

# A Practical Guide for Landlords and Tenants:

## COVID-19 Commercial Rent Deferral Options and Orderly Closures

April 20, 2020

**Disclaimer** – The following document does not constitute legal advice. It is a document offering limited guidance to landlords and tenants in navigating the challenging circumstances resulting from COVID-19. Legal Counsel is advised for further questions and information.

### Unique challenges facing Landlords and Tenants

It is definitely not “business as usual” for many commercial landlords and tenants given the challenges faced by ongoing costs, business closures, and the changing public health landscape. In today’s environment, many tenants are facing severe decreases in revenue and many are having to make the very difficult decision of shutting down their operations, making it very challenging to afford fixed costs, such as rent.

Country-wide, we have seen landlords providing assistance to struggling tenants where they can or within certain criteria,<sup>1</sup> however, landlords also face significant financial obligations including mortgage payments, taxes, utilities, cleaning, maintenance, security and other operating costs. While parties to a commercial lease could adopt a strictly legal posture to their contractual relationship, there are other options available should the parties seek to take a longer view of the commercial lease.

### Considerations for Landlords and Tenants

During this difficult time, landlords and tenants might consider the following options to reach an agreed resolution regarding the deferral of the payment of rent or to assist with the orderly closure of a business.

#### Financial Support for Businesses

Both landlords and tenants should consider accessing any available financial support. This includes, but is not limited to, wage support, loans, tax payment flexibility and potential mortgage deferrals.

The Federal and Provincial Governments have recently announced the Canada Emergency Commercial Rent Assistance Program designed to assist property owners and commercial tenants. Additional information regarding details and access to this program are forthcoming.

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<sup>1</sup> <https://www.retail-insider.com/retail-insider/2020/4/landlords-in-canada-seek-government-assistance-amid-covid-19-pandemic-boma>

An additional program that may provide meaningful financial support to both landlords and tenants is the [Canada Emergency Wage Subsidy](#). This subsidy will help companies of all sizes, non-profits, and charities that face year-over-year revenue decreases of at least 30% (15% for March). The subsidy will be back-dated to March 15, 2020 and will cover 75% of the first \$58,700 of wages paid per employee - up to \$847/week per employee.

Landlords should directly contact their financial institution about options for a potential mortgage deferral.

A concise summary of available financial support can be found on the Greater Vancouver Board of Trade's COVID-19 Business Resource website: <https://www.boardoftrade.com/covid-19>

### Rent Deferral Agreements

If a rent cost reduction negotiation is necessary, landlords and tenants could both consider the following:

1. Examine the lease for:
  - a) A force majeure clause and determine if this is relevant given the context
  - b) Any other language in the agreement that might provide assistance
2. Check to see if a security deposit was paid. If so, both parties can negotiate if that money can be utilized as a temporary measure for relief
3. If there is agreement, and both parties agree to negotiate a Rent Deferral Agreement, landlords and tenants might consider the following:
  - a) The deferral (i.e. temporary suspension) of rent.
  - b) The abatement of rent (i.e. outright forgiveness of the rent).
  - c) How much rent is to be forgiven or deferred?
  - d) Is the deferral or abatement to be for the full amount of the rent. Explicitly outline what operating costs are, as opposed to only basic rent, and clarify what costs still need to be paid?
  - e) The Government of Canada along with provincial and municipal governments are allowing for various taxes to be deferred until a later date. Are these deferrals reflected in the calculation of the ongoing operating costs?
  - f) If rent is deferred, when will it be repaid? Options here can include the payment of a lump sum amount at a future date or the spreading out of the deferred amount over the balance of the term of the lease.
  - g) Is interest to be paid on the deferred rent, and if so, at what rate?
  - h) Legal fees may be incurred as part rent cost reduction negotiation, and if so, who pays the fees and how?



4. If a Rent Deferral Agreement is made, tenants should anticipate requests from landlords to provide:
  - a) Proof of financial loss, including financial statements.
  - b) Compliance with a public health order to close.
  - c) Financial statements and cash flow projections.
  - d) A business restructuring plan and supporting documents.
  - e) A summary of financial support secured from all levels of government.
  - f) Current ownership and capital structure.
  - g) Accurate information about the status of other Rent Deferral Agreements (where the tenant operates multiple premises).

