

So You're Thinking of Going Back to Work... A Legal Perspective for Leasing Professionals | Part 1

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As we look toward the future and think about reopening our country, all of us in commercial leasing are asking principally the two same questions: What will that future look like? And what can we do to assist our clients to transform their businesses to adapt to that new reality?

As a landlord or a tenant, there are some issues related to these two questions with respect to which you might want to make some further investigations. Here are some of the questions we have been asking ourselves and some of the answers that we have come up with so far.

Where are we right now?

It would seem that, looking only at the commercial leasing landscape, the hardest hit by the pandemic was the retail sector. Those hardest hit seem to be the mom and pop operations, the personal service industry, and restaurants, although you can't exclude from that list the movie theatres, the fitness centres, the hotel industry and department stores. And there are certainly clothing stores that are suffering. Some of these sectors have been in decline for quite some time. Others are new to the list of challenged tenants. Grocery stores, pharmacies, liquor stores, and home improvement stores seem to be surviving well. Internet department stores – like Amazon – don't seem to be suffering at all.

Just to focus for a moment on just one of those challenged sectors – the restaurant industry. When we consider this disruption, and think about the long term, it is inconceivable that there won't be sit-down restaurants in the future. But the restaurant industry has a variety of issues with which it is going to have to grapple: social distancing; labour shortages; and the change in eating habits that the pandemic has wrought – with people getting used to eating in and cooking for themselves. Chances are if you ordered in during the pandemic it was from a chain! Statistically, in the last few months, it looks like consumers were looking for food that could travel, in circumstances in which they could not. So it is impossible not to believe that, until at least there is a vaccine, fine dining isn't going to be at least partially disrupted for some period to come. It was already operating on pretty thin margins – exacerbated by high rent in urban centres. How can these restaurants continue to afford these high rents in circumstances in which they might become not places where people congregate, but places where people come to pick up provisions-delivery, drive through, take out? Is this what the future holds for the restaurant industry? We certainly hope not, but as restaurant tenants pivot to stay alive, it is important to consider what your lease says – whether you are even allowed to pivot, and what that new method of service delivery will mean to your profitability and your ability to pay the rent. You need to look at your insurance policies to see whether or not they afford some protection (and in that regard, there is new case law that you might want to discuss with your lawyer if protection is declined).

If we focus on another sector – what we will call “strategic tenancies” – and if as some say, the department stores in shopping malls are in deep and perhaps permanent trouble, landlords should be looking at the promises they have made in their leases that anticipate

that nothing would go wrong with their anchors. Co-tenancy clauses will be of particular interest. But also, there must be a lot of thoughtful attention paid to all of the other tenants, in circumstances in which that anchor may no longer be there to generate traffic for the centre. It goes without saying that the larger the tenant, the more likely it is that it had the cash reserves and a stronger relationship with its banks and its landlords to weather the pandemic and the longer term economic disruption. But so far we have seen Neiman Marcus and J Crew take Chapter 11 proceedings in the United States to restructure their businesses. So landlords would be well advised to look at all of their leases and figure out what the implications to their centres will be if they lose various of their strategic tenants, how that will affect the likelihood of the balance of their tenants returning, and generally how a new tenant mix will affect the value of their centre. How is it that landlords can repurpose those spaces without tripping over their obligations to other tenants? Suffice to say, for the retail landscape, there is a lot of planning to do – and that is without considering what we will call ongoing-pandemic preparedness issues revolving around social distancing, sanitization, and similar types of challenges.

Regardless of what kind of tenants we are talking about, in the retail landscape, landlords should also consider that for those of their retail tenants that survive, many of them may become depots for pick-up and delivery, rather than the more traditional retail environments. And if that is the case, what are they going to do with all of that extra parking availability- and from a contractual standpoint – what can they do? Just this week, RioCan announced its curbside pickup program. And there have been articles about landlords turning their parking lots into drive in theatres. There are a lot of things to think about. At the end of the day, it is inevitable that a lot of the traditional customers for retail will, at least in the short term, be harder to find.

On the other hand, the office and industrial sectors at this point in time, except in certain areas, seem to be surviving well. But while we think that the metrics in the industrial sector will continue to look good, we are not as sure about the office sector. As companies ask their employees to return to work, it is inevitable that a lot of issues are going to arise: companies may have to re-envision their office environments so that their employees keep a comfortable distance from one another; some of their employees who have been working from home may not want to return at all or on a five day a week basis. Companies are already beginning to consider the employment law issues with which they will have to grapple. What to do with furloughed employees or those whose pay has been cut? How to accommodate employees who want a more flexible working environment and the impact that might have on the company's business? What additional measures or changes to the workplace are necessary to provide a safe work environment for employees? Will further workforce reductions be necessary due to continued slowdown in business or is there an ability to maintain current operations with fewer employees?

