

January 18, 2019

## HERE TODAY, GONE TOMORROW – A PRIMER ON POP-UPS

A recent study shows that in Canada almost a quarter of all online and brick-and-mortar retailers are using pop-up stores to enhance sales. Pop-ups come in all shapes and sizes and have a broad range of uses, from formats testing new products and concepts, to support for online retailers.

### **Rent and other Charges**

Pop-ups typically pay lower rent/fees than traditional retail tenants. Payment is often structured as a gross amount, inclusive of all common area expenses and property taxes. In some cases, even utilities are included. These amounts may be payable as one lump sum in advance, or in monthly instalments.

Pop-up users with little upfront capital may prefer a percentage rent structure, in which the user pays the licensor/landlord a percentage of the gross sales from the pop-up location. This arrangement is appealing to pop-up users, since it correlates with the success of the user's business. For the same reason, a percentage rent structure may be less appealing to the licensor/landlord.

### **Space to be taken "As Is"**

Given the temporary nature of the arrangement, it seldom makes economic sense for landlords to invest in pop-up premises. Consequently, most agreements specify that the premises are taken in an "as is, where is" condition. Landlords typically deny pop-up users the right to significantly alter or fixture their space in any way that might compromise its long-term value or marketability.

### **Choice of Document**

In most cases, pop-up deals move quickly and are temporary in nature. As a result, the pop-up transaction must be papered efficiently; this means the document governing the relationship between the parties is more likely to be a *licence agreement* or

*short form lease* and not the landlord's standard form commercial lease.

A *licence* is a personal right between the owner of the lands (the licensor) and the licensee, that grants a contractual, non-exclusive right of possession. This permission may be revoked at the will of the licensor (upon notice) and cannot be transferred unless transfer rights are expressly granted in the licence. By contrast, a *short form lease* (like a full-blown lease) transfers an interest in land. It confers a right of exclusive and irrevocable possession on the tenant. Any lease, long or short, carries rights and remedies, including certain statutory rights, but a short form focuses on only essential terms and expresses them in an abbreviated form.

The choice of licence agreement or short form lease depends on a few factors: the length of the term, the complexity of the business arrangement (including the dollars at risk) and the particular use of the pop-up space. Terms of longer duration with complex rent/fee structures (such as triple net deals or financial arrangements tied to sales) are more typically documented by a short form lease. In contrast, a simple licence agreement is well-suited for short terms and straightforward gross fee structures.

### **Risk Allocation**

The insurance provisions of the pop-up agreement are arguably among its most important terms. Because the rental stream flowing from a pop-up arrangement is often slim, licensors/landlords are justified in shifting as much risk and liability to the pop-up user as possible through the risk allocation provisions, including releases and indemnities. Pop-up agreements should therefore contain comprehensive insurance requirements similar to those found in a long form lease. The user's covenant may be strong or weak or in-between, with the result that procurement of the appropriate insurance is fundamental.

## **Default and Termination Rights**

Because speed is usually key to a pop-up transaction, licensors/landlords may overlook certain operational issues of the pop-up user, such as failure to secure permits or the necessity to respect existing exclusives at the property, relying instead on short-fuse termination rights and strong default provisions. At a minimum, the licensor/landlord should be permitted to terminate the deal immediately or on very short notice in circumstances of a default or breach of another tenant's exclusive use right. Sometimes the landlord/licensor might even insist upon a unilateral right to terminate the agreement at any time, with minimal notice, for any reason or no reason. If these unilateral rights are unrelated to any default, they can be exercised pre-emptively without any recourse to the courts.

## **Transfer**

Pop-up shops usually occupy small areas of retail space for relatively short periods. Consequently, the rights granted under an agreement are typically "personal", i.e. they are granted only to the named user. The governing document prohibits the user from assigning or subletting or allowing the pop-up space to be occupied by any other party.

## **Is it a Licence or a Lease?**

Parties considering a pop-up relationship should be aware of the Ontario Court of Appeal's decision in *Exchange Corporation Canada Inc. v Mississauga (City)*. In this case, a dispute arose as to whether the parties' agreement was a lease or a licence, where the answer would determine whether realty taxes were payable to the local municipality. (Under the *Assessment*

*Act*, land leased by an airport is exempt from realty taxes provided that the airport makes payments in lieu of taxes to the municipality. However, the exemption does not extend to any leased portions of the airport itself.) The application judge held that the agreement between the parties was a licence, not a lease, because the term was not clear, and the tenant was not granted exclusive possession or rights to assign.

