

COVID-19 SURVIVAL GUIDE: COMMERCIAL LEASING

29 April 2020

The COVID-19 pandemic is wreaking havoc on the commercial leasing industry and posing challenges for both landlords and tenants. The speakers from various regions across the country will share their insights to help you navigate the commercial leasing landscape in these unprecedented times.

Topics include:

- Commercial property closures
- Operating costs
- Changing economic picture
- Rent deferral or abatement
- Strategies to deal with challenges in the face of the ongoing pandemic

*This webinar counts for up to 1 hour of Substantive credits toward the mandatory annual CPD requirement.

On-demand webinar

Transcript



Susan: Good afternoon. Welcome to our COVID-19 webinar on Commercial Leasing: Survival Guide. I'd like to thank everybody for tuning in, joining in and listening to our webinar. It's obviously a very time for this webinar in light of recent developments with the Federal government and Provincial governments on Friday. But first, before we get to that, I'd like to introduce you all to our panelists. Starting from Vancouver we have Joel Camley, who's a partner in our Vancouver office. Next we have Julie Desrochers, who is in our Montreal office and is a partner there. And third, we have Darren Taylor, who is a partner in our Calgary office. Thank you everyone for participating today. As we all know we're in the midst of unprecedented times. The COVID-19 has come upon us and commercial landlords, commercial tenants and their respective lenders and other service providers are all in the situation trying to decide how best to facilitate and manage through this every difficult economic time. The Federal government and Provincial governments, and even municipal governments, have been trying their best to put together various relief programs and what we're going to try to do today is take you through a number of topics and issues that we feel are relevant and pertinent to considering how best to survive this very difficult economic time. The first thing I'd like to do is to talk about, to have a cross country check-up, essentially, of the state of emergency legislation and the definition of essential workplace. Now the government created a state of emergency and each of the Provinces have instituted their respective state of emergencies. The Provincial government, I'm going to talk first about Ontario. In Ontario on March 25th the Provincial government instituted a list of 75 different essential workplaces and on April the 3rd that was reduced to 44 essential workplaces. Because the emphasis is that people are to remain in place, to shelter in place and to not go out and continue, or aggrandize, the spread of COVID-19. This has obviously, I don't need to tell any of you watching today or just being Canadians living in this world of ours, that businesses have had to close down, offices have effectively, for the most part, shutdown and people have moved all of their business, to the extent that's possible to be working from home. It's made it very, very difficult. I'd like to ask Darren to comment about Alberta. Darren can you comment about

what the state of emergency and the essential workplace legislation is in Alberta?

Darren: Sure, Susan. So in Alberta, under the Public Health Act, there have been some public health emergencies orders that have come out. They did come out aggressively, much like they did in Ontario, where initially there was restrictions on gatherings of over 50 people and then that was reduced down to 15 people. There is, however, some exceptions for essential businesses. Essential businesses, or essential services, in Alberta, these essential services can have more than 15 people on a worksite and they can even have some allowances for not observing social distancing, just because sometimes they can't, as long as they have other risk mitigation strategies in place. Some of the essential services, there's quite a list of essential services, but maybe I'll kind of say some of them are viewed as non-essential. So much of retail has been viewed as non-essential unless it involves things like food services, grocery stores and things like that. Restaurants, cafes, they've been able to stay open to the extent they do take-out or delivery, drive-thru, but there's no dine in/dine out. Initially there was some. There was allowance for them to be open but with reduced number of diners and now it's just no dining in. Bars and night clubs are closed. Recreation, entertainment is closed. Then a lot of other, of course, other personal service things like salons, of course everybody's hearing about salons, and then even health services like dentists, chiropractors, massage are closed. The list of the essential services, they are health, medical, public safety, food and shelter, energy and utilities, which of course in Calgary it's very important, covers a large part of the downtown, transportation, industrial, petroleum, construction, agriculture, some retail is still open, you'll see stores open like grocery stores and some of the big box stores are able to be open. Even some of the retails are able to be open, even if they're not essential, they're able to do curbside pick up, where you can call ahead and then arrange to pick things up.

Susan: We've seen that in Ontario as well. Yes. Joel, what about in BC? Is it similar type of restrictions and closures?

Joel: I suggest, actually, by contrast to Ontario and I think what we're going to hear from Julie in Quebec, British Columbia's containment measures being less restrictive and we've seen fewer sectors under mandatory shutdown orders. Certainly under the combination of the Provincial Emergency Program, the Provincial Health Authority and the City of Vancouver, many of the closures are similar to what Darren just spoke of including recreational sites, non-essential personal care services and the like. What the legislation has also done, similar to your Province, is designated the number of services as being mandatory and necessary essential services. For those businesses that don't fall under either of those classifications, they're entitled to operate provided they can comply with

the Provincial Health Authority regulations, which largely address the social distancing situation. It is different. I would suggest in Ontario, perhaps Quebec, and the fines associated with violations at the Provincial level are at the \$25,000.00 level and possibility of jail time. In the City of Vancouver, a breach of the bylaws, are at \$1,000.00 per violation.

