

**Osgoode Hall Law School
of York University
Professional Development Programme**

NEGOTIATING THE COMMERCIAL LEASE

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**LETTER OF INTENT / OFFERS TO LEASE /
PROPOSALS**

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I. INTRODUCTION

After 15 years of hanging around leasing managers, brokers and real estate representatives, I have learned to understand what gets them excited: a deal. I can relate to their enthusiasm. They've worked hard at persuading, negotiating, cajoling, and they've finally reached the finish line - or so they think. I'm sure I detect, after they've called me to give instructions, a noticeable drop in their degree of enthusiasm. Too many questions, too few answers, ending in my favorite words of instruction, "Just stick to the important stuff, I really want to do this deal!"

One of the most difficult aspects of "the deal" is to document it correctly, and one of the most important decisions in that regard is where to start. Many leasing managers, brokers and real estate representatives don't consider the task of writing down the deal as all that demanding until they encounter that peculiar brand of individual known as a leasing lawyer.

In this paper, I will attempt to explain the basic framework of a lease transaction. I hope you will find these comments useful as a how-to, and how-not-to, get your lease transaction off to a good start.

II. DOCUMENTATION

1. Form of Documentation

At the stage where a landlord and a tenant have made a decision to try to "do a deal", there is a documentation issue. Having decided to proceed, the question is "how"?

In commercial leasing arrangements, it is quite common to find that the Landlord insists on proceeding with its standard form of documentation. This may or may not entail entering into an Offer to Lease or other form of pre-Lease documentation. There are as many different approaches to this aspect of the lease transaction as there are landlords and tenants. There are even some situations where the Tenant is so strong that it is able to demand that the documentation be on its standard form.

In the retail sector, despite the best-written company policies, there are still many instances of tenants taking possession without a signed lease in place. By contrast, a typical office or industrial leasing arrangement will almost always involve a signed lease having to be in place before possession is granted.

The issue is one of balancing the goal of obtaining a binding agreement quickly against the goal of obtaining a comprehensive binding agreement. Speed versus certainty - superimposed over which is the likelihood of a lender or two in the picture who may insist on an executed lease being in place as a condition of financing.

The "straight-to-lease" format is not necessarily the approach usually taken for finalizing the documentation. Most office and industrial leasing arrangements, whether because of the desire of the parties to clarify the essential terms pending the satisfaction of some pre-conditions, or the desire of the broker to confirm the existence of the deal for presentation to and acceptance by the landlord, begin with a preliminary document of some sort. The preliminary document may be in the form of an offer (with or without a lease form attached), a letter agreement, or a term sheet, but whatever the form, it is the prelude to the lease itself. Most retail leasing arrangements also begin with a preliminary expression of terms, although "document" may be an over-statement of what the end result of that exercise yields.

In almost all office deals, the landlord or the broker will prepare all lease documentation. Generally landlords prefer to have standard documents for each development, in order to simplify administration and achieve the desired degree of control over the project. However, there are certainly times when tenants with a lot of clout require the landlord to adjust to the tenant's form of documentation. For example, I have never seen Her Majesty the Queen agree to document an office lease arrangement on anything but Her own form. Likewise, anchor tenants and grocery store operators in shopping centres will generally succeed in insisting on using their own forms of agreements. Whatever the case, the party "calling the shots" will usually ensure that the documentation is as biased as possible in its favour. The other party will attempt to swing the pendulum in the other direction.

It is a myth that the form of documentation used is related to which party is controlling the deal. There are many landlords who are flexible and accommodating in their approach to

documentation and while they may not care which form of documentation they start with, they will not sign off until they are as adequately protected as they would have been had they started with "their" form. There are also many tenants who are extremely strong in lease negotiations who may not insist on (or even have) their own form of document, but who will whittle away at the landlord's boilerplate until it resembles nothing of its original form.

As always, the issue to be concerned with is not form, but content.

2. Preliminary Documentation

As already indicated, some form of written, signed, short agreement is usually put into place as a precursor to the lease. Some landlords prefer to begin with an Offer to Lease. They may have their own standard form for the building or for all of their commercial properties, or they may rely on a standard Dye and Durham or Toronto Real Estate Board form, for example. Some offers are lengthy and detailed, and others are more succinct. Some offers have the lease form attached as a schedule and require the Tenant to acknowledge that the form will either be executed unchanged or will be the starting point for discussion and therefore subject to reasonable modifications requested by the tenant's solicitor. Some offers are in the form of sign-back letters. Four (4) Sample preliminary documents are attached to this paper:

- | | | |
|----------|---|---|
| Sample A | - | Retail Agreement to Lease (Letter Format) |
| Sample B | - | Office Offer to Lease (Short Form) |
| Sample C | - | Retail Offer to Lease (Long Form) |
| Sample D | - | Non-Binding Tenant Proposal Form |
| Sample E | - | Agent's Form of Office Offer to Lease (Short Form) ¹ |

In order to have a binding agreement to lease between the parties, there are certain essential elements that must be present. These essential elements transcend the questions of whose or which form of documentation is being used, or whose interest is best protected thereunder.

Occasionally it happens that a landlord and a tenant will create a tenancy agreement without a signed lease. In some cases the law will afford some protection to such parties and will enforce the agreement despite the lack of formality. In the next part of this paper, I will examine the five essential elements of a binding agreement to lease. Later, commencing on page 33, I will touch

¹ Thanks to Christopher Cuff, Associate Vice President, Royal LePage Commercial Inc., for allowing me to use one of his many "basic" versions of an Offer to Lease

on the circumstances in which an agreement to lease may be enforced even though not reduced to writing.

3. The Five Essential Elements

What must be in place, in order to have a binding agreement between the parties, are what Williams and Rhodes¹ term "the requisites of a valid agreement for lease". There are five such requisites - they must be established before the parties can be bound to proceed:

- (a) The Premises - they must be clearly defined and ascertainable.
- (b) The Parties - they must be named and the names must be correct.
- (c) The Rent - all types of rent, minimum (or basic or net), percentage and additional, must be clearly expressed.
- (d) The Term - the commencement and expiry dates must both be clear or readily ascertainable.
- (e) All other material terms of the contract not incidental to the landlord and tenant relationship, including any covenants, conditions, exceptions or reservations.

It is often the case that the Landlord and Tenant will enter into an agreement to lease, whether in the form of an Offer to Lease or a letter agreement, contemplating implicitly or explicitly that a formal lease will subsequently be entered into. The fact that a lease is unsigned is not material if (1) the agreement is sufficiently clear (i.e. it is not merely an agreement to agree), (2) there is evidence of the intention of the parties to be bound by the agreement, and (3) the five essential elements are in place.²

Let us examine the five essential elements in greater detail:

- a. The Premises -They must be clearly defined and ascertainable. This is usually accomplished by referring to a unit or suite number of the premises in a shopping centre or other building or complex, or if they comprise an entire building, its civic address. Generally speaking there will be a schedule or two attached to the agreement, indicating the lands (i.e. a site plan and/or legal description), the premises (possibly outlined or cross-hatched on a plan), and/or the measurement of the premises.

The area measurement of the premises may or may not be relevant. The governing criteria here is whether the rent is a function of the area. It could also be that area is an issue where the Tenant requires a minimum area from which to carry on its business.

On the topic of area, in a preliminary lease agreement for office space, the concepts of "usable" and "rentable" areas may appear, addressing the fact that the actual area of the premises will be grossed-up for the purposes of calculating rent. This will ensure that the landlord enjoys maximum return on multi-tenanted floors. The rationale is that, on a single-tenanted floor, except for elevator banks and utility areas, the entire area of the floor will be used to determine the rent payable by the Tenant. On a multi-tenanted floor, where corridors and washrooms are shared by two or more tenants, in order for the Landlord to obtain the same return and not suffer from the lack of coverage of the floor, all of the tenants on the floor share proportionately in the unleased area. Accordingly, the actual or "usable" area of the premises is grossed up to the "rentable" area. If the

Landlord intends to gross up the usable area of the premises, the agreement to lease must so state or else the Tenant will be entitled to rely on the terms of the agreement and it will be too late to introduce it in the lease. Some preliminary lease agreements incorporate their corresponding lease form's definition of "useable" and "rentable" area (which may be variously referred to as Net Rentable Area and Rentable Area, Useable Area and Gross Useable Area, Leasable Area and Gross Leasable Area, Rentable Area and Weighted Rentable Area, or any number of other terms). Others refer to certain industry standards, such as the BOMA Standard Method for Measuring Floor Area in Office Buildings³, as the basis for measuring area. Basically, the useable area is the area of the space itself, whereas the rentable area is the area that is used for calculating all rent obligations, and it is obtained by taking the useable area and multiplying it by a fraction, or applying a pre-agreed gross-up rate, which is intended to arrive at a figure that reflects the tenant's share of the shared areas on its floor or wing, as the case may be.

BOMA has recently taken this a step further. The latest BOMA standard is one that was approved on June 7, 1996 by the American National Standards Institute, Inc.⁴ The revised standard represents a major change from the previous (1980) standard.

The Introduction to the Standard states on page (v) that:

The need for ... a changed approach was first identified within BOMA International in 1992. While surveys showed that the *Standard* was the most commonly used method of measurement for office buildings, they also documented that it was not being universally applied on a floor-by-floor basis. Buildings constructed during the 1980s tended to incorporate design elements intended to benefit building occupants generally, rather than on a floor-by-floor basis (for example, spacious entrance lobbies

with concierge desks, health clubs, daycare facilities, conference centers, etc.). In view of this trend, BOMA's marketplace information indicated a widespread need to fairly account for these building-wide amenities.

Essentially, the revised Standard permits landlords to recover rent on not only the common areas of multi-tenanted floors of office buildings, but also on building common areas that provide services to building tenants. Examples of these common areas include lobbies, atrium spaces, concierge areas, security desks, conference rooms, lounges, vending areas, food service facilities, health or fitness centres, daycare facilities, locker or shower facilities, mail rooms, fire control rooms, fully enclosed courtyards outside the exterior walls and building core and service areas such as fully enclosed mechanical or equipment rooms. Excluded are parking spaces, portions of loading docks outside the building line, and major vertical penetrations (such as elevator banks).

The Standard contemplates that the Landlord will measure the individual space's Useable Area, then gross that up by a factor reflecting the shared common areas on the floor, which grossed-up figure is referred to as the Basic Rentable Area. The Basic Rentable Area is, in turn, grossed-up by a factor reflecting the shared building common areas, resulting in the Rentable Area which is the basis for calculating rent.

Most Canadian landlords have still not begun to measure space on the basis of the new standard. Many landlords with mature portfolios believe that the conversion would be impractical and are not planning to adjust their measurements as their inventory of space rolls over. They may wish to reconsider this, considering the potential revenue being

passed over. With respect to any newly constructed space, one would expect that landlords will want to use the new approach, of course depending on whether the market will allow it.

The message clearly is to be very careful to clarify which BOMA standard it is that the parties are agreeing to be guided by, if a BOMA standard is to be used for measurement purposes.

In retail leases, the term "Weighted GLA" is often used. It pertains to a further mathematical adjustment to the actual area of the leased premises, by augmenting or reducing it to factor in the location of the unit. For instance, a kiosk with no interior customer space might be weighted at a 2.0 (double) factor on the assumption that the Tenant actually "occupies" more space than its kiosk occupies, because the Tenant's customers can only congregate, and only the Tenant's customers congregate, in the areas immediately surrounding the kiosk. Correspondingly, a basement bowling alley space might be factored at a 0.5 (one-half) factor, on the theory that the space is not very desirable or easily leased and the Tenant could not realistically be called upon to contribute to common area costs on a full-share basis.

It has become common over the past 10-15 years to provide that the Landlord may require the Tenant to relocate to other premises in the building. Most landlords do not make much, if any, mention of this in their standard forms of offer to lease or letter agreement. Interestingly, most tenants simply negotiate the terms of the relocation clause

at the lease stage without questioning whether the Landlord is even entitled to alter one of the essential terms, when it was not mentioned in the agreement to lease that preceded the lease. In my view, on the basis of the "5 essential elements", the Tenant can resist a relocation clause in the Lease if it is not contemplated in the (binding) pre-Lease document. The courts will, however, enforce a relocation clause that is clearly written and agreed upon.

- b. The Parties - One would think that this would be the easiest aspect of the transaction, but it is interesting how often it is not. Surprisingly, many times the party named as Landlord does not turn out to be the owner of the land or even an interest in the land. Frequently, the party named as Landlord turns out to be a property manager or a ground lessee, or the party named as Tenant turns out to be either an incorrect combination of the business and corporate name of an entity, or a defunct or even non-existent corporation.

The cost and time involved to ascertain the name of the registered owner of the land is not prohibitive and this extra step should be taken before a Tenant contracts with someone who has no capacity to grant a demise.⁵

The party to be named as Tenant may be one of many types of legal entities. An individual may sign in a personal capacity. A partnership or corporation may wish to be the Tenant. The Landlord should ensure that the partnership or corporation is registered and should be satisfied that the individuals signing the agreement have the authority to

bind the party named as Tenant. If the party named as Tenant is entering into the agreement for the benefit of a company to be incorporated in the future, the Landlord should not agree that the named party "has no liability". If the Landlord agrees that the named party has no liability, then it has effectively entered into an agreement to lease with nobody or nothing. If parties do not agree in writing that the party named as Tenant (on behalf of a company to be incorporated) does so without personal liability, the law is that the named party will have assumed liability until the new company is formed and adopts the agreement, whereupon the originally named party is automatically relieved from any liability.⁶ It does not take long to incorporate a company. The named party could easily avoid any liability at all simply by taking the necessary steps to incorporate a company. That new company should be named as the Tenant.

Lastly, on the topic of "names of parties", if there is to be a second covenantor, this party (the Guarantor/Indemnifier) should be named in the preliminary agreement or it will be too late to insist on the additional covenant at the lease stage. (As to the significance of naming the party as a "Guarantor" vs. an "Indemnifier", the session after this one will go into detail.)

- c. The Rent - There are many different ways of calculating rent. Some rents are gross rents and others are net or quasi-net. Whatever the deal, the terms should be specified as clearly as possible to eliminate uncertainty. In a retail setting, there is often minimum rent as well as percentage rent (i.e. a rent which is based on a percentage of the gross sales at the premises).

If the lease is net, and the building is multi-tenanted, the Tenant will generally also contribute to the costs of operating the building (sometimes referred to as "TMI" - taxes, maintenance and insurance, or "CAM Costs" - common area maintenance costs). The term "Additional Rent" is often used to describe this category of rent in pre-Lease documents. That term should be used with caution since it can be all-encompassing. It may be inaccurate to state, as many landlords and tenants do, that "Additional Rent will not exceed \$X per annum".

The method of determining and paying rent should be clearly set out. The minimum (or "basic" or "net") rent may be calculated based on square footage, or may be a flat amount regardless of area. It may be payable monthly, quarterly or annually, on the 1st or 15th or some other day, in equal or unequal instalments, in advance or in arrears.

Percentage Rent may be based on an artificially high or low breakpoint level of gross sales at which it becomes payable, or it may be determined on a "natural breakpoint" basis by taking a percentage of all sales and deducting from that result the minimum rent theretofore paid. Percentage Rent may be calculated and payable cumulatively or non-cumulatively or when gross sales reach the annual breakpoint. It is usually payable in arrears (unless it is to be based on estimates and subject to later adjustment - this is very rare). It may be based on the Tenant's or the Landlord's fiscal year end, and there may be categories of sales which are to be excluded from the gross sales calculation. At the preliminary documentation stage it is unusual to address the Percentage Rent issue

beyond stating the method of calculation and timing of payment. I have rarely found this to cause difficulty at the lease negotiation stage.

Additional Rent may be payable based on estimates, subject to subsequent adjustments when the actual amounts are determined. The utilities component of Additional Rent may be based on separate meter readings or pro-rated on the basis of area. The realty tax component of Additional Rent is increasingly becoming an area of focus in preliminary agreements to lease in Ontario, as some tenants are trying to retain the former "separate assessment" method of apportioning realty taxes even though official separate assessments are no longer available. Much has been written on the topic of Additional Rent and there is a later session in this Conference wherein Operating Costs and Realty Tax issues are to be examined. Rather than addressing the many types of costs that may be debated by landlords and tenants, I will gloss over a few of the more critical ones that should be considered at the agreement to lease stage.

