Acceptable?

As a general rule, before a remedy against a person or his property may to enforced, two steps must be observed. First, there must be some adjudication by a court or other competent tribunal of the person's entitlement to that remedy. Second, the actual enforcement of the remedy must be entrusted to an officer of the court such as a sheriff. The reasons which underlie the general rule are fairly obvious. The first step accords with the widely accepted principle that a person should not be deprived of his property except by due process of law. The second step is related to public order. It is thought that by placing the actual enforcement process in the hands of a disinterested officer of the court, breaches of the peace are much less likely than if enforcement is left to an interested party.

The application of this process to claims for arrears of rent, in the absence of a right of distress, means that the landlord commences an action in court for unpaid rent and the tenant is given an opportunity to dispute the claim. If the landlord's claim is established, he obtains a judgment and then causes a writ of execution to be directed to the sheriff. The sheriff, acting under the authority of the writ, may then seize the tenant's property and cause it to be sold. The proceeds of the sale are then available to the landlord toward satisfying his judgment. This, in fact, is now the procedure that must be adopted with respect to arrears of rent owing on residential tenancies.

Where distress is available, the safeguards inherent in the process described above are absent. Whether or not a levy of distress will be made is a unilateral decision by the landlord. He needs only to be satisfied in his own mind that arrears of rent are owing to start the process in motion. The actual process of seizure may be carried out by the

landlord or his employee. Alternatively, he may direct a warrant to a commercial bailiff to carry out the seizure as his agent. It should be noted that in British Columbia, in contrast to certain other jurisdictions, a bailiff is not an officer of the court similar to a sheriff. The supply of bailiff services is a purely commercial enterprise licensed under the *Debt Collection Act*. Where property is seized under a distress, the safeguards of the tenant's interest are minimal.

The right of a person to enforce remedies against property directly is often referred to as a "selfhelp" remedy. The modern tendency of statutes is to restrict or discourage the exercise of selfhelp remedies. In the context of residential tenancies, selfhelp remedies formerly available to both landlords and tenants have been limited. The residential landlord's right to distress has been abolished and the tenant's former right to withhold rent and apply it to remedy a breach by the landlord has been abolished and replaced by a statutory remedy.

Should the commercial landlord's right of distress continue in its present form as a largely unregulated selfhelp remedy? It would be idle to assert that the notion of selfhelp remedies is now obsolete. There is another important sphere of commercial activity in which selfhelp remedies are, and likely will continue to be, important. That is in the enforcement of security interests in personal property. Where there is a default in payment under a chattel mortgage, conditional sale agreement, or some more complicated type of security device, realization on the collateral frequently takes place without reference to legal process.

Even in the sphere of secured transactions, however, the trend toward limiting and regulating selfhelp remedies is evident. In British Columbia, a conditional seller may not repossess the goods sold except under the authority of a court order where the buyer has paid two-thirds of the purchase price. In Alberta, under the *Seizures Act,* the sheriff has the carriage and conduct of all seizures under a "power of distress. Power of distress is defined broadly to include not only the landlord's right of distress, but a seizure under a security agreement. Finally, modern personal property security legislation, while recognizing the continued existence of selfhelp remedies in this area, codifies those remedies in a rational fashion and provides a measure of protection to the debtor.

It seems safe to say that the selfhelp nature of distress, as it presently exists, is out of step with contemporary developments designed to bring unrestrained creditor initiative within rules and procedures designed to achieve a fair and orderly realization of a debtor's assets.

C. Is the Law Concerning Distress too Complex?

The whole of the law concerning distress is not set out in the *Rent Distress Act* and the other statutes referred to in Chapter II. While those statutes introduced important changes, most of the detailed rules are to be found in the common law and in the cases that interpret and gloss the relevant statutes. The result is a very complex body of law. In the first edition of Halsbury published in 1910, an introductory passage said of distress:

> Although the right to distrain is of common law origin, it was subject at common law to many exceptions and has since undergone many statutory modifications and been extended by additional statutory powers. This exceptions and additions are so many that scarcely an important absolute statement can be made in dealing with the law of distress as it affects landlord and tenant. The law of distress as it stood before statutory alteration was perhaps simple and of easy application. Today it demands, by reason of statutory alterations, more knowledge of various branches of law than any other common law authority which is as frequently exercised. It calls for a knowledge of the law relating to leases, fixtures, trespass, property in goods, specific performance, fraud, executions, and the obligations arising in respect of the sale of the goods distrained.

That observation applies with equal force in British Columbia today. The passage of time has not decreased the complexity of this body of law. It has only made it more obscure.

One consequence of the complexity and obscurity of this branch of the law is that a landlord seeking to distrain often proceeds at his peril in all but the most straightforward of cases. A wrongful distress may subject him to liability to the tenant for conversion or trespass and, in extreme cases, for exemplary or punitive damages as well. Some reported cases in which the landlord has been held liable involve highhanded conduct on his part that is unlikely to attract sympathy. Other cases, however, illustrate the very real difficulties that a landlord may face in attempting to thread his way through a maze of technical legal rules to effect a valid seizure.

For example, the validity of a seizure may depend on whether the entry of the landlord or his agent into the premises was lawful. The case law surrounding what constitutes a lawful entry is bewildering in its technicality. A landlord may not break open an "outer" door to gain entry but he may break open an "inner" door. If he has entered lawfully in some other way, however, he may break the outer door to remove the goods distrained. It is not "breaking" an outer door to turn a key and lift a latch, but the landlord may not use a key hanging beside a locked door or a "passkey." He may enter through an open window but not through a window that is shut but not fastened. If a window is slightly open it may be opened wider to gain entry.

The law concerning entry set out above is derived from Williams Canadian Law of Landlord and Tenant, and the numerous cases cited illustrate that the line between a lawful entry and an unlawful entry can be an exceedingly fine one. The distinction between opening a door with a key already in the lock or by using a key hanging beside it is not obvious, but the landlord who fails to recognize and act on the distinction may find himself liable in damages.

CHAPTER V OPTIONS FOR REFORM

A. Introduction

The discussion in the two previous chapters should be sufficient to demonstrate the unsatisfactory state of the law concerning distress and to support a general conclusion that reform of some kind is called for. There remains the question of the nature and extent of that reform.

We believe that relatively drastic measures are necessary. The present state of the law is the result of several centuries of *ad hoc* legislation designed to meet particular problems. The law in this area is unlikely to be improved by further tinkering. There are two lines along which "massive reform" might proceed. The first is a full restatement of the law of distress in a modernized, simplified and rationalized form. The second is the total abolition of distress.

B. Rationalize and Restate the Law

In a Report published in 1976 by the Ontario Law Reform Commission on Landlord and Tenant Law, distress was one of a number of matters considered. That Commission saw a "need for a restatement of the law governing the right of distress so as to ensure a greater degree of fairness to all parties affected by its operation," and went on to set out a large number of recommendations to achieve that end. The full text of those recommendations is set out as Appendix B to this Report. A detailed discussion of them is beyond the scope of this Report but the principal recommendations are described below:

1. ___Rationalization

It was the view of the Ontario Commission that the law of distress would be simplified and clarified by assimilating it, as far as possible, to seizure under an ordinary writ of execution, and adopting the expression "rent execution" to describe the process:

> It is our view that the remedy of rent execution should be incorporated into the general body of law governing the enforcement of writs of execution against personal property after judgment, in the hope that a better balance than exists at present between the interests of landlords and tenants will be thereby achieved. We recommend, therefore, that *The Landlord and Tenant Act* be amended to provide that a rent execution may be levied at any time that it is lawful to seize personal property under a writ of execution and shall be subject to the same rules as govern the seizure and sale of personal property under a writ of execution, unless otherwise provided in the Act. Thus, for example, chattels exempt from seizure under a writ of execution would also be exempt from seizure under a rent execution.

The Report goes on to point out how this step would clarify the "confusing array of rules" relating to the legal means of gaining entry to effect a seizure.

