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## Is the “Department Store” extinct or just elusive?

The insolvency and closure of Hudson’s Bay Company (“HBC”) follows the shuttering of several other Canadian department stores. The list of defunct department stores includes Target, Sears, and Nordstrom – just in the last dozen years. Go back a little further and the list includes former well-knowns like Zellers, Eatons, BiWay, Kmart, Army & Navy, Woodwards, Simpsons and Woolco.

When major department stores close, landlords are faced with the challenge of backfilling the immense retail void. While this often opens the door to creative reimagining of how the former department store premises may be repurposed, landlords must work within a number of confines, including commitments made to other tenants.

Historically, department stores functioned as anchor tenants. They were relied on to drive shoppers to the centre. Other retail tenants with sufficient clout may have negotiated for rights that qualify some of their lease obligations upon the ongoing presence of one or more anchor department stores. These rights are a type of “co-tenancy clause”. While anchor co-tenancy clauses come in many forms, they commonly entitle the tenant to a reduction in rent (or give it the right to terminate) if the specified anchor tenant closes and is not replaced by a similar anchor within a specified period of time.

In hopes of avoiding such an outcome, some landlords are seeking to re-lease their former HBC premises to a replacement department store. Given that many traditional department stores have left the Canadian market (or have closed all together), many are asking: what qualifies as a “department store”?

### Dictionaries and Industry Publications

Cambridge Dictionary defines “department store” as “a large shop divided into several different parts, each of which sells different things”. Canadian Oxford Dictionary provides a similar definition, describing a department store as “a large store stocking many varieties of goods in different departments”. The common elements of the two definitions are: (1) large store; (2) variety of goods; and (3) different departments. However, those elements alone appear to capture a very large group of retailers, many of which would not be considered “department stores” within the colloquial use of the term. For example, these definitions would capture big box electronics stores, large format hardware stores, office supply superstores, and even some grocery stores.

Digging deeper by looking at industry usage, the *ICSC Dictionary of Shopping Centre Terms* offers some insight. While it does not define “department store”, it provides a definition of “department store type merchandise”. According to the ICSC, this includes: apparel, shoes, jewelry, gifts, and merchandise normally found in variety, furniture, appliance, sporting goods, luggage, stationary and camera stores – but it excludes personal services, entertainment, food services, drugs, groceries, and automotive products/services.

To complicate the matter, there are some common qualifiers that further categorize the department store concept. For example, there are *specialty* department stores, *junior* department stores, *discount* department stores, and *outlet* department stores (to name a few). It’s not clear whether these are various types of department stores, or if each is something distinct from a department store (sometimes also referred to in the industry as *traditional* department store). In the leasing law publication *The Commercial Lease* (Haber), the author suggests that a junior department store sells the same products as a department store, except for hard goods, such as stoves,

refrigerators, and other large items.

### **What Do the Courts Have to Say?**

In *Saskatoon Market Mall Ltd. v Macleod-Stedman Inc.*, the Saskatchewan Court of King's Bench described men's, ladies', boys', girls', and children's clothing and footwear as the "classical departments" of a junior department store and held that when the tenant removed clothing and footwear from its store in favour of selling plumbing supplies, automobile products, and farm equipment, it no longer qualified as a junior department store.

In *Richter & Partners Inc. v Westwood Mall (Mississauga) Ltd.*, the Ontario Superior Court noted that the concept of a "junior department store...clearly contemplates a range of goods for family use". The Court refused to force through an assignment of the lease from Biway to Dollarama, on the basis that Dollarama's operation was neither a department store nor a junior department store (as required under BiWay's use clause).

Recently, the fate of the former HBC premises at Yorkdale Mall came under consideration by the Ontario Superior Court. In *Riocan Real Estate Investment Trust v 2455034 Ontario Limited Partnership*, the Receiver with control over the HBC premises sought Court approval for the use thereof as a Les Ailes de la Mode – a Quebec-based concept originating in the 1990s. The landlord resisted the change, in part on the basis that Les Ailes de la Mode would violate the use

clause – which required the operation of a "single integrated traditional retail department store".

While the Court refused to approve the transaction on other grounds, it accepted expert testimony indicating that there is no commonly understood meaning of what might constitute a "single integrated traditional retail department store", but that Les Ailes de la Mode (and incidentally, Simons) qualified as a department store. The Court also accepted evidence that Les Ailes de la Mode is one of the few remaining Canadian department stores under the North American Industry Classification System, a widely-adopted business classification regime developed by governmental agencies.

Despite the absence of a well-established definition, the meaning of the term "department store" can have significant impacts on parties' rights under a lease. In addition to co-tenancy clauses and use clauses, the meaning of "department store" is also often relevant when considering common exceptions from exclusive use covenants. However, as it currently stands, landlords and tenants are left with only a hodgepodge of guidance.

Once considered a staple of the retail landscape in Canada, traditional department stores appear to be thing of the past. Whether some of the various large-format retailers currently active in the market qualify as "department stores" is still an open question.

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