COVID-19: Global Real Estate Guide - Canada

COVID-19 Impact on Real Estate

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# If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

As of 17 August 2021

Yes.

Commercial leases in Canada typically contain a tenant covenant to comply with all applicable laws, statutes, governmental regulations, etc. which would extend to all legal obligations concerning public health, even if adopted after the commencement of the lease. In other instances, legislation may impose other public health requirements directly on the tenant as an occupier of premises.

If the lease includes such a covenant, a failure to comply would constitute an event of default under the lease and the tenant would have a cure period to permit the tenant to comply. For example, some leases may include health emergency clauses affording landlords certain rights such as amending property rules and regulations. “Health emergency” is often defined as an occurrence that may expose people to imminent danger from disease, virus or other situations detrimental to human health. These clauses may allow landlords to place restrictions on access to the property for tenants, employees or visitors, restriction or extensions on operating hours and changes to property cleaning protocols while the COVID-19 pandemic continues.

Some provinces have also introduced COVID-19 legislation to limit civil liability if anyone fails to meet the minimum public health requirements.  Ontario and British Columbia have both implemented protection that so long as there is no gross negligence and a person acts in good faith in following public health guidance as well as federal, provincial and municipal law, then no civil liability will be imposed.

# If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

As of 17 August 2021

Under triple net leases, a tenant pays its pro rata share of the landlord’s costs incurred in operating the building or space where the premises are located, in addition to certain other costs incurred by the landlord.

Depending on what is negotiated between the parties, operating costs may include a “catch-all” for additional services provided in accordance with the principles of good estate management, and any such costs will be passed on to the tenants. These costs would typically apply to the common areas, where the tenant would typically be responsible for any such cleaning in its premises.

If the lease includes a health emergency clause, it may allow a landlord to include extra costs such as for sanitization in the operating expenses paid by the tenant.

# If the tenant cannot use its property, does it have to continue paying rent?

As of 17 August 2021

It depends.

Generally, if the leased premises are damaged, destroyed, expropriated or (in limited cases) inaccessible, the commercial lease will specify that the parties can mutually agree to terminate the lease, the landlord may unilaterally terminate the lease, or the landlord may be excused from certain non-monetary obligations.

If the leased premises are inaccessible, unless due to being taken by a governmental authority, this will not typically excuse the payment of rent.

If a governmental authority issues an order that prohibits the use of the leased premises, unless the lease expressly provides otherwise, the tenant will be required to continue paying rent.

The provincial case law and legislation varies across the country and therefore the actual jurisdiction where the property is located should be specifically reviewed as needed:

In Ontario, non-payment of rent remains a breach of contract absent lease terms to the contrary. The provincial government enacted some COVID-19 protections for commercial tenants preventing landlord’s from exercising termination or distress rights for non-payment of rent in certain situations. Additionally, recent case law has demonstrated a willingness on the part of the courts to provide relief from forfeiture for commercial tenants where the cause of default was pandemic related and the circumstances support the granting of relief to the tenant.

In British Columbia, the provincial government excluded commercial tenants from any rent freeze and the courts have rejected attempts to protect tenants where there is a default due to non-payment of rent during the COVID-19.

In Quebec, the Superior Court relieved a commercial tenant from its obligation to pay rent during the time non-essential businesses were closed by provincial order. In the common law jurisdictions in Canada, it is unlikely that this Quebec decision would be followed because "force majeure" clauses are not found in legislation but are dependent on the particular lease agreement. In most leases the "force majeure" (or unavoidable delay) clauses specifically state that such a provision does not provide relief from the tenant's obligation to pay rent.

# Is it common for leases to contain a tenant's keep-open covenant? If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

As of 17 August 2021

Depending on the type of lease, it is not unusual to have continuing operation covenants.

This will depend on the business of the applicable tenant entity and the context in which the tenant is leasing the premises. Specifically, operating covenants sometimes are negotiated under Canadian commercial leases for larger commercial tenants in specific retail spaces (i.e., a movie theater in a shopping mall). Such clauses require tenants to operate their business continuously and during specific business hours at all times during the lease term, which, from the landlord’s perspective, contributes to the appeal of the shopping mall or other space.