2. A Retreat from Selfhelp

(a) ___A Court Order

The Ontario recommendations contemplate a greater degree of judicial supervision over distress. In particular, at unilateral decision cof the landlord to levy distress would no longer be the critical factor. The Report stated:

> Landlords should be required to obtain an order from a county or district court judge before a rent execution may be carried out. Rent execution should only be carried out by a sheriff or sheriff's officer. Because rent execution represents one of the very few instances where a seizure can be carried out before judgment, it does not seem unfair to permit a judge to fix security in order to protect a tenant against damages which might result from an excessive, unlawful or irregular rent execution.
>
> We recommend, therefore, that provisions setting forth conditions precedent to obtaining a rent execution be enacted in The *Landlord and Tenant Act*, applicable to nonresidential tenancies. Provisions along the following lines are proposed:
>
> (1) A landlord may levy rent execution for the rent of any premises to which this Part applies.
>
> (2) "Rent execution" means any and all acts or things done in the exercise of a power of rent execution whether arising by statute, the common law or contract.
>
> (3) No rent execution shall be levied except after the landlord has first obtained an order from a judge of the county or district court of the county or district in which the premises are situated, upon a summary *ex parte* application.
>
> (4) In support of such application there shall be filed a true copy of the tenancy agreement, if any, together with an affidavit of the landlord or some person acting on his behalf having personal knowledge of the facts relating to the, application, setting out the particulars of the claim for arrears of rent which it is claimed are justly due and owing.
>
> (5) The order of the judge permitting a rent execution to be levied shall state the amount of arrears of rent claimed by the landlord.
>
> (6) The judge may fix an amount for security to be paid into court or otherwise by the landlord for the costs of the rent execution, and any claim for damage in respect of the reni execution.
>
> (7) In fixing an amount for security, the judge shall consider the possible injury to the tenant which would be caused by a rent execution which is unreasonable or otherwise unlawful or irregular.

(b) ___Role of the Sheriff

The Ontario Report reflected some unease at leaving the physical seizure of goods to be carried out privately:

> At present, private bailiffs are usually employed to carry out the distress on the authority of the landlord's warrant. Since distress is a private remedy, judicial supervision exists only in the event of proceedings being brought under Part II of *The Landlord and Tenant Act* or by an action apart from the provisions of that Part. In the view of the Commission, it would represent a salutary step to remove the bailiff from his "hired gun" status. This would be accomplished by having all distress proceedings dealt with by the sheriff of the county or district where the rented premises are situated.

Accordingly, it was proposed that:

> No rent execution shall be made except by a sherriff, deputy sheriff or sheriff's officer of the county or district where the premises are situated or by some other person authorized in omitting to do so by a judge of the county or district court where the premises are situated.

(c) Priorities

The Ontario Report recommended that the rights of secured parties be recognized and the appropriate legislation be amended to make it clear that the holder of a security interest in personal property has priority over a rent execution.

(d) General

The recommendations made by the Ontario Law Reform Commission address a large number, but not all, of the concerns set out earlier. Not everyone would agree with the particular solutions adopted but, as part of a recent consideration of distress in a Canadian context, they provide useful guidance and deserve careful study.

C. Abolish Distress

Retention of the "landlord's right of distress, even in a modern and rationalized form and subject to judicial supervision, does not meet one central objection to the present law. The objection is that a right of distress confers on the landlord a legal advantage that is not enjoyed by other creditors whose contribution to the tenant's economic enterprise may be equally, or more, important. This objection can be met only through the total abolition of distress.

This suggestion is not new. In England, almost 100 years ago, the abolition of distress was urged on a Royal Commission considering agricultural tenures. The argument was summarized in the following terms:

> It was complained that this relic of feudalism placed the tenant at the landlord's mercy; that it impaired the general credit of the tenant and rendered it impossible for him to obtain agricultural machinery or breeding stock on hire; that it, gave the landlord an unfair preference over other creditors. It was contended that there was no difference in the commercial position of the landlord who supplied the land, and the man who supplied any other commodity; and that the right of distress should be altogether abolished.

More recently, distress has been considered by two official bodies in England.

The Law Commission in 1965 submitted its Interim Report on Distress for Rent. Abolition was considered but its retention, for the time being, was recommended pending the completion of an examination by the Committee on the Enforcement of Judgment Debts (Payne Committee) on remedies available to creditors.

The Payne Committee reported10 in 1969. That Report considered a number of features of distress and observed:

> The cumulative effect of the differences which we have outlined place the landlord in a privileged position compared with other creditors, and the question arises whether these advantages can be justified and whether distress for rent as a remedy should be retained.
>
> The arguments in favour of the retention of distress are mainly based on the position of landlords *qua* landlords. It is said that a landlord is in a less favourable position than most other creditors since "once a landlord has taken a tenant he is compelled to give credit until he has recovered possession, whilst a tradesman gives and can withhold credit upon his assessment of the customer's position." For this reason it is said that the landlord needs a remedy which operates more quickly and at less cost than an action in the courts. Even to apply to the court for leave to distrain would add to the delay and to the arrears. Distress for rent therefore provides precisely the remedy which the landlord needs, particularly against a bad tenant.
>
> In our view these arguments, though formidable, are unconvincing and do not justify the landlord's priority over other creditors, the removal of this remedy from the control of the courts and the deprivation of the tenant's rights, enjoyed in other forms of litigation, to seek a stay of enforcement. Rent is not unique in being a recurring debt and one is reminded of rates, taxes, mortgage interest and instalments due under agreements, sometimes for the supply of necessaries. Public utility undertakings supplying gas, electricity, water and telephone services also need a speedy and effective remedy for the recovery of their debts.
>
> There are further arguments in favour of the abolition of distress for rent. Only the accident of history entitles the landlord to exercise this right without first having to transform his claim into a judgment debt.

It was concluded that, in the light of other recommendations concerning the enforcement of debts generally, distress should be abolished.

This view has also commended itself in Northern Ireland. In the Report of the Joint Working Party on the Enforcement of Judgments, it was recommended that the priority of the distraining landlord over execution creditors be abrogated. The legislation that implemented the recommendations of the Joint Working Party, however, went further and totally abolished distress for rent.

The abolition of distress was considered briefly by the Ontario Law Reform Commission and rejected:

> The remedy of distress, essentially an extrajudicial means of recovering rent by the seizure and sale of a tenant's chattels, was examined in considerable detail by the Commission in its report on residential tenancies. The Commission concluded that the advantages of distress to landlords were far outweighed by its disadvantages to tenants and the public, and recommended the abolition of the right to distrain.
>
> So far as nonresidential tenancies are concerned, two factors have led us to the conclusion that a different approach is warranted from that which we took with respect to residential tenancies. In the first place, we could find no marked sentiment among either landlords or tenants of commercial premises favouring the abolition of the remedy of distress. ... Secondly, landlords of commercial premises are, in one sense, more vulnerable than landlords of residential tenancies in that they ordinarily experience greater difficulty in reletting than do landlords of residential premises. Many commercial properties are suitable for specialized tenancies, and the fact that a tenant (especially one engaged in retail trade) has been unsuccessful may contribute to the problem of finding a satisfactory new tenant.

Such a situation must inevitably result in a certain amount of sympathy for the commercial landlord's position. Both of these factors suggest that the retention of at least some form of the remedy of distress is warranted.

These reasons are not totally convincing.

First, it should be stressed that a principal concern is that the continued existence of distress is unfair to competing unsecured creditors. The fact that there may be no marked sentiment among landlords and tenants favouring abolition is irrelevant. How does the fact that the landlord may have difficulty in reletting the premises justify a rule that, in all cases, gives him priority over the unpaid creditor who may have supplied goods or services?

The *Bankruptcy Act* adopts the view that equality among creditors should be promoted and abolishes the landlord's right of distress in that context. If a landlord has levied distress and a bankruptcy intervenes, the landlord or his agent is obliged to deliver the goods or, in some cases, the proceeds of their sale to the trustee. The landlord does, however, receive a preference as to three months' rent.

The abolition of distress is not as radical a step as it might first appear, particularly when examined as an alternative to the Ontario proposals. The regime suggested for that province, with its requirement of a court order before seizure, putting seizures in the hands of the sheriff, and assimilation to execution law, brings distress so close to the ordinary processes of litigation and execution for the recovery of debts that its continued existence as a distinct remedy is questionable.

D. Contractual Security for Rent: A Landlord's Alternative

The landlord's right of distress is, at bottom, a form of security for the payment of money. In functional terms it is not unlike a floating charge that might be created in a corporate security or debenture. It provides a form of security on a shifting mass of collateral (such as inventory) for the payment of a fluctuating debt. A significant difference between these two types of security, however, lies in the mode of their creation. The floating charge type of security arises through a contract or agreement between the parties while the right of distress arises through operation of law.

In Chapter IV we pointed out that, historically, the right of distress arose long before the array of contractual security devices now in common use received legal recognition and sanction and served an obvious need. It seems relevant to ask if that need still exists or whether the law relating to secured transactions has reached a sufficiently satisfactory state that the landlord's legitimate desire for security for unpaid rent can be met in other ways.

The law relating to secured transactions has been the subject of intensive study by this Commission which culminated in 1975 with the publication of our Report on Personal Property Security.

If the proceeds are in the hands of a bailiff the trustee may also have a right to claim them if it can be established that the bailiff was not a direct agent of the landlord. *See Re StanDon Supply Ltd*., (1968) 68 D.L.R. (2d) 125 (Ont. S.C. in Bankruptcy). If the bailiff is a direct agent of the landlord (and no fraudulent preference exists) then the trustee would appear to have no claim to the proceeds. *See Re Southern Fried Foods Ltd*., (1976) 21 C.B.R. 267 (Ont. S.C. in Bankruptcy).

