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Commercial Landlord and Tenant Law in Ontario

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SECTION II

AGREEMENTS, OFFERS, LETTERS OF INTENT AND OTHER FORMS OF COMMITMENT

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A. Recognizing When You Have Made An Agreement, And What You Have Agreed To

1. Introduction

It is in the interests of both the landlord and the tenant to reduce their agreement upon the basic terms of the tenancy to some form of writing as soon as possible and preferably prior to the expenditure of any significant amounts of money on the part of either party.

The decision to use either a non-binding letter of intent, a binding letter agreement or a formal offer to lease will be determined by the prevailing market conditions, the nature of the project (development or operations), the strength or desirability of the project, the availability of time, the requirements of lenders (for both the landlord and the tenant), the trust between the parties based on previous dealings, the existence of recently executed leases between the parties, the willingness (or unwillingness) to incur legal costs, the amount of money to be expended by both parties prior to opening and the presence or absence of a real estate agent or broker commanding a commission.

2. Legal Requisites for an Agreement

In order for a binding agreement to exist, there must be what Williams and Rhodes[1] term "the requisites of a valid agreement for lease". The five (5) essential elements for a legally enforceable agreement to exist are as follows:

(a) The Premises - they must be clearly defined and ascertainable.

(b) The Parties - all types of rent, minimum (or basic or net), percentage

and additional, must be clearly expressed.

(c) The Term - the commencement and expiry dates must both be clear or readily ascertainable.

(d) All other material terms of the contract not incidental to the landlord and tenant relationship, including any covenants, conditions, exceptions or reservations.

The fact that a lease is unsigned is not material if (1) the agreement is sufficiently clear (ie. 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]

3. Oral Agreements to Lease

There are some instances wherein a tenant finds itself in occupation of leased premises without a written agreement. Although this may arise in the case of a "handshake" deal (an increasing rarity), this situation more commonly arises where (1) there is an exchange of "deal-evidencing" correspondence between the parties that is thought to form the basis for 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 Frauds[3], 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 (eg. 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.

4. Letters of Intent - How To Keep Them Non-Binding

Letters of intent can be "risky business". What has started out as an expression of interest runs the risk of becoming a binding agreement to lease. Often, there is no lawyer involvement because, after all, it is "non-binding" and because it is "non-binding", it is often relegated to lower level employees who would otherwise never

have had the authority to enter into the contract. The danger is that the employee has inadvertently bound the company to a deal that would, had it been a formal contract, required approval of the company's Board of Directors, the consent of a co-owner, and so on.

When used herein, the term "letter of intent" means a lease proposal, a term sheet or a simple letter. The key factors here are the intention of the parties and the conduct of the parties. The two crucial rules to follow are: (1) avoid having the letter of intent construed as a contract, and (2) do not undertake any conduct that would invoke equity under the theories of promissory estoppel, detrimental reliance or quantum meruit.

Promissory estoppel arises when one party makes a promise which it should reasonably expect will be relied upon by the other party, and such party does so to its detriment. A failure to enforce the promise would result in injustice to the innocent party.

Quantum meruit is "an equitable doctrine, based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby; under those circumstances, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefor." (Black's Law Dictionary)

Even though there is no signed lease, a letter of intent may inadvertently be binding, especially if all the essential terms have been agreed upon and there has been part performance by one of the parties. This is because the parties, by their actions, have indicated an intention of being legally bound.

Accordingly, it is important that a letter of intent contains language which constantly reinforces the fact that there is no intention of being bound. The words " letter of intent", "letter of understanding", or "intention" should be used constantly. The words "agreement", "agree" or any variation thereof should never be used. The document should state, in bold and capital letters, if necessary, that the document *is not and is not intended to be* a legally enforceable agreement. Avoid using a consideration clause or an execution clause, as these are evidence of agreement.

For example, some sample wording might be:

> "This letter constitutes only an expression of intent and does not constitute a binding agreement between the parties. No party will be under any legal obligation unless and until a definitive agreement containing the terms outlined in this letter and other terms mutually agreeable to the parties has been executed and delivered by all parties intended to be bound."

A commonly used expression is: "The foregoing matters are subject to the parties entering into a formal lease". In *British Columbia (Egg Marketing Board) v. Jansen Industries Ltd. (1992), 24 R.P.R. 36 (B.C.S.C.),* the landlord and tenant signed a letter agreement which stated that the agreement was "subject to the execution by the

parties of a mutually satisfactory lease agreement". The Court held that the letter agreement was in fact an enforceable lease, since it contained the five essential elements. The term requiring a formal lease was not a condition precedent, but instead was a term of the contract. Accordingly, it would have been more prudent to insert in the letter agreement or letter of intent a condition that the lease be signed before a binding agreement will result.

