



## Managing the evolution of commercial spaces

Whether it is to welcome new American tenants (i.e. Target, J. Crew, and Crate & Barrel), to convert buildings to become LEED certified, or to entice more shoppers to come into their centre, many shopping centres and office buildings in Canada have recently completed, or are in the midst of, expansion and modernization. For example, in Toronto alone, a major renovation of two food courts at the Eaton Centre has occurred, Yorkdale Shopping Centre is undergoing a major expansion to accommodate more tenants, and First Canadian Place has re-skinned its exterior walls and windows and renovated its common areas and retail spaces. How do you think different types of redevelopment affect landlords and tenants?

**1** A small pet store is located in the middle of a traditional “barbell-shaped” enclosed mall (with two anchors at either end of the mall). Due to the departure of one of the anchor tenants, foot traffic in the mall decreased considerably. In order to salvage the profitability of the mall, the landlord decided to completely redevelop it. The redevelopment entailed the following: 1) only a part of the interior mall would remain, 2) a new part of the mall would be built with the tenants in the new part having exterior access only, and 3) access to the remaining anchor tenant would primarily be from the outside. The lease of the pet store provides that the relocated premises must be “similar in location” to the original premises. To which part of the redeveloped mall can the landlord relocate the pet store without being in breach of its obligation under the relocation clause of the lease?

- (a) In part of the smaller interior mall close to the remaining anchor tenant
- (b) In the new part of the mall with exterior access only
- (c) Either (a) or (b)
- (d) Neither (a) nor (b)

**2** A two-storey building has been leased by a restaurant. The restaurant operates from the ground floor of the building and the tenant has subleased the whole second floor of the building to a hairdresser. The landlord now wishes to demolish the entire building to make way for redevelopment. The restaurant has agreed to enter into a surrender agreement with the landlord for its head lease of the entire building. Is the sublease automatically terminated and is the hairdresser immediately required to deliver vacant possession of the second floor of the building to the landlord at the surrender date of the restaurant lease?

- (a) Yes
- (b) No

**3** As part of its efforts to become more environmentally friendly, the landlord wishes to install solar panels on the roof of all of the buildings in a big-box open-air shopping centre. A major electronics retailer leases space within one of the buildings comprising the shopping centre. The building in which the electronics store is situated also contains a pharmacy, a restaurant, and a shoe store. The electronics retailer has taken issue with the installation of solar panels on the roof of its own premises. Do they have the right to prevent the landlord from installing the solar panels on its roof?

- (a) Yes
- (b) No

**4** A landlord owns a 20-storey office building with a retail component on the ground floor and in the basement of the building. As part of its efforts to modernize the office portion of the building, the landlord has installed many energy-efficient features into the interior and exterior parts of the offices. The landlord’s efforts were successful, and this has resulted in significant operating cost savings with respect to the office portion of the building. The retail component of the building was unfortunately not part of the renovations; however the tenants in this retail area now want their operating costs to be reduced due to the recent changes in the office area. Can the tenants in the retail component on the ground floor and in the basement benefit from the operating cost savings in the office portion of the building?

- (a) Yes
- (b) No
- (c) It depends

**5** A lease for a jewelry store contains a termination clause, which provides that “in the event of a redevelopment of all or any part of the shopping centre, then the landlord may terminate the lease.” The landlord decided to redevelop that portion of the shopping centre at the opposite end of the mall from the jewelry store. However, the landlord exercised its option to terminate as set out in the lease. The tenant objected to the termination and brought an action arguing that the jewelry store premises was not required by the landlord in order to carry out the redevelopment, therefore, the landlord cannot terminate the lease pursuant to the termination clause. Does the termination clause allow the landlord to terminate the jewelry store’s lease?

- (a) Yes
- (b) No
- (c) It depends



**1 (D)** Notwithstanding the fact that a redevelopment encompassing a new retail concept is required to entice more customers to visit a previously declining shopping centre, the landlord is still required to strictly abide by the terms of the lease, which provides that the relocated premises must be “similar in location” to the original premises. In this example, there were no premises left in the redeveloped shopping centre that was “similar in location” to the original premises — being located in the interior part of an enclosed mall between two anchor tenants. Therefore, the landlord does not have a choice but to be in breach of its obligation under the relocation clause of the lease. However, on a practical basis, if the tenant were relocated to an area of the mall that would have generated more traffic and sales, then it would have no reason to complain and would probably not bring a suit against the landlord for damages.

**2 (B)** At common law, the termination of a head lease (for example, due to the non-payment of rent by a head tenant) would result in the termination of any subleases. However, if the head landlord and the head tenant agree to a surrender of the head lease, the head landlord would become bound by any sublease. This common law rule has been codified into statute in many provinces (see for example, section 17 of the Commercial Tenancies Act (Ontario)). In fact, in Alberta, the registered owner of a sublease must first consent before a head lease is surrendered. It is also important to note that in most provinces, in the event a head lease is terminated by the landlord, any subtenant may apply to court to have the sublease made binding on the landlord, in which case the subtenant may be required to be bound by the terms of the head lease as head tenant, including becoming the tenant for the entire premises under the head lease.

**3 (B)** In a typical lease for a commercial retail unit (CRU), the premises being leased by the tenant comprises the area from the top surface of the structural subfloor to the bottom surface of the structural ceiling. The roof of the premises itself is typically considered part of the common areas, which are controlled by the landlord. If the roof is controlled by the landlord, then the landlord would be able to install solar panels on the roof of such buildings, and in many cases, enter into a lease for the roof with the solar panel provider. Contrast this to a situation where the tenant has entered into a lease for the entire building or has entered into a ground lease, in which case the tenant controls the roof of the building. This would arguably not allow the landlord to install solar panels on the roof of the building.

**4 (C)** In multi-use developments, it is common for leases to provide that the operating costs and taxes with respect to one type of use within one area of the building are not shared with the operating costs and taxes with respect to another “component” of the building. It would depend on the language found in the lease to determine whether a retail tenant can benefit from the operating cost savings that tenants in the office premises enjoy. When entering into a lease for such a multi-use development, (for example, a retail premises on the ground floor of a residential condominium building) a tenant must turn its mind to the setup of the development and determine whether operating costs and taxes are shared between the two portions of the development, or whether they are kept separate.

**5 (A)** Since the termination clause specifically provided that the termination clause may be triggered in the event of a redevelopment of “all or any part” of the shopping centre, then the principles of the interpretation of commercial contracts would allow the landlord to terminate the lease even though the redevelopment of the shopping centre did not affect the jewelry store. In this case, nothing more is necessary for the landlord to act on its strict rights under the termination clause.

## YOUR RANKING?

- **One or less correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three or four correct:** *very well done, but not perfect*
- **Five correct:** *excellent*

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