

Presentation of Ian E. MacRae, Macleod Dixon LLP

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Operating Cost Recoveries

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**The Calgary Real Estate Forum**  
**Leasing Conference**  
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**Operating Cost Recoveries**

**Generally**

The following are items to consider with respect to operating costs and considerations from both a landlord and tenant viewpoint. It is important to distinguish between the nature of the tenant and the size of the premises being leased. Large and significant tenants command the ability to negotiate leases. Smaller tenants do not. The following discussion assumes that the tenant is of sufficient size and sophistication to negotiate these issues with the landlord. What can be bargained for is always a function of market conditions and so it is important to recognize that the following are not rules but guidelines.

Operating cost and tax recoveries are from the landlord's point of view about the landlord being kept whole so that the basic rent is profit.

From the tenant's point of view operating cost and tax recoveries are about minimizing its liability for hidden costs and ensuring it is only responsible for paying direct costs for the use of the leased premises and that the operating and tax recoveries are not hidden profit centres for the landlord.

**Know Your Property**

Operating cost recovery clauses and definitions need to reflect the nature of the building and whether there are any off site costs or costs associated with shared facilities or adjacent properties that need to be recovered and how utilities and services are provided and charged. It is important in drafting and using operating cost and realty tax definitions from other leases that such clauses reflect operating costs for the property and the recovery of any costs for shared facilities.

For a new building understand the particular aspects of the property and whether there are or may in the future be shared facilities located off site or adjacent to the property the cost of which needs to be recovered.

For existing or acquired buildings, ensure that the operating cost clauses actually reflect what is being recovered and what may be recovered in the future. This is important especially for due diligence on acquisitions as it may affect the pricing of the property if there are operating cost shortfalls or liabilities to tenants if the operating costs being recovered are not supported by the lease or there is a perceived shortfall as the operating cost recovery clause is not providing for full recovery to the landlord.

## **The Offer to Lease**

The offer to lease or agreement to lease underpins the rights of the landlord and tenant and establishes the terms of the lease and the rights of the landlord and tenant for purposes of negotiating the lease.

It is important that the offer or agreement to lease reflect the basic requirements of a net lease and deals with the recovery of operating costs and realty and other taxes.

It is important in the offer to allow for recovery of certain items that are not otherwise recoverable. The courts have held that costs such as capital tax, large corporations tax, management and administrative fees are not within the landlord and tenant relationship and must be clearly described as a recoverable operating cost and included in the offer and the lease otherwise they are not recoverable.

Similarly, if the tenant wants specific exclusions and definition on operating costs and any audit rights in terms of operating costs then the tenant needs to bargain for these in the offer to lease.

If the tenant wants to negotiate operating costs recoveries in the lease then the tenant should bargain for a condition in the offer that the lease be satisfactory to the tenant in all material respects. A landlord will resist such a change as it opens up the entire lease to negotiation. A landlord would instead prefer to agree to "reasonable non-financial amendments requested by the tenant". Either option will require changing the landlord's standard language in the offer that the parties agree to use the landlord's standard form lease subject only to the changes necessary to incorporate the financial terms of the offer. If the tenant agrees to the latter, the tenant has lost its bargaining and negotiating power.

## **Leases**

### **1. Net Lease Concept**

Most leases are net leases. The concept of a net lease is that all direct and indirect costs for the premises and the building are to be paid by the tenants. Thus the term: "fully net and carefree to the landlord" or "triple net".

The landlord will want a wide and open ended net lease clause upon which it can rely to charge back costs that the landlord wishes to recover but that are not itemized in the definition of operating costs.

The tenant will want:

- (a) The operating cost clause to be exhaustive and the net lease clause to reflect this.
- (b) Only direct costs attributable to the premises and the operating and management of the property are recoverable as operating costs.
- (c) Any costs not enumerated as operating costs are excluded.

## 2. **Operating Costs, Realty and Other Taxes**

It is important to provide for the recovery of operating costs, realty and other taxes separately. Attached as Schedule 1 is a definition of operating costs from an office lease.

It is important that the introductory paragraph deal with the general categories of recovery.

- (a) Landlord: The list of recoverable expenses should be without limitation so that the landlord can argue that the list is not exhaustive and should relate to all costs of ownership, operation, management, repair, replacement, administration, supervision and management of the property.
- (b) Tenant: The tenant wants to argue that the list is inclusive and if an item is not on the list it should not be recoverable. The tenant should also resist having the operating costs extend to ownership.

## 3. **Capital Costs**

The treatment of the recovery of capital costs and the definition of capital costs varies depending on the landlord. Capital costs are costs that are made to repair, maintain or replace long term building components that have an extended life time. The recovery of capital costs is usually done over the life time of the asset. A typical capital item is the HVAC system. Most of the negotiation over capital costs relates to the inclusion of such costs by the landlord and exclusion of such costs by the tenant based on what is perceived to be the fair treatment and allocation of such costs. Obviously the landlord wants maximum recover.

- (a) Definition: The definition can be comprehensive or with respect to an external standard. An external standard that is often used is generally accepted accounting principles consistently applied in the public real estate industry. If such a standard is used then there should be a provision in the lease that provides for determination of such costs in the case of dispute.
- (b) Expensing the cost versus amortization or depreciation:
  - (i) Landlord:
    - (1) The landlord will want flexibility to either expense the capital cost where appropriate under GAAP or amortize the recovery of such cost over the useful lifetime of the asset. Some operating cost definitions allow for depreciation or amortization. My understanding is that depreciation and amortization are not the same. Landlords who have depreciation language in the definition of operating costs can use such clauses to justify charging in advance the depreciating value of the asset. If the concept of amortization is the only concept being used, then the operating cost charge back can only be recovered when the expense is incurred

and for that portion of the amortized amount falling due in a lease year.

- (2) The landlord will want to define structural components to include the weather envelope including the roof and the roof membrane so that all building components are caught and cost associated with such components recoverable under the lease.

(ii) Tenant:

- (1) The tenant will want to ensure that the treatment is fair and that only appropriate capital costs are expensed or preferably amortized over the asset's useful life. The tenant will also want to ensure that significant capital costs must be amortized (and not leave it open for a landlord to charge the full amount of such costs in the year they are incurred). This can be accomplished by using a threshold amount (for example \$20,000). The tenant should require that depreciation language be excluded and it made clear that amortization is required. The tenant will want certain capital cost items excluded based on the notion that such costs are not a fair charge back to the tenant. A list of such tenant exclusions for operating costs is set out on Schedule 2. This list includes capital cost exclusions.

- (2) To the extent possible depending on the tenant's negotiating power and market conditions, the tenant will want to exclude certain capital items such as:

- a. The original cost of the building and the building systems.
- b. Repairs to and replacement of the building and building systems which are due to construction defects or if possible all structural repairs and replacements except for routine maintenance.
- c. Roof and roof membrane repairs and ensure that such components are excluded from the definition of structural components in the lease.
- d. Expansion to the building or additional structures on the lands.

#### 4. **Administration or Management Fees**

- (a) Landlord: To be recoverable the lease must specify the management fees payable. If management fees are not specified or allowed for, the landlord will not be able to enforce the collection of such fees. The landlord may want to consider providing for management fees recoverable as function of operating

costs so that the landlord is protected in a down market where net rents may be decreasing. Management fees are usually payable either as a percentage of operating costs (15% is typical) or on net rent for the building or a combination of the greater of those 2 calculations or the fees payable to a third party property manager. Some leases provide for management fees based on a percentage of gross rent. Management fees which are based on a percentage of net or gross rent will result in an escalation of management fees as rents rise.

- (b) Tenant: Tenants will want the management fees based on a percentage of operating costs subject to certain exclusions or a fixed management fee. Any management fees payable as a function of a percentage of net rent or gross rent will result in rising management fees where basic rent is increasing. The tenant should consider trying to remove duplication of items of operating costs so that it is not paying fees on fees or on items that do not directly relate to the management of the property or which do not provide a direct benefit to the tenant. To the extent it can the tenant will want to exclude paying management fees on:
  - (i) salaries and wages;
  - (ii) realty and other taxes;
  - (iii) property and other taxes;
  - (iv) interest on undepreciated or unamortized capital costs;
  - (v) depreciation or amortization on capital costs;
  - (vi) any imputed rental value of the landlord's on site premises;
  - (vii) structural and capital repairs and replacements;
  - (viii) indirect costs and any allocations that are not property specific (so called head office overhead allocations); and
  - (ix) any costs which should not be included as operating costs.

## 5. Allocation and Proportionate Share

### Proportionate Share

There are different ways of calculating a tenant's proportionate share depending on the nature of the premises and the building.

- (a) Office: Typically the office proportionate share is based on a numerator of Rentable Area of the premises over the denominator of rentable area of the entire building. This will result in a gross up of 10% or more depending on the measurement standard used in the lease: BOMA 1980 or BOMA 1996 or the landlord's customized measurement standard.

