Landlord Rights to Tenant Property

by
Brian Parker and Dylan Armstrong, Daoust Vukovich LLP
Eight-Minute Commercial Leasing Lawyer, February 26, 2025

1. Introduction

A lease transaction invariably involves the tenant bringing moveable property to the leased premises. This paper sets out the Landlord's rights in respect of such property.

A logical starting point for assessing a landlord's rights over property brought to the leased premises by the tenant is whether the property is attached to the leased premises. Broadly speaking, the law divides tangible property into two categories: chattels and fixtures. Generally, a chattel is an item of property that is not attached to land or buildings. Inventory and supplies are examples of chattels. A fixture is an item of property that was a chattel, but has since been physically attached to land or buildings. Walls, staircases, and built-in cabinetry are examples of fixtures. In the commercial leasing industry, the term "leasehold improvements" generally aligns with the meaning of fixtures.

2. Landlord Rights to Fixtures

It is a general proposition of law that, once a chattel becomes a fixture, ownership over the affixed item transfers to the owner of the real property.[1] However, there are three exceptions:

(a) the intentions of the parties;

(b) section 34 of the *Personal Property Security Act*;[2] and

(c) trade fixtures.

(a) Intentions of the Parties

The seminal case of *Stack v T. Eaton Co.*[3] presents the following guiding principles:

(i) a tangible item that is not attached to the land, other than by its own weight, is deemed to be a chattel, unless there is evidence to show that the item was intended to be a part of the land;

(ii) a tangible item that is attached to the land is deemed to be a fixture, unless there is evidence to show that the item is intended to be separate from the land and remain a chattel;

---

[1] This proposition arises from the maxim *quicquid plantatur solo, solo cedit*, which translates to "whatever is affixed to the soil, belongs to the soil".
[2] RSO 1990, c P10 [*PPSA*].
[3] (1909) 4 OLR 335 [*Stack*].

(iii) attachment of the item to the land raises an assumption of its character. To rebut this assumption, the degree of attachment and the nature, size, and value of the item are examined; and

(iv) the intention of the person attaching the item is only material insofar as it can be presumed from the degree and nature of the attachment.

Stack demonstrates that physical attachment does not definitively render the item in question a fixture, as the intentions of the parties can preserve physically attached property as a chattel. Cases since *Stack* have focused this test into one of determining the "degree" and "object" of annexation of the item. The "degree" of annexation assesses how easily the item can be removed and the extent of damage that removal would cause. The more difficult an item is to remove and the more extensive the resulting damage, the more likely it is to be seen as a fixture. The "object" of annexation assesses whether the purpose of affixing the item was to improve the land, or to improve the item's use. Courts are less likely to assume that the intention was to improve the land when the item was affixed by a tenant.[4]

Sometimes, parties to a lease will expressly agree in the lease that certain items, despite being affixed to the leased premises, are to remain chattels. *Stack* opens the door for such intention to be presumed from the nature, size, and value of the item, as well as the degree and nature of its attachment. While the *Stack* test is routinely cited, it is difficult to utilize in dispute situations to arrive at a determination.

(b) Section 34 of the *PPSA*

The *PPSA* sets out a regime for priorities of security interests (including conditional sales contracts)[5] in personal property. While the *PPSA* regime is largely separate from the law of real property, Section 34 of the *PPSA* intrudes into real property law. It states:

> *34 (1) A security interest in goods that attached*[6]
>
> *(a) before the goods became a fixture, has priority as to the fixture over the claim of any person who has an interest in the real property; or*
>
> *(b) after the goods became a fixture, has priority as to the fixture over the claim of any person who subsequently acquired an interest in the real property, but not over any person who had a registered interest in the real property at the time the security interest in the goods attached and who has not consented in writing to the security interest or disclaimed an interest in the fixture.*

---

[4] See *Deloitte & Touche Inc. v 1035839 Ontario Inc*., 28 OR (3d) 139; Anne Warner La Forest & Diana Ginn, *Anger & Honsberger Law of Real Property*, 3rd ed (Canada: Thomson Reuters Canada Limited, December 2024 (Release No. 2)), §20:9.
[5] *859587 Ontario Ltd. v Starmark Property Management Ltd*., 164 DLR (4th) 167 (ONCA) [*Starmark CA*].
[6] For the purposes of the *PPSA*, "attached" refers to the creation of a security interest. This is in contrast to the use of the word "attached" when discussing items physically affixed to land or buildings.

