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Commercial Leasing and Injunctions 2021

**KEY CONSIDERATIONS AND
STRATEGIES**

February 5, 2021

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Retail Vacancy in B.C. Is Forecast to Increase

Retail Vacancy

Retail vacancy across Canada has started to increase and is expected to continue!



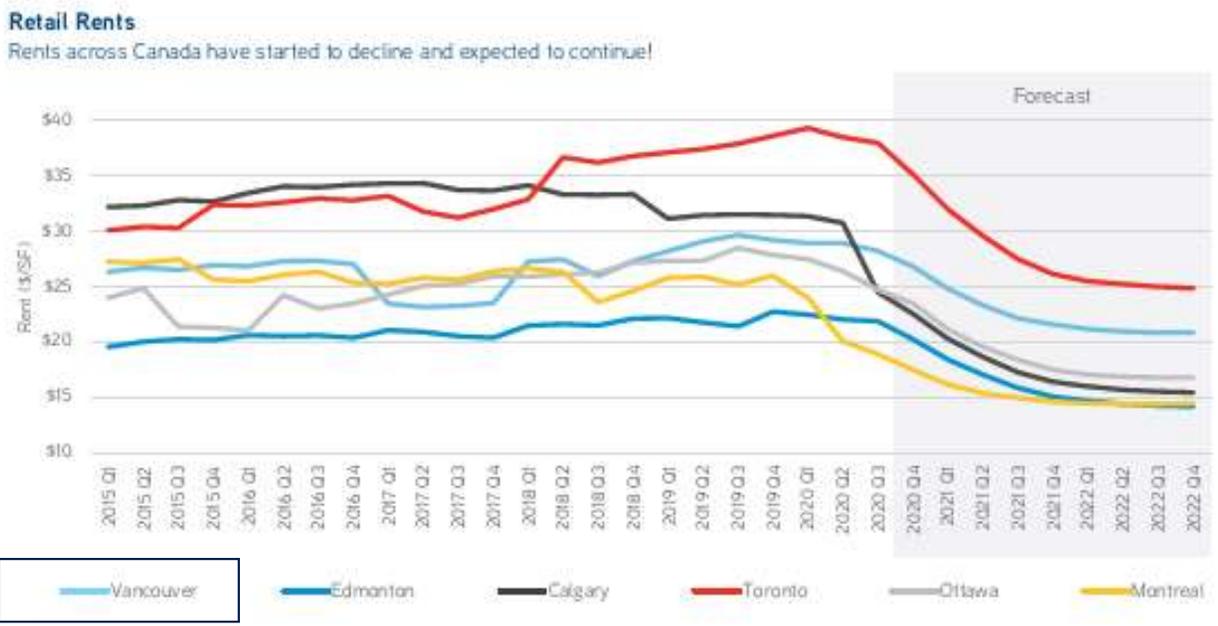
Source: MSCI Canada, Colliers, Q3 2020

Source: Colliers Canada National Report Report – Year End

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Retails Rent Are Forecast to Decline



Source: MSCI Canada, Colliers, Q3 2020

Source: Colliers Canada National Report Report – Year End

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Presentation Outline

1. Leasing Injunctions in Context – A Recent Example
 2. Injunctions Refresher
 3. Common Situations Where Tenant Seeks Injunction
 4. Common Situations Where Landlord Seeks Injunction
 5. Common Situations Where Either Party Seeks Injunction
 6. Key Practice Points
- The role of strategy in leasing disputes.

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Recent High Profile COVID Example

- The Bay leased premises at the Coquitlam Centre Mall.
- Mall owned by the defendant, Pensionfund.
- In March 2020, The Bay closed all of its B.C. locations. The Bay stopped paying its rent in April 2020 (April sales bottomed out at 1% YoY). In May 2020, The Bay re-opened the store at the Mall, albeit with greatly reduced patronage of the store and Mall.
- In the intervening period, Pensionfund delivered two written notices of default (October 6th and November 3rd). By October, sales were at 42% YoY).