- (i) Landlord: Most current leases will use BOMA 1996 unless the landlord perceives a competitive advantage in using BOMA 1980 so that its operating costs are lower. The measurement standard in the lease should provide for flexibility on the landlord's part to use a particular standard (for example BOMA 1996) but allow for the landlord to modify the standard.
  - (ii) Tenant: The tenant should understand the measurement standard. If the tenant has sufficient bargaining power the tenant may be able to stipulate the measurement standard. For example BOMA 1980 will or should result in a lower gross up on the rentable area. Alternatively if the landlord insists on BOMA 1996 and there is a large common area in the building such as a large atrium, the tenant could negotiate for an exclusion of the atrium. Another tactic for the tenant is to specify the percentage of its proportionate share to ensure it matches up for a desired result or deem the premises area and the building area for purposes of calculation operating costs to be equal to arbitrary amounts to achieve the desired result.
- (b) Retail: Retail centres will sometimes (depending on the nature of the centre and its size) use the concept of weighted gross leaseable premises for the numerator so as to give different weighting to different tenants. A higher weighting will be given to food court tenants and kiosks due to those tenants generating higher common area costs. Most of the leases that use a weighting formula are for enclosed regional malls. The denominator will be the weighted gross leaseable area of the shopping centre. This will usually include exclusions with respect to certain tenants (such as anchor tenants) who will not be paying a proportionate share of operating costs and taxes for the shopping centre. These exclusions will be found in most retail leases whether the lease uses a weighting formula or not. The exclusions typically are:
- (i) kiosks
  - (ii) storage space
  - (iii) free standing buildings
  - (iv) theatres
  - (v) office space
  - (vi) mezzanines
  - (vii) health or sport facilities
  - (viii) day cares
  - (ix) government space



- (x) rentable premises in excess of a certain gross leaseable area (often 15,000 square feet; the “anchor exception”)

The effect of the exclusion is that the CRU tenants end up subsidizing the anchor tenants for shortfalls in operating costs due to the anchor tenants not paying their full share of operating costs. The exclusions also allow for establishing different operating cost pools for a mixed use centre where there is retail and office provided that there are proper allocation clauses in place.

- (i) Landlord: The landlord wants the foregoing to be as comprehensive as possible so there is no loss of recovery of operating costs.
- (ii) Tenant:
  - (1) Will want ensure that the denominator uses rentable as opposed to rented.
  - (2) Should review the list of exclusions and seek justification from the landlord on the exclusions.
  - (3) Any contributions by excluded tenants to operating costs needs to be deducted from the operating cost pool that the non-excluded (CRU) tenants are paying rent and any maintenance and repair costs of excluded tenants are not included in operating costs. In other words, the different categories of tenants are or should be treated as different operating cost pools.

### **Gross Up Clauses**

Gross up clauses are usually found in office leases only but seem to be creeping into retail leases as well. The concept of a gross up clause is that certain costs should be grossed up as if the building was fully occupied. If used properly this is a fair clause. A typical example in an office building is for cleaning and where there is substantial vacancy. For example if 50% of the building is occupied by one tenant and only half of the building and common areas are being cleaned, the tenant should be paying for all such costs. If the tenant were to only pay its proportionate share (50%), the tenant would not be paying its actual share.

Landlord: The landlord will want this clause as broad as possible.

Tenant: The tenant will want:

- (a) to specify the items that will vary with occupancy;
- (b) negotiate for less than a 100% gross up as landlord’s typically use a 90 to 95% occupancy factor in determining costing models; and

- (c) negotiate that in any event it shall not pay more for such costs than it would if the building were fully leased.

### **Allocation Clauses**

Allocation clauses should be in every lease. If there isn't one, then the landlord may have a difficult time justifying allocations that are outside of the proportionate share clause. This is of particular importance where there are shared facilities between different properties or the property is comprised of office and retail and has different operating cost pools with some common shared facilities. Two examples are: (a) an office complex with a large retail component; and (b) a shopping centre with an office component and free standing buildings.

- (d) Landlord: The landlord will want this clause to allow for allocation on the basis that the landlord determines is appropriate.
- (e) Tenant: The tenant will want to ensure that the allocation is done on an equitable and reasonable basis and any costs allocated to that tenant's operating cost pool are actually benefiting those tenants. For example tenants occupying free standing buildings in a shopping centre that has an enclosed mall should resist paying interior mall costs as there would be no perceived direct benefit to that tenant from such costs.

## **6. Caps**

Tenants of significant size may be able to negotiate caps on operating costs or certain operating costs thus limiting liability for increases in such costs. Often when a cap is used, increases above the cap will often be limited to certain percentage increases or increases in CPI. If a landlord agrees to a cap, it will seek to exclude certain expenses that it can't control such as insurance premiums and taxes. The beauty of a cap for a tenant is the need for monitoring and auditing operating costs is reduced. Arguably with caps in place the need for extensive negotiations on operating cost inclusions is reduced and perhaps eliminated.

## **7. Adjustments**

Leases usually provide that the landlord will estimate operating costs and then the actual operating costs will be reconciled at the end of the year or the fiscal period for the lease and the amounts owing refunded. The landlord will often overestimate such amounts and then refunds to the tenants will be by way of a credit against rent coming due under the lease.

Landlord: The landlord will want the adjustment clause to be final and without any recourse by the tenant after a certain period of time (often 6 months). The landlord will not want to pay interest on amounts owing. The landlord will not want to grant an audit right.

Tenant: The tenant will or should want:

- (a) To limit year over year increases in estimates to a certain percentage.
- (b) Interest on amounts owing as determined by the reconciliation.
- (c) Payment by way of refund within a specified period of time or by credit against rent as it comes due and by refund at the end of the term.
- (d) An audited operating cost statement.
- (e) An audit right.
- (f) A right to limit how often the landlord can re-estimate operating costs throughout the year.

**8. Audit Clauses**

If the tenant has negotiated for operating costs exclusions, the tenant will typically want an audit clause. While this is the topic of another presentation, remedies such as audit clauses are very useful for a tenant and clause which a landlord greatly dislikes. Any refunds resulting from an audit should bear interest and should be credited against rent coming due or if the tenant so chooses and can successfully negotiate for such a result, the tenant should have the refund paid to it within a specified period of time after the determination of the refund has been made.

**9. Cases on Operating Costs**

Attached as Schedule 3 is an updated case summary. This list of cases has been updated from materials prepared by Steve Raby, QC of Macleod Dixon LLP for an Insight Conference.

**10. Bibliography and Acknowledgement**

A bibliography of source materials is attached. I have used these source materials in composing this paper. I also want to thank Elizabeth Williams, a student with Macleod Dixon LLP, who helped me with the preparation of this paper.

**11. Schedules**

The following schedules are attached to this paper.

- 1. Schedule 1 Definition of Operating Costs (Office Lease).
- 2. Schedule 2 List of Operating Cost Exclusions (Tenant).
- 3. Schedule 3 Case Summary Dealing with Operating Costs.

## SCHEDULE 1

### Definition of Operating Costs (Office Lease)

#### [Representative office building operating cost clause]

"Operating Costs" means the total of all expenses, costs, fees, rentals, disbursements and outlays of every kind paid, payable or incurred by or on behalf of the Landlord on an accrual basis (or on a cash basis to the extent the Landlord considers appropriate), but without duplication, in the ownership, maintenance, repair, replacement, operation, administration, supervision and management of the Property. Without limiting the generality of the foregoing:

- (a) subject to certain exclusions and deductions provided in sections (b) and (c) of this definition, Operating Costs include:
  - (i) costs of providing security, supervision, traffic control, janitorial, landscaping, window cleaning, waste collection, disposal and recycling and snow removal services and the costs of machinery, supplies, tools, equipment and materials used in connection with the Building (including rental costs of such items);
  - (ii) costs of telephone and telecommunications (including riser, rooftop and wireless management), information technology, telecopier, stationery, office equipment, supplies, signs and directory boards and other services and materials required for management, maintenance and operation (whether on or off-site and whether incurred by the Landlord or a management company);
  - (iii) costs of providing electricity, fuel, heat, processed air, water, telephone, gas, sewage disposal and other utilities and services (including all energy management and administration costs) and costs of replacing building standard electric light fixtures, ballasts, tubes, starters, lamps, light bulbs and controls (to the extent such item is charged separately to the Tenant pursuant to this Lease then the costs of any such item attributable to other leaseable premises shall be excluded);
  - (iv) costs of:
    - (1) operating, maintaining, replacing, modifying and repairing the Building, including without limitation such costs where incurred by the Landlord in order to comply with Applicable Laws or required by the Landlord's insurance carrier or resulting from normal wear and tear to the Building;
    - (2) providing, installing, modifying and upgrading energy conservation equipment and systems, life safety and emergency

response systems, materials and procedures and telecommunication systems and equipment if any;

- (3) making alterations, replacements or additions to the Building intended to reduce Operating Costs, improve the operation of the Building and the systems, facilities and equipment serving the Building, or maintain their operation; and
- (4) replacing machinery or equipment which by its nature requires periodic replacement,

all to the extent that such costs are fully chargeable in the Fiscal Year in which they are incurred in accordance with sound accounting principles or practices as applied by the Landlord;

- (v) depreciation or amortization of the costs referred to in section (iv) above as determined in accordance with sound accounting principles or practices as applied by the Landlord, if such costs have not been charged fully in the Fiscal Year in which they are incurred, and interest on the undepreciated or unamortized balance of such costs, calculated monthly, at an annual rate equal to 3% above the Prime Rate in effect on the first day of each Fiscal Year;
- (vi) amounts paid to, or reasonably attributable to the remuneration of, all personnel (whether on or off-site and whether employed by the Landlord or a management company) involved in the maintenance, repair, replacement, operation, administration, supervision and management of the Building, including fringe benefits, severance pay, termination payments and other employment costs;
- (vii) auditing, accounting, legal and other professional and consulting fees and disbursements incurred in connection with the maintenance, repair, replacement, operation, administration, supervision and management of the Building, including those incurred with respect to the preparation of the statements required under the provisions of this Lease and costs of administering, minimizing, contesting or appealing assessments of Real Estate Taxes (whether or not successful);
- (viii) costs of all insurance which the Landlord is obligated or permitted to obtain under this Lease and the amounts of losses incurred or claims paid either below the insurance deductible amounts or as the co-insurance portion of an insured claim;
- (ix) Real Estate Taxes to the extent not charged to the Tenant pursuant to section \_\_\_ and to other tenants of the Building pursuant to lease provisions similar to such section;
- (x) Capital Tax;