Susan: We're seeing that in Ontario as well. \$1,000.00 fines and I know that there was a group of 4 people who were found in a car and each of them received \$1,000.00 fine. It wasn't a \$1,000.00 for the car so it's \$1,000.00 per person. The fines are definitely very significant. Julie, what's the situation in Quebec and how is it similar or different?

Julie: Yes, well, as you probably all know, Quebec is a Province in Canada where there's the most people having tested with COVID-19.

Susan: Right.

Julie: As of yesterday morning, there was 24,000 confirmed cases and 5,000 deaths. If you compare that to Ontario, in Ontario there was only, not only, but there was 14,000 confirmed cases and 815 deaths. So if you take into consideration the population of Quebec is a little less than 8.5 million and the one of Ontario, greater than 14.5 million, that really means that Quebec has been more affected than the other Provinces in Canada. The closure here effectively happened in two phase, like the rest of you, and it was mainly under an order in council on March 24th, where essentially all businesses that were not providing priority services need to close down. The priority service, there was a list to that order, and it has evolved a few times since then. It's really long. You can find it on the site of the Government of Quebec. As a result thereof everything that is not essential has been shutdown also here. Until, for the moment, May 4. The fines here are between \$1,000.00 to \$6,000.00 and they can double if you're a risk ...

Susan: Right. So, essentially, there's essentially been closures right across the country as we know. I'm sure everybody who is tuned in who wants to here about the Canada Emergency Commercial Relief Assistance Program. The Federal government announced they were going to have a program approximately 2 weeks ago and then on Friday, Justin Trudeau, announced that they had more details for this Canada Emergency Commercial Relief Assistance Program. However, it's important to note that that's ... the full program is not being fully baked, or formalized, yet and Justin indicated that that would be closer to mid-May. Just to give you some idea of what the program currently entails is it's essentially the lowering of 75% of the rent for small businesses that have been affected by COVID-19. The question is how does that 75% come to be. The concept is that the Federal government in partnership with the Provinces and the Territories are to take up

50% of that. Ontario is currently going to be doing 12.5% and the Federal government is going to be doing 37.5%, in terms of the relationship with Ontario. Ontario is the only Province who so far has anything on their website so it'll be interesting to see if the other Provinces suit with only wanting to take on 12.5% of that burden. Technically the program, as it's listed in the Federal website, says that the Provinces could potentially take up to 25% of the cost. The second element is that the Landlords are being asked to take on 25% of the burden of the rent. Then the tenants are asked to come up with the remaining 25%. The concept of this program is that there's going to be a forgivable loan and the forgivable loan is to be 50% of, essentially, the government component of the program. The program is intended to be managed or administered by the CMHC through landlords' existing lenders. However, not all landlords have mortgages and so that's also something that's having to be finalized and worked out. Likely those landlords who don't have mortgages will be dealing with the CMHC directly. The other thing is, is that in order for the program to work, the tenants will be required to enter into rent forgiveness agreements with their landlords, and the tenants will agree to be obligated to pay 25% of their rent, and the landlords will agree not to enforcement on the leases for the period of the 3 months. The 3 months are going to be designated as April, May and June. As I said, this is intended to come into being in May. Lots of questions. Rent. Is it gross rent? Is it basic rent? And additional rent? Operating Costs? Not certain. The tenants that are technically eligible for this program are tenants who have rent that is less than \$50,000.00 per month, that's one requirement, and the second requirement is that they've had to either cease operations due to COVID-19 or they've experienced the 70% drop, pre-COVID-19 revenues. Obviously one of the concerns is how is that going to be determined, validated, verified? My instinct is it's likely going to be similar to the \$40,000.00 loan program that the government has instituted with some attestations being given by the tenants. But there's going to need to be, hopefully, a lot more involved in that. In addition, what type of financial information are those tenants going to have to provide? The other thing is that landlords are now, if they're interested in taking advantage of this program, are going to have to communicate with their lenders and coordinate the program, however, that may place landlords in somewhat of a prejudiced position because they're now taking on new debt. Because technically the 50% is being paid by the government, or through CMCH, is a loan that is forgivable provided that all the terms and conditions of the program are complied with. Another question. Will this program apply to sub-tenants and licences? There's some real issues. What does everybody do May 1st? Because the programs not effective, or won't really have the details, until likely mid-May. Also there are a number of landlords who have entered into deferral agreements with their tenants and may not be interested in this program. They may be prepared to wait pursuant to their

deferral agreements to receive, ultimately all of their rents but on a preferred basis, so it's unclear and the tenants will be uncertain as to whether or not their landlords will, or will not be, offering this program. Lots of questions and we don't have all of the answers but we do have a program so that's better. We'll see where that goes in the days and weeks to come.

