Ontario Real Estate Law Developments

February 2022
Number 558

Recent Cases

VACCINE MANDATES BY COMMERCIAL LANDLORDS: ARE THEY PERMITTED AND WHAT ARE THE RISKS?

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Many commercial landlords are considering implementing vaccine mandates in their properties as a response to the COVID-19 pandemic. In the absence of a governmental mandate, landlords are understandably concerned by the friction between their legal obligation to provide healthy workplaces and employee rights under human rights and employment legislation. In this bulletin, we address the question of whether landlords have the right to implement a vaccine mandate and the risks arising from potentially restricting tenants' and their employees' access to their premises and places of work. This bulletin does not address the case of landlords who must impose a vaccine mandate under a government directive (e.g. commercial tenants in Ontario hospitals) or other law.

Does a Landlord Have a Right to Mandate Vaccination?

Whether a landlord does or does not have the right impose a vaccine mandate will depend, in part, on the terms of the lease. There are several common lease terms that may assist in the analysis.

- **Quiet Enjoyment**: Most commercial leases contain the landlord's covenant to provide the tenant with quiet enjoyment, which means that a landlord will not, so long as the tenant is not in default, interfere with the peace or comfort of the tenant's exclusive possessory right to the premises. If a vaccine mandate prevents access to the premises, a tenant may claim that the landlord has breached its covenant for quiet enjoyment. However, if another lease provision requires the tenant to comply with reasonable health and safety requirements imposed by the landlord, e.g., a vaccine mandate, the tenant's failure to comply with such requirement would be a default under the lease and may be invoked as a complete defence to the tenant's assertion of a breach of its right to quiet enjoyment.
- **Compliance with Laws**: Many commercial leases also contain the tenant's covenant to comply with all present and future laws and regulations. Some leases may also provide that a tenant will use and occupy the premises in a safe, careful and proper manner. Although currently in Ontario there is no blanket law imposing a mandatory vaccination requirement on tenants and their employees as a prerequisite to the leasing of commercial premises, there are several other laws that may apply, such as occupiers' liability legislation and occupational health and safety laws. These laws generally require property occupiers and employers, respectively, to take care to ensure that persons entering the property and its employees are reasonably safe. In the face of scientific and governmental guidance showing the efficacy of vaccination

in inhibiting the spread of the COVID-19 pandemic, a landlord requiring the vaccination of its tenant's employees or, for that matter, a tenant requiring the vaccination of its employees, might reasonably be regarded as falling within an occupier's obligation to ensure that its premises are used and occupied in a safe, careful and proper manner.

- **Rules and Regulations**: Some commercial leases may grant the landlord the right to impose rules and regulations for the safety and benefit of all tenants and may require the tenant to comply with, and cause its employees, servants, agents, licensees and invitees to comply with, the rules and regulations adopted from time to time by the landlord. A landlord may be able to change or add new rules and regulations to which, upon notice thereof, tenants will be bound. Such rules and regulations might include a requirement that all tenants wear masks in common areas or, perhaps, that they be vaccinated before being permitted entry into the landlord's building.
- **Health Emergency**: As briefly discussed earlier, some commercial leases may explicitly permit the landlord to impose security and/or health screening measures during health emergencies.
- **Restrictions on Use & Occupancy and Access by Landlord**: Although these clauses alone will not independently justify a landlord's right to implement a vaccine mandate, they may play a supporting role in permitting a vaccine mandate.

As any commercial lease usually contains a complex combination of rights, obligations, restrictions and remedies of both landlords and tenants, landlords should take care to provide ample notice to their tenants and other occupiers of any changes, restrictions, or new rules and regulations in order to permit such persons to take the necessary steps to come into compliance.

Landlord's Liability for Discriminating against Commercial Tenants

Even if a landlord is entitled to impose a vaccine mandate under its lease, the landlord can still be liable under the Ontario *Human Rights Code*[1] (the "***Code***") for exercising the mandate in contravention of the protections set forth in the *Code*.