A brief survey of the existing law was set out in the introductory chapter of that Report and is reproduced as Appendix C to this Report. It includes a summary of the "difficulties of the present law." Those difficulties are with us today and just as they inhibit commercial financing generally, they restrict the ability of a landlord to bargain for and acquire adequate security.

Our 1975 Report, however, contained recommendations for new legislation that would eliminate those difficulties and rationalize this difficult body of law. Briefly stated, it was recommended that a new *Personal Property Security Act* (hereafter PPSA) be enacted that is comparable to those now in force in Manitoba, Ontario, and Saskatchewan. While our recommendation has not yet been implemented, we are optimistic that legislation will be enacted in the near future. In 1978 a proposed Act based on our recommendations was given wide circulation by the Ministry of Consumer and Corporate Affairs and this was followed by extensive consultation with members of the legal profession active in secured financing. We understand that the interest of that Ministry continues.

23. *See* Ministry of Consumer and Corporate Affairs, Annual Report, 1980 at 6 and 14.

If legislation of this kind is enacted in British Columbia, it is arguable that those landlords wishing security for arrears of rent would have all the legal tools at their disposal that are necessary to meet their legitimate expectations and the need for a right of distress would cease to exist.

CHAPTER VI THE WORKING PAPER

A. Contents and Distribution

The discussion in the first five chapters of this Report is essentially that set out in a Working Paper which we circulated late in 1980. The Working Paper went on to set out our tentative conclusions and proposals for reform. These were described in the Working Paper as follows:

> It is our tentative conclusion that the landlord's right of distress for arrears of rent should, in principle, be abolished. In our view, the preferred position of the landlord should no longer be maintained. In a purely commercial setting, there is nothing special about a debt that has accrued in respect of rent that justifies the existence of a summary remedy that is denied to other unsecured creditors and gives a priority over those creditors. The priority it gives over certain secured creditors and the danger it poses to the rights of innocent third parties reinforces this view.
>
> The abolition of distress for rent would mean that the landlord would rely on the remedies available under the general law to enforce a claim for arrears of rent. There are two ways in which a landlord might proceed. The first is to bring an ordinary action in court, followed by execution, to enforce his claim. In some cases this may be of advantage to the landlord. The property which can be seized in a distress is generally limited to tangible chattels located on the rental premises. A judgment would make a much wider range of property available to satisfy the debt. The landlord could proceed against land owned by the tenant, goods located off its premises and intangible wealth such as debts owed to the tenant. These assets are not amenable to distress.
>
> The other way open to the landlord was discussed at length in the previous chapter. That is to contract for a security interest in the tenant's property and assume the rights of any other secured creditor. This approach has much to commend it.
>
> 1. The security interest would be created by agreement between the parties and the law would not give the appearance of preferring one type of creditor over another.
>
> 2. The status of that security interest would be governed by a rational and welldefined priority structure.
>
> 3. Selfhelp would remain available to the landlord but it would be "tamed" by the general law concerning the enforcement of security interests.
>
> In summary, security taken within the framework of a modern *Personal Property Security Act* would meet our concerns relating to distress but still give the landlord an appropriate measure of protection on the tenant's default.
>
> As we pointed out earlier, however, a new *Personal Property Security Act* has not yet been enacted. We therefore believe that distress should be abolished only when such legislation comes into force.
>
> The abolition of distress for rent should also have the effect of eliminating a number of other rights of distress for debts other than for rent. The reason for this is that such rights are frequently defined with reference to the rights of landlords. both this underpinning removed, these other rights of distress would be rendered nugatory. The distress rights that would be so eliminated are those created by contract and many of those created by statute for the collection of taxes. As far as we are aware, neither of these nonrental rights of distress are relied on to any significant extent so no hardship would result. For consistency of principle and the sake of a tidy statute book, however, we believe it would be desirable to repeal those provisions that create a right of distress for tax obligations. Another result flowing from the abolition of distress for rent is that the *Rent Distress Act* and those sections of the *Commercial Tenancy Act* concerning distress could Be repealed as unnecessary. Consequential amend-

ments to a number of other statutes that refer to distress should also be enacted. A list of the relevant provisions, including the taxation statutes referred to above, are set out in an Appendix.

The only type of distress that would survive the abolition of distress for rent is the right of "distress damage feasant," the right of an occupier of land to retain possession of a trespassing chattel as security for damage arising out of the trespass. This is a purely common law right. We have no firm views on whether this right should continue to exist. In favour of its abolition is that it is archaic and little used. On the other hand, it may be argued that the right of distress damage feasant should not be disturbed. Where distress damage *Feasant* might be exercised, the distrainer's claim arises out of a tort. In contrast to the landlord, the distrainer damage feasant has no opportunity to assess the worth of the person against whom his claim lies and choose not to deal with him or to demand security. This distinction, it may be argued, justifies different treatment. We would welcome comment on this issue.

To summarize, the Commission proposes that:

1. *The* Commercial Tenancy Act *be amended by adding a provision that the common law remedy of distress for arrears of rent is abolished.*

2. *The* Rent Distress Act *and those provisions of the* Commercial Tenancy Act *that grant or regulate distress be repealed.*

3. *The provisions of various taxation statutes that create a right of distress in respect of tax obligations be repealed and consequential amendments made to a number of other Acts. A list of use relevant provisions is set out in Appendix C.*

4. *Legislation implementing proposals 1 to 3 should not be proclaimed into force until a* Personal Property Security Act *comparable to that recommended in our 1975 Report on that topic (LRC 23) is also brought into force.*

Comment on the contemporary utility of the common law right of distress damage feasant is also sought.

As we indicated earlier, these views were expressed to be tentative only and were subject to reconsideration in the light of the response and comment received.

The Working Paper was circulated widely among landlords and their representatives, competing creditors, persons and bodies likely to represent the tenants, the legal profession and a number of disinterested but knowledgeable observers.

B. The Response

Landlords

(a) Written Submissions

The response to the Working Paper was one of the heaviest we have received in recent years. Most of it came from landlords or those identified with their interests and was highly critical of the tentative proposals. While in a number of cases the language of these responses suggests a degree of "orchestration," there was sufficient diversity in the comment we received to make it clear that we had touched on an issue of genuine concern to commercial landlords.

The landlords' response does not easily lend itself to summary or analysis. It is best approached by trying to identify what we perceive to be some of the major "threads" running through the landlords' submissions. The basic question posed in the Working Paper is why a landlord should, by operation of law, have a speedy selfhelp remedy against his tenant's property that is denied to other unsecured creditors and which gives priority over them and over many secured creditors. Some of the reasons given by landlords to justify their special position are:

(1) They need the priority because they have their own obligations bills, taxes, mortgage payments to meet. These are unlike other trade debts in that they arise out of the subject matter of the transaction.

(2) The landlord is not a "mere" creditor. Contrary to the view set out in the Working Paper, the premises are the most important component of a tenant's business in a majority of cases.

(3) Other "suppliers" such as workers have statutory priority why not landlords?

(4) The priority enjoyed by a landlord may motivate him to forbear collection action, thus allowing the tenant to stay in business. This benefits everyone.

(5) Nobody wants to see distress abolished. A number of submissions referred to the second paragraph of the quotation from the Ontario L.R.C. Report which were set out in the Working Paper as justifying the retention of distress.

(6) The consequence of a default is more drastic for a landlord than for other creditors difficulties in reletting, repairs, etc.

(7) The landlord needs special protection because he is usually the last to know of the tenant's financial difficulties.

(8) Distress enables the landlord to move quickly and protect other creditors from the tenant who would fraudulently remove and hide the goods.

(9) Abolition of distress would add to the landlord's financial burden "with little hope of recovery." It would place a burden on small owners who cannot spread their losses over a number of properties. A landlord is far less able than other creditor grantors to spread his credit risk.

(10) The added burden on the landlord will be passed on to all (good) tenants and increase rental costs generally.

(11) Landlords have at preference as to three months' rent in a bankruptcy (and by implication they deserve priority under provincial law).

(12) The landlord's priority is not unfair to competing creditors because they have full knowledge of that priority and their exposure to risk is small.

(13) The abolition of distress would force landlords to screen their prospective tenants more carefully and the less creditworthy of them may be unable to rent business premises.

(14) The right of distress makes landlords much more willing to allow receivers, etc., to store, on the premises, goods that have been seized.

The landlords' submissions were also unanimous in condemning ordinary litigation proceedings as expensive and timeconsuming and characterized them as an unacceptable vehicle for the collection of rental arrears. Consensual security was also rejected as an acceptable alternative to distress.

