



Cassels

**Commercial
Leasing in the
COVID-19 ERA**

June 26, 2020

Chris Sharpe, Fasken

Layne Hellrung, Cassels Brock

Dan Baxter, BC Chamber

Today's Webinar

1. The CECRA Program
2. In-Term Lease Negotiations
3. Renewals and Effect of COVID on Leasing Rates
4. New Leases In a Climate of Business Uncertainty

Cassels



A Pan-Canadian Problem

Colliers Canada May 2020 Report – Survey of 7,100 Tenants:

- “**16%** of commercial tenants did not pay rent in May”.
- “Of the tenants who requested rent relief, **23%** were able to negotiate direct relief agreements with their landlords outside of CECRA. Of that number, **94%** were granted deferrals and **6%** were granted rent abatements”.
- “The most common relief duration is **three months**, with 46% of tenants being granted this length of relief, 28% granted two months of relief and 18% granted one month of relief”.

Cassels



The CECRA Program

- Canada Emergency Commercial Rent Assistance (CECRA):
 - 3 months (April, May, June)
 - Tenant pays up to 25% / Landlord must reduce rent by at least 75%
 - Forgivable loan of up to 50% (forgiven December 31, 2020 with continued compliance with terms)
- Qualification criteria
 - Change to original announcement: No requirement that Owner have a mortgage on property
 - Tenant pays no more than \$50,000 gross rent/month/location; no more than \$20 million gross revenues; 70% decline
- Applications on CMHC website starting on May 25th
 - Requires four agreements/documents: Rent Reduction Agreement (at least 25%); Forgivable Loan Agreement; Tenant's/Subtenant's Attestation; Owner's Attestation

Cassels



The CECRA Program (cont'd)

- The B.C. Government's Restriction on Evictions
 - June 1, 2020 - Ministerial Order No. M179
 - The Order prohibits landlords who were eligible for CECRA, but did not apply, from issuing notices of termination; exercising any right of re-entry, distraint of the tenant's goods, and taking steps to rent out the tenant's leased property, as a result of a tenant's failure to pay rent when due.
 - Order in place until the earlier of the end of the CECRA program and the date of the expiration of the state of emergency (now until July 7th).

Cassels



The CECRA Program (cont'd)

- Success of the Program and Likelihood of Extension
 - \$3 bn budgeted – as of June 8th paid out \$39 million
 - Quebec – province will contribute 12.5%, so Landlord will only have to forego 12.5% of rent



In-Term Lease Negotiations

- What documents should my lawyer be looking at?
Offer/Agreement to Lease, Lease, amendments and key letters.
- What is the actual outcome you are looking for?
 - Renegotiating = Changing terms.
 - Surrender = Ending the lease.



In-Term Lease Negotiations (cont'd)

- *Force majeure* = superior force
- Depends on the wording of the lease – for example, reference to a “pandemic”, “epidemic” or “public health emergency”
- In this case, the pandemic must have an actual and direct impact on the relying party’s ability to perform their contractual obligation
- Normally a deferral of the obligation
- vs. doctrine of frustration (end of the legal obligation)

Cassels



In-Term Lease Negotiations (cont'd)

- Renegotiation Options:
 - Starting point - Rent *is* to be paid.
 - Ex. “Except as otherwise expressly provided in this Lease, the Tenant shall pay Rent from the Commencement Date without prior demand and without any deduction, abatement, set-off or compensation”.
 - Deferrals vs. Abatements:
 - Abatement – No obligation to pay.
 - Deferral – Payment at a future date.

Cassels



In-Term Lease Negotiations (cont'd)

- Factual Background to Renegotiation
 - Financial covenant / track record
 - How easy/hard will it be to replace you
 - Tenant mix
 - How long is left in the lease
 - How does rental rate compare to current rates
 - Where is the space located (desirable vs. undesirable)
 - What kind of space is it (unique vs. commodity)
 - Relationship between landlord and tenant



In-Term Lease Negotiations (cont'd)

- Formalizing the deferral / abatement agreement:
 - What rent is the relief applicable to? (base rent / additional rent / gross rent)
 - Consideration (including additional covenants of the parties; financial consideration; enhanced covenant/guarantees)
 - Addressing current technical defaults and related rights (e.g. renewal)
 - Addressing existing Rental and Security Deposits
 - All other terms of the lease continue to apply
 - What occurs if there is a default of rent relief agreement
 - Rights and remedies preserved
 - Confidentiality
 - Lender approval necessary?

Cassels



In-Term Lease Negotiations (cont'd)

- Other creative ways to address Tenant cash-flow:
 - Partial payment, with a profit-sharing (think percentage rent)
 - Triggering event to end the deferral period – e.g. when revenues/operations hit negotiated target
 - Sub-letting all or part of the space
 - Assignment of all or part of the lease
 - Negotiating a full or partial surrender / buy-out
 - Structuring rent deferral as a loan (with security?)
 - Security deposits being transferred to Landlord and released w/ Tenant obligation to provide a new deposit



In-Term Lease Negotiations (cont'd)

- A Surrender of the Lease:
 - How much is the balance of the lease worth (current market for subject location and length of lease term remaining)
 - Financial means of the Tenant
 - Existence of a Guarantor/Indemnifier/Co-Covenantor
 - Costs/Benefits to Landlord in terms of insisting on payment of rent (i.e. maintain the lease even if the Tenant leaves)
 - Risk for Tenant in unilaterally vacating the premises
 - Other options including distraint or the termination of the lease coupled with a Court Action claiming any arrears and damages



Renewals and Effect of COVID on Leasing Rates

- Consider “fair market rent” – essentially, the rent that would reasonably be obtained by arm’s length Tenant in the same market on the same terms
- Consider provisions stipulating that basic rent not less than preceding term:
 - Ex. “the annual Minimum Rental payable during the renewal term shall not be less than the annual Minimum Rental payable during the last year of the Term or any renewal term as applicable”
- May result in more tenants not exercising option, even though bare right in their favour – what do the next round of negotiations look like?

Cassels



New Leases In a Climate of Business Uncertainty

- Do You Actually Need a Physical Location? If yes, can you:
 - Sub-lease?
 - Rent a co-working space
- Tenants: Consider space requirements carefully:
 - Expansion options
 - Partial surrender options
 - Multiple, shorter terms and renewals
 - Agents, landlords, tenants, lawyers all working together

Cassels



New Leases In a Climate of Business Uncertainty (cont'd)

- Tailored *force majeure* clauses
- Rent escalation / percentage rent





Cassels

Questions?

Suite 2100, Scotia Plaza
40 King Street West
TORONTO, ON
M5H 3C2 Canada

t: 416 869 5300
f: 416 350 8877

Suite 2200, HSBC Building
885 West Georgia Street
VANCOUVER, BC
V6C 3E8 Canada

t: 604 691 6100
f: 604 691 6120

Suite 3810, Bankers Hall West
888 3rd Street SW
CALGARY, AB
T2P 5C5 Canada

t: 403 351 2920
f: 403 648 1151

© 2019 Cassels Brock & Blackwell LLP. All rights reserved.

This document and the information in it is for illustration only and does not constitute legal advice. The information is subject to changes in the law and the interpretation thereof.
This document is not a substitute for legal or other professional advice. Users should consult legal counsel for advice regarding the matters discussed herein.