



Avoiding Pitfalls:

Commercial Landlord Rights & Remedies

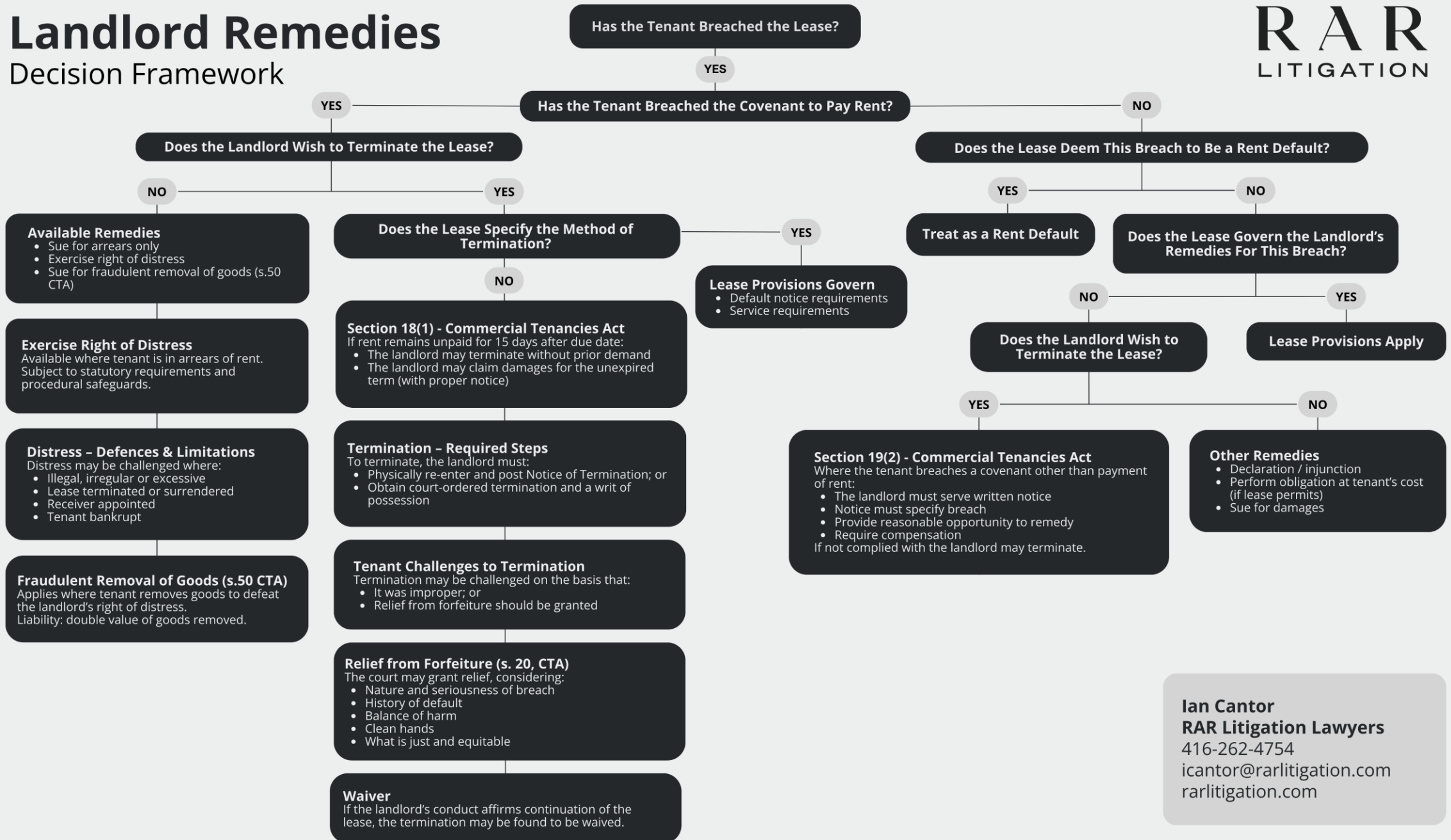
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Landlord Remedies

Decision Framework



Has the Tenant Breached the Lease?

If YES: What type of breach?

- **Rent default** (breach of the covenant to pay rent or other monetary default); or
- **Non-monetary default**

Has the Tenant Breached the Covenant to Pay Rent?