(b) An Oral Submission: Distress in Practice

Following the receipt of the written submissions a meeting was held, in response to a request made to us, between the members of the Commission and the representatives of the Building Owners and Managers Association (BOMA), a major landlords' organization. Some of what we were told was repetitive of the written submissions. However, some new and significant information about the use of distress in practice did emerge.

Essentially, we were told that the principal value of distress, as it is used today, lies not in the money that may be recovered through seizure and sale of the tenant's goods. The kind of prices that goods may bring at a "distress sale" often live up to the popular connotations of that term. Rather, the right of distress gives the landlord a powerful tool to persuade the tenant to satisfy his rent obligations.

We were told that a typical situation in which distress is used might proceed as follows. First, a tenant's financial difficulties will often become clear to a landlord well before any substantial arrears accrue. Most commonly a pattern of late payments may develop which the landlord fears may imperceptibly slide into such arrears. An even greater fear is that the tenant may become totally insolvent and visit on the landlord the expenses attendant on allowing the premises to remain empty until a new tenant can be found and then repairing them or altering then to suit the needs of the new tenant. It was stressed to us that the landlord has a strong interest in the continued financial health of his tenant.

We were told that, with these considerations in mind, the landlord will approach the tenant to discuss his difficulties and advise on, or explore, ways of overcoming them. The tenant may be advised to improve his business practices or he may be advised to seek a buyer for his business one who is able to run it more effectively. It is also at this point that distress may enter the picture, in one of two different ways.

The ability to seize the tenant's tangible business assets on the premises and hence put the tenant out of business gives the landlord immense leverage to see that his advice is followed. The mere threat of distress may be sufficient inducement to do so. Depending on the landlord's assessment of the situation, however, more than a mere threat any be required and the landlord may, in fact, distrain the tenant's goods at this time. But this distress will be of a special type.

This special type of distress takes the form of what is usually referred to as a "walking seizure." The essence of the arrangement is that a formal seizure of the tenant's goods is made by the landlord or his agent and an inventory of the goods is made. The landlord and tenant then enter into an agreement under which the tenant retains possession of and may continue to use or deal with the goods. The agreement, however, specifies that the tenant holds the goods in the capacity of a bailee of the landlord. Under such an arrangement the tenant is permitted to carry on his business without interruption while the "persuasive" powers of the landlord are enhanced. Moreover, under a walking seizure the landlord acquires a specific interest in the goods that is enforceable against third parties except to the extent that the law protects a *bona fide* purchaser from the tenant in the ordinary course of the tenant's business:

We were told that it is far more common for distress to be made, in the first instance, through a walking seizure than through a seizure which deprives the tenant of possession of his goods. If the default continues, the land-

lord may, at some time after a walking seizure has been levied, assume possession of the goods and realize on them. In the majority of cases, however, distress does not proceed beyond the walking seizure stage.

(c) ___Other Issues

While the submissions of the landlords were critical of the proposal to abolish distress, there was substantial agreement with our views on the technical deficiencies of the *Rent Distress Act* and the law relating to distress generally. In particular, two issues were raised that were not canvassed in the Working Paper.

We were told that the scale of fees set out in the Schedule to the *Rent Distress Act* was inadequate and outdated. It was urged that if a fee schedule was to be retained the amounts provided for should be set at a realistic level. In fact, amounts set out in the fee schedule appear to be of limited application because of the widespread use of the walking seizure which is ultimately withdrawn. In that case the landlord is entitled to "reasonable fees, charges and expenses" and no specific dollar amounts are fixed.

The other technicial deficiency concerns the situation where a distress is made coincidental with, or as part of, a termination of the tenancy by the landlord through his retaking possession of the premises. In such a case retaking the premises may simply involve putting a padlock on the outer door.

The difficulty arises out of the common law rule that distress can only be levied while the tenancy subsists and once the tenancy is terminated the right to distrain is lost. On the face of it this common law rule has been altered by section 3 of the *Commercial Tenancy Act*:

> 3. Any person having any rent in arrear or due on any lease for life or lives, or for years, or at will, ended or determined, may distrain for such arrears, after the determination of the said respective leases, in the same manner as he might have done if such lease or leases had not been ended or determined.

Section 3, however, must be read in the light of section 4, which provides:

> 4. Distress under section 3 shall be made within the space of six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due.

Thus section 3 will permit distress after determination of the tenancy only when the tenant remains in possession a situation that is inconsistent with a "padlocking" of the premises.

In the result, the landlord must exercise great caution in the order in which he exercises his rights. He must distrain first and padlock the premises second. If the order of those steps is reversed even though they may only be minutes apart the distress is unlawful. This, it was suggested to us, is an anachronistic technicality which places landlords in needless jeopardy.

2. ___Other Respondents

Several responses were received from persons who were disinterested, in the sense that they were not identified with the interests of landlords, tenants or competing creditors. This response was generally supportive of the one such respondent views set out in the Working Paper. One such respondent stated:

> I have read your Working Paper No. 25 with some interest, as the existence of this remedy in modern law has always rather baffled me. It is as you suggest, irrational and unfair and I could give you further examples where it has quite lawfully deprived innocent third parties of their goods, where such happened to be in the possession of

> bailees against whom a distress has been levied. Such things should not happen, and would not if properly adjudicated upon.

We received other responses in a similar vein.

An exception among this group of respondents was the Business Law Section of the British Columbia Branch of the Canadian Bar Association. The Section's formal response was brief and took the form of a resolution:

> That the right of distress should not be abolished. However, consideration should be given to modernizing and reforming existing legislation.

A group from whom little response was received were competing creditors and their spokesmen. We received only one detailed submission:

> I have read with interest your recent paper with respect to the above described matter and, while the present *Rent Distress Act* ... needs reform if any statute does, I can see little to be gained by the wholesale abolition of the statute or the concepts comprised therein. I am of this view notwithstanding the fact that most of the parties for whom I act are secured lenders and that I am, in consequence, usually at odds with either a landlord or his solicitor and the subject matter of the dispute is, almost invariably, the meaning of the *Rent Distress Act*.

Basically, I am in agreement with the view that liens or charges, particularly those created by and for the benefit of feudal landowners and perpetuated and improved by statute, cannot be justified on moral grounds. The fact remains, however, that if you deprive the landlord of his present right to distrain, which I look upon as a type of floating charge, you immediately force him to seek other security, presumably in the form of a chattel mortgage or, where a corporate tenant is involved, a debenture. While one cannot pretend to foresee the consequences of such a charge, I believe that it is safe to presume that the landlords who are universally most protective of their present right to distrain and generally refuse to forego that right when so requested by the tenants' mortgagees, will be equally disinclined to enter into priority agreements with those mortgagees. In short, then, the tenants' mortgagees will not benefit and the chattels which the tenant might otherwise offer as security to the mortgagee instead of being subject only to something equivalent to a floating charge, with all the defects inherent therein, will in all likelihood be specifically charged, as will tenants' fixtures, which are presently exempt from distress and will probably be charged to a greater extent than necessary in order that the landlord may feel secure. If I am correct in this assessment, and I am confident that I am, the tenant's ability to secure financing could, in many instances, be significant impaired, and in consequence the wouldbe tenant/ borrower will gain no meaningful advantage.

3. Comments on Distress Damage Feasant

In the Working Paper we asked for comments on the contemporary utility of distress damage feasant the common law right of an occupier to seize a trespassing chattel to secure compensation for damages arising out of the trespass. Of the three respondents who considered this matter two favoured the retention of the remedy. The most detailed comment stated:

> We would not be inclined to abolish "distress damage feasant."
>
> Our first reason for reaching this conclusion is that we believe that the ordinary man on his land exercises that remedy out of his natural human nature and would be astonished to find that he did not have that remedy. Indeed, the children's ball through the neighbour's kitchen window is a classic comic scenario. ... [Distress damage feasant also] enables the person who has suffered the damage to identify the person who caused the damage. He does that by taking the goods into his possession. That is particularly appropriate where the damage is done by a wandering animal. I suppose that it would be possible to devise a scheme which would entitle him to locate the owner by keeping possession but which would deny him the right to retain possession against a demand from a person who

> is able to demonstrate that he was the true owner. However, that presents difficult problems about feeding and caring for an animal and we think that it is neater and better to retain this ancient selfhelp remedy.

It was also waggishly suggested that the damage being done on private land by flying saucers is an additional reason for retaining this remedy.

CHAPTER VII OUR CONCLUSIONS

A. Distress by Landlords

1. Comment and Analysis

A summary of the written responses we received from landlords was set out in point form in the previous chapter. It is appropriate that we comment on these submissions.

