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Evolving Pandemic Legal Issues

COVID-19: Evolving Legal Issues[1]

After approximately a year's experience in dealing with the global pandemic there are lessons that are crucial for property owners and managers to consider in dealing with a global pandemic or localized health emergency.

Property owners, landlords and property managers have a fairly unique position, wearing two hats during any pandemic or health emergency. First, as an employer with the obligation to protect the health and welfare of their employees. And second, as an owner/landlord/property manager of a commercial or mixed-use property with further obligations to protect its tenants/occupants, invitees and the property from any foreseeable damage that might be caused in a health emergency.

Have a Plan

If there was any doubt before COVID-19 whether property owners/landlords or property managers had an obligation to have a pandemic plan or health emergency plan in place, that doubt for the most part has been (from both a legal and practical perspective) completely eclipsed.

Occupational health and safety obligations (in all provinces and federally) require employers to maintain a safe workplace for its employees, at the very least.[2]

Besides governmental legislation and regulations, the general standard in the real estate industry is for all prudent property owners/landlords/property managers to have a pandemic/health emergency plan for its buildings to protect the tenants and the asset itself.

The possibility that a claim may be made civilly against any owner/landlord or manager in negligence for not having a pandemic, epidemic or health emergency plan is an open question, but may only be a matter of time. Furthermore, it is likely there will be claims made against owners/landlords and managers who have a plan but do not follow it.

Obligations of Employers[3]

The obligations of the employer are to restrict access to the employment premises if there is a reasonable basis to exclude an employee or a third party from entering the premises. It is an obligation that stems from both provincial and municipal guidelines and regulations that are applicable in the circumstances pursuant to employment legislation and orders made by these governmental authorities during COVID-19.

There are a whole host of thorny issues that have arisen during COVID-19 that include the following:

- Can an employer require its employees to divulge whether they have had a COVID-19 test and further divulge what the results are?
- Can the employer require that employees be obligated to take COVID-19 tests at fixed intervals in order to maintain the ability to access the work premises?
- Can the employer require that any and all employees be vaccinated in order to attend the work premises?
- Is an employer required to make accommodations for any employees that refuse to be tested for COVID-19 or receive vaccinations?

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1 This paper does not in any manner constitute legal or business advice and may not be relied upon as such for any purpose. The reader must obtain its own legal or business advice from qualified professionals.

2 Canada Emergencies Act, Emergency Management Act, the Canada Labour Code, Part 2, Occupational Health and Safety (every provincial jurisdiction has an Occupational Health and Safety Act or Workplace Health and Safety Act which contains similar provisions).

3 It is beyond the scope of this paper to deal with any and all obligations that property owners/landlords/property managers may have with respect to their employees during a pandemic for health emergency. As with all legal matters referred to in this paper, the issues raised herein do not constitute legal advice and must not be relied upon. The reader must refer for any of the issues raised herein with their own legal counsel and receive their own legal advice.

- What safeguards and steps should be taken by an employer with respect to repatriating its employees to the workplace if, from a legal perspective, they have been out of the office for extended periods of time?
- Are there family status concerns that must be considered by employers relating to employees having childcare or elder-care concerns?

These issues are further complicated by the fact that there may be mixed attendance at schools combined with home online learning.

These issues with respect to COVID-19 testing and mandatory vaccines are evolving on an ongoing basis. They are in their relative infancy in terms of legislation and case law.

Without clear guidelines, these types of issues will likely be dealt with on an ad hoc basis at the onset. In particular, the question as to whether vaccinations may be mandated by the employer is being dealt with on the basis of what sort of business is carried on at the premises. For example, if it is health care related (e.g., a nursing home) employees who are dealing with patients on an ongoing basis may be required to be tested and vaccinated at the earliest possible time.

Going down the scale, the question of mandatory COVID-19 testing and vaccinations is less clear. An employee's failure to take a COVID-19 test or vaccination at this point will not likely be upheld as a just cause for termination. Especially where there are circumstances concerning religious or health concerns. Each situation will have to be dealt with on its own merits as it appears there is currently no one size fits all solution.

There are also evolving privacy issues that employers must respect in terms of any health information obtained from employees relating to COVID-19 and steps must be taken to ensure that information is safeguarded.

Employees that have issues with COVID-19 testing or vaccinations may be accommodated through remote work opportunities when circumstances require it. Employers do not have to extend these types of accommodations as a result of an employee preference. There must be a substantive basis for the employer to extend this type of accommodation.