Accordingly, a security interest in personal property that attached before the property became a fixture, has priority in that property over those with an interest in the real estate to which it is affixed. A security interest in personal property that attached after the item became a fixture, has priority in that property over those who subsequently acquired an interest in the real estate to which it is affixed, but not over those who held interests in the real estate before the item was physically attached (unless they consented to, or disclaimed their interest in, the fixture).[7] Given that this priority regime does not depend on registration of the security interest, an unregistered security interest could still have priority over the landlord's interest in the fixture,[8] unbeknownst to the landlord.

It is not unusual for tenants to approach their landlords seeking consent to the installation of financed equipment and a waiver (or subordination) of the landlord's rights therein. Landlords regularly accommodate these requests. A consent agreement between the lender and the landlord is a practical place to address the mechanics of the lender's potential removal of the secured property, including topics like timelines, repairs, and indemnification. Some of these topics are also addressed in the *PPSA*.[9]

(c) Trade Fixtures

A third exception relates to a subset of fixtures known as "trade fixtures" (also called "tenant trade fixtures" or just "tenant fixtures"). Trade fixtures are those fixtures that have been affixed to the real estate for the purpose of the tenant's trade.[10] Common examples of trade fixtures include kitchen equipment, cubicles, and projectors. A tenant has the presumptive right to remove its trade fixtures, so long as the removal: (i) does not materially damage the leased premises;[11] and (ii) is not contrary to the express terms of the lease.[12]

Case law suggests that a useful test for determining whether a fixture is a "trade fixture" may be to consider whether the item was installed for the better use of the leased premises or for the better use of the item installed.[13] However, in the case law, this test is sometimes blended with the test from *Stack* (including analysis of the degree and object of annexation) in determining whether the item is a fixture or a chattel. It is unclear whether these factors are used to draw a dividing line between fixtures and chattels, or fixtures and trade fixtures.[14] In *859587 Ontario Ltd v Starmark Property Management Ltd.*,[15] the Ontario Superior Court applied these factors to determine that a built-in spray paint booth that was

---

[7] Interestingly, Section 34(1) of the *PPSA* does not, technically, grant priority to the secured interest over an existing real property interest holder who has consented to the security. Rather, it states that the security interest does not have priority over an existing real property interest holder who has not consented. See also section 428 of the *Bank Act*, *infra* note 49.
[8] See e.g. *Starmark CA*, *supra* note 5.
[9] See *PPSA*, *supra* note 2, s. 34(3), which gives the secured party a right to remove the fixtures but imposes no timeline.
[10] *889267 Ontario Ltd. v Norfinch Group Inc.*, [1998] OJ No 3850 at para 28 [*Norfinch*].
[11] *2105582 Ontario Ltd. (Performance Plus Golf Academy) v 375445 Ontario Limited (Hydeway Golf Club)*, 2017 ONCA 980 at para 33 [*Performance Plus*].
[12] *Norfinch*, *supra* note 10 at para 28.
[13] See e.g. *Canada v. Edmundston Lumber Company Limited*, 63 NBR (2d) 129; *Norfinch*, *supra* note 10.
[14] *Ibid*.
[15] 34 OR (3d) 43 [*Starmark SC*].

bolted to the floor and vented through the roof of the leased premises by the tenant was a trade fixture. Contrast this with the decision in *889267 Ontario Ltd. v Norfinch Group Inc.*,[16] where a similar test was implemented to determine that certain machinery and equipment that was bolted to the floor, for the "better use and enjoyment" of the property as a convenience store, were in fact chattels. Whether a trade fixture or a chattel, the tenant has a superior claim to the item over the landlord. Given this outcome, it is not clear why a category of "trade fixtures" is needed at all.

Some leases override the common law by providing that all fixtures (which would include trade fixtures) become property of the landlord upon affixation and may not be removed without the landlord's consent,[17] and/or that trade fixtures may only be removed during the term if the tenant is not in default and replaces them with trade fixtures of equal or similar value.