If one of the parties believes (or is afraid) that the parties have reached agreement on the essential elements of an enforceable contract but that party does not yet want this to constitute an enforceable contract, then the party should consider entering into a letter agreement or a formal offer to lease, but with a condition precedent inserted. Any type of condition precedent will suffice (eg. Board of Director or senior management approval). The insertion of a condition precedent effectively achieves veto power over the effectiveness of the agreement.

Once the letter of intent has been signed and the parties begin to exchange correspondence and draft leases start going back and forth, the risk again arises that the exchange of letters and conduct of the parties may result in a binding agreement. Therefore, when a landlord sends out the lease, it may wish to set out in its accompanying correspondence (or even stamp the lease with) the following statement:

> "The submission of this lease for consideration does not constitute an offer to lease the Leased Premises and the proposed lease will

> become effective only upon execution, delivery and acceptance thereof by the Landlord and the Tenant."

Even if a letter of intent is drafted carefully enough to avoid being a contract, an unwilling party may still be bound based on the theory of promissory estoppel. Although the parties have not entered into a binding contract, one party has acted toward the other in a manner which would create an inequity if the first party were not bound by their agreement. For example, a landlord may have given notice to an existing tenant to vacate the premises in order to make way for the new tenant, and then the new tenant purports to renege on the deal.

If a party does not yet want to be legally bound, and has noticed that the other party is starting to spend a lot of money relying on the likelihood that the parties will enter into an enforceable contract, then it may be prudent to remind the other party in writing that no legally binding agreement yet exists and that any such expenditures are solely at the risk of the other party. If the contract never does materialize, then the first party will have successfully avoided a claim on a quantum meruit basis, since it never led the other party to believe that an enforceable agreement existed.

A final tip: if it looks like negotiations are going to go on for some time, and if there is some element of confidential information involved, then ensure that the parties enter into a Confidentiality Agreement. The letter of intent may not be enforceable, but the Confidentiality Agreement is.

5. What Have You Agreed To?

The agreement to lease provides the landlord with the binding documentation it needs for financing purposes, as well as the marketing tool it requires to attract other retailers to the centre. It also secures the landlord's rental income stream, since the tenant may be given possession of the premises upon full execution of the agreement.

The disadvantage to the landlord and hence, the advantage to the tenant, of granting the tenant possession of the premises on the basis of only an agreement to lease is that many items that are of importance to the landlord and which are ultimately covered in the lease are not addressed in the agreement. Notwithstanding that the tenant may be successful in negotiating some excellent amendments to the lease, the lease is still a document heavily weighted in the landlord's favour, containing many more covenants and obligations on the tenant's part than on the landlord's. By contrast, the tenant in possession of premises pursuant to an agreement to lease can, within reason, do anything he wants unless specifically prohibited from doing so by the terms of the agreement. The tenant need only be careful that the landlord's standard lease form is not incorporated by reference into the agreement and that any rights of special importance to the tenant are incorporated into the agreement.

The brevity of the document works in the Tenant's favour in many areas. For example, the fact that these agreements rarely specify that rent is due on the first day of the month has created enforcement problems for landlords. With respect to

percentage rent, the agreement will state the percentage factor but usually omit details regarding frequency of payment. The tenant may successfully argue that no percentage rent is payable until the sales breakpoint is reached and that payment may be made annually or quarterly, rather than monthly.

Agreements to lease usually require the tenant to pay its proportionate share of the costs of operating, maintaining, repairing and insuring the shopping centre. Administration fees or management fees may be assumed but are rarely mentioned. In the Denninger case[4], the tenant successfully avoided the payment of administration fees that were not specifically provided for in the offer, as the court held that administration fees were not caught within the net lease concept. Since most agreements to lease do not include the detailed definition of "proportionate share" contained in most leases, with the various exclusions from the denominator and different weighting factors of tenants, the tenant may successfully argue that the plain English definition of "proportionate share" applies, namely, a fraction, the numerator of which is the area of the premises and the denominator of which is the area of the shopping centre.

While agreements to lease often specify payment of advertising and promotion costs on a per square foot basis, they often omit reference to annual escalations based on C.P.I.

The use clause may have been drafted with varying degrees of precision and the tenant may take advantage of any imprecise or liberal wording devised by the landlord's leasing representative. Conspicuous by its inadvertent omission in most agreements is the tenant's operating covenant.

The conditions precedent for the exercise of any renewal option (such as the notice period and the tenant not being in default under the lease) may not have been specified. Similarly, all of the conditions precedent for the payment of any tenant inducement may not have been detailed, in the interests of brevity.

