

Canadian Law: Make Sure Your Lease Isn't a Dealbreaker

Article By:

Elizabeth Graper

Candice A. Kennedy

When selling your business in Canada, you will face a long list of due diligence requests as the purchaser reviews all aspects of your business. If there is a lease, one key aspect of due diligence review will be the lease for the location from which you operate your business. Before signing on the dotted line to sell your business, and even before speaking with potential buyers, you should review your lease to make sure it doesn't negatively impact or restrict your ability to sell the business. We frequently assist with the transfer of leases and, based on our experience, the following are common issues related to leases that you should consider prior to listing your business for sale.

A. Documentation

The first and easiest thing to do is to gather and organize your lease documentation. It is more common than not that a vendor does not have all lease documentation available to deliver to a prospective purchaser. If a vendor must obtain missing documents from the landlord's files, it may cause a delay in the closing date and complicate the lease transfer process. If you are contemplating selling your business, gather all existing lease documents in advance. Request any missing documents from the landlord in advance so you have your documents in order.

B. Make Sure You are in Good Standing

It may seem like common sense but ensure that you are up to date on all payments due under the lease, including minimum or basic rent, operating costs, common area costs, and taxes, as applicable. Make sure that you have met your other obligations under the lease. If you are in default, the landlord likely has no obligation to consent to a transfer of the lease, which will impact your ability to sell the business. If you are in default, you should remedy the default in advance of listing your business for sale to ensure you are in a position to transfer the lease.

C. Available Term

Typically, a purchaser finds value in a lease which is not going to expire in the next few years. Purchasers (and their banks) do not want the risk of having to find replacement premises, build out the new space and relocate the business shortly after completing a purchase. A purchaser will also

not want to risk losing customer base as a result of having to relocate if the Landlord does not agree to grant further options to extend. You may want to negotiate an amendment to the lease to provide an option for additional term(s) if you have only a few years remaining on the term of the lease. You will also want to ensure your options to extend are enforceable and not void for uncertainty, otherwise a purchaser will not be able to rely on them.

D. Exclusivity Rights

If your business is in a building, mall or plaza with multiple tenants, a purchaser will appreciate the security of being the only tenant permitted to carry on the particular type of business you operate. If your lease does not include an exclusivity provision, you may want to consider negotiating an amendment to the lease to provide for the exclusive right to carry on your particular type of business within the building, mall or plaza.

E. Know your Transfer Rights

You should verify whether you have the right to transfer your lease to a purchaser, whether by assignment, sublease, license or otherwise. A landlord can impose restrictions upon your ability to transfer your lease and you should familiarize yourself with the restrictions and what process will need to be followed to transfer the lease. For example, some leases require that you submit to the landlord a written request for consent and information regarding the proposed transferee at least 30 days before the date of the proposed transfer. There is also typically a fee payable to the landlord in connection with their review of your request for consent, which should be factored into your calculations regarding closing costs and negotiations with the purchaser. If you are a professional, such as a doctor, chiropractor, or dentist, you may consider negotiating an amendment to the lease to permit you to assign your practice to another licensed professional in your field without requiring consent from the landlord. Alternatively, you may seek amendments to simplify the transfer requirements or to remove certain landlord rights, such as the ability to increase the rental rate or terminate the lease upon a request for consent to a transfer.

F. Landlord's Demolition and Relocation Rights

A landlord's right to demolish the building or relocate the business to other premises both put the tenancy and ability to carry on the business at risk. Buyers will be comforted knowing that either the landlord does not have the right to (i) demolish the building and terminate the lease; or (ii) to relocate the business. If you are unable to remove these provisions altogether, you may look to amend the lease so as to minimize the impact they may have on a purchaser.

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