Both office landlords and tenants are considering how they control the damage associated with the virus in their work environments on a go forward basis. Everyone is considering what will be the framework that they should be using to minimize risk to their employees and their businesses, while still keeping those businesses operational and profitable. Office tenants are now beginning to look at rent deferral arrangements that were common in the retail industry in March and April. And we are told that requests for sublet are becoming increasingly common.

How will our downtown cores look if people don't want to live there or work there? How will our existing infrastructure be responsive to the needs of commuters in this new world? We don't have answers to these questions but we do know this: if young people don't gravitate to the downtown cores, then there are a lot of companies with excess office space that they were already considering having to reconfigure at a significant cost. It will definitely change the current office market if companies discover that they now need more space to accommodate social distancing, but have fewer employees who want to work there – their profitability model has been capsized and they are all going to be looking at their leasing options to determine what they can and cannot do. Add to that the increased costs of sanitization, security and perhaps technology that landlords of office buildings are going to be looking to pass along to their tenants – and you have a recipe for disruption. At least in the short term. In the long term, if rental rates in urban centres decline, then perhaps the exodus to the suburbs will reverse itself yet again!

Lurking in the background is the issue of how our city governments will respond to all of this. Property taxes are the most important revenue source of cities. If owners can't pay their property taxes (in Ontario the assessment for 2021 taxes is based on January 1,

2016 values when circumstances were dramatically different), then how will cities pay for any new infrastructure and the other changes that they will need post-pandemic? One thing we can predict with some certainty – there will be an increase in tax appeals for 2021 when the property assessments are returned at the same value as they were for 2020.

As we return to work, what are the legal issues that we should all be thinking about?

Employers are constantly thinking about how they can attract, retain and engage their employees. And it goes without saying that the environment in which those employees work is a crucial factor in that analysis. But now, health and safety considerations take on primary importance as we endeavour to avoid the spread of the virus and the risk of a second wave. In making decisions about re-opening, companies must consider not only government requirements, but also occupational health and safety particularly now when failure to do so could result in claims relating to illness or fatality. They must also think about what their suppliers are doing. And generally speaking, who isn't revisiting their existing protocols to look at their emergency response plans and communication plans?

It is important to break this discussion down with a little more sophistication: it very much matters to both landlords and tenants if the business that we are talking about is high risk or low risk or something in between – for instance, in an office setting, are we talking about how to run a dental office or a law firm? As lawyers, it is important that we advise our clients that it is impossible to eliminate risk, but it is possible to try and minimize them and that the process of minimizing risks may be multi-layered. So when advising your client, by way of example only, we are talking not only about what to do in the way of workplace reconfiguration, and how that is impacted by their lease, but also consideration of the respective obligations of both landlords and tenants in this scenario. A business's employees will access not only the premises of the business, but invariably they are accessing a larger project that is operated by someone else as well. And for each business, there is bound to be different levels of risk that need to be factored into the discussion.

Landlords need to think about what they can do in their projects to minimize risks to their tenants while at the same time protecting themselves from claims from their tenants and the public at large. For a landlord the focus is likely not only access but also communal areas and their basic infrastructure – for instance, how air is circulated in their building and whether or not it is feasible to make changes. Landlords have been talking for some time about how movement of customers and clients and occasional users of their project will be affected by the pandemic; they have been talking about monitoring elevators, dealing with deliveries and other shipments and generally, security-based changes to limit or monitor access of goods and people. They are also talking about what are the privacy protections they need to have in place to deal with the information that they have collected and generally not to expose themselves to either bad press or claims relating to invasion of privacy. And ultimately, the entire discussion about what landlords are doing involves a discussion about passing those additional costs onto their tenants – landlords are surely reviewing the extent to which they are entitled to do that and thinking about whether or not their tenant base can afford the increased costs (despite what might have been decreased costs while their projects were closed).

There are a number of human rights issues involved in the discussion about return to work and what the new employer-employee relationship is going to look like, that are beyond the scope of this analysis. In that regard, not only should employers be considering policies and protocols vis a vis their employees (PPE requirements, workplace sanitation and hygiene, governmental requirements and the like) and how best to communicate and enforce them, but they should also be consulting with their contractual partners to determine what they are doing to reduce exposure.

From a tenant's perspective, there needs to be a sophisticated analysis of the impact of the pandemic on existing contractual obligations and profitability. If you are a tenant in an office building, it may be that some of your employees are going to be working from home and that you need to reduce the amount of space that you have on a permanent basis. In the alternative or perhaps also, it may be necessary to de-densify your work space. Tenants may be thinking about running their businesses in shifts, if that is feasible or permitted by the terms of their leases.