Tenants will often ask for a garden variety of exclusions from the net lease concept. A typical list of net lease exceptions is attached as Appendix "B". I will not address the many concepts covered there, but suffice it to say that at the preliminary documentation stage, some tenants will insist on addressing these issues. Others will prefer to wait for the Lease. If the deal is "no lease - no key", it may be preferable to leave this issue for the lease stage. However, if the agreement to lease does not specify that an administration fee (e.g. 15% of operating costs or a percentage of gross or net rent) is payable, it likely cannot be forced on the Tenant in the lease. There have been several

recent court decisions to that effect⁷. Tenants may therefore wish to focus on certain Additional Rent items at the pre-Lease stage. Similarly, any other items of Additional Rent which the Landlord wishes to recover from the Tenant, whether in the form of Promotion and Advertising charges (common in shopping centre leases), after-hours lighting and/or elevator charges, janitorial charges, security charges, HVAC operating charges, amortization of major expenses, capital and large corporation taxes, tenant coordination or plan approval fees, hoarding charges, and the fee paid to a property management company to carry out the functions of the Landlord, should be expressed to be payable in the agreement to lease or there is a strong possibility that they will not be acceptable when introduced in the lease, or recoverable if a lease is never signed.

Astute tenants will attempt to curtail the "blank cheque syndrome" that characterizes most agreements by tenants to pay a share of Operating Costs. Some tenants not only exclude many charges from the list of recoverable costs, they are able to negotiate a "cap" on the dollar amount they may be required to pay (except with respect to property taxes and utilities). However, unless such a clause is provided in the agreement to lease, it will not find its way into the subsequent lease. Many tenants believe they have achieved this result when they insert a provision in the agreement to lease which reflects the Landlord's current charges. For instance, there might be clause stating that the Landlord acknowledges that the current rate payable in respect of Operating Costs and Realty Taxes is \$X, subject to year-end adjustments. Or it might state that the Landlord estimates that the total of Operating Costs and Taxes will not exceed \$X. While such a clause may be helpful if the actual costs turn out to be significantly higher, the Tenant

should note that these clauses are only estimates and not warranties. Landlords will (properly, in my opinion), refuse to carry over these provisions into the subsequent lease, since they are only estimates and not binding. If the Tenant requires a guarantee, it should get a guarantee and not an estimate.

Some tenants are able to get landlords to agree to fix a dollar amount in respect of Additional Rent, for the first or a number of years of the Term, and perhaps provide for a set percentage or CPI escalation, or an escalation based on actual increases over the base year, in subsequent years. These terms must be clearly included at the preliminary documentation stage or they will not likely be found in the lease as the Landlord will be opposed to altering the financial basis of the original Agreement (unless it was non-binding and the tenant has leverage).

As a matter of practice, lawyers acting for tenants entering into agreements to lease on net terms should ask their clients to obtain from their prospective landlords a list of the items of Additional Rent that are included in the figure that was quoted to them by the Landlord as the current rate of Additional Rent. A rate of \$13 per square foot for Additional Rent may seem reasonable to the Tenant, but it may include some items which are apt to escalate unpredictably. If the list is provided, it will allow an opportunity to consider where problem areas might lie and whether there is room for negotiation. The Tenant will be hard pressed to argue, at the lease stage, that it will not agree to include, for instance, the cost of seasonal decorations of the shopping centre in which its premises are located, when the breakdown provided by the Landlord before the

deal was done indicated that such costs were included. Landlords will argue at the lease stage that the Tenant knew what the \$13 rate included and that it should have objected to any charges it disputed at the time it was entering into an agreement to lease on a net basis. They will also cleverly say that had they known the Tenant was going to refuse to pay \$0.25 for seasonal decorations, they would have charged the Tenant \$0.25 more in Minimum Rent since it was obvious the Tenant did not object to the estimated gross occupancy cost (i.e. the basic rent and additional rent), and that the Tenant is simply "nickel-and-diming" by chipping away at the list of Additional Rent items payable. If it is true that the Landlord would have accepted the Tenant's "principled" objections to certain Additional Rent items by simply converting the dollar amount to a Minimum Rent figure (thereby preserving the income stream it negotiated for and requires), then tenants should ask for a breakdown of the Additional Rent items before concluding a deal and give this a try - in the case of capital taxes, for instance, it's a far better situation for the Tenant if the Landlord will agree to take the charge out of Additional Rent and tack it on to Minimum Rent, since this is effectively the same thing as a cap, which would undoubtedly be meaningful to a tenant.

Tenants in office buildings should inquire at the front end what Additional Rent items may be charged for after-hours lighting and elevator use, for freight elevator use when moving in and out, for janitorial and security services and any other "extras" that may not be included in the major items of rent that are quoted. If any of these charges are problematic, they should be settled early on.

It is common to find a clause in the lease that allows the Landlord to "gross up common expenses" to the amount that the Landlord estimates would have been incurred if the building were fully occupied. I have seldom encountered any mention of this in a pre-Lease agreement. However, I believe that if a Court were asked to resolve the issue in respect of an unexecuted Lease in contention, it would not grant a Landlord the right to calculate Additional Rents using this mechanism (in the Lease) unless it were clearly provided for in the signed pre-Lease agreement. Tenants usually have severe reactions to these clauses when they negotiate this aspect of the Lease. Perhaps landlords should start writing this feature into their pre-Lease documents.

Depending on the common expense to be "grossed-up", this arrangement is in fact not at all unfair. It is not a case of the Landlord passing on the cost of vacancy to the tenants in the building. It is a matter of trying to match costs with users, so that the fact there is a vacancy does not cause the Landlord to subsidize the costs actually generated by the occupants of the building. With the current realty tax regime, this has become even more important given the disparity in level of taxation between occupied and vacant commercial space.

For instance, if the Tenant were the only occupant of the building, it would be unfair (to some extent) to require the Tenant to pay only its proportionate share (based on area) of utilities consumed by the building, since there would be no other occupants consuming the utilities and the only utility costs would be those generated by the tenant (leaving aside any common area utility consumption). Similarly, any janitorial services provided

to the Tenant would be priced to the Landlord to correspond with the actual space being served, and if the Tenant were to pay only its proportionate share of those costs then the Landlord would effectively be absorbing some of the Tenant's janitorial costs. Some common expenses are inappropriate for grossing-up, such as insurance, and to some extent, the cost of personnel carrying out administrative or property management functions.

There are a couple of ways to get around this result, mathematically. One way is to adjust the denominator of the proportionate share fraction to ensure that the actual users of the services are included and vacant space is not. Another way is to gross-up the costs so that when the proportionate share fraction (unadjusted for vacancies) is applied to the grossed-up amount, full recovery is achieved. A combination of these mathematical approaches may in fact be necessary to truly match costs to users.⁸ At the preliminary documentation stage, the conundrum for landlords is whether to avoid mentioning these elements and possibly have to fight over them at the Lease stage, or to address it squarely in the pre-Lease document and thereby invite negotiation of the point at a time when perhaps more basic issues are pressing.

- d. The Term - If it is not clear when the Term is to commence and expire, an agreement to lease may be void for uncertainty.

With an agreement to lease space that is already built and vacant and where the Tenant accepts the premises in their "as is" condition, setting out the Term is a straightforward exercise of incorporating the correct commencement date and length of Term.⁹

However, where the premises are to be constructed or if, for example, the date when an existing occupant will vacate to permit delivery of space to the Tenant is uncertain, it is tricky to set out a provision that determines exactly when the Term will commence. It is inadequate at law to provide a formula for the commencement of the Term which depends on a number of triggering events (such as completion of the Landlord's and Tenant's work) where there is no absolute "outside date" by which the Term commences.¹⁰ As a result, it is common to find, where the commencement date is intended to be flexible, that the parties add to their "formula date" a fictional outside date that is so far off in the future (e.g. the second anniversary of the date of the agreement) that it will not realistically affect the application of the formula. As long as the fictional outside date is far enough off in the future that it is impossible that any of the conditional events triggering the commencement date will not have taken place by then, the fictional outside date will merely serve the purpose of satisfying the technical legal requirement that the commencement date be capable of determination. The parties may, for administrative purposes, agree to sign a certificate at a later date, confirming the exact commencement and expiry dates of the Term. If there is any concern between the parties that after some period, if the triggering events have not taken place as planned, the agreement should be called off or some penalties should be exacted from the responsible

party, it is of course open to the parties to add a provision that if the commencement date has not occurred by a certain date, certain consequences will flow.

If the commencement date is readily determinable, and the duration of the Term is also clear, it will be possible to determine the expiry date. If there is any room for doubt, the agreement should specifically express the expiry date. A five-year term commencing in the middle of a month will end five years later on the day before the 5th anniversary of the commencement date. If either the Landlord or the Tenant would prefer an expiry date of the last day of a month, and the other party does not object, it will be necessary to expressly so provide. Many retailers prefer to state that notwithstanding the "natural" expiry date, the Term will expire on the ensuing January 31st (for the obvious purpose of enjoying one more Christmas season).

On the subject of options to renew the Lease or extend the Term, these may or may not be "essential terms". If they are material terms of the agreement, they will have to be included in a pre-Lease document for it to be binding. This is a function of the fifth essential element - examined next commencing on page 28. A wrinkle that is worthy of note is that most landlords are now expressing renewal options as options to extend the Term. What is the difference? As a result of case law¹¹ holding that a renewal of the lease by an assignee tenant creates a "fresh demise" whereupon the continuing liability of an original tenant/assignor of the lease comes to an end, landlords have attempted to circumvent this result and assure the continuing liability of such a tenant/assignor through any additional Terms by characterizing the additional Terms as extensions (and

not "fresh demise" renewals). It is not yet known whether this distinction will yield the desired result. Most lawyers concede that the approach stands a better chance of succeeding if the provisions are worded as having retroactive effect (i.e. upon exercise of the option, a 5-year term is extended to operate as a 10-year term, rather than a 5-year "Initial Term" being extended "for a further 5-year term (the "Extended Term)").

Apart from that fairly obscure point, the focus continues to be on the actual terms of the renewal (or extension, as the case may be). Most pre-Lease documents do address this issue, but not all of them give the topic the thorough attention it deserves, thereby creating lasting problems to be resolved later. In my view, the terms of any renewal/extension option should be fully spelled out in the pre-Term agreement. The issues to address are: Will the option be personal to the originally named Tenant and not available to any assignee? Must the Tenant be in actual occupation of the whole of the premises at the time of exercising the option? How many months' advance notice, written or not, must be given by the Tenant in order to exercise the option? Or alternatively, will the Tenant be deemed to have exercised the option if it does not notify the Landlord to the contrary by a certain date? Is the Landlord required to notify the Tenant that it did not exercise the option by the agreed date and provide the Tenant with an opportunity to correct its oversight?

Need the Tenant be in good standing at the time of exercising the option? What if the Tenant defaults under its lease obligations during the Term but cures the default at the

time of exercising the option - will that suffice or is one of the Landlord's remedies for a default of the Tenant the right to revoke the Tenant's option to renew/extend?

How long is the option period, and how many of them will there be?

What terms will govern the parties' relationship during the extension or renewal period?

The same terms and conditions of the original lease, or can the Landlord require the Tenant to sign a new lease on its then-standard form?

Will the rent change, and if so, to what? If the deal for the initial Term is for a gross rent, the Landlord may want to move to a net arrangement on the renewal/extension. The Tenant would like to "peg" the rent rates for certainty, knowing that if the pegged rates are too high for the market at the time, it can always approach the Landlord, as the exercise date nears, to negotiate a more appropriate rate in exchange for the Tenant's commitment to stay. The Landlord would generally rather defer the decision of the applicable rental rate to the time of exercising the option. The Landlord's position is, if the Tenant wants the Landlord to commit to a rental rate which is 5 years away from applying, then the Tenant should commit to the longer Term to start with. To avoid this, landlords and tenants often agree to set the option rate at the fair market rent prevailing at the time the option is exercised. That begs the question, what is the fair market rent and what if the parties cannot agree on it? "Fair market rent" is often defined as the rate then being obtained on the market for similar premises, similarly used, fixtured and located. Tenants will object to the "similarly used and fixtured" aspect of this definition.

Since rental rates often reflect a "repayment" of inducements given by the Landlord to the Tenant at the beginning of the initial Term, and an inducement may not be payable at the commencement of the renewal or extension period, the comparison point should be the fair market "net effective" rent (i.e. factoring in all inducements). It will not suffice to say that the renewal rent will be agreed by the parties, since that gives no assistance to a court attempting to give effect to the intention of the parties - it is only an (unenforceable) agreement to agree in the future. If the option clause stipulates a rent to be agreed by the parties, and provides further that failing agreement the dispute will be settled by arbitration, then the clause will be enforceable. Better still, if the option clause stipulates that the rent will be the fair market rent for the premises, and provides for arbitration in the event the parties are unable to agree, the fact that a formula for determining the rent and a mechanism for solving any dispute are provided will ensure that the option will be enforceable. Even if the option clause only stipulates that the rent will be the fair market rent but does not provide for a mechanism for resolving a dispute between the parties as to what the fair market rent is, the courts will breathe life into the agreement by merely ascertaining what the fair market rent is.

If the same terms and conditions (except as to rent) as set out in the lease are to apply to the renewal/extension period, then any terms and conditions that are not to apply should be listed. For example, the clause should state that any fixturing period, tenant allowance, rent free period, construction obligation on the part of the Landlord or other benefit provided by the Landlord at the beginning of the initial Term will not apply to the renewal or extension period. It should also clarify that the option to renew or extend

itself will also not apply at the end of the renewal/extension period or else the Landlord will be subject to perpetual renewals.

To summarize, the simple requirement that the commencement and expiry of the Term need be definitely set down or capable of being ascertained is actually not that simple to satisfy.

- e. All other material terms - Williams and Rhodes Canadian Law of Landlord and Tenant¹² states that if the parties agree that the lease will contain the "usual covenants", the only "usual" covenants upon which they are entitled to insist are (1) the Landlord's covenant for quiet enjoyment, (2) the Tenant's covenant to pay rent and taxes, (3) the Tenant's covenant to keep the premises in good repair, (4) the Tenant's covenant to allow the Landlord to enter and view the state of repair, and (5) the Tenant's covenant to allow re-entry by the Landlord in the event of non-payment of rent by the Tenant. Clearly there are a few things missing from that list that would be desirable for landlords and tenants. It is therefore essential to address all other material terms in whatever form of pre-lease agreement is used, since the Courts will not "write-in" the terms.

The other material terms that are most often found in pre-lease agreements include:

- i. whether any advance rent or security deposit is to be paid,
- ii. the use to which the premises may be put,
- iii. the form of lease to be used and who is to prepare it, any deadline for signing it and whether it or certain elements of it may be negotiated,

- iv. the remedies to which either the Landlord or the Tenant may be entitled if the other party defaults in its obligations,
- v. any security interest taken by the Landlord in the Tenant's property,
- vi. any restrictive covenants prohibiting the Landlord from leasing other premises in the building for certain uses,
- vii. any restrictive covenants (or "radius clauses") prohibiting the Tenant from using any other premises within a geographic limit for the same business purpose as that of the leased premises (typical in retail leases, particularly where Percentage Rent is payable),
- viii. any renewal or extension options, the pre-conditions that must be in place in order for the Tenant to exercise them and the terms that are to apply to the renewal or extension period,
- ix. any inducements or allowances (including cash payments, improvements and rent-free periods) which the Landlord may be providing in order to obtain the tenancy,
- x. any restrictions on the Tenant's ability to assign or sublet, on corporate changes of control, or on sharing or parting with possession of the premises whether with or to a franchisee or licensee or other party,
- xi. a demolition clause allowing the Landlord to terminate the lease if it wants to raze the building,
- xii. any restrictions on the Tenant's right to register the Offer or a notice or short form of it on title to the lands underlying the premises,
- xiii. any commissions that may be payable to an agent for securing the transaction,

- xiv. any rights of first refusal to lease adjoining or other space in the building, or other arrangements to permit the tenant to expand, as well as any rights on the part of the Landlord to relocate the Tenant to other premises in the building,
- xv. exclusive parking arrangements, or rights to enjoy reserved or unreserved parking spaces,
- xvi. any rights or restrictions on the Landlord to modify the Common Area and Facilities or to let others use them, as well as any rights of the tenant to use the Common Areas and Facilities, for example, for exterior or roof-top signage, as well as rights to be represented on directory board, lobby and other directional signs, and nowadays even increasingly for telecommunications connections and related purposes; and
- xvii. any warranties or representations that one party may have made to the other upon which the latter is entitled to rely (e.g. that the premises are zoned to permit the Tenant's use, or that the Tenant has the necessary authority such as a franchise or license that may be required in order to permit it to proceed with the agreement, or even something as seemingly minor as that 24-hour access to the premises for the Tenant and its employees will be provided).