There does not appear to be any legislation at this time which prevents employers from providing incentives to employees for COVID-19 testing and vaccination.

Rights and Obligations of Employees

Both federal and provincial Occupational Health and Safety legislation provides that:

- Employees have the right to be informed of known or foreseeable hazards such as pandemic, influenza or other health emergency. They must be given the information, instruction, training, and supervision necessary to protect their health and safety. Effective communication will be crucial in preparing for any such health emergency event in accordance with a well thought out and a comprehensive health emergency plan.
- Employees have the right and the responsibility to identify and correct job-related health and safety issues. They could exercise this right during a health emergency. The employees can also participate through a complaint process if the health emergency has not been properly identified or well handled.
- Right to refuse: Employees can refuse to work where there is a reasonable cause to believe:
  - A dangerous condition exists; and
  - An activity constitutes a danger to one or more employees.

As a result, employees have the right to refuse to work when there is a health emergency which poses a danger to them and is not properly addressed in accordance with either the health emergency plan or related legislation, or orders made by any governmental authority.

Employers have the obligation to create a safe work environment. Employees have a corresponding obligation to prevent occupational related injuries and diseases. They must take reasonable and necessary precautions for their own and others' health and safety. In a COVID-19 setting this would relate to ensuring that all employees have the required guidance, training, education, cleaning substances, protective clothing, and protective barriers (such as masks and gloves) if necessary.

Owners/Landlords

The courts of Canada have held that all contractual obligations as between parties must be carried out in good faith and it is the same with the landlord tenant relationship. Landlords and tenants are bound by their contractual obligations set out in the Lease.

Based on our experience with COVID-19, landlords must as a part of their review and response to a pandemic or health emergency, review the terms of its lease and deal with challenges relating to issues ranging from prohibiting access to all or part of the building, to what sort of inspection it may make of any tenant's premises. The following issues should be considered in any lease review:

Quiet enjoyment covenant.

Landlords have to limit or restrict access to the property during a health emergency or pandemic. This of course conflicts with the obligation of enjoyment to the tenant and its invitees. This can range from the landlord restricting access to the building completely or restricting access through designated entrances, exits, escalators or elevators.

Furthermore, there is the issue as to whether a landlord can enter a tenant's premises to decontaminate any or all of the tenant's premises upon a confirmed case of COVID-19 or any other transmissible virus. There is a fine line between the landlord having the contractual option to enter the leased premises to decontaminate a tenant's premises, without foisting the obligation on the landlord to do so.

Force majeure clauses.

Never in the history of commercial leases have force majeure clauses come under such review and scrutiny. And never has their drafting and interpretation been so crucial in dealing with the landlord/tenant relationship. Given their exculpatory implications, they are generally interpreted strictly. If either party is going to rely upon it, then it will have to expressly deal with a pandemic or health emergency circumstance and there will have to be a comprehensive definition of what constitutes a "health emergency".[4]

Of course, in a general sense, force majeure clauses have been drafted by landlords for their own benefit and a tenant will have to be wary of terms set out as the end result, usually, is that the tenant will have to continue to pay rent during any pandemic or health emergency.

Limitation of Liability provisions

ensure that the lease provisions adequately protect the landlord, its officers, directors, property managers, and agents from liability in carrying out the terms of any pandemic plan or in dealing with any health emergency situation.

As an example, consider the situation where the cleaning staff (independent contractors) inadvertently spread a virus or health emergency biohazard into the building. If there is any suit that results therefrom, based upon illness, death and/or loss of revenues, it is likely that the "deep pocket" landlord defendant will be included in any such breach of duty or negligence claim.

Tenant reporting to Landlord.

During a pandemic, the landlord will have an interest in ensuring that its communications with tenants (and from the tenants) is timely and informative. The lease should ensure that any incidents of illness experienced by a tenant or its invitees is well-documented and traceable. There must be provisions that require this reporting on an immediate basis and that the appropriate health authorities are notified forthwith.

Privacy issues.

The owner/landlord will be faced with a situation where it receives private and confidential health information from the tenant about its employees or invitees that may have suffered from a relevant illness or been exposed to persons that have been ill. The issues that flow from this are complex and should be addressed in any pandemic plan and lease. Of course, the landlord must at all times comply with any and all applicable privacy legislation that exists in the province. The landlord will have an obligation to store this information confidentially and only release it in accordance with privacy laws.

