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Top Five Canadian Pandemic Leasing Cases You Need to Know

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The COVID-19 pandemic has caused thousands of businesses across the country to close their doors either temporarily or permanently. These closures have resulted in a significant increase in disputes between commercial landlords and their tenants. While many of those disputes have been, or can be, resolved with a business-minded solution - with the landlord and the tenant sharing the "economic pain" – a number of cases have ended up in court.

Cassels is experienced in handling leasing and real estate disputes. Below we have summarized the most significant reported lease cases over the last year. These decisions inform the approach that is to be taken in the current business environment. If your business is involved in a lease dispute and you are seeking advice, we encourage you to contact a member of the Cassels leasing team.

1. Hudson's Bay Company v. ULC v. Pensionfund Investment Ltd., 2020 BCSC 1959 (British Columbia)

At 3:30 AM on Saturday November 21, 2020, the defendant landlord, Pensionfund Investment Ltd. (Pensionfund), changed the locks to The Bay's premises at the Coquitlam Centre Mall. The Bay had been forced to close in March 2020 as a result of the pandemic and had not paid its rent since April 2020. It reopened in May 2020 to greatly reduced patronage at the store and the mall.

Pensionfund had delivered two written default notices (in early October 2020 and early November 2020 respectively). On Monday November 23, 2020, The Bay commenced a claim against Pensionfund and sought an urgent injunction to regain access to the premises and to prevent Pensionfund from taking any further steps with respect to the termination of the lease. The injunction application was heard on the same day, and judgment was delivered the next day.

The Bay argued that since reopening Pensionfund had failed (as required by the lease) to maintain the mall in a "first class" condition and had failed to provide The Bay with "quiet enjoyment" of the premises. The Bay also argued that an "Unavoidable Delay" clause, similar to a *force majeure* clause, suspended its obligation to pay rent during the pandemic.

The Court granted The Bay's injunction application but required The Bay to pay 50% of its rent arrears and

ongoing rent to Pensionfund, with the other 50% of arrears and rent being paid into The Bay's lawyer's trust account. The Court also ordered that this temporary arrangement remain in place for two months (over the Christmas holidays).

Key Takeaways: The Court attempted to balance the rights of the two parties and crafted a temporary solution regarding payment of the rent and arrears until the case could be heard on the merits (at a later hearing on a full evidentiary record).

On this urgent application, the Court did not resolve the important contractual arguments raised by The Bay regarding what actions are required from the landlord during the pandemic in order to comply with the requirement of maintaining a "first class" mall, and whether the "Unavoidable Delay" clause actually had the effect of suspending The Bay's obligation to pay rent. The implications of these arguments are significant, as The Bay has raised them in other disputes with landlords (as noted below); a decision on the merits will set an important precedent with respect to these questions.

2. Revenue Properties Company Limited v. Hudson's Bay Company ULC, CV-20-00648922-0000 (November 23, 2020) (Ontario)

In the BC decision summarized above, the judge referenced a similar decision in Ontario by Justice Hainey. Although that decision has not been reported in full written reasons, we obtained a copy of Justice Hainey's short handwritten "endorsement" and the Court's order.

In this case, a landlord had sued The Bay on account of, among other things, outstanding rent arrears. The Bay had counterclaimed and sought an injunction to prevent the landlord from terminating the lease or re-entering the premises.

On November 23, 2020, Justice Hainey granted The Bay's injunction motion, preventing the landlord from taking steps to terminate the lease and restoring possession of the premises to The Bay. The judge also ordered that The Bay pay 50% of the outstanding arrears, and 50% of the rent going forward (as well as other amounts due arising under the lease). The Court noted that these interim orders were "without prejudice" to The Bay's right to argue at a later hearing that no rent, or a lesser amount of rent, was due, and to the landlord's right to argue that 100% of the rent and rent arrears were due.

In his endorsement, Justice Hainey noted that he had presided over a similar case in October 2020 involving a claim by another landlord against The Bay. In that case, he had held that "equity requires that there should be a sharing of the effects of the Covid-19 pandemic and that an order requiring HBC to pay 50% of rent arrears and future rent constitutes a fair sharing of the effects of the pandemic between landlord and tenant." Justice Hainey held that the same approach applied to this case.

Key Takeaways: Both the BC and the Ontario decisions involving The Bay illustrate the approach that courts may take ("a sharing of the effects" of the pandemic) when dealing with substantial claims for unpaid rent arising between sophisticated commercial parties on interim motions (not a final hearing).

The order in BC required half the arrears and future rent be paid to the landlord, the other half into their lawyer's trust account. In the Ontario decisions, the result was the payment of 50% of the arrears and ongoing rent directly to the landlord. While there is no guarantee of what a judge will do in a specific case, the two Ontario decisions and the BC case provide guidance on what the parties should consider, and what the court may order, pending a final hearing of the dispute.

3. The Second Cup Ltd. v 2410077 Ontario Ltd., 2020 ONSC 3684 (Ontario)

When the pandemic hit, the majority of Second Cup's cafes temporarily suspended operations. 114 of them, including one on Front Street in Toronto, were limited to take-out and pick-up services.

The landlord, 2410077 Ontario Ltd. (241), advised that April 2020 rent could be paid in two installments. On April 1st, 74% of the rent was paid. On April 3rd, 241's property manager delivered a notice of default on account of the full rent not being paid. On April 23rd, 241's property manager issued a demand for the April rent arrears and provided a statement for the May rent. On May 2nd, 241 locked the premises and on May 4th, delivered a Notice of Termination.

