

NEXT STAGE: Q&A ON COVID-19 IMPLICATIONS FOR PERFORMING ARTS



CANADIAN
ASSOCIATION FOR
THE PERFORMING ARTS



GOWLING WLG

PRESENTERS



Susan Abramovitch
Partner, Gowling WLG
Head of Entertainment & Sports Law
Toronto, Canada
+1 416-814-5673
susan.abramovitch@gowlingwlg.com



Jahmiah Ferdinand-Hodkin
Partner, Gowling WLG
Ottawa, Canada
+1 613-786-0275
jferdinand@gowlingwlg.com



Andrew Bratt
Partner, Gowling WLG
Toronto Group Leader, Employment Labour & Equalities
Toronto, Canada
+1 416-369-6641
andrew.bratt@gowlingwlg.com



Alexis Vaughan
Associate, Gowling WLG
Toronto, Canada
+1 416-862-7661
alexis.vaughan@gowlingwlg.com

Gowling WLG COVID-19 Updates: <https://gowlingwlg.com/en/topics/covid-19/overview/>
gowlingwlg.com

Gowling WLG (Canada) LLP is a member of Gowling WLG, an international law firm which consists of independent and autonomous entities providing services around the world. Our structure is explained in more detail at gowlingwlg.com/legal



LEGAL DISCLAIMER

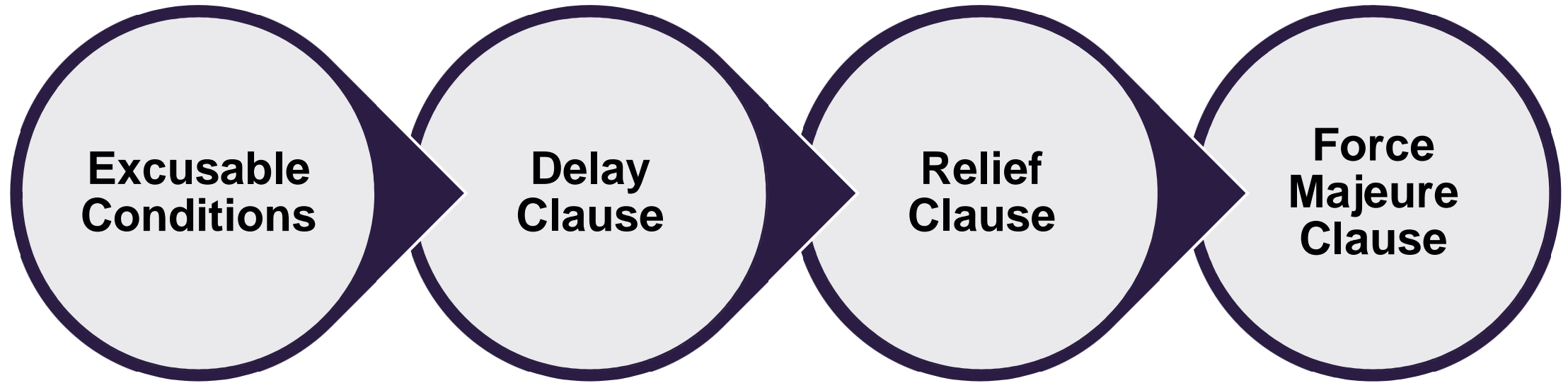
- The presentation today is not intended as legal advice.
- Because this is a high level overview, it is impossible to cover all relevant details, and available rights and remedies will depend on the unique facts of each situation.
- For specific advice, please consult with your qualified legal counsel before making any decisions or taking any action. This is of particular importance as every province and territory in Canada has its own legal regime.
- As you know, the situation is extremely fluid and is changing on a daily basis. As circumstances evolve, your best course of action could also evolve. Follow up to date and reliable sources for your information. **This information is up to date as of May 21, 2020.**

AGENDA

Topic	Speaker
Force Majeure and Frustration	Jahmiah Ferdinand-Hodkin
Force Majeure IRL: A Case Study	Susan Abramovitch
Employment Issues	Andrew Bratt
Copyright Law	Alexis Vaughan
Copyright IRL: A Case Study	Susan Abramovitch

FORCE MAJEURE/ CONTRACT FRUSTRATION

CONTRACTUAL SOLUTIONS



FORCE MAJEURE – SAMPLE – *NOT FOR USE*

Neither party shall be liable for any costs or damages due to delay or non performance under this Agreement **arising out of** any cause or event beyond such party's control, including, without limitation, **cessation or services hereunder or any damages resulting therefrom to the other party as a result of** work stoppage, power or mechanical failure, computer virus, natural disaster, **governmental action**, or communication disruption.

FORCE MAJEURE

Protects parties from impairment caused by extraordinary events (“Acts of God”)

Contractual provision that provides for how risk is allocated when an event occurs that is beyond the control of the contracting parties.

Relieves parties from some or all obligations/liability if such events occur

JURISDICTION & GOVERNING LAW



FORCE MAJEURE – *WHAT MAKES A CLAUSE ENFORCEABLE*

ELEMENTS:

1. **Qualification:** was it described in the clause;
2. **Impossible Performance Standard:** was or is performance truly impossible;
3. **Foreseeability:** was the risk of non-performance foreseeable and able to be mitigated
4. **Remedy:** what next?