4. General Comments

Ideally, since generally it is customary in the industry to preface leases with some sort of a preliminary agreement, if the goal of the parties is to achieve a binding agreement to lease, it is important to bear these prerequisites in mind and ensure that they are addressed throughout the documentation of a deal.

However, there is one important caveat to add to all of my remarks thus far: if the preliminary agreement to lease is explicitly stated to be non-binding, it is generally customary (with good reason - no deal is in place until the lease is signed) not to focus as intently on the many technical issues addressed above, since they can all be resurrected at the lease stage. This strategy is subject, of course, to recent developments in the law of good faith and negligent negotiations, and to the conscionability - and the effect on the willingness of parties involved to proceed - of revising terms or introducing new terms at a later stage in the deal-making process.

III. CASE LAW UPDATE

There are several cases spanning several years and different jurisdictions, concerning the principles espoused above. The following summaries describe some recent decisions in this area of the law:

1. *Ossory Canada Inc. v. Wendy's Restaurants of Canada Inc.*, [1997] O.J. No. 5168 (Ont. C.A.)

The Landlord attempted to negotiate the terms of a lease with the Tenant. Some discussions were held, resulting in a letter being sent from the Landlord's Property Manager to the Tenant, purporting to confirm a "mutual agreement in principle" to lease the site commencing on the earlier of January 1, 1988 or completion of the building to be constructed by the Tenant. The

Tenant was asked to sign back the letter to confirm the deal, but approximately 1 month later the Tenant wrote its own letter, via one of its real estate representatives, stating that it was "prepared to recommend the site", subject to a number of terms and conditions, including that the deal be based on a "build-to-suit" arrangement. A draft Build-to-Suit contract was enclosed. Over the next two and a half months some discussions took place and the Tenant's Director of Real Estate wrote a letter to the Landlord stating that it would "lease the site subject to a satisfactory lease negotiation" and a number of items, including the "build-to-suit" arrangement, as reflected in an enclosed Build-to-Suit contract. The Landlord was asked to sign the letter and sign it back as an acknowledgment that the deal was on. The Landlord signed as requested, and returned the Agreement.

A further draft Build to Suit contract was then prepared and submitted by the Tenant to the Landlord, differing from the original one in many respects, including as to driveway and parking elements, the Tenant's right to assign, the Tenant's right to terminate the lease for default by the Landlord, and revising the commencement date and introducing other conditions respecting the obtaining of permits and licenses. More negotiations ensued, culminating in yet another draft, still containing many of the disputed provisions. The Tenant wrote to the Landlord, stating that the deal was off.

The Landlord sued the Tenant for damages and was successful at trial. The Tenant appealed and the Court of Appeal overturned the lower court's decision. The Court of Appeal reiterated the five requirements of a valid and enforceable agreement for lease:

- (1) the names of the parties,
- (2) a description of the premises,
- (3) the commencement and duration of the Term,
- (4) the rent, and
- (5) all other material terms of the contract not being matters incident to the relation of landlord and tenant.

Since the commencement date of the subject lease was clearly in dispute, and many of the other terms which were disputed were material to the Tenant, if not to the Landlord, the Court of Appeal found that the Agreement between the parties was not firm and binding but was merely an agreement to agree that was aborted before full agreement on all points was reached.

2. *Sudaby v. Clark (c.o.b. Cul-Pro Investments), [1998] O.J. No. 2033*

The tenant entered into two leases with a landlord for a restaurant operation. One was terminated; the other was the subject of litigation. The tenant began an action to recover damages as a result of the "non-terminated lease".

In order to obtain financing for its operation the tenant approached a local business development centre. The organization required that a lease be produced in respect of the operation and the tenant felt pressured to sign and produce the lease in order to be quickly evaluated for funding. The tenant met with the landlord to resolve the lease terms. The landlord was not a sophisticated party and was extremely uncomfortable with the document that was ultimately signed. The landlord inserted a clause in the lease that provided for detailed future amendments to various provisions.

The Court held that the landlord did not intend that the signed lease presented for purposes of obtaining funding by the tenant be a final binding document. To the landlord it was merely an outline of items to be agreed upon. The essential provisions required to make the lease a binding document had not been agreed upon and therefore the Court held that the lease was not an enforceable contract.

The Court addressed the 1997 case of the Ontario Court of Appeal, *Ossory Canada Inc. v. Wendy's Restaurants of Canada Inc.* (summarized above)

3. *Hostelling International Travel Services Inc. v. Toronto Hospital* [1997] O.J. No. 384 (Ont. Ct. Gen. Div.)

Negotiations in the Spring of 1995 between the president of a youth Hostel and the vice-president of a Hospital's property management consultant led the Hostel to maintain that it was the tenant of three (3) floors of the Hospital's residence under a valid lease until the year 2001. The negotiations were summarized in various letters and draft leases. The Hostel took possession of the premises in May of 1995 and paid rent, but the Hospital maintained that such occupancy was in the nature of a 6-month short-term tenancy, reflected in a letter agreement contemplating that the parties "[intended] to negotiate during the next six months following the commencement date of [the] agreement to finalize a long-term (up to 20 years) arrangement". The parties developed several drafts of an agreement concerning a long-term lease but nothing was ever signed. A number of issues were outstanding, including a termination right in favour of the Hospital. The property manager's representative had also made it clear that it had no authority to bind the Hospital. The Hostel commenced an action for a declaration that there was a valid lease and for specific performance. The Hospital sought summary judgment or in the alternative, an injunction requiring the Hostel to cease activities pending a trial. At the motion for summary judgment, the Hostel argued that the fact that the Hostel had exclusively occupied the three (3) floors, the obligation on the part of the Hospital to act in good faith and the history of the negotiations, all combined to provide a lease for the Hostel. The Court did not agree, and held that even if there were an inference to be drawn that a lease existed, the termination right contained in the lease would have served to allow the Hospital to have terminated the lease. In its decision the Court acknowledged the evolving case law concerning the application of the doctrine of good faith to commercial leasing. However, it held that a clear agreement as to the terms of the tenancy was needed as an underlying foundation for the good faith argument to hold. further noted that the doctrine of part performance was also inapplicable where there was no agreement on the essential terms of the long-term tenancy.

4. *Victoria Child Abuse Society v. Matiko* (1995), 50 R.P.R. (2d) 20 (B.C.S.C.)

The Landlord had been leasing premises to the Tenant since 1988. Over the next six years, the parties entered into several lease agreements, ranging in length from one year to three years. On October 29, 1993, the Landlord sent a letter to the Tenant confirming the extension of the previous lease for a period of one year, commencing on October 1, 1993. By letter dated November, 1994, and signed by both the Landlord and the Tenant, the Landlord confirmed the extension of the previous lease "for a period of three years - November 1, 1994 to October 31, 1997" (the "Lease Extension").

At some time in 1995, the Tenant began to look for alternative rental space. The Tenant took the position that the Lease Extension was a month-to-month tenancy agreement; the Tenant applied to court for a declaration to that effect.

The Court held that, despite the fact that no formal lease document had been executed, the Lease Extension was a valid and binding agreement. This conclusion was based on the existence in the November 1994 letter of all the requirements of a valid lease agreement:

1. the parties;
2. a description of the premises to be demised;
3. the commencement and duration of the terms;
4. the rent; and
5. all material terms of the contract that are not matters merely incidental to the relationship between Landlord and Tenant.

As to whether the lease agreement was a month-to-month tenancy or a tenancy for three years, Hutchison J. held that he would "avoid interpretations that are absurd, commercially unreasonable, unjust or even improbable". Given the previous course of dealing between the parties and the reference in the November 1994 letter to a particular three year period, the Lease Extension could not be a month-to-month tenancy; it was clearly an agreement for a three year term.

7. *Saskatoon Business College vs. 607113 Alberta Ltd., [1996] S.J. No. 668 (Q.B.) Baynton J.*

In February of 1995, the owner of a vacant building signed a memorandum agreeing to lease the premises to 607113 Alberta Ltd. ("Centrefold") for a five (5) year term commencing April 1, 1995, subject to the completion of a formal lease agreement. Centrefold intended to use the premises to carry on an adult entertainment enterprise which included the private viewing of nude entertainers, although this later fact was not disclosed to the owner at the time the memorandum was signed. In March of 1995, the president of the Saskatoon Business College Ltd. (the "College") learned of Centrefold's plan to have private viewing of nude entertainment on the premises. As the College was located next door to Centrefold, the president considered this type of activity to be a threat to the welfare of the female students who attended the College. He also feared that it would devalue the College's business and property. The president attempted to address these concerns by purchasing the Centrefold building on behalf of the College from the owner effective April 1, 1995. As the lease was in excess of three (3) years and had not been registered in accordance with the Land Titles Act (the "Act"), the president had been advised by legal counsel that by purchasing the premises he could then evict Centrefold and thereby force them to relocate.

The solicitor for the owner advised the realtors that the memorandum to lease contained only some of the key conditions and that by its express terms it was subject to the completion of the formal lease which had not been executed. Further, the owner's solicitor advised the realtor that in his opinion the memorandum did not constitute an enforceable lease. This same information was communicated to the solicitor for the College during negotiations for the sale of the property. A copy of the memorandum was sent to the College's solicitor so that he could draw his own conclusions regarding the validity of the lease. On March 28, 1995, a counter-offer made by the owner was accepted by the College and the property was sold. The counter-offer however contained the following clause:

"The condition precedent that the vendor provide vacant possession on or before April 1, 1995 to be amended to provide that the purchaser shall take possession of the property in accordance with the current status of the property as it relates to the occupancy thereof."

Title was registered in the name of the purchaser on April 5, 1995 and on March 31 the vendors' solicitor advised Centrefold of the change in ownership and returned the prepaid rent. Centrefold refused to accept the return of the prepaid rental.

Upon acquiring the keys to the building on April 1, 1995, the College immediately gave notice to Centrefold to vacate the premises. Centrefold refused to do so, relying on the memorandum to lease, and subsequently registered a tenant's caveat on April 3, 1995. The College applied to the Court for an order granting it possession of the premises.

The Court determined that there was a valid lease. A binding tenancy was created pursuant to the memorandum to lease, even though not all of its provisions were ascertainable and enforceable terms of the tenancy. The Court held that the memorandum set out, with sufficient particularity, the essential elements of a lease, namely: (i) the identity of the lessor and the lessee; (ii) the description of the premises; (iii) the term and its date of commencement; and (iv) the rent. Despite the reference contained in the memorandum that it was not "the final lease" but "only an agreement to lease with some of the key conditions contained within it", the Court held that the parties intended to enter into a binding tenancy comprised of at least the basic elements. Therefore, the memorandum created an enforceable five (5) year, fixed-term, present tenancy in favour of Centrefold as lessee.

The Court concluded, albeit reluctantly, that the tenancy established by the memorandum was assigned and assumed by the College. The Court acknowledged that the "subject to" clause in the sale agreement was worded to avoid any specific reference to the term "lease" or "tenancy" and the clause itself would not constitute an enforceable assignment of a specific long-term lease agreement not known to the purchaser of the property. However, as a copy of the memorandum had been provided to the purchaser prior to the closing of the sale, there could be no other reasonable conclusion but that the "current status" of the "occupancy" clause in the sale agreement referred to the tenancy and occupancy granted to Centrefold pursuant to the memorandum to lease. The disclosure of a copy of the memorandum prior to the closing of the sale was the "significant aspect" of the case upon which the Court based its finding that the College was an assignee of the Centrefold lease.

IV. ORAL AGREEMENTS TO LEASE

There are some instances wherein a tenant finds itself in occupation of leased premises without a written agreement. Aside from the more obvious case where the Landlord and Tenant actually proceed on only a handshake (hard to believe that anyone does that in these complicated times, but surprisingly enough it does happen), this situation might also arise where (1) there is a lot of "deal-evidencing" correspondence that is thought to form the basis of the agreement, or (2) some form of preliminary document was executed but it purported to be non-binding and contemplated that the Tenant would execute a lease.

If it cannot be established, from the pre-Lease documentation or the conduct of the parties, how unresolved terms of the lease are to be resolved, then it is possible that either the Landlord or the Tenant might argue that no agreement was ever reached. If the unresolved terms are on the list of the five essential elements, the argument might succeed and the deal may be aborted.

If it can be shown that the essential terms are in place but the paperwork is all that is missing, the agreement might be saved by The Statute of Frauds¹³, which provides that if an agreement to lease is for a Term of not more than three years from the making of the agreement, and the rent is equal to at least two-thirds of the full improved value of the premises, it can be enforced despite the lack of documentation. The common law doctrine of part performance (e.g. where the Tenant has taken possession of the premises and has paid rent based upon oral understandings) may also operate to cause an unwritten and otherwise unenforceable agreement to be binding and enforceable, even if its terms fall outside of the protection offered by the Statute of Frauds. Failing these two avenues, an unwritten agreement to lease cannot be saved and will be void.

There is a 1998 decision of the Saskatchewan Queen's Bench (Capital Properties Ltd. v. Bennett Properties Ltd. (1998), 166 Sask. R. 278) in which Mr. Justice Klebuc did not accept a subtenant's plea that it was entitled to enjoy a 5-year tenancy that had not been properly documented. Generally, I believe the age-old expression still, for the most part, holds true in this regard: "The deal is as good as the paper it's written on."

However, the following case holds out some hope for those who fail to achieve the goal of a signed lease:

Robindale Enterprises (c.o.b. Toronto Tops) v. Ply Investments Inc., [1997] O.J. No. 3117, (Ont. Crt. (Gen. Div.))

This case involved an action for a declaration that the parties had concluded a lease with respect to industrial premises and, if the lease was so found, for an order that the lease be specifically performed.

The tenant operated a T-shirt screening business and entered into negotiations with the landlord for industrial space. After a series of meetings, the tenant alleged that a deal was agreed to for a five (5) year term at a rental rate of \$1.75 per square foot for the first three (3) years of the term, and \$2.00 per square foot for the balance of the term. A lease document was never signed.

The tenant took possession of the space and began to fixture the premises for its business. The court found as a fact that the tenant did more than the usual "clean-up", but substantially refixed the space.

In the middle of the Term, the landlord advised the tenant that he was proposing to raise the rent by \$0.50 per square foot and a debate then ensued between the parties as to the legal nature of the "agreement" reached by the parties, the landlord taking the position that there was no lease but merely a "gentlemen's agreement" and the plaintiff arguing that there was a lease for a term of five (5) years at specific rental amounts.

The landlord set out 3 arguments:

1. there was no agreement between the parties;
2. if there was an agreement, namely, a lease, it was void at law as offending the Statute of Frauds, R.S.O. 1990, c. S.19; and
3. the doctrine of part performance did not "save" the deal because the acts of the tenants were not "unequivocally referable to the contract asserted" (Degelman: see below)

The court held that:

- (a) the parties did conclude a "lease". All essential terms of the deal had been agreed to and the parties only disagreed on the amount of the rent payable during the last three (3) years of the term;
- (b) the lease was not void as offending the Statute of Frauds. As the court stated, "the apparent strictures imposed by sections 1, 2 and 4 of the Statute of Frauds have been answered by the actions of the plaintiff over the past four-plus years, which actions, in my view, "... point unmistakably to a contract affecting ... the tenure of the land and to nothing else. ..." (Degelman v. Guaranty Trust Company of Canada, [1954] S.C.R. 725, at page 734); and
- (c) the tenant's acts did satisfy the doctrine of part performance. Those acts included:
 - (i) the provision of a deposit;
 - (ii) the continuous and uninterrupted occupation of the premises from the date that possession was given to the tenant;
 - (iii) the leaseholds undertaken by the tenant at the commencement of occupation;

- (iv) the ongoing maintenance of the premises by the tenant;
- (v) the payment of all rent; and
- (vi) the payment for repairs to air conditioning.

The court therefore declared that the parties had entered into a lease and that the lease be specifically performed until its expiry date.