First, not all landlords are in agreement as to the factors that justify their special position. Where a loss arises out of a tenant's default must it be absorbed by the landlord (No. 9) or spread among other tenants (No. 10)? Is the landlord the last to know of the tenant's financial difficulties (No. 7) or does he learn of them early enough to move quickly and protect other creditors (No. 8)? Probably all these observations have some basis in fact in the sense that they may apply in some rental situations at some time. The same may be true of a number of the other points made they apply to some landlords with respect to some premises at some time but it is difficult to state any universal truths.

Two of the points call for special comment. It was suggested (No. 4) that a right of distress may motivate a landlord to forbear collection action, thus permitting the tenant to remain in business for the benefit of all. It should not be overlooked that this forbearance may also clothe the tenant with an appearance of solvency and financial stability that he does not, in fact, possess. This may induce others to extend credit to the tenant to their ultimate loss. It was also suggested (No. 13) that the loss of distress might cause landlords to adopt a more cautious approach to what essentially is a decision to extend credit. Not everyone would regard this as an undesirable development.

The oral submissions we received from BOMA added a further dimension to our deliberations. A picture as painted of the landlord as the benevolent guardian of the tenant's interests, wielding his rights of distress in a way that is designed to encourage responsible and efficient business practices. This, it is said, benefits the tenant and all who deal with him. Further, we were told that only in a minority of cases is it necessary for the landlord to pursue his rights to the point of a physical seizure and sale of the tenant's goods the threat of distress or a walking seizure being sufficient to accomplish the desired ends. Hence, the danger of loss to third parties is said to be minimal in practice.

This picture has a number of enticing features, but there are also a number of aspects which trouble us. The first is the aura of paternalism that surrounds the submission. Not everyone would agree that it is an appropriate attitude in a modern business context.

Secondly, if the principal virtue of distress is its persuasive value and the power it would give the landlord to close down the business of a defaulting tenant, it is not clear what distress adds to rights already enjoyed by landlords. In almost every case where a tenant's rental payments are in arrears it is open to the landlord to threaten to terminate the tenancy. This would put him out of business as surely as the seizure and sale of his business assets. We see nothing in a threat of distress that makes it a more potent inducement to responsible financial conduct on the part of the tenant than a threat to terminate the tenancy.

Finally, while we have no doubt the BOMA representatives who met with us accurately described the approach of their members, we are not sure it can be safely assumed that this approach has been adopted by all commercial landlords.

2. ___Conclusion

The tentative conclusion that we set out in the Working Paper was that the landlord's common law right of distress should be abolished, leaving them to the collection rights and the contractual security devices that are available to creditors generally. We do not retreat from that view, as a statement of principle, but we are also alive to the fact that occasionally principle must bend, at least in part, to pragmatism and popular notions of what is fair and workable.

The mood of the landlords is clear. They derive considerable comfort from the existence of distress and see it as a valuable tool in enforcing their just claims for rental arrears. The response from other quarters was divided and much less forceful. While such matters are not to be determined solely by counting heads, neither can the general tendency of the response be ignored.

We believe it is possible to achieve something of a middle ground and develop a new *Rent Distress Act* which:

(a) meets a majority of the concerns that led us to a tentative conclusion that abolition of distress was called for;

(b) retains those features of the existing law that landlords see as most valuable;

(c) reflects more clearly existing practices in relation to distress;

(d) eliminates a number of anachronistic features of the existing law which, it is common ground, should not be retained.

Our version of such an Act is set out in the next chapter.

We believe that a new *Rent Distress Act* should be enacted but that it should be reconsidered with a view to its possible repeal after an appropriate period of time has passed. Such a reconsideration might take place after both the new Act and a *Personal Property Security Act* have been in force for five years. The focus of this review would be the extent to which landlords take consensual security under the *Personal Property Security Act* and how well it has served their interests, the extent to which landlords continue to rely on distress and the operation of the new regime generally.

This review may well find that commercial landlords have found consensual security to be a superior means of securing unpaid rent and one that is widely used, with a corresponding decline in the use of distress. In such a

case, repeal of the Act and the abolition of distress would likely be uncontroversial. This review might be undertaken by an appropriate arm of government or by this Commission if time and resources permit.

3. Our Approach to New Legislation

We leave a more detailed discussion of the specific features of the draft Act to the next chapter but believe it is important to set out at this stage some of the general principles that have guided us in its preparation.

First, it is clear that the existing *Rent Distress Act* is beyond repair and the law would be better served by drafting afresh rather than attempting to amend or modify the existing legislation. This drafting approach has, we believe, helped us to focus on the truly fundamental issues of what a distress law should necessarily contain and how it should be expressed.

Secondly, we have attempted to state the rights and duties of the landlord either explicitly in the Act (as with the procedures for the sale of goods seized) or with reference to familiar bodies of law (as with the landlord's right of entry and the kinds of property that may be seized). The common law of distress on such issues is complex, highly refined and badly understood. The present *Rent Distress Act* to the extent that it touches on them, provides little assistance.

A central feature of the draft Act is the way in which it deals with third party rights. It is in this area we believe that the existing law is most deficient, in that it fails to give effect to the rights of other creditors that arose prior to seizure and it provides inadequate machinery to protect the rights of other third parties. Any change in the law which meets these concerns must necessarily involve a degree of erosion of the landlord's rights. If, however, the primary value of distress lies in its "persuasive" force which can be brought to bear on the defaulting tenant rather than what may be realized on a seizure and sale, then the benefits that flow from the present priority structure are of secondary value only. The loss of such priority, while perhaps regretted by landlords, would not be felt heavily so long as they retain a basic right to seize whatever interest in goods the tenant possesses.

A final observation as to our guiding philosophy relates to the role of judicial supervision. We have not adopted the view of the Ontario Law Reform Commission that a landlord be required to obtain a court order before levying distress. There are two reasons underlying our conclusion iri this regard. First, the Ontario recommendation would appear to apply equally to both walking seizures and seizures in which the landlord takes possession of the goods. The widespread use of the former suggests that judicial supervision at such an early stage is inappropriate.

The second reason for our divergent view flows from a fundamentally different characterization of distress. The Ontario Law Reform Commission viewed it as a form of execution a procedure closely tied to notions of due process and early adjudication. Our own view is that the existence of arrears is a matter that is seldom in dispute and to call for the leave of a court will add significantly to the costs of all distresses without benefit to the tenant except in rare cases.

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.

B. Distress by Persons Other than Landlords

As pointed out earlier, a number of provincial enactments create rights of distress that benefit persons other than landlords. The most frequent beneficiary of a statutory right is the Crown itself. A number of provincial taxa-

tion statutes provide for a right of distress in addition to other remedies to enforce the collection of taxes such as statutory liens, trusts, demand notices and certificate procedures.

The Working Paper proposed that these and several other statutory rights of distress be abolished. Our proposals have been overtaken, in part, by subsequent work. Early in 1981 we distributed a Working Paper entitled The Crown as Creditor: Priorities and Privileges, in which we consider the collection rights of the Crown in a wider context. In the light of this development we have concluded that it would be appropriate to defer further consideration of the Crown's rights of distress and deal with them in a final Report that is directed specifically to its collection rights and remedies.

What remains, in the sense that they cannot be dealt with in the other Report, is an assortment of statutory distress rights, all of which are anachronistic and, we believe, can be safely expunged from the statute book.

Finally, we are persuaded that distress damage feasant has a useful, albeit limited, role to play and ought not to be abolished. Thus an occupier of land would continue to have the right to seize a trespassing chattel to enforce the payment of compensation for damage arising out of the trespass.

CHAPTER VIII A NEW RENT DISTRESS ACT

A. Introductory Notes

1. General

In part B of this chapter we set out a draft *Rent Distress Act* that attempts to provide a modern legal framework within which the historic rights of landlords may be asserted. One point that should be noted at the outset is that the draft Act does not attempt to restate the law in modern form. This draft departs from the present law in a number of significant ways. This reflects a desire to formulate legislation that conforms to the way in which we are told distress is actually being used today, which attempts to reconcile the rights of landlords with the rights of other credit grantors in a rational fashion. Some general features of the draft Act are described unre specifically below. In addition, a large number of the provisions of the draft Act are accompanied by drafting notes which will give further guidance.

2. What Goods May be Seized?

Under the present law what goods may or may not be seized is determined with reference to the common law in relation to distress, as narrowed by a number of exemptions in the present *Rent Distress Art*, and widened by certain other provisions. The draft Act rejects this position in favour of an assimilation of distress law to execution law. Section 3(1) of the draft Act provides that any goods may be taken in distress if they: (a) are located on the rented premises, and (b) are goods of a kind that might be seized by the sheriff under a writ of seizure and sale. This conforms generally to the approach of the Ontario Law Reform Commission on this issue. For almost all practical purposes the scope of distress, in this regard, will not be changed.

