
MITIGATING FINANCIAL LOSSES AND NAVIGATING THE COURTS DURING COVID-19

*By Sean S. Carter and Heidi LeBlanc**

A. INTRODUCTION

The COVID-19 pandemic has had a yet undetermined, but significant, impact on charities and not-for-profits (“NFPs”). As the provinces, and Ontario in particular, move to new stages of the reaction to COVID-19, much of the initial emergency financial assistance and relief will likely soon come to an end. It is yet unknown what provincial and federal governments will do during these next stages, but it is almost certain that there will be ‘growing pains’ as both society and the economy start to slowly gear back up. Charities and NFPs, as well as businesses, will all need to carefully review how to mitigate the impact of COVID-19 on their organizations during this period. However, with proactive strategy and legal assistance, it is possible to minimize the risks and potential losses. This *Bulletin* reviews some of the strategies in this regard that charities and NFPs may want to consider in conjunction with their legal counsel, and provides an update on what is happening in the courts in Ontario during COVID-19.

B. BUSINESS INTERRUPTION INSURANCE

In an attempt to shoulder potential financial losses from COVID-19, charities and NFPs in Ontario have been, or will be looking at their insurance policies for coverage for the business interruptions and other potentially related losses. Many commercial property insurance policies include coverage for business interruption, and may provide coverage for lost income and other expenses related to an interruption to

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the insured's organization as a result of a direct physical loss or damage to the insured property. As COVID-19, and the provincial and federal government's emergency measures to deal with it, have truly 'interrupted business', many insured organizations which have business interruption coverage may well consider that they have a basis for a valid claim.

It is critical to note, however, that business interruption insurance is highly dependent upon the specific wording of the policy. This is particularly important to consider with respect to whether the insurance coverage is applicable to specific facts surrounding the damages caused to the organization as a result of the ongoing COVID-19 pandemic. Business interruption insurance policy wording can vary greatly and it is critical to understand what coverage may be in place for each organization. Generally, business interruption coverage includes specific reference to damages caused by natural disasters, including floods, strikes, earthquakes, and fires, which cause physical property damage to the organization's assets.¹ The key is that the unforeseen event usually must have a physical impact on the property of the insured. However, specific reference is typically not made to losses resulting from infectious diseases, and it is less clear concerning whether such losses will constitute a "direct physical damage or loss" pursuant to the policy. Courts have previously held that a 'contamination' may amount to physical damage if it causes the property to be unusable for a period of time. However, it has not yet been decided by the courts whether or not business losses financially incurred due to closures mandated by government orders as a result of the COVID-19 outbreak would constitute property damage or loss so as to trigger business interruption coverage.

Further, in some cases, insurance coverage pertaining to losses relating to a "pandemic", "virus", or "disease" will be specifically excluded from the individual policy. Therefore, a careful review of the policy must be conducted to determine whether such exclusions exist and, if there is no such exclusion, whether there is sufficient ambiguity within the language of the policy that it could be applied to circumstances involving COVID-19 related losses. The wording of the policy will therefore need to be reviewed within the specific context of the facts surrounding the loss in order to determine whether it falls within the scope

¹ For further information on *force majeure* matters, see Sean S Carter and Heidi LeBlanc, *Charity & NFP Law Bulletin* No. 472, "Practical Strategies for Dealing with Termination of Contracts in a Pandemic" (30 April 2020) online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2020/chylb472.pdf>>.

of coverage. Obtaining legal advice and contacting the organization's insurance broker are all a part of addressing losses due to COVID-19.

It is also important to note that some insurance policies include specific extensions to include infectious diseases and resulting non-physical damages caused when a government requires organizations to close. Typically, however, these policy extensions are only included if they are specifically negotiated as part of the policy, but are otherwise not normally included as part of usual business interruption insurance coverage.

As such, it will be extremely important for businesses, with the assistance of counsel, to conduct a thorough review of the language of the applicable policies, along with the specific facts pertaining to the loss in order to determine whether coverage will be available for COVID-19 related losses. This review of potentially applicable policies may reveal that other sections of the insurance policies may apply, such as the concept of "*force majeure*". Again, this is highly dependent on the wording of the individual policy, but legal counsel may be able to determine if legal principles such as frustration of contract or liquidated damages are relevant and if they may be of assistance in negotiating and limiting risk. These principles and strategy are complicated and therefore beyond the scope of this *Bulletin*. However, they are explained in some detail in *Charity & NFP Law Bulletin* No. 472, "Practical Strategies for Dealing with Termination of Contracts in a Pandemic."²

It is also important to remember that a possible initial denial of coverage does not necessarily mean that the insured's rights and choices have ended. Legal counsel can help review the policy and the denial and, if necessary, bring an application before the court for coverage. Insurers will likely see a massive increase in claims as a result of COVID-19, and various tactics may be used by insurance companies to keep claims from being paid out (including legitimate ones based on the policy). However, given how much is at stake, it is critical that organizations understand their options and rights.