Barring any restrictions set out in the lease, what is not clear is the timing by which the tenant is permitted to remove a trade fixture before it firmly becomes the property of the landlord. Some courts have simply described the tenant's right as being exercisable "during the term", implying that upon expiration or earlier termination of the lease, the landlord would be entitled to immediately enforce its ownership over the trade fixture as forming part of the real estate. However, the extent of this approach may vary depending on the circumstances, such as where the lease has a periodic term or where the landlord's actions create circumstances that provide the tenant with insufficient time to remove its trade fixtures. In such cases, the tenant is permitted a "reasonable" time following the end of the term to remove its trade fixtures.[18]

Unless the fixture falls into one of the three exceptions set out above, once the item is installed in the leased premises, it becomes part of the leased premises. So long as the lease remains in force, the tenant has a leasehold interest in such item and the landlord has a reversionary interest in it. Some tenants request clarification in their leases that, notwithstanding that leasehold improvements become the landlord's property upon installation, the tenant (and not the landlord) is entitled to claim the capital cost allowance for such property under the *Income Tax Act*. This provision is generally not controversial as the landlord did not incur the expense of the installed property.

3. Landlord Rights to Tenant Chattels

There are four main ways that a landlord can acquire an interest in a tenant's chattels. They are:

(a) distress;

(b) the terms of the lease and/or a landlord security agreement;

---

[16] *Norfinch*, *supra* note 10.
[17] *Clemmer Steelcraft Technologies Inc. v. Bangors Metal Corp*., 2009 ONCA 534.
[18] *Performance Plus*, *supra* note 11.

(c) abandonment; and

(d) storage liens.

(a) Distress

Distress is a self-help remedy which permits a landlord to seize a tenant's chattels and sell them to satisfy arrears of rent.

The remedy of distraint is an incident of the landlord-tenant relationship.[19] If the landlord-tenant relationship no longer exists, neither does the landlord's right to distrain.[20] A provision in a lease permitting distress after termination will not be enforceable.[21] Furthermore, distress may only be levied to recover arrears of rent.[22] If the lease gives the landlord a right to cure a tenant's non-rent default and deems the cure costs incurred by the landlord as rent (sometimes referred to as "monetizing" the default), the landlord *may* be able to expand the scope of defaults for which distress is available. However, an amount defined in the lease as constituting "Rent" is not necessarily "rent" for the purposes of the landlord's distress right. [23]

Distraint is a technical process with many rules. Some missteps by the landlord will render the distress wholly "illegal", while others will merely render the distress "irregular". Distress is illegal where the landlord had no right to exercise the remedy in the first instance (such as where the lease was terminated, or the tenant was not in arrears[24]). This type of distress is void *ab initio*. Illegal distress provides the tenant with action for damages against the landlord for conversion (discussed further below).[25] Distress is irregular where the landlord has the legal right to distrain, but fails to adhere to procedural requirements (such as, for example, failing to obtain proper appraisals prior to selling the goods, or not obtaining the best possible price for the goods).[26] Irregular distress may or may not give the tenant an action against the landlord for damages, depending on the circumstances and the extent of the irregularities.

(i) Rules

Some rules a landlord must follow when exercising distraint include:

---

[19] *Ibid* at para 44.
[20] At common law, no distress could be levied against an overholding tenant because of the technical ending of the lease. However, modification by statute preserves the landlord's right to distrain for up to six months after expiry of the lease term, so long as: (1) the landlord remains the landlord of the leased premises; and (2) the tenant remains in possession of the leased premises. See s. 41 of the *Commercial Tenancies Act*, RSO 1990, c L7 [*CTA*]. Similar legislation exists in other Canadian jurisdictions.
[21] *Stanley v Willis*, [1914] 16 DLR 549.
[22] Christopher Bentley, John McNair, Mavis Butkus, *Williams & Rhodes' Canadian Law of Landlord and Tenant*, 6th ed (Toronto: Carswell, 2024), § 8:29 [*W&R*].
[23] See e.g. *Pickering Square Inc. v Trillium College Inc*., 2016 ONCA 179, for a discussion of how "Rent" (as defined in that lease) differs from "rent" under the *Real Property Limitations Act*, RSO 1990, c L15.
[24] *Chan v Farrell Estates Ltd.*, 20 RPR (3d) 63.
[25] *1694879 Ontario Inc. v Krilavicius*, 2017 ONSC 2396 [*Krilavicius*].
[26] *CTA*, *supra* note 20, s. 54.

