

# How Will the Coronavirus Pandemic Affect Your Commercial Lease & Rent Payments?



Michael Drouillard  
Harper Grey LLP

As we all know, the ongoing pandemic of coronavirus 2019 (“COVID-19”) has impacted commerce worldwide. It is safe to say that all businesses have been affected, but for some, the result is particularly devastating. With April 1st approaching, many commercial tenants will soon have an obligation to pay rent, and some will have concerns about their ability to do so that month, and in the months that follow.

Unlike residential tenancies, commercial leases are not governed by a provincial regulatory scheme intended to provide a minimum level of tenant protection such as British Columbia’s *Residential Tenancy Act*. It is largely a matter of getting what you bargain for in the terms of the lease. Because of this, as well as the fact the real estate market has been landlord friendly for years and therefore with the power to bargain the terms of the lease weighing in favour of the landlord, you may find that your commercial lease gives you no room other than to continue to pay rent or else risk being found in default.

For example, your lease may contain a *force majeure* clause. Typically, this clause will provide that a landlord or tenant is excused from timely performance of an obligation if catastrophic events outside of the control of the parties prevent the timely performance of that obligation. However, it is also typical that this clause, when found in a commercial lease, will carve out the obligation to pay rent as an obligation that benefits from the protection of this clause. In other words, assuming that COVID-19 amounts to a *force*



*majeure* event, if the *force majeure* clause in your lease is drafted with this carve out, then you are still likely obliged to pay rent on time.

Many leases also provide that the obligation to pay rent exists “without demand, deduction or right of offset”. The intent of this phrase is to impose an obligation on the tenant to pay rent on time even if the tenant feels that it is owed money by the landlord. During these times, the management of the building may be impacted, and a tenant may feel that its landlord is not managing the property as it should be; and in fact, that the landlord is in breach of the lease for this failure. It may be difficult, if not impossible, to take the position that the obligation to pay rent is suspended at this time if the lease provides that the tenant is obligated to pay rent on time without deduction or right of offset.

Some tenants may also wonder if their lease has been frustrated as a result of these events. When a contract is frustrated, the obligations of the parties come to an end. However, the test for frustration is strict, and amounts to an impossibility to perform the agreement. Typically, the fact it is no longer economically possible to perform the agreement does not amount to frustration.

It may be tempting to simply allow default to occur without discussing the matter in advance with the landlord, but such an approach is typically not

advisable. When a tenant goes into default for non-payment of rent, the typical commercial lease will give the landlord a wide range of options to deal with the matter, including ways that could make a bad situation worse. Most commercial leases provide, for example, that on default of payment of the rent the landlord can:

1. terminate the lease and sue the tenant in damages for the unexpired balance of the term. Although the landlord may have an obligation to mitigate its damages, it may be difficult for the landlord to do so if the leasing market is generally impacted by COVID-19 in the months that follow; or
2. enter the premises, without a court order, and seize and sell personal property using the landlord’s right of distress, a decision that could bring the tenant’s ability to conduct business to a practical end.

But furthermore, most commercial leases provide that the tenant is required to pay all of the landlord’s enforcement costs, including actual solicitor and client costs. This means, in addition to being sued for non-payment of rent, a tenant could be sued for significant enforcement expenses.

Ultimately, because the terms of commercial leases vary so much, and because they are not consistently regulated under a single provincial scheme, these difficult questions require legal advice and a review of your lease with legal counsel.

---

*Michael is associate counsel at Harper Grey and co-chair of the firm's Real Estate Law group. His practice focuses on commercial real estate transactions and real estate disputes.*

## Michael Drouillard

mdrouillard@harpergrey.com  
604.895.2904

This material is not a legal opinion. Readers should not act on the basis of this material without first consulting a lawyer for analysis and advice on a specific matter.

We hope you found this material useful. If you’d like to receive helpful information on similar topics directly to your inbox, consider subscribing using the link below:

<https://www.harpergrey.com/knowledge/#subscribe>

[Subscribe](#) | [Unsubscribe](#)

© Harper Grey LLP, All Rights Reserved

[Privacy Policy](#) | [Disclaimer](#)