FIRST QUESTION: DOES THIS QUALIFY

- **Pandemic**
- **Public Health Emergency**
- **Government Action/Restriction/Regulation**

SECOND QUESTION: WHAT WAS THE CAUSE

Do the circumstances meet the impossible performance standard?

QUESTIONS:

- 1.** Is an industry directive for a temporary closure an appropriate force majeure trigger?
- 2.** Is force majeure triggered if the closure is the result of a Government restriction or regulation?
- 3.** Does a preventative closure by the facility trigger force majeure?
- 4.** Are you limited to relying on force majeure only where there is a direct incident of infection

THIRD QUESTION: DID YOU SEE IT COMING

- **Foreseeability Window = CLOSING**
- **Review, Analyze and Respond**

FOURTH QUESTION: WHAT DO YOU WANT

- **Verify the Contract for remedies**
- **Extension/Cancellation**
- **Financial solution?**

DOCTRINE OF FRUSTRATION

NO force majeure clause OR force majeure clause does not fit

- The doctrine of frustration applies where a situation has arisen for which the parties made no provision in the contract and the performance of the contract becomes “a thing radically different from that which was undertaken by the contract”
- Frustration is a common law principle (not a contractual one)
- Force Majeure = excusing party from a force majeure related obligation
- Frustration = entire contract brought to an end

HOW IT APPLIES

The doctrine of frustration

- Different implications and consequences
 - Force Majeure = excusing a party from force majeure related obligations
 - Frustration = entire contract brought to an end

Courts will still consider defences based on the foreseeability of the impairing event

FORCE MAJEURE: A CASE STUDY



FORCE MAJEURE CASE STUDY

The Players



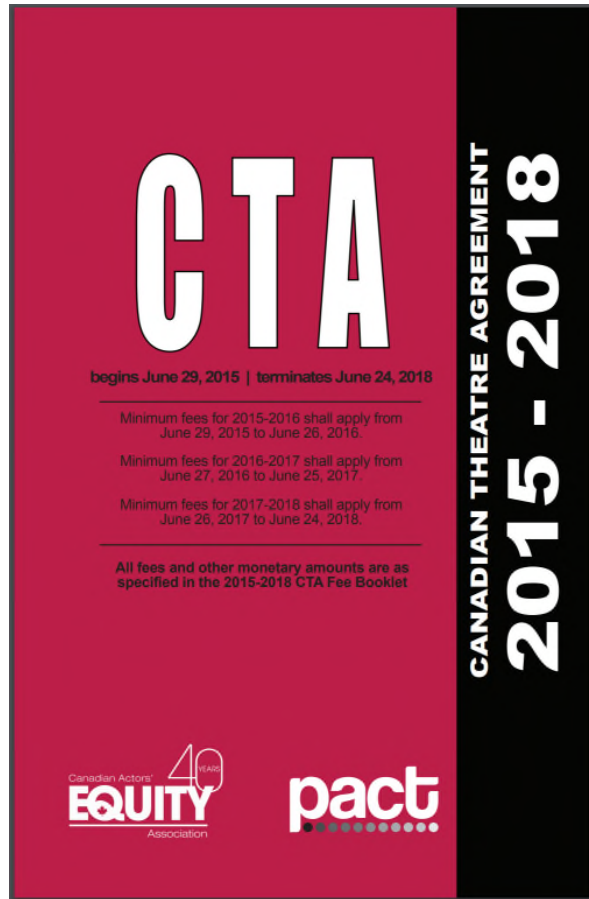
Professional
Association of
Canadian Theatres

Canadian Actors'

EQUITY

Association

CANADIAN THEATRE AGREEMENT



37:00 PERFORMANCES AND/OR REHEARSALS LOST

If the company cannot rehearse or perform because of the serious and prolonged illness or the death of a prominent member of the cast, fire, accident, strikes, riot, Acts of God or act of the public enemy, which could not be reasonably anticipated or prevented, then the Artist shall not be entitled to his/her contractual fee for the time during which his/her services shall not for such reason or reasons be rendered, except that the Artist shall receive one-seventh (1/7) of the minimum fee for the applicable Company Category for each day on which rehearsals or performances are not given thereafter including the Artist's free day. Should any of the foregoing conditions continue for a period of ten (10) days or more, either party may terminate the CTA Engagement Contract immediately and the Theatre will pay the Artist for all services to date and his/her transportation back to the place of residence. If the above should occur outside the point of origin, the Artist will receive the applicable per diem during the ten (10) day period.

38:00 TERMINATION

38:01 Notice Period

(A) Two Weeks Minimum

The minimum period of notice of termination for the Artist shall be two (2) weeks.

...

PACT AND CAEA JOINT INTERPRETATION

March 16, 2020

PACT and CAEA Joint Interpretation Bulletin of Article 37

PACT and CAEA have discussed and agreed upon the following interpretation of Article 37:00 of the Canadian Theatre Agreement.