² For further information on force majeure and other potentially applicable strategies when assessing insurance policies, see Sean S Carter and Heidi LeBlanc, *Charity & NFP Law Bulletin* No. 472, "Practical Strategies for Dealing with Termination of Contracts in a Pandemic" (30 April 2020) online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2020/chylb472.pdf>>.

C. NEW PROTECTIONS FOR COMMERCIAL TENANTS

In addition to potential protections available for organizations under commercial insurance policies, there has also been increasing demand for government intervention in managing financial losses to businesses throughout the COVID-19 pandemic, particularly as they relate to the struggles many charities and NFPs are currently facing in keeping up with the high costs associated with commercial leases. The Ontario government has attempted to respond to such demands, and on June 18, 2020, the *Commercial Tenancies Act* was amended with the passing of Bill 192, *Protecting Small Business Act, 2020*.⁴ Specifically, the amendments to the *Commercial Tenancies Act* are aimed at providing relief for commercial tenants against landlords who are not applying for the Canada Emergency Commercial Rent Assistance (“CECRA”) program for small businesses, despite existing eligibility.⁵

Under the *Protecting Small Business Act, 2020*, all evictions of commercial tenants on the basis of rent arrears commenced during a “non-enforcement period”, *i.e.* between June 18 and September 1, 2020 (unless repealed earlier), are temporarily halted where the landlord was eligible to apply for the CECRA program, but chose not to do so. Further protections also provided under the *Protecting Small Business Act* to prohibit commercial tenants from being locked out of the premises or from the seizure of assets relating to rental arrears during the non-enforcement period, where the landlords could have taken advantage of the CECRA program, but failed to do so.

In addition, the *Protecting Small Business Act, 2020* seeks to rectify similar actions taken prior to the non-enforcement period by landlords eligible for the CECRA program. The *Protecting Small Business Act, 2020* explicitly reverses any actions taken beginning on May 1, 2020 until June 18, 2020, with respect to a lockout, seizure of property, or eviction due to rental arrears. Each organization needs to investigate whether this protection applies to them or not, particularly as the expenditure of liquid assets becomes more and more important, and any chance to receive relief during this time deserves a thorough review.

The *Protecting Small Business Act, 2020* seeks to provide protections on a short-term basis in order to provide some relief to organizations that may be experiencing significant financial difficulties as a result

⁴ Bill 192, *Protecting Small Business Act, 2020*, 1st Sess, 49th Parl, Ontario, 2020 (assented to 18 June 2020), SO 2020, c 10.

⁵ For further details on CECRA and the *Protecting Small Business Act, 2020*, see Adriel N Clayton and Luis R Chacin, *Charity & NFP Law Bulletin No. 475*, “COVID-19 Rent Relief for Commercial Landlords and Tenants” (25 June 2020) online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2020/chylb475.pdf>>.

of the COVID-19 pandemic and any related business closures, in the particular circumstance where an organization's landlord could have applied for relief under CECRA. Once the *Act* is repealed, however, these landlords will regain their full range of rights and remedies previously available under the *Commercial Tenancies Act*.

D. ONTARIO COURT UPDATE

Understandably, the Ontario court system has not been exempt from the impacts of the litany of safety measures imposed as a result of COVID-19. It has had to shift its focus away from physical appearances in a courtroom and a hard-copy filing system in order to meet the demands of the new reality caused by the COVID-19 pandemic. Measures have included introducing the use of video and teleconferencing for case conferences, hearings, and trials, as well as enacting temporary changes to court procedures for the duration of the pandemic to allow for suspensions of limitation periods and procedural timelines, and electronic scheduling, service, and filing. Some of these developments, such as the suspension of limitation periods and in-person court hearings, will exist only through the course of the pandemic. However, many developments pertaining to the use of technology inside and outside of the courtroom are expected to have a significant effect upon post-pandemic advocacy.