3. Method of Effecting Seizure

The methods by which a landlord nay effect entry and is needlessly complex. This is purely a common law development and the present *Rent Distress Act* is silent on the manner of effecting seizure. The draft Act, in section 4, provides guidance by stating that a landlord may enter property and seize goods by any means available to a sheriff carrying out an execution. This is also an approach adapted by the Ontario Law Reform Commission.

4. The Walking Seizure

The draft Act contains provisions that specifically relate to the "walking seizure," a matter on which the present Act is silent. The representatives of landlords have told us that by far the most common use of distress is not to effect a seizure with a view to immediate sale. Rather, they normally enter into a walking seizure type of arrangement whereby the goods are seized and an inventory made of them but they are left in the possession of the tenant or some other third party on a basis akin to a bailment. The essential feature is that the tenant remains free to use and deal with the goods but the landlord's rights are secure. The widespread use of the walking seizure suggests that a more detailed treatment is called for.

For all the benefits that both landlords and tenants may derive from a walking seizure, it poses a significant danger to third parties. The tenant's apparently unencumbered ownership, possession and control of goods subject to a walking seizure may induce third parties to buy the goods or to lend money on their security. In such a case, the landlord's rights may prevail even though the third party would have had no means of discovering their existence.

The policy of the draft Act is, in part, to assimilate the walking seizure to a chattel mortgage and provide for registration so third parties will not be deceived in these circumstances. Section 6 of the draft Act provides that where a walking seizure occurs, a notice of seizure may be prepared. This notice corresponds to the "inventory" now taken in these cases. A copy of the notice, or such other document as may be prescribed, may then be registered as if the seizure were a chattel mortgage creating a security interest in the goods seized. The registration procedure contemplated will interface both with the present *Chattel Mortgage Act* and with a new *Personal Property Security Act*. Under section 6(2) of the draft Act, a walking seizure is not effective against third parties until the notice is registered. Sections 6(4) and 6(5) provide machinery for the cancellation of a registration after the rent obligation has been satisfied.

5. ___Recognition of Third Party Rights

Earlier in this Report we described the failure of the law to give adequate recognition to third party rights and the unjustified priority the present law gives to the landlord over certain secured creditors. The policy of the draft Act is to sweep away all of the old priority rules and to provide that the landlord's priority be determined with reference to certain other bodies of law.

With respect to third party interests in goods that are in existence at the time of the landlord's seizure, the landlord's position is assimilated to that of an execution creditor. This flows from section 3(2) of the draft Act. The effect of this is that the interest which a landlord acquires in goods he has seized is subordinate to prior security interests such as those arising under a prior chattel mortgage, conditional sale or the like so long as those interests have been properly perfected under an applicable registration law. The landlord's rights would also be subordinated to a wide variety of proprietary interests in the goods that do not serve a security function.

The position of these third party interests is further fortified by the definition of "wrongful seizure" which includes the violation of various third party rights. Under section 10(1) a person aggrieved by a wrongful seizure is

entitled to sue the landlord for damages for his loss. In extreme cases, under section 10(2), the court may award punitive damages. This corresponds, roughly, to the old provision for double damages against a wrongful distrainor.

Where goods have been taken under a walking seizure, but remain in the tenant's possession, it is possible for new third party rights to arise, even when the landlord has registered a notice of the seizure. Priorities in this situation are governed by section 6(3). It provides that any question as to rights or priorities is to be resolved as if the landlord had acquired his rights to the goods under a properly executed and registered chattel mortgage. The effect of this priority will be that, in most cases, the landlord's rights will take priority such as where the competing interest is a subsequent chattel mortgagee or a subsequent execution creditor. There may however be circumstances in which the third party interest will prevail, as they would prevail over an ordinary chattel mortgage. This might arise where the third party interest takes the form of a repairer's lien or where the third party has bought the goods and the sale was in the ordinary course of the tenant's business.

A final alteration of the priority rules consists in the repeal of section 1 of the *Commercial Tenancy Act* by section 14 of the draft *Rent Distress Act*. Section 1 of the *Commercial Tenancy Act* has the effect of giving the landlord priority for up to one year's arrears of rent over an execution creditor even though the landlord had not seized any goods at the time the competing creditor seeks to levy execution. The effect of this will be that the landlord will cease to have any inchoate right to his tenant's goods prior to seizure under distress and he will take subject to any prior enforcement measures by competing creditors.

6. ___*Realization*

The present Act gives very little guidance on the way in which goods seized in distress are to be disposed of. The draft Act sets out some fairly elaborate provisions. By and large they parallel the provisions concerning realization in the latest version of the model *Personal Property Security Act*.

A basic policy of the realization provisions is to avoid laying down hard and fast rules about methods of disposition such as calling for a public sale or imposing time limits. The key requirement is that the disposition be in a "commercially reasonable" manner.

These provisions also provide some guidance as to the quality of title that will be obtained by a purchaser from the landlord of goods that have been distrained. The basic policy is that the *bona fide* purchaser for value who acts in good faith should get good title subject only to any prior security interests that might have been discovered by a check of the central registry. This is based on commercial convenience and avoiding a multiplicity of actions even though the price to be paid is that occasionally the landlord may seize, sell and pass on good title with respect to goods he had no right to seize. In such a case the party whose interests have been adversely affected is left to pursue his remedy against the landlord for a wrongful seizure.

7. ___Tenant Misconduct

The provisions of the old law concerning pound breach and the fraudulent removal of goods from the premises have not been carried forward in their old form. Tenant misconduct is dealt with in section 9. Subsection (1) provides that where goods have been removed to defeat the landlord's rights, or the tenant has "retaken" them, a court may order that possession of them be delivered to the landlord. Subsection (2) provides for solicitor and client costs and exemplary damages in appropriate cases.

8. ___Transition

Transition provisions are set out in section 11. They provide guidance in the situation where there has been a seizure before the new Act comes into force but the landlord has not yet disposed of the goods or the proceeds of their disposition, or he has left the goods in the possession of the tenant.

Subsection (1) provides that, *prima facie*, the rights of the parties are determined by the prior law. An exception to the *prima facie* rule is where the outstanding seizure is of the walking seizure type. In that case the seizing party (who may be a landlord or who may be a person whose rights of distress arise out a provision to be repealed) is given six months to either register a notice of his seizure under section 6(1) or take physical custody of the goods.

9. ___Repeals and Consequential Amendments

In sections 13 to 33 of the draft Act, a number of statutory provisions are repealed or modified. In most of these cases, the aim is to eliminate rights of distress given in statutes to persons other than landlords. The distress rights given by these provisions are an anachronism.

One repeal that does not fall into this category is at modification to section 4 of the *Commercial Tenancy Act*. The purpose of this is to abrogate the technical rule that a landlord cannot distrain for arrears of rent after he has terminated his lease unless the tenant remains in possession of the premises. As described in chapter VI, the effect of the present rule is that a landlord who wishes to both terminate a tenancy and distrain at the same time must be very careful about the order in which he proceeds. He must seize first and padlock the premises second. If he padlocks first and seizes second, it is a wrongful distress. The recommended amendment would make the order in which he proceeds irrelevant.

In Appendix D we set out the text of all enactments affected by sections 13 to 33 of the draft Act.

10. Regulations

Section 12 creates a power in the Lieutenant Governor in Council to make regulations concerning the form of notices to be prepared under section 6, the proper office for registration, and registration fees. The primary purpose of leaving these matters to subordinate legislation is to allow a smooth transition between the registration system currently in force and a new *Personal Property Security Act*.

We expect that initially, the notice to be registered will be that prepared under section 6(l)(a) of the draft Act, and it would be registered in the office of the Registrar General as provided in the *Chattel Mortgage Act*. Later, as the procedures evolve to a notice filing system, either under a *Personal Property Security Act* or the regulations contemplated by section 32 of the *Chattel Mortgage Act*, the notice to be filed might take the form of an abstract of particulars. It would be beneficial if the *Rent Distress Act* could accommodate changes in the other legislation through amendments to its regulations rather than amendments to the Act itself.

B. The Act

RENT DISTRESS ACT, 1981

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

Interpretation

1. In this Act,

"court" means the Supreme Court of British Columbia or a County Court;

“goods" means all chattels personal other than things in action and money, and includes growing crops and other things attached to or forming part of the land that may be severed and sold;

"landlord" means it person to whom a rent obligation is owed;

"rent obligation" means a monetary obligation in consideration for the use or occupation of rented premises, that is due and in arrear of payment;

"rented premises" means immovable property occupied or used by a tenant out of which a rent obligation arises;

"right of distress" means a right granted under this Act to seize and dispose of goods to enforce the payment of a rent obligation;

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

[Note: This definition is taken from personal property security legislation.]

