CANADA LAW BOOK

Landlord's Rights and Remedies in a Commercial Lease

A PRACTICAL GUIDE

Second Edition

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Force Majeure: A Commercial Leasing Perspective for Landlords and Tenai

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"The future ain't what it used to be".
Yogi Berra

That's for sure. At this time in history our world is mired in turmoil. If it's not some extreme weather event, such as Hurricane Katrina, a North American-wide Ice Storm or massive floodwaters (usually the hallmark of the Mississippi States, but more recently migrated north to Alberta and Ontario), it's a medical health emergency in the form of an epidemic or pandemic. Last but not least, the famous American editorialist Charles Krauthammer has dubbed this the "Age of Terrorism". You cannot read or watch the news without learning of new terrorist attack or threat. The only thing that seems predictable these days is unpredictability itself. The old adage "hope for the best, plan for the worst" is appropriate in these circumstances. And so it is, that the often overlooked "force majeure" clause in commercial leases is slowly starting to get a fresh look by lawyers, landlords and tenants alike. In fact, one prominent Canadian leasing lawyer suggested that the force majeure clause was the number one clause on a top ten list of underrated commercial lease provisions.[1]

While today's commercial buildings are more costly, have more sophisticated operating systems and technology and are more valuable than ever before, so too are the businesses carried on by their Tenants, which cumulatively are generating revenues and business values that may be greater than the value of the building itself. In this global economy, some businesses can gain or lose very significant sums in seconds, minutes or days. The tolerance of today's tenants for any disruption, delay or outright closure of their ability to carry on business in this globalized competitive economy, is less and less.

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[1] Jerald M. Goodman, Sharon D. Brown, and Steven Messinger, "The Rodney Dangerfield Clauses: Ten Lease Provisions That Get No Respect", online: http://www.mindengross.-com/docs/publications/the-rodney-dangerfield-clauses-stephen-messinger-(july-10) > (published in (July-August 2010), 24:4 *Probate & Property* 11).

Cumulatively, this cauldron of unpredictability including potentially catastrophic weather, the emergence of disease-based epidemics or disaster-like health epidemics and terrorist based events, can cause significant economic damage and disruption to not only the commercial buildings and their owners but also the tenants and the businesses that are carried on. In this milieu, the force majeure clause in commercial leases deserves a closer look, a fresh perspective and considerable thought by all parties concerned. This especially includes legal counsel who draft leases and litigation counsel such as myself that enforce them.

"FORCE MAJEURE" MEANING

It is no secret that "force majeure" is a French term which means "supervening or superior force".[2][3] Without delving into its historical background, over the years it has become synonymous mostly with catastrophic weather events that have been seen to be "Acts of God". It's commonly known as the "Acts of God" clause. Having said that, the force majeure events that are typically enumerated in force majeure clauses often have much to do with human activities such as acts of war or terrorism, employment disputes including strikes and lockouts or acts of governments and their representatives, any or all of which may result in temporary or permanent delay, damage, destruction or closure of all or part of the leased premises.

PURPOSE OF THE FORCE MAJEURE CLAUSE IN COMMERCIAL LEASES

The purpose of the force majeure clause in commercial leases is to define and outline the circumstances where the parties to the lease exclude liability and/or suspend or release all or part of their contractual obligations under the lease. It specifically, or more broadly, lists circumstances where unforeseen events beyond a party's control prevent performance of its obligations pursuant to the lease. It contemplates situations outside the control of the parties in which performance of the contract becomes impossible. Such clauses attempt to anticipate and describe each party's obligations when the unthinkable or the unknowable occurs. Typically these clauses have covered off natural disasters or war-time situations, where commercial conditions have become so fundamentally altered that performance of the obligations under the agreement may be excused or suspended for the period of the delay

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2 *Merriam- Webster Online* (Springfield, Massachusetts: Merriam-Webster, Inc.). online. <http://www.merriam-webster.com/dictionary/force%20majeure>.