A landlord could enforce an operating covenant using any remedies granted to it under the lease, which may include specific performance. That being said, a landlord may not require the tenant to break the law, so if there is a governmental quarantine or mandatory shutdown, the landlord would not be able to enforce the covenant. In Canada, it is rare to see a landlord successfully seeking enforcement of this covenant by specific performance forcing the tenant to stay open given the adequacy of damages to repair any loss and difficulties in court supervision.

If the lease contains a force majeure clause it should be reviewed to determine if it may apply to relieve a tenant of the obligation to keep open if it is ordered closed by government authorities and cannot operate continuously.

# Could the parties claim that Covid-19 is a force majeure event which excuses the parties from performing the lease obligations?

As of 17 August 2021

Force majeure provisions are standard in commercial leases in Canada, but they generally do not apply to or excuse monetary obligations such as payment of rent. Usually, force majeure provisions excuse non-monetary obligations under a lease that requires performance. In our current circumstances, this could excuse a tenant from keeping their premises open, but it would not excuse the non-payment of rent.

In general, force majeure provisions tend to be narrowly construed in Canada to exclude circumstances that do not clearly fall within the clause, and to exclude events that are not truly beyond the party’s control. The force majeure clause must clearly contemplate a pandemic or a health emergency in order for a party to rely on the clause to absolve themselves of liability under the contract because of COVID-19. In Quebec, the only civil law province, force majeure is codified in provincial legislation but can be modified by contract.

Quebec and Ontario have seen their first couple of cases arguing force majeure clauses in the post-COVID-19 era with varying degrees of success and the area of the law is very unsettled at present.

In Quebec the concept of force majeure has been codified, however, in the rest of Canada there is no legislated concept of force majeure. Consequently, Quebec has seen more generous relief for commercial tenants.  For example, in one case, the provincial court granted a commercial tenant relief from its obligation to pay rent during the time non-essential businesses were closed by provincial order and therefore as the landlord could not fulfill its obligation to provide peaceable enjoyment of the premises due to pandemic shutdown orders.  In the common law jurisdictions in Canada, it is unlikely that this Quebec decision would be followed because “force majeure” clauses are not found in legislation but are dependent on the particular contract.  In most leases the force majeure or unavoidable delay clauses specifically state that such a provision does not provide relief from the tenant’s obligation to pay rent.

# Could the parties argue that the lease contract is frustrated by Covid-19?

As of 17 August 2021

Yes, but only in rare circumstances.

Leases do not typically include a specific provision in connection with frustration of purpose. As a general principle of contract law, the parties may be able to argue that the purpose of the lease has been frustrated.

This remedy would only be available in cases where the leased property is absolutely incapable of enjoyment in any form.  In the case of COVID-19, it would be unlikely that frustration would be successful.

Recently, Ontario courts have rejected attempts to argue frustration of the lease on the basis of force majeure.  In Quebec the concept of force majeure has been codified in the Quebec Civil Code, however, in the rest of Canada there is no legislated concept of force majeure and therefore the general laws of contract law would apply and the language included in the lease will control the outcome.

# Do landlords and tenants commonly obtain business interruption insurance?

As of 17 August 2021

Yes.

Carrying business interruption insurance may or may not be included as a requirement in the lease (to be carried by the tenant). Regardless of what the lease requires, most tenants would carry business interruption insurance. Landlords will very rarely directly take out business interruption insurance.

Business interruption insurance is typically tied to the risk of material damage to the property, including risk of business interruptions arising from property damage that results in partial or total closure of the business, which in turn leads to loss of profits. The specific wording of the insurance policy will control whether tenants can recover for losses arising from COVID-19.

Business interruption insurance is an evolving area in the COVID-19 commercial leasing context and the applicability of such policies is dependent on the relevant policy and facts. Recently, some guidance on how courts may interpret business interruption insurance claims has emerged. In one Ontario case, the term “resulting physical damage” was given a broad interpretation to include potential loss of use of certain property despite no actual physical damage to it. However, prior case law has held that loss of use of a premises did not equate to physical damage. Moreover, the unique facts in that case and the dependence of the courts on the scope of the individual policy before them limits the applicability beyond its own facts.

# Are there other government intervention schemes that may affect leases?

As of 17 August 2021

Yes.

