

COVID-19 ADVISORY: CONSIDERATIONS FOR COMMERCIAL TENANTS

Visit our COVID-19 resource centre



20 March 2020

Gowling WLG has been monitoring the development of COVID-19 closely and is continuously advising clients as more information becomes available. In the interest of helping **tenants** who lease commercial space manage the challenges created by the outbreak of COVID-19, Gowling WLG has prepared the following bulletin. Updates will be available as new information is released.

Health and safety of your staff: [Click here to learn more from our employment and labour law professionals across the country.](#)

Rent:

Many tenants are asking us whether their rent obligation is deferred or forgiven as a consequence of the COVID-19 pandemic and state of emergency. The short answer is that it is very unlikely that the rent is suspended or abated.

- While every lease is different, most will include a 'force majeure' or 'unavoidable delay' provision that suspends the fulfillment of an obligation by an unavoidable occurrence. This clause is often written in favour of the landlord only, and if it extends to the tenant, invariably excludes the payment of rent, and often the surrender of the leased premises on the expiry of the lease. As such, even if there is an unavoidable delay clause in your lease, it most likely does not suspend the obligation to pay rent when due.
- Occasionally, the damage and destruction provisions of the lease are broadly enough stated to extend to a pandemic but the rent abatement provisions are generally tied to "damage" to the leased premises or the building. As such, while it is worth checking, these provisions are unlikely to suspend the payment of rent.

Business Interruption Insurance:

While you should consult your insurance broker, it is unlikely that your business interruption insurance will protect you in the event of a pandemic.

Insurance Concerns:

If you elect to work remotely or should you be legally mandated or elect to temporarily cease operations, we recommend that you both advise your landlord and your insurers. Most insurance policies will require you to notify the insurer of any material change in circumstances, and a failure to do so could void the insurer's obligation to pay out in the event of a claim. We also suggest that you thereafter arrange to have your premises monitored as required under the terms of your insurance policies, e.g. every 24-48 hours.

Closures and Going Dark

Ontario:

On March 17, 2020, the Government of Ontario declared an emergency under s 7.0.1 (1) the Emergency Management and Civil Protection Act. As a result of this declaration and its associated orders, the following establishments are legally required to close immediately:

- All facilities providing indoor recreational programs;
- All public libraries;
- All private schools as defined in the Education Act;
- All licensed child care centres;
- All bars and restaurants, except to the extent that such facilities provide takeout food and delivery;
- All theatres including those offering live performances of music, dance, and other art forms, as well as cinemas that show movies; and
- Concert venues.

Further, all organized public events of over fifty people are also prohibited. These orders were approved by the Lieutenant Governor in Council and will remain in place until March 31, 2020, at which point they will be reassessed and considered for extension, unless this order is terminated earlier.

British Columbia:

On March 17, 2020, the Government of British Columbia declared a public health emergency under Part 5 of the British Columbia Public Health Act. As a result of this declaration and its associated orders, the following establishments are legally required to close immediately:

- All businesses with liquor primary licenses including bars, pubs, and night clubs;
- All restaurants and cafes that are unable to adequately meet requirements of social distancing (1-2 meters between patrons), except to the extent that such facilities can provide takeout food and delivery;
- All casinos, community gaming centres and bingo halls; and
- All public schools.

As of March 18, 2020 the closure order remains in place indefinitely until further notice.

Further, all public gatherings of more than fifty people are also prohibited. This order was approved by the British Columbia Minister of Health and Provincial Health Officer and will remain in place until May 30, 2020, at which point they will be reassessed and considered for extension, unless this order is cancelled earlier.

Alberta:

On March 17, 2020, the Government of Alberta declared a public health emergency under the Public Health Act. New public health measures are now recommended to limit the time Albertans spend in large crowds and crowded spaces. Effective March 17, 2020:

- All events over 50 people are to be cancelled;
- No attendance at recreational centres, casinos, bingo halls, bars, theatres and other facilities;
- Sit-down restaurants can remain open at lower capacity (50% capacity to a maximum of 50 people);
- All students will no longer be attending classes in K to 12 schools until further notice (teachers and other school staff will still be expected work, either from home or at their workplace); and
- All licensed childcare facilities, out-of-school programs and preschool programs are closed immediately (approved day homes are exempt as they care for fewer than 7 children at a time, but should use enhanced sanitation practices).