Next we want to go on to some of the challenges that different types of properties face as a result of COVID-19. Julie, could you comment about shopping centers, in particular, in Quebec? I think I recall they're not mandated to close. Is that right?

Julie: Actually, there's two categories of commerce in a shopping center. The shopping center's were closed on March 25th except two categories. The first one being the SA2 outlets, the grocery stores and the pharmacy, so this is one part. The second part are businesses that render priority services. If they have an exterior door, which allows their clients to go to the store without going to the common areas of the shopping center. That's the nuance. If you're an SA2, drugs, pharmacy or a grocery store you don't need the exterior door. Like I believe you need in the rest of Canada.

Susan: It's my understanding in the rest of Canada, to the extent that the various Provinces have obviously created their list of essential services, shopping centers typically fall under that category of essential services or essential workplaces. As Julie mentioned, certainly to the extent that if there are exterior doors, and there might be grocery stores, there might pharmacies or potentially even restaurants that facilitate take-out, those types of businesses can continue to operate if they so choose. One of the things that we've seen though, with shopping centers, is that a number of them have closed off entrances to the shopping centers and required all access to be through exterior entrances, to specific tenants. In addition a number of shopping centers, as with retail plazas and office buildings, have increased security to ensure against vandalism and theft. So, we're definitely seeing that. Talking about retail plazas, Joel, can you tell us what you're seeing?

Joel: It's very similar to the shopping center example that you just gave. Again, because of the approach British Columbia has taken, like shopping centers, they're open here in BC as are retail plazas. So, the activity levels can be based on whether the retailer is caught by a mandatory shutdown or is required to continue to operate, and the decision of the actual operator. It's not too dissimilar to what we're seeing in the shopping center ...

Susan: Right. Darren, office buildings. Office buildings are unique in that many of them have parking, multiple access, elevators and that sort of thing. What are you seeing, in different types of uses obviously, what are you seeing in Calgary?

Darren: From what I've seen in Calgary so far is that the office buildings are closed to a certain degree and really they have to have access because there are a lot of essential services in them. For example, our own building, where it's open because we're considered an essential service but there is heightened security. We need to have lock access with elevators only, in our building, there's security there, will direct you up if you don't have your own key card, which keeps essential services open. Some offices, I think even if they are an essential service and they're open, they still have a social distancing requirement so there's not many people there. Especially in the downtown areas. As mentioned, we see heightened security. We see things like hand sanitization stations, in our office we have that, and I think many of them do to make sure that things are well covered and leading to social distancing and hygiene requirements.

Susan: It's funny you say that. I have been coming in on occasion to the office and I got in the elevator, and then I was waiting for the elevator to go up, and another gentleman came to come into the elevator and then he sort of saw me and kind of backed up and let the elevator go up. He was going to take another elevator. It's going to be very interesting when we get back to whatever the new normal will be. I suspect it will be on a graduated basis. But it will be very interesting when, historically, we would see 15, 20 people in an elevator, how many people will actually be in that elevator. I suspect a lot of people will be taking the stairs but it depends on how tall your office building is. Julie, what about you? Any thoughts or comments about office buildings?

Julie: No. Darren has covered pretty much. We see increased security because a lot of the tenants are in their homes this week. We see increased in cleaning routine for all the touch point, as you mentioned, all the surfaces, the doors, the restrooms. And also most of the landlord has adopted access protocol and delivery services protocol, they have communicated to their tenants. Know which door to the building they need to use. Are there elevator banks that are closed? Those kinds of things that Darren, you touched on.

Susan: It also seems that, to the extent possible, it's my understanding that some of the office buildings, and even of some of the shopping centers, have been attempting to reduce their operating costs, to the extent possible. Lights, HVAC and various things like that, trying to keep some of their costs a minimum. I can attest to that because in my office, it's freezing, right? But I guess every penny counts. So it's a good thing. Mixed use. Obviously right across the country there are many, many types of mixed use buildings. Whether they're everything from parking component, retail, residential, office and so it's quite interesting. We're seeing similar restrictions and limitations on mixed use and so I think all of those are pretty much the same. Next I wanted to talk about manufacturing

industrial. This brings me to you Joel. One of the questions is what's an essential workplace and how does that impact manufacturing industrial buildings and workplaces staying open?