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4 Durham Sports Barn Inc. Bankruptcy Proposal, 2020 ONSC 5938 (Durham)

Operational issues:

There are several operational issues that have arisen during COVID-19 which are dealt with earlier in this paper.

Rent defaults:

In any health emergency, it is likely that there will be tenants that will default in the payment of rent. Landlords may wish to determine in advance what criteria they may utilize to decide whether any tenants may be offered rent relief or deferral agreement and on what terms. In some circumstances, landlords may decide to request further security in exchange for any deferral or forbearance agreement.

Services to Leased Premises:

In a health emergency, the landlord may wish to (or be forced to) reduce or cease any particular services to the leased premises or common areas:

- The landlord may be in a position where it must reduce cleaning and trash removal services.
- Cleaning staff will be on the front line in dealing with any health emergency and many may become ill or not report to work. The landlord may wish to have a set plan for certain services. It is crucial that the landlord have discussions with not only its tenants concerning these issues but also with suppliers well before an emergency situation arises. The reduction or any ceasing to provide services to the leased premises (or any of the common areas) must be expressly and clearly set out in the Lease.
- Social distancing will be a significant strategy employed by many tenants to maintain their business operations.
- Landlords and tenants may wish to revise the hours of operation for the building in order to accommodate specific requests for some tenants to have their employees work during evening hours. Evening shifts may allow for tenants to maximize parking facilities and use of the building facilities all while maintaining social distancing. This flexibility should be provided for in the lease.

Existing Leases versus New Leases:

The above noted issues have been considered by commercial landlords now in relation to revising their existing lease form for new leases. These new lease forms will, without question, have to include a specific definition of a health emergency and include an article on health emergency or general emergency powers that the landlord may invoke.

Existing leases are somewhat trickier. It is unlikely that the landlord can make any amendments to the lease form itself without the consent of a tenant. Having said that, most all commercial leases do give the landlord the power to pass regulations relating to the operation of the building on an ongoing basis and landlords may wish to utilize that right to draft and deliver a set of health-related rules and regulations to deal with issues set out herein. This will give the landlord some contractual basis upon which to exercise powers which might otherwise not be authorized by the existing lease form.

Compliance with Laws:

In almost every commercial lease there is a provision to the effect that the tenant and landlord must comply with all applicable laws and regulations. This sort of clause may be revisited and revised to ensure that it is particularized and strengthened.

Health Emergency Article:

Perhaps the biggest and most important take away from everything that has occurred throughout COVID-19, were the unprecedented actions of governments at the Federal, Provincial, and even Municipal levels. This extended not only to contractual obligations but also financial support.

Governmental Legislation and Regulation

The Canadian government and the provinces and municipalities (including all major cities in Canada) cooperated in passing legislation, regulations, and various orders in council that effectively required landlords and tenants at various times throughout the pandemic to close down their businesses or buildings (or parts thereof) in order to protect the public.

The irony is that no matter what pandemic plans you make (or steps you take) to strengthen your lease provisions, the government can at any time, pursuant to its emergency powers, pass legislation that will effectively

interfere with your rights as a landlord to enforce specific provisions in your lease (including termination of the lease for non-payment of rent). Alternatively, from a tenant's perspective, government regulations may require you to shut down your office or retail business during what is commonly referred to as a "lockdown".

In addition, financial stimulus steps were taken by all levels of government to require landlords and tenants to cooperate in dealing with what otherwise would potentially be a financial catastrophe for real estate owners, landlords, property managers and office and retail tenants.

The effect of government intervention has been unprecedented (albeit at times extremely confusing) for those affected, not only in its interpretation as to its coverage and effect, but also in relation to the administration, implementation, or enforcement of the legislation. Some of the main legislative interventions have been as follows:

- April 24, 2020: CANADA EMERGENCY COMMERCIAL RENT ASSISTANCE (CECRA) provided rent relief for small businesses that met certain conditions relating to the amount of monthly gross rent (less than $50,000) and generating no more than $20 million in gross revenues together with having either ceased operations or having had a 70% reduction in pre-COVID-19 revenues.

  Landlords would be given forgivable loans to cover 50% of the monthly rent calculated on what appeared to be a strictly cost basis in so far as the rent amount was concerned.

  The owner had to meet other conditions including mortgage loans, entering into a rent reduction agreement for three months with the tenant. One of the flaws concerning this legislation related to the fact that tenants had to rely on the landlords for the purpose of applying for the program. Tenants who were faced with landlords that would not apply under the program were left in difficult situations.

