

**ICSC LAW CONFERENCE 2022 – BREAKFAST ROUNDTABLE**  
**“CANNABIS – LANDLORD AND TENANT LEASE CONSIDERATIONS”**

**Kenneth Beallor – Torkin Manes, LLP**  
[kbeallor@torkinmanes.com](mailto:kbeallor@torkinmanes.com) 416-643-8818

CANNABIS - LEGISLATION

Enforcement of cannabis laws in Ontario is governed by the Cannabis Control Act, 2017, S.O. 2017, c. 26, Sched. 1 (“CCA”), Cannabis Licence Act, 2018 S.O. 2018, c. 12, Sched. 2, (CLA) and the federal Cannabis Act (S.C. 2018, c. 16) (CA).

It is illegal to sell or cultivate cannabis in Ontario without a licence.

Individuals and corporations that are convicted of an offence under the CCA can be subject to significant fines and possible imprisonment (see Section 23 of the CCA).

A director or officer of a corporation who causes, authorizes, permits or participates in an offence under the CCA by the corporation is guilty of an offence.

A Landlord and anyone operating a property can be made subject to a charge for an offence under the CCA as Section 13(1) of the CCA provides that “no person shall knowingly permit a premises of which he or she is a landlord to be used in relation to an activity prohibited by section 6”. It is a defence to a charge under the CCA that the defendant took reasonable measures to prevent the activity. Accordingly, it is an offence for landlord to knowingly allow leased premises to be used in relation to the illegal sale or cultivation of cannabis and the consequences of breaching the laws are far reaching.

So what should a property owners and property managers do?

1. Always know what is happening at your property and enforce all applicable rules.
2. Put in place a policy at the start of the term and ensure that policy is followed by whomever manages the property.
3. Conduct periodic inspections and respond promptly to complaints.
4. Document everything. Keep records of all complaints and responses to complaints; Keep records of attendances at the property and correspondence to and from the tenant.
5. Inquire several times a year as to whether Tenant is maintaining all required licenses, permits and approvals. Ask for copies.
6. Do not distraint against the Tenant’s cannabis inventory. If Tenant abandons the premises and leaves cannabis products behind, secure the premises and call the AGCO and local authorities.

If a landlord or manager took reasonable measures to prevent the activity of unlawful sale or distribution of cannabis then this can be a defence to a charge against a landlord.

CANNABIS-LANDLORD LEASE CONSIDERATIONS

Things to consider and add to your standard lease form:

1. Before you lease to a cannabis tenant ensure that no other leases at the complex prohibit the landlord from leasing premises to an entity that sells or cultivates cannabis;

2. Tenant must covenant to obtain and maintain throughout the term of the lease all licenses, permits and approval required to other sell cannabis at retail or to cultivate cannabis depending in what the property is being leased for.
3. Provide that the tenant will not be using the leased premises for the unlawful sale or distribution of cannabis.
4. Tenant must supply landlord with copies of all permits, licenses and approvals required to operate its permitted business;
5. Provide in the lease that the Tenant must immediately cease selling or cultivating cannabis if its licenses, approvals and/or permits are revoked or suspended.
6. Ensure the use clause is narrow. If you do not want the Tenant doing certain things at the Premises explicitly state so in the lease.
7. Have the Tenant sign a direction authorizing governmental authorities to release to the Landlord information concerning the status of all required licenses, permits and approvals.
8. Provide that if the Tenant or its employees are charged for any offence under applicable laws, it will be a default for which Landlord may immediately terminate the lease;
9. Provide that if the property becomes uninsurable or unfinanceable because of the business of the Tenant, the Landlord can terminate the Lease.
10. If leasing to an entity for cultivation of cannabis. be aware of the environmental impact such a business can have and require Tenant to maintain sufficient environmental insurance. Wastewater can become contaminated due to heavy use of pesticides.
11. Ensure the Tenant has proper and sufficient security for its business.

#### CANNABIS - TENANT LEASE CONSIDERATIONS

- The lease should be conditional on the tenant obtaining all required permits, licenses and approval from all governing authorities (including the Alcohol and Gaming Commission of Ontario (the “AGCO”)).
- Before signing the lease do your due diligence and ensure the site is zoned to permit a retail cannabis use and that it meets the AGCO site selection criteria.
- Ensure that the Use provision is as broad as possible so as to permit the tenant to sell cannabis and cannabis related products (including edibles and consumables) and expand on services provided in the leased premises (such as the sale of coffee or food products) as are permitted to be sold from time to time under the governing legislation. Today there are stringent limitations, but over the term of the lease those limitations may become less stringent and the tenant may be able to sell additional products such as edibles, oils and offer additional services
- Tenant should only be required to operate its business from the leased premises during those hours permitted under the applicable legislation governing cannabis retail operations.
- Landlord should acknowledge that it will have no right to distraint or otherwise seize or sell any regulated or controlled substances within the leased premises including, without limitation, cannabis.
- Tenant should request that the landlord waive all rights and interest it may have in the tenants personal property. In the alternative the landlord should agree to postpone or subordinate any interest it has in the tenant’s property in favor of any lender of the tenant. If the tenant is financing its operations, the lender will likely require first security in all of the tenant’s personal property and will want a waiver from the landlord.

- In exercising any right of entry into the leased premises the Landlord must enter in the accompaniment of a representative of the tenant (except in a bona fide emergency or where tenant fails to make a representative available). Regardless, any entry must be made in compliance with all laws, including cannabis laws.
- Tenant should request the exclusive right to operate a Cannabis retail store from within the development. No other Tenant should be permitted to sell Cannabis or Cannabis products [consider providing examples of products to be restricted including edibles and consumables].
- Try and have the landlord warrant and represent that the leased premises are zoned to permit a retail cannabis store and that there are no restrictions in any agreements affecting the landlord or the development that would restrict or prohibit the tenant from operating a retail cannabis store at the development. Tenant's counsel may consider searching title to the property to ensure there are no agreements on title containing any such restrictions.
- The landlord should covenant to abide by all laws including cannabis laws.
- The lease should provide for the tenant's ability to assign or sublet the premises for other uses as if the retail sale of cannabis is not profitable at the location, or if the tenant loses its license or retail sale of cannabis becomes illegal, the tenant will need the ability to assign the lease or sublet the leased premises to another party for, or carry on itself, another use.
- There should be no right for the landlord to elect to terminate the Lease in the event of a request to assign the lease or sublet the premises.
- Be wary of clauses in the lease that require a tenant to pay any proceeds from an assignment of the lease or sublease to the landlord which were attributable to the lease or the location. If the tenant sells the business, it should be certain to state that no value is being attributable to the lease or the location.
- Storage and receiving areas must be exclusive to the tenant (this can be accomplished by managing hours of access and providing security guard to enforce it).
- The Tenant should request the right to terminate the lease if at any time (i) any permit or license required to operate a retail cannabis store from the leased premises is revoked or cancelled for any reason outside of the control of the tenant, or (ii) the laws are changed such that the sale of cannabis and/or cannabis products are prohibited or severely restricted such that tenant is not able to reasonably operate I the business of a retail cannabis store.
- if the lease is more than 3-5 years, consider requesting an early right of termination in case the business does not work. Typically a landlord would request several months rent as an early termination fee. Another way of tackling the problem is to negotiate the right to terminate the lease after the first "x" years if sales in the last year do not exceed "X" dollars.