COVID And The Courts: The Year In Review

Canada has officially surpassed the one-year anniversary of our first case of COVID-19. The ensuing pandemic has since disrupted almost every aspect of our lives and has thrown us into a great recession. Ever since the difficulties and restrictions caused by COVID-19 started taking effect, many questions have arisen about what sort of protections the law would provide for individuals and businesses and how the inevitable storm of litigation would play out.

Although these questions are far from settled, COVID-19-related issues have been litigated extensively in the courts over the past year and we have been given some guidance as to how the law will (or will not) protect those affected by this ongoing pandemic. On top of this, many regulatory and legislative changes have been introduced to help accommodate us during these strange times.

Changes to the Justice System and Legislation

When the initial lockdowns started to take hold last March, the government and court system wasted little time taking measures to adapt to the new reality. For the first time, courts allowed materials to be filed electronically, thus doing away with the requirement of in-person attendances. This change was seen by many as important and long overdue.

The court system also immediately began to embrace remote hearing technology and litigants at all levels of the Ontario Justice system were able to conduct hearings, case conferences and appeals over Zoom. In certain circumstances, courts also opted to have certain matters determined entirely in writing in order to alleviate the need for oral advocacy. In addition to that, an electronic hearings task force was established to implement the use of virtual hearing technology for court hearings across Ontario.

As virtual hearings started to gain traction, many litigants began to oppose them as a viable means of prosecuting their cases. On top of this, parties also took issue with participating in virtual examinations and having matters determined in writing. In response to these objections, both the Ontario Superior Court and the Court of Appeal made a number of orders to compel litigants to participate in the new justice system by forcing them to conduct hearings and examinations virtually and have appeals heard entirely in writing. These decisions served as reminder that people could not side-step the litigation process because of COVID-19.

The Ontario Ministry of the Attorney General also made a series of important orders to protect litigants and the public at large during this uncertain time. First and most notably, an order was made suspending all limitation periods in Ontario retroactive to March 16, 2020 as an emergency measure. The suspension has since been lifted and limitation periods have resumed, but the order did indeed provide some much-needed comfort when the initial turmoil began. On top of that, orders were made to halt residential evictions and to suspend administrative dismissal notices and dismissal orders in Superior Court.

But perhaps the biggest change to occur in Ontario's justice system last year was a sweeping number of important and timely changes to the Ontario *Rules of Civil Procedure*. The changes include accommodations for remote hearings, facilitating electronic documentation signing and service, and doing away with obsolete practices, like fax machines. These changes were heralded as a positive step to make Ontario's justice system more efficient and to encourage litigants to adapt to present-day realities.

Protections for both Landlords and Tenants

In addition to amending the *Rules of Civil Procedure*, at the end of 2020, the Ontario Government also altered the *Commercial Tenancies Act* (the "*CTA*") to provide protections for commercial tenants eligible for COVID-19 emergency relief programs.

On December 8, 2020, Ontario Bill 229 came into force, which amended the *CTA* to establish "non-enforcement periods" for qualifying commercial tenants. During a non-enforcement period, courts are prohibited from evicting tenants for non-payment of rent, and landlords are prohibited from terminating leases due to any type of default by the tenant and from distraining on a tenant's goods.

The amended legislation also includes provisions with retroactive effect. If a landlord terminated a lease between October 31, 2020 and December 7, 2020, it is required to restore possession of the premises to the tenant as soon as reasonably possible, unless the tenant declines to accept possession. If the landlord is unable to restore possession of the premises to the tenant, the landlord is required to compensate the tenant for all damages sustained by the tenant by reason of the inability to restore possession. Similarly, if a landlord distrained upon a tenant's goods for arrears of rent between October 31, 2020 and December 7, 2020, it must return any unsold goods to the tenant as soon as reasonably possible.

Soon after these amendments were put in place, a commercial tenant was able to put them to use when a court granted it relief from forfeiture of its premises.

In *2487261 Ont. Corporation v. 2612123 Ont. Inc.,* 2021 ONSC 336, a tenant, rented commercial space for use as a banquet hall. The Tenant paid rent on time each month until March 2020, when it was forced to stop operating its business because of provincial restrictions caused by COVID-19. The Tenant failed to pay rent in full between March and October 2020 and on October 19, 2020, the Landlord entered the premises and locked the Tenant out of its banquet hall for non-payment of rent. The Tenant commenced an application for relief from forfeiture.

In granting the Tenant's application, it was held that the new provisions of the

CTA established a non-enforcement period during which commercial landlords were not entitled to exercise a right of re-entry for failure to pay rent. However, the non-enforcement period established by the new *CTA* provides a blanket prohibition on re-entry for any reason, not just rent defaults. The Landlord re-entered the premises on October 19, 2020, even though the non-enforcement period had been extended to October 30, 2020 at that time. For that reason, it was held that there was "no doubt" that the Landlord must restore possession of the premises to the Tenant.

The decision did not address the new section 86 of the *CTA*, which provides that a landlord will be liable to the tenant for any damages sustained as a result of their unlawful re-entry. This is likely because the Tenant in this case did not sustain any damages as they were not operating at the time.

Although this decision and the recent amendments to the *CTA* are seen as a victory for tenants, another recent decision has been hailed as good news for landlords who have been affected by the current pandemic.

In the matter of the *Companies' Creditors Arrangement Act (the "**CCAA**")* of North American retailer *Groupe Dynamite*, a major retailer with over 300 stores across Canada and the U.S., had to shut many of its locations due to COVID-mandated lockdowns and closures of non-essential businesses. It soon commenced bankruptcy proceedings under the *CCAA* as a result. The retailer sought a court order in Quebec Superior Court to allow it to get out of paying rent after it made its filing under the *CCAA* and the landlord opposed. In determining the tenant's request, the court looked at section 11.01 of the *CCAA*, which permits a supplier of goods or services to require immediate payment for the use of leased premises.