"tenant" means the person who owes a rent obligation;

"wrongful seizure" includes

(a) a seizure of goods in which the tenant has no right or interest, or in which the tenant's right or interest is limited to

(i) a temporary right to possession, or

(ii) a lien on the goods for their storage or for improvements or repairs made to them,

(b) a seizure of goods having a value unreasonably in excess of the amount necessary to satisfy the tenant's rent obligation,

(c) a seizure of goods

(i) when there is no rent obligation, or

(ii) after the tenant has tendered the amount of the rent obligation to the landlord,

(d) the failure to

(i) deliver up possession of goods seized to any person entitled to possession,

(ii) comply with section 7,

(iii) comply with a demand under section 6(4), or

(iv) give effect to the rights of persons other than the tenant arising under this Act or any other law.

[Note: an injured party may bring an action under section 10 for losses arising out of a wrongful seizure.]

Right of distress

2. (1) A landlord has a right of distress exercisable in accordance with this Act.

[Note: This states the landlord's right of distress in positive terms and forecloses any argument that it has been indirectly abolished by the *Debt Collection Act*.]

(2) No landlord has a right of distress except in accordance with this Act.

[Note: Distress to become a purely statutory remedy.]

(3) No person nay waive the provisions of this Act and any agreement to the contrary is not enforceable.

(4) A landlord may employ or engage an agent or bailiff for the purpose of enforcing his right of distress.

(5) This Act does not apply to a rent obligation arising under a tenancy agreement under the *Residential Tenancy Act*.

[Note: This preserves the immunity of residential tenants from distress.]

(6) Section 65 of the *Court Order Enforcement Act* does not apply to a seizure or disposition made under a right of distress.

[Note: This clarifies the operation of section 3(1).]

(7) The *Creditor Assistance Act* does not apply to a disposition made under a right of distress.

[Note:

1. This is consistent with the policy in the Commission's earlier Report that the *Creditor Assistance Act* be repealed.

2. The C.A.A. does not presently apply to the proceeds of a distress.]

(8) The rights of a landlord as against a trustee in bankruptcy of the tenant shall be determined without regard to this Act.

[Note: If the tenant becomes bankrupt the landlord's rights are to be governed by insolvency laws.]

Seizure of goods

3. (1) A landlord acting under a right of distress may seize any goods which he finds on the rented premises that may, lawfully be seized by a sheriff acting under the authority of a writ of seizure and sale directed to the goods of the tenant.

[Note: The kinds of goods that may be seized would be determined with reference to execution law.]

(2) Subject to sections 6(3) and 7 the rights of a landlord with respect to

(a) the goods he has seized, and

(b) the proceeds of the disposition of the goods, shall be determined, as against any person other than the tenant who had rights in or to the goods before the seizure, as if the landlord were an execution creditor who has caused the goods to be seized under the authority of a writ of seizure and sale.

[Note:

1. This is a priority rule.
2. Landlord has whatever priority an execution creditor would have in similar circumstances.

3. The effect is to subordinate the landlord's rent claim to prior security interests and other outstanding proprietory interests.

4. If notice of the seizure is registered under section 6(1)(c) the priority rule is that set out in section 6(3).]

Right of entry

4. A landlord acting under a right of distress may enter the rented premises and seize goods by any means that may lawfully be used by a sheriff acting under the authority of a writ of seizure and sale.

[Note: This replaces the complex and overrefined common law rules as to entry and seizure by adopting execution law on these matters.]

When seizure is effective

5. Where goods, that have been seized by a landlord under a right of distress, are not taken into the landlord's exclusive physical custody and control, the seizure is not effective against third persons unless the landlord has

(a) registered a notice of the seizure in accordance with section 6(l)(c), or

(b) physically secured or impounded the goods on the rented premises in a way that

(i) deprives the tenant of all control over and use of the goods, and

(ii) gives the landlord unrestricted access to the goods.

[Note: A walking seizure is not effective against third parties unless there has been a registration under section 6(l)(c).]

Registration of notice of seizure

6. (1) Where goods have been seized by a landlord under a right of distress, the landlord may

(a) prepare a notice of seizure setting out

(i) a description of the goods as prescribed,

(ii) his identity and the identity of the tenant and any other person who has physical custody and control of the goods,

(iii) the location of the rented premises, and

(iv) the date of the seizure,

(v) the tenant's right of redemption under section 8 and the amount of the rent obligation.

(b) give a copy of the notice of seizure to the tenant no later than 5 days after the seizure, and

(c) register in the prescribed office a prescribed notice.

[Note:

1. This describes the procedures to be followed if a walking seizure is to be effective.

2. The most important provision is that which permits the landlord to register a notice of the seizure.]

(2) A registration of the notice under subsection (1)(c) is effective against third persons from the date of registration.

(3) Subject to section 7 the rights of a landlord, after a notice of seizure has been registered under subsection (1)(c) in respect of the goods he has seized, shall be determined, as against a person other than the tenant who acquires or purports to acquire rights in or to the goods seized after the registration, as if the landlord had acquired his rights to the goods under a chattel mortgage that was properly executed and registered on the date the notice was registered under subsection (1)(c).

[Note:

1. This is a priority rule that applies when a notice has been registered.

2 . Landlord's priority is determined as if he were a chattel mortgagee.

3. Most registered seizures will be walking seizures, but a landlord may also wish to register notice of a "physical" seizure to guard against the possibility of crystallization of a prior floating charge before he has disposed of the goods. In the absence of such registration, the relevant priority rule would be found in section 312) and the charge-holder would, arguably, have priority.]

(4) Where a notice has been registered under subsection (1)(c) and the rent obligation has subsequently been satisfied the landlord shall, on demand of the tenant, prepare and deliver to the tenant a notice in prescribed form confirming that the seizure is released.

(5) A notice delivered pursuant to a demand under subsection (4) may be registered in the prescribed office, and on its registration the notice registered under subsection 1(c) is cancelled.

Disposal of seized goods

7. (1) The landlord may dispose of any of the seized goods before or after the goods have been repaired, processed or prepared for disposition.

(2) Proceeds of the disposition of seized goods shall be applied and distributed in the following order to satisfy

(a) the reasonable expenses of seizing, holding, repairing, processing or preparing the goods for disposition, disposing of the goods and any other reasonable expenses incidental to the seizure or distribution incurred by the landlord,

(b) the rent obligation, and

(c) an obligation secured by a security interest in the goods that is subordinate to the interest of the landlord,

and any balance shall be paid to the tenant or any other person legally entitled to it.

[Note:

1. Section 7 is an adaptation of the realization provisions of the latest draft of the *Model Uniform Personal Property Security Act*.

2. Clause (a) refers only to "reasonable expenses" of seizure. This draft rejects the set schedule of fees in the present Act.]

(3) Before a person is entitled to receive proceeds of the disposition under subsection (1) (c), he shall

(a) send a written demand to the landlord before the distribution of the proceeds is completed, and

(b) on request, deliver within a reasonable time to the landlord reasonable proof of his security interest.

(4) The landlord may dispose of the goods seized in whole or in part

(a) by public sale, private sale, lease or otherwise,

(b) subject to subsection (6), at any time and place, and

(c) on any terms,

so long as every aspect of the disposition is commercially reasonable.

[Note: This provision sets out the core concept of the realization procedures: everything must be "commercially reasonable."]

(5) The landlord may retain the goods seized in whole or in part for a period of time that is commercially reasonable.

(6) Unless

(a) the goods are perishable, or

(b) the landlord believes on reasonable grounds, that the goods will quickly depreciate in value,

the landlord shall give not less than 15 days' notice in the prescribed form of his intention to dispose of the goods to the tenant and to any other person who

(c) has a security interest in the goods, and

(d) has registered his interest or notice of his interest under an applicable enactment.

(7) The landlord who seized the goods shall not purchase all or any part of the goods seized unless

(a) the goods are sold at a public sale, or

(b) a court on application otherwise orders.

(8) Where a landlord disposes or purports to dispose of goods seized in accordance with this section, whether or not the goods were wrongfully seized, the disposition

(a) terminates any interest of the landlord in the goods, and

(b) if made to a *bona fide* purchaser for value acting in good faith, terminates

(i) the tenant's interest in the goods,

(ii) any security interest in the goods subordinate to the landlord's interest, and

(iii) the interest of any other person in the goods, other than a person who has a security interest having priority over the landlord's interest under section 3 (2) or 6 (3).

[Note:

1. The title of a *bona fide* purchaser of distrained goods from the landlord is Subject only to prior security interests.

2. Under this rule an innocent owner may be deprived of his title. He is left to his remedy of damages for a loss arising out of a wrongful seizure.]

(9) If requested in writing by the tenant or any other person with an interest in the goods seized, the landlord shall provide a statement of the disposition of the goods, and the distribution of the proceeds of the disposition.

