

# OVERHOLDING IN COMMERCIAL LEASING

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## Introduction

The concept of overholding (or “holding over” or “holdover”) is often misunderstood and deserves more attention in commercial leases, given the significant consequences for both landlords and tenants, as this bulletin explains.

## Common Law Overholding

At common law, overholding refers to a tenant remaining in occupancy of the leased premises with the landlord continuing to accept rent, despite the term of the lease having expired. For an original lease term over one year, a year-to-year periodic tenancy gets created, so either party can terminate on at least six months’ notice. For a shorter lease term, a month-to-month tenancy is created, terminable on a minimum of one month’s notice. In either case, the lease terminates at the end of the applicable tenancy year or month. While overholding, the tenant may also be liable for “occupation rent”, that is, a “reasonable amount for the use and occupation” of the landlord’s land.<sup>[1]</sup>

We note that these common law principles are flexible, and Courts take a highly contextual approach when assessing responsibilities and costs in the event a tenant is overholding.

## Other Common Law Outcomes

There are three other common law situations that may occur instead of overholding, described as follows:<sup>[2]</sup>

1. **Tenancy at sufferance:** when the tenant remains in possession of the leased premises after the lease expires, without the landlord’s consent or acceptance of rent, but where the landlord does not demand that the tenant vacate the leased premises.<sup>[3]</sup> When the landlord demands possession of the leased premises, the tenancy ends and the tenant becomes a trespasser of the leased premises, as discussed below. The landlord accepting rent leads to overholding, as noted above.
2. **Tenancy at will:** if a tenant remains in possession of the leased premises after the lease has expired but with the implied or express consent of the landlord, especially while the parties negotiate a new lease. The original lease applies while the new lease is being negotiated or if a new lease never gets signed.<sup>[4]</sup>

Either party may end the tenancy at any time.

3. **Trespass:** where the landlord refuses to accept rent and demands that the tenant leave the leased premises, yet the tenant fails to leave within a reasonable time.<sup>[5]</sup> This situation may be modified by legislation, e.g. the *Trespass Act* (British Columbia).<sup>[6]</sup>

## Legislation

Provincial commercial tenancy legislation (or lack thereof) is the next step when interpreting overholding. For example, in British Columbia<sup>[7]</sup> and Ontario,<sup>[8]</sup> a tenant is liable for double the original rent, where (1) the landlord demands possession and then the tenant wilfully overholds; or (2) the tenant delivers an early termination notice<sup>[9]</sup> as permitted under the lease, but fails to leave the leased premises on the early termination date. Alberta no longer has equivalent provisions.<sup>[10]</sup>

The legislation may also specify the notice period for either party terminating overholding and other periodic commercial tenancies,<sup>[11]</sup> or modify the application of occupation rent.<sup>[12]</sup> All this to say that province-specific advice is necessary to interpret one's overholding situation where the lease is silent.

## Overholding in a Lease

While the tenant obviously wants to avoid paying statutory double rent, both parties may not want an implied yearly or monthly tenancy, and a landlord may also wish to retain the leased premises for their own use, or rent them out to a different tenant. As such, a well-drafted overholding clause offers important benefits for both parties.

An overholding clause in a lease often contains the following features:

- Specifying whether overholding requires the landlord's explicit, written consent (for further discussion of this principle, see this [bulletin](#) prepared by our colleague Bill Rowlands);<sup>[13]</sup>
- Stating the outcome if the landlord does not consent to overholding;
- The basic rent and additional rent payable during overholding;
- The term of the lease during overholding, commonly month-to-month; and
- Whether certain tenant rights do not apply during overholding.

Even if an overholding clause includes the features described above, a Court will still take a contextual approach and assess what is fair given the circumstances of the matter.

## Conclusion

Overholding clauses are prevalent in modern commercial leases, but the complexity surrounding overholding offers opportunities for confusion and incurring extra costs. Although overholding is rarely top of mind when

reviewing a draft lease, diligent consideration of this clause is worthwhile for both landlords and tenants.

If you wish to obtain further information on overholding and its potential implications for your business, please do not hesitate to contact us.

[1] *Young v Bank of Nova Scotia*, 23 DLR 854 at 857; 1915 CanLII 531 (ON CA) (ON CA).

[2] *Aim Health Group Inc. v 40 Finchgate Ltd. Partnership*, 2012 ONCA 795 at para 92 [*AIM Health*].

[3] *Ibid* at para 93.

[4] *Ibid* at para 94; *Gardner v Ganapathi*, 1996 CanLII 2274 (BC SC) at para 8, 1996 CarswellBC 1171.

[5] *Cullen v Rice*, 1981 ABCA 3 (CanLII), 27 AR 361.

[6] *Trespass Act*, RSBC 2018, c 3.

[7] *Commercial Tenancy Act*, RSBC 1996, c 57, ss 15–16 [BC Act].

[8] *Commercial Tenancies Act*, RSO 1990, c L.7, ss 58–59 [ON Act].

[9] Sometimes referred to as a “notice to quit”.

[10] *Law of Property Act*, RSA 2000, c L-7, s 66(2) [AB Act] (which excludes application of, among other things, the double rent clause contained in the *Landlord and Tenant Act*, 1730 (4 Geo II) c 28, s 1 and the double rent after notice to quit clause contained in the *Distress for Rent Act*, 1737 (11 Geo II), c 19, s 18).

[11] See e.g. ON Act, *supra* note 8, s 28.

[12] AB Act, *supra* note 10, ss 67–68.

[13] Case law indicates that the consent requirement is implied (and usually satisfied through accepting rent), if an overholding clause is silent on whether the landlord’s consent is required: *AIM Health*, *supra* note 2 at para 108, as discussed further in Bill’s [bulletin](#).

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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