For office tenants, the floors of conference room facilities in offices will need to be rethought and perhaps repurposed. The facilities for virtual meetings will need to be improved. Tenants need to direct their employees respecting their behavior for their own safety and for the safety of other third parties with which they will inevitably have contact as they return to work. And more than ever before, everyone needs to think about what third parties access your premises and what your expectations are respecting those third parties. At the end of the day, it doesn't necessarily demand an expensive investment to make your work environments healthier, particularly when you think about the cost of failing to do so. But it does demand advance planning, regard to your legal obligations, and training. To avoid liability and ensure compliance with government regulations, businesses may have to hire a licensed medical professional, occupational health and safety specialist and/or industrial hygiene specialist in addition to discussing all of these issues with their lawyers.

In the retail context, some high-risk tenants that came to mind are hairdressers, spas, gyms (especially boutique fitness gyms), buffet/self-serve restaurants, bars or clubs, or for that matter, any retail store where people are able to touch products while browsing in general, etc.

What will happen immediately after reopening for businesses, before a vaccine is created? What would the initial stage of reopening look like when these businesses are allowed to reopen? There will be a continuance of defensive measures to prevent a resurgence of the current outbreak, and businesses will have to rework their work practices and workplaces. Yes there will be increased cleaning measures/disinfecting protocols, and a limit on who can enter each space. Likely there will be hand sanitizers everywhere.

But from a legal perspective there are some other fundamental issues that high risk tenants, in particular need to consider in conjunction with their other stakeholders. What follows are just some examples of businesses and the concerns that they might be addressing:

- Are health service businesses allowed to require customers to wear face masks and gloves and will the businesses be required to provide this personal protective equipment (PPE) or is this the customer's responsibility when choosing to enter the business? Where does the responsibility for minimizing the risk fall? Given that physical distancing is not possible in some scenarios and requires employees to be in direct contact with customers, should customers be required to sign a waiver knowing the potential dangers of these services during the ongoing pandemic?
- Will gyms have to hire more employees to ensure that equipment is disinfected after each use or is it sufficient that they insist that their customers do so? Will customers be required to wear gloves and masks during their workout, which may be impractical given the impact on the ability to breathe during a workout or the wear and tear certain equipment or exercise will place on the gloves? Will some equipment have to be removed from the gym to provide distance between machines? Or will customers agree to take on the risk of entering the gym and using the equipment in such a close space by signing a waiver/acknowledgement? How about a communal pool? Will this be re-opened or will certain areas of the gym not be able to be used until a vaccine has been created? Are business owners allowed to close down selective areas under their lease if the government allows them to reopen? The above issues are increased even more for boutique fitness gyms whose business model is based on group circuit training. In certain workouts, 20ish people are squished into one room, and they jump between different stations after a few minutes. No one stops to disinfect equipment, everything is shared in a fast pace workout. Will the entire business model now have to change? Will classes be cut down to 10 people, and they each have their own set of equipment that cannot be shared and are spaced out? How does that work for that kind of business or is that model just a thing of the past that needs to be changed – and will the lease permit the change?
- We can see how sit down bars can rework their workplace to be in compliance with COVID-19 precautions; but dance clubs are based on random people coming together in close proximity. It seems highly unlikely anyone would go to a club to stand at a spot designated by tape and 2 meters away from other. In addition, even if customers are willing to take on this risk and enter the business in close proximity with others, they are usually intoxicated when they attend these spaces. Given this, would waivers/acknowledgments they sign be legally enforceable?
- People go to physical retail stores in the era of e-commerce for the purpose of physically touching/inspecting the products,

and in some stores, trying the products on. However, will stores now have to close down their fitting rooms and remove products from the floor so that customers and employees will not cross-contaminate? It seems impossible to sanitize products, clothing for instance, every time a customer picks it up to look at it. We already see at grocery stores the rule that if you touch it, you buy it. Some retail stores will have an easier time reworking their business model in accordance with COVID-19 precautions than others. But at the end of the day, as each retail establishment considers what it has to do to ensure that its business attracts customers and remains profitable, it will also have to consider the legal consequences of those decisions and landlords must do the same with respect to each business in their centres as they begin to reopen.

In all these instances, if businesses ask customers before they enter their premises if they are exhibiting any symptoms, if they live with anyone exhibiting symptoms or if they are in contact with anyone exhibiting symptoms, does this result in privacy concerns? Are businesses allowed to use technology to monitor the temperature of customers? Can businesses require customers to go through thermal cameras and infrared sensors? Some religions would not allow this and some patrons are scared of the health risks attached with this technology. In airports, they are required to give patrons an option to use the full body scanner or just be pat down. Can businesses refuse service to customers who refuse to cooperate with these precautions? Would this lead to a human rights issue? These precautions are meant to protect other customers and employees in the business, so a customer who refuses cannot simply sign a waiver. Clearly there are a lot of issues here that need to be reviewed, not to mention problems associated with communicating new protocols to your employees and your customers and other third parties.

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