The *Code* prohibits discrimination in certain contexts based on specified personal characteristics, such as disability (e.g. an allergy to vaccines) or creed (e.g. religion bars vaccination). Commercial landlords may be liable to their tenants if they discriminate in the context of providing facilities to,[2] or contracting with, a tenant.[3] In order to resist a claim for liability for an infringement of the *Code*, landlords should ensure that their vaccine mandates reasonably accommodate any *Code*-protected personal characteristics. One common example of an appropriate accommodation may be to permit antigen testing instead of vaccination for individuals who have a legitimate medical or religious reason preventing vaccination. Whether a specific form of accommodation is sufficient, however, will vary from business to business.

Landlords' Liability for Discriminating against Commercial Tenants' Employees

A landlord that imposes a vaccine mandate may also be liable for contravening the *Code* if its mandate does not accommodate its commercial tenants' employees. Although there are no cases considering the liability of a landlord to its tenants' employees under the *Code*, it appears that a landlord could be liable under two sections of the *Code*.

Section 5 of the *Code* provides that each person is entitled to equal treatment with respect to employment. Section 5 does not limit discrimination claims to employers. Instead, it applies equally to any situation where there is a sufficient nexus between the discrimination and the employment. For example, liability under section 5 has been considered against a union where the union has either (1) created a discriminatory work rule or (2) impeded an employer's ability to accommodate an employee.[4] Similarly, a municipality was liable under the *Code* to employees where the employees

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[1] R.S.O. 1990, c. H.19.

[2] *Jensen v. Ulanowicz*, 2012 HRTO 559.

[3] *Osman v. Toronto District School Board*, 2011 HRTO 1476.

[4] *Gungor v. Canadian Auto Workers Local 88*, 2011 HRTO 1760.

worked for a company contracting with the municipality.[5] As section 5 is not exclusively an employer-employee area of liability, the section might apply to a landlord if its vaccine mandate affects the employee's ability to work.

Section 1 of the *Code* provides that each person is entitled to equal treatment with respect to accessing facilities. The Human Rights Tribunal has previously held that landlords were liable for discriminating against customers of tenants under section 1 by failing to provide an accessible facility to those customers.[6] Since the landlord is similarly providing a facility to the employees of the tenant, it appears that section 1 liability could arise if the landlord's vaccine mandate prevents the tenants' employees from accessing their workspace. However, section 1 may only apply to premises that are open to the public, as "facilities" has been interpreted to mean places available for the public to request access to.

As with direct liability to tenants, the key to preventing liability is ensuring that the vaccine mandate reasonably accommodates any *Code*-protected personal characteristics. We recommend seeking legal advice in designing any vaccine mandate to limit liability under the *Code*.

Landlords' Liability to Their Own Employees

A landlord could also face discrimination claims from its own employees if it implements a vaccine mandate. For more information on employee claims, see our bulletin for employers.

RECENT CASES

Contingent Interest in Lands Was Void Under Rule Against Perpetuities

Ontario Court of Appeal, November 26, 2021

In 1997, the appellant acquired property subject to various historical land development agreements affecting its use made between Campeau Corporation ("Campeau") and the former City of Kanata ("Kanata"). A 1981 agreement provided, at sections 5(4) and 9, that Campeau, or its successors and assigns, had to operate a golf course on the property in perpetuity ("the golf course lands"), failing which, the golf course lands were to be conveyed at no cost to Kanata, which was now part of the respondent City of Ottawa ("City"). If the golf course lands were conveyed, the City was obliged to continue using the golf course lands for recreation or natural environmental purposes or else they were to be reconveyed to Campeau. The appellant operated a golf course on the property for 24 years. After membership began declining, it submitted an application for a zoning by-law amendment and approval of a plan of subdivision and publicly accessible green space on the golf course lands. The City brought an application for an order requiring the appellant to withdraw its application. The appellant took the position that the City's right to call on a conveyance had not vested within the perpetuity period of 21 years following the 1981 agreement, and the provisions requiring the operation of a golf course in perpetuity were void for being contrary to the rule against perpetuities.

The application judge found that the 1981 agreement was a valid and binding contract and that the appellant's obligations remained enforceable. Accordingly, the appellant was required to operate the golf course in perpetuity or, if it ceased to do so, convey the golf course lands to the City. The judge declared that if the golf course lands were conveyed to the City, the City was not required to operate the golf course in perpetuity if it used the lands for recreation and natural environmental purposes. The appellant appealed.