The municipality appealed to the Divisional Court, which overruled the application judge based on the intentions of the parties. Exchange Corporation then appealed to the Court of Appeal, which held that the application judge did not take into account provisions of the agreement such as the quiet enjoyment clause, the obligation to pay "rent", the description of the premises, and the obligation to surrender the space on expiration or termination of the term. Because the agreement also referred to the parties as "landlord" and "tenant", and in fact labelled the transaction a "lease", the Court of Appeal concluded that the parties intended to enter into a lease.

This case underscores that the determination of whether an agreement is construed as a lease or a licence will follow the substance of the agreement as a whole, as well as the intentions of the parties.

Both property owners and users can benefit from the excitement generated by pop-ups, if they are careful to document their temporary and unique relationship. At their heart, pop-up agreements deal with the core concepts of money, use, term and risk, and, as such, are deserving of the same attention as a full-blown lease.

---

*This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.*



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients' needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

Often a deal will change complexion in mid-stage. At this critical juncture, you will find us responsive, flexible and able to adjust to the changing situation very quickly and creatively. We turn a problem into an opportunity. That is because we are business minded lawyers who move deals forward.

The energy our lawyers invest in the deal is palpable; it makes our clients' experience of the law invigorating.

MARY ANN BADON  
416-598-7056  
[mbadon@dv-law.com](mailto:mbadon@dv-law.com)

FRANCINE BAKER-SIGAL  
416-597-8755  
[francine@dv-law.com](mailto:francine@dv-law.com)

JEANNE BANKA  
416-597-0830  
[jbanka@dv-law.com](mailto:jbanka@dv-law.com)

CANDACE COOPER  
416-597-8578  
[ccooper@dv-law.com](mailto:ccooper@dv-law.com)

DENNIS DAFOUST  
416-597-9339  
[ddaoust@dv-law.com](mailto:ddaoust@dv-law.com)

BITALI FU  
416-598-7053  
[bitalif@dv-law.com](mailto:bitalif@dv-law.com)

GASPER GALATI  
416-598-7050  
[ggalati@dv-law.com](mailto:ggalati@dv-law.com)

S. RONALD HABER  
416-597-6824  
[rhaber@dv-law.com](mailto:rhaber@dv-law.com)

PAETRA KAUFMANN  
416-479-4357  
[pkaufmann@dv-law.com](mailto:pkaufmann@dv-law.com)

WOLFGANG KAUFMANN  
416-597-3952  
[wolfgang@dv-law.com](mailto:wolfgang@dv-law.com)

LYNN LARMAN  
416-598-7058  
[llarman@dv-law.com](mailto:llarman@dv-law.com)

MIMI LIN  
416-597-8493  
[mimil@dv-law.com](mailto:mimil@dv-law.com)

MELISSA M. MCBAIN  
416-598-7038  
[mmcbain@dv-law.com](mailto:mmcbain@dv-law.com)

PORITIA PANG  
416-597-9384  
[ppang@dv-law.com](mailto:ppang@dv-law.com)

JAMIE PAQUIN  
416-598-7059  
[jpaquin@dv-law.com](mailto:jpaquin@dv-law.com)

BRIAN PARKER  
416-591-3036  
[bparker@dv-law.com](mailto:bparker@dv-law.com)

DINA PEAT  
416-598-7055  
[dpeat@dv-law.com](mailto:dpeat@dv-law.com)

KEN PIMENTEL  
416-598-7049  
[kpimentel@dv-law.com](mailto:kpimentel@dv-law.com)

CLAIRE RENNEY-DODDS  
416-488-3568  
[crenney-dodds@dv-law.com](mailto:crenney-dodds@dv-law.com)

LUCIA TEDESCO  
416-597-8668  
[ltedesco@dv-law.com](mailto:ltedesco@dv-law.com)

NATALIE VUKOVICH  
416-597-8911  
[nvukovich@dv-law.com](mailto:nvukovich@dv-law.com)

DANIEL WALDMAN  
416-597-9306  
[dwaldman@dv-law.com](mailto:dwaldman@dv-law.com)

DEBORAH A. WATKINS  
416-598-7042  
[dwatkins@dv-law.com](mailto:dwatkins@dv-law.com)

DANIEL WIENER  
416-479-9662  
[dwiener@dv-law.com](mailto:dwiener@dv-law.com)