(A) entry onto the leased premises must only be achieved through "ordinary and natural" means. The landlord may not use force to enter the leased premises (e.g., breaking a window or door);[27]

(B) distress must be levied during daylight hours;[28]

(C) distress must be "reasonable" (e.g., the landlord must not seize and sell more goods than are reasonably necessary to satisfy the rent arrears);[29]

(D) the landlord must obtain two appraisals of the chattels distrained, and sell them at the "best price that can be got";[30]

(E) only goods found on the leased premises may be distrained (subject to the landlord's right to follow goods that have been fraudulently removed from the leased premises; discussed further below);[31]

(F) a notice of seizure must be left at a conspicuous place on the leased premises. The notice must contain the "cause of taking" (i.e., the amount of rent due[32]) and will start a five-day period after which the chattels may be sold if the arrears are not paid;[33] and

(G) the landlord must give the tenant a notice of the costs of the distress.[34]

(ii) *Constructive Distress & Changing the Locks*

The landlord need not physically remove the tenant's chattels from the leased premises to distrain against them. Rather, the landlord can seize the goods on the leased premises by preventing their removal. This is known as "constructive distress". The case law suggests that constructive distress is only appropriate where the tenant's chattels are too large to remove from the leased premises or that their removal would damage the leased premises.[35]

Short of commencing a distraint, landlords sometimes change the locks to the leased premises to prevent removal of distrainable goods. When doing so, landlords must be careful not to inadvertently terminate the lease[36] (which would nullify the landlord's right to distress and may be a fundamental breach, depending on whether the appropriate notice and cure period regime has

---

[27] See *W&R, supra* note 22, §8:67
[28] *Shaw v Goodberry*, [1936] 4 DLR 198.
[29] *CTA*, *supra* note 20, s. 43.
[30] *Ibid*, s. 53.
[31] *Ibid*, s. 47.
[32] See e.g. *Burrell v Watt and Hardinge*, [1928] 3 DLR 505 at para 8.
[33] *CTA*, *supra* note 20, s. 53. See also *1526183 Ontario Ltd. v Grant Equipment Corp.*, 2010 ONSC 928 at para 37.
[34] *Costs of Distress Act*, RSO 1990, c C41, s. 6; see also *Krilavicius*, *supra* note 25 at para 75.
[35] *Starmark SC*, *supra* note 15.
[36] *Bonaventura v 1603752 Ontario Inc.*, 2020 ONSC 4889.

been observed). To avoid termination, the landlord must not prohibit the tenant's entry to, and use of, the leased premises.[37] When changing the locks, landlords are advised to make clear that the leased premises have only been secured to protect the distrainable chattels, that the landlord is not terminating the lease, and the tenant will promptly be permitted to gain access to the leased premises upon contacting the landlord or its agent.

(iii) *Fraudulent and Clandestine Removal*

Goods that have been fraudulently or clandestinely conveyed or removed from leased premises in order to defeat a landlord's distress right may, nevertheless, be distrained against by the landlord in the 30-day period following such conveyance or removal.[38] Section 50 of the *CTA* provides that parties who assist in the removal of assets of the tenant in order to defeat a landlord's distress right are liable to a claim in damages for double the value of the goods removed. Interestingly, the landlord carries the burden of proving the value of the goods, even if clandestinely removed.[39]

(iv) *Exemptions from Distress*

Not all property on the leased premises may be distrained against. Property which is exempt from distress includes:

(A) fixtures (including trade fixtures[40]);

(B) the property of a subtenant;[41]

(C) goods which do not belong to the tenant (or a person who is "liable for rent", such as an indemnifier);[42] and

(D) goods that cannot be returned in their original condition (for example, perishable foods).[43]

(v) *Third Party Claims*

When assessing rights over tenant property, landlords must be mindful of the potential that third parties may have rights in that property as well. For example, the property on the leased premises may be subject to a security interest of a financier, and/or the Crown may have a claim to the property for the tenant's unfulfilled tax obligations.