**Rent relief**

Under the Canada Emergency Commercial Rent Assistance (“CECRA”), the government provided loans to property owners to help lower or forgo rent of small and medium-sized businesses for April to September 2020. CECRA was funded by way of forgivable loans to landlords and required their voluntary cooperation. CECRA ended on 1 October 2020. Through the program, the government would cover up to 50% of monthly rental payments during the eligible period on the condition that the landlord absorb 25% of the costs and the tenants 25% of the rent.

On 9 October 2020, the government introduced a new rent-relief program called the Canada Emergency Rent Subsidy (“CERS”) to replace CECRA. This program provides assistance to many small business tenants who continue to be affected by pandemic closures. Under the CERS program, the tenant applies directly for the subsidy as opposed to having to rely on the landlord’s election to apply for the program (as required under CECRA). This subsidy is available for commercial rent and for other expenses related to commercial properties, including: property taxes, property insurance, and interest on commercial mortgages. Eligible commercial entities with a revenue loss of 70% or more from 27 September 2020 to 3 July 2021 can be granted relief of up to a maximum of 65% of eligible expenses. For entities that have experienced a revenue loss of less than 70%, the subsidy is available on a sliding scale. Businesses that have been mandated to close by a public health order may also be eligible for additional rent relief of 25% (referred to as “lockdown support”). The maximum subsidy amount will start to decline as of 4 July 2021, with the program due to end 25 September 2021.

**Tax relief**

Certain municipal and provincial/territorial governments have instituted delayed payment of property tax or postponed increases in tax assessment as relief measures for businesses. The arrangements affecting a particular property should be confirmed by checking with the local municipal or provincial authority.

 **Prohibition on enforcement actions**

Some provincial and territorial governments had passed prohibitions or restrictions on the exercise of certain rights of landlords relating to the enforcement of (primarily) residential leases (including terminating the lease and evicting the tenant). Ontario, Quebec, British Columbia, Manitoba, Alberta, Nova Scotia had temporary moratoriums on evictions in place for commercial tenants eligible for Federal rent assistance programs, however, these measures did not relieve tenants of their obligation to pay rent or give the tenant the right to pay reduced rent. For example, Ontario initially implemented protections for commercial tenants whose landlords declined to apply for CECRA, prohibiting evictions for non-payment of rent and landlord distress rights. Originally in force from 1 May 2020 to 1 September 2020, these protections have been extended until 22 April 2022 and transitioned to apply to the CERS program.

The suspension periods for evictions were discontinued in most provinces as stay-at-home orders ended. As of August 2021, only Ontario maintains a prohibition on evictions for CERS-approved tenants.

 Quebec courts have granted temporary injunctive relief preventing landlords from terminating commercial leases and/or reducing rent payable during the closure periods, particularly where landlords refused to participate in Federal rent assistance programs. The landlord’s inability to provide peaceable enjoyment of the premises for their intended use was a key factor in these cases. Courts in other Canadian jurisdictions are unlikely to rely on these same principles but have achieved similar results through interlocutory injunctions and/or relief from forfeiture. For instance, a tenant who rented commercial space in Ontario was granted relief from forfeiture after failing to pay rent in full between March and October 2020. The court held that the landlord was not entitled to exercise a right of re-entry at that time.

# Are there any government actions in play affecting other real estate businesses or premises?

As of 17 August 2021

**Other Support Programs Available:**

Certain sectors particularly impacted by the pandemic such as agriculture, aquaculture, air transportation, tourism and energy, additional support is available through various government programs.

Through the Regional Relief and Recovery Fund (“RRRF”), the government is helping businesses in sectors such as manufacturing, technology, tourism and others that are key to the regions and to local economies. The RRRF program specifically targets businesses that may require additional help to recover from the pandemic, but have been unable to access other support measures.

The Large Employer Emergency Financing Facility **(**“LEEFF”**)** is another government program that provides bridge financing to Canada’s largest employers, who are not able to arrange conventional financing, in order to keep their operations going.

Canada Emergency Response Benefit (“CERB”) provided a taxable benefit of CAD 2,000 every 4 weeks for up to 24 weeks to eligible workers directly affected by COVID-19. This program is now closed but was replaced by modifications to the Employment Insurance program (“EI”) coupled with the implementation of the Canada Recovery Benefit (“CRB”). The CRB provides workers affected by COVID-19 who are not eligible for EI with up to 50 weeks of income support.