Matters pertaining to assignment, subletting and change of control by the tenant are rarely addressed in this type of document, with the result that until the lease is fully negotiated, the tenant is free to transfer its rights under the offer and the lease.

As agreements to lease rarely address the landlord's relocation rights, the tenant may be in a position to ransom the landlord seeking to redevelop the centre by demanding major concessions and compensation in return for the tenant's consent to relocation.

Restrictive covenants may be so briefly worded in the document as to give the tenant an edge in lease negotiation, as customary exclusions (such as departments stores and freestanding buildings) may have been omitted. A landlord seeking to make any concession, such as a restrictive covenant or a renewal right, personal to the tenant

may face problems if these personal rights have not been spelled out in the agreement.

As it is unlikely that the tenant's insurance obligations have been addressed, it is also unlikely that all of the blanket releases and indemnities of the landlord by the tenant contained in the lease have been provided for.

Hence, it is clear that a good agreement to lease will balance brevity with the need of both parties for certainty of terms. A sample letter agreement balancing these completing factors is attached to this paper.

B. Coping With A Binding Agreement That Doesn't Deal With Important Points

The relative bargaining strengths of the parties will determine how successful a party will or will not be in bettering its position under the lease. The victim of a deficient offer to lease may seek to evoke the "relationship" argument, stating that it is in the interests of the long term landlord and tenant relationship or other future dealings between the parties, to allow additional concessions to be granted to the disadvantaged party during the lease negotiations. After all, "what goes around, comes around."

The disadvantaged party make also seek to stall lease finalization until the other party requires some concession, such as a consent to financing, or a consent to transfer, or

an estoppel certificate, and so on.

The question ultimately arises as to whether it is best to simply repudiate a bad agreement. Until a tenant enters upon the land, he has no interest in the land but merely a contractual right. "The demise of a term in land does not vest any estate in the lessee, but gives him a mere right of entry on the land, which right is called his interest in the term, or 'interesse terminii'." (Bouvier's Legal Dictionary) Hence, if a landlord feels that it has made a bad deal and then reneges on the agreement, the tenant may only sue for breach of contract and not specific performance. The measure of damages is the difference between the rent to be paid and the actual value of the premises at the time of the breach for the unexpired term. There can, however, be no recovery of loss of profits from a business to be carried on upon the premises. Hence, while there may be liability for breach of contract, the damages may be minimal.

C. When Is It Better Not To Complete A Formal Lease?

Everyone would agree that it is better not to complete a formal lease when you know that it will be worse than the offer.

From the tenant's viewpoint, the lease is usually one-sided in favour of the landlord. The lease has many covenants on the tenant's part, but few on the landlord's part. Unlike the lease, the offer may not have an operating covenant, radius restriction,

transfer provisions, relocation rights in favour of the landlord, and other landlord rights at the expense of the tenant. The offer will have fewer tenant default provisions, if any, than the lease. In a falling market, the tenant may refuse to execute the lease until the landlord agrees to rent concessions. If the tenant is planning a major corporate reorganization or insolvency proceedings, it may find the existence of an offer, as opposed to a lease, of benefit. The refusal to finalize the lease until the deal is bettered may favour the tenant.

A landlord under an offer to lease may also resist lease finalization when it perceives no benefit to it. Consider the situation of a landlord who, having signed an agreement to lease with an anchor tenant, now faces the dreaded prospect of negotiating and signing the tenant's (as opposed to the landlord's) standard lease form, which it knows to be worse than the offer. In that case, the landlord's position deteriorates upon lease execution because silence in the offer may make the tenant responsible for fulfilling the obligation. For example, unless the lease stipulates otherwise, the tenant has a duty to repair its premises. *The Conveyancing and Law of Property Act, R.S.O. 1990, c.C. 34* contains certain duties on the tenant's part which the tenant may contract out of when the lease is signed, namely, the duty to pay rent without any deduction whatsoever, the duty to pay taxes, except for local improvements, and to repair, reasonable wear and tear and damage by fire, lightning and tempest only excluded.

Consider also the situation of a landlord who is proposing a redevelopment of the shopping centre or an expansion by an anchor tenant. In that case, the landlord may wish to stall lease execution because it may be forced to give certain approval rights to the anchor tenant which are not currently contained in the offer to lease.

D. When Does A "No Lease, No Key" Policy Work Best?

"No lease, No key" is used to describe the situation where the landlord withholds delivery of the premises to the tenant until a lease has been fully negotiated and signed by both parties. It is most common in office and industrial leasing situations, perhaps due to real estate agent involvement, but it is rapidly gaining favour in the retail sector as well.