YES

NO

Rent Default Branch

Does the Landlord Wish to Terminate the Lease?

Strategic considerations may include:

- Nature of the tenant relationship
- Market conditions and re-leasing prospects
- The tenant's role within the property (e.g., anchor tenant)

YES

NO

If NO – Landlord Does Not Wish to Terminate

Available Remedies

The landlord may instead:

- **Sue for rental arrears only**
 - *(Note: The existence and scope of any duty to mitigate is currently under consideration by the Supreme Court of Canada.)*
- **Exercise the right of distress**
- **Sue for fraudulent removal of goods**

Exercise Right of Distress

Requirements and Process

Distress is available where the tenant is in arrears of rent.

Key requirements:

- Must be levied between sunrise and sunset, and not on Sunday
- Landlord (through a bailiff) must post a Notice of Distress
- A five-day waiting period must expire before any sale
- Two independent appraisals of the seized goods are required after the five-day waiting period
- Tenant must be granted access to the premises during levy period
- The lease cannot be terminated during the levy period

Sale of goods:

- Following appraisal and expiry of the waiting period, goods may be sold
- The landlord cannot purchase the distrained goods
- Net sale proceeds are applied to rental arrears

Distress

Defences and Limitations

Distress may be challenged where:

- The distress is illegal
- The distress is irregular or excessive
- The lease has been terminated
- The tenant has surrendered the lease and the landlord has accepted the surrender
- A receiver is appointed
- The tenant has become bankrupt

Fraudulent Removal of Goods

Section 50, *Commercial Tenancies Act*

This remedy applies where:

- A tenant abandons the premises and removes goods to defeat the landlord's right of distress

Liability:

- The tenant – and any person who assists – is liable for **double the value of the goods removed**, regardless of the amount of rental arrears

If YES – Termination Path

Does the Lease Specify the Method of Termination?

- **If NO:** Section 18(1) of the *Commercial Tenancies Act* applies
 - If rent remains unpaid for 15 days after it becomes due, the landlord may terminate the lease without prior demand
- **If YES:** The lease provisions govern
 - Default notice requirements
 - Service requirements

Termination: Required Steps

To terminate the lease, the landlord must:

1. **Physically re-enter the premises**
 - Change the locks and post a Notice of Termination*; **or**
2. **Obtain a court-ordered termination** under the *Commercial Tenancies Act*, together with a writ of possession.

*The Notice of Termination must expressly reserve the landlord's right to claim damages for lost rent for the balance of the lease term (i.e., the amount that would have been payable but for the termination).

Tenant Challenges to Termination

A tenant may challenge the termination on the basis that:

1. The termination was improper

- Non-compliance with lease provisions or statutory requirements

2. Relief from forfeiture

- A discretionary remedy available through the court

Waiver

- If the landlord's conduct implies or expressly acknowledges the continuation of the lease, the landlord may be found to have **waived the termination**
- In such circumstances, the landlord cannot rely on the prior termination

Relief from Forfeiture

- Under **section 20 of the *Commercial Tenancies Act***, a tenant may apply for relief from forfeiture
- The application must be brought within a **reasonable time**

In exercising its discretion, the Court will consider:

- The nature and seriousness of the breach
- The frequency or history of default
- The balance of harm between the parties
- Whether the tenant has “clean hands”
- What is just and equitable in the circumstances

Non-Rent Breach Branch

Does the Lease Deem This Breach to Be a Rent Default?

- **If YES:**
 - Treat as a rent default
 - Proceed to the Rent Default Branch
- **If NO:**
 - Continue to non-rent remedies analysis

Does the Lease Govern the Landlord's Remedies for This Breach?

- **If YES:** The lease provisions apply
- **If NO:** Does the landlord intend to terminate the lease?

If YES – Landlord Intends to Terminate: Section 19(2), CTA

Where the tenant breaches a covenant **other than the covenant to pay rent**:

- The landlord must serve written notice on the tenant

The notice must:

- Specify the breach
- Provide the tenant with a reasonable opportunity to remedy the breach
- Require compensation for any resulting damages

If the tenant fails to comply with the notice, the landlord may then terminate the lease.

If NO – Landlord Does Not Intend to Terminate: Other Remedies

The landlord may instead pursue:

- A declaration and/or injunction
- The right to perform the obligation at the tenant's cost (if the lease permits)
- An action for damages

Questions & Discussion

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