Joel: Again, because of the approach BC has taken, absence specific cases where an operator is unable to comply with the health authorities, again, common example, social distancing rules, or where we've had a particular COVID issue. A good example, recently we had a poultry plant shutdown due to an outbreak. This sector has largely not been affected by the mandated closures. What is coming forward are issues where the operators of manufacturing and distribution facilities are running into supply chain disruptions based on the fact that the ultimate user, often retailers, aren't able to, or are not willing to accept, that the product line or new orders, which is causing some financial distress for those operators and warehouse operators. Also, there is legislation on the books on rights, an order, by which we have a Provincial supply chain commission. Their job, as the name applies, to ensure that there is maintenance of the distribution channels for essential goods and services. That order does allow for the Province, if necessary, to take control over warehouses and other facilities to achieve those goals. But to your point, I think what's important, particularly around the discussions between landlords and tenants about rent abatements and deferrals, is that there are a number of facilities that are under the essential service legislation. To me that's an example of why the factual matrix is really important for landlords to understand before these negotiations come into play.

Susan: That's a very good point. I think also we should tell our viewers to be, I mean, everyone hopes that a vaccine will be found and we will be able to get back together and enjoy a drink on a patio, things will be better, but there is some suggestion that we may unfortunately go back into a second round in the fall and that will take us into the winter. I think one of the things that we would suggest to the Landlords that you consider, to the extent that you have, whether it's a retail location, a manufacturing location, that you check on the water and the heat to make sure that if you do get into the winter months, and fortunately, hopefully, even in Alberta, it's not that cold anymore, but hopefully when we get into this winter, if there is again sheltering in place and certain businesses are closed down, definitely recommend to landlords to maybe implement some kind of maintenance and check system to ensure that their buildings are okay. Also, to the extent that there are any buildings that are left vacant, that could affect insurance. So landlords should double check on that and also advise your insurers if they determine that there is some buildings that have been left vacant. Even though there might be product and the tenant may still be, technically, in possession the effect that the premises are vacant.

Next thing we wanted to talk about is communication. This may seem simplistic, but to be

perfectly honest, one thing we're seeing is that, and it's human nature, that people will sometimes, when things get so difficult you want to hide your head under the covers or do the old ostrich hide your head in the sand, but I think as landlords, to the extent that we have landlord viewers, or agents, or brokers, and tenants, really develop communicating. The landlords communicating with the tenants and their tenants communicating with landlords. To the extent that the landlords are able to assist the tenants, but sometimes the tenants who aren't really looking or being aware, may not be aware of all of the relief programs that are currently being offered. It's a really good thing and I really highly recommend that landlords to pull up some of the great websites, the government has amazing websites, Ontario does as well, but the government website is actually [canada.ca/en/department-finance/economic-response-plan](https://www.canada.ca/en/department-finance/economic-response-plan), and you can actually go under Support for Individuals, Support for Businesses and Support for Sectors. The Support for Businesses is amazing. It has on a, basically a clip basis, all the various programs that are currently being offered and the current status of those programs. I really highly recommend that people do that. In addition, our law firm, as other law firms, have great COVID pages and links. There's a number of webinars. Even a lot of accounting firms have a lot of great information. So there's a lot of great information that's out there that's for free and it's really important to take advantage of it. One thing I've been hearing, I talked to someone and they'll tell me that they had to lay some people off, and I said, "Oh, have you considered some of the employment subsidies?" "No. I didn't really realize." Or they didn't fully appreciate it so really communicate with each other and try to take advantage those unique programs.

Joel, landlord due diligence. What type of due diligence can you recommend that landlord's do in connection with potentially offering rent relief program opportunities to their tenants?

Joel: Yeah, it's very topical because as landlord's make inquiries, which I've been happy to go through now, tenants are, particularly tenants who are private companies, are now operating in an environment where they're being asked to make a disclosure of information that would otherwise not be normally granted to their landlord during the tenancy relationship, my advice has been to start from basics and that is when there's rent deferral or abatement discussion about the absence they're starting, the first step is to look at the current identity of the tenant. That is more of a lawyer's position in that dialogue. But now is the time to review the tenant's corporate status to see if there's been amalgamation, or other corporate reorganization that the landlord was not aware of, to review against the lease whether consent was required and whether it was, or was not, a given. Certainly the financial status of the tenant is important to understand. It is absolutely normal for a

landlord to make reasonable inquiries of the tenant's past sales, current sales, projections, which is quite obvious what the case may be, the extent to which it's mitigated losses and the extent to which it has made application to some of the government programs that we've talked about here. During that review it's also important for a landlord to take a moment and review property taxes, to the extent that that has been left in the charge of a tenant, and the tenant's insurance. That's reviewing against the coverage requirements under the lease. So these are normal asks during the discussion between landlord and tenant. Out of that discussion, and there may have been concerns prior to the COVID situation, but the landlord may have concerns about the financial covenant of the tax ... In consideration of the landlord making any type of rent concession, it is absolutely appropriate to start a discussion about whether more security, or the addition of an indemnifier to the lease, is warranted. The landlords being asked to take some risk here and certainly, potentially, a financial hit, and to the extent the landlord can secure that position or mitigate that risk, that's a valid ask of a landlord.