A Landlord may be required to collect some or all of this information from all tenants in a building in order to qualify for their own mortgage deferral or other financial assistance.

#### Reduction in Services by the Landlord

Landlords may consider reducing operating costs (e.g. hydro, water, gas etc.) by implementing a reduction of services for their building. Likewise, landlord savings might be achieved through other voluntary measures with the reduction being passed on to a tenant so as to reduce the need for rent deferral or abatement.

#### Surrender or Buyout of the Lease

Landlords and tenants might consider to negotiating a surrender or buyout of a lease.

#### Documenting a Lease Amending Agreement

If the parties agree to drafting a new agreement, the landlord and tenant will again need to consider the terms of the lease which, in all likelihood, will require that the execution of a Lease Amending Agreement be confirmed in writing and signed by all involved parties. In that regard, any such document should:

1. Clearly spell out the Lease Amending Agreement;
2. Ensure that the language within the new amending agreement outlines an agreed upon and specific time frame, and that there is clarity on terms still covered by the original agreement and those covered by the new amending agreement; and
3. Include all the parties to the lease including any indemnifiers or guarantors under the lease.

## Business Interruption Insurance

Business Interruption (BI) coverage is typically an 'add-on' to a standard business insurance policy that provides financial support for expenses or lost profits in the event of direct physical damage to a business. Although BI Insurance will not generally offer coverage for business interruption or supply chain disruption resulting from COVID-19,<sup>2</sup> businesses are encouraged to talk to their insurance representative for assistance if they have this insurance and questions on coverage/support.

## Insurance and the Orderly Closure of a Business

Governments' public health response to the COVID-19 crisis includes the forced closure of some businesses. This necessary decision impacts the ongoing viability of non-essential businesses, or businesses that have not adapted their services and workplace to the orders and recommendations of the Provincial Health Officer. It is worth noting that a business insurance policy may be impacted if business premises are vacant or unoccupied for 30 days or more. If a business is closed for any reason, for insurance purposes, it is important to maintain the security and maintenance of the premises. When closing down a business, some considerations include:

1. The landlord's and tenant's respective insurance policies should be reviewed to ensure any requirements under the terms of the coverage are being met. This might include the need to:
  - a) Give notice to the insurer(s) of the business closure.
  - b) Secure the premises in an orderly fashion and maintain alarm systems.
  - c) Perform required periodic checks of the premises.

If you are unable to have someone visit your business premises, contact your insurance representative to determine what solutions are available.

2. As mentioned above, the landlord and tenant may want to document a method to close and monitor the business in order to meet both insurance requirements and an orderly closure of business. Ensure to consider that:
  - a) Physical security measures are in place, fences are in good repair, windows are locked, shutters are in place, gates are locked.
  - b) Fire and/or sprinkler systems are fully operational.
  - c) The activation (or installation) of a monitored intruder alarm.
  - d) Temporary signage is installed to advise customers and suppliers of the closure, including essential contact information.
  - e) Non-essential utilities have been turned off.
  - f) External lighting is operational.
  - g) Heat and/or air conditioning are maintained at an appropriate level.

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<sup>2</sup><http://www.ibc.ca/on/business/covid-19>



- h) No obvious sewer or water leaks.
- i) Recycling, compost, waste removal and landscaping services are suspended (as appropriate).
- j) Mail and/or courier packages are redirected.

An orderly closure and monitoring of the premise will lead to a smoother return to normal operations by helping to prevent unnecessary damage and expenses.

#### The Option of Mediation for Dispute Resolution

Any agreed changes to commercial leases should be recorded in writing between landlords and tenants. Legal counsel can certainly assist in that regard if needed.

However, it is important to acknowledge that our courts are currently closed for all but emergency matters. Consequently, disputes which cannot be resolved directly between landlords and tenants could be settled through the use of a mediator. The process of mediation can be called upon even when formal litigation has not been commenced and presents the possibility for a speedy and cost-effective solution by which parties can maintain their commercial relationship and continue in business together.

## Acknowledgement

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