Second Cup filed a claim and sought an injunction to regain access to the premises. The Court found that the tenant was not in default on April 3rd, as 241 had advised that the rent could be paid in installments. The Court also found that 241 had no right to lock the tenant out on May 2nd, given that only nine days had passed since the April 23rd notice (and the lease required a default to persist for ten days after notice was given to the tenant). Although an argument regarding relief from forfeiture was raised, the Court found it was unnecessary to decide that issue (although it noted that it would have decided in the tenant's favour).

Key Takeaways: 241 and its property manager experienced two problems: (1) a communication issue between them with respect to rent collection and 241's advice regarding accepting instalment payments, and (2) the failure to comply with the notice and default requirements under the lease.

One of the key aspects in enforcing the terms of a lease, whether as a tenant or landlord, is strict compliance with its terms; accordingly, all landlords should thoroughly review their lease agreements to ensure compliance, including compliance with notice requirements.

4. Hengyun International Investment Commerce Inc. c. 9368-7614 Québec

inc., 2020 QCCS 2251 (Québec)

The tenant, 9368-7614 Québec Inc., operated a fitness center. On March 24, 2020, the Quebec government issued a government decree ordering the closure of all "non-essential businesses" (which included fitness centers).

The tenant failed to pay rent and the landlord subsequently sued and sought payment of the rent arrears and termination of the lease. In its defence, the tenant relied on the "Unavoidable Delay" clause in the lease and on article 1470 (*force majeure*) of the Civil Code of Quebec (Civil Code). The landlord sought to rebut this argument on the basis of the language in the "Unavoidable Delay" clause, which expressly required the tenant to continue paying rent during an Unavoidable Delay. The tenant also argued that the landlord had failed to provide it with "peaceable enjoyment" of the premises during the closure on the basis of article 1854 of the Civil Code, and therefore it was relieved of paying rent during the closure.

The Court did not accept the tenant's argument that it was relieved from paying rent on the basis of a *force majeure*. However, the Court did find that the government decree was a *force majeure* which prevented the landlord from providing peaceable enjoyment of the premises to the tenant as required by article 1854. Therefore, as the landlord could not provide peaceable enjoyment, the tenant was relieved of its corresponding obligation to pay rent pursuant to section 1694 of the Civil Code.

Key Takeaways: The key takeaway for parties outside Québec is that leases should be reviewed for *force majeure* clauses, and the language of those clauses should be carefully scrutinized as they may or may not apply in the current environment.

Quebec differs from the other Canadian provinces in that it has a codified *force majeure* provision – article 1470. *Hengyun* has only been cited in one Canadian case outside of Quebec (*Durham Sports Barn Inc. Bankruptcy Proposal*, 2020 ONSC 5938, and see the reasoning in *2487261 Ont. Corporation v. 2612123 Ont. Inc*., 2021 ONSC 336). In those two cases, the reasoning in *Hengyun* was not followed (although *Hengyun* has been relied on in Quebec in other cases). *Hengyun* is under appeal.

5. Peninsula (Kingsway) Seafood Restaurant Inc. v Central Park Developments Ltd., 2021 BCSC 119 (British Columbia)

The tenant had consistently failed to pay its rent. This included breaching rent deferral agreements with the landlord before, and during, the pandemic. In October 2020, the landlord terminated the lease and made an offer to lease the premises to a third-party, which had been accepted.

The tenant petitioned the Court for relief from forfeiture – an equitable doctrine pursuant to which the

tenancy could be reinstated despite the tenant's defaults.

The landlord, and the new tenant, argued that the accepted offer to lease was determinative of the petition. In other words, as a result of the new tenant's lease interest, the Court should not exercise its discretion to grant relief from forfeiture to the defaulting tenant.

The Court ultimately declined to grant the defaulting tenant's application. The Court held that but for the existence of the new lease interest, it would have granted the defaulting tenant's application. The new lease was described as "tip[ping] the scale".

The Court made a number of adverse findings against the defaulting tenant. It found that the defaulting tenant had been consistently late in its rent payments. The defaulting tenant also had no assets in BC (or "apparently elsewhere") and was not in good standing with the Registrar of Companies. Moreover, the two indemnifiers under the terminated lease were companies that were either struck from the registry or were not in good standing. Finally, the landlord faced liability to the new tenant if relief from forfeiture was granted to the defaulting tenant.

Key Takeaways: This case is instructive in three respects.

Firstly, the Court highlighted the landlord's reasonable conduct and the defaulting tenant's consistent defaults. In some cases, strict compliance with the terms of the lease will not be enough to put the landlord in a bullet-proof position to resist this kind of court application. At all times (and especially during the pandemic) landlords and tenants should act reasonably.

Secondly, this decision provides some comfort to landlords who validly terminate a lease with a defaulting tenant and enter into a new lease for the premises with an "innocent" third-party. Had the defaulting tenant's application been granted, the new tenant could have sued the landlord for breach of the new lease.

Thirdly, relief from forfeiture is an equitable remedy that gives the judge hearing a matter considerable discretion. Despite the petitioner in this case obviously being a problem tenant, with the landlord having been more than patient and having little legal recourse against the defaulting tenant, the Court noted that it would have granted the defaulting tenant's relief but for the new lease with the third-party. While each decision turns on its own facts, landlords should be aware that in this case the judge set a troublingly low bar for tenants looking to obtain relief from forfeiture (i.e., even a tenant who has consistently defaulted under the terms of a lease may be able to obtain relief from forfeiture).
