NEWS Release

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Exercising the Distress Remedy? Waive Goodbye to Your Right to Terminate!

If a tenant fails to pay rent, the landlord has a decision to make: whether to terminate the lease and sue for the unpaid rent and for future rent, or to continue the tenancy and distrain on the tenant's goods.

Most commercial leases contain a clause which states that the landlord's remedies under the lease are cumulative, and that no remedy is exclusive or dependent on any other remedy. Since termination and distress are both powerful self-help remedies, why not use both?

If the landlord elects to terminate the lease and take possession of the premises (known as the landlord's right of forfeiture), it may sue the tenant for the unpaid rent, as well as the lost future rent over the balance of the term. But, if the landlord elects to seize and sell the tenant's goods to satisfy the rent arrears, it must preserve the lease. That remedy (of distress or distraint) is **only** available while the lease is ongoing and arrears of rent are outstanding. Some landlords take this step first, and after selling the tenant's goods to pay the arrears, terminate the lease on the basis of the rent still owing.

Canadian Courts have consistently held that distress and termination are mutually exclusive remedies that cannot be exercised concurrently. In other words, a landlord cannot distrain **and** terminate the lease at the same time. Nor can a landlord terminate the lease and **then** distrain, since distress is only available while the lease is alive.

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The British Columbia Court of Appeal recently addressed the question of whether a landlord could distrain first and **then** terminate the lease after the distress is completed in *Delane Industry Co. Ltd. v. PCI Properties Corp.* Landlords will not like the outcome.

The *Delane* Case

In *Delane*, the tenant stopped paying rent due to a dispute with its landlord. The landlord commenced distress proceedings and sold the tenant's goods. The sale proceeds were not sufficient to satisfy the rent arrears, so the landlord terminated the lease for non-payment of rent immediately after the sale, relying on a notice of default delivered to the tenant during the distress proceedings.

The tenant brought an action against the landlord for, among other things, a declaration that the landlord illegally terminated the lease.

At trial, the Supreme Court of British Columbia held that the notice of default delivered during the distress proceedings was not effective to terminate the lease. The Court noted that since termination is fundamentally inconsistent with distress, the two remedies cannot be exercised concurrently. The Court also held that the "cumulative remedies" clause in the lease could not be extended to permit concurrent remedies that are, by definition, mutually exclusive. The Court found that in order to terminate the lease, the landlord was required to provide the tenant with a fresh notice of default and opportunity

to cure after the distress was completed. In reaching its decision, the Court implied that had the landlord issued the new notice of default, it would have been entitled to terminate the lease based on the rent arrears that accrued before and during the distress.

The Landlord appealed to the British Columbia Court of Appeal, which upheld the trial Court's decision, but found that the trial judge erred in suggesting that the landlord could terminate the lease based on the rent arrears that accrued before and during the distress. The Court of Appeal concluded that having elected to distrain for the rent arrears, the landlord permanently and irrevocably waived its right to terminate the lease for those arrears. The Court of Appeal noted that in order to terminate the lease, a fresh default, unrelated to the breach that led to the distress, would be necessary.

In reaching its decision, the Court of Appeal relied on the 1985 Alberta Court of Queen's Bench decision *A & M Enterprises Ltd. v. B.J. Millwork Ltd.* In that case, the Court noted that "distress is an unequivocal election to continue the landlord and tenant relationship and any subsequent forfeiture for the same breach is illegal."

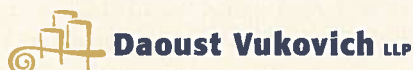
Although the Court of Appeal noted that some lower level decisions appeared to conclude that distress proceedings merely "suspended" the landlord's right to terminate until the distress was fully completed, it ruled that this is an incorrect statement of law and contrary to the principles of contract interpretation.

In sum, an election between two mutually exclusive remedies is irrevocable, and once the election is made, the other remedy is unavailable. Moreover, a "cumulative remedies" clause in a lease will not alter this outcome.

As a result, the landlord in *Delane* was entitled to sue for the arrears accruing before and during the distress, but it lost its right to terminate the lease for those arrears when it elected to distrain.

Bad News for Landlords

This case is problematic for many landlords (and lawyers) who have, for years, assumed that if distress proceedings did not yield sufficient proceeds to cover a tenant's outstanding rent arrears, the landlord could simply terminate the lease and sue for the arrears, as well as lost future rent. The British Columbia Court of Appeal has made it clear that, for any given rent default, the landlord cannot pursue both distress and termination. Once the landlord chooses its path, there's no turning back.



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