---

[37] *Falwyn Investors Group Ltd. v GPM Real Property (6) Ltd.*, [1998] OJ No 5258. See also *CID v Garnier Holdings*, 2021 ONSC 196.
[38] *CTA*, *supra* note 20, s. 48(1).
[39] *11889796 Canada v Donnelly*, 2023 ONSC 1462.
[40] *Starmark CA*, *supra* note 5.
[41] Provided that the subtenant has satisfied the requirements of Section 32(2) of the *CTA*.
[42] *CTA*, *supra* note 20, s. 31(2).
[43] *Morley v Pincombe (1848)*, 154 ER 423.

(A) Secured Creditors

As between a distraining landlord and a creditor with security under the *PPSA,* the first to seize and sell the tenant's goods will have priority over the other.[44] Sometimes, this "race to the swiftest" can have a counter-productive effect, as the landlord and the secured creditor are each incentivized to promptly seize the tenant's chattels. This may result in premature closure of the tenant's business, that otherwise may have been avoided under a proposal or other plan of arrangement available pursuant to applicable insolvency legislation.

Where the security arrangement takes the form of a conditional sales contract, courts have interpreted section 31(2) of the *CTA* to permit a landlord to distrain against the goods to the extent of the tenant's accrued equity interest.[45] The landlord may be called upon to pay the title holder an amount equal to its interest in the goods from the sale proceeds.[46] Sales of items subject to conditional sales contracts have been held to be invalid where the landlord purports to sell the entire item (and not just the tenant's interest therein).[47]

Section 427 of the *Bank Act*[48] permits a bank to secure money lent against goods, wares, and merchandise of a manufacturer, wholesaler or retailer. Where the notice provisions are complied with, section 428 of the *Bank Act* gives priority to *Bank Act* security over "all rights subsequently acquired".[49]

When a tenant obtains financing, it is also common for its lender to require that the landlord execute a waiver whereby the landlord foregoes (or subordinates) its right and interest in the secured chattels. The form of such an agreement will be similar to the waiver/consent to financing agreement in respect of fixtures described above (and is often included in the same form).

Upon entering insolvency proceedings, the tenant's secured creditors will move into a priority position over the landlord's right of distraint. The stay of proceedings that accompanies the commencement of insolvency proceedings will prevent the landlord from

---

[44] See e.g. *Commercial Credit Corp Ltd. v Harry D. Shields Ltd.*, (1980) 29 OR (2d) 106, aff'd on appeal.
[45] *JR Auto Brokers Ltd. v Hillcrest Auto Lease Ltd.*, [1968] 2 OR 532 (citing the equivalent section of the former *Landlord and Tenant Act*, RSO 1960, c 206). But see *Norfinch*, *supra* note 10, which suggests that the Landlord may not distrain goods subject to a conditional sales contract (without referencing the relevant legislation referred to above).
[46] *Starmark SC*, *supra* note 15.
[47] *Ibid*.
[48] SC 1991, c 46.
[49] The rules for priority under the *Bank Act* (which include provisions relating to fixtures) are distinct from the those under the *PPSA* and would need to be assessed against the rights of the landlord in the circumstances. See e.g. *Re Newmarket Lumber Company, Limited, International Wood Products Limited v. The Royal Bank of Canada,* [1951] OR 642.

commencing or continuing a distraint, but will generally not impact the rights of secured creditors to realize on their collateral.[50]

(B) *Deemed Trust in Favour of the Crown*

Where a tenant fails to remit source deductions and/or HST to the Crown as required under the *Income Tax Act* and the *Excise Tax Act*, all of that tenant's property is deemed to be held in trust for the Crown to the extent of the unremitted amount.[51] The Crown's trust will have priority over secured creditors, which has been held to include the landlord's right of distraint.[52]

We are not aware of any process for a landlord (or any other creditor) to obtain written confirmation that certain property is not subject to a deemed trust claim in favour of the Crown. As a result, such claims in favour of the Crown are always a looming risk when dealing with a tenant's property.

(b) The Lease and/or Landlord Security Agreement

In addition to a landlord's right of distress, a landlord may also have claim over a tenant's chattels through the express terms of the lease. Unlike distress, this contractual claim may, depending on its terms, be available to the landlord after the lease is terminated.