- June 18, 2020: ONTARIO GOVERNMENT BANNED COMMERCIAL EVICTIONS IN ONTARIO PURSUANT TO BILL 192, Protecting Small Business Act, 2020. These amended provisions of the Provincial Tenancies Act temporarily. The effect of it was to limit landlords' ability to enforce leases during the COVID-19 pandemic. This bill confirmed that the landlord was not entitled to exercise any right of re-entry under the lease and extended not only to monetary defaults but also non-monetary defaults by a tenant, and further extended this moratorium to denying the right of the landlord under the Commercial Tenancies Act to distrain against any goods or chattels of the tenant to recover arrears of rent.

  The Bill confirmed that judges were prohibited from granting writs of possession to landlords to take possession of any leased premises relating to a termination for arrears of rent. The Bill even had retrospective terms that could result in the landlord being responsible for any damages sustained by the tenant as a result of any non-compliance or contravention of the Act.

- November 23, 2020: The Federal government extended the relief for commercial tenants to continue into the middle of 2021 under the new CANADA EMERGENCY RENT SUBSIDY ("CERS"). This succeeded the CECRA.

  Its intention was to improve on the CECRA program which had a number of administrative and functional deficiencies. In particular, under CECRA the landlords had to apply for the relief as opposed to permitting tenants to apply for the relief. CERS provided that businesses and organizations could apply for relief under the Act for the period retroactive to September 21, 2020 to June 2021. In fact, CERS was not limited to tenants only. It provided relief for property owners that had experienced revenue deficiencies as a result of COVID-19. This program is being administered by CRA as opposed to the Canada Mortgage and Housing Corporation that administered CECRA.

  In order to make a successful application under CERS the applicant had to meet certain conditions relating to revenue declines. There was also something referred to as a "Lockdown Support Top-Up" that related to circumstances where business had been ordered to be closed or activities significantly restricted for at least a week under a COVID-19 health order.

- December 8, 2020: BILL 229 – PROTECT, SUPPORT and RECOVER from COVID-19 ACT was passed and it effectively extended the moratorium originally imposed under Bill 192 – Protect Small Businesses Act, 2020 (as extended under Bill 204 – Helping Tenants and Small Businesses Act, 2020). Shortly thereafter O.REG.763/20: Non-Enforcement-Prescribed Tenancies was enacted, effectively extending the protections to tenancies that were approved under CERS. It extended the non-enforcement period to CERS related tenancies (being the period commencing on September 17, 2020 and expiring on April 22, 2022).

  The practical effect of the regulation was to limit the ability of landlords to terminate leases or retake possession of the leased premises. The issues relating to entitlement of tenants and landlords under these various acts are complicated and one should certainly contact legal counsel to assist in their applicability and interpretation.

  As of the date of publication of this Guide, there likely will be further legislation passed relating to this matter. Landlords and tenants alike will have to ensure that no matter what provisions they have in their lease, they have to remain cognizant of any and all legislation, regulations or orders that are made in relation to commercial tenancies when and if a pandemic or health emergency situation is declared by any governmental authority.

Courts Intervention during the COVID-19 Health Emergency

Given COVID-19's interference in business relations between commercial property owners/landlords and tenants, disputes have arisen that the parties have not been able to resolve between themselves. Accordingly, the courts have weighed in on some issues concerning the interpretation of landlord/tenant rights under their respective lease agreements.

Durham Sports Barn Inc. Bankruptcy Proposal, 2020 ONSC 5938 (Durham)

In Durham, the Ontario Superior Court of Justice (the "Court)") decided that a tenant was not relieved from the obligation to pay the rent under its Commercial Lease during the pandemic given the terms of the force majeure clause in the Lease.

The tenant took the position that it was statutorily required to close its business, and this constituted a force majeure event under the appropriate section in the lease. The force majeure provision excluded the obligation of the landlord to provide quiet enjoyment of the premises during a force majeure event. In other words, the effect of the force majeure provision was that the Landlord was excused from the obligation to provide quiet enjoyment when the government required the tenant to shut down, but the tenant still had to pay rent. As unfair as this may seem, the Court held that the force majeure clause in the lease relieved the landlord of its obligation to provide quiet enjoyment but did not relieve the tenant from its obligation to pay rent.[5]

Note that almost the exact opposite conclusion was reached by the Quebec Courts due in no small part to the legislation framework in Quebec concerning the effect of a force majeure event.[6]

Second Cup Ltd. v 24109077 Ontario Ltd., 2020 ONSC 3684 (Ont)

During the pandemic, Second Cup temporarily suspended operations in most of its outlets which were limited to take out and pick up services. Although the landlord agreed to receive installment payments from the tenant pursuant to what might have been seen to amount to a rent deferral agreement, the landlord did not follow through on that agreement and took steps to terminate the tenant's lease at its Front Street Toronto location.