- (xi) fair market rental value (having regard to rent being charged for similar space including additional rent for operating costs and Real Estate Taxes) of space used by the Landlord and/or its property manager, acting reasonably, in connection with the maintenance, repair, operation, administration and management of the Building and such fair market rental value of any building amenities (such as conference and day-care facilities provided primarily for tenants of the Building), together with the reasonable costs relating to such building amenities;
  - (xii) a management fee in an amount comparable to that which would be charged by a real estate management company for management of similar office buildings in the area in which the Building is located; and
  - (xiii) all other costs and expenses of every kind, to the extent incurred in or allocable to ownership, maintenance, repair, replacement, operation, administration, supervision and management of the Property;
- (b) except to the extent otherwise provided above in section (a) of this definition, Operating Costs exclude:
- (i) Real Estate Taxes;
  - (ii) interest on, and the capital retirement of debt, except as specifically provided in section (a) above, and ground rent payable to the lessor under any ground or other lease pursuant to which the Landlord has an interest in the Property;
  - (iii) major repairs to the Structural Elements that are required as a result of defective design or construction of such structural components;
  - (iv) expenses relating to decorating or redecorating or renovating rentable space for tenants or occupants of the Building and costs relating to tenant inducements, allowances or similar expenses;
  - (v) all leasing expenses, real estate brokers' fees, leasing commissions, advertising and space planners' fees;
  - (vi) repairs or maintenance done for the direct account of other tenants;
  - (vii) net recoveries by the Landlord in respect of warranties or guarantees and insurance claims to the extent (but only to the extent) that the repair costs in respect of the work covered by such warranties or guarantees or insurance claims have been charged as Operating Costs;
  - (viii) amounts recovered from TSPs and tenants as contributions to the cost of telecommunications related services (including riser, rooftop and wireless management) to the extent (but only to the extent) that those costs have been included in Operating Costs; and

- (ix) utilities consumed by a tenant or occupant of the Building (including the Tenant) which are either separately metered or separately allocated to a tenant or occupant of the Building and paid separately from Operating Costs;
  - (x) cleaning costs for the Premises (other than portions of the Premises forming part of the Common Areas) which the Tenant has incurred as a result of the Tenant's cleaning contractors cleaning the Premises and paid separately from Operating Costs;
  - (xi) the cost of additional services provided to other tenants or occupants of the Building under lease provisions similar to the similar provisions of this Lease **[contained in sections \_\_\_ and \_\_\_ of this Lease]**;
- (c) in computing Operating Costs there will be credited as a deduction:
- (i) an amount equal to the net proceeds of insurance actually recovered by the Landlord for damage to the Property (or, if the Landlord has self-insured, an amount equal to such damage less a reasonable deductible) to the extent that the cost to repair such damage is included in Operating Costs; and
  - (ii) an amount equal to recoveries by the Landlord in respect of warranties or guarantees relating to the construction of the Property or any part of it to the extent that the repair costs in respect of the work covered by warranty or guarantee is included in Operating Costs.
- (d) In computing Operating Costs:
- (i) if less than 100% of the Rentable Area of the Building is completed or occupied during any period for which a computation must be made, the amount of Operating Costs will be increased by the amount of the additional costs determined by the Landlord, that would have been incurred had 100% of the Rentable Area of the Building been completed or occupied during that period, provided that the foregoing shall not result in the Tenant's Proportionate Share being greater than it would be if the Building was fully occupied and completed;
  - (ii) where the Landlord determines, acting reasonably but in its sole discretion, that any item(s) of Operating Costs are provided only to or for the benefit of a portion of the Building, then the Landlord shall be entitled, but not obligated, to allocate the cost of those item(s) over such portion of the Building and adjust the Tenant's Operating Cost payment based on such allocation;
  - (iii) if the Building is comprised of different categories of leaseable premises, the Landlord shall be entitled, but not obligated, to allocate Operating Costs among the various categories on the basis of such factors as the

Landlord determines to be relevant and to adjust the Tenant's Operating Cost payment based on such allocation; and

- (iv) if any facilities, services or utilities:
  - (1) for the operation, administration, management, repair and maintenance of the Building are provided from another building or other buildings owned or operated by Landlord or its manager;
  - (2) for the operation, administration, management, repair and maintenance of another building or other buildings owned or operated by the Landlord or its manager are provided from the Building; or
  - (3) are otherwise shared between the Building and another building or other buildings,

the costs, charges and expenses of such items shall be allocated by the Landlord, between the Building and other building or buildings on a reasonable basis.



## SCHEDULE 2

### List of Operating Cost Exclusions (Tenant)

#### Operating Cost Exclusions and Deductions:

- (a) costs attributable to areas excluded from the denominator of the proportionate share definition;
- (b) professional fees (including legals) for negotiating, enforcing or interpreting leases;
- (c) interior mall space expenses passed onto non-mall tenants;
- (d) costs, including utilities, incurred for the benefit only of a particular tenant of the development;
- (e) costs of structural repairs or replacements;
- (f) costs of repair or replacement of any item required to be covered by landlord's insurance under the lease;
- (g) capital costs of any nature, including without limitation capital expenditures to improve or increase the value of any portion of the development;
- (h) costs that are required to be depreciated under generally accepted accounting principles and any other depreciation or amortization expense;
- (i) credit for rentals obtained by landlord for use of common areas;
- (j) marketing or advertising costs for the development;
- (k) any off-site salaries and expenses including executive or managerial salaries, consulting fees, fees paid to architects, engineers, attorneys or other professionals, market study fees;
- (l) any general overhead costs including any rent or other costs attributable to a management office, and any other administrative, management or supervisory fees or expenses and any off-site salaries;
- (m) initial paving, initial striping or initial landscaping costs;
- (n) costs of sculptures, paintings or other artwork in the common areas;
- (o) penalties incurred because the Landlord fails to pay taxes or any other obligations on time, fees and interest charges, principal payments or other payments of any kind related to the landlord's acquisition, financing, or refinancing of the

development or any portion of it, rental or other payments under any ground lease and money the landlord must pay if it defaults under a lease or other agreement;

- (p) the cost of containing, removing or otherwise testing for or remediating any contamination of the land or other portions of the development or other environmental liability, home or branch office expenses;
- (q) administration fees - (maximum 15%)  
- (not on taxes / utilities / insurance);
- (r) costs resulting from any sale or transfer of the development or any interest therein by the landlord;
- (s) expenses resulting from defective construction or other work, including the cost of defective or inferior materials, or the negligence of other or improper performance or non-performance of the landlord;
- (t) the cost of work which is to be performed at the expense of the landlord under any other provision of the lease;
- (u) any excessive amount the landlord pays a contractor or vendor because of a special relationship;
- (v) costs of any repairs and damages in respect of which the Landlord is entitled to reimbursement pursuant to contractors' or manufacturers' warranties;
- (w) costs relating to repairs and damages to the systems bringing utilities to the premises;
- (x) work or improvements to the premises or the development carried out as a result of governmental requirements as to fire or earthquake protection, structural upgrading or other governmental requirements not resulting from the tenant's default under this lease;
- (y) capital taxes, income taxes, corporate taxes, excise taxes, profit taxes or other taxes personal to the Landlord;
- (z) any single expense of which tenant's proportionate share exceeds two thousand five hundred dollars (\$2,500.00) and which has not been approved in advance by the tenant, or any other unjustifiable or unreasonable cost;
- (aa) leasing commissions, brokerage fees, legal fees, inducements, improvement allowances and all other cost; expenses incurred by the Landlord to lease other premises development;
- (bb) improvements, modernizations, additions or alterations to the development, leasing costs and expenses for redecorating and renovating space tenants; and

- (cc) amounts directly chargeable to other tenants or vacant space of the development for services, costs or expenses solely attributable to or payable by those other tenants or vacant space.

## SCHEDULE 3

### CASE SUMMARY DEALING WITH OPERATING COSTS

#### ISSUES IN FULLY NET LEASES

##### 1. Capital Tax and Large Corporations Tax

Most old leases don't use any language that can support the payment of either of these types of tax. Generally in such old leases, the only references to tax are that the tenant pays its proportionate share of property taxes and related taxes imposed on the property and improvements and the landlord is responsible for any income taxes derived from its profits in the operation of the building or project. In these circumstances, the courts have made it relatively clear that capital tax and large corporations tax do not fit within the normal definition of property tax and falls within the definition of income tax. In *KPMG Peat Marwick Thorne v. SPE Operations Ltd.* (1995), 95 D.T.C. 5269 and *Dylex Ltd. v. Premium Properties Ltd.* (1998), 17 R.P.R. (3d) 227, the Ontario Courts had clearly indicated that without explicit language to include capital taxes and large corporation taxes as operating costs, they are to be excluded. Language that attempts to include taxes payable on the basis of the ownership of the realty would not be sufficient to capture either federal or provincial capital taxes as the Courts have said that those capital taxes are based on the financial statement of the corporation without regard to the nature of the corporation's assets. The Courts in these two cases ( *Dylex* went to the Ontario Court of Appeal) also concluded that the basket provision in the operating costs clause, which stated that all expenses incurred by the landlord are to be included and that the lease is intended to be a fully net lease, was not sufficient to include a cost that does not belong in operating costs as a result of the language contained in the specifically enumerated items.

In a more recent 2003 Ontario Court of Appeal decision in *CT Securities Inv. v. Oxford Properties Canada Ltd.* (2003), 172 O.A.C. 193, the lease for the commercial premises in question required tenants to pay landlords "occupancy costs" based on operating costs. These operating costs were net costs directly attributable to the operation of the building and included taxes based on the amount of space leased. Between 1998-2000 the landlords paid a lower tax rate for vacant portions of the building. The tenants applied for a declaration detailing the manner in which they could be charged for real property taxes. The leases provided for recouping the portion of real property taxes paid by the landlords. The Court determined that the legislature did not intend all of the benefits of the lower rates for vacant premises to enure to the landlord. Moreover, it was open to the landlords to include specific gross-up language in their leases. The Court granted the tenants declaration that the landlords were not entitled to charge the same real property tax rate as if the building were fully occupied and were ordered to repay the tenants the amount overcharged. The Court of Appeal found that the trial judge has not made an error in interpreting the lease term "net" as inclusive of taxes.