Some landlords utilize a simple "Tenant Proposal Form" (or TPF), being a non-binding deal sheet or reservation form (a sample of which is attached to this paper), and then proceed directly to a lease. Any form of pre-Lease document may also be used, but the shorter and simpler the better. The rationale for a simple pre-Lease document is that a tenant who is unlikely to sign a TPF is even more unlikely to sign a lease.

A "No lease, No key" scenario is obviously inappropriate where the tenant is renewing its lease in the same premises and the landlord has no leverage in getting a lease signed.

"No lease, No Key" is beneficial in new lease situations where one or both parties will be spending significant monies on premises construction or inducements to lease and requires the certainty of having a firm deal with "no surprises" before proceeding with such expenditures. The payment of a leasing commission is often tied in to the later of lease execution or the tenant opening for business. When a property is in high demand and the landlord needs to know quickly if the deal will be fully consummated by lease execution, a "No lease, No key" policy is helpful in allowing a landlord to determine whether the tenant should be dropped in favour of dealing with another tenant on the waiting list. The practice is most workable when the parties have a precedent lease to refer to, which further expedites lease finalization. A "No lease, No key" policy is also beneficial to a landlord who is dealing with a tenant who has a reputation for tardy lease finalization.

Obvious benefits of a "No lease, No key" policy include the avoidance of delayed and protracted lease negotiations by tenants who, having been given possession of their premises before lease finalization, now experience operational problems or realize that their deal is not as good as they had originally hoped. Legal fees are reduced, as both parties focus on only the major issues and do not get sidetracked by the lesser ones.

Some tenants resent "No lease/No key" situations because they may feel a need to have their lawyers give up on issues earlier in the negotiation process in the interests

of getting the key. If the commencement date is a fixed one, the tenant may end up paying rent before the lease is signed. Many tenants also feel disadvantaged by the deadline pressures which are inherent in "No lease/No key" situations, as they often have only one clerk handling all of their lease negotiations, whereas landlords often have legal departments well staffed with numerous clerks and lawyers to handle these negotiations.

The downside of a "No Lease, No Key" policy to a landlord is the possibility of lost rent if the lease negotiation extends beyond the original anticipated premises turnover date. Income is sacrificed for certainty of terms, but this is a price which many landlords are increasingly prepared to pay.

E. Dealing With Use Clauses, Exclusive Use, And Other Restrictions At The Offer Stage

As is often the case, the importance of a provision in an offer is often inversely proportional to the talent of the person drafting it. Few would disagree that the use clause, exclusive use provision and other restrictions are crucial provisions in any offer to lease, yet their drafting is usually left to leasing agents or property managers who, through inadvertence, badly draft these provisions.

1. Use Clauses

A retail tenant's use clause is its life blood. While the tenant will want the use clause to be as general as possible, the landlord will seek to restrict it as much as possible. The tenant requires flexibility so that it can take advantage of any new trends that may evolve in its business. Furthermore, the less specific the use clause, the easier it is for a tenant to sell its business and assign its tenancy.

From the viewpoint of a landlord seeking to maintain a balanced merchandise mix in its shopping centre, it is important to specify in detail the use clause at the offer to lease stage, as the landlord will likely be unsuccessful in "bettering" the clause during the lease negotiation. While it is inappropriate to specify a pricepoint for the goods to be sold in the premises, the landlord can certainly allude to this by reference to "high quality", "medium quality" or "budget". The use clause should list the items which are to comprise the principal use and the ancillary use. Examples of the types of items which are permissible are helpful, as are lists of excluded items.

Surprisingly, many offers omit reference to the trade name under which the tenant is to carry on business. Not only does such an omission allow a tenant to freely change its operation to another of its divisions, but it also facilitates an assignment of the entire lease by the tenant.

2. Exclusive Use Covenants

Poorly drafted exclusives are law suits waiting to happen. The most deadly wording which can be used in an offer is that which states: "The landlord shall not lease any other space in competition with the tenant's business." Although exclusive use covenants are most commonly found in retail lease, they also occasionally appear in office leases where a major tenant seeks to limit entry into the building (or onto certain floors of the building) by its competitors.

While landlords are loathe to grant exclusives, they can at least minimize the damage by careful drafting at the offer to lease stage. Any landlord seeking to improve the wording during the lease negotiation has an uphill battle. From the landlord's viewpoint, the exclusive should be made personal to that particular tenant, and it should apply only to the tenant's principal use and not any ancillary uses. It should exclude any anchor tenants (as the landlord usually has little control over their use clauses, which are often of a general nature), any existing tenants in the centre, allow any existing tenants to renew their leases and allow replacement of existing uses by new tenants. The landlord may seek to exclude the exclusive use from applying to any expansion of the centre. The exclusive should self-destruct if the tenant is in

default under the lease, or if the tenant "goes dark" (ie. ceases to operate), or if it ceases to carry on the principal use, or if it downsizes below a certain square footage.