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Recent High Profile COVID Example (cont'd)

- At 3:30 AM on November 21, 2020, Pensionfund delivered a written Notice of Termination, and immediately thereafter took steps to re-enter and lock-up the premises.
- On November 23, 2020, The Bay filed the action and sought short leave that morning. The application was heard that afternoon.
- The Bay claimed that the landlord had breached the lease (by failing to maintain the Mall in a first class condition and failing to provide quiet enjoyment of the leased premises during the closure), and relied on an “Unavoidable Delay” clause (similar to a *force majeure* clause) to argue that its rent obligations to pay rent were suspended during the pandemic.
- The Bay also alleged that Pensionfund failed to perform its contractual obligations in good faith.

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Recent High Profile COVID Example (cont'd)



Termination
Notice

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The Coquitlam Centre Mall



Recent High Profile COVID Example (cont'd)

- The “Unavoidable Delay” clause (section 21.02(a)):

If the doing or performing of any act or thing required hereunder to be done or performed by the Landlord or the Tenant is affected by Unavoidable Delay, then the time for such doing or performing or the time within which it shall be done or performed shall be extended for a period equal to the Unavoidable Delay or, if the Unavoidable Delay ceases after the specified period for the doing or performing, for a period equal to the Unavoidable Delay after the Unavoidable Delay ceases;



Recent High Profile COVID Example (cont'd)

- Rendering reasons the next day (*Hudson's Bay Company ULC v. Pensionfund Investment Ltd.*, 2020 BCSC 1959), Fitzpatrick J. granted an interlocutory injunction, ordering Pensionfund to immediately provide The Bay with unencumbered access to the premises, and enjoining Pensionfund from taking further steps to act under its Notice of Termination.
- However, the Court also ordered The Bay to pay 50% of all rent and arrears to the landlord, with the other 50% of rent and arrears paid into counsel's trust account.
- The order remained place until January 22, 2021.... We will revisit this example!

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Injunctions Refresher - Pre-Trial vs. Permanent

- General principle - An injunction will be granted to enforce or maintain a legal right.
- In the BCSC (s. 39 of the *Law and Equity Act* codifies the Supreme Court's inherent jurisdiction to grant injunctions) (BCPC has no jurisdiction; bad forum for lease disputes)
- Pre-Trial (or pre-hearing):
 - Interim – *Ex parte* and for a fixed term (continuation hearing / expiry of inj. / appl. to set aside).
 - Interlocutory – Following a hearing with notice and usually granted pending the determination of the dispute
 - Undertaking as to damages – Requires payment of damages to the defendant if claim dismissed (sometimes referred to as the “price of an injunction” – court has discretion – see Rule 10-4(5)).
- Permanent – After the adjudication on the merits.

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Injunctions Refresher - Prohibitory vs. Mandatory

- Prohibitive – Prevents the defendant from acting in a certain manner. For example, locking the tenant out of the premises.
- Mandatory – Requires the defendant to act positively. For example, the landlord seeking to require the tenant to operate its business continuously (rarely obtained).
- Distinguishing the Two? Look at “practical consequences” of order sought (*The Bay*, paras. 36-38).

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Injunctions Refresher – Interim vs. Interlocutory

- The Three-Part Pre-Trial Test:
 - Test from *RJR MacDonald*:
 1. A serious question to be tried (in the case of a prohibitive injunction) or a strong *prima facie* case (in the case of a mandatory injunction, where a constitutional question arises as a simple question of law alone, or where the injunction will in effect amount to a final determination of the action) as to the existence of the right alleged and a breach thereof, actual or reasonably apprehended;
 2. Without an injunction, irreparable harm will occur; and
 3. The balance of convenience favours the granting of the injunction.
 - *Wale* sets this out as a two-part test, but BCCA has held that there is “no practical effect to this distinction” (see *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA, para. 37, although there remains some debate on this point).
 - Serious Question – Sometimes referred to as a “fair question” or “reasonable question”.
 - Irreparable Harm – Nature of harm, not its magnitude... can the harm be quantified/compensated by damages?

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Injunctions Refresher – *Ex Parte*

- The need for an *ex parte* injunction will infrequently arise in the leasing context. It will only arise: (1) if given notice, the defendant will act to frustrate the process, (2) if the matter is so urgent that giving notice is impractical or impossible (if the landlord is represented, notice should be given to their counsel of the application), or (3) the identities of the parties against which relief is sought are unknown (ex. protests/encampments).
- Counsel must make “full and frank” disclosure of any facts or law known to counsel which might reasonably be expected to be raised by the opposite party (*Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36). Failure to do so may result in the order being set aside, and in certain cases, special costs.