##### 2. Head Office and Administrative Costs

[no new cases in the area]

### 3. Management Fees

Han v. 9938 Investments Ltd . (1995), 45 R.P.R. (2d) 100, the tenant argued that an administrative charge equal to 15% of all other operating costs should be unenforceable because the lead in to the operating costs provision indicated that the tenant was to pay its proportionate share of the operating costs which costs were defined generically to be “the sum (without duplication) of all costs incurred by the landlord.” The tenant argued that paying an administrative fee was a duplication of costs and not allowed under the general provisions in the lease. A British Columbia Court of Appeal concluded that while the clause was not “elegantly drafted”, the intent clearly was to allow the administrative costs to be charged back to the tenants.

#### [Positive treatment- cited in ]

Grosvenor Canada Ltd. v Canadian Petcetera Ltd. Partnership, 2004 CarswellBC 1949, 2004 BCSC 1122, [2004] B.C.W.L.D. 1174, [2004] B.C.J. No. 1772 (B.C. S.C. Aug 24, 2004)

P.T. Hero Enterprises Inc. v. Paris Restaurant Ltd., 9 R.P.R. (3d) 98, 1997 CarswellBC 701, [1997] B.C.J. No. 933 (B.C. S.C. Apr 21, 1997)

### 4. Capital Expenditures

Determination of what is a capital cost and what is an operating cost is generally not handled very well in most leases. The simple reality however is that it is very difficult to handle the issue well. Some examples of the alternatives are as follows:

- (a) to simply rely on generally accepted accounting principles. Subject to some sort of vague materiality test, if the cost benefits more than one accounting period, it is prima facie capital in nature. Without the materiality test, this would apply to such things as light bulbs and accordingly is not a particularly good test;
- (b) attempting to include only costs relating to certain specific claims involving the base building structure such as roofs, parkade concrete, major mechanical equipment and building “skin.” Where the costs of replacement or repair is significant in relation to such an item, then it is easy to justify that this should be capital in nature and accordingly amortized, but what if the cost is relatively small but it relates to one of these building structural items?
- (c) making an attempt at distinguishing between replacement and repair with repairs being operating costs and replacements being capital costs; and
- (d) attempting to quantify some of the foregoing distinctions on a dollar amount basis. For example, anything that might normally be considered to be repair

would be categorized as a replacement if the cost is over a certain dollar amount for a particular repair, or the aggregate of all repairs in a given fiscal year is in excess of a certain dollar amount.

Comprehensive commercial leases can go on for pages in attempting to define replacements and capital items.

My view on the issue is that all the words in the world won't solve the problem and what really should be the focus of the exercise is to get the tenant away from the concept that they don't like paying for capital costs and have landlords get away from the natural inclination to try and include as much as possible of even long term maintenance and repair issues in the current year's operating costs. It seems to me that it is in both party's interest to attempt to fairly allocate the costs of significant capital improvements and the only real issue is whether there are certain costs that may have to be incurred by the landlord that shouldn't be borne by the tenants at all. Presumably from the landlord's standpoint, there should be very few of those costs which may include such things as replacing the building's skin (which from a tenant's perspective should have a virtually perpetual useful life), inherent structural defects such as full extension cabling and perhaps removal of hazardous materials such as asbestos. Tenants with significant negotiating ability may attempt to have other structural replacements excluded from both operating costs and amortized recoveries such as roof replacements, repairs to parkade concrete and elevator cab replacements.

The Ontario Court of Justice (General Division) decision in *Shenkman Corp. v. O.A.C. Holdings Ltd.* (1997), 8 R.P.R. (3d) 118 was a good example of how the wording in respect of capital matters needs to be crystal clear. In this lease the tenant was obliged to make structural repairs and repairs to the walls and the roof. The landlord was required to carry out any structural repair to things such as footings, foundations and beams. When serious roof leakage occurred during a spring thaw, the landlord replaced the roof and brought an action against the tenant to recover those costs. The judgment indicates a number of different reasons to arrive at the same conclusion, namely that the landlord could not recover these costs. Significantly to the issue of repairs versus replacements, the Court concluded that the new roof involved a change of such a nature and to such an extent that this was a replacement and not a repair as contemplated by the lease.

**[No negative treatment of this case]**

## **5. Reconciliation and Auditing of Operating Costs**

The Ontario Court of Appeal had an interesting fact situation before them recently in *Lou Vettese Transport Inc. v. Cabano Transport Inc.* (1996), 4 R.P.R. (3d) 227. In this case, the tenant occupied approximately 80% of the premises and two other tenants occupied 15% and 5% respectively. While there were not many costs that were applicable to the whole site, this tenant was required to pay 80% of those costs. However, the tenant having 15% of the area was required under its lease to pay 35% of such expenses. At first instance, the Court concluded that the landlord could not profit from these costs and rather surprisingly reduced the tenant's share

of the costs by 20% (on the basis that the tenant having 15% of the area was paying 20% more). The Ontario Court of Appeal concluded simply that there was no law that prevented a landlord from contracting so as to profit from the payment of expenses by tenants and what the landlord had negotiated with another tenant was irrelevant when construing a lease.

**[No consideration of this case]**

# **LEASE DRAFTING CHECKLIST**

**(courtesy of the Law Society of British Columbia)**



PROVISIONS TO BE CONSIDERED	NOTES
<p style="text-align: center;"><b>INTRODUCTION</b></p> <p><b>Purpose and currency of checklist.</b> This checklist is designed to be used with the Commercial Lease Procedure Checklist. It must be considered in relation to the particular facts in the matter at hand, and augmented and revised as appropriate. This checklist is primarily intended for use by the lawyer acting for the landlord. It is current to February 1, 2008.</p> <p><b>Additional resources.</b> See <i>Commercial Leasing: Annotated Precedents</i>, loose-leaf (CLEBC, 1996).</p> <p style="text-align: center;"><b>CONTENTS</b></p> <ol style="list-style-type: none"> <li>1. Date of Agreement</li> <li>2. Introductory Clauses</li> <li>3. Identification of Parties</li> <li>4. Description of Premises</li> <li>5. Words of Present Demise</li> <li>6. Term of Lease</li> <li>7. Rent</li> <li>8. Use of Premises</li> <li>9. Initial Construction to Complete the Premises</li> <li>10. Alterations and Improvements</li> <li>11. Maintenance and Repairs</li> <li>12. Services to Be Furnished by Landlord</li> <li>13. Common Areas</li> <li>14. Parking</li> <li>15. Operating Costs</li> <li>16. Taxes</li> <li>17. Utilities and HVAC</li> <li>18. Insurance and Indemnity</li> <li>19. Damage and Destruction</li> <li>20. Changes in Parties</li> <li>21. General Rights of Landlord</li> <li>22. General Covenants of Tenant</li> <li>23. Tenant's Options</li> <li>24. Merchant's Association or Promotion Fund for Shopping Centre</li> <li>25. Registration</li> <li>26. Overholding</li> <li>27. Termination of Lease</li> <li>28. Default</li> <li>29. Interpretation and General Provisions</li> <li>30. Third Party Indemnity</li> </ol>	

PROVISIONS TO BE CONSIDERED	NOTES
<b>CHECKLIST</b>	
<b>1. DATE OF AGREEMENT</b>	
<b>2. INTRODUCTORY CLAUSES</b>	
2.1 Whether made under the <i>Land Transfer Form Act</i> , R.S.B.C. 1996, c. 252 (consider whether this is advisable).	
2.2 Recitals setting out the special features of the transaction.	
2.3 Consideration clause.	
<b>3. IDENTIFICATION OF PARTIES</b>	
3.1 Landlord.	
3.2 Tenant.	
3.3 Third party indemnifier (if any).	
<b>4. DESCRIPTION OF PREMISES</b>	
4.1 Legal description and street address.	
4.2 Clear description of the part leased, including:	
.1 Reference to a marked plan attached as a schedule (do not use colours).	
.2 Area, or procedure for calculating the area (e.g., indication that the area is grossed-up for common areas and hallways, etc.), which must accord with plan.	
.3 Boundaries relative to outside walls, corridor walls, walls of demise, windows, etc.	
.4 Description of premises vertically, if necessary.	
4.3 Whether landlord has the right to expand, relocate, change, or upgrade the leased premises or development containing the leased premises, or alter the design or merchandising plan or the common areas or facilities, before or during the term, and if so:	
.1 Tenant's remedy, if any, if there is a material change (if acting for the tenant consider limits on such rights of the landlord).	
.2 Amendments to rent, additional rent, calculation of	