3. Other Restrictions

If the landlord intends to insist on a radius restriction, it must provide for it in the offer to lease, otherwise it will be unsuccessful in inserting one in the lease.

Most leases state that any assignment, subletting or change of control by the tenant requires the consent of the landlord, not to be unreasonably withheld. Accordingly, any tenant who seeks more liberal transfer rights should provide for these in the offer to lease. The tenant may wish to freely transfer, without the landlord's consent, among its related companies or to a chain acquirer.

Co-occupancy provisions (which entitle a tenant to either cease operating or pay a reduced rent if certain key tenants or a certain percentage of tenants in a shopping centre vacate or cease operating) must be bargained for by the tenant at the offer to lease stage. These clauses are so abhorent to landlords, particularly in light of the recent Eatons closure, that landlords will vigorously oppose their inclusion in the lease unless required to do so by the terms of the offer. The landlord should seek to make this concession personal to the tenant.

F. How To Avoid Damage To The Market Value Of Your Real Estate

A deficient pre-Lease document may adversely impact a landlord's ability to finance, sell, develop, and re-develop its property.

Many agreements to lease do not specifically contain a right on the landlord's part to relocate the premises, as this matter is usually dealt with at the lease negotiation stage. If the landlord is redeveloping the shopping centre, it may be held to ransom by a tenant who refuses to relocate, citing its agreement to lease as authority for its position.

An offer may be deficient if it fails to provide for an operating covenant. However, even if the offer grants the tenant the right to cease operating, it may be still be deficient and render damage to the landlord's real estate if it fails to provide that upon the cessation of operation by the tenant, any approval rights which the tenant may have over the leasing of other space in the shopping centre, the tenant's right to restrict the landlord's right to modify or redevelop the shopping centre, the landlord' repair obligations and any exclusive use covenant of the tenant, will be at an end.

The offer may have made some vague reference to installation of telecommunications equipment by the tenant, with no further detail. With no prohibitions in the offer, the tenant may now be utilizing such equipment as a hub and selling service to third party users. In such case, not only is the landlord foregoing the generation of its own

income from such equipment, but it is also exposed to vast potential liability if the tenant's customers experience interruption of service due to some act of the landlord or casualty occurring in the building.

A Landlord's ultimate nightmare is that a deficit agreement to lease has rendered its property unsaleable. A little extra effort taken at the offer stage may be well worth it in the long run.

FOOTNOTES

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. R.S.O. 1990, c. 5-19, ss. 1,2,3

4. R. Denninger Ltd. v. Metro International General Partner Canada Inc. and Lehndorff Property Management Ltd. (1992), 8 O.R. (3d) 720, (Ont. Ct. Gen. Div.)

TENANT PROPOSAL FORM (TPF)
*** Shopping Centre, Toronto, Ontario

Unit No.: ________ Floor Area: ________ (sq.ft.) Level: ________

Tenant: ____________________ Contact: ____________________
Trade Name: ____________________ Phone No.: ____________________
Address: ____________________ Fax No.: ____________________
____________________ GST No: ____________________
Postal Code: ____________________

Indemnifier: ____________________

Term: ____ Years ____ Months ____ Days

Commencement Date: [YY/MM/DD] OR [TBD, estimated at [Date]]

Renewal Option: [N/A] OR [see attached Rider]

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

Percentage Rent:
[(X% of Sales) - Minimum Rent] OR [X% of (Sales - Y)] for each Lease Year

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]

Promotion Fund: $____________ p.s.f. per annum, subject to annual CPI increases

Advance Rent: $____________ to be applied to First Rent due

Security Deposit: $____________ to be held as security without interest throughout the Term

All Rent is payable monthly without deduction, set off or abatement.

Use: ________

Radius: __________ km

Landlord's Work: ["As Is"] OR [see attached Rider]
Fixturing Period: _____ days OR Renovation Due Date: [YY/MM/DD]

Possession Date: [YY/MM/DD] OR [TBD, = estimated at [Date], based on 7 days' notice from Landlord]

Tenant's 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:

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: ____________________

Special Clauses: [N/A] OR [see attached Rider]

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.

Tenant to acknowledge and return to *** Management Office (Fax: (416) ***) by 5:00 p.m. on [Date]

DATE: ____________ **[TENANT LEGAL NAME]**

Per: ____________________
Name:
Title:

SAMPLE LETTER AGREEMENT

[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.

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.

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.

RECENT CASE 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. Cal-Pro Investments), [1998] O.J. No. 2055**

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.

5. ***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.