The Court effectively held that the landlord did not follow the rent deferral agreement or the implied agreement that it had made with the tenant and as a result the termination was unlawful. The tenant successfully obtained an injunction restraining the

5 For a more detailed analysis on this, see my paper "Force Majeure – A Commercial Leasing Perspective for Landlords and Tenants", published in the seminal text "Landlords Remedies in a Commercial Lease – A Practical Guide (2nd)", Haber.

6 Hengyuen International Investment Commerce Inc. C 9368-7614 Quebec Inc., 2020 QCCS 2251 (Quebec)

to terminate the tenancy, especially in the middle of a mandatory order made by a governmental authority, the landlord must strictly comply with all the terms of the lease or any rent deferral agreement it makes with the tenant in respect of any of the terms of the lease.

Hudson Bay Company v ULCV Pension Fund Investments Ltd. 2020 BCFC 1959 (British Columbia)

In or about March 2020, the Bay was forced to close its operations in the Coquitlam Centre Mall in British Columbia. It did not pay rent throughout March and April 2020. It reopened its doors for business in or about May 2020. The landlord thereafter delivered default notices in October and November 2020. The tenant shortly thereafter moved for an urgent injunction to restrain the landlord from taking any further steps to terminate the tenancy after delivery of the notices. The tenant tried to rely on the "First Class" provision in the lease which required the landlord to carry on business in the mall as a "First Class" mall and failed to provide the Tenant with "quiet enjoyment" of the premises. The tenant further tried to suggest that the equivalent to the force majeure clause applied and suspended its obligation to pay rent during the pandemic.

While the court granted the tenant's injunction, it did require the Bay to pay 50% of its rent into arrears and ongoing rent to the landlord and the other 50% of the arrears to be paid to the tenant's lawyer's trust account. The result is that the Court required the tenant to ensure that all of the rent was either being paid to the landlord or alternatively being held in trust to the credit of the proceedings. That being the case, the tenant was really no further ahead by virtue of its having attempted not to pay the rent during the pandemic.

Certainly, the issues as between landlords and tenants will prove to be challenging during the pandemic and subject to the law that develops in each of the provinces relating to the interpretation of their leases and statutory provisions as may be amended during the pandemic and the resulting case law.

Key Take Aways

Owners/landlords/property managers and tenants must have a pandemic or health emergency plan that can be utilized in any such an emergency. In many provinces in Canada it is already a statutory obligation. In any event, after COVID-19, it is likely that having a pandemic or health emergency plan will be a standard within the real estate industry.

Failure to protect your employees, tenants, and invitees by not having a plan in place would likely result in some finding of negligence in case any one of the above suffered damages as a result of the failure to have a plan. The practical business reality is that tenants will now likely ask landlords and property managers what the terms of their plans are when they decide whether to lease premises.

It is key that owners/landlords and tenants review and/or negotiate important provisions in their leases that will be impacted by a pandemic or health emergency. In particular, it is suggested that landlords and tenants ensure that the lease contains an article dealing with any possible health emergency. Other important provisions to review include force majeure, quiet enjoyment, compliance with laws, rent defaults and remedies and continuous operation provisions. In addition, given the fact that landlords will try to ensure that the risk of loss is borne by the tenants, tenants should be attempting to negotiate that any and all of its obligations under the lease are covered off by its business interruption insurance.

Notwithstanding the fact that you have a robust health emergency plan, or a comprehensive lease, dealing with all the issues that may arise in a health emergency, the fact is that either of them may be trumped by any legislation that any governmental authority may invoke during a health emergency.

In the event that any landlord takes steps to enforce any terms of the lease during a health emergency (especially termination) it will generally do so at its own peril as the courts and legislatures will be inclined to protect tenants that have not been able to continue to carry on business if they are not responsible in whole or in part for their inability to do so.

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Ce rapport est disponible en français.

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