PROVISIONS TO BE CONSIDERED	NOTES
<p>proportionate share, etc.</p>	
<p>.3 Qualifications as to location, size of, and access to new premises.</p>	
<p>.4 Improvement allowances, payment of undepreciated cost of existing improvements, extent of landlord's and tenant's work.</p>	
<p>.5 Minimum period, if any, of the remaining term in which relocation can occur.</p>	
<p>.6 Notice requirement.</p>	
<p>4.4 Specified exceptions (e.g., the exterior face of the building, roof areas not leased to full floor tenants, such as vertical shafts for elevators or utilities). Describe carefully and refer to a marked plan attached as a schedule.</p>	
<p>4.5 Specified appurtenances included in the demise such as parking (see item 14), basement, storage space, fixtures, furnishings, machinery. Describe carefully. (If equipment is leased, consider registration requirements under the <i>Personal Property Security Act</i>, R.S.B.C. 1996, c. 359.)</p>	
<p>4.6 Right to use common areas (see item 13). (Consider whether easement is required from strata corporation if premises are a strata lot.)</p>	
<p>4.7 Obligation of landlord to build expansion space in the future. Set out details very clearly.</p>	
<p><b>5. WORDS OF PRESENT DEMISE</b></p>	
<p><b>6. TERM OF LEASE</b></p>	
<p>6.1 Commencement date:</p>	
<p>.1 Whether tied to completion of work, and if so:</p>	
<p>(a) Method for determining when completion occurs and documenting the commencement date.</p>	
<p>(b) Whether tenant has ability to give notice within specified time after taking possession if the premises are deficient or whether acceptance deemed on taking possession.</p>	
<p>.2 Whether tied to an official opening date, and if so:</p>	
<p>(a) Whether the date is certain, able to be</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>changed by landlord, or to be determined and tenant notified.</p>	
<p>(b) Whether tenant must open on that date and not before.</p>	
<p>(c) Whether date is contingent on anything (e.g., the opening of specified other businesses at the same time).</p>	
<p>.3 Whether dependent on previous tenant vacating the premises.</p>	
<p>.4 Whether dependent on landlord obtaining financing.</p>	
<p>.5 Insert "outside date" or other mechanism to avoid certainty problems.</p>	
<p>6.2 Consequences of landlord's failure to deliver the premises on the commencement date, for example:</p>	
<p>.1 Cancellation of the lease; whether the mortgagee is entitled to cure the default.</p>	
<p>.2 Adjustment of the commencement date:</p>	
<p>(a) Whether this is to involve an abatement of rent and other charges.</p>	
<p>(b) Whether there is any effect on the term of the lease.</p>	
<p>(c) Whether a memorandum is required between the parties to confirm.</p>	
<p>.3 Liquidated damages for delay.</p>	
<p>.4 Force majeure considerations.</p>	
<p>6.3 Whether tenant may take possession prior to commencement and, if so:</p>	
<p>.1 Obligations as to payment of rent and other charges.</p>	
<p>.2 Whether the remaining provisions of the lease apply (e.g., insurance, utilities).</p>	
<p>.3 Whether there is any effect on the term of the lease.</p>	
<p>.4 Length of fixturing period, and whether can begin operating from premises before commencement date.</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>6.4 Whether offer to lease merges on commencement or taking of possession.</p> <p>6.5 Whether any of tenant's obligations begin before the commencement date.</p> <p>6.6 Length of term and expiry date.</p> <p>6.7 Whether renewal terms are defined as extension of term, or separately (see item 23).</p>	
<p><b>7. RENT</b></p>	
<p>7.1 Payment details:</p> <p>.1 Time of payment (e.g., monthly instalments to be paid in advance on the first day of each month).</p> <p>.2 Place at which payments are to be made.</p> <p>.3 When payments to commence (e.g., any provision for a rent-free fixturing period?).</p> <p>.4 Provision for partial months.</p> <p>.5 No deductions or set-offs.</p> <p>.6 Whether there is interest on late payment of rent, additional rent, or other charges (comply with <i>Interest Act</i>, R.S.C. 1985, c. I-15).</p> <p>.7 How payments of percentage and additional rent are to be made (see items 7.3 and 7.4).</p> <p>.8 Provision for obligation to pay to survive the lease where calculations are not made until after the termination of the lease.</p>	
<p>7.2 Basic or minimum rent:</p> <p>.1 Amount of annual rent and instalments.</p> <p>.2 Adjustment of rent necessitated by use of estimates if rentable area changes, or is not the same as the specified estimate.</p> <p>.3 Whether the rent is fixed for the term or adjusted at specified intervals to take into account inflation, market value, etc.</p> <p>.4 Methods for calculating the rent and adjustments (e.g., Statistics Canada cost of living adjustment, fair</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p style="padding-left: 40px;">market rental value, arbitration).</p>	
<p style="padding-left: 20px;">.5 Post-dated cheques or automatic debit payments.</p>	
<p>7.3 Additional rent (required payments should be characterized as rent):</p>	
<p style="padding-left: 20px;">.1 Taxes paid by landlord (see item 16).</p>	
<p style="padding-left: 20px;">.2 Operating costs (see item 15).</p>	
<p style="padding-left: 20px;">.3 Insurance paid by landlord (see item 18).</p>	
<p style="padding-left: 20px;">.4 Amounts that tenant should have paid or for which landlord is entitled to reimbursement.</p>	
<p style="padding-left: 20px;">.5 Tenant's right to inspect landlord's records or obtain information to verify amounts; periods in which adjustments, if any, must be made.</p>	
<p>7.4 Percentage rent:</p>	
<p style="padding-left: 20px;">.1 Whether this is in addition to the basic rent; whether amounts are offset against a minimum rent so that tenant pays the larger amount.</p>	
<p style="padding-left: 20px;">.2 Calculation:</p>	
<p style="padding-left: 40px;">(a) Method, including whether the rate is fixed or graduated, and whether it applies only above a stated amount of gross sales, etc.</p>	
<p style="padding-left: 40px;">(b) Clear definitions of factors and terms involved (e.g., "gross sales").</p>	
<p style="padding-left: 40px;">(c) Specified inclusions and exclusions for gross sales.</p>	
<p style="padding-left: 40px;">(d) Whether a minimum payment is required.</p>	
<p style="padding-left: 40px;">(e) Method of payment (e.g., monthly, together with monthly statement of "gross sales").</p>	
<p style="padding-left: 40px;">(f) Annual adjustments (e.g., specify timing and whether audited; see also item 7.2.2 and 7.4.2(g)).</p>	
<p style="padding-left: 40px;">(g) Landlord's right to independent audit (tenant to pay unless statements wrong by specified amount e.g., greater than 5%).</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>.3 Tenant's obligations:</p> <ul style="list-style-type: none"> <li>(a) To operate the business continuously and in entire premises.</li> <li>(b) To operate during specified business hours; to be open for business when the building is open for business.</li> <li>(c) To keep adequate stock and staff to produce maximum revenues.</li> <li>(d) To use a specified trade name.</li> <li>(e) To maintain a specified ratio of selling area to floor space.</li> <li>(f) To keep records as specified (e.g., what type, where, for how long) and to allow landlord to examine them.</li> <li>(g) To provide specified documentation with payments or at specified intervals.</li> <li>(h) To honour credit cards.</li> <li>(i) To not operate a similar business within a given radius (otherwise gross sales of other business will be subject to payment of percentage rent). (Extend to related companies.)</li> </ul>	
<p>.4 Whether landlord is obliged to keep information confidential.</p>	
<p>.5 Audit rights and notice requirements.</p>	
<p>.6 Landlord's remedies in the event of default:</p> <ul style="list-style-type: none"> <li>(a) Termination of the lease.</li> <li>(b) Right to employ auditor.</li> <li>(c) Payment of audit costs, interest, liquidated damages, etc. (Such amounts to be owing "on demand" of landlord to avoid automatic GST payments.)</li> </ul>	
<p>.7 Statement that sums are paid as rent and not as a share of tenant's profits; negation of partnership or joint venture.</p>	

PROVISIONS TO BE CONSIDERED	NOTES
.8 GST.	
7.5 Intent: whether net lease.	
7.6 Mechanism to settle disputes as to costs.	
<b>8. USE OF PREMISES</b>	
8.1 Tenant's obligations:	
.1 To take possession, continuously occupy entire premises, carry on business continuously in, and not abandon the premises.	
.2 To use the premises for the specified uses only (particularly important where exclusive rights given to other tenants).	
.3 Not to use the premises for prohibited uses.	
.4 Not to permit the premises to be occupied by anyone other than the specified persons (e.g., permitted subtenants, employees); not to permit the premises to be used by anyone other than the specified persons (e.g., licensees, concessionaires, franchisees).	
.5 Not to commit waste or nuisance or interfere with other tenants, nor obstruct the movement of persons in the building.	
.6 Not to use signs or other advertising material visible from the exterior of the premises without approval of landlord.	
.7 Not to use heavy equipment without approval of landlord. Not to use equipment that would overload the floors or the facilities.	
.8 To comply with applicable laws, bylaws, and regulations relative to the premises and the business carried on including, where premises are a strata lot, current bylaws and rules and Form K notice of tenant responsibilities that the tenant and other occupants of the premises will comply with the strata corporation bylaws and rules ( <i>Strata Property Act</i> , S.B.C. 1998, c. 43, ss. 130 and 131).	
.9 To operate tenant's business in accordance with the specified standards (e.g., hours of operation, stocking and maintaining merchandise-see item 7.4.3).	
.10 To refer to the building only by the name designated	



PROVISIONS TO BE CONSIDERED	NOTES
<p>by landlord; to use that name for all business and promotional activities.</p>	
<p>.11 Not to permit hazardous substances or any prescribed waste to be brought on to, or stored or handled in or around, the premises and building, and to take any necessary remedial action in that regard. Consider adding immediate notice to the landlord prior to taking remedial action and stipulating the ability of landlord to undertake such work. Consider including indemnity regarding non-compliance and ability of landlord to enter premises to conduct testing.</p>	
<p>8.2 Landlord's covenants and representations:</p>	
<p>.1 To lease the premises.</p>	
<p>.2 Quiet enjoyment.</p>	
<p>.3 Remainder of covenants and representations are negotiable and may include:</p>	
<p>(a) That tenant's proposed use is permitted under zoning bylaws.</p>	
<p>(b) That tenant's proposed use does not conflict with use exclusively given to another tenant.</p>	
<p>(c) That tenant will have the exclusive right to operate the specified type of business in the building subject to the landlord's obligations to comply with the <i>Competition Act</i>, R.S.C. 1985, c. C-34, or other legislation.</p>	
<p>(d) That landlord will co-operate in securing any required licence.</p>	
<p>8.3 If a zoning change is required:</p>	
<p>.1 Whose responsibility this is.</p>	
<p>.2 Who pays the cost.</p>	
<p>8.4 Right to use other parts of the building (e.g., common areas- see also items 4.6 and 13).</p>	
<p><b>9. INITIAL CONSTRUCTION TO COMPLETE THE PREMISES</b></p>	
<p>9.1 Who is to do the work.</p>	
<p>9.2 Nature and extent of the work (if necessary, attach plans as a</p>	