6. ***Business Depot Ltd. v. Lehndorff Management Ltd. et al.*, British Columbia Court of Appeal, Unreported No. CA021031, May 15, 1996**

The following clause was contained in an offer to lease:

> "A formal lease document must be executed by both parties prior to the Landlord commencing Landlord's Work within the premises. Failure to do so will render this Agreement null and void."

After the offer was signed, further negotiations took place between the landlord and the tenant with respect

to amending the definition of leased premises to include a particular expansion space. The executed offer did not refer to the expansion space. The landlord later advised the tenant that it would not be proceeding with a lease of the premises because the landlord had entered into a lease with another party. The landlord took the position that since the offer to lease required certain conditions to be satisfied by a certain date and as those conditions had not been satisfied, the offer had expired. The tenant sued the landlord for specific performance of the offer. The trial judge ordered specific performance of the initial offer to lease, as modified to include the expansion area. The landlord appealed.

The Court of Appeal stated that the failure of the parties to execute the lease and the failure of the landlord to refuse to proceed based upon the non-performance of conditions could not be used by the landlord as an excuse to end the lease. It could, however, be used by the tenant, as the tenant was not in default and had not by its conduct waived the strict performance of the conditions by the particular date. The landlord lost whatever right it may have had to invoke these clauses by continuing to negotiate with the tenant beyond the deadlines regarding the possible inclusion of the expansion space. An order for specific performance was granted, but the order related only to the initial offer to lease signed by both parties, which did not include the expansion space.

7. ***Edwin Schramek v. C Corp (Ontario) Inc.*, Ontario Court of Justice, Unreported No. 93-GD-26410, April 5, 1994, Killeen, J.**

The tenant entered into an offer to lease to construct a convenience store/gas bar. The offer stated that the term of the lease was to commence on the date the tenant opened for business in the premises. The offer also imposed four conditions which were in fact satisfied by the landlord. The economic climate declined and the tenant failed to commence construction of the premises. The landlord sued for a declaration that the tenant was in breach of the offer to lease and sought a mandatory order requiring the tenant to comply with the terms of the offer and commence construction of the premises. The tenant argued that it was not in breach of the offer, as the commencement of the term was only to begin once the convenience store/gas bar was completed. As that condition was clearly for the benefit of the tenant, it was open to the tenant to decline to build the premises and thereby make the offer null and void.

The Court rejected the tenant's argument, holding that the tenant had a duty to use good faith efforts to build the gas bar and convenience store, once the four conditions of the offer had been satisfied. Since the tenant had not acted in good faith and in a reasonable manner, it could not be allowed to avoid its commitments. The Court granted a mandatory order requiring the tenant to comply with the terms of the offer and commence construction of the premises.

8. ***Seaport Crown Fish Co. Ltd. et al v. Vancouver Port Corporation*, Supreme Court of British Columbia, unreported No. C931043, Saunders, J., Septemher 28, 1995**

The landlord had its tenants on month-to-month leases, pending the landlord's decision to redevelop the project. The landlord wrote to the tenants advising them of its decision to proceed with the redevelopment work, subject to authorization from the landlord's board of directors. The landlord's letter advised the tenants that after redevelopment, the tenants would be granted fixed term leases for ten years and requested that the tenants commit by a particular date to such fixed term lease at the proposed rent set out in the letter. On that date, all of the tenants met with the landlord and verbally advised the landlord that they would commit. However, the landlord did not proceed with the redevelopment and terminated all of the month-to-month

leases. The tenants sued the landlord for damages arising from the landlord's breach of the ten year lease.

The Court held that the landlord's letter to the tenants did not create a ten year unconditional lease. The letter clearly stated that the landlord required authorization of its board of directors and that when the premises had been redeveloped, the tenants would be granted ten year leases. Hence, the new leases were dependant upon the redevelopment of the project. The Court stated that what the landlord had made was an invitation to treat, following which the tenants made an offer to the landlord which was never accepted. The tenants' allegation that a ten year lease existed was rejected as the tenants could not establish the mutuality of intention to conclude a ten year lease.

9. ***Med-Chem Laboratories Limited v. Michael Baratz, et al.*, Ontario Court of Justice, unreported No. 34908/91U, Then, J., October 21, 1994**

A letter agreement was signed on behalf of the landlord personally but underneath his signature appeared the words "Arla Developments Inc." At that time, no such corporation existed, nor was it ever incorporated. The offer to lease contained a condition whereby the landlord guaranteed that the building in which the leased premises where located would be occupied by fifteen full-time medical practitioners. The tenant paid a deposit and made other required payments required for marketing the building. The landlord never obtained any full-time medical practitioners as tenants. The landlord also never obtained title to the building and was unable to convey a leasehold interest to the tenant. The tenant argued that the offer to lease had been frustrated because there had been a total failure of consideration on the part of the landlord. Hence, the tenant could either sue for breach of contract or seek return of monies that it had paid. The tenant sought the latter.