1. Virtual Hearings and In-Court Operations

Since March 17, 2020, in-court operations have been suspended in Ontario due to safety concerns pertaining to COVID-19. Since the suspension, Ontario courts have continued to hear urgent matters, while having to rely upon technology in order to continue to develop new methods of providing litigants access to the judicial system throughout the course of the pandemic. As well, since the suspension began in mid-March, 2020, there has been an increasing shift towards the use of videoconferencing technology for commissioning affidavits, examinations for discovery and cross-examinations, urgent hearings, and simple procedural matters.

During this time, the courts have begun to place a greater emphasis on the use of technology in judicial proceedings as it becomes available, and judges have already begun to voice their opinions about the requisite need for counsel to embrace the technological means available to allow litigation to proceed during this time. For example, in *Arconti v Smith*,⁶ Justice Myers ordered that counsel

⁶ 2020 ONSC 2782.

would be required to utilize available video-conferencing technology in order to conduct any examinations to avoid any potential delay in proceeding with a scheduled upcoming mini-trial, or they would have to forego their opportunity to examine. Similarly, in *Rovi Guides, Inc. v Videotron Ltd.*,⁷ Justice Lafrèniere found that, although in-person testimony was preferable, the continuation of a patent infringement trial would proceed by way of video-conference, without the in-person attendance of witnesses in the interest of proceeding with the matter without delay.

These two decisions are early examples of the court's current attitude in adapting to the use of available technology to ensure that litigation can continue to move forward throughout the COVID-19 pandemic, and they suggest a significant shift towards technology-based advocacy in the future. This is an excellent reminder to charities and NFPs that, although the courts should be the solution of last resort, the legal system continues to operate and be an option for relief during these times when the very existence or viability of organizations may be on the line.

2. Limitation Periods and Procedural Timelines

Due to the impacts noted above with respect to the court system in Ontario, the suspension of in-court operations has had an immediate impact upon current and prospective litigants. In an attempt to assist during this period, the Ministry of the Attorney General's Order-in-Council of March 20, 2020 suspended all limitation periods and procedural time periods.⁸ Initially, the Order-in-Council stipulated that the suspension would be tied to the duration of the state of emergency declaration in the province. This suspension was intended to assist litigants and their counsel to preserve their right to proceed with litigation matters through the pandemic period as they continue to navigate the ever-changing developments with court procedures and closures due to COVID-19. The March 20, 2020 Order-in-Council, however, provided little certainty for litigants, leaving no end in sight for the end of the suspension period due to continued extensions of the emergency declaration.

The Ministry of the Attorney General, however, has now sought to provide greater clarity with respect to the suspension period. Effective June 5, 2020, the Ministry of the Attorney General has amended the Order-in-Council to provide an end date for the conclusion of the suspension period,

⁷ 2020 FC 596.

⁸O Reg 73/20, *Order under Subsection 7.1 (2) of the Act - Limitation Periods*, online: <https://www.ontario.ca/laws/regulation/200073>.

set for September 11, 2020. As a result, the ongoing suspension period is no longer tied to the duration of the emergency declaration, which provides greater clarity and finality for litigants in the midst of litigation and hoping to enforce applicable limitation periods and procedural timelines under the *Rules of Civil Procedure*. Charities and NFPs therefore need to ready themselves to proactively defend or even commence litigation, if absolutely necessary, as the ‘pause’ that was put on much of the civil system (most importantly the two-year limitation period) will be coming to an end on September 11, 2020. Legal counsel can assist in understanding how this change can impact an organization’s ability to protect its assets, assert its rights and utilize the courts to seek some relief from damages and losses. One important issue to remember is that contractual deadlines, for instance ‘notice’ periods under insurance contracts, are not put on hold by this legislation and could still be the basis for denial.

E. CONCLUSION

As the court system begins to adapt to the COVID-19 reality, it really has only begun to address the litany of issues that necessarily arise out of the significant losses during this period and the failure, in some circumstances, of the risk mitigating measure (*e.g.* insurance) to cover the losses that an organization may have been paying on a policy for years and may be expecting compensation of some sort.

The scale of the losses, but also opportunities, during COVID-19 is unprecedented, and charities and NFPs are struggling to engage, reform and continue their services to some of the most vulnerable people in society. With proactive planning and strategy, an organization can determine the best of its options to minimize loss to its programs, donations and property.