The outbreak of COVID-19 has impacted everyone’s lives in 157 countries (as at the date of writing). COVID-19 was identified as a pneumonia of unknown cause in China on December 31, 2019 and in less than three months, was declared a pandemic by the World Health Organization. The outbreak and the ensuing social distancing are having a very real and lasting impact on the Canadian economy and the Canadian business landscape. In order to weather this storm, Canadian companies need to implement a comprehensive response plan which should include cost control and mitigation of operational losses.

Wages and real property leases are arguably two of the largest cost items on any Canadian company balance sheet and any meaningful response plan should include a careful consideration of these two items. This article will take a closer look at potential considerations relating to leases and other real property related agreements that should be taken into account.

First step in understanding your rights and obligations (as a landlord or a tenant) is careful review of your lease. After the SARS outbreak in 2003, many leases contemplate extraordinary rights and obligations in case of a health emergency. These rights may include landlord’s right to control, limit or restrict access to the building, or tenant’s right to close down its business (and get an abatement of rent) in certain extreme circumstances. In the case of commercial leases, where rent abatements are offered, such as rent refunds, rent reductions, rent free periods or rent inducements, it is important to be aware that such transactions can have various GST/HST and QST implications.

Leases pre-dating the SARS outbreak usually contain provisions granting the landlords the ability to govern and control access to and operations of the building and common areas.

These access rights give rise to a number issues, including:

— What is the extent of a landlord’s rights to limit or restrict access to your premises?
— What are your rights as a tenant to gain access to remove files or material after a closure?
— Can a landlord enter the premises without permission in case of a health hazard? If so, what happens to the tenant’s privacy obligations?

In addition to the above, most leases and other agreements relating to real property, contain a “force majeure” clause. Some leases may also contain a “Material Adverse Effect” clause (MAE) that should be reviewed closely. A MAE clause generally provides for termination of or adjustment to obligations of a party in a lease because of an event that negatively impacts that party or its business. The leases often do not specify the exact events that could give rise to MAE in the same manner a “force majeure” would, but they use broad description of types of impact required to give rise to the MAE. Relying on a MAE is generally difficult and requires the materiality to be demonstrated clearly. Invoking a MAE as a result of the COVID-19 outbreak is heavily dependent on the actual wording of the MAE clause in each agreement and the subjective effects of the outbreak on your business.
Terminations of commercial leases initiated by a tenant can invoke special rules for GST/HST and QST purposes. In cases where a tenant is required to make a payment to the landlord as a consequence of a breach, modification or termination of a lease agreement an amount paid may be considered to be GST/HST included.

In these uncertain times, all Canadian companies should undertake a careful review of all leases and other real property related agreements to fully understand their rights and obligations under such agreements. This will enable the management to accurately assess its current situation and better mitigate its operational risk under these agreements.

We are here to help you in any way we can.

Contact us

Ali Baniasadi  
Partner, Business Law  
KPMG Law LLP  
416 218 7900  
abaniasadi@kpmg.ca

Daryl Hooley, MBA, CPA, CGA  
Senior Manager, Indirect Tax Services  
KPMG Law LLP  
416 777 8097  
dhooley@kpmg.ca

Dino Infanti  
Partner, National Leader – Enterprise Tax  
KPMG in Canada  
604 673 4437  
dinfanti@kpmg.ca

Walter Sisti  
Partner, National Leader – Indirect Tax Services  
KPMG in Canada  
416 777 3920  
wsisti@kpmg.ca