V. THE U.S. PERSPECTIVE

The experience of negotiating a lease in the United States and in Canada is in many ways not very different. The lease forms used are very similar. The visual appearance of the documents, including the location of clauses, their length and to a great extent their substance are closely tied. Although it is impossible to term any lease as being "standard" in the commercial leasing industry, a "typical" Canadian shopping centre lease clearly resembles a "typical" American counterpart. However, even though landlords and tenants in Canada and the United States deal with similar documents that are comprised of similar concepts, procedures, rights and obligations, differences do exist.

The experience at my firm (which is a commercial leasing boutique where shopping centre leases comprise more than a majority of our workload), is that American retailers often find Canadian landlords to be much more "difficult" in lease negotiations than their American counterparts. American retailers tell us, and it has also been our experience in representing Canadian retailers leasing space in the United States, that American landlords are much more willing than Canadian landlords to agree to amendments requested by tenants. A number of reasons may be offered to explain this different approach towards negotiation:

- (a) The size of the United States and the leasing opportunities that exist across the country lead to increased competition to attract the top retailers. Since retailers can pick and choose among such an enormous number of properties, landlords may be forced to give tenants many more concessions than is the case in Canada. In Canada, there is only a handful of major developers wielding power in the Canadian shopping centre industry. These landlords realize that they can be more successful in resisting changes to their standard forms because, "they're the only game in town". I know of more than one landlord of a great location who clings to the myth that their lease form is sacred and cannot be and is not amended. While this is strictly not true, it reveals an attitude of inflexibility that has permeated the landlord side of the Canadian shopping centre industry for a long time. However, the tables are slightly turned in terms of department store tenants in Canada. Since there are fewer "anchor" tenants to pursue in Canada, landlords will agree to more revisions than would be given to the smaller independent tenant(s), although it appears not as many or as liberal as are given by their American counterparts.
- (b) Also in Canada, the small circle of landlords and tenants has resulted in there being histories of prior negotiations among them. Canadian landlords will often agree to base a tenant's lease on a previously negotiated form for one of its other centres. However, the lease forms will rarely be identical to one another. Canadian tenants have accepted the fact that a standard lease for one shopping centre may not always contain all amendments granted by the same landlord for a different centre. In typically Canadian fashion, they either shrug it off or ignore the file in hopes the lease will expire before it

becomes necessary to sign it in its (unacceptable) form. By contrast, because there are so many different developer landlords in the United States, there are many different lease forms in use and generally speaking, the U.S. forms appear to be more reasonable in substance from the outset.

- (c) The custom in U.S. retail leasing is for the landlord and tenant to execute the lease prior to the tenant taking possession of its premises. Many American retailers experience "culture shock" when they embark upon business in Canada, where preliminary documents in the form of binding offers to lease or agreements to lease continue to be prevalent. The "Canadian way" has resulted in thousands of leases remaining unsigned because tenants in possession without signed leases perceive no upside and only a downside in the lease finalization. The longer the Tenant remains in possession without a lease, the greater the opportunity it is given to assess whether or not it has made a good deal. If the Tenant finds the location unprofitable, it may never sign the lease, barring a drastic rent reduction. Tenants have quickly learned that the deal can sometimes be bettered if the Landlord needs to tidy up all outstanding leases in a hurry, such as in the case of a sale or refinancing of the particular project. Not surprisingly, some Canadian landlords are moving to the American practice of "no lease/no key". Some of our American clients have convinced me of the merits of their approach. They won't invest a single penny in store design, much less construction, unless the Lease is fully executed by both parties. The philosophy has been explained to me thus: "If we're going to invest our hard-earned money and valuable executive time in this location we want to know every single term of our commitment and the landlord's commitment. If they don't want

to be professional about it, and think it all out, and write it all down, and negotiate it fully until we're both satisfied on all aspects, we don't want to do a deal with them."

- (d) In my opinion, there is another reason why Canadian landlords do not seem to be as willing to amend their leases as American landlords: *lawyers*. In the United States, since most deals are done on a preliminary non-binding basis and then handed over to the lawyers to conclude, there is a lot of give and take in the lawyer-to-lawyer negotiation that doesn't necessarily happen in Canada, resulting in a less one-sided document. Lawyers are trained in negotiation and in law, and they generally feel comfortable in using a starting document as just that - a starting point. In Canada, many landlords have adopted the brilliant (and I mean this in all sincerity) strategy of avoiding lawyers in their leasing deals. Letter agreements, written in many cases by non-lawyers, can be binding (as I have explained above), and parties sometimes live by nothing more than the letter agreement throughout the duration of the tenancy. If a lease is to be written, often law clerks of in-house legal departments are assigned the task of conforming the preliminary document to the standard lease form and negotiating/finalizing the lease for execution. Frequently these clerks are either not trained, or are trained not, to give any amendments except for certain standard pre-formatted "stepdown" clauses that may not address the concerns of the tenant. If possession is granted before the lease is signed, the necessary pressure to conclude the lease may be lost. If possession is withheld until the lease is signed, the tenant gets frustrated with their lawyer's inability to make progress with the landlord's clerk and ultimately pressures their lawyer to give up on most of the requested amendments in order to get the key.

VI. CONCLUSION

One of the problems commercial landlords and tenants frequently encounter is that it seems to be such an easy task to enter into a lease transaction that many people attempt to undertake it without much, if any, appreciation of the finer points. Then the relationship deteriorates and what was thought to be clearly expressed or at least clearly understood turns out to be neither and is hotly debated as the complexities emerge.

As you will hopefully discover as you read the papers and listen to the presentations of the others at this conference who are addressing this exciting topic of Commercial Leasing, the matter is at least a little bit more involved than simply filling in a few blanks. A commercial lease transaction is every bit as complex as a commercial lending agreement, if not more so given the interplay between real estate and contract law, and the dynamic element of operational issues (especially in retail properties) that impact on the value of the asset.

As you embark on your next (or first) commercial lease file, I urge you to carefully consider the consequences of the preliminary (pre-Lease) agreement you are working with. Each time you do this, hopefully you will gain a greater appreciation for the significance of that document, and you will ultimately learn that in many ways, the Offer/Letter of Intent/Proposal is the most important document in the transaction.

ENDNOTES

1. Williams & Rhodes, Canadian Law of Landlord and Tenant, 6th Ed., The Carswell Company Limited, 1988, p.3-3.
2. Horse & Carriage Inn v. Baron (1975), 53 D.L.R. (3d) 426 (B.C.S.C.).
3. Published by the Building Owners and Managers Association International as an American National Standard ("ANSI"). BOMA is an international federation representing the commercial real estate industry's interests through a variety of means.
4. ANSI/BOMA Z65.1-1996.
5. The case of Med-Chem Laboratories Ltd. v. Baratz, [1994] O.J. No. 2388 (Ont. Ct. (Gen.Div.)) is a shining example of what can go wrong when the Landlord is incorrectly named. In it, the Landlord was supposedly "Aria Developments Inc. Wellesley Square", and two individuals purported to sign the agreement to lease on behalf of the company. The company did not in fact exist. The Tenant advanced \$142,333.33 to the Landlord as a deposit on the lease. One of the conditions of the deal was that the Landlord would "guarantee" that the building would be occupied by 15 full-time medical practitioners. Not only could the individuals signing on behalf of the non-existent company not deliver on the promise of 15 full-time doctors, they also could not obtain title in order to convey a leasehold interest. The Court ultimately found that although one of the individuals was bankrupt, the other could be and was found personally liable for the return of the deposit money. As to how easily the judgment was enforced, we can only speculate.
6. Ontario Business Corporations Act, R.S.O. 1990, c.B-16, s. 21.
7. City of Saint John and Bank of Montreal v. Revenue Properties Company Limited, unreported, July 6, 1989, Court of Queen's Bench, Trial Division, New Brunswick - 15% fee not recoverable because not specifically agreed to in writing. Dalton's Ltd. v. Bay Roberts Shopping Centre, unreported, March 23, 1990, Newfoundland Supreme Court - 5% gross rent management fee specifically included in lease, landlord not allowed to also charge general and administrative expenses from head office level attributable specifically to shopping centre. Lik Cue Co. Ltd. v. John Ingle et al., unreported, September 22-24, 1980, Ontario Supreme Court - "net net" language not extending to include internal management fees. 789247 Ontario Inc. v. Piccadilly Properties Inc., [1991], 20 R.P.R. (2d) 294 (Gen. Div.), affirmed [1992] O.J. No. 214 (C.A.) - management fee paid to third party, as well as 10% administration fee, properly chargeable based on precise wording of lease. Faema Co. (Canada) v. Hammerson Mississauga Inc., [1991] O.J. No. 627 (Gen. Div.) - obligation in Offer to Lease to pay proportionate share of "Operating Costs" (which was not a defined term of the Offer) could not be expanded at lease stage to include 15% administration fee in Operating Costs. Hardwick & Hardwick Meats Ltd. v. 471477 Ontario Ltd., [1991] O.J. No. 2057 (Gen. Div.) - lease silent as to management fees, but landlord entitled to pass on the cost of management services, based on number of hours per month spent by landlord and his family, at reasonable hourly rate. R. Denninger Ltd. v. Metro International General Partner Inc., (1992), 8 O.R. (3d) 720 (Gen. Div.) - the words "absolutely net" were not sufficient to require the tenant to pay charges for performance of duties by a third party that would normally be done by a landlord in its own interest, i.e. management fees. Carbrig Holdings Ltd. v. Olympia Tile International Inc., [1992] O.J. No. 884 (Gen. Div.) - the words "net lease" did not permit the landlord to recover management fees. Hun v. 9938 Investments Inc., (1993), 43 R.P.R. (2d) 100 (B.C.C.A.) - fees paid to a management company by the landlord, as well as the landlord's own 15% administrative overhead charge, were both recoverable (based on clear wording in the lease permitting both to be charged). Dylex Ltd. v. Premium Properties Ltd., [1996] O.J. No. 2165 (Gen. Div.) - general net lease language expressing net intention and requiring tenant to pay its proportionate share of all costs for operating, managing, maintaining and repairing etc. was insufficient to permit a 15% administration fee to be recovered.
8. Many leases that contemplate the grossing up of common expenses do not express the gross-up as having the goal of achieving 100% recovery. Often, 97% or 95% or some other similar figure is used, to reflect that some cost of shortfall should be inherent and should not fall back on the tenants.
9. One business issue to consider in this area is that for income tax purposes, capital cost allowance on leasehold improvement expenditures must be calculated on the length of the term plus the first renewal option. If there is no renewal option, the allowance may be taken over the length of the Term. As a result, if there are to be renewal options, the tenant may wish to split the initial Term into two segments (e.g., a 5-year term could be set up as a 4-year term with a 1-year option, with the other options following, in order to take the capital cost allowance on the improvements over the first 5 years), in which case the landlord should require the tenant to exercise the first renewal option immediately upon signing the lease so that the initial commitment contemplated is obtained.

10. There is a recent case that held otherwise, Schramek v. C Corp. (Ontario) Inc., (1994), 38 R.P.R. (2d) 250 (Ont. Ct. (Gen. Div.)), but it turns on good faith principles and is not thought to have changed the general law requiring certainty of Term.
11. Aylor Investments Ltd. v. J.K. Children's Wear Inc. (1991), 6 O.R. (3d) 225 (Ontario Court General Division)
12. Supra, note 1, pp. 3-47 and 3-48
13. R.S.O. 1990, c. 5-19, ss. 1, 2, 3

APPENDIX "B"

NET LEASE EXCEPTIONS

The Tenant shall not be responsible for, and there shall not be included in any rent payable under this Offer or the Lease, any of the following costs, charges or expenses for which the Landlord shall be solely responsible:

- (a) any and all costs and expenses incurred as a result of faulty construction or design, improper materials or workmanship, soil subsidence or structural defects or weaknesses in respect of the Project, including the Leased Premises,
- (b) any and all costs of maintenance, repairs or replacements to the structural portions of the Project, including the Leased Premises, including without limitation, the outside walls and the structural roof deck of the Project;
- (c) all costs and expenses which are considered to be capital expenses in accordance with generally accepted accounting principles;
- (d) all costs and expenses incurred as a result of the negligent or wilful acts or omissions of the Landlord or those for whom it is in law responsible, or arising from or occasioned by the default or negligence of any person other than the Tenant, including the cost of honoring or enforcing other tenants' leases;
- (e) all income taxes, corporation taxes, business taxes, capital or place of business taxes, value-added or other taxes personal to the Landlord, or penalties relating to the late payment by the Landlord of any taxes;
- (f) any ground rentals, and any principal, interest or other carrying charges or mortgage payments or other financing in respect of the Project;
- (g) all repairs, replacements, costs or expenses to the extent covered by insurance required to be maintained by the Landlord hereunder or otherwise maintained by the Landlord, or to the extent covered by warranties required to be maintained by the Landlord hereunder or otherwise enjoyed by the Landlord;
- (h) administrative or management costs and expenses in excess of _____ dollars (\$ _____) per annum;
- (i) amounts expended by the Landlord for advertising and promotion of the Project (other than amounts expressly payable by the Tenant pursuant to this Offer);
- (j) the amount of any leasing commissions, tenant inducements, legal fees or tenant allowances in connection with leasing any part of the Project;
- (k) all costs and expenses of carrying out any Landlord's Work (including any such work necessitated by the Landlord's non-compliance with codes, by-laws, or registrations) or relating to the construction of the Project (including the Leased Premises) or relating to any expansion, renovation or remodelling of the Project;
- (l) all costs of removing any asbestos from any portion of the Project including the Leased Premises, and of making any alterations, repairs or replacements in connection with any condition of environmental concern in respect of any portion of the Project including the Leased Premises;

- (m) any costs or expenses (including realty taxes) in respect of any lands comprising the Common Area and Facilities which are not in actual day to day use for the Project as parking area, landscaped area or built upon Common Area and Facilities; and
- (n) the amount of any sales tax, goods and services tax, value-added tax or any similar tax ("GST") paid or payable by the Landlord on the purchase of goods and services, the cost of which is included in Operating Costs or in any other item of additional rent, which may be available to the Landlord as a credit or offset in determining the Landlord's net tax liability or refund on account of GST.

Further, any administrative or management fees shall not apply to the costs of realty taxes, insurance premiums, depreciation and interest.

SAMPLE A

[Date]

[Legal Name of Tenant]
[Address]

Attention:

Dear *:

RE: AGREEMENT TO LEASE PREMISES AT *
***, ONTARIO**

Further to our discussion regarding the above-noted Shopping Centre, outlined below are the terms and conditions for a lease:

1. **LANDLORD:** [Legal Name of Landlord]
2. **TENANT:** [Legal Name of Tenant]
3. **TRADE NAME:** [Trade Name]
4. **PREMISES:** Store No. ***, as shown highlighted on the attached leasing plan for the Shopping Centre.
5. **G.L.A.:** Approximately *** (***) square feet. Final measurement to be determined by the Landlord's architect and all Rent dependent on GLA will be adjusted accordingly, retroactively if necessary.
6. **TERM:** *** (***) years commencing on the earlier of:
 - (i) the expiry of the Fixturing Period; and
 - (ii) [Outside Date].
7. **OPTION TO EXTEND:**
(OPTIONAL)

Provided that the Tenant is not and has not been in default under the Lease and Gross Revenue is at least *** Dollars (\$***) for the twelve (12) calendar month period of the Term ending in the month prior to the month in which the Tenant's notice exercising the within option is given, the Tenant will have a non-transferable right to extend the Term for *** (***) years, upon written notice given to the Landlord at least six (6) months but not more than twelve (12) months prior to the expiry of the initial Term. Minimum Rent payable during the extension term shall be based upon the then-prevailing fair market net rental for similar premises similarly located, provided that in no event shall annual Minimum Rent be less than the total Minimum Rent and Percentage Rent payable by the Tenant in the last year of the initial Term.
8. **FIXTURING PERIOD:** A maximum of *** (***) days commencing on [optional: substantial completion of the Landlord's Work, estimated to occur by] ***, and expiring on the earlier of (i) the date any portion of the Premises is first opened for business; and (ii) *** (***) days after the commencement of the Fixturing Period.

During the Fixturing Period, the Tenant shall not be required to pay Minimum Rent, Percentage Rent or such Additional Rent as consist of the Tenant's contribution to Taxes, the Tenant's contribution to the costs and expenses of maintaining, operating, repairing and administering the Shopping Centre, the Promotion Fund payment or the Advertising Payment. In all other respects all terms of the Lease shall apply as if the Term commenced on the commencement of the Fixturing Period.