Susan: Can I just ask you, so you talked about rent relief and we talk about abatement and deferral. Just quickly, what's the difference, if you'll just explain to our viewers the difference. I'm not sure too many know, but just quickly, the difference between an abatement and a deferral.

Joel: Certainly. Very important. An abatement is the forgiveness of rent. The duration of that forgiveness, or the scope of it, is absolutely a matter of contract. My caution with an abatement is, if only because of the program that was just announced by the Federal government on Friday, it is too early to be having discussions about rent abatements that are lengthy in nature. If only because we don't know what other financial assistance is out there from other parties, namely government, to assist tenants through this process. By contrast, a rent deferral is, as implied, is a deferment or postponement of all or part of the rent to some future point in time, and that's usually coupled with the repayment mechanism, which is amortized over, I've seen a range from a year up to 3 years, with or without interest.

Susan: Right. Okay. I think that's very helpful. Darren, landlords. They come in all shapes and sizes and I think it's important for those who are viewing who are tenants to understand that landlords are accountable to other people as well. They're accountable to their lenders, their accountable to service providers, could you just talk about that a little bit?

Darren: Sure, Susan. So, two things. First, I think, tenants needs to be understanding of landlords. No matter what their size they're not a big bad landlord because they have

obligations to these other parties. You could have a large landlord who has major covenants and loans to lending institutions or small landlords. We just really don't know. It varies among all of them to a degree the project is paid for, and what their expenses are. In fact, for a landlord to make some sort of a rent concession or rent relief, they probably need to get permission from their lender before they do that. That will be a provision in the loan agreements and in their mortgages. In addition, there are other parties that are relying on landlords. For example, service providers, they have contract for maintenance, whether it be landscaping or, fortunately snow removal is gone for now, but all these other service providers to the buildings that are also relying on the landlord so it's kind of a chain of events. You can't just stop one of them and expect it to all be fine.

Susan: Good point. Next I wanted to talk about the thing that we're getting lots of emails about. Lots of calls. Julie smiles because she knows, force majeure. I mean, what are some of the arguments that tenants can potentially put forward to say that they're not going to pay their rent or they don't feel that they should be paying their rent. Julie, could you comment about force majeure and I understand it's a little different in Quebec than in the rest of Canada. So, just talk about that a little bit.

Julie: Well, first of all it's really important to review your lease to see if you have a force majeure clause. Pay particular attention because a lot of the time those clauses are solely to the landlord's benefit and when they are to the benefit of both parties they usually do not excuse the tenant of fulfilling it's monetary obligation as paying the rent.

Susan: Right.

Julie: So, this being said, if we look at it from the, I'll skip something to go to Quebec, because let's say that your situation, where you don't have any force majeure clause but you're in Quebec. Section 1472 of the civil code specifically deals with force majeure. If it's not written in your contract a tenant could argue force majeure but in order for the tenant to do so you need to prove that the advance was meeting characteristics. You need to prove the unpredictability of the event and the irresistible nature and it's security. The proof of the irresistible nature is really hard because it needs to be the absolute impossibility of fulfilling its obligation. As we know, a tenant under a lease has not much obligation other than paying their rent. Sometimes to continually occupy and sometimes to make some repairs. I believe that landlord will have the arguments of saying, particularly with the new rent grant and the fact that COVID-19 is a temporary situation, well the landlord will have ... of saying, "Well, okay, yes tenant. Perhaps you have difficulty paying your rent but you are not in the absolute impossibility of paying you rent." But on the other hand, if you look at it from the landlord's point of view, the landlord will have strong

argument of saying, "Well, because of a company slow down, I was ... the possibility of a renting certain services that I usually do of a fulfillment obligation under ... clause or renting complete access to my office building or to my shopping center." So I certainly believe that it's going to be much more to the advantage of the landlord than the tenant. I believe, Darren, that you want to look at it from the tenant's point of view.

Darren: Yeah, so, I think it's also more than just that. There's different elements of force majeure. When we think about force majeure there are actions that the tenant and landlord have to take. A tenant may have a continuous operation clause, very common in retail provisions and retail leases, there may be co-tenancy clauses, again that's common in retail leases, and these are things that under the current circumstances with COVID-19, these are things that probably landlords and tenants can't meet. I think that force majeure would apply to that, or quite likely apply to that, where's it outside of their control, they are unforeseen and they're unable to deal with them. Again, it's really important

Susan: Darren, I guess if it's not in the lease or in the contract then they're not entitled to it as it was to Quebec where there is a civil code right. Is that correct?

