COVID19 – Key Legal Issues For Your Charity or Non-Profit Organization to Consider.

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Please note all information provided during this session is not intended to, constitute legal advice; instead, all information, content, and materials available are for general informational purposes only.
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Signing Documents and Getting Things Done during COVID
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Real Estate Issues during COVID-19 – Tips for Dealing with Landlords, Lenders & Others
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www.millerthomson.com COVID-19 Resources
Signing Documents and Getting Things Done During COVID-19
Agenda

• General Overview of Electronic Signatures in Canada
• Electronic Signatures for Specific Documents
  • Written Resolutions
  • Electronic Signatures
  • Gift Agreements
  • Wills
General Overview

Legislation
- General electronic commerce/transaction legislation
- Governing legislation
- Specific legislation regarding jurisdiction and/or context

Governing Documents
- Articles
- By-laws
- Policies
- Signing Authorizations
Electronic Signatures

“A requirement pursuant to any law for the signature of a person is satisfied by an electronic signature”

-Electronic Information and Documents Act (Saskatchewan)
Electronic Signatures

• Electronic signature means:
  • “information in electronic form that a person has created or adopted in order to sign a record that is in, attached to or associated with the record”
    • Electronic Transactions Act (British Columbia)

• Electronic signature may be:
  • Electronic representation of your manual signature; or
  • Electronic information by which you provide your name and clearly indicate it is being provided as your signature to the document
    • Electronic Transactions Act (New Brunswick)
Signning Technology

• Can physically sign a document, and then send scanned copy
• Can use applications for signing documents:
  • Is the person affixing a signature or something they have adopted as their signature to a document
• DocuSign
  • Common in real estate transactions
  • Becoming more popular for other purposes
  • Allows signors to apply a verified and secure digital signature
General Overview

Legislation

- General electronic commerce/transaction legislation
- Governing legislation
- Specific legislation regarding jurisdiction and/or context

Governing Documents

- Articles
- By-laws
- Policies
- Signing Authorizations
Written Resolutions

• Unless the by-laws provide otherwise, a written resolution signed by all the directors or members entitled to vote on that resolution at the meeting is valid as if it had been passed at the meeting.
Written Resolutions

*Canada Not-for-Profit Corporations Act*

Signatures

270 Except with respect to a statutory declaration or an affidavit, a requirement under this Act or the regulations for a signature or for a document to be executed is satisfied in relation to an electronic document if the prescribed requirements, if any, pertaining to this section are met and if the signature results from the application by a person of a technology or a process that permits the following to be proven:

- the signature resulting from the use by the person of the technology or process is unique to the person;
- the technology or process is used by the person to incorporate, attach or associate the person’s signature to the electronic document; and
- the technology or process can be used to identify its user.
Gift Agreements

• Documents gift
• Sets out donor and charity/NPOs understanding for terms of gift
• In the case of a charitable gift, the gift may have binding conditions
  • Cannot be amended unless agreed to between donor and charity at time gift is made
• Recommended that the terms of significant gifts be documented in writing, or gifts with conditions
Gift Agreements

• **Pledge:**
  • a promise to make a future gift – not enforceable
  • Not necessarily signed, but signing indicates parties’ understanding on terms

• **Gift Agreement:**
  • when making an immediate gift
  • the agreement about gift terms.
  • Recommended that it is signed.
  • May be combined with a pledge of future gift, but pledge is still not enforceable

Generally, Pledges and Gift Agreements can be signed electronically
Gift Agreements

• **Deed of Gift:**
  • Signed under ‘seal’
  • At contract law, seal is consideration and creates a binding obligation without doing anything more
• **Reason may be used:**
  • If the agreement to make a future gift is made under seal, may be binding
  • Gifts are only enforceable when they have been ‘completed’ (intention, delivery and acceptance)
  • May be used where delivery is difficulty (real property or gifts in kind that cannot be easily delivered)
Gift Agreements

• **Deed of Gift:**
  • Can a document be signed under seal electronically?
  • ETA BC – silent on the issue
    • Common law:
      • Form and material of seal – attachment, mark or impression of a seal
      • Sufficient Act of Sealing – acts or words sufficient to show intention of execution being binding
  • *Electronic Commerce Act* ON - can be signed under seal if (i) signed with an electronic signature; and (ii) the document and the signature meet the ‘prescribed seal equivalency requirements’ (which do not exist)
Gift Agreements

• Does the gift involve land?
• In BC, documents creating or transferring interests in land and that require registration to be effective against third parties are excluded from electronic signature legislation
• Depending on province, written document may be required for:
  • Gift agreement or
  • Documents for registering transfer
    • BC Land Title Forms require being witnessed before lawyer or notary
    • ‘work around’ – have form improperly and then get affidavit of execution (with affidavit being taken via video conference)
Wills

Independent Witnesses with appropriate physical distancing measures in place

Virtual Witnesses (if permitted by province)

Holographic Will

Court order that a record is a will (BC)
Wills

• Excluded from electronic signature legislation
• Generally, wills must be signed by the will-maker in the presence of two witnesses, each of whom must also sign the will
  • Can still do this, if can arrange witnesses and maintain physical distance
  • Will likely need witnesses outside of household (if beneficiary witnesses, will lose gift)
• Some provinces have introduced the ability to witness wills virtually (ON, Quebec for notarial wills)
• Some provinces permit a ‘holograph will’
  • Handwritten will that is dated and signed at the end
• BC, we can apply for a court order that any record is the last testamentary intention
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REAL ESTATE ISSUES DURING COVID-19