The Court held that the landlord's failure to find fifteen full-time medical practitioners, together with the landlord's failure to be in a position to convey a lease of the premises to the tenant amounted to a total failure of consideration on the part of the landlord. The landlord was ordered to return all monies which the tenant had paid. Furthermore, since no company was ever incorporated, the party who signed the offer was personally liable to the tenant.

10. ***South Shore Venture Capital Limited v. Peter Haas and Christine Haas*, Supreme Court of Nova Scotia, unreported, No. 93-566, Saunders, J., March 21, 1994**

The landlord and tenant negotiated an oral lease for a five year term. The tenant took possession, paid rent, paid its share of operating costs and reimbursed the landlord for its share of structural improvements in accordance with the oral agreement. The landlord intended to sell the building and advised the tenant that it did not have an enforceable lease and that it would have to vacate its premises when the building sold. The tenant continued to tender rent which was accepted and commenced an action for specific performance. The landlord's position was that there was no written agreement in place and hence, pursuant to The Statute of Frauds, the lease was unenforceable and only a month-to-month tenancy existed.

The Court held that by going into possession, paying rent, paying its share of operating costs, and reimbursing the landlord for its share of structural improvements to the premises, the tenant had committed sufficient acts of part performance to relieve the tenant from compliance with The Statute of Frauds. There was an enforceable lease between the parties and the landlord was in default of its obligations. Hence, the tenant was entitled to an order for specific performance. The tenant was allowed to remain in possession

until the expiration of the five year term.

11. ***Multi-Area Developments Inc. v. Jurgen Punko*, Ontario Court of Justice, unreported, No. 3559/93, Cavarzan, J., November 10, 1994**

An offer to lease was executed and the landlord delivered to the tenant, with the accepted offer, copies of the form of lease for the tenant's review and execution. The tenant advised the landlord that it would not be proceeding and would not be taking possession of the premises. The landlord sent the tenant a letter notifying it that this represented an anticipatory breach of the offer and that the landlord would hold the tenant liable for damages arising from the breach. Despite listing the premises for lease, the landlord was unable to locate a new tenant for seven months. The landlord sued the tenant for damages due to breach of the offer to lease.

The Court held that the offer represented a contractual obligation to enter into a lease. In the absence of a formal lease, the interest in land had not crystallized and no landlord and tenant relationship had been established. However, the contractual obligations of the landlord and the tenant contained in the agreement to lease did exist. The landlord and tenant had entered into an enforceable agreement to lease and that the tenant had breached that agreement.

12. ***Dr. F. Torfason Inc. and Thorvaldur Torfason v. 338058 B.C. Ltd.*, Court of Appeal for British Columbia, unreported, No. CA017812, November 29, 1994**

During the negotiation of a renewal lease, the tenant changed the identity of the tenant on the lease form sent to it by the landlord, from an individual to a corporation. In a cover letter accompanying the executed lease, the tenant confirmed that the landlord had agreed to install a heat exchanger at the landlord's expense. The landlord did not respond to the tenant's change of lessee on the lease and to the extra condition contained in the tenant's letter. However, the landlord did accept rent from the tenant corporation for four months. The tenant applied for an order of specific performance requiring the landlord to execute the lease and to install the heat exchanger. The tenant won in the lower court and the landlord appealed.

The Court of Appeal held that the acceptance of one month's rent by the landlord is not evidence of the landlord's acceptance of the amended lease. However, the landlord's acceptance of three months' rent without objection did, to the reasonable observer, amount to an acceptance of the amended terms of the lease.

13. ***Shamac Country Inns Ltd. v. 412765 Alberta Ltd.*, Court of Queen's Bench Alberta, Unreported, No. 9403 03952, Funduk, M., April 7, 1994**

The landlord sought an order for possession on the basis that a lease had expired. The tenant alleged that an oral lease existed for eighteen months, together with a two year renewal option. The landlord claimed that The Statute of Frauds was applicable here.

The Court held that oral leases have the force and effect of leases at will only, except for those leases where the term does not exceed three years and where the rent is at least two thirds of the full improved value of the premises demised. The issue was whether this lease was for a term not exceeding three years. The Court held that the renewal options are not to be included when calculating the term of the lease.

14. ***John Brigis v. St. Lawrence Seaway Authority*, Ontario Court of Justice, Unreported, No. 30,543/92, Kovacs, J., April 8, 1993**

The landlord terminated a restaurant lease for rental arrears. Thereafter, the same parties entered into negotiations regarding a new lease. The landlord sent a letter to the tenant outlining the main terms of the agreement but the letter was never signed by the tenant. The tenant remained in possession and paid rent at the rate set out in the new letter. The tenant again fell into arrears of rent and taxes and the landlord applied for an order of possession. The tenant argued that there was a valid written lease existing between the parties or, alternatively, there was part performance by the tenant.

