

2022 ICSC Canadian Law Conference Roundtable

CO-TENANCY PROVISIONS

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Main Types of Co-Tenancy Provisions

Opening: Allows a tenant to delay opening (and typically results in the tenant paying no rent, less rent or an alternative rent) unless a set of conditions are satisfied when the tenant is slated to open.

Ongoing: Allows a tenant to pay no rent, less rent or an alternative rent (and typically, after a period of time, results in the tenant having a right to terminate the lease) unless a set of conditions are satisfied.

Anatomy of a Co-Tenancy Provision

- **Prerequisites** (if applicable)
- **Trigger**
- **Grace Period** (if applicable)
- **Performance Test** (if applicable)
 - Replacement Tenants
 - Exclusions
- **Outcomes**
- **“Recapture”** (if applicable)
- **Reset on Renewal** (if applicable)

Specialty Considerations for Co-Tenancy Provisions

1. Who is determining that a co-tenancy failure has occurred? What if there is disagreement?
2. If the co-tenancy provision is tied to the condition that a certain percentage of tenants must be open and operating, should any tenants be excluded from the calculation? What about tenants with no operating covenants or rights to go dark?
3. Is the landlord entitled to the right to find a replacement tenant? Is it realistic or practical to name a specific replacement tenant or is that something that can be more broadly defined?
4. Are there any circumstances that could be considered legitimate for a tenant to cease operating from its premises? For example, certain hours tenants can be closed or temporary closures due to damage and destruction, renovations, repairs and inventory taking. Further, is there be an exception for events force majeure events (including government shutdowns)?
5. What happens if the tenant terminates? Is the tenant required to pay back any unamortized costs?