37:00 PERFORMANCES AND/OR REHEARSALS LOST states the following: *If the company cannot rehearse or perform because of the serious and prolonged illness or the death of a prominent member of the cast, fire, accident, strikes, riot, Acts of God or act of the public enemy, which could not be reasonably anticipated or prevented, then the Artist shall not be entitled to his/her contractual fee for the time during which his/her services shall not for such reason or reasons be rendered, except that the Artist shall receive one-seventh (1/7) of the minimum fee for the applicable Company Category for each day on which rehearsals or performances are not given thereafter including the Artist's free day. Should any of the foregoing conditions continue for a period of ten (10) days or more, either party may terminate the CTA Engagement Contract immediately and the Theatre will pay the Artist for all services to date and his/her transportation back to the place of residence. If the above should occur outside the point of origin, the Artist will receive the applicable per diem during the ten (10) day period.*

We have agreed that the correct interpretation and application of Article 37:00 is that should a Theatre be required to cancel a performance or rehearsal for reasons beyond its control, the payment provisions of Article 37 shall apply; specifically that the Artist(s) be paid 1/7th of the minimum weekly fee according to the applicable company category per day that the performance or rehearsal is cancelled, for a maximum of 10 days, including per diem if the Artist(s) are outside the Theatre's point of origin. After performances or rehearsals are cancelled for a period of 10 days, the Theatre can terminate the CTA Engagement Contract effective immediately, with no further payout required.

Should the reason for the cancellation be within the control of the Theatre, Article 37:00 does not apply and the regular termination clauses as outlined in Article 38:00 apply.

Please contact your association directly with any questions.

Thank you,

EMPLOYMENT ISSUES

YOUR QUESTIONS

- 1. Can employment contracts be revised to reflect the “new normal”?**
- 2. How can we ensure that artists/contractors are healthy before coming on site?**
- 3. How can we mitigate the potential costs associated with a temporary layoff becoming a deemed termination after 13/35 weeks?**

COPYRIGHT LAW



YOUR QUESTIONS

- 1. What copyright issues should my organization consider when posting performances online?**
- 2. Can my organization post archival footage that was never intended to be shared publically?**
- 3. My organization has asked performers to record clips that will be spliced together to create a compilation video. Who owns copyright in the final video?**

WHAT IS PROTECTED BY COPYRIGHT?

Works	Other subject Matter
Literary Works	Performer's Performances
Dramatic Works	Sound Recordings
Musical Works	Communication Signals
Artistic Works	

OWNERSHIP OF COPYRIGHT

Generally...

The Author(s)

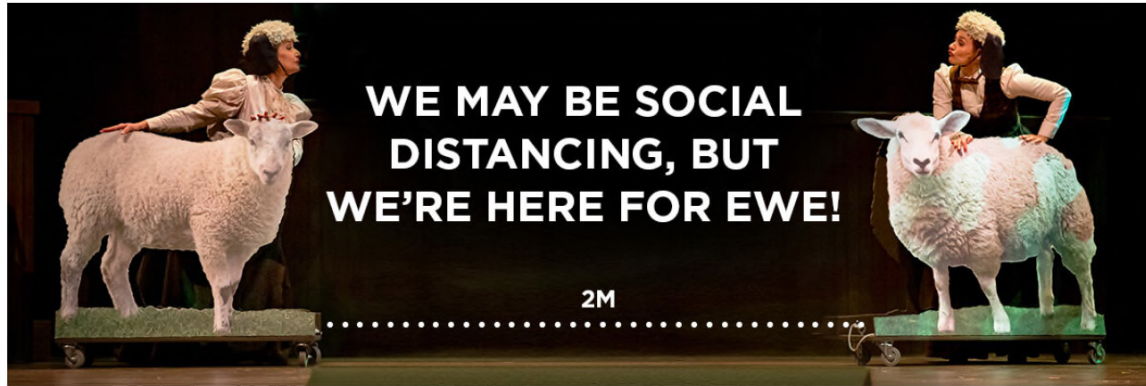
Except...

Work made
in the
course of
employment

Assignment

License

CONSIDERING COPYRIGHT LAW: A CASE STUDY



FROM THE ARCHIVES



CANDIDE – 2020



DON GIOVANNI – 2018

Music

Watch members of the Toronto Symphony Orchestra come together for virtual performance



They performed sections of the suite from Aaron Copland's Appalachian Spring

[Melody Lau](#) · CBC Music · Posted: Mar 23, 2020 11:43 AM ET | Last Updated: March 23



Members of the Toronto Symphony Orchestra came together, virtually, to perform for music lovers in the midst of the COVID-19 pandemic. (cnstntnrg/YouTube)

PRESENTERS



Susan Abramovitch

Partner

Head of Entertainment & Sports Law



susan.abramovitch@gowlingwlg.com



+1 416-814-5673



Andrew Bratt

Partner

*Toronto Group Leader, Employment
Labour & Equalities*



andrew.bratt@gowlingwlg.com



+1 416-369-6641



**Jahmiah Ferdinand-
Hodkin**

Partner



jferdinand@gowlingwlg.com



+1 613-786-0275



Alexis Vaughan

Associate



alexis.vaughan@gowlingwlg.com



+1 416-862-7661



GOWLING WLG