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SPECIAL CARTERS COVID-19 WEBINAR: LEGAL ISSUES FOR CHARITIES AND NFPS

April 9, 2020

CONTRACT TERMINATION STRATEGIES AS A RESULT OF COVID-19

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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>Special Carters COVID-19 Webinar: Legal Issues for Charities and NFPs April 9, 2020</p>
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INTRODUCTION

- COVID-19 has meant that charities and not-for-profits (NFPs) may need to make decisions to minimize liabilities related to income loss, program changes, etc.
- This presentation will focus on strategies to consider when one or all parties are unable to carry out contractual duties because of COVID-19
- The governmental (and other) restrictions are constantly evolving, but charities and NFPs may need to make difficult decisions regarding events months away
- The cancellation of events, services, etc. will likely result in significant monetary losses. It is important to consider what potential strategies are available, whether it be through effective private negotiation or preparation for future litigation

- The courts in Ontario that deal with civil actions (Superior Court of Justice) are (and have been) open, subject to evolving limitations
- Each situation could be subject to judicial review. For now, delay will certainly be experienced, but the underlying legal responsibilities remain binding
- Duties such as the responsibility to preserve evidence (even if only a prospect of litigation) and compliance with existing legal responsibilities continue to exist
- Though contractual responsibilities continue during the unique circumstances of a pandemic, there are potential options for relief or limiting penalties, losses or liabilities if proactive steps are taken and legal advice is sought

1. Force Majeure (“FM”) Clauses

- These type of clauses (not a free floating remedy) exist in a variety of contracts, but they do not necessarily provide complete relief from contractual responsibilities. Each FM clause is unique and the facts may drastically change how a court may interpret it
- These FM clauses often include language that relieves the parties of some/all contractual responsibilities if certain events occur, commonly “acts of God, riots, strikes...” and other events beyond human foresight
- Since SARS and the ‘Bird Flu’, many contracts have actually referred to “pandemics” in the FM list, so it will be up to the courts to interpret whether the individual contractual clause was meant to cover a pandemic like COVID-19 (e.g. is it an ‘act of God’?)

- It is important, however, to remember that well-meaning attempts to invoke the FM contractual clause (if already existing in the contract) may inadvertently lead to anticipatory or peremptory breach of contract
- It may be best initially that the FM clause be utilized as a tool to assist in ‘without prejudice’ negotiations, and only openly invoked as a matter of last resort
- Need to pay careful attention to the “notice” periods within these FM clauses
- They may require a minimum notice period to notify the other parties that the FM clause is to be invoked. Parties can reach out and discuss issues related to FM clauses on a without prejudice basis much earlier, in an effort to reduce potential damages, losses and liability

- It is not a foregone conclusion that a FM clause may be enforced by the court, particularly if it is part of some un-negotiated “terms and conditions” written in small print on the back of each contract. The ‘*contra proferentem*’ rule may provide the court the basis to hold a FM clause unenforceable
- The facts of the case, conduct of the parties, and the terms of the FM clause will be mainly determinative if it proceeds to court
- Because of the likely delay that will occur in enforcement in the civil courts over the next year or two particularly, there are strong reasons to consider early negotiated settlement or even private arbitration

2. What about ‘Frustration of Contract’?

- Where a FM clause is not present in the contract or has been stuck down, the parties may be able to resort to the common law remedy of ‘frustration of contract’
- Remember that *until* a court rules on it, frustration is simply a remedy or defense to be raised depending on the specific facts of the situation
- Therefore, frustration does not depend on either party raising it in the moment (but it may assist in without prejudice negotiations)
- It is difficult to predict whether the contract will be deemed to be frustrated, however the purpose of the contract (and whether it has been undermined) and the timing will be critical to the analysis

3. Impossibility ...*closely related to Frustration*

- Impossibility is some dramatic change that radically impacts on the very nature of the contract
- This remedy has been widened beyond simply what is impossible and really should be understood as what is commercially impracticable
- Again, it is a matter of law (a defence or remedy to be raised); however impossibility may be a remedy that courts rely on for this pandemic
- *E.g.*, a church *could* hold a conference at a resort that defies government direction and safety at that time (in that it may be fined), but it is commercially impracticable to do so because of government directions and common sense safety precautions
- Again, this is a highly fact-specific analysis, and it is legal relief that the court may grant after. However, it can be used to assist in “without prejudice” discussions

4. Liquidated Damages Clause

- These clauses exist in many contracts to discourage last minute cancellation and (in theory) to quantify the damages if a party wants to terminate the contract
- Because so many contracts have them, it is another critical reason why parties may want to avoid anticipatory breach of contract (as termination is a precondition)
- A lot of contracts will have these clauses with pre-specified monetary penalties. However, even if termination of the contract is likely, not all penalty clauses will hold up to judicial scrutiny

- If the clause is akin to a penalty, the liquidated damages clauses may not be enforced, particularly if there was no attempt, when the contract was formed, to estimate the actual loss or damages or may violate public policy
- While there is little case law yet to support this, this pandemic may very well be the 'public policy' reason courts may look to in order to either strike or dramatically lessen a liquidated damages clause
- This analysis does not apply to deposits, which are to be assessed separately and are often forfeited, but the return (or partial return) of the deposit may be an effective position for negotiation

CONCLUSION - What to do?

- Given this relatively unprecedented situation, ensure that liabilities (including contracts for services or goods) are carefully reviewed
- These strategies may assist both those parties that wish for relief from some aspect of the contract and those that need to ensure that the maximum amount of funds or damages are retained
- No one likes to litigate, but the threat alone should not push an organization into accepting an unreasonable position. Negotiation and effective advocacy of your position is crucial in protecting charitable and NFP assets
- There is little doubt that there will be years of litigation that ensue from this pandemic period, so getting help early and being proactive can save tremendous time and resources in litigation

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