For example, some leases specify that upon expiration or termination of the lease, any property remaining on the leased premises will, at the option of the landlord, become property of the landlord and may be removed, sold or disposed of as the landlord sees fit, without compensation to the tenant. Interestingly, in *Michael Houle (Movement Martial Arts) v 2424375 Ontario Inc.*,[53] the Ontario Superior Court stated that the existence of such a clause does not permit the landlord to retain the goods, and the sale of such goods amounted to an invalid post-termination distress. According to the Superior Court, the actual intent of this provision, and those similar to it, is to enable the landlord to avoid liability as an involuntary bailee for abandoned property.[54] The legal basis for this finding is dubious.

Some leases also grant (or require the tenant to grant) the landlord a security interest in the tenant's property in the leased premises.

---

[50] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 69.3(1) [*BIA*]; *Canadian Imperial Bank of Commerce v Canotek Development Corp.*, [1965] 35 OR (3d) 247. If the distress occurs shortly before a tenant enters bankruptcy, it may be treated as a fraudulent preference within the meaning of the *BIA*, which would require that the proceeds be handed over to the trustee in bankruptcy.

[51] *The Attorney General of Canada v Community Expansion Inc. et al*, [2004] OJ No 5493 [*Community Expansion*]; see also s. 227 of the *Income Tax Act*, RSC, 1985, c 1 and Section 222 of the *Excise Tax Act*, RSC 1985, c E-15.

[52] *Ibid*.

[53] 2023 ONSC 3664.

[54] Courts have acknowledged that bailment cannot be "foisted on the bailee", yet also recognized the notion of an "involuntary bailee", who may validly dispose of a tenant's goods at the conclusion of a lease upon "reasonable notice to the tenant that the goods will be disposed of if not removed". *See Malka and Circle Inc. v Vasilladis and Lugassy*, 2011 ONSC 5884.

A landlord's contractually arising claims to the tenant's property (whether in the form of security agreement or not) will have to be assessed against the rights of third parties, including secured lenders and the Crown. The *PPSA* or *Bank Act* regimes, the terms of the landlord's rights to the tenant's property in the lease and/or security agreement, and liability to the Crown for unremitted taxes, will all be relevant in determining the order of priority. The timing and method attachment and perfection of security interests, as well as the timing when the tax failure arose, may be relevant. In many cases, the tenant's secured lender will register a first ranking security interest, which will have priority over the landlord's claim in the tenant's property arising under the express terms of the lease and/or a subsequent landlord security agreement.

(c) Abandonment

When a tenant leaves its chattels on the leased premises following the expiry or termination of the lease, a landlord may have a claim over the tenant's chattels on the basis that they have been abandoned. In such circumstances, the landlord's claim is that of a "finder", i.e., the person in possession of an apparently abandoned chattel. While not providing the landlord with an absolute ownership right in the chattel, it provides the landlord with a right to keep it against all but the "true owner".[55]

To establish its rights in the chattel in priority to the tenant, the landlord must establish that the tenant abandoned the property. Abandonment is the intention to renounce title, and to be indifferent to the fate of the property.[56] If this can not be established, and the landlord proceeds to deal with the chattel as if it were the owner, the landlord runs the risk of committing the tort of conversion (i.e., the unauthorized dealing with property causing its true owner damage). Abandonment is a full defence to a claim for conversion.[57]

For example, in *2668602 Ontario Inc. v GWL Realty Advisors Inc.*,[58] the purchaser of a significant amount of the tenant's racking (through a court-supervised liquidation process) failed to pick up the racking within the specified period. The court order provided that any fixtures or personal property left behind after the specified removal deadline shall be deemed abandoned. After the pick-up date, the landlord sold the racking remaining in the leased premises. There was a significant difference in the price the landlord obtained for the racking and the value attributed to it by the purchaser. The purchaser sued the landlord for conversion. The landlord was successful in relying on the deemed abandonment provision in the court ordered sales guidelines as a full defence to the claim for conversion.

---

[55] *Trachuk v Olinek*, [1995] A.J. No. 1177 at para 31.
[56] Bruce Ziff, *Principles of Property Law*, 6th ed (Canada: Thomson Reuters Canada Limited, 2014), 135-139.
[57] See *1083994 Ontario Inc. v Kotsopoulos*, 2012 ONCA 1434 at para 17 [*Kotsopoulos*].
[58] 2024 ONSC 6913 [*Bombay*].