The Canada Emergency Wage Subsidy (“CEWS”), passed by the Canadian Government, grants eligible Canadian employers whose business has been affected by COVID-19 a subsidy of 75% of employee wages up to a maximum of  CAD 847/week per eligible employee. The program has been extended until September 2021 and a proposal has recently been made to continue the program until October 2021.

Through the Canada Emergency Business Account (“CEBA”), the Canadian Government is offering interest-free loans to small businesses to give access to capital through the pandemic and help them return to full operations as permitted by COVID-19 restrictions. These interest-free loans of up to CAD 40,000 are available exclusively to eligible small business and not-for-profits.

On 26 January 2021, the federal government announced the Highly Affected Sectors Credit Availability Program (HASCAP) Guarantee. This program provides eligible businesses impacted by COVID-19 who received CERS or CEWS payments with guaranteed, low interest loans of CAD 25,000 to CAD 1,000,000 to cover operational cash flow needs. The deadline for applications under HASCAP is 31 December 2021.

# Are any additional laws being contemplated?

As of 17 August 2021

No.

# Are landlords and tenants negotiating amendments to leases?

As of 17 August 2021

Yes.

When it became clear that the COVID-19 pandemic may have a longer term impact, tenants began exploring alternative rental arrangements to alleviate financial pressure, accommodate the shift toward work-from-home or flexible work arrangements, and provide future flexibility.

Many tenants are negotiating rent abatements, temporary rent reductions, enhanced assignment / subletting rights, early termination rights, rent deferrals, shorter lease terms and renewal terms, reductions in square footage or the use of alternate leased premises, and/or other concessions.

# As businesses re-open are there any new requirements to adhere to?

As of 17 August 2021

Yes.

Businesses that may re-open must continue to adhere to the various restrictions seen in the market since the onset of COVID-19.

These restrictions include

limiting the number of customers and employees inside a business or retail space at a given time

requiring a six foot distance between the customers and employees inside a business or retail space, with corresponding signage for guidance

requiring the use of face masks while inside a business or retail space

providing hand sanitizer at entry-ways and check-out counters

requiring that employees and customers undergo temperature checks before entry

requiring regular top-to-bottom cleaning and sanitation of businesses and retail spaces.

These restrictions will vary depending on the jurisdiction and the extent of any COVID-19 infections and hospitalizations in that jurisdiction.

# Are there other emerging trends or key issues for landlords and tenants?

As of 17 August 2021

**Force majeure clauses**

Tenants and landlords are negotiating more robust force majeure clauses under commercial leases, which take the COVID-19 pandemic and any subsequent “waves” into account. However, force majeure provisions will still typically only excuse a landlord’s or tenant’s non-monetary obligations under a lease that require performance, subject to very limited carve-outs.

**Commencement date**

Parties may agree to extend the commencement date of the lease on a day-for-day basis, in the event that the landlord is unable to deliver the leased premises to the tenant by a certain date or if the tenant is unable to use and occupy the leased premises as of the intended date due to shelter-in-place orders or other governmental restrictions; however, these extensions may be capped. The parties may even agree to specify an outside date whereby the tenant has the right to terminate the lease if the leased premises still have not been delivered by such date. Further, the parties may agree that the tenant will receive a rent abatement or rent deferral if the tenant is unable to use and occupy the leased premises for a certain number of consecutive days during the lease term due to shelter-in-place orders or other governmental restrictions. These types of provisions are often heavily negotiated and will ultimately depend upon the negotiating leverage of the parties.

**Business interruption insurance**

Many commercial tenants are attempting to bring claims under their business interruption insurance policies in response to ongoing financial distress caused by COVID-19. However, these claims are often denied by their insurers, who claim that business interruption insurance covers only physical damage to the tenant’s property or other property that impacts the tenant’s ability to carry out its business, and not financial losses as a result of a pandemic. Many tenants and landlords are heavily negotiating the typical requirement under commercial leases that the tenant obtain and maintain business interruption insurance throughout the lease term.

**Tenant security**

Many landlords are now insisting that tenants provide stronger security for tenants’ obligations under the leases, in the form of a guaranty, letter of credit, and/or security deposit, to protect against any default by the tenant under the lease, which may be caused by a future disruption to a tenant’s business as a result of COVID-19.

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