Darren: Right. I think there can be some common law where you could have it an entitlement of force majeure but I think one of things to consider is most leases do have a force majeure, they might call it an unavoidable delay clause.

Susan: Right.

Darren: It would be the norm to have that. You should look at that very closely, and most of them do tend to favour the landlord, and they say that rent or financial obligations are not covered by force majeure. Not necessarily but quite often.

Susan: One are the arguments now, we've also been hearing is frustration, typically. So can you comment about frustration? That's obviously a common law, right? It's not necessarily ... within the contract itself. What is frustration? If someone was to claim that.

Darren: Right. Frustration has some connections to force majeure but it's a stronger remedy. So frustration of a contract occurs where a situation has arise, for which the parties didn't make any provision in the contract, that's why you don't see frustration clauses built in. In such instances where performance of the contract becomes, let's say, a thing radically different from that which was undertaken in the contract. Where there's been some event that the parties couldn't have anticipated and it's such a radical change that it makes a contract impossible to perform. Another major difference with force majeure and frustration is force majeure is usually a time limited thing where it doesn't end

the contract but it puts it on delay. A lease might be delayed or payment of rent might be delayed. Whereas in frustration the contracts at an end. It's a very broad and strong result. What we're seeing and the sessions we've had is that frustration may be, is probably too strong of a remedy, at this point and most leases are longer term. If there's a long term lease that goes on for years and if there's a few months of problems, or a few months of inability to carry on business, that might be too strong.

Susan: That brings me to business interruption insurance. Some people have argued that tenants should argue against business interruption insurance. There was a fairly recent case that came out, however, in my view and I think in the view of a number of people, it's not totally on point. I think the difficulty of business interruption insurance is that there needs to have been a loss that was caused or incurred when there was essentially damage to the property. It's going to be difficult to say that the COVID-19 in and of itself was a damage to the property. However, again, I think this is going to be heavily litigated and it really depends on the individual's business interruption clause and how expansive it is. Also, if it in fact actually included reference to infectious diseases and/or pandemics specifically. Some have but it's not actually that common. Joel, right to terminate. Some tenants have a right to terminate in their lease. Is it usually like anytime or is it restricted in time?

Joel: I think I'll start off by saying one of the theme's that's coming out of this discussion, and others like it, is the importance of reading each individual lease and, in particular, paying attention to the special provisions which is often where one would find this tenant right. Either by virtue of the tenant having bargaining power at the outset or the landlord being interested in securing a key tenant in the new development. The right itself is can be triggered by a number of negotiated points. It could be a decrease in sales, it could be closure of some common areas, restricting access to the premises or, another example would be where a key tenant in the development is either temporarily or permanently not operating. Pardon me?

Susan: Co-tenancy clause.

Joel: Exactly. It's so important that both parties understand their respective positions and be aware of the pre-conditions to exercising that right. It's on the topic of pre-condition that the caution for tenants would be these are often drafted in a manner that it is a condition precedent of the exercise of that right; that the tenant not be in default or not have been in default during the history of the tenancy. Certainly, if there's been a situation where that is in the lease, a tenant made a decision not to pay all or part of rent in April, by the time you get to the rent deferral discussion, that tenant right may have been lost.

Susan: Right. What about quiet enjoyment? I've heard some tenants say that the landlord has taken away their right to quiet enjoyment. Certainly, some landlords are saying, "I haven't done anything. There's a state of emergency in place. Any thoughts about the argument of quiet enjoyment?"

Joel: Just for the benefit of the everyone watching, most commercial leases, if not all, have an expressed covenant given by the landlord to the tenant which runs along the lines of something like provided the tenant pays rent and otherwise complies with the terms of the lease, the landlord grants to the tenant quiet enjoyment of the premises. Which essentially means subject to any expressed rights set out in the lease, the landlord's going to grant the tenant the right to peaceably use the premises for the described purposes. Now, in order for a breach, sorry, where we're seeing this type of discussion or argument coming forward is in the shopping center context. Where there's been reduced access. For a breach of this covenant to be demonstrated it has to be shown that it's the action, either indirect or direct, of the landlord in that the landlord saw, or should have foreseen, that it's action would cause some substantial interference with the tenant's use of the premises. A classic example is where the landlord is regularly interfering with access to the premise. That is a tried and true example of a breach of quiet possession. Some words of caution around looking to this argument would be, again like the tenant's rights situation, it's often conditional on the tenant complying with all terms of the lease and not having been in default at any time. It is also relevant to look at whether the landlord is complying with a government order or whether it was done voluntarily.

Susan: That's a compliance of laws section. That's really important. You always have to look at the clauses at the end of the lease or the clauses just up at the front of the lease. Those are sometimes the most important provisions of all.

