

# Navigating Unrest: Legal Insights for Commercial Landlords and Tenants Amid Protests

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In recent months, commercial landlords and tenants have grappled with the challenge of maintaining a secure retail and office environment amid protests that have unsettled customers and perhaps negatively affected businesses. It is a complex task to strike the balance between respecting peaceful expression and safeguarding the well-being of customers, stores, and employees. We propose to discuss the relevant legal considerations associated with managing protesters in commercial spaces. We will discuss, albeit briefly, some of the relevant provisions of the Criminal Code, but our focus will be on the other legal principles that might affect you as a landlord or a tenant.

## 1. The Application of the Criminal Code

While some protesters may engage in peaceful demonstrations, sometimes criminal activities can occur during a protest, such as vandalism, destruction of property (or mischief)[\[1\]](#), unlawful assembly[\[2\]](#), theft[\[3\]](#), harassment[\[4\]](#), or other unlawful behavior. There are various offences in the *Criminal Code* that can potentially be applicable during a protest that becomes aggressive, violent or unlawful. For the purposes of this article, we will not get into an in-depth conversation on the provisions of the *Criminal Code*. The above is meant to highlight some considerations if a protest goes awry or activities escalate. If criminal activity is occurring or has occurred on your property (and for tenants, the property you are renting), it is best to call the police. This highlights the importance of establishing a positive working relationship with local law enforcement to help ensure the safety of the property. Landlords (and tenants) can proactively communicate with the police to provide information about potential protests and to coordinate security measures.

## 2. Private Property and Trespass

In Ontario, the *Trespass to Property Act*[\[5\]](#) (the “TPA”) provides the legal framework for addressing issues related to unauthorized access to private property. Under the TPA, it is an offence to: (i) enter onto private property without the legal authority or permission of the occupier; (ii) engage in prohibited activity while they are on the private property; and (iii) refuse to leave the private property when directed to do so. The offender may be liable to a fine of not more than \$10,000.[\[6\]](#) The term “occupier” is defined in the TPA as including “(a) a person who is in physical possession of premises, or (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises, even if there is more than one occupier of the same premises”[\[7\]](#). As a result, each of a landlord (the owner of the private property) and a tenant (the person responsible for control of its premises) might be considered an occupier under this legislation. And while a shopping centre is by its nature a quasi-public kind of private property, there may be circumstances in which an entry could be characterized as trespass.

### A. Prohibiting Entry onto the Property in the First Place

An occupier can prohibit someone from accessing their private property through notice which can be given in various manners: (a)

orally; (b) in writing; (c) by signs; or (d) a marking system as set out in the *TPA*.<sup>[8]</sup> So, if a landlord wished to prohibit someone from accessing a building on its property, the posting of signs could be considered as having created such a prohibition. It is obviously more complicated in the context of outside common areas of a development. Some landlords have also posted on their properties the policies that outline permissible conduct within their property and the consequences of potentially disruptive behavior. The devil is of course in the details. How do you prohibit access selectively by notice in what is essentially a semi-public private space?

#### B. Actions that can be taken to get the Trespasser off the Property

The *TPA* provides the police and individuals in physical possession or control of a property, and those they authorize (such as security personnel) with the ability to arrest without warrant “any person he or she believes on reasonable and probable grounds to be on the premises in contravention”<sup>[9]</sup> of the *TPA*. If someone other than a police officer makes an arrest, the person must promptly call for the assistance of the police.<sup>[10]</sup> The *TPA* does not provide a procedure for how to make an arrest; instead, we must look to case law.<sup>[11]</sup> Clearly, there are risks associated with an individual making an arrest and the making of such an arrest is unlikely to ever occur except in truly extraordinary circumstances.

#### C. Dealing with a Protester that is on the Property

A majority of shopping malls have security measures in place including the hiring of security guards and personnel. In Ontario, the *Private Security and Investigative Services Act, 2005*<sup>[12]</sup> governs the private security industry and investigative services within the province. The act regulates licensing requirements, standards of practice, the code of conduct, complaints and enforcement, training requirements, and offenses and penalties for violations of the act. The code of conduct provides that security guards must, among other things, “act with honesty and integrity”, “treat all persons equally, without discrimination” and “refrain from exercising unnecessary force”.<sup>[13]</sup> Landlords should ensure their security personnel are properly licensed and trained as dealing with protestors may be a complex and delicate task.

