

COVID-19 CONSIDERATIONS FOR COMMERCIAL TENANTS ONTARIO

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.

Closures and Going Dark:

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.

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.

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.

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