In considering this, the court concluded that, despite the government-mandated closure of the tenant's stores, the tenant was still using the premises for the purpose of the *CCAA* and it therefore had to pay rent. The court also held that it did not have jurisdiction to allow the tenant to get out of paying rent in this case and even the existence of unprecedented circumstances like the COVID-19 pandemic did not factor into the decision of whether jurisdiction should be granted.

Challenging Government-Mandated Shutdowns

As 2020 drew to a close, a new sweeping round of government-imposed regulations placed businesses across Ontario in lockdown. Only "essential" businesses were permitted to remain open, with all other businesses being forced to cease normal operations. Soon after those measures were put in place, certain businesses began challenging them in court.

For instance, in *Canadian Appliance Source LP v. Ontario*, a large appliance retailer sought a court order to allow it to keep operating during the lockdown on the basis that it should be deemed an essential service. In that case, the business (Canadian Appliance Source LP) was one of Canada's largest home appliance retailers, which operated 29 showrooms in six Canadian provinces. After the lockdown commenced, Canadian Appliance refused to close on the basis that it characterized itself as "hardware store" and was therefore exempt from mandatory closure under the terms of the applicable regulation. After it was charged for defying lockdown orders, it commenced an application in Superior

Court seeking an order requiring the government to allow it to remain open on the basis that it operates “hardware stores”, which are exempt from mandatory closure under the express terms of the applicable regulation.

Canadian Appliance argued that it should be deemed to be a hardware store by virtue of the fact that hardware stores sell appliances, which are also hardware. In response, the Ontario government argued that Canadian Appliance was not interpreting the regulation correctly and that it did not fall within the category of essential businesses which are permitted to remain open. Canadian Appliance argued that it is an essential service business because the goods it supplies are “essential” and it was therefore in the spirt of the regulation.

The application was denied, and Canadian Appliance was not allowed to remain open as a result. The court held that, even though Canadian Appliance sells a type of hardware (like appliances), it does not primarily sell products which are found in a conventional hardware store, such as tools and building supplies. It was also held that this argument would create a commercial absurdity, insofar as it could lead to the conclusion that any business which sells a type of hardware (such as department stores, dollar stores and computer stores) should also be deemed to be “hardware stores” under the regulation. As for the “essential service business” argument, it was rejected on the basis that it was not an interpretive argument about what the legislature actually meant in introducing the regulation, but rather it begs the interpretative question about what the legislature intended. As such, in making this argument, Canadian Appliance was deemed to be challenging the regulation and not seeking an interpretation of its application.

As such, in the end, it lost its challenge and was not permitted to remain open during the lockdown.

The Effect on “Busted Deals”

Ever since COVID-19 began disrupting business activity, one of the most burning questions that has consistently been raised is whether individuals and businesses could use this pandemic as an excuse to get out of contractual obligations. For instance, some “*force majeure*” clauses in commercial contracts specifically reference pandemics as a viable reason for a party to be excused from performing its duties. But the greater question has been whether, in the absence of such a specific provision, a party to a contract can use an outside circumstance (such as an international pandemic) as a valid reason not to meet its obligations.

The Ontario Superior Court has recently answered this question in the negative in what is expected to be the first of many decisions on this issue. In *Fairstone Financial Holdings Inc. v. Duo Bank of Canada*, a bank argued that it should be entitled to escape its obligations under a share purchase agreement after the target company became negatively impacted by COVID-19.

The subject share purchase agreement contained a material adverse effect covenant which stated that no material adverse effect was to occur between the time the agreement was executed and the closing of the transaction. COVID-19 adversely affected the financial status of the target corporation and the bank refused to close the transaction on the basis the existence of the pandemic constitutes a material adverse effect.

The target company did not accept the bank's recission and brought a successful action for specific performance of the share purchase agreement. The court did not accept that the pandemic constituted a material adverse effect, as defined by the share purchase agreement and the bank was therefore ordered to close the transaction on its terms.

Although the *Fairstone* decision does provide a complete answer to the question of whether the disruption caused by COVID-19 is a valid reason to get out of a contract, we can expect much more similar litigation in the future. However, this case supports the notion that material adverse effect covenants are not intended to protect share purchasers from outside risks, such as a pandemic.

What Comes Next

The vast amount of legislation, regulations and court challenges which have arisen over the past year because of COVID-19 is likely just the beginning. We can definitely expect much more litigation and legislative changes to come about this year, both before and after this pandemic ends. Over the past few weeks, a few more decisions have been handed down which should pave the way for more pandemic-related litigation this year.

For instance, the recent decision of *Yee* v. *Hudson's Bay Company*, 2021 ONSC 387 states that COVID-19 should be taken into account when determining reasonable notice for employees who are dismissed after the commencement of the pandemic. Although COVID-19 did not influence the court's decision in that particular instance, the case may be a starting point for courts to order additional severance to employees who were dismissed after the pandemic began.

Additionally, in *Workman Optometry et al v. Aviva Insurance et al*, 2021 ONSC 142, the Ontario Superior Court awarded carriage of a class action lawsuit by tens of thousands of insurance policy holders who were denied claims for business interruption insurance as a result of COVID-19. Although this lawsuit has not yet made it to the certification stage, it will likely be the first of many such court challenges.

With any luck, the COVID-19 pandemic will finally cease before the end of this year. But given everything that has transpired so far, we can expect another busy year in courtrooms and beyond.

by Pallett Valo LLP
Pallett Valo LLP