9. MINIMUM RENT:

Annual Minimum Rent shall be calculated at the following annual rates per square foot of the GLA of the Premises:

Rental Years ***	-	\$*,**
Rental Years ***	-	\$*,**
Balance of Term	-	\$*,**

Minimum Rent is payable monthly in advance commencing on the Commencement Date, and thereafter in equal consecutive instalments on the first day of every month in the Term.

10. PERCENTAGE RENT:

*** percent (***%) of Gross Revenue, in excess of Minimum Rent *[optional where artificial breakpoint - delete comma after Gross Revenue, and insert breakpoint figure instead of words "Minimum Rent": \$***,000]* for each Rental Year, payable monthly on a cumulative basis the 10th day after each calendar month in the Term.

11. ADDITIONAL RENT:

Fully net to the Landlord including utility charges, Basic HVAC Charge, HVAC Operating Charge, the Tenant's Proportionate Share of Taxes, and the Tenant's Proportionate Share (calculated on a Weighted GLA basis) of Landlord's costs and expenses attributable to the ownership, administration, operation, management, maintenance, improvement, insurance, cleaning, supervision, rebuilding, replacement and repair of the Shopping Centre (including an administration fee equal to fifteen percent (15%) of the total of such costs and expenses), as set out in the Lease. The denominator of the Proportionate Share fraction may exclude the GLA of Rentable Premises each having a GLA in excess of 10,000 square feet as well as the GLA of other premises as set out in the Lease.

Estimated charges for Additional Rent per annum per square foot of the GLA of the Premises for the year ending 199* are as follows:

CAM:	\$* **
Basic HVAC Charge:	\$1.75
HVAC Operating:	\$*,**
Taxes:	\$*,**

Additional Rent shall be payable in advance on the Commencement Date and thereafter in equal monthly instalments on the first day of every month in the Term, based on the Landlord's estimates for periods not in excess of twelve (12) months, subject to adjustment when the actual amounts are determined and the Landlord delivers a statement thereof to the Tenant.

Mr.
[date]
Page 3

12. **PROMOTION FUND:** \$*.** per square foot of Weighted GLA of the Premises per annum or a minimum of \$**** per annum, subject to annual CPI increases.
13. **ADVERTISING:** \$*.** per square foot of Weighted GLA of the Premises per annum or a minimum of \$**** and a maximum of \$**** per annum, subject to annual CPI increases.
14. **DEPOSIT:** Within three (3) days of the removal of the Landlord's Condition as set out in Paragraph ***, the Tenant will submit a cheque in the amount of \$*** plus GST, to be held by the Landlord without interest. Such deposit will be applied as follows:
- *** to be applied to the Rent and GST first becoming due under the Lease; and
 - the balance to be held as security deposit in regard to the Tenant's obligation under the Lease.
15. **USE:** The Tenant shall use the Premises principally for the retail sale of *, and as ancillary to such principal use, for the retail sale of *.
16. **RADIUS RESTRICTION:** *** kilometres from any point of the Shopping Centre.
17. **CONDITION OF THE PREMISES:**
{OPTIONAL} The Tenant shall accept the Premises in their "as is" condition as of this date.

OR
18. **LANDLORD'S WORK:**
{OPTIONAL} The Landlord shall deliver the Premises to the Tenant in a standard Schedule "C" condition as set out in the Lease.

OR

The Tenant shall accept the Premises in their "as is" condition as of this date, save for those items listed on the attached list of the Landlord's Work.
19. **TENANT'S WORK:** All work required to fully fixture and equip the Premises to ready them for the conduct of the Tenant's business therein shall be completed by the Tenant [during the Fixturing Period OR by no later than ***], at the Tenant's cost, in accordance with professionally prepared, detailed plans and specifications submitted by the Tenant to the Landlord for approval prior to the commencement of any of the Tenant's Work in the Premises, as set out in Schedule "C" of the Lease. The Tenant shall pay all fees charged by the Landlord or its representatives or consultants in connection with the Landlord's review of the Tenant's plans and specifications, and/or the Landlord's supervision of the Tenant's Work.

**20. CONSTRUCTION
ALLOWANCE:**
{OPTIONAL}

The Landlord shall pay to the Tenant a cash allowance (the "Allowance") equal to *** Dollars (\$***) [optional: per square foot of the GLA of the Premises] together with GST thereon.

The Allowance shall be paid to the Tenant by the Landlord sixty (60) days after the Commencement Date, provided that the Tenant has fully complied with all of the following:

- (a) The Tenant has completed the Premises for occupancy in accordance with the Tenant's obligations under Schedule "C" of the Lease and the Tenant's plans and specifications approved by the Landlord;
- (b) The Tenant has secured all applicable completion and occupancy certificates for the Premises;
- (c) The Tenant has provided the Landlord with a Statutory Declaration stating that there are no liens or encumbrances affecting the Premises, the Shopping Centre, or the Project, in respect to work, services, materials and equipment relating to the Premises and that the Tenant's designers, contractors, sub-contractors, workers and suppliers of materials and equipment (if any) have been paid in full for all work and services performed and materials and equipment supplied by them on or to the Premises;
- (d) The Tenant has provided the Landlord with copies of all costs actually expended by the Tenant for completion of the Tenant's Work; and
- (e) The Tenant has executed and delivered the Lease in form acceptable to the Landlord [optional: with the Indemnity Agreement executed by the Indemnifier].

All charges for work performed by the Landlord on the Tenant's behalf will be deducted from the Allowance prior to payment by the Landlord and if the Landlord's said charges are in excess of the Allowance, the Tenant shall pay the excess on demand. Notwithstanding anything to the contrary in this Lease or any other agreement or under any statute or at law generally, if the Tenant or its parent corporation or any occupant of the Premises takes the benefit of or is subject to any creditors' petition under any legislation for the protection of insolvent debtors, or if this Agreement or the Lease is terminated for any reason, such portion of the Allowance as shall remain unamortized (assuming a straight-line rate of amortization to zero over the balance of the initial Term from the date of payment of the Allowance) as of the day before the date such filing is made (or termination date, as the case may be) shall be deemed to be outstanding and immediately payable as Rent to the Landlord as of such date.

**21. SURRENDER OF
EXISTING LEASE:**
{OPTIONAL}

The parties are entering into this Agreement and the Lease in connection with the simultaneous surrender of premises currently leased by the Tenant from the Landlord which are designated as Store No. * (the "Existing Premises").

Effective on the Commencement Date, this Lease supercedes and renders null and void the lease dated * between *, as tenant and *, as landlord, as amended (the "Existing Lease") with respect to the Existing Premises. Accordingly, (a) the Existing Lease is deemed to have been amended by reducing the Term thereof so that it will have expired as of 11:59 p.m. on the day before the Commencement Date, such that the Existing Lease will thereafter have no further force or effect and (b) the parties hereby release each other from all liability thereunder as of and from such expiry date, except as to any outstanding amounts or obligations which remain to be paid or fulfilled by the parties thereunder as of such date, for which each party shall remain liable to the other, and except for any adjustment billings on account of Rent payable under the Existing Lease for the period prior to and including such date, for which the Tenant shall remain liable to the Landlord.

**22. VACANT
POSSESSION:**
{OPTIONAL}

The Tenant acknowledges that the Premises are presently occupied by and subject to a lease in favour of a third party. Notwithstanding anything to the contrary, the Tenant's right to occupy the Premises is conditional upon the Landlord obtaining vacant possession of the Premises from said third party prior to the commencement of the Fixturing Period failing which the commencement of the Fixturing Period, the Commencement Date and all other relevant dates shall be extended from time to time, by notice in writing from the Landlord.

23. STORAGE:
{OPTIONAL}

The Tenant shall have a revocable license to use certain storage premises in the Shopping Centre, comprising an area of approximately *** (***) square feet as shown on the plan attached to this Agreement as Schedule "***", designated as Unit #***. The storage premises may only be used for storage of non-perishable items permitted to be sold on the Premises except the Landlord may prohibit the storage of various items at its sole discretion.

A fee for the use of the storage premises will be paid by the Tenant to the Landlord at the following annual rates:

Rental Years *** -	\$*. **
Rental Years *** -	\$*. **
Balance of Term -	\$*. **

[Optional: In addition to the above fee, the Tenant shall pay the Landlord its (i) proportionate share of taxes as well as (ii) its proportionate share of the costs and expenses of maintaining, operating, repairing and administering the Shopping Centre, with respect to the storage premises.]

The storage fee is payable monthly in advance commencing on the Commencement Date, and thereafter in equal consecutive instalments on the first day of every month in the Term.

24. LEASE:

Within thirty (30) days after receipt thereof, and prior to the Tenant's possession of the Premises, the Tenant will execute the Landlord's standard form of net Lease for the Shopping Centre. Such standard lease shall incorporate the provisions of this Agreement and shall contain, among other provisions, a continuous operating covenant, a provision entitling the Landlord to relocate the Premises and provisions restricting assignments and subleases and changes in voting control of the Tenant.

The Tenant acknowledges that this Agreement contains the basic terms and conditions upon which the Landlord will consider leasing the Premises to the Tenant and that supplementary language and revisions to the existing language contained in this Agreement may be warranted in the Lease. Capitalized terms in the Agreement have meanings given to them in the Lease. The Landlord will reasonably consider requests of the Tenant for modifications to portions of the Lease not specifically provided for in this Agreement, but no modifications will alter the business or financial basis of the terms set out herein.

25. INDEMNITY:
{OPTIONAL}

To induce the Landlord to enter into this Agreement, *** (the "Indemnifier") will indemnify the Landlord with respect to the Tenant's observance and performance of its obligations under this Agreement and the Lease. The Indemnifier will execute the Landlord's standard form of Indemnity Agreement (a copy of which is available upon request) concurrently with the execution of the Lease.

26. CONFIDENTIALITY:

The Tenant shall not disclose to any person the financial or any other terms of this Agreement or the Lease, except to its professional advisors, consultants and auditors, if any, and except as required by law.

Mr.
[date]
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27. **CONDITION:** This Agreement is conditional upon the Landlord obtaining final approval for the business and financial terms herein from its own approval committee, and upon the Landlord obtaining any required approvals from lenders or anchor tenants. This condition is for the sole benefit of the Landlord and may be waived by it at any time.

Please signify your acceptance by executing an original duplicate of this letter and returning it to the undersigned by no later than ***, 2000.

Yours truly,

[LEGAL NAME OF LANDLORD]

Per: _____
{insert name & title}

Date: _____, 1999

[LEGAL NAME OF TENANT]

Per: _____
Name:
Title:

Per: _____
Name:
Title:

I/We have authority to bind the corporation.

[LEGAL NAME OF INDEMNIFIER IF CORPORATION]

Per: _____
[Name of Indemnifier if individual]

I/We agree to accept the obligations of the Indemnifier set out in Paragraph {25} of this Agreement.

SAMPLE B

OFFER TO LEASE

We, *** ("Tenant"), hereby offer to lease from you *** ("Landlord") a portion of *** (the "Building") on the following terms:

1. **LEASED PREMISES** - The Leased Premises are designated as Suite No. *** on the *** floor of the Building and have a Useable Area of approximately *** square feet and a Rentable Area of approximately *** (***) square feet. The Leased Premises are located in the approximate location shown cross-hatched on the floor plan attached hereto as Schedule "A". The exact measurement and boundaries of the Leased Premises shall be governed by BOMA standards as more particularly set out in the Lease. All Rent dependent upon the Rentable Area of the Leased Premises may be retroactively adjusted upon measurement of the Leased Premises. The location of the Leased Premises may from time to time be relocated with the Tenant's consent, which will not be unreasonably withheld or unduly delayed.

2. **TERM** - The Term of the Lease shall be a period of *** years and *** months, commencing on *** and expiring on ***.

3. **BASE RENT** - The annual Base Rent shall be *** (\$***), based on an annual rate of *** (\$**) per square foot of the Rentable Area of the Leased Premises, payable in equal monthly instalments in advance on the first day of the Term and thereafter on the first day of each month in the Term. If the Term does not commence on the first day of a month, Base Rent for such month shall be pro-rated on a daily basis using a 365-day year.

4. **ADDITIONAL RENT** - The Tenant shall pay: (a) its Proportionate Share of Realty Taxes; (b) GST on all Rent payable under this Offer or the Lease and any other GST imposed by the applicable legislation on the Tenant in respect of this Offer or the Lease; (c) its Proportionate Share of Operating Costs; and (d) all Utilities consumed or used in the Leased Premises.

The Landlord's estimate of Realty Taxes, Operating Costs and Utilities payable in respect of the Leased Premises for the calendar year *** is \$*** per square foot of the Rentable Area of the Leased Premises. Such Additional Rent shall however be calculated in accordance with the Lease.

5. **ACCEPTANCE OF THE LEASED PREMISES** - The Tenant acknowledges and agrees that it is accepting possession of the Leased Premises in an "as is" condition as of the commencement of the Term and that the Landlord has no responsibility or liability for making any renovations, alterations or improvements in or to the Leased Premises, except for the Landlord's Work set out in Schedule "C" attached hereto. All further renovations, alterations or improvements in or to the Leased Premises are the sole responsibility of the Tenant and shall be

undertaken or completed at the Tenant's expense and strictly in accordance with the provisions of the Lease.

6. **EARLY OCCUPANCY** - Provided (a) the Lease has been fully executed, (b) the Landlord's Work has been substantially completed and (c) the Tenant has provided the Landlord with certificates of insurance evidencing that the Tenant has taken out insurance covering the Leased Premises as more fully set out in the Lease, the Tenant may have possession of the Leased Premises prior to the commencement of the Term. The Tenant will not be required to pay any Base or Additional Rent for any period prior to ***, 2000 but will be bound by all other terms, covenants and provisions of the Lease as though the Term had commenced.

7. **USE** - The Tenant shall use the Leased Premises only for office purposes.

8. **LEASE** - The Tenant shall execute the Landlord's standard form of lease for the Building attached as Schedule "B" (the "Lease") within ten (10) business days after receiving copies incorporating the provisions of this Offer. The Offer shall merge upon execution of the Lease. The Lease shall be net and carefree for the Landlord and the Landlord shall not be responsible for any costs, charges, expenses or outlays of any nature whatsoever arising from or relating to the Leased Premises or the contents thereof. The Lease is subject to any reasonable amendments not contradictory to the terms of this Offer agreed to by both parties within such ten (10) business day period. If the Tenant fails to execute the Lease within ten (10) business days as set out above, the Landlord may terminate this Offer on three (3) days' written notice, without prejudice to any other rights or remedies of the Landlord. If there is any conflict between this Offer and the Lease, the latter governs. All capitalized terms used in this Offer have the meanings given to them in the Lease. The Tenant may not register this Offer nor any notice of it on title to the Building lands.

9. **DEPOSIT** - The Tenant delivers herewith a Deposit in the amount of _____ (\$_____) dollars, to be retained by the Landlord without interest and applied against the first and last months' Rent, plus GST, accruing due.

10. **TRANSFER** - This Offer is personal to the Tenant and may not be assigned or transferred. The Tenant shall not enter into a Transfer (as provided in the Lease) except in accordance with and subject to the terms of the Lease.

11. **NOTICE** - All Notices shall be in writing and shall be either delivered or posted by registered prepaid mail to: in the case of the Tenant or the Indemnifier, at the Leased Premises or at Landlord's option, at the following address: ***, and (b) in the case of the Landlord, at _____, Attention: _____.

A Notice shall be deemed to have been received on the date of its delivery or, if mailed, three (3) business days after mailing. In the event of a disruption or threatened disruption in the postal system, all Notices shall be delivered in person.

12. **NO REPRESENTATION** - There are no covenants, representations, agreements, warranties or conditions, express or implied, collateral or otherwise, in any way relating to the subject matter of this Offer, except those set forth in this Offer.

13. **TIME OF THE ESSENCE** - Time is of the essence of this Offer.

14. **FINANCIAL CONDITION** - Within five (5) business days of acceptance of this Offer the Tenant will provide to the Landlord the following material: (a) explanation of the ownership structure of the Tenant; (b) background on the nature of the Tenant's business and history of the company; (c) copies of the Tenant's most recent audited financial statements; and (d) the name, address, telephone number and contact at the Tenant's financial institution.

Upon receipt of all of the above the Landlord shall have three (3) business days to satisfy itself as to the Tenant's financial covenant. In the event the foregoing material is not delivered or the Landlord is not satisfied with the Tenant's covenant, this Offer shall be null and void and the Deposit shall be returned to the Tenant.