Redemption of seized goods

8. At any time before the landlord has disposed of or contracted to dispose of the goods seized, the tenant, owner of the goods or any person with a security interest in the goods may redeem the goods by tendering to the landlord a sum sufficient to satisfy

(a) the rent obligation,

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

(c) any other reasonable expenses incurred by the landlord.

Unlawful removal of goods

9. (1) Where a tenant has

(a) with the intent to defeat his landlord's right of distress, removed from the rented premises goods that would otherwise be subject to seizure, or

(b) retaken possession of, and removed from the rented premises, goods that have been seized or impounded in accordance with section 5 (b),

a court may, on application by the landlord, order the tenant to deliver possession of any goods remaining in his custody and control to the landlord.

[Note: This replaces the old pound breach and fraudulent removal provisions.]

(2) In an application under subsection (1), the court may award the landlord costs on a solicitor and client basis and, in a serious case of misconduct by the tenant, may award exemplary damages.

[Note: This is an analog of the old treble damage sanction.]

Damages for wrongful seizure

10. (1) A person who has sustained loss, damage or convenience arising out of a wrongful seizure may recover damages from the landlord or the landlord's agent or bailiff employed or engaged by him to enforce his right of distress.

[Note:

1. See definition of wrongful seizure.

2. This provision creates a broad right of recovery.

3. An action under this section might be brought by either the tenant or by a third party that has sustained a loss.]

(2) Where a landlord has employed or engaged a bailiff or agent to enforce a right of distress, the landlord and the agent or bailiff are jointly and severally liable for the payment of any damages recovered under subsection (1).

[Note: This is to make it clear that both the landlord and his bailiff are liable.]

(3) In any proceeding under subsection (1), the court may award the plaintiff costs on a solicitor and client basis and may award exemplary damages where the defendant's conduct was reckless or demonstrated a flagrant disregard of the rights of the tenant or any other person having an interest in the goods seized.

[Note: Exemplary damages and costs under this provision are an analog of the prior s. 11, which permitted "double damage" And "full costs" against a wrongful distrainor.]

Transition

11. (1) Subject to subsections (2) and (3), where goods have been seized before this Act comes into force under a right of distress

(a) as defined in this Act, or

(b) created by an enactment repealed by this Act any question as to the rights of a person in or to the goods shall be resolved as if this Act had not come into force, whether or not the goods are disposed of or the proceeds of their disposition are distributed after this Act comes into force.

[Note:

11. Transition provision.

2. Basic rule is that a seizure made before Act comes into force is not affected.

3. Exception to basic rule in subsections (2) and (3) for a walking seizure.]

(2) Where

(a) a seizure of goods has occurred as described in subsection (1), and

(b) at the time this Act comes into force, the goods were not

(i) in the exclusive physical custody and control of the person that seized them, or

(ii) secured or impounded in accordance with section 5 (b),

the seizure remains effective for 6 months only after the time this Act comes into force unless the person that seized the goods

(c) registers a notice of the seizure under section 6 (1) as if he were a landlord,

(d) takes exclusive physical custody and control of the goods, or

(e) secures or impounds the goods in accordance with section 5 (b).

[Note:

1. This provision applies to a walking seizure that is outstanding at the time the Act comes into force.

2. Landlord has six months to "perfect" the status of the seizure by registering or by taking possession of the goods.]

(3) Where a person proceeds under subsection (2) (c) to (e), the act of registration, taking custody and control or impoundment shall be deemed to have been done on the date this Act comes into force.

(4) Where the effectiveness of a seizure of goods is continued by an act described in subsection (2) (c) to (e), the rights of the person that seized the goods shall be determined under this Act as against any person whose interest in the goods arose after this Act comes into force.

[Note: Where the landlord "perfects" the seizure under subsection (2) his perfected status relates back to the time the Act came into force.]

Regulations

12. The Lieutenant Governor in Council may make regulations including

(a) prescribing notices to be prepared under sections 6 and 7,

(b) designating the proper office for registration under section 6, and

(c) prescribing fees for registration under section 6.

Consequential Amendments

Assessment Act Amendment

13. Section 72 (3) of the *Assessment Act*, R.S.B.C. 1979, c. 21, is amended by striking out "or a distress is made" and "or distress".

[Note: These references are an anachronism.]

Commercial Tenancy Act Amendments

14. Section 1 of the *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54, is repealed.

15. Section 4 is amended by striking out "and during the possession of the tenant from Whom the arrears became due".

[Note:

1. Repeal of section 1 eliminates the landlord's right to compel a prospective execution creditor to satisfy arrears of rent even though the landlord has not made a seizure.

2. The amendment to section 4 will permit a landlord to seize goods after the tenancy has been terminated and the tenant is out of possession.]

Company Clauses Act Amendments

16. Section 146 (2) of the *Company Clauses Act*, R.S.B.C. 1979, c. 60, is amended by repealing the last sentence.

17. Section 177 is amended by repealing the last 2 sentences.

18. Sections 178 and 183 to 186 are repealed.

19. Section 189 is amended by repealing the last sentence.

[Note: The rights of distress provided in these sections are an anachronism.]

Expropriation Act Amendments

20. Sections 53, 120, 122 and 123 of the *Expropriation Act*, R.S.B.C. 1979, c. 117, are repealed.

21. Section 54 is amended by striking out "by distress, and on application to a justice he shall issue his warrant accordingly" and substituting "by execution."

22. Section 81 is amended by striking out "by distress".

23. Section 87 (2) is amended

(a) by striking out "levied by distress" and substituting "recovered by action", and

(b) by repealing the last sentence.

24. Section 129 is amended by striking out "or levied by distress on his goods".

[Note: The rights of distress provided in these sections are an anachronism.]

Municipal Act Amendments

25. Sections 308(2), 449, 752 and 753 of the *Municipal Act*, R.S.B.C. 1979, c. 290, are repealed.

26. Section 827 (1) is amended by striking out "distress".

Railway Act Amendment

27. Section 290 of the *Railway Act*, R.S.B.C. 1979, c. 354, is repealed.

Rent Distress Act Amendment

28. The *Rent Distress Act*, R.S.B.C. 1979, c. 362, is repealed.

[Note: This repeals the existing Act.]

Taxation (Rural Area) Act Amendments

29. Section 30 (1) of the *Taxation (Rural Area) Act*, R.S.B.C. 1979, c. 400, is amended by striking out "distress or,".

30. Section 35 is repealed.

31. Section 43 is amended by striking out "by distress,".

32. Section 44 is amended by striking out "distress,".

33. Section 53 is repealed and the following substituted:

Cancellation of uncollectable taxes

53. (1) If

(a) taxes become delinquent,

(b) there is no property on which the taxes may be levied, and

(c) there is no reasonable prospect of collection, the collector shall, at the time designated by the Surveyor of Taxes, forward to him a statement

(d) giving a detailed list of all taxes on his books which the collector considers uncollectable, and

(e) showing the efforts that have been made to recover the taxes.

(2) The Surveyor of Taxes, if instructed by the minister, shall cause the delinquent taxes referred to in subsection (1) to be cancelled on the books of the collector.

Commencement

34. This Act comes into force on proclamation.

CHAPTER IX SUMMARY AND ACKNOWLEDGEMENTS

The principal recommendation made in this Report is that legislation comparable to the draft *Rent Distress Act* set out in the previous chapter be enacted in British Columbia. In the response to our Working Paper, however much views may have diverged on other issues, there was almost universal agreement with our technical criticism of the law concerning distress. There was wide support for the proposition that, if the remedy of distress is to be re-

tained, the law in this area should be rationalized and restated in a modern form. The draft Act is intended to meet this obvious need. Inevitably, there will be some disagreement over specific features of the draft Act but on the whole we believe it achieves a workable and equitable balance of the competing interests at stake in this area.

We also recommend that, after an appropriate period of time, the total abolition of distress should again be considered. While the enactment of the recommended legislation should effect a vast improvement over the present law, a strong case for abolition remains. A review of developments in this area and, in particular, business patterns that may arise once a *Personal Property Security Act* is in place and functioning, is desirable.

Even under the present law it is to a landlord's advantage to take contractual security for unpaid rent rather than rely on distress. This advantage will be even greater once the two new pieces of legislation are in place. The landlord's rejection of contractual security at this time is, we believe, a reflection of an understandable caution with respect to an unfamiliar legal tool. We foresee that the advantages of contractual security will ultimately become clear to landlords and that distress will fall into disuse. In that event the abolition of distress would likely be uncontroversial.

In conclusion we would like to thank all those who took the time to read our Working Paper and give us their views. As is evident, they played a major role in shaping our final recommendation. We also wish to express our gratitude to Bonita Thompson of Legislative Counsel's office for her assistance in the preparation of our draft Act.

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