Joel: That's exactly it.

Susan: ... clause, waiver provisions, time of the essence, all of those provisions are so, so important. I'm just ... based on time. We're just going to jump now to what are the types of relief we're seeing, that landlords are offering tenants? Darren, so what are some of the deferral options that you are seeing, or that we've been talking about, that landlords are offering the tenants?

Darren: A range of default options, lot of them can be quite frankly. So, we see landlords were allowing deferrals for 2 months, 3 months or even 6 months, and the repayment terms can vary greatly as well. So deferral means they do have to pay back. I've seen them where they have to repay by the end of the year, over the few months right after the

deferral. Looked at one this morning where it was pay back over the next calendar year and some where they may just add it on to the long term of the lease to reduce that number somewhat. Other options they may provide is they could provide percentage rent only, there are some savings in operating costs which hopefully would be passed on. If the cost isn't there the tenant would benefit from those costs. Other things they may apply, the security deposits from the existing leases, rather than waiting for that they may apply those now. Really, the big thing now I think you're going to see is when we need some more detail on this new government legislation providing rent relief. A lot of what you might want to do as a landlord, or a tenant, will be dependent on what the government provides in details on those programs.

Susan: Right. Fair enough. I think one of the issues also is, is what is the considerations for agreeing to deferral or the agreement. Joel, you touched on it before. You said potentially asking for an indemnifier, additional indemnity. Another thing is, is that maybe potentially a termination clause that if there's struggling and maybe consider whether the landlord wants to terminate the lease because maybe they want to expand or renovate or redevelop the premises, and so as quid pro quo the landlord may say they want a termination clause. We have situations where if a tenant has asked for a deferral we've heard that some landlords are asking, saying that they'd like to retract any options to purchase, options for additional space, options to extend, and/or amend the leases to include a right to redevelop, demolish or renovate. Also the addition of, you mentioned Joel, was addition of maybe more waiving financial covenant obligations. A number of tenants have successfully negotiated, understandably, not to have to deliver financial statements at the end of the year and generally only deliver financial statements when they're paying gross rent, but maybe in the circumstance, even if they're not paying, sorry not gross rent, percentage rent I should say, maybe in the circumstance, even if they're not paying percentage rent, asking for financial statements through that process. Julie, paper the deal. What do you think?

Julie: Well, it's really important to paper the deal. So usually what we see is the party is entering into a lease amending agreement. What should be in that lease amending agreement, well, firstly under common law there should be a consideration clause. As you know, we don't have that in Quebec. It should clearly state when the concession expires. It should say that, in the lease amending agreement, all of the clause of the lease remain in full force and effect and unamended. It should say that time is of the essence. It should say that the concession is not a waiver of any of the clause of the lease. Most always have a confidentiality clause in there and also, as you guys have touched on, if there was an indemnifier of the original lease, well they should also be signing this lease amending

agreement.

Susan: What's the purpose of a confidentiality clause?

Julie: I wouldn't want my landlord saying that it grant different rents for 4 months for a tenant and 2 months for another one, when the tenant's are talking to each other and knowing what particular deal as a landlord I've given to one tenant versus the other.

Susan: I guess that's because there might be different extenuating circumstances. People sometimes may think it's the same but it's different so that's why it's that important. I guess what you're saying is sending an email saying, "Yeah. It's okay, you don't have to pay your rent for 2 months is not the way to go?"

Julie: No. No. No, no, no.

Susan: Not the way to go. Next, I wanted to talk about, Joel, what advice do you have for landlords and tenants who are in the middle of a sit out period. They haven't taken possession or, the ... hasn't started and they're trying to get the work done. What are some thoughts and things we should be thinking about and structuring, or maybe restructuring, deals that have already been documented?

Joel: That's very topical right now because of the delays in obtaining permits and inspections or even shortage of labour and materials. It brings into a discussion or a review of the relationship between landlord and tenant, and often a review of construction contract, that the landlord or tenant are a party to. I want to reiterate what's been discussed already and that is communication is absolutely essential between landlord and tenant. One hopes that there's a path set out in the lease for delays. If the build out provisions have been properly drafted it will contemplate a scenario for what happens when there is a delay, and as do most construction contracts, and the force majeure clause does come into focus during these circumstances. But because of the uncertain nature of what we're facing, again, I go back to communication. To the extent that communication, that path isn't going to unfold in a favourable manner for one party, it's critical that the party who's facing the delay, and frankly the other side too, each keep a very detailed diary of the events and how, for example, the COVID-19 situation has led to the delay. What's the nature of the delay? It's critical that parties pay attention to notice provisions. Often when there's a delay there's a strict protocol for giving notice of that delay and it must be followed to the letter. Other points would be what steps has the party facing the delay taken to mitigate that delay? And detailing how the construction path has been interfered with. Now, because of the time that's lapsed between the beginning pandemic, in the Canadian context, and where we are today I would suggest

that a number of these issues have been identified and discussions already happening. We're kind of at a point now where it's time for parties, to the extent that the resolution isn't on the horizon, to start retaining delay consultants to quantify the scope of the loss, the potential loss caused by those delays. But document, document, document.