PROVISIONS TO BE CONSIDERED	NOTES
schedule).	
9.3 Who pays the cost.	
9.4 Completion date for the work (consider liquidated damages if work not done in time and whether commencement date/term extends by number of days it takes to complete work).	
9.5 Obligation to comply with building codes, etc. and to obtain required permits, insurance, etc. and provision for payment.	
9.6 Whether the other party has the right to approve the plans, and procedure for plan approval.	
9.7 Access to the leased premises (including times and cost).	
9.8 For work to be done by Tenant:	
.1 Tenant's obligations:	
(a) To meet specified requirements before starting work (e.g., insurance, permits, bonds, letter of credit, security).	
(b) To pay the cost of landlord's review and approval of plans.	
(c) To use specified contractors and consultants.	
(d) To use contractors having union affiliations compatible with landlord's contractors.	
(e) To comply with specified construction procedures and design schemes.	
(f) To submit to landlord's supervision.	
(g) To protect landlord re: builders liens, other liens, security interests in favour of third parties, etc.	
(h) To take out any additional insurance reasonably required by landlord.	
(i) To do the work during specified hours only.	
(j) Not to interfere with landlord's other construction or use of the building by other tenants.	
(k) To pay garbage removal costs, utilities,	

PROVISIONS TO BE CONSIDERED	NOTES
lifting costs, loading dock charges, etc.	
.2 Whether landlord is to pay for work or pay inducements, and if so:	
(a) Whether there is any security for this (e.g., tenant fixturing loan agreement-see item 3.9.10 in Commercial Lease Procedure Checklist).	
(b) When this is payable (e.g., on completion of the work in accordance with specifications, on tenant's furnishing proof that related obligations have been paid and no builders liens filed on expiry of lien claim period, on commencement of the lease, on tenant opening for business, or amortized over the period of the lease).	
(c) Whether inducement payments include GST component.	
.3 Filing of notice of interest under <i>Builders Lien Act</i> , S.B.C. 1997, c 45, before commencement of any work by tenant (see item 10.1.5).	
.4 Landlord's remedies if tenant defaults in construction.	
9.9 Acceptance of the premises by tenant (see item 6.1.1(b)).	
9.10 Unavoidable delay.	
<b>10. ALTERATIONS AND IMPROVEMENTS</b>	
10.1 Landlord's rights:	
.1 To make changes to the leased premises before the commencement date (see item 43).	
.2 To make changes to the building:	
(a) Qualifications, e.g., whether the leased premises can be adversely affected.	
(b) Landlord's rights with respect to the leased premises (e.g., right of entry, support).	
(c) Restrictions on tenant's ability to claim breach of quiet enjoyment or for compensation.	

PROVISIONS TO BE CONSIDERED	NOTES
.3 To grant, modify, or terminate easements or other agreements pertaining to the use and maintenance of the building.	
.4 To use and make changes to pipes, wires, conduits, etc. in the leased premises, consider whether can interfere materially with the use and enjoyment of the premises or requirement of landlord to use reasonable efforts to minimize disruption; landlord to pay damages; tenant to permit reasonable access.	
.5 To file a notice of interest under the <i>Builders Lien Act</i> ,	
10.2 Tenant's rights and obligations:	
.1 Right to alter the premises and install and remove trade fixtures; whether landlord's approval is required and is not to be unreasonably withheld.	
.2 Obligations similar to those set out in item 9.8.1.	
.3 Obligation to protect landlord re builders liens, etc.	
10.3 Ownership of fixtures; obligation to repair. Consider prohibiting the tenant from creating a security interest in the fixtures except in favour of the landlord or with the landlord's prior consent.	
10.4 On termination of the lease:	
.1 Whether trade and other fixtures can or must be removed; whether landlord can require that the premises be returned to their original condition. (Deal with refusal or neglect of tenant to remove.)	
.2 Whether landlord has a lien for unpaid rent or other default under the lease. (Note: landlord will be required to rely on its rights under a security interest or <i>Rent Distress Act</i> , R.S.B.C. 1996, c. 403.)	
.3 Ownership of leasehold improvements; ability to remove and store at different location at cost of tenant; any right in favour of tenant to recover fair value if landlord becomes owner.	
<b>11. MAINTENANCE AND REPAIRS</b>	
11.1 Consider a covenant from landlord dealing with habitability, the state of repair of the premises, related portions of adjacent premises, common areas, heating, ventilation, air conditioning ("HVAC"), etc. at commencement of lease. (Note that if	

PROVISIONS TO BE CONSIDERED	NOTES
<p>premises are a strata lot, the strata corporation must keep in a good state of repair and properly maintain common areas and facilities.)</p>	
<p>11.2 Landlord's obligation to make specified repairs; exception where there is serious damage (see item 19) or where damage is caused by negligence or wilful misconduct of tenant; whether recoverable from tenant as operating costs.</p>	
<p>11.3 Landlord's right to make other specified repairs.</p>	
<p>11.4 Tenant's obligation to make specified repairs or replacements, including:</p>	
<p>.1 Whether landlord's approval is required.</p>	
<p>.2 Whether landlord may inspect and give notice requiring tenant to make repairs.</p>	
<p>.3 Whether there is a right to be reimbursed by landlord.</p>	
<p>11.5 Tenant's responsibility for acts or omissions of tenant, its employees, or customers.</p>	
<p>11.6 Replacement of mechanical equipment.</p>	
<p>11.7 Exclusions (e.g., ordinary wear and tear, structural repair and latent defects, damage by perils, whether insurance is relevant, etc.).</p>	
<p>11.8 Responsibility for:</p>	
<p>.1 Maintenance of building systems.</p>	
<p>.2 Janitorial services (see item 12.1.5).</p>	
<p>.3 Painting and decorating.</p>	
<p>.4 Compliance with building codes and building standards.</p>	
<p>11.9 Procedures for determining standards of repair.</p>	
<p>11.10 Procedures for determining responsibility for rectifying environmental hazards on the premises/building.</p>	
<p><b>12. SERVICES TO BE FURNISHED BY LANDLORD</b></p>	
<p>12.1 Services:</p>	
<p>.1 Hot and cold water.</p>	

PROVISIONS TO BE CONSIDERED	NOTES
.2 Electricity.	
.3 Heat, climate control, smoke, odours from other premises.	
.4 Elevator service.	
.5 Janitorial services (see item 11.8.2).	
.6 Removal of garbage and rubbish.	
.7 Private security service.	
.8 Tenant's name on building directory board.	
.9 Landlord not liable for interruption, but to pursue rectification.	
12.2 Standards.	
12.3 Whether tenant will pay for services in addition to rent; ability of Landlord to re-allocate costs if Tenant a heavy user.	
12.4 Tenant's obligations (e.g., energy conservation).	
<b>13. COMMON AREAS</b>	
13.1 Description of common areas (e.g., entrance foyer, lobby, parking lot, public entrance doors, halls, stairways, elevators, lavatories, shipping and receiving areas).	
13.2 Parties who share common areas.	
13.3 Whether landlord has the exclusive right of control over common areas, and right to make rules and regulations. If premises are strata lot, consider strata corporation's right of control over common areas.	
13.4 Whether landlord is entitled to change common areas; qualifications on the right (e.g., protection of tenant's right of access to the premises).	
13.5 Tenant's right to use common areas, subject to landlord's rules and regulations, strata corporation bylaws (if applicable), and any other specified restrictions (non-exclusive, non-transferable licence).	
13.6 Landlord's obligation to maintain common areas for the use and benefit of all tenants, including:	
.1 Hours of operation.	

PROVISIONS TO BE CONSIDERED	NOTES
.2 Conditions for altering or closing common areas.	
.3 Standard of maintenance and operation required of landlord.	
.4 Restrictions on merchandising in common areas.	
.5 Whether revenue from common areas is offset against the maintenance and operating costs of these areas.	
13.7 Tenant's obligation to pay for a portion of specified common area costs (e.g., maintenance, snow removal, cleaning, lighting, signs, liability insurance, real estate taxes, replacing light fixtures, repaving, restriping, heating and cooling of mall areas).	
13.8 Potential liability of tenant for accidents that occur in common areas.	
<b>14. PARKING</b>	
14.1 Whether parking is included in the leased premises or the subject of a separate agreement (whether lease or licence).	
14.2 Location and whether it can be changed by either party.	
14.3 Landlord's obligations:	
.1 To maintain parking facilities.	
.2 To maintain a ratio of public parking stalls to rentable area.	
14.4 Tenant's costs.	
14.5 Whether landlord receives revenue from common area parking facilities and, if so, whether revenue is offset against expenditures.	
14.6 Rights of landlord to charge the public for use of parking area in retail facility.	
<b>15. OPERATING COSTS</b>	
15.1 Clear and comprehensive definition:	
.1 Inclusions:	
(a) General (all costs of operating, maintaining, repairing, replacing, rebuilding, insuring,	