15. **IRREVOCABLE OFFER** - This Offer shall be irrevocable by the Tenant and shall be open for acceptance by the Landlord until ** p.m. on ***, after which time, if not accepted, this Offer shall be null and void and the Deposit shall be returned to the Tenant. This Offer may be accepted by letter, telegram, telex, facsimile or by signing and returning a duplicate copy of this Offer.

The Tenant and the Indemnifier have executed this Offer at _____ on this _____ day of _____, 19____.

) *** (Tenant)
)
) Per: _____
) Name: _____
) Title: _____
)
) Per: _____
) Name: _____
) Title: _____
)

We hereby accept this Offer to Lease this _____ day of _____, 19____.

) *** (Landlord)
)
) Per: _____
) Name: _____
) Title: _____
)
) Per: _____
) Name: _____
) Title: _____
)

short.off

SCHEDULE "A"

FLOOR PLAN

The purpose of this plan is to identify the approximate location of the Leased Premises in the Building. The Landlord reserves the right at any time to relocate, rearrange, alter, expand or reduce any part of the Building from that shown on this plan.

SCHEDULE "C"

**IMPROVEMENTS FOR THE PREMISES
TO BE PROVIDED AND INSTALLED BY THE
LANDLORD AT ITS EXPENSE**

SAMPLE C

AGREEMENT TO LEASE

Date: _____, 2000

The undersigned, _____

(hereinafter called the "Tenant") hereby agrees to and with

(hereinafter called the "Landlord") to lease certain premises
in the *** situated in the north-west quadrant of
*** and ***

Town of ***

on the following terms, covenants and conditions herein referred to as the Agreement:

SECTION 1 THE SHOPPING CENTRE AND THE PREMISES

For the purposes of this Agreement and the resulting Lease, the Shopping Centre shall mean those lands legally defined as "****", together with the common area facilities as defined herein, as highlighted in BLUE on Schedule "A" attached hereto. It is acknowledged and agreed that the purpose of Schedule "A" is to indicate the boundaries of the Shopping Centre and the general location of the Premises. The Tenant acknowledges that the area outlined in GREEN on Schedule "A" is owned by the Town of *** and is not subject to the terms, covenants and conditions of this Agreement or the Lease. Schedule "B", if attached, is only a preliminary interior floor plan of the Premises.

The premises are located in Building _____ and are generally shown outlined in RED on Schedule "A", and are said to contain an area of approximately _____ (_____) square feet at grade (the "Premises"). The exact leasable area and location of the Premises shall be determined by the Landlord's architect or surveyor and such exact leasable area shall be used for all calculations of Rent. The Premises shall not contain any patios, drive-thru's, basements, mezzanines or additional floors.

SECTION 2 FIXTURING PERIOD AND TERM

2.1 The Tenant shall have a fixturing period of thirty (30) days (the "Fixturing Period"). The Fixturing Period shall commence on the earlier of the following:

- a) Upon substantial performance of the Landlord's Work as set out in Schedule C attached hereto and forming part of this Agreement. The certificate of the Landlord's Construction Consultant shall be final and binding upon the parties hereto as to the date of substantial performance; or

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- b) Upon the Tenant commencing any of the Tenant's Work in the Premises as set out in Schedule "C", notwithstanding that the Landlord may still be completing its Landlord's Work; or
- c) Two (2) years from the execution of this Agreement.

During the Fixturing Period the Tenant will not be required to conduct its business in the Premises or pay Minimum Rent or Percentage Rent, but shall otherwise be subject to all the terms and conditions contained in this Agreement, including without limitation, the payment of Additional Rent and the obligation to insure.

2.2 The term of the Lease shall be for a period of ten (10) years (the "Term") commencing on the earlier of the following (hereinafter called the "Lease Commencement Date"):

- a) The end of the Fixturing Period; or
- b) The opening by the Tenant to the public of its business in and from the Premises.

The Landlord and the Tenant estimate that the Lease Commencement Date shall be _____. Notwithstanding the above, if the Landlord has not commenced its Landlord's Work prior to December 1, 2000 this Agreement shall be null and void, the deposit shall be returned to the Tenant without interest or deduction, and neither party shall have any rights or obligations hereunder. A Lease Year is defined as twelve (12) months from the Lease Commencement Date.

2.3 If the Tenant fails to open for business, in accordance with Section 7 herein, within thirty (30) days of the Lease Commencement Date, or if at any time the Tenant advises the Landlord that it does not intend to open for business, or if the Tenant fails to continue to operate its business in the Premises as provided herein, then the Landlord may immediately terminate this Agreement or the resulting Lease, without notice to the Tenant, and retain any deposits, letters of credit or other security without any necessity for legal proceedings and without prejudice to any of the Landlord's rights or remedies hereunder or at law.

SECTION 3 RENT

3.1 Rent is defined herein as including Minimum Rent, Percentage Rent and Additional Rent and all such sums are payable in lawful money of Canada without deduction, abatement, set-off or compensation whatsoever. The Tenant covenants to and with the Landlord to pay all Rent as and when due in accordance with the terms of this Agreement. All amounts of Rent shall bear interest from their respective due dates until the actual dates of payment at a rate of five percent (5%) per annum in excess of the prime commercial rate of interest charged by the Toronto Dominion Bank at Toronto for commercial loans from time to time, calculated and compounded monthly.

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"Additional Rent" means any and all sums of money or charges required to be paid by the Tenant under this Agreement or the Lease (except Minimum Rent and Percentage Rent) whether or not the same are designated "Additional Rent" or whether or not the same are payable to the Landlord or otherwise. Additional Rent is due and payable with each monthly installment of Minimum Rent unless otherwise provided. Additional Rent may be estimated by the Landlord from time to time and such estimated amount is payable in monthly installments, in advance with annual adjustments.

3.2 Minimum Rent

The Tenant shall pay from and after the Lease Commencement Date a fixed annual minimum rent (the "Minimum Rent"), which will be payable in advance in equal monthly installments, via post-dated cheques, without deduction, abatement, reduction, counter-claim or setoff, as follows:

TERM	MINIMUM RENT
Years 1 to 5	_____ (\$_____) per square foot
	_____ (\$_____) per annum
Years 6 to 10	_____ (\$_____) per square foot
	_____ (\$_____) per annum

The above Minimum Rent is based on and shall be adjusted in accordance with the exact leasable area of the Premises as per the Landlord's architect's or surveyor's certificate of area.

3.3 Percentage Rent

In addition to the Minimum Rent, the Tenant shall pay to the Landlord, without any prior demand therefor and without any deduction, abatement, set-off or compensation whatsoever, a sum, if any, equivalent to six percent (6.0%) of Gross Revenue for that particular year of the Term or any renewals or extensions thereof in excess of _____ (\$_____), (the "Percentage Rent"). Percentage Rent shall be calculated and payable within fifteen (15) days after the last day of each month during such period, together with the Tenant's Gross Revenue statements, and adjusted annually.

3.4 Gross Revenue

For the purposes of this Agreement and the resulting Lease, "Gross Revenue" means the sum of the sales prices of all sales of goods and services from all business conducted on or originating at the Premises and any Competing Business, if any, (including without limitation, all sales of goods and services by the Tenant and of all licensees, franchisees, concessionaires and sub-tenants of the Tenant) whether such sales are made or services performed at the Premises, any Competing Business or elsewhere.

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Within fifteen (15) days after the last day of each calendar month of the Term the Tenant shall deliver to the Landlord a statement setting forth Gross Revenue for such month. Within sixty (60) days after the last day of each Lease Year the Tenant shall deliver to the Landlord a statement in writing certified by an independent accountant setting forth the Gross Revenue by calendar month and the Percentage Rent payable for each Lease Year.

Landlord shall have the right at any time or times to cause to be made an inspection or audit to such extent as Landlord shall determine of all of the books and records relating, directly or indirectly, to Gross Revenue including an audit of books and records of any person, firm or corporation not at arm's length with Tenant to the extent to which they may be relevant to the determination of Gross Revenue.

SECTION 4 NET LEASE

The Tenant acknowledges and agrees that it is intended that the Lease and the Rent payable thereunder are to be completely carefree and absolutely net to the Landlord and that the Landlord is not to be responsible for any taxes, impositions, costs, charges, expenses or outlays of any nature whatsoever arising from or relating to the Shopping Centre and the use and occupancy of the Premises or the contents thereof or the business carried on therein save and except only for Landlord's capital taxes and the Landlord's mortgage payments and the Tenant shall pay all charges, impositions, costs and expenses of every nature and kind relating to the Premises except as expressly herein set out.

Without limiting the generality of the foregoing, the Tenant shall pay the following:

4.1 Real Property Taxes

The Tenant shall pay all real property taxes, including local improvement rates, import charges or levies, rates, duties and assessments whether general or special, foreseen or unforeseen, levied, rated, charged or assessed from time to time against the Shopping Centre including the Common Areas and Facilities and the Premises or any part thereof and any other taxes, assessments or duties, levied, rated, charged or assessed in substitution for, or in addition to, the above and any costs payable or incurred by the Landlord in contesting and/or appealing the above (the "Real Property Taxes"). If there is no separate tax bill or direction, then the Tenant shall pay its Real Property Taxes, at the Landlord's option, on the basis of assessed value of the Premises or as a proportionate share of the Real Property Taxes levied, rated, charged or assessed from time to time against the Shopping Centre. If during the Term the method of taxation shall be altered, so that the whole or any part of the Real Property Taxes are levied, assessed, rated or imposed wholly or partially as a capital levy or on the rents received or otherwise, or if any tax, assessment, levy, imposition or charge, in lieu thereof, shall be imposed upon the Landlord, then all such taxes, assessments, levies, impositions and charges shall be included within the Tenant's impositions and charges shall be included within the Tenant's obligation to pay taxes.

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4.2 Tenant's Taxes

In addition to the Real Property Taxes payable by the Tenant pursuant to Section 4.1, the Tenant shall pay as Additional Rent to the lawful taxing authorities, or to the Landlord, as it may direct, (a) all taxes, rates, duties, assessments, license fees and other charges that are levied, rated, charged or assessed against or in respect of all businesses, improvements, equipment and facilities of the Tenant, its sub-tenants, assignees, licensees or franchisees on or in the Premises or the Shopping Centre or any part or parts thereof, or the Landlord on account of its ownership thereof or interest therein to the extent that the Landlord is assessed for any such taxes, rates, duties, assessments and other charges in lieu of the same being levied, rated, charged, or assessed against the Tenant; all of the foregoing being collectively referred to as "Business Taxes". If there is no separate tax bill or direction, then the Tenant shall pay its Business Taxes, at the Landlord's option, on the basis of the assessed value of the Premises or as a proportionate share of all such taxes levied, rated, charged or assessed from time to time against the Shopping Centre.

4.3 Utilities

If there are separate utility meters, the Tenant shall pay directly to the applicable utility the cost of supplying all utilities used in the Premises. If there are no separate utility meters the Tenant shall pay utility costs directly to the Landlord on the basis of a reasonable allocation as determined by the Landlord.

4.4 Operating Costs

The Tenant shall, during the Term and any renewals or extensions pay the following: (a) a proportionate share of all costs and expenses incurred by the Landlord in owning, insuring, promoting, supervising, servicing, policing, managing, operating, maintaining, repairing, rebuilding and replacing the Shopping Centre, including, without limitation, the Common Areas and Facilities ("Operating Costs"); (b) an administrative fee equal to four percent (4.0%) of the Minimum Rent, and; (c) a proportionate share of the rental charge for electrical, mechanical, garbage, utility, storage, service, and delivery rooms and corridors, which charge shall be based on the average minimum rent per annum on a square foot basis paid by all tenants in the Shopping Centre, such average may, exclude leased premises larger than ten thousand (10,000) square feet.

Wherever the term "proportionate share" is used or applied in this Agreement or the Lease, such term shall mean and be a fraction, the numerator of which shall be the leasable area in square feet of the Premises and the denominator of which shall be the leasable area in square feet of all premises as constructed from time to time in the Shopping Centre set aside for leasing by the Landlord. In the case of Real Property Taxes, the denominator shall exclude any vacant premises and the Real Property Taxes reasonably attributable to the vacant premises shall be deducted from the total Real Property Tax bill before it is apportioned to the Tenant. In cases

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where tenants are paying directly for any of the above costs, such as garbage removal, the applicable area in square feet may be deducted from the numerator and the denominator.

SECTION 5 DEPOSIT

The Tenant shall deliver concurrent with execution of this Agreement, a certified cheque in the amount of _____ dollars (\$_____) the sum of the 23rd, 24th and last months' installments of Minimum Rent plus applicable G.S.T., to be held by the Landlord without interest for application, on account of the respective months' installments of Minimum Rent including G.S.T. as they fall due (the "Deposit"). If this Agreement is not executed by the Landlord then the Deposit shall be returned to the Tenant without interest or deduction. In the event that the Tenant is in default under the terms of this Agreement or the Lease, the Landlord shall be entitled to retain any deposit, letter of credit or other security paid hereunder as liquidated damages and not as a penalty. If the entire Deposit, or any part thereof, is appropriated and applied by the Landlord for the payment of overdue Rent, then the Tenant will, upon demand, forthwith remit to the Landlord a sufficient amount of cash to restore the Deposit to the original sum deposited. The foregoing shall be without prejudice to the Landlord's right to seek such further and other damages and remedies as it may be entitled to under law.

SECTION 6 CONSTRUCTION OF THE PREMISES

The Landlord shall, at its expense, complete the Landlord's Work as described in Schedule "C" in accordance with plans and specifications prepared by the Landlord's architect or designer, and where applicable, by the Tenant's architect or designer. The Tenant shall, at its expense, and prior to the Lease Commencement Date, complete the Tenant's Work as described in Schedule "C" and complete all other work required to open its business from the Premises as contemplated in this Agreement and the Lease. The Tenant hereby further acknowledges and agrees to observe and comply with the General Provisions set forth in Schedule "C".

SECTION 7 USE OF THE PREMISES

The Tenant covenants to and with the Landlord to open, occupy and maintain the whole of the Premises throughout the Term, and any renewals or extensions thereof, such that the Premises shall be continuously, actively and diligently operated, fixtured, stocked and staffed on such days and during such hours as the Landlord reasonably determines, subject to local by-laws, night delivery restrictions, and the general rules and regulations of the Shopping Centre, solely for the purpose of conducting the primary business of the sale at retail of _____ and as an ancillary use _____ (representing less than five percent (5%) of Gross Revenue) and operating under the name of _____

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Any ancillary use granted to the Tenant during the Term or any renewals or extensions thereof must: (a) be entirely contained within the Premises, (b) operate from the Premises at the same hours as the primary business, (c) not have a separate entrance, (d) not have separate or independent signage on the outside of the Premises, and (e) not have any other characteristics that may lead to the assumption that the ancillary use is as a separate entity.

It is understood and agreed that the Tenant does not have the benefit of an exclusive-use restriction and that nothing in this Agreement or the Lease will be implied to give the Tenant the benefit of an exclusive-use restriction, even where there are other tenants in the Shopping Centre which may directly or indirectly compete with the Tenant's permitted use.

The Tenant acknowledges and agrees that the Premises shall not be used, in whole or in part, for any one or more of the uses, businesses or activities described in Schedule "D" attached hereto, which prohibited uses include, without limitation, exclusive use rights granted to certain other tenants of the Shopping Centre. The Tenant shall indemnify and save the Landlord harmless from any and all liability, losses, damages and expenses incurred or suffered by the Landlord in connection with the infringement by the Tenant of this Section 7 and Schedule "D" or in remedying or attempting to remedy such infringement including, without limitation, the Landlord's legal fees and expenses on a solicitor and client basis.

From and after the date of this Agreement, and throughout the Term and any renewals or extensions thereof, the Tenant, or its officers, directors, assignees or successors, will not, either directly or indirectly, engage in any use or business which is the same as or similar to or in competition with the Tenant's business in the Premises within any building or part thereof which is located within a radius of two (2) miles from any point of the Shopping Centre (the "Competing Business"), provided that any business of the Tenant in operation within such radius as at the date of this Agreement, which is disclosed in writing to the Landlord as a Rider to this Agreement, shall not be governed by the foregoing.

SECTION 8 CONDUCT AND OPERATION OF BUSINESS

The Tenant covenants to and with the Landlord to comply with the following with respect to the conduct and operation of the Tenant's use and business in the Premises.