Susan: Yeah. That's the bottom line. Document, document, document. I guess, where do we go from here? What we know is that everything's uncertain right now. To the extent that our clients are often calling and asking us to take the crystal ball out and figure out where we go from here. I think right now, especially since the new Canadian Emergency Commercial Rent Assistance program has sort of come out but not fully come out, and we really don't know the full details of it just yet, it's probably, as you suggested Joel, best if you're in a circumstance that you continue with a rent deferral until such time if one has been put in place. If one hasn't been put in place it's obviously up to the landlord. But to continue with that as such time as we understand what the actual details will be of the emergency Canadian Emergency Commercial Rent Assistance program will be. I've noticed we've gotten a number of questions. We don't have a lot of time left and we still have a few things to talk about. There seems to be a number of people have asked what if you have multiple locations? I think, it's unclear yet, but I believe that this program is really focused and oriented towards small and medium size businesses, and what will likely happen is those businesses who operate multiple locations under the same corporate entity, will likely not qualify for the new program. It's something but we're not certain just yet. It's highly unlikely that that will offer a more significant program for larger tenants but we don't know. In 2008 the government bailed out Chrysler and GM. So who knows? It'll be interesting to find out and similarly we don't know if the pandemic will subside, and hopefully we'll flatten the curve but it may come back in the fall and ... in the winter. So there could be additional programs that may be available in the future. But what we do know is that everyday everything changes. And the landlords and tenants will likely have to revisit any deferral agreements or abatement agreements they've made and to reconsider where those businesses are. What's also really important, and I think something is likely fundamentally different than the recession that we had in 2008, the economic downturn, is that people are just going to be different. I think it's going to be a period of time before people are going to feel comfortable going to concerts, and going to movie theatres, and going out to listen to music and going to crowded bars and entertainment. Hopefully it won't be that long but likely I think people are going to be changing the way they interact with one another. So there, unfortunately, may be some industries, your businesses, they may not be able to recover and hopefully there'll be others that can recover. It'll be a coordinated effect between the parties, the landlords and the tenants, and the lenders and the government and the service providers working

together.

Darren: Susan, one thing that we want to just remind people of is that all though we've given a lot of advice, we think there'll quite likely be some further litigation that comes out of this. Thinks like force majeure and frustration and quiet enjoyment might not have had any recent cases but there'll almost certainly be some litigation that comes from it that might create some new law that we weren't aware of.

Susan: I think that's absolutely going to be the case. We typically see that that happens after there is an economic downturn. One of the things we often also see is the courts tend to favour what they perceive the party with deeper pockets. Which may or may not be fair. It's the court of equity. Julie, can you give us some final thoughts on some of the things that we should be thinking about as we move through this difficult time.

Julie: Final thoughts, I have to end this by saying ... we're all in this together. I think that we've touched on the important things to really review your lease and not to assume what your lease has. We've mentioned to you that communication is key and we encourage the landlord and tenant to keep themselves apprised of their situation punctually. We've mentioned to you it's really important to document your deal. For those leases that are being negotiated right now, that the parties will have to take into consideration all of the issues we discussed today and the fact that this virus might recurrent. So in the drafting there needs to be latitude in there. No delay, provided that the parties act diligently, in good faith, without dragging their feet. If this comes back it shouldn't be default of the landlord or the fault of the tenant. Obviously all of our ... to help you out if you have question for us or mandates.

Susan: Right. We want to tell everybody watching today that we are going to have another webinar. We're anticipating it's probably going to be at the end of May or mid-June. Hopefully the Canada Emergency Commercial Rent Assistance program will be fully baked at that point. We'll know what each of the Provinces is going to do or will do. We're also going to be talking about next steps. Where we go from here and our communities opening up and social distancing reducing. I think we may even see start to see, hopefully we won't see any litigation yet at that point, but we'll start to see, I think, some themes coming through. We're going to be having that next webinar so we really, really invite you to attend and watch. I want to thank Joel Camley, from our Vancouver office. Thank you, Joel. I want to thank Julie Desrochers, from our Montreal office and, of course, I want to thank Darren Taylor, from our Alberta office, our Calgary office. Thank you to each of you for helping and participating and all I can say is, stay safe, shelter in place and let's see what comes in the next couple of days and weeks to come. Thank you very much.

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