The appeal was allowed. In interpreting the agreement, the application judge had found that the parties never expected nor intended for the interest in land to "crystallize", and they had no intention to create an interest in land, with sections 5(4) and 9 being "mere contractual provisions". The Court found that the judge erred in using the expectation that a contingency would materialize as a factor to distinguish between an intent to create an interest in land and a contractual right. The rule against perpetuities applied only to contingent interests in land that vested too remotely. Pursuant to case law, a contingent interest in land could be created without the intention that it would "crystallize", and control over the triggering event was not determinative. Whether the contingent interest in sections 5(4) and 9 was intended to

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[5] *Johnson v. Regional Municipality of Peel*, 2019 HRTO 1028.

[6] *Saxon v. 1762668 Ontario Inc*, 2014 HRTO 232 and *Brock v. Tarrant Film Factory Ltd*, 2000 CanLII (ON HRT).

materialize was not the question, the Court stated, as it was the nature of all contingent interests that they might never materialize. The 21-year perpetuity period limitation reflected the public policy purpose behind the rule against perpetuities, namely, preventing the "public evil" that was a contingent interest in land "fettering" real property and excluding it from "commerce and development". The Court concluded that the judge committed extricable errors of law in the analysis of the contractual provisions of the 1981 agreement.

The Court found that the parties intended that sections 5(4) and 9 of the 1981 agreement create contingent interests in the golf course lands. Reading the agreement as a whole, in the context of the factual matrix, the Court found that under section 5(4), the City's interests in the lands were contingent on Campeau or its successor or assign in title ceasing operation of the golf course. Pursuant to section 9, the reconveyance was contingent on, first, the conveyance under section 5(4), and, second, the City ceasing to use the lands as prescribed. As the appellant operated the golf course for over 21 years, neither the City's right to a conveyance nor the appellant's right to a reconveyance vested within the perpetuity period. Accordingly, the contingent interests in the golf course lands were now void.

Ottawa (City) v. ClubLink Corporation ULC, 2022 OREG ¶59,499

Affordability Was Important Factor in Uniqueness Analysis for Specific Performance

Ontario Superior Court of Justice, November 18, 2021

In December 2020, the plaintiff purchasers entered into an agreement of purchase and sale ("APS") with the defendant vendor for the purchase of a residential property in Markham. The purchase price was $615,000. The closing date was February 24, 2021. On February 16, 2021, the vendor's realtor informed the purchasers' realtor that the vendor no longer wished to sell the property. The following day, the purchasers' counsel wrote to the vendor confirming that the purchasers were ready, willing, and able to close, and confirmed their intention to seek specific performance. On the closing date, the purchasers sent their closing package to the vendor. The vendor alleged that the APS was not valid and sought a mutual release.

In March 2021, the purchasers brought an action seeking specific performance and obtained a certificate of pending litigation. They brought a motion for summary judgment.

The motion was granted. Case law provided that specific performance was not to be granted as a matter of course absent evidence that the property was unique to the extent that a substitute would not be readily available. Further, case law provided that in a housing market characterized by bidding wars, such as the current real estate and development market of the Greater Toronto Area ("GTA"), it was no longer accurate to assume that residential properties were "mass produced", thus suggesting that the criteria for specific performance could be more easily met in matters dealing with property within the GTA. The purchasers relied on several alleged uniqueness factors and the Court found that the following two sufficed to support a specific performance claim: the property was purchased for the limit of the purchasers' budget, $615,000, and similar properties in the same area were currently selling for $720,000; and the property was located five and 15 minutes from the purchasers' places of employment. The Court noted that the uniqueness requirement considered not only whether there were similar homes in the neighbourhood for sale, but whether they were "readily available" for the purchasers to acquire, namely, whether they were within the purchasers' price range. The Court stated, "[w]hen the housing market is characterized by rapid price increases, affordability becomes an important factor in the analysis".

As the purchasers failed to claim damages for incidental costs in their statement of claim, they were not now entitled to seek them in a summary judgment motion. The Court ordered specific performance of the APS, with closing to take place within 60 days.