PROVISIONS TO BE CONSIDERED	NOTES
<p style="text-align: center;">supervising, managing and administering).</p>	
<p style="padding-left: 40px;">(b) Specific.</p>	
<p>.2 Possible exclusions:</p>	
<p style="padding-left: 40px;">(a) Structural repairs.</p>	
<p style="padding-left: 40px;">(b) Improvements, additions or alterations (except those made to reduce operating costs or to comply with changes in the law).</p>	
<p style="padding-left: 40px;">(c) Costs for which landlord is reimbursed or which are covered under contractor warranties.</p>	
<p style="padding-left: 40px;">(d) Interest on capital retirement of debt.</p>	
<p style="padding-left: 40px;">(e) Costs incurred for the direct account of a specific tenant or for unleased space.</p>	
<p style="padding-left: 40px;">(f) Management costs not related to maintenance or operation (e.g., leasing expenses, promotional expenses).</p>	
<p style="padding-left: 40px;">(g) Capital cost allowance, depreciation, expensing capital repairs and replacements.</p>	
<p style="padding-left: 40px;">(h) Lease rentals for land.</p>	
<p style="padding-left: 40px;">(i) Capital tax, income tax, profits tax, GST for which landlord receives an input tax credit, and other similar taxes.</p>	
<p style="padding-left: 40px;">(j) Costs for public facilities or incurred to meet development agreement obligations.</p>	
<p style="padding-left: 40px;">(k) Costs recovered directly from a tenant for separate charges relating to his or her other premises.</p>	
<p style="padding-left: 40px;">(l) Revenue received for common areas and facilities.</p>	
<p style="padding-left: 40px;">(m) Costs reimbursed by insurer.</p>	
<p style="padding-left: 40px;">(n) Inherent structural/construction defects.</p>	
<p style="padding-left: 40px;">(o) Amounts required to rectify environmental hazards existing before tenancy.</p>	
<p>.3 How capital costs and depreciation are dealt with</p>	



PROVISIONS TO BE CONSIDERED	NOTES
(see also item 15.1.2(g)).	
<p>.4 How operating costs are calculated, including procedures for adjustment if.</p> <p>(a) Estimates are used.</p> <p>(b) Different items are included in operating costs for different years.</p> <p>(c) There are changes in the area of the premises, the amount of unleased space, or the total rentable area.</p>	
15.2 Tenant's share of operating costs:	
<p>.1 Whether tenant must pay a proportionate share; if so, whether there is to be a gross-up for lobby and washroom areas.</p>	
<p>.2 How tenant's share is calculated:</p> <p>(a) Method (e.g., payment on monthly estimates, payment on request, adjustment when final costs known, documentation required from landlord).</p> <p>(b) What areas of the premises or building are included; denominator to be building area from time to time, to give flexibility for future expansion.</p> <p>(c) Whether tenant must pay a share of all or only some operating costs (e.g., costs of various types allocated to different parts of the building or types of premises).</p>	
<p>.3 Whether landlord reserves the right to allocate costs on an equitable basis.</p>	
<p>.4 Whether all tenants must pay a proportionate share or whether some are given special treatment, in which case the proportionate share may be required to be adjusted.</p>	
15.3 Management fees. Consider limit on amount (e.g., 10% of operating costs excluding insurance and property taxes).	
15.4 Strata fees. If premises are a strata lot and you are acting for tenant, ensure there is no overlap between the definition of operating costs in the lease and strata fees payable to the strata corporation. If acting for tenant, note that the strata	

PROVISIONS TO BE CONSIDERED	NOTES
<p>corporation will incur most of the expenses that are typically operating costs in a lease, and that the landlord's expenses may be only strata fees, property taxes, and insurance. Also, consider what expenses forming part of the strata fees should be excluded from the fees payable by the tenant (e.g., capital expenses for repairs or replacements, and expenses incurred in maintaining limited common property for the exclusive use of other strata lots).</p>	
<p><b>16. TAXES</b></p> <p>16.1 Landlord's obligation to pay specified taxes (e.g., municipal taxes whether depend upon payment by the tenant.</p> <p>16.2 Tenant's obligation to pay (prior to the due date):</p> <p>.1 Property taxes:</p> <p>(a) On the leased premises.</p> <p>(b) On a proportionate share of the taxes for the building, if the premises are not assessed separately (define and specify exclusions, e.g., improvements made by landlord or other tenants that result in taxes).</p> <p>(c) On fixtures or improvements to the premises.</p> <p>.2 Business taxes.</p> <p>16.3 Method of calculating and adjusting present and future payments (generally the same as used re operating costs-see item 15).</p> <p>16.4 Whether tenant has a right to contest taxes and, if so, security and indemnity provisions.</p> <p>16.5 Whether tenant must furnish evidence of payment.</p> <p>16.6 Tenant to pay GST assessed for the rent or any other items payable by the tenant under the lease.</p> <p>16.7 Consider inclusion of capital tax, if not dealt with in operating costs.</p>	
<p><b>17. UTILITIES AND HVAC</b></p> <p>17.1 Landlord's obligation to provide:</p> <p>.1 Type of service (e.g., hydro, heating, ventilation, air</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>conditioning).</p> <p>.2 Hours of operation.</p> <p>.3 Standards; provision for an initial adjustment period; not liable if services interrupted for repairs, etc.</p> <p>17.2 Tenant's obligations:</p> <p>.1 To pay:</p> <p>(a) Own costs, where there is separate metering.</p> <p>(b) Proportionate share of costs for building (e.g., see items 15 and 16); whether landlord may allocate on basis of use.</p> <p>.2 Regarding energy conservation.</p> <p>.3 .3 To maintain sufficient heat or air conditioning so as not to affect overall temperature in rest of building.</p> <p>17.3 Provisions relating to excessive use by a tenant.</p>	
<p><b>18. INSURANCE AND INDEMNITY</b></p>	
<p>18.1 Landlord's obligation to insure. Where premises are a strata lot, the strata corporation must insure the buildings (<i>Strata Property Act</i>, ss. 149, 150, 151, 152).</p> <p>.1 Types of insurance required, for example:</p> <p>(a) All risk insurance for building, improvements, common facilities; or fire and extended coverage, consider also building bylaw endorsement.</p> <p>(b) Boilers, pressure vessels.</p> <p>(c) Third party liability (including personal injury and property damage)</p> <p>(d) Business interruption.</p> <p>.2 Waiver of subrogation in favour of tenant.</p> <p>.3 Whether tenant must be named as co-insured in liability policies, and whether landlord must obtain a cross-liability clause.</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>18.2 Tenant's obligation to insure:</p> <p>.1 Types of insurance required, for example:</p> <p>(a) All risk insurance for stock-in-trade, furniture, etc. and leasehold improvements (full replacement cost).</p> <p>(b) General liability insurance (including public liability and property damage).</p> <p>(c) Legal liability.</p> <p>(d) Business interruption.</p> <p>(e) Contractor's insurance, if tenant is improving the premises.</p> <p>(f) Such other insurance as landlord or the mortgagee may reasonably require.</p> <p>.2 Endorsements required (e.g., waiver of subrogation, inclusion of additional named insureds, cross-liability and severability of interests clause, waiver of breach of conditions clause, contractual liability, non-owned automobile, notice of amendment or cancellation given to landlord, notice of non-payment given to landlord, requirement that tenant's insurance be considered primary and will not call into contribution landlord's policies).</p> <p>.3 Whether minimum amounts are specified.</p> <p>.4 Whether landlord must be named as a co-insured (e.g., for improvements paid for by landlord).</p> <p>.5 Landlord's rights:</p> <p>(a) To approve policies or insurers.</p> <p>(b) To be given evidence of coverage.</p> <p>(c) To insure and recover the cost if tenant fails to insure or if the insurer threatens to cancel the policy.</p> <p>18.3 Tenant's covenant to indemnify landlord (e.g., for breach of covenant, property damage, injury).</p> <p>18.4 Landlord's waiver of responsibility (e.g., for property damage, injury), except where caused by landlord's negligence or</p>	

PROVISIONS TO BE CONSIDERED	NOTES
wilful acts.	
18.5 Tenant's responsibility for increase in landlord's insurance premiums and ability to terminate lease if insurance cancelled.	
18.6 Landlord's covenant to indemnify tenant (e.g., for breach of covenant or for damages resulting from interruptions in tenant's business as a result of the operation of the building systems).	
<b>19. DAMAGE AND DESTRUCTION</b>	
19.1 Type of peril (all, or only those insured by the landlord).	
19.2 Degree of damage (consider substantial damage to building or to anchor tenant, but not premises, etc.).	
19.3 Effect on lease, for example:	
.1 Abatement of rent; extent of abatement.	
.2 Landlord's obligation or option to repair or rebuild (consider use of insurance proceeds); tenant's obligations. Should be consistent with maintenance and repair obligations (see item 11). If premises are a strata lot, the strata corporation is responsible for reconstruction and repairs to building, including common property ( <i>Strata Property Act</i> , ss. 72, 157, and 159).	
.3 Rights of parties to terminate the lease (see item 27.2).	
19.4 Landlord not responsible for specified types of loss or damage.	
19.5 Provisions for expropriation and condemnation.	
<b>20. CHANGES IN PARTIES</b>	
20.1 Assignment and subletting:	
.1 Right to assign, sublet, otherwise part with possession; in what circumstances; whether prior written approval is required (whether approval not to be unreasonably withheld; tests for withholding approval; ensure tests for withholding approval are "without limitation" to other reasonable tests; information about assignee and subtenant required to be delivered to landlord)).	
.2 Whether successive assignees and any subtenants are	

PROVISIONS TO BE CONSIDERED	NOTES
required to become contractually bound to landlord in writing.	
.3 Whether original tenant remains liable under the lease, subject to a release by landlord.	
.4 Manner in which the provisions of the lease apply to the assignee or subtenant.	
.5 Provisions regarding:	
(a) Right of first refusal in favour of landlord.	
(b) Sharing of profit rent with landlord.	
(c) Assignment of subtenant's rent to landlord.	
(d) Landlord's right to terminate lease.	
.6 Provisions regarding subsequent assignment, subletting, etc.	
.7 Whether tenant is prohibited from advertising the premises for rent, sublease, etc.	
.8 Whether landlord wants to charge an assignment fee, and tenant's responsibility to pay all legal and other fees and disbursements incurred by landlord in considering tenant's request for an assignment and documenting same.	
20.2 Change in control of a party:	
.1 Effect.	
.2 Whether this is different for a public corporation traded and listed on a recognized stock exchange.	
.3 Tenant's obligation to furnish share records.	
20.3 Transfer of property by landlord; landlord not liable if transferee assumes obligations.	
20.4 Whether tenant has right to finance operation by mortgaging lease.	
20.5 Consider prohibiting the tenant from creating a security interest in fixtures without landlord's prior written consent.	