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Revisiting The Bay Decision

A Serious Question to be Tried

- Pensionfund argued that the relief sought was a mandatory injunction (and thus the applicable standard was a strong *prima facie* case – see *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5).
- The Court held that the substance of the order was to preserve the *status quo* (restore access and regain entry), thus the lower, serious question to be tried, standard applied.
- The Court noted that complex issues of interpretation were raised, and the judge acknowledged not having had an opportunity to review the entirety of the lease.

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Revisiting The Bay Decision (cont'd)

Balance of Convenience / Irreparable Harm

- See *Canadian Broadcasting Corp. v. CKPG Television Ltd.*, 1992 CanLII 560 (BC CA)
- The Bay tendered evidence *inter alia* that: (i) it could not secure other premises, (ii) a disruption to store operations would cause harm, (iii) it would suffer reputational harm / concerns re solvency caused by landlord's actions, and (iv) damage to supplier relationships and employees (106 of them).
- The Court reviewed the law regarding relief from forfeiture under section 24 of the *Law and Equity Act*.

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The Bay Decision Takeaways

- This decision highlights:
 1. Most injunctions turn on satisfying the test for irreparable harm and tilting the balance of convenience in your client's favour (note that the Court in *The Bay* did not delve into contractual interpretation arguments);
 2. The relevance of case-law from other jurisdictions in the leasing context (for example, the Court's comments regarding similar equitable jurisdiction and similar proceedings in Ontario);
 3. The breadth of the Court's discretion and its desire to craft a fair and business-minded interim solution (2 months; use of trust accounts; 50/50); and
 4. The speed at which pre-trial injunctions can proceed.

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Permanent Injunctions

- After the merits hearing.
- A Court can grant a permanent injunction where it is satisfied that:
 - The moving party has established its legal rights; and
 - Injunctive relief is appropriate.

(See *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396)

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Common Situations Where Tenant Seeks Injunction

- Breach of the covenant of quiet enjoyment (right to exclusive possession of the premises)
 - Novel - *Hengyun International Investment Commerce Inc. c. 9368-7614 Québec inc.*, 2020 QCCS 2251– Fitness center relieved of obligation to pay rent from March 24th to June 22nd due to governmental decree closing gyms (however, not followed in Ontario (*Durham Sports*) and subject to appeal).
 - Raised in *The Bay*.
- Breach of Exclusivity Clause / Restrictive Covenant (ex. only store of X nature in the mall)
 - *2432714 Ontario Inc. v. Heffner Development Group Limited*, 2018 ONSC 1034 – Tenant operated a “Pita Pit” franchise and had exclusive right to sell “pitas and wraps”. Brought a motion to prohibit landlord from leasing to Mexican restaurant, “Holy Guacamole”. Tenant relied on evidence from food journalist; injunction granted.
- Renewal of Lease (see *Top Flight Fueling Ltd. v. 600897 B.C. Ltd.*, 2006 BCSC 1951)
- Landlord locks tenant out & landlord’s wrongful termination of the lease (ex. *The Bay*)
 - Redevelopment - *2261358 Ont. Inc. v. Kompter*, 2020 ONSC 2931 – Landlord had previously discussed sale of property with tenant/applicant. Landlord delivered notice regarding alleged breaches of lease, which notice was found to be vague and unsubstantiated. Tenant granted interlocutory injunction. See also *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2005 BCCA 583.
 - Further Pandemic Example - *The Second Cup Ltd. v. 2410077 Ontario Ltd.*, 2020 ONSC 3684



Common Situations Where Tenant Seeks Injunction (cont'd)

The Second Cup Ltd. v. 2410077 Ontario Ltd., 2020 ONSC 3684:

- The Second Cup / its franchisee were locked out of its premises for non-payment of rent by the defendant landlord.
- In March 2020, by virtue of the state of emergency, 114 Second Cup locations, including this one, were limited to take-out and pick-up services. Others were closed.
- The landlord advised that the April rent was not due in full on April 1st and could be paid in two installments. A partial payment was made on April 1st (~74% of rent). However, the landlord's property manager delivered a notice of default on April 3rd, delivered a further demand on April 23rd and purported to terminate the lease on May 4th.