The Tenant shall not permit to be carried out in the Premises, or any part of the Shopping Centre, any liquidation, going out of business, distress, fire or bankruptcy sale without the written permission of the Landlord which may be arbitrarily withheld.

The Tenant shall restrict its business so as not to maintain or produce any noxious, offensive, or excessive liquids, solids, gases, odours, dust, smoke, noise, heat, cinders, by-products, wastes, vibration or radiation (the "Hazardous Substances"). The Tenant shall notify the Landlord in writing prior to opening for business in the Premises as to whether or not any Hazardous Substances are in any way related to the Tenant's use or business practices. The Tenant shall

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properly contain within the Premises and dispose of any Hazardous Substances in accordance with the applicable regulations of the Ministry of the Environment or any other regulatory agency as amended from time to time. The Tenant shall obtain and provide evidence to the Landlord of all governmental approvals required for the operation of its business in the and the Tenant shall maintain the currency of such approvals from time to time. The Tenant shall be solely responsible and liable for any clean-up of Hazardous Substances required by the Landlord or any regulatory agency. If the Landlord reasonably suspects that there is an environmental problem, the Landlord may require the Tenant to provide an environmental audit of the Premises, or the Landlord may commission a consultant's report with respect to these matters, at the Tenant's expense. The Landlord or its authorized agent have the right to enter the Premises at any time in the event of any complaint, accident, or other cause with respect to Hazardous Substances.

The Tenant shall properly contain within the Premises and dispose of its garbage in accordance with practices acceptable to the Landlord and any applicable regulations as amended from time to time. The Tenant shall use at the Tenant's cost such pest extermination contractor as the Landlord may reasonably direct and at such intervals as the Landlord may reasonably require.

The Tenant shall and does hereby indemnify the Landlord and save it harmless from any claims, including legal costs on a solicitor and client basis, arising out of any breach by the Tenant of the terms of this Agreement including, without limitation, all damages, loss, injury, or death claimed by the Landlord, other tenants, insurers, governmental authorities, councils or parliaments, regulatory agencies, or any individual, association or group.

SECTION 9 INSURANCE

The Tenant covenants to and with the Landlord that, during the Fixturing Period, and throughout the Term and any renewals or extensions thereof, and during any prior possession, the Tenant shall take out and maintain at its sole cost and in the names of the Tenant, the Landlord, and the Landlord's mortgagee(s), such insurance coverages as are reasonably determined by the Landlord from time to time as appropriate for the proper operation of the Tenant's business in the Premises, taken out with insurers acceptable to the Landlord and in a form satisfactory from time to time to the Landlord, on a one hundred percent (100%) replacement value basis and including, without limiting the generality of the foregoing, contents insurance, all risks insurance, boiler and machinery insurance, legal liability insurance, plate glass and sign insurance, builder's all-risk insurance, business interruption insurance, automobile insurance and public liability and property damage insurance including personal injury liability on a comprehensive basis with a policy limit of not less than five million dollars (\$5,000,000.00) per occurrence. The Tenant shall deposit certificates of all such insurance coverages with the Landlord prior to the Tenant taking possession of the Premises and from time to time during the Term upon request from the Landlord. All insurance policies shall (i) contain a severability of interest clause, a cross-liability clause and a waiver of all rights of subrogation; and (ii) be non-contributing with, and shall apply only as primary and not excess to any other insurance available to all and any of the Landlord

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or any Mortgagee. Where Tenant is required to contribute to the costs of any insurance policies carried by the Landlord with respect to all or any part of the Shopping Centre or the operation thereof, Tenant agrees that notwithstanding such contribution, it shall have no insurable interest thereunder and that Tenant shall not be entitled to any of the proceeds of such insurance, the full benefit thereof of which shall belong to the Landlord.

SECTION 10 MAINTENANCE AND ALTERATIONS

The Tenant covenants to and with the Landlord that, during the Fixturing Period and throughout the Term and any renewals or extensions thereof, and any prior possession, it shall maintain, heat, repair and replace the whole of the Premises and keep all systems, doors, windows, fixtures and equipment therein in good order, and first class condition and repair as determined by the Landlord. Notwithstanding the above, the Landlord shall have the right to maintain the HVAC System serving the Premises on behalf of and at the expense of the Tenant. Notwithstanding the above, the Tenant agrees and covenants that it will not make any changes or repairs to the structure of the Premises or the Shopping Centre, or the systems within the Premises, without the express written permission of the Landlord acting in its sole discretion. The Landlord reserves the right to complete said alterations or repairs as Additional Work. All repairs, alterations, replacements, decorations or improvements shall be carried out by the Tenant in a good and workmanlike manner and in accordance with plans and specifications pre-approved by the Landlord, in writing, acting reasonably.

SECTION 11 SIGNAGE

The Tenant will install signage on the Premises in the locations designated by the Landlord within thirty (30) days of execution of this Agreement or substantial performance of the Building, whichever occurs last. All signage on or in the Premises shall be supplied and installed by the Tenant at its expense. All proposals and installations require the prior written approval of the Landlord. All Tenant signage shall comply with local by-laws and shall conform to the Landlord's sign criteria as follows:

- (a) Exterior signs shall be individual illuminated letters mounted directly on the building in the specified location for Tenant signage;
- (b) Maximum letter height shall be 24 inches;
- (c) Signs located inside the Premises shall not be attached directly to any part of the exterior windows as this may cause damage to the glass; and
- (d) Exterior temporary signs shall also be subject to Landlord's consent.

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SECTION 12

LEASE

The Tenant agrees to execute and deliver to the Landlord the Landlord's standard form of Lease within thirty (30) days after receiving same, which forms shall be prepared by the Landlord so as to include all of the fundamental terms, covenants and conditions of this Agreement (the "Lease"). The parties hereto acknowledge and agree that the matters contained within this Agreement shall be dealt with in greater detail in the Lease and where there is any conflict between the terms of this Agreement and the terms of the Lease, this Agreement shall govern. The parties hereto further acknowledge and agree that in the absence of the Lease, this Agreement shall govern the tenancy. If the Tenant fails to work diligently towards executing the Lease as aforesaid, the Landlord is entitled to terminate this Agreement or any exclusive covenant granted to Tenant, on written notice to the Tenant without prejudice to the Landlord's right to retain any deposit, letter of credit or other security and to claim and provide a greater sum of damages and to avail itself of any other remedies available to it at law.

SECTION 13

ASSIGNMENT, LICENSING AND SUB-LEASE

The Tenant shall not assign, mortgage, pledge, charge or encumber the whole of or any part of its interest in this Agreement, the Shopping Centre, the Premises, or any part thereof or any leasehold improvements installed by or on behalf of it in the Premises or sublet, license, franchise or part with possession of all or any part of the Premises (collectively hereinafter referred to as "Transfer"), without the prior written approval of the Landlord in each instance, which approval shall not be unreasonably withheld. As a minimum, when requesting the approval of the Landlord, the Tenant shall submit to the Landlord an executed copy of the Landlord's standard form of Transfer, copies of any proposed Transfer along with financial statements of the proposed transferee, assignee, subtenant, franchisee or licensee (the "Transferee"). Tenant shall pay all Landlord's costs related to the consideration of each request for consent to Transfer including, without limitation, legal fees on a solicitor and client basis and Landlord's standard administrative fee. Notwithstanding any such approval of the Landlord, neither the Tenant nor the Indemnifier shall be relieved from their respective covenants hereunder and under the Lease and Indemnification Agreement throughout the Term and any renewals or extensions thereof. Any change in the present effective voting control of the Tenant by the person holding such voting control at the date of execution of this Lease (or at the date a Transfer of this Lease to a corporation is permitted) shall, for the purposes of this Section 13, be deemed to be a Transfer. The consent by the Landlord to any Transfer, if granted, shall be upon the Landlord's standard form of Transfer and shall not constitute a waiver of the necessity for such consent to any subsequent Transfer. This prohibition against a Transfer is construed so as to include a prohibition against any Transfer by operation of law.

Notwithstanding any of the above, the Landlord shall not be obligated to consent to a Transfer prior to the Tenant opening for business to the public in accordance with the terms of this Agreement. The Tenant further confirms that in no situation will the Landlord be required to grant its consent to any Transfer where the Transferee pays any amount or agrees to pay amounts

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or provide other forms of compensation to the Tenant or compensation paid or given are attributable to the rental value of the Premises as opposed to the goodwill and business assets of the Tenant; or where the proposed Transferee is an existing tenant of the Shopping Centre to whom the Landlord wishes to lease space within the Shopping Centre.

In the event of any Transfer which is a subletting or licensing of the Premises by the Tenant by virtue of which the Tenant receives a rent in the form of cash, goods or services from the Transferee which is greater than the Rent payable hereunder to the Landlord, the Tenant will pay any such excess to the Landlord in addition to all Rent payable under this Lease, and such excess rent shall be deemed to be further Additional Rent. If the Landlord has consented to the Transfer and if the Transferee pays or gives to the Transferor money or other value that is reasonably attributable to the desirability of the location of the Premises or to leasehold improvements that are owned by the Landlord or for which the Landlord has paid in whole or in part, then at the Landlord's option, the Transferor will pay to the Landlord such money or other value in addition to all Rent payable under this Lease and such amounts shall be deemed to be further Additional Rent.

SECTION 14 DEFAULT

If the Tenant fails to observe or perform any of the terms, conditions and covenants of this Agreement or the Lease it shall be in default of this Agreement or the Lease and subject to all the rights, remedies and damages permitted the Landlord hereunder or at law. In addition, should the Tenant default under any of the terms and conditions of this Agreement then three (3) months' Rent shall immediately become due. Furthermore, should the Tenant make any assignment for the benefit of creditors or any bulk sale or become bankrupt or insolvent, or take the benefit of any Act now, or hereafter in force for bankruptcy or insolvent debtors, or if any order shall be made for the winding up of the Tenant then, and in every such case, the three (3) months' Rent preceding any of the above events and the next ensuing three (3) months' Rent shall accelerate. If the Tenant fails to remit any Rent or other monetary payment required under this Agreement or the Lease within three (3) days of written notice by the Landlord, the Landlord, in its sole discretion, without any necessity for legal proceedings and without prejudice to any of the Landlord's rights or remedies hereunder or at law, may immediately terminate this Lease. If the Tenant should fail to comply with any of the non-monetary terms of this Agreement within ten (10) days after receiving written notice from the Landlord regarding such breach, or if the nature of the default is such that it is not possible for the Tenant to comply within ten (10) days, if the Tenant has not begun and is not working diligently to comply within ten (10) days, the Landlord, in its sole discretion, without any necessity for legal proceedings and without prejudice to any of the Landlord's rights or remedies hereunder or at law, may terminate this Agreement or the Lease, or, immediately re-enter the Premises and begin to cure the default at the expense of the Tenant, which cost shall be billed to the Tenant as Additional Work.

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SECTION 15

INDEMNIFIER

In consideration of, and as a condition precedent for, the Landlord entering into this Agreement, _____ (the "Indemnifier") hereby agrees to observe and perform all the terms, covenants and conditions of the Tenant set out in this Agreement and in the Lease (the "Covenants") and to indemnify and save harmless the Landlord from any loss, costs or damages which the Landlord may suffer, incur or be liable for (including, without limitation, costs on a solicitor and client basis) as a result of any non-observance or non-performance of the Covenants, from the execution of this Agreement and throughout the Term or any renewals or extensions thereof, notwithstanding, inter alia, any disclaimer of this Agreement or the Lease by a trustee in bankruptcy. The Indemnifier further agrees to execute and deliver to the Landlord the Landlord's standard form of Indemnification Agreement attached as Schedule "G" to this Agreement, concurrent with its execution of this Agreement and to execute the Lease together with an up-to-date Indemnification Agreement at the same time and within the same period as the Tenant is required to execute and deliver the Lease. Failure by the Indemnifier to execute this Agreement, the Lease or the Indemnification Agreement shall constitute a default and the Landlord, in its sole discretion, without any necessity for legal proceedings and without prejudice to any of the Landlord's rights or remedies hereunder or at law, may terminate this Agreement or the Lease

SECTION 16

MISCELLANEOUS

The Tenant further acknowledges and agrees to the following terms and conditions:

- a) Covenants by the Tenant or the Indemnifier, if more than one person, firm or corporation are hereby declared to be joint and several.
- b) The Tenant will not allow or cause this Agreement or the resulting Lease or any assignment or sublease or other document evidencing an interest of the Tenant in this Agreement, the Lease or the Premises to be registered on title to the Premises or the Shopping Centre lands, or any portion thereof, except that, at the Tenant's request, if the Tenant pays the Landlord's reasonable expenses and legal and administration fees, the Tenant may register a caveat, notice or short form of lease against title to the Premises, describing the parties, the Term, and the other minimum information required under the applicable legislation, but the form must first be approved, in writing, by the Landlord. Within thirty days of the expiry or earlier termination of this Agreement or the Lease, the Tenant shall cause such notice to be removed from title to the Shopping Centre lands. The Tenant irrevocably appoints the Landlord as the Tenant's attorney with full power and authority to sign and deliver in the name of the Tenant any documents requested under this paragraph (b) which the Tenant fails to sign and deliver within ten (10) days after the request is made.
- c) Notwithstanding anything herein to the contrary, the Landlord is not obligated to construct the Shopping Centre as shown on Schedule "A" or any part thereof for any reason

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whatsoever as determined by the Landlord in its sole discretion. The Site Plan and the improvements situated on the Shopping Centre, as well as the lands comprising the Shopping Centre from time to time, may be expanded or otherwise changed (including major changes) by the Landlord in accordance with reputable and good shopping centre, development and operating practices.

d) If any term, covenant or condition of this Agreement, or application thereof to any person or circumstance, is to any extent, held or rendered invalid, unenforceable or illegal, the remainder of this Agreement and/or the application of such term, covenant or condition to persons or circumstances other than those with respect to which it is held invalid, unenforceable or illegal are not affected thereby and continue to be applicable and enforceable.

e) It is acknowledged and agreed that any commissions, fees, charges, or expenses of any type caused by any action of the Tenant that may be payable to any person with respect to the execution of this Agreement or the Lease or to any of the Tenant's Work, labour, fixtures, supplies, materials, or equipment in, on, or intended for the Premises shall be payable by the Tenant, and the Tenant shall and does hereby indemnify the Landlord in the event of any claims resulting thereto. The Tenant warrants that no real estate commissions are required to be paid by the Landlord with respect to this Agreement.

f) This Agreement shall enure to the benefit of the Landlord's successors and assigns. In the event of a sale of all or a part of the Shopping Centre by the Landlord, and the assumption of this Agreement or the Lease by the purchaser, the Landlord shall be released of any and all obligations hereunder and the Tenant shall and does hereby indemnify the Landlord in the event of any claims resulting therefrom. Furthermore the Tenant agrees to execute and deliver to the Landlord, or to any proposed mortgagee or purchaser, within ten (10) days of receipt of written request, any estoppel certificates or status statements, confirming, amongst other things, the then status of the Lease, including as to whether it is in full force and effect, modified or unmodified, confirming the rental payable hereunder, the existence or non-existence of defaults and other matters pertaining to this Agreement as to which the Landlord may reasonably request whether required as a result of a sale of all or a part of the Shopping Centre or any financing requirements of the Landlord or otherwise. The Tenant irrevocably appoints the Landlord as the Tenant's attorney with full power and authority to sign and deliver in the name of the Tenant any documents or certificates requested under this paragraph (f) which the Tenant fails to sign and deliver within ten (10) days after the request is made.

g) From time to time the Tenant shall, within ten (10) days of written request, provide the Landlord with such information as to the Tenant's financial standing and corporate organization as the Landlord or its mortgagee may request, and the Tenant further hereby authorizes the Landlord or its mortgagee to make such credit checks as the Landlord or its mortgagee may require.

h) Neither the Landlord nor the Tenant shall be deemed to be in default of the performance of any of their obligations, except for payment of Rent, during any period when they are

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prevented from such performance by reason of any matter beyond their reasonable control (other than an inability to procure funds) ("Force Majeure") and any period stipulated for the performance of such obligation shall be extended accordingly.

i) Time shall be of the essence.

j) During or in connection with any of the Landlord's activities and the making of alterations, improvements, construction or repairs to any portions of the Shopping Centre, the Landlord may close portions of the Common Areas and Facilities and may erect temporary scaffolds and other construction aids in the Common Areas and Facilities and on the exterior of the Shopping Centre, and may interfere, to the extent necessary and reasonable, with the use and access over any portion of the Common Areas and Facilities, all without any liability to the Tenant. The exercise of the Landlord's rights hereunder shall not be deemed to be a breach of its covenant with the Tenant for quiet enjoyment.