Furthermore, most landlords have implemented sophisticated surveillance systems which might serve as a proactive way to address potential protests. An adequate system of surveillance would also help law enforcement and security personnel in any investigation relating to protests and disruptions. Ultimately, landlords (and tenants) should give thought to the security measures they currently have in place and consider whether they need to be updated or not given recent events. In addition, in the context of privacy breaches<sup>[14]</sup>, landlords and tenants should ensure they are complying with their privacy obligations and relevant privacy legislation such as the *Personal Information Protection and Electronic Documents Act*<sup>[15]</sup> for those in Ontario. Since many landlords and/or tenants likely use surveillance cameras, it may be helpful to review the guidelines published by federal and provincial authorities for the use of video surveillance in the private sector.<sup>[16]</sup>

From a tenant's perspective, a service provider may refuse service as long as it does not violate the individual's human rights. Section 1 of the *Human Rights Code*, R.S.O. 1990, c. H.19 (Ontario) prohibits discrimination on the basis of a protected ground in services, goods and facilities. This includes, but is not limited to, malls, parks, stores and restaurants.<sup>[17]</sup> Intent is irrelevant when establishing discrimination, and discrimination is proven on a balance of probabilities. In order to establish discrimination, the claimant must demonstrate: (1) they have a characteristic protected from discrimination; (2) they have experienced an adverse impact within a social area protected; and (3) the protected characteristic was a factor in the adverse impact.<sup>[18]</sup>

### 3. Freedom of Expression and Assembly

As shopping malls are colloquially referred to as “public” private property; some might argue that the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) applies with respect to the right to freedom of expression and assembly.<sup>[19]</sup> This is a complex topic and well beyond the scope of this article. There is one case that was decided prior to the introduction of the *Charter* in which the Supreme Court of Canada decided that a shopping centre was sufficiently under the control of the owner, and thus the owner had the right to

protect their private property under trespass.<sup>[20]</sup> However, for the purposes of this article, we will not be examining the applicability of the *Charter*.

#### 4. Other Potential Problems

If a landlord permits protesters to be on its property, it should consider the impact of those protesters on its employees and the employees of its tenants. The *Occupational Health and Safety Act* ("OHS") provides a worker the right to refuse work that they believe is unsafe to themselves or another worker and sets out a specific procedure that must be followed in any work refusal.<sup>[21]</sup> Employers have an obligation to protect the safety of their employees, including protection from violence and harassment.<sup>[22]</sup> Below are a couple of cases that deal with protestors and trespassers in the context of the OHS.

In *Bracken v. Fort Erie (Town)*, 2017 ONCA 668, a protestor marched outside a town hall by walking back and forth in the public area in front of the building. Employees felt unsafe by the protestor's loud and intimidating (non-violent) behaviour. The Town issued a trespass notice barring him from the location and argued that the trespass notice was necessary to protect employees under the OHS.<sup>[23]</sup> The Court agreed that the behaviour made employees feel unsafe, but held that a person's subjective feelings of disquiet, unease, and even fear do not trump freedom of expression rights under the *Charter*. While this case might not be applicable to shopping centres since the protest occurred on public property, it does highlight considerations for landlords and tenants with respect to creating a safe work environment during a protest.

In *General Motors of Canada Company v. Osita-Adubasim*, 2023 ONSC 1723, General Motors ("GM") brought and was granted an injunction against a former worker who tried to enter the workplace multiple times since being dismissed. He displayed disturbing behaviour, including threatening guards and spitting on one of them. Prior to the injunction, GM delivered multiple trespass notices and a site ban to the trespasser. GM also contacted police services on multiple occasions. The Court granted the order and specifically cited that GM was "required to take steps to meet its obligations on the OHS to provide safe work environment for its employees and third-party contractors. This includes protection from violence and harassment"<sup>[24]</sup>.

In conclusion, both landlords and tenants have an obligation to their employees to provide a safe work environment which might be called into question when a protest occurs.

#### 5. Contractual Obligations arising out of the Commercial Lease

Landlords should review and update their precedent leases to include clauses that address their responsibilities and the responsibilities of their tenants in the event of protests. This can include obligations to maintain a safe environment and report any disturbances promptly, as well as implementing the requisite policies, procedures and security measures as detailed above.