PROVISIONS TO BE CONSIDERED	NOTES
<b>21. GENERAL RIGHTS OF LANDLORD</b>	
21.1 Right to make rules and regulations:	
.1 Type of rules and regulations; whether they apply to common areas and the premises, and to all visitors to the premises; whether landlord must enforce against all tenants of property.	
.2 Relationship to the lease (e.g., whether they become part of the lease; whether they may contradict the lease).	
.3 Notice requirements.	
21.2 Right to enter the premises:	
.1 For specified purposes (e.g., to inspect, make repairs or alterations whether includes ability to leave materials and equipment in premises without constituting default of landlord's obligations).	
.2 At specified times.	
21.3 Right to exhibit the premises:	
.1 For specified purposes (e.g., for rental, for financing, for prospective sale of the building).	
.2 At specified times (e.g., within certain period of time before lease expires).	
.3 Designation of manager of building.	
<b>22. GENERAL COVENANTS OF TENANT</b>	
22.1 To pay rent as provided in the lease.	
22.2 To perform the covenants in the lease.	
22.3 To pay costs incurred by landlord in enforcing the provisions of the lease.	
22.4 To subordinate the lease to any mortgages or to register the lease in priority to any mortgage. Consider also:	
.1 Whether subordination clause is operative without further documentation (i.e., not an agreement to subordinate). Whether attornment is operative without the express agreement of the lender.	
.2 Tenant's requirement for a non-disturbance	

PROVISIONS TO BE CONSIDERED	NOTES
agreement from landlord's mortgagee.	
.3 Whether non-disturbance agreement is subject to tenant not being in default or landlord otherwise being entitled to terminate.	
22.5 To peaceably surrender the premises at the end of the term, in good condition. Restoration obligations; obligations to remove improvements, fixtures, etc. and repair damage caused thereby.	
22.6 To deliver estoppel certificates from time to time in form and substance reasonably required by landlord.	
<b>23. TENANT'S OPTIONS</b>	
23.1 Option or right of first refusal to rent other space in the building.	
23.2 Option or right of first refusal to purchase the premises.	
23.3 Option to renew:	
.1 Whether term, rent, and essential conditions are certain. (Consider fair market rental value test if amount to be agreed or arbitrated. Consider whether to be not less than rent during term.) Clarify whether rent based on improved or unimproved premises, see <i>Fire Productions Ltd. v. Laura</i> , 2005 BCSC 1414, reversed 2006 BCCA 497.	
.2 Method and timing for determining the terms.	
.3 Method and timing of the exercise of the option.	
.4 Whether there are conditions precedent to the exercise of the right (e.g., no existing default, no default during the term of the lease, and no assignment of the lease).	
.5 Whether the guarantor, indemnifier, or tenant who has assigned its leasehold interest during the initial term must join in the exercise of the option and execute a new indemnity covenant. (Note, landlord will prefer indemnity to guarantee.)	
.6 Whether the option may be assigned.	
.7 Whether, on renewal, there is an option to renew again.	
.8 Whether renewal on same terms as original lease or	



PROVISIONS TO BE CONSIDERED	NOTES
<p style="text-align: center;">on landlord's then current terms (if original terms set out exceptions such as rent, inducements, and renewal clause).</p>	
<p><b>24. MERCHANTS' ASSOCIATION OR PROMOTION FUND FOR SHOPPING CENTRE</b></p>	
<p>24.1 Merchants' association:</p>	
<p>.1 Tenant's covenants:</p> <p>(a) To join, maintain membership, and pay dues.</p> <p>(b) To comply with rules.</p> <p>(c) To promote the shopping centre in its advertising.</p>	
<p>.2 Landlord's covenants (e.g., to contribute to promotion).</p>	
<p>.3 Rules to be approved by landlord.</p>	
<p>24.2 Promotion fund:</p>	
<p>.1 Tenant's covenant to contribute.</p>	
<p>.2 Landlord's covenant to contribute.</p>	
<p>.3 Promotion director.</p>	
<p>.4 Fund to be used to promote the centre.</p>	
<p><b>25. REGISTRATION</b></p>	
<p>25.1 Whether lease is to be prepared in registrable form, and at whose expense; whether lease may be registered; consider <i>Property Law Act</i>, R.S.B.C. 1996, c. 377, s. 5(2) and <i>Land Title Act</i>, R.S.B.C. 1996, c. 250, s. 20(2). Determine if short form of lease is to be registered (see Commercial Lease Procedure Checklist, item 2.7.18).</p>	
<p>25.2 Responsibility for cost of plan.</p>	
<p>25.3 Responsibility for cost of preparation of general instrument (Form C).</p>	
<p>25.4 Tenant to pay property transfer tax (if lease term including renewals is more than 30 years). Even if exempt, still must file special property transfer tax return.</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p><b>26. OVERHOLDING</b></p> <p>26.1 Status of tenant (must be month to month, otherwise possible renewal of term).</p> <p>26.2 Obligations of parties (e.g., tenant to pay double rent).</p>	
<p><b>27. TERMINATION OF LEASE</b></p> <p>27.1 At the option of one or both parties.</p> <p>27.2 Whether specified events will terminate the lease or may terminate it at landlord's option (if not, make other provisions for them):</p> <ul style="list-style-type: none"> <li>.1 Bankruptcy, insolvency, etc. of tenant, guarantor, and assignee (note <i>Commercial Tenancy Act</i>, R.S.B.C. 1996, c. 57, s. 29, and <i>Bankruptcy and Insolvency Act</i>, R.S.C. 1985, c. B-3, ss. 30, 65, 65.1, 65.2, 65.21, 65.22, 69, 69.1).</li> <li>.2 Damage or destruction of a specified degree (e.g., that will take a specified time to repair, or that affects a specified percentage of the leasable premises).</li> <li>.3 Expropriation of the interest of one or both parties.</li> <li>.4 Redevelopment by landlord.</li> </ul> <p>27.3 On default (see item 28.6).</p> <p>27.4 Whether landlord has right to terminate lease early for sale, demolition, or redevelopment, and if so, notice requirements and compensation to tenant.</p>	
<p><b>28. DEFAULT</b></p> <p>28.1 Provisions regarding violation by the tenant of the obligations set out in the items above (consider including with the clauses creating each obligation).</p> <p>28.2 Description of events of default (e.g., for tenant these would include non-payment of rent, breach of covenant, insolvency, abandonment of premises); whether delay constitutes default and whether time for performance may be extended.</p> <p>28.3 Force majeure clause.</p> <p>28.4 Whether notice must be given; whether the party is entitled to a reasonable time to cure the default and, if so, what is a reasonable time in different circumstances.</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>28.5 Whether default may be cured by the non-defaulting party; whether defaulting party is liable for the costs.</p>	
<p>28.6 Remedies (in addition to any provisions included throughout the lease):</p>	
<p>.1 Landlord's remedies:</p>	
<p>(a) Remedies are cumulative and in addition to any other remedies.</p>	
<p>(b) Interest (on demand).</p>	
<p>(c) Collection of rent; acceleration.</p>	
<p>(d) Re-entry.</p>	
<p>(e) Re-letting as tenant's agent, and collection of rent.</p>	
<p>(f) Seizure.</p>	
<p>(g) Damages, including the present value of the rent for the balance of term.</p>	
<p>(h) Whether tenant waives any statutory protection against distress.</p>	
<p>(i) Circumstances in which the lease may be terminated.</p>	
<p>(j) Waiver of a default does not affect the rights arising from subsequent defaults.</p>	
<p>.2 Notice requirements.</p>	
<p><b>29. INTERPRETATION AND GENERAL PROVISIONS</b></p>	
<p>29.1 Definitions (should be at the beginning of the lease).</p>	
<p>29.2 Choice of law.</p>	
<p>29.3 Principles that govern the interpretation of the agreement (e.g., use of the masculine form, insertion of headings for convenience only).</p>	
<p>29.4 The lease constitutes the entire agreement (consider carefully); relationship to offer to lease (e.g., merger).</p>	
<p>29.5 Severability (consider carefully).</p>	

PROVISIONS TO BE CONSIDERED	NOTES
29.6 Time of the essence.	
29.7 Notices.	
29.8 Enurement.	
29.9 Amendment.	
29.10 Arbitration and other methods for resolving disagreements (consider including specific provisions with the relevant clauses of the agreement).	
29.11 Costs.	
29.12 Statement of relationship (i.e., negation of partnership or joint venture).	
29.13 Application or waiver of <i>Commercial Tenancy Act</i> .	
29.14 Security for tenant's performance of its obligations: <ul style="list-style-type: none"> <li data-bbox="373 924 649 955">.1 Security deposit.</li> <li data-bbox="373 987 633 1018">.2 Letter of credit.</li> <li data-bbox="373 1050 682 1081">.3 Security agreement.</li> <li data-bbox="373 1113 1039 1165">.4 Provision for landlord's remedies being exclusive or cumulative if landlord realizes on security.</li> </ul>	
29.15 Schedules.	
<b>30. THIRD PARTY INDEMNITY</b>	

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