k) Any work performed by the Landlord for the Tenant as a result of (i) the Tenant's request beyond the work set out herein as Landlord's Work, (ii) the Tenant's Work, (iii) the failure of the Tenant to comply with the covenants hereunder or (iv) any other actions of the Tenant as otherwise noted in this Agreement shall be herein defined as Additional Work. Additional Work shall be paid for by the Tenant immediately upon presentation of the Landlord's invoice and, at the discretion of the Landlord, prior to the Landlord commencing the Additional Work. Additional Work shall be charged at cost plus 15%. These costs may be applied as Additional Rent or deducted from any deposit, letter of credit or other security as the Landlord so requires. Furthermore, any Additional Work shall be excluded from the determination of substantial performance of Landlord's Work.

l) If the Landlord withholds, delays or refuses to give consent as provided by the terms of this agreement or the Lease, whether or not the Landlord is entitled to do so, Landlord shall not be liable for any losses or damages in anyway resulting therefrom and Tenant shall not be entitled to terminate this Agreement or the Lease or exercise any remedy whatever in respect thereof except to seek the order of a court of competent jurisdiction compelling the Landlord to grant such consent which the Landlord is obliged to grant pursuant to the terms of this Agreement or the Lease.

m) "Common Areas and Facilities" whenever used in this Agreement or the resulting Lease shall mean (a) those lands, areas, facilities, service areas, utilities, systems, structures, improvements, equipment and installations in the Shopping Centre which, from time to time, are not designated or intended by the Landlord to be leased to tenants of the Shopping Centre, and (b) those lands, areas, facilities, service areas, utilities, improvements, equipment and installations which serve or are for the benefit of the Shopping Centre, whether or not located within, adjacent to, or near the Shopping Centre and which are designated from time to time by the Landlord as part of the Common Areas and Facilities, including, without limitation, all lands, areas, facilities, service areas, utilities, systems, structures, improvements, equipment and installations which are provided or designated from time to time by the Landlord for the use or

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Tenant	Landlord

benefit of the tenants of the Shopping Centre, or any part thereof, their employees, customers and other invitees in common with others entitled to their use and benefit. Landlord shall have the right to designate, amend and redesignate the Common Areas and Facilities from time to time.

n) The Tenant shall not allow any liens to be placed against the Shopping Centre. Failure by the Tenant to discharge any liens within ten (10) days after the filing of such lien shall constitute a default under this Agreement. The Landlord may discharge or vacate any liens filed against any part of the Shopping Centre at the sole cost of the Tenant (including legal fees on a solicitor and client basis) which cost shall be payable by Tenant as Additional Work and may, at the Landlord's sole option, be deducted from any deposit, leasehold improvement allowance, inducement, letter of credit or other security as the Landlord so requires and the Tenant shall indemnify and save the Landlord harmless from any and all liability, losses, damages and expenses incurred or suffered by the Landlord in connection with the infringement by the Tenant of the above or in remedying or attempting to remedy such infringement including, without limitation, the Landlord's legal fees and expenses on a solicitor and client basis.

SECTION 17 NOTICE

Any notice which may be, or is required to be, given under the terms of this Agreement shall be in writing and delivered personally, by courier or sent by facsimile and such notice shall be deemed to have been given and therefore become effective on the day of personal or courier delivery or facsimile transmission with a copy by personal or courier delivery.

To the Landlord: c/o ***
Telephone: _____ Facsimile: _____
Attention: Property Manager

To the Tenant: c/o ***
Telephone: _____ Facsimile: _____
Attention: ***

SECTION 18 ENTIRE AGREEMENT

This Agreement, including any Schedules, Riders or Appendices attached to this Agreement, constitutes the entire agreement between the parties pertaining to the subject matter of this Agreement and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the parties. Without limiting the generality of the foregoing, the Tenant specifically acknowledges and agrees that the Landlord has not made any representations or warranties to the Tenant regarding the anticipated traffic flow in the Shopping Centre or the level of sales which the Tenant may be able to generate in or from the Premises, the Tenant having independently satisfied itself with respect to these matters prior to signing this Agreement.

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SECTION 19 ACCEPTANCE

The submission or preparation of this Agreement by the Landlord or the Tenant shall not in any way constitute a reservation of, or option for, the Premises and this Agreement becomes effective only upon the execution and delivery thereof by all of the parties hereto.

This Agreement shall be irrevocable by the Tenant and open for acceptance by the Landlord for three weeks from the execution of this Agreement by the Tenant.

DATED AT _____ this ____ day of _____, 20__.

SIGNED, SEALED AND DELIVERED)

TENANT:

In the Presence of:)

Name:

Name:

Title:

Title:

INDEMNIFIER:

Name:

Name:

Title:

Title:

The Landlord has accepted this Agreement and executed same this ____ day of _____, 20__.

LANDLORD: ***

Per: _____

Initials	
Tenant	Landlord

TENANT PROPOSAL FORM

*** Shopping Centre, Toronto, Ontario

<p>Unit No.: _____ Floor Area: _____ (sq. ft.) Level: _____</p> <p>Tenant: _____ Contact: _____</p> <p>Trade Name: _____ Phone No.: _____</p> <p>Address: _____ Fax No.: _____</p> <p>Postal Code: _____ GST No.: _____</p> <p>Indemnifier: _____</p> <p>Term: _____ Years _____ Months _____ Days</p> <p>Commencement Date: _____ [YY/MM/DD] OR [TBD, estimated at [Date]]</p> <p>Renewal Option: [N/A] OR [see attached Rider]</p> <p>Minimum Rent: Yr[A] to Yr[B]: \$ _____ psf per annum of Floor Area Yr[C] to Yr[D]: \$ _____ psf per annum of Floor Area Yr[E] to Yr[F]: \$ _____ psf per annum of Floor Area</p> <p>Percentage Rent: [(X% of Sales) - Minimum Rent] OR [X% of (Sales - Y)] for each Lease Year</p> <p>Additional Rent: [Net: all Operating Costs (including capital taxes, management and administration fees) Shopping Centre Taxes, and HVAC Operating Charges, all shared on a pro-rated basis (excluding Major Tenants', non-mall, mezzanine, non-retail space), and Utilities based on consumption or pro-rated, as applicable] OR [see attached Rider]</p> <p>Promotion Fund: \$ _____ p.s.f. per annum, subject to annual CPI increases</p> <p>Advance Rent: \$ _____ to be applied to First Rent due</p> <p>Security Deposit: \$ _____ to be held as security without interest throughout the Term</p> <p>All Rent is payable monthly without deduction, set off or abatement.</p> <p>Use: _____</p> <p>Radius: _____ km</p> <p>Landlord's Work: [As Is] OR [see attached Rider]</p> <p>Fixturing Period: _____ days OR Renovation Due Date: [YY/MM/DD]</p>	<p>Possession Date: [YY/MM/DD] OR [TBD, estimated at [Date]], based on 7 days' notice from Landlord</p> <p>Tenants Work: The Tenant will at its expense provide and install within the Premises all finishings, fixturing, architectural, electrical and mechanical work, to complete the construction of the Premises in accordance with the Design Criteria as reflected in the approved Tenant's plans and specifications and to equip the Premises ready for occupation. In this regard, Tenant will remove and replace or otherwise alter, at minimum:</p> <table style="width: 100%;"> <tr> <td style="width: 50%;">Storefront:</td> <td style="width: 50%;">Projecting store front</td> </tr> <tr> <td></td> <td>Closure (door, grille, glazed panels, etc.)</td> </tr> <tr> <td></td> <td>Sign(s)</td> </tr> <tr> <td></td> <td>Materials or finishes</td> </tr> <tr> <td></td> <td>Other</td> </tr> </table> <table style="width: 100%;"> <tr> <td style="width: 50%;">Interior:</td> <td style="width: 50%;">Floor Coverings</td> </tr> <tr> <td></td> <td>Wall finishes</td> </tr> <tr> <td></td> <td>Ceiling</td> </tr> <tr> <td></td> <td>Lighting</td> </tr> <tr> <td></td> <td>Furniture or sales fixtures</td> </tr> <tr> <td></td> <td>H.V.A.C. system - details:</td> </tr> <tr> <td></td> <td>Other:</td> </tr> </table> <p>Special Clauses: [N/A] OR [see attached Rider]</p> <p>This is a proposal only. It is not a binding agreement. The Landlord will prepare a lease based on the terms of this proposal. The Tenant may not take possession of the Premises until the Lease is executed by the Tenant in a form acceptable to the Landlord.</p> <p>Tenant to acknowledge and return to *** Management Office (Fax: (416) ***) by 5:00 p.m. on [Date]</p> <p>DATE: _____ [TENANT LEGAL NAME]</p> <p>Per: _____ Name: _____ Title: _____</p>	Storefront:	Projecting store front		Closure (door, grille, glazed panels, etc.)		Sign(s)		Materials or finishes		Other	Interior:	Floor Coverings		Wall finishes		Ceiling		Lighting		Furniture or sales fixtures		H.V.A.C. system - details:		Other:
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	Other:																								

SAMPLE E

OFFER TO LEASE

Agreement made this ____ day of _____, 2000

BETWEEN:

(hereinafter referred to as the "Tenant")

AND:

(hereinafter referred to as the "Landlord")

THROUGH:

(hereinafter referred to as the "Agent")

LOCATION:

Toronto, Ontario

(hereinafter referred to as the "Building")

PREMISES:

The Tenant hereby Offers to Lease approximately _____ thousand (____) Rentable Square Feet of office space comprising part of the _____ (____th) floor of the Building (the "Premises") as approximately shown on the attached Schedule "A". The Premises shall be remeasured by the Landlord's designer according to B.O.M.A. standard and a certificate provided to the Tenant.

TERM:

The Term of the Lease (the "Term") shall be for *** (***) years commencing _____ (the "Commencement Date") and expiring on _____ (the "Termination Date").

NON-DISTURBANCE:

The Landlord agrees to obtain from the holders of all mortgages and lien holders of the leased premises or any part thereof, an agreement that the tenancy of the Tenant will not be disturbed for any reason whatsoever during the Tenant's term or any renewals thereof (including, without limiting the generality of the foregoing in the event of a foreclosure or sale by said mortgage or lien holder) so long as the Tenant is not in default under the lease.

FIXTURING PERIOD: Provided that the Lease has been executed by the Tenant, the Tenant shall have access to the Premises from _____ until the Commencement Date (the "Fixturing Period") to complete construction, install its trade fixtures and otherwise to commence operation of its business. No Net or Additional Rent shall be charged during this period however all other terms of the Lease shall apply.

ADDITIONAL RENT: The Tenant shall pay its proportionate share of the Landlord's realty taxes, tenant hydro, janitorial and cost of operating, maintaining and managing the Building (the "Additional Rent") currently estimated at _____ plus G.S.T. per rentable square foot for 2000. The Additional Rent shall be paid in advance in equal monthly installments of one-twelfth (1/12) of the annual amount on the first day of each month of the Term.

NET RENT: The annual net rental (the "Net Rent") for the Term shall be calculated by multiplying the rentable area of the Premises by:

Years * - *:	\$ *** plus G.S.T. per sq.ft.
Years * - *:	\$ *** plus G.S.T. per sq.ft.

The Net Rent shall be paid in advance in equal monthly installments of one-twelfth (1/12) of the annual amount on the first day of each month of the Term.

TENANT CONDITION: This Offer to Lease is conditional for ten (10) business days on the receipt and approval by the Tenant of the following items:

- a) An space plan and construction estimate from the Tenant's designers;
- b) The approval of all terms and conditions of the Offer to Lease by the Tenant's Board of Directors.

If all of these items are satisfactory to the Tenant, in the Tenant's sole discretion, the Tenant shall so notify the Landlord in writing within such time period, failing which, this Offer to Lease shall become null and void.

PARKING: The Tenant shall have the right throughout the Term and any subsequent renewals to lease up to ** (**) parking spots in the Building's underground lot at the prevailing monthly rates which is currently \$*** plus GST per month per spot and is subject to change from time to time.

LEASE:

Acting reasonably and in good faith, the Landlord and Tenant agree to expeditiously execute a formal lease (the "Lease"), prepared on the basis of the Landlord's standard lease form and subject to the incorporation of the provisions contained in this Offer to Lease and such reasonable modifications and amendments as are agreed upon by the parties and their respective solicitors. In case of discrepancy between the Lease and the Offer to Lease, the terms and conditions of the Lease shall govern.

DEPOSIT:

Upon unconditional acceptance of this Offer to Lease, a deposit of ** (**) months Net and Additional Rent (the "Deposit") will be submitted to the Landlord "In Trust". This deposit will be held in trust pending execution of the Lease and is to be applied to the first and last months' Net and Additional rent payable under the Lease. If, for any reason, the parties fail to agree on and execute a Lease, the Deposit shall be returned to the Tenant without interest or deduction and the Offer to Lease shall become null and void.

LANDLORD'S WORK:

The Landlord shall complete, prior to the Fixturing Period at its sole cost and expense the following:

- a. Install Building standard signage identifying the Tenant on the main lobby directory board and beside the main entrance to the Premises;
- b. Demise the Premises with slab-to-slab drywall with all interior surfaces taped, sanded and ready to receive the Tenant's choice of wall covering; and
- c. Repair or replace any damaged or missing ceiling tiles, lights and window coverings within the Premises.

The Tenant, at the Tenant's sole cost, may make further renovations to the Premises with the prior approval of the Landlord, such approval not to be unreasonably withheld.

RIGHT TO RENEW:

The Tenant shall be granted ** (**) options to renew the Lease for further terms of up to ** (**) years each, provided that written notice is given to the Landlord at least six (6) months prior to the expiry of the then current Term. All terms and conditions shall be negotiated by both parties, acting reasonably and in good faith, provided that, if the parties are unable to agree on all terms three (3) months prior to the expiration of the Term, then the parties hereby agree to submit to binding arbitration in accordance with the provisions of The Arbitration Act of Ontario.

- NO RESTORATION:** It is agreed that the Tenant shall not be obligated to restore the Premises at the expiry of the Term to base building standard. The Landlord agrees to accept the Premises in the configuration in which structured at that time subject to reasonable wear and tear.
- RIGHT TO SUBLET:** The lease shall contain a clause allowing the Tenant the right to sublet or assign all or part of the Premises subject to the approval of the Landlord, such approval not to be unreasonably withheld.
- USE:** The Tenant may use the Premises for general office purposes or any other legally permitted use.
- FIRST RIGHT TO LEASE:** Subject only to prior rights existing as of the date of this Offer to Lease, the Tenant shall have the first right to lease any space on the ** (**) floor of the Building which becomes vacant. All terms and conditions shall be negotiated by the parties acting reasonably and in good faith and in accordance with then current market conditions. If the parties are unable to agree, the parties hereby covenant to submit to arbitration in accordance with the provisions of The Arbitration Act of Ontario.
- LEGAL & TAX ADVICE:** The parties to this Agreement acknowledge that the Agent has not represented itself to be a legal or tax expert and it has been recommended that the parties obtain advice from their respective Legal and Accounting Counsel prior to executing this Offer to Lease.
- DELAY:** In the event that the Lease has not been executed by ***, then the Fixturing Period, the Commencement Date, the Termination Date and all other relevant dates shall be delayed by one (1) month. In the event that the Lease has not been executed by ***, then, at the Tenant's sole option, either this Offer to Lease shall become null and void or the Fixturing Period, the Commencement Date, the Termination Date and all other relevant dates shall be delayed by a further mutually agreed upon period.
- IRREVOCABLE:** This Offer to Lease is irrevocable until 5:00pm on _____, 2000 after which time, if not accepted, will become null and void.

TENANT:

With authority, the undersigned hereby executes this Offer to Lease:

DATED AT _____ THIS ____ DAY OF _____,
2000.

SIGNED, SEALED & DELIVERED
in the presence of:

Witness

Tenant's Signature

LANDLORD:

With authority, the undersigned hereby accepts the above Offer to Lease and agree to pay in consideration of the procuring by Agent(s) of this Offer to Lease the commission as per the commission agreement.

DATED AT _____ THIS ____ DAY OF _____,
2000.

SIGNED, SEALED & DELIVERED
in the presence of:

Witness

Landlord's Signature