Thillairajan v. Sivasubramaniam, 2022 OREG ¶59,500

Court Did Not Have Jurisdiction to Set Market Rate for Renewal Term

Ontario Superior Court of Justice, November 1, 2021

The applicant tenant entered into a lease with the respondent landlord and took possession of the commercial premises in November 2018. The lease term expired on October 31, 2021. The lease contained a renewal clause providing that if not in default, the tenant had the option to renew for a further term of three years if notice was given in writing no less than six months pre-expiry of the lease term. The clause further stated that "the basic rent during the renewal term shall be based on the then market rate and shall be agreed upon by the landlord and tenant at least one (1) month prior to the expiration of the term, failing which the renewal option shall be revoked". The tenant provided written notice within the required period and was not in default. The tenant and landlord could not agree on the applicable rent rate.

The tenant filed an application seeking for the Court to find that it had the jurisdiction to set the market rate for the basic rate of the lease; that it fix the rate and extend the lease by three years; and that it find the landlord in breach of its duty to act in good faith. The parties agreed that the term "market rate" was not void for uncertainty.

The application was dismissed. The renewal provision in the parties' lease was similar to that in *Empress Towers Ltd. v. Bank of Nova Scotia* (1991), 73 DLR (4th) 400 (BCCA) ("*Empress Towers*"). The British Columbia Court of Appeal had found that, as the final sentence of the renewal clause in *Empress Towers* contemplated that a failure to agree would give rise to a right of termination, the landlord could not be compelled to enter into a renewal tenancy at a rent which it has not accepted as the market rental. The lease at issue contained the same "failure clause" and the Court found that it prevented the Court from intervening and setting the market rate, subject to the duty to act in good faith.

The Court did not find that the landlord breached the duty to act in good faith. The evidence indicated that the parties simply failed to reach an agreement while negotiating in good faith. As a result, the Court found that the lease was at an end.

Jagtoo & Jagtoo v. Grandfield Homes, 2022 OREG ¶59,501

Court Enforced Mortgage Debt and Did Not Find Notice of Sale Invalid

Ontario Superior Court of Justice, November 12, 2021

The plaintiff was the mortgagee and the defendants were the mortgagors. The first mortgage was registered on title to a residential condominium development in May 2020 for the principal amount of $3.1 million at an interest rate of 10 per cent per annum, with $25,833 payable monthly. The mortgage had a five-month term and matured in October 2020. It had a holdover interest rate of 24 per cent per annum. The second mortgage was registered in September 2020 for the principal amount of $350,000, at an interest rate of 15 per cent per annum, with $4,375 payable monthly. The second mortgage had a three-month term and matured in December 2020. It had a holdover interest rate of 20 per cent per annum. The mortgagors defaulted on their payments. The mortgagee delivered a Notice of Intention to Enforce Security and Notice of Sale ("NOS") to the mortgagors on November 28, 2020.

The mortgagee brought a summary judgment motion to enforce the mortgage debts. The mortgagors took the position that the mortgagee failed to adduce into evidence the standard charge terms of the mortgage; a new NOS had to be issued before judgment could issue because there had been negotiations following the issuance of the NOS; and the NOS was deficient because it sought over $158,000 more than was properly chargeable and included amounts that offended the *Interest Act*.

The motion was granted. The Court found there was no ambiguity or uncertainty between the parties as to the existence and applicability of the Standard Charge Terms 200033 to the mortgages. The parties were not unsophisticated parties, had independent legal representation in respect of both mortgage transactions, and had signed and amended documents that referenced Standard Charge Terms 200033.

The Court did not find that the case law relied on by the mortgagors stood for the proposition that a NOS was "spent" and no longer of force if there were negotiations after the NOS issued. The Court also did not find that the negotiations amounted to enforcement steps during the stand-still period under section 42 of the *Mortgages Act*. The Court did not find that a new agreement was reached between the parties or steps were taken to enforce payment during the redemption period.

The Court accepted that there was an accounting defect in the NOS. Pursuant to case law, a NOS was not inoperative because of minor irregularities, such as a miscalculation, as long as it met the purpose for which it was required. The Court had to assess whether the magnitude of the error affected the mortgagors such that they were misled in assessing

whether to redeem the mortgage, based on a commercially reasonable standard. The Court found that the mortgagors were seeking to use the *Mortgages Act* to engage in further delay in making any payments. The mortgagors had not made any attempts at payments since the mortgages matured. Further, since September 2021, the mortgagee was demanding an amount that was less than that in the NOS.