Quebec:

On March 13, 2020, the Gouvernement du Québec adopted an order in council (Order in Council number 177-2020) (, the "**Order**") that declares a health emergency throughout Québec's territory pursuant to Section 118 of the Public Health Act. As a result of the Order and its associated orders (mainly Ministerial Order number 2020-003 and Ministerial Order number 2020-004) the following businesses, establishments and public spaces are required to close during the indicated period:

- From Monday, March 16, through Friday, March 27: educational institutions (elementary and secondary schools, vocational training and adult education centres, private schools, CEGEPs, colleges and universities);
- From Monday, March 16, through Friday, March 27: childcare centres, day care centres (subsidized, non-subsidized, family and non-regulated), home childcare services and school childcare services. However, childcare services must continue to be organized and provided for a child if one of the child's parents is employed by or exercises a profession in the health and social services network (including in private professional practice, community pharmacies and pre-hospital emergency services) or is a police officer, firefighter, ambulance technician, correctional services officer or special constable;
- Until March 30, 2020: places to which the public has admittance for cultural, educational, sports, recreation or entertainment purposes, including the following:
 - spas, saunas and swimming pools;
 - amusement parks and water parks;
 - recreational sites (including ski resorts, amusement parks, trampoline centres, skating rinks and ice rinks);
 - libraries;
 - fitness centres (including training gyms, dance halls and spinning, zumba and yoga centres);
 - sports centres (including indoor soccer arenas and outdoor recreation centres);
 - cinemas,
 - theatres,
 - museums;
 - arcades;
 - performance spaces;
 - dance halls;
 - zoos and aquariums; and

- all other similar facilities.
- Until March 30, 2020: bars, discotheques, restaurants offering buffet service and sugar shacks. Restaurants that do not offer buffet services are authorized to continue to operate provided they admit no more than one-half of the number of clients they can normally admit and provided they apply measures to distance clients from one another; they may also continue activities of the "drive-through" and "take-out" type. However, sample counters and booths in grocery and department stores are prohibited.
- Further, gatherings of more than 250 people are prohibited. The state of public health emergency is declared for a period of 10 days starting March 13th, 2020. On or prior to the expiry of this 10-day period, the situation will be reassessed and the public health emergency will be considered for renewal.

Ontario, British Columbia, Alberta and Quebec:

Many commercial leases require the tenant to stay open for business. A failure to do so may not only constitute an event of default but may also void other tenant rights such as options to renew, rights of first refusal, parking and signage rights etc. **Many tenants are asking, will my closure constitute an event of default under my lease?** Strictly speaking the answer may be yes if your lease mandates you to stay open and your lease does not include a force majeure/unavoidable delay clause in your favour or a compliance of law requirement (which may arguably supersede the operating covenant). That said, however, we expect that it is unlikely a court would enforce an operating covenant on the grounds that it is contrary to the public interest in light of the legally mandated closures.

Download fact sheets by jurisdiction: Click [Ontario](#), [British Columbia](#), [Alberta](#) and [Quebec \(English, French\)](#) for PDF versions.

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Related Real Estate, COVID-19: How will coronavirus impact your business?

Authors

Laurie J. Sanderson

Partner - [Ottawa](#)

 Email

laurie.sanderson@gowlingwlg.com

 Phone

+1 613-786-0169

 vCard

Laurie J. Sanderson

Stacey J. Handley

Partner - Vancouver

 Email

stacey.handley@gowlingwlg.com

 Phone

+1 604-891-2713

 vCard

Stacey J. Handley

Joel Camley

Partner - Leader - Canadian Real Estate Practice Group, Vancouver

 Email

joel.camley@gowlingwlg.com

 Phone

+1 604-443-7602

 vCard

Joel Camley

Darren J. Taylor

Partner - Calgary

 Email

darren.taylor@gowlingwlg.com

 Phone

+1 403-298-1091

 vCard

Darren J. Taylor

Julie Desrochers

Partner - Head - Montréal Real Estate
Group, Montréal

 Email

julie.desrochers@gowlingwlg.com

 Phone

+1 514-392-9512

 vCard

Julie Desrochers

Lisa Buriak

Associate - Calgary

 Email

lisa.buriak@gowlingwlg.com

 Phone

+1 403-298-1855

 vCard

Lisa Buriak

Susan D. Rosen

Partner - Toronto

 Email

susan.rosen@gowlingwlg.com

 Phone

+1 416-862-3519

 vCard

Susan D. Rosen