“Pop-ups”- Evolution of the more modern pop up shops:

- Retail concepts/tenants take space in shopping centres, airports, and other street retail for a few months or less. Now landlords are creating permanent CRU space for the use of a number of pop-up/short term tenancies or licenses within the same CRU space. For example, the Concept and Indulge at Yorkdale.
- As more and more “pop-up shops” continue to appear, considerations such as the use of short term leases and/or licenses, understanding the nuances of a license and lease and the benefits/detriments of “pop-up shops” should be seriously contemplated by both parties (Landlord/Tenant or Licensor/Licensee) prior to entering into said relationship.
- Examples of recent “pop-up shops”: Magnum in Yorkville; Ikea Café on Queen Street; OVO in NYC; Tiffany box at JFK Airport; Bulgari at Helsinki Airport.

Lease vs. License- The key differences:

- **Exclusive possession/interest in land**- A lease provides a tenant with an interest in land and grants exclusive possession of premises for a defined period of time and control of premises without interference from landlords. A license only provides the licensee with permission to use/occupy said premises (never to the exclusion of the licensor) and creates a contractual interest.

- **Revocability**- licensor has more flexibility in regaining possession of the premises as licenses are revocable (upon reasonable notice), whereas one cannot revoke a lease, unless specifically provided for in the Lease.

- **Transferability**- a license cannot be transferred by licensee (unless expressly agreed to in the license agreement)- this is because a license is a personal right. Lease rights are generally assignable, unless specifically agreed to otherwise.

- **Rent v. Fee**- instead of payment of rent, a fee is paid for the licensed space.

Positives/Negatives of “pop-up shops” for Landlords:

- **Positives**: More foot traffic to shopping centre (if “pop-up shop” is in an enclosed shopping centre); fills vacancies if no long term tenant is on the horizon; a way to generate additional rental stream; opportunity to convert short term tenants into long term tenants; minimal landlord work, if any; and temporary for landlord’s that are undergoing development.

- **Negatives**: High turnover; lower rental income; conflicting use restrictions in respect of other existing tenants.

Positives/Negatives of “pop-up shops” for Tenants:

- **Positives**: Not locked into long term rental agreement/short term agreements; minimal operating costs; can test new concept without the risk of signing a long term lease; not as much costs in respect of building out space and fixturing.
• **Negatives**: Don’t get same type of exposure/advertising as long term tenants in a shopping centre; short notice periods for termination rights of landlord; size of premises may be an issue (not being able to accurately gage how they would perform in a model which they prefer); limited time to develop recognition and build consumer base.

**Legal Perspective: Essential Terms to contemplate when entering into a short term lease or license in respect of a “pop-up shop”**.

1. **Term**: generally for a term of less than a year. One month? Three months? Six months?
   a. From a tenant’s perspective, the term will depend on what the tenant is looking to get out of the space. Is it a model to test the market? Is it a holiday/seasonal promotion? Landlord’s would generally want security of at least one month.

2. **Rent/Fee Structure**:
   a. Gross Lease- one amount that covers all elements of rent
   b. Fixed Rates (with operating costs and realty taxes)- fixed amounts to the elements of Rent (i.e. $ per square foot, $ for insurance, $ for maintenance)
   c. Percentage Rent- payment based on a percentage of the tenant’s gross sales, and this is generally after sales are generated. Rent directly correlates with success of store.

3. **Default/Termination Rights**: Landlord should ensure they have a strong right to terminate (protection if long term tenancy comes along, or if the Tenant’s pop-up is not what is expected or if tenant fails to adhere to by-laws or obtain relevant permits).

4. **Signage**: an important factor for landlords considering maintaining a first class image. Tenant will not want to spend much on signage if they are only there for the short term.

5. **Condition of Premises**: Landlord likely to insist on delivering the space “as-is”.

6. **Use**: Landlord must ensure that tenant uses do not conflict with existing exclusives in the shopping centre.

7. **Insurance**: Tenants should be required to take out comprehensive insurance, similar to those required in landlord standard form leases and landlords should demand comprehensive indemnities.

8. **Other Considerations**: (i) Exclusive Use Rights, (ii) No-Build Areas, (iii) First Class Shopping Centre, (iv) allowances/landlord’s work.

**Drafting Tips**:

- If a lease is more appropriate than a license, choose an abbreviated short form lease; if percentage rent is chosen, provide clear and detailed instructions with respect to reporting and deadliness; removal and restoration at end of term; no returns policy after term.
- **If acting for landlord**: no transfers; narrow use clause; default/termination rights; shift liability away from landlord and toward the tenant by way of releases and indemnities; no alterations (if allowed, removal of said alterations); ensure permits are obtained.
- **If acting for tenant**: keep use clause broad; shorter term; request option to extend; seek adequate notice and cure periods; push back on arbitrary termination rights.

**Case Law**:

*Exchange Corporation Canada Inc. v Mississauga (City)*, 2014 ONCA 113
• Case considered the differences between a lease and a license. Essentially, one must look to the details of the written agreement and the intent of such agreement.