The Court held that the although the letter sent by the landlord to the tenant outlined the essential terms to form the basis of a new agreement to lease, that letter was never signed by the tenant and hence, there was no written agreement to lease. The only evidence of part performance by the tenant was the payment of rent and that did not amount to part performance. In order to have part performance, the tenant had to establish that it acted in some manner to its detriment and that the landlord did not retain any benefit from these acts. The payment of money was an equivocal act and in itself was not indicative of the existence of a lease.

15. ***Sun Life Assurance Co. of Canada v. Dalgleish and Co. Insurance Brokers Ltd.*, Ontario Court of Justice, General Division, Unreported, No. 16391/89, Borkovich, J., April 29, 1993**

An offer to lease was under negotiation, but no written lease was ever prepared. The tenant went into possession and a dispute arose with respect to additional charges. The tenant claimed that the landlord's agent had misrepresented that there were no additional expenses beyond the gross monthly rent. The Court held that no lease was ever entered into between the parties, that a reasonable rent would be the gross monthly rent without the additional charges, that the tenant was a monthly tenant and that adequate notice had been given to terminate the tenancy.

16. ***Pensionfund Realty Ltd. v. Lawson Mardon Group Ltd.*, Ontario Court of Justice, General Division, Unreported, No. 391323/90, Boland, J., November 2, 1993**

A headtenant subleased portions of the premises to three subtenants. The headtenant advised the landlord that it would not renew the headlease and the landlord approached the subtenants about entering into direct leases. The landlord sent an offer to one of the subtenants, who made certain changes to the offer, signed it and returned it. The subtenant remained in possession after expiry of the headlease and sublease and made certain improvements to the premises. The subtenant subsequently sent a notice to the landlord advising it that it was occupying the premises on a month-to-month basis and would be vacating the premises. The landlord claimed that a three year lease existed.

The Court held that the offer from the landlord was subject to executive approval and that notice of such approval was never given to the subtenant. Hence, no agreement was ever concluded. The draft lease which the landlord sent to the tenant was not consistent with the offer. The conduct of the parties indicated continued negotiations over the terms of a proposed lease, rather than a concluded lease. Accordingly, the subtenant occupied the premises on a month-to-month basis and was entitled to vacate in accordance with its notice.

17. ***Harnox Holdings Limited v. Canada Post Corporation,* Ontario Court of Justice, Unreported, No. 91-CQ-4195, O'Driscoll, J., April 28th, 1993**

Prior to the expiration of its lease, the tenant requested a six month extension. The parties agreed to extend the current lease for six months at an increased rent. The tenant prepared appropriate documentation but the landlord did not execute it. The tenant occupied during the six month extended term, but did not pay the increased rent. Following expiration of the extended six month term, the landlord sued for rental arrears, equal to the difference in rent actually paid by the tenant and the increased rent in the tenant's offer. The tenant argued that the overhold clause contained in its lease applied. That clause stated that if the tenant, with the consent of the landlord, continued to occupy the premises after the expiration of the lease without any further written agreement, the tenant was deemed to be a tenant from month-to-month at the monthly rent set out in the lease. Since the landlord had not signed the documentation sent to it by the tenant, there was no further written agreement between the parties and hence, the overhold clause applied.

The Court held that it was totally irrelevant that the landlord did not sign the tenant's documentation. The tenant did not make the execution of such documentation a condition to the extended term at the increased rent and, accordingly, the failure of the landlord to sign the tenant's documentation could not prevent the Court from enforcing the agreement. The landlord and tenant had an enforceable agreement in accordance with the tenant's offer and such agreement superseded the overholding provision in the lease.

18. ***Dolphin Transport Ltd., v. Weather B Transport Co.,* (1993) 30 R.P.R. (2d), 111, (British Columbia Supreme Court)**

The issues considered in this case were firstly, who were the parties to the agreement, and secondly, whether or not there was a binding lease agreement. The tenant did not advise the plaintiff that the tenant was only a tenant and not the owner of the property. The tenant and the plaintiff entered into a letter of intent, but the tenant later decided not to proceed with the necessary construction to prepare the premises. An application was brought to determine whether the letter of intent constituted a valid and binding lease.

The Court held that if there was an agreement, the parties were the tenant and the plaintiff, and that the landlord was not a party to the agreement. On the issue of whether there was a binding lease agreement, the Court held that it was not necessary that the parties agree upon, and record in writing, each and every detail relating to their proposed relationship of landlord and tenant in order to create a valid and legally binding lease