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Leasing

Tough Times Indeed for Commercial Tenants

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In *Anthem Crestpoint Tillicum Holdings Ltd. ("Anthem") v. Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI ("HBC" or the "Company")*, 2022 BCCA 166, HBC believed that its landlord, Anthem, should assist them in getting them through the tough times caused by the COVID-19 pandemic by offering a reduction in rent, among other remedies. HBC had been operating a Home Outfitters Store located in a mall owned by Anthem at a monthly base rent of approximately \$58,750.50. The Company had ceased to pay rent as of April 2020, the beginning of the pandemic. The landlord refused their request, instead offering a rent deferral; the parties went to court.

HBC argued that it could stop paying rent because of the landlord's previous refusal to allow the Company to assign its lease, which they tried to characterize as unreasonable. Months prior to the point they stopped paying rent, HBC had attempted to assign the lease to Value Village, despite there being a prohibition in the agreement on using the premises for the sale of second-hand goods, as a result the landlord refused the assignment. This argument proved unsuccessful as the British Columbia Court of Appeal found nothing unreasonable in the landlord's refusal to consent to the assignment, reasoning that HBC did not, at the time, treat the landlord's refusal as a default since the Company had continued to pay rent after the landlord's decision.

HBC further argued that rent was not owed due to the fact that the landlord had breached its duty of good faith contractual performance by failing to pursue other opportunities to re-let the premises after the Company had ceased operating its Home Outfitters store in July 2019. The court determined this not to be the case as the landlord was under no obligation to mitigate its losses from the tenant's failure to pay rent and it had no obligation to pursue other rental opportunities for the premises. Consequently, the court awarded judgment to the landlord for the full amount of rent due.

In cases across Canada including in Ontario, such as one involving Hillcrest Mall in Richmond Hill, HBC advanced a similar argument that rent should be reduced due to restrictions on operating its store during the COVID-19 pandemic. In these other cases the Company fared about as well as they did in *Anthem v. HBC* cited above, with the courts upholding the landlord's right to rent payments due under the lease and not finding that



HBC should be offered a rent reduction, although the courts did offer HBC protection from eviction. Tough times for a mall retailer, indeed.

At De Francesca Law, we seek to provide landlords and tenants with valuable strategic commercial leasing assistance, especially in today's changing circumstances in the community and the economy at large. Only with the benefit of insightful and well considered advice, can you be well-positioned to avoid the perils and pitfalls of heading down the uncertain path of lease defaults and having to deal with the prospect of ensuing litigation that may result.

