

LLP

“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 gauge 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.