While under section 8 of the *Interest Act* it was improper to charge interest at the rate of 24 per cent, the mortgagee had reduced the applicable interest rate to 10 per cent for the first mortgage and 15 per cent for the second mortgage. The mortgagee was also not entitled to claim a three-month interest bonus under section 17 of the *Mortgages Act* after issuing the NOS, the expiration of the redemption period, and the commencement of the legal proceedings, as this would offend the *Interest Act*. The Court ordered payment of the owing amounts under the mortgages and granted an order for possession of the lands and premises in favour of the mortgagee.

We Care Funding Limited Partnership v. LDI Lakeside Developments Inc. et al., 2022 OREG ¶59,502

Purported Sale of Unit Under Power of Sale Was Non-Arm's Length and Not Valid

Ontario Superior Court of Justice, November 15, 2021

The plaintiff couple were the owners of a condominium unit in Toronto. The plaintiffs had two mortgages registered against the unit. After their divorce, the husband moved to Australia and the wife remained in the unit. In 2016, the wife suffered from health issues that resulted in both mortgages going into default. In September 2016, the first mortgagee brought power of sale proceedings. In January 2017, the second mortgagee, the defendant 2462030 Ontario Inc. ("246"), paid out the first mortgage to preserve its position. 246 brought an action for possession and on the covenant, and also sought to exercise its power of sale under the mortgage privately. The defendants claimed that 246's representative reached an oral agreement with the plaintiff wife that she would transfer possession and ownership of the condominium to 246 in return for forgiveness of the mortgage debt, outstanding realty taxes, outstanding common expenses, and legal expenses under both mortgages. The transfer price was set at $350,000, which was below the outstanding liabilities and 246 agreed not to pursue a deficiency judgment.

The wife moved out and left the keys to the unit with the concierge. 246 paid all arrears and accruing liabilities, and condominium costs thereafter. In 2020, 246 registered a sale by power of sale to the defendant Carlos Araujo for $350,000, and Mr. Araujo granted a mortgage over the unit to the defendant 2757043 Ontario Inc. for $350,000. Mr. Araujo was a director of both 246 and the new mortgagee.

The plaintiffs brought an action seeking a declaration that they continued to own the unit. They sought an order declaring the defendants' purported non-arms' length transfer of the unit by power of sale under a second mortgage to be void. The plaintiffs brought a motion for summary judgment.

The motion was granted. The Court did not find that the alleged oral agreement was a binding contract. The defendants' only evidence was that the plaintiff wife indicated that she and the husband no longer wanted financial responsibility of the condominium. 246 was aware that it needed the assent of both titled spouses. The defendants did not allege that the oral agreement was reached with the husband. Further, 246's acts of taking possession and paying out priority claims and repairs were acts that would be taken on merely taking possession of the unit as mortgagee in possession under the mortgage. The acts were not necessarily referable to an undocumented sale or quitclaim for $350,000 with a release and indemnity agreement or a foreclosure and indemnity agreement. Accordingly, there was no agreement binding the plaintiffs to transfer title to the unit.

The Court noted that the sale by power of sale in 2020 was wholly inconsistent with the claim that 246 had purchased the unit from the plaintiffs three years earlier under an oral agreement. As the alleged oral agreement was not effective, the sale by power of sale, however, would be the correct mode of transfer. Non-arms' length transfers by power of sale were presumptively void unless the mortgagee established that it took reasonable steps to obtain fair market value for the mortgaged premises. The defendants did not adduce any evidence to rebut this presumption, and took no steps to try to obtain fair market value. The Court directed that a reference be completed to determine if the plaintiffs had any equity remaining in the unit and to determine the amount properly due to 246.

Ishaq v. Araujo, 2022 OREG ¶59,503

ONTARIO REAL ESTATE LAW DEVELOPMENTS

Published monthly as the newsletter complement to the *Ontario Real Estate Law Guide* by LexisNexis Canada Inc. For subscription information, contact your Account Manager or call 1-800-387-0899.

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