With respect to currently existing landlord obligations, depending on the lease, these may include obligations to operate and maintain the shopping centre or property in accordance with all applicable laws and regulations and perhaps in accordance with standards from time to time prevailing for similar shopping centres in the area in which the property is located.

Generally speaking, in order to comply with what might be a landlord's existing contractual obligations, landlords should also confirm that there is some sort of provision in their leases that deals with control of the property in order to allow landlords to be able to carry out any obligations to operate the property in a certain manner. In addition, landlords will want the flexibility to be able to create their own procedures and regulations and change them as needed. If you are a tenant, you will want to provide in your lease that the landlord and its procedures do not interfere with your business operations. Often you will see a clause such as "the Landlord shall use commercially reasonable efforts not to unreasonably interfere with the Tenant's business operations in the Premises". Tenants may also want to consider adding provisions that guarantee public access to and from their unit. Needless to say, generally speaking landlords have an interest in protecting their flexibility to the greatest degree possible to protect their private property and to

preserve their relationship with potential customers. Tenants also wish to do the same but will want to protect against overreaching that has the effect of impacting their business negatively.

Another important consideration for landlords is cost recovery. All costs associated with creating a safe environment for tenants, customers and the general public should be included in operating costs and charged back to tenants (for example, security measures). Landlords (and tenants) should also carry adequate insurance to deal with any incidents on the property, the cost of which, in the case of landlords, can be charged back through operating costs if provided in the lease.

## 6. Conclusion

As outlined above, handling protests in shopping centres is a complex and multifaceted undertaking. It involves balancing the interests of landlords, tenants, customers and the general public. Both landlords and tenants want to assure customers that shopping malls are safe so that businesses remain open and provide customers with a sense of security.

Landlords and tenants should seek legal advice to understand their specific rights and responsibilities during a protest. Should you have any questions about protests in the context of commercial real estate properties or if you would like to discuss how we can help you with your commercial leasing needs, please do not hesitate to contact us.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

[1] *Criminal Code*, RSC 1985, c C-46 at s 430.

[2] *Ibid* at s 63.

[3] *Ibid* at s 322.

[4] *Ibid* at s 264.

[5] RSO 1990, c T.21.

[6] *Ibid* at s. 2(1).

[7] *Ibid* at s. 1(1).

[8] *Ibid* at ss 3(1), 5 and 7.

[9] *Ibid* at s 9(1).

[10] *Ibid* at s 9(2).

[11] See *R v Asante-Mensah*, 2003 SCC 38 and *Tucker v Cadillac Fairview Corporation Ltd.*, [2005] OJ No 2921 (QL).

[12] SO 2005, c 34.

[13] Code of Conduct, O Reg 363/07 at s 2.

[14] See for instance: Office of the Privacy Commissioner of Canada, *Cadillac Fairview collected 5 million shoppers' images* (Ottawa: Office of the Privacy Commissioner of Canada, 2020) online: Office of the Privacy Commissioner of Canada <[https://www.priv.gc.ca/en/opc-news/news-and-announcements/2020/nr-c\\_201029/](https://www.priv.gc.ca/en/opc-news/news-and-announcements/2020/nr-c_201029/)>.

[15] SC 2000, c 5.

[16] Office of the Privacy Commissioner of Canada, *Guidelines for Overt Video Surveillance in the Private Sector* (Ottawa: Office of the Privacy Commissioner of Canada, 2008), online: <[https://www.priv.gc.ca/en/privacy-topics/surveillance/video-surveillance-by-businesses/gl\\_vs\\_080306/](https://www.priv.gc.ca/en/privacy-topics/surveillance/video-surveillance-by-businesses/gl_vs_080306/)>.

[17] RSO 1990, c H.19 at s 1.

[18] Ontario Human Rights Commission, *5. Establishing discrimination* (June 2016), online: Ontario Human Rights Commission <<https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/5-establishing-discrimination>>.

[19] See *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 and *R v Layton* (1986), 38 CCC (3d) 550 (Prov Ct Crim Div).

[20] See *Harrison v Carswell*, [1976] 2 SCR 200.

[21] RSO 1990, c O.1 at s 43 [OHSAA].

[22] *Peel Standard Condominium Corporation v Jakacki*, 2020 ONSC 3697 at para 35.

[23] See: OHSAA, *supra* note 20 at s 25(2); "... an employer shall, (h) take every precaution reasonable in the circumstances for the protection of a worker".

[24] *Ibid* at para 33.

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