3 Douglas Hodgson, *The Law of Intervening Causation* (Burlington, Vermont: Ashgate Publishing, 2008).

caused by the force majeure event. Under the force majeure exception, a party that is properly claiming force majeure is relieved of the burden of performing its obligations pursuant to the lease because a supervening event has rendered performance impossible. In some cases, it may be even practical to terminate the lease completely under these conditions.

In legal terms, force majeure is defined as:

> [A] contractual term by which one (or both) of the parties is entitled to cancel the contract or is excused form performance ... or is entitled to suspend performance ... upon the happening of a specified event or events beyond [his or her] control.[4]

The main hallmarks of a force majeure provision in a commercial lease include the following:

(i) A definition of what constitutes a force majeure event. This is more often than not a list of events;

(ii) A requirement that the force majeure event must be beyond the reasonable control of, and not the fault of, the non-performing party.

(iii) A description of what the parties' obligations are during the force majeure event. For example, often landlords' standard form commercial leases will require that the tenant continue to pay rent during the force majeure event;

(iv) The duration of the force majeure event. It will provide for temporary suspension of the lease obligations or, in more serious cases potential termination of the lease;

(v) A reference to the test of foreseeability. If the event was reasonably foreseeable, it may not qualify as a force majeure event;

(vi) A requirement that the non-performing party deliver notice of the force majeure event to the performing party;

(vii) It will include the duty to mitigate on behalf of both parties and that both parties act in good faith.

CONTEXT FOR INTERPRETATION OF FORCE MAJEURE PROVISIONS

Notwithstanding the above enumerated events are often referred to in commercial lease force majeure clauses, the fact is that the parties themselves are free to contract for any event to be a force majeure event. Each clause should be tailored to deal with the practical realities that exist in any given business and commercial leases are no exception in that

[4] H.G. Beale, ed., *Chitty on Contracts*, 30th ed. (London: Sweet & Maxwell, 2008).

regard. The different types of businesses and landlord tenant relationships that exist in each particular circumstance may form the basis for a different negotiation with respect to the terms of a force majeure clause.

Having said that, to date, force majeure clauses have often been glossed over as boiler plate and not closely reviewed or negotiated. To be candid, there may be some basis for this historical context given the fact that there have not been any Canadian reported cases of any substantive nature that provide any significant guidance or opinions with respect to force majeure events affecting commercial leases. The paucity of case law in this area perhaps speaks to the rationale for why these clauses have been overlooked and "underrated" in a commercial leasing context. It's a fair question to pose as to whether raising awareness and effectively sounding the alarm for a fresh look at force majeure clauses amounts to a "tempest in a teapot". One might suggest that if there are no Canadian cases on point then why take any time to review and negotiate what could be a very controversial lease provision. While that attitude may allow some to sleep soundly at night after having *not* informed the client of the importance of, or not negotiated the terms of a force majeure provision in a commercial lease, the present-day circumstances suggest it would *not* be a prudent approach. This approach may even form the basis for a substantial professional negligence claim should counsel not address the force majeure issues in a lease and not explain the risks and obligations to their respective clients whether they be tenants or landlords.

There is of course plenty of litigation in Canada already relating to construction and commercial supply contracts concerning force majeure issues. The leading Canadian Supreme Court of Canada case is a commercial supply case.[5] However, there is a very substantial body of cases dealing with force majeure clauses in the commercial leasing context in the United States. The litigation arising from the terrorist acts of 9/11 destroying the World Trade Center Towers is perhaps the starkest example in our time of this practical reality that now squarely faces us.[6] I suggest it's only a matter of time before our Canadian courts will have to deal with the interpretation of force majeure clauses in a commercial leasing context.

In order to understand the context for interpretation of force majeure provisions, it is perhaps wise to take a step back and understand some of the nuanced elements that relate to force majeure provisions in a lease and their heightened importance at this time. In particular,

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5 *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co.* (1975), [1976] 1 S.C.R. 580 (S.C.C.).

6 *One World Trade Center LLC v. Cantor Fitzgerald Securities*, 789 N.Y.S.2d 652 (N.Y. Sup. Ct., 2004) at p. 655.