A landlord that claims abandonment bears the onus of proving, on a balance of probabilities, that the chattels have been abandoned.[59] This onus may be easier to meet where the lease clearly provides for the times when chattels are deemed to be abandoned. Absent a provision to this effect, a landlord might consider other measures to assist in easing the burden of proof, such as providing a written notice to the departing tenant that the landlord will consider the goods to be abandoned if they are not removed from the leased premises within a certain number of days. Courts have found that, where a landlord failed to provide a tenant with notice of its intention to dispose of goods that it considered abandoned, the lack of notice assisted the tenant's argument that there was no abandonment.[60]

Another avenue for the landlord to defend against a claim for conversion is for the landlord to assert that the continued presence of the goods on the leased premises amounts to trespass.[61] Courts have held that, where a tenant fails to remove chattels from its former leased premises within a reasonable period of time, a trespass on the landlord's property is committed. The landlord has the right to remedy the trespass by removing and selling the chattels, as long as it acts reasonably, which the courts have held requires analysing whether the cost of preserving the chattel outweighs its value.[62]

Even if the landlord can establish that the tenant has abandoned the chattels, the landlord still must consider third party interests (much like in the case of distraint and/or in respect of a contractually arising claim to the property). A landlord that sells or disposes of chattels abandoned by a tenant may still be liable in conversion to secured creditors and/or the Crown. Performing secured creditor searches can help identify registered security interests, but unregistered security interests and trust claims by the Crown could still undermine the landlord's claim to the abandoned chattels.

(d) Storage Liens

Under Ontario's *Repair and Storage Liens Act*,[63] a landlord may be able to sell property left behind by a tenant, free and clear of the claims from the tenant and secured creditors. To do so, the landlord must qualify as a "storer" under the *RSLA*, which is defined as "a person who receives an article for storage or storage and repair on the understanding that the person will be paid for the storage or storage and repair, as the case may be". There is one case where a bailiff retained by the landlord was found to qualify as a "storer".[64] The lien is limited to the costs incurred by the storer in storing the property (including reasonable storage rent). The storer may retain possession of the goods until the amount of the lien is paid. Any sale must be commercially reasonable and the storer must give notice of its intention to sell the property to the former tenant, all registered secured creditors, and anyone else who

---

[59] *Ibid*.
[60] *Kotsopoulos*, *supra* note 57.
[61] *Bombay*, *supra* note 58 at para 51.
[62] *Ibid*.
[63] RSO 1990, c R.25 [*RSLA*].
[64] *Marathon Neon Sign & Display Co. Ltd. v 2017408 Ontario Ltd.*, unreported, September 22, 2004, ONSC, docket No. 03-CV258239CM1.

the landlord believes may have an interest in the property. Those who receive notice of the sale may redeem the property by paying to the storer the storage rent and the related expenses. Where no one redeems the property within the legislated time period, the storer may proceed with the sale free and clear of claims by those who received notice.

4. Conclusion

Asserting a claim over tenant property is fraught with uncertainty. While a well-crafted lease can help minimize the uncertainty, there will always be a risk that a third party (such as secured creditors or the Crown) will surface unexpectedly and claim that the landlord has exceeded its rights. Some have suggested that given this risk, landlords should not view tenant property in the leased premises as a potential source of value to be realized upon, but rather as a potential source of liability to be mitigated against. Significant time and money may be spent navigating the complexities of a landlord's interest in tenant property on the leased premises, only to result in the landlord having to cough-up any realized value to the Crown, or worse yet, finding itself defending a claim for conversion.

Nevertheless, landlords are often required to make decisions about tenant property on the leased premises. It is prudent for a landlord to take steps to minimize risk or establish evidence that can help it later justify its decisions, such as taking detailed inventory of the tenant's property before any action is taken and obtaining one appraisal (or ideally, multiple appraisals). Landlords should be wary of selling (or permitting the use of) tenant property, unless it is clear that the landlord is only selling *its interest* in such property (to the extent that it has one) and that the landlord is not transferring title in the property free and clear of third party interests.