Tips for dealing with landlords, tenants & others
TOPICS

• Canada Emergency Commercial Rent Assistance (CECRA)
• Signing Things and Real Estate Industry Reactions
• Leniency with Property Taxes and Utilities
• Enforcement Limitations for Nonpayment of Rent
  • Residential Tenants
  • Court Closures
• Vulnerable Population Facilities
Canada Emergency Commercial Rent Assistance (CECRA)

• Aims to lower rent by 75% for eligible tenants
• Available to non-profit and charitable organizations
• Forgivable loans will be provided to qualifying property owners to cover 50% of rent payments for April, May and June, 2020
• The loans will be forgiven if the owner enters into a rent forgiveness agreement, with a term prohibiting evictions
• 25% of the monthly rent would remain payable by the tenant
• Landlord has to bear loss of 25% of the rent
Canada Emergency Commercial Rent Assistance (CECRA)

• Eligible small (non-essential) business, charitable or NFP tenants are those:
  • Paying less than $50,000 per month in gross rent, AND
  • Either:
    • Have temporarily ceased operations, OR
    • Have experienced at least a 70% drop in their pre-COVID-19 revenues

• Expected to be operational by mid-May
• Details not expected until mid-May
Canada Emergency Commercial Rent Assistance (CECRA)

For Tenants

• Optional for Landlords – no guarantee of availability

• Do you and should you qualify?
  • Compare revenue to same period in 2019 or to average of January and February, 2020.
  • No indication extraordinary revenue can be deducted
  • Gross rent concept – How will leases where tenant pays all costs directly be treated?
  • Will have to disclose revenue to landlord
  • No automatic override of any rent deferral agreement or other arrangement
Canada Emergency Commercial Rent Assistance (CECRA)

For Landlords

• No evictions for 3 months – no mention of whether just for non-payment of rent (even after reduction)

• Is rent deferral agreement better?

• Mixed use projects eligible

• Must be “registered owner”
  • Charitable trusts with corporate or other trustee?
  • Land lease – landlord is head lessee?
Canada Emergency Commercial Rent Assistance (CECRA)

For Landlords

• Likely cannot recoup its 25% contribution later
• Ontario indicating rent must be for fixed costs – excluding profit

• What are fixed costs?
  • Mortgage payments – principal portion?
  • Lower maintenance or advertising costs?
  • No property specific debt evidenced by mortgage?
  • Portion of debt not secured against property?

• What is profit?
  • Management or Administrative fees?
Signing Things

• Transactions require identity verification and confirmation of signing
• Some lenders anxious about both identity verification and remote signing
• Title Insurance may protect from fraud
• Stewart Title’s Remote Signing Endorsement – Residential and Commercial
Leniency for Property Taxes and Utilities

• Many (but not all!) municipalities and utilities have
  • Extended deadlines for payment of tax and utilities
  • Will not charge penalties for late payments
  • Treatment of pre-authorized payments and post-dated cheques differs
  • Some require negotiation with the utility
  • As a tenant, your lease still governs and landlord may be able to insist on timely payment – check your lease.
  • Such a breach of lease may affect other (future) rights – e.g. options to extend
  • As owner, mortgage governs your obligations to pay taxes
Dealing With Residential Tenants

• A couple of Provinces have rental supplement – paid directly to you
• Administration of Evictions largely suspended
  • Some Provinces: All applications, except in urgent or special cases
  • Others: Specifically for non-payment of rent
  • How to deal with safety issues?
• Many have suspended rent increases
Courts Largely Closed

• Exceptions for urgent matters
• Commercial landlords may not need eviction orders
• Anecdotally, judges unsympathetic to landlord evicting tenants for non-payment of rent – likely to hear interim injunctions
• Correspondence and court materials usually required to establish urgency
Vulnerable Population Facilities

• Retirement and Long Term Care/Nursing Homes subject to Emergency Orders
• Non-licenced seniors communities, shelters and hard to house projects and most communal living (group) homes not explicitly named
• Controlling access and imposition of rules harder but potentially not impossible
• Seek advice on Emergency Orders specific language
COMMERCIAL LEASING TIPS

1. Each Situation is Unique
2. Lease “Hot Spots”
3. Force Majeure and Frustration
4. Operational Clauses
5. Business Interruption Insurance
6. Rent Relief Agreements
7. Landlord Remedies
8. Future Implications
Each Situation is Unique

• Looked at on a case by case basis.

• No “one size fits all” approach.
Lease “Hot Spots”

• Right to set-off, deduct or abate rent.
• Right to defer payment of rent.
• Security deposit.
• Early termination rights.
• Special rights.
• Health emergency provision.
Force Majeure and Frustration

- **Force majeure** = excuses a party from performing its obligations in the lease due to circumstances or an event beyond its control.

- **Frustration** = results in the termination of the lease. Occurs where a situation arises for which the parties made no provision in the lease and the performance of the lease becomes “a thing radically different from that which was undertaken” by the lease.
Operational Clauses

• Quiet enjoyment.

• Continuous operating.

• Mandatory government closures.
Business Interruption Insurance

• Usually covers the actual loss sustained by the insured as a result of direct physical loss or damage by a peril not excluded from the policy.

• MDS Inc. v Factory Mutual Insurance Company (2020 ONSC 1924).
Rent Relief Agreements

• *Rent abatement* = eliminates the obligation to pay rent on the part of the tenant.

• *Rent deferral* = postpones the obligation to pay rent until a future time.
Landlord Remedies

• Right of re-entry and forfeiture.
• Acceleration of rent.
• Claim for damages.
• Landlord’s right to cure.
• Right of distress.
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