Common Situations Where Tenant Seeks Injunction (cont'd)

- The landlord changed the locks to the premises on May 2nd. On May 4th, the landlord delivered a Notice of Termination.
- The termination of the lease and repossession of the premises was found to be premature and invalid, given the landlord's representation regarding accepting two payments (no default on April 3rd) and the requirement that the default persist for ten days under the lease (there was insufficient time between April 23rd and the May 2nd lockout to terminate – not ten days).



Common Situations Where Landlord Seeks Injunction

- To enforce a continuous operation clause (generally a Court will not order this because of the adequacy of damages and difficulties of supervising the operation of a business - *A.L. Sott Financial (Newton) Inc. v. Vancouver City Savings Credit Union*, 2000 BCCA 143 and *Longwood Station Ltd. v. Coast Capital Savings Credit Union*, 2007 BCSC 1564)
- Carrying on a use not permitted or illegal
 - Ex. Unlicensed business
 - See for example, *Geoffrey L. Moore Realty Inc. v. The Manitoba Motor League*, 2003 MBCA 71
- Creating a nuisance for other tenants (see for example, *Bonavista Management Inc. v. Absolute Star Design Ltd.*, 2015 BCSC 1002 – cigar and marijuana smoke)
- Contaminating the premises

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Common Situations Where Either Party Seeks Injunction

- Repair / Renovation:
 - See for example, tenant seeks an injunction to prevent ongoing renovations, which was denied (*472448 B.C. Ltd. v. 343554 B.C. Ltd.*, 2006 BCSC 1075)



Defending an Injunction Application

- Issues to consider arguing:
 - No merit, however, the threshold in most cases is low and you want to avoid proving the other side's case with your own affidavit evidence.
 - No irreparable harm (can't be quantified, or can't be collected) / injury is minimal.
 - No undertaking as to damages.
 - There has been an inordinate delay in seeking the injunction.
 - The moving party does not have clean hands / they acted to alter the *status quo*.
 - The injunction would require ongoing supervision by the court (if mandatory).
 - The injunction is simply a bargaining tool.
 - If the injunction is granted, an undertaking is not enough (security should be posted) and/or it should be time limited.

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Failure to Apply for CECRA?

- Interesting Superior Court decisions from Quebec where “safeguard orders” have been refused on the grounds that the landlord failed to mitigate their damages by applying for CECRA.
 - The first of several decisions - *Investissements immobiliers G. Lazzara inc. c. 9224-5455 Québec inc.*, 2020 QCCS 2176.
- One of the major criticisms of CECRA is that it required landlord participation. No known cases on this argument in B.C.
- CECRA now replaced by Canada Emergency Rent Subsidy (CERS) – direct payment to qualifying renters.

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Key Practice Points

- **Pre-Litigation Conduct is Key** – Get litigation counsel involved early. Review the lease and make sure any notices are in compliance (ex. the *Second Cup* case).
- **Equitable Remedy** – Get all the facts, put forward something reasonable, make sure your client has clean hands.
- **Evidence** – An interim/interlocutory injunction can be obtained based on hearsay evidence, however, you cannot be seeking a final order and the source of the hearsay must be stated. There must be a “non-speculative” basis to demonstrate irreparable harm.
- **The Order** – Must be specific and clear, or it will not be granted / enforceable. In the case of mandatory injunctions, be mindful of orders crafted to require the ongoing supervision of the Court to comply.

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Key Practice Points (cont'd)

- **An Injunction Cannot Be Used Simply to Enhance Bargaining Position**
- ***Quia Timet*** – An injunction to prevent anticipated harm.
- **Incorporate the Undertaking Into Your Affidavit Materials**
- **Agreed Facts** – Time permitting, an agreement on key facts may help clear the path to victory for your client (ex. *The Second Cup* decision).
- **Think Two Moves Ahead** – Will there be a hearing for a continuation of an interim injunction? An application to set aside an interlocutory injunction? Will the action be carried forward to trial for a permanent injunction? (it can be set aside if not prosecuted)
- **An Exercise of Discretion is Very Very Hard to Appeal** – Put your best foot forward!

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Key Resources (before a long night!)

- CLE-BC, *Injunctions: British Columbia Law and Practice*, 3rd ed.
- Justice Robert Sharpe, *Injunctions and Specific Performance* (loose-leaf and ProView)
- Richard Olson, *A Commercial Tenancy Handbook* (loose-leaf and ProView)
- Jeffrey Berryman, *The Law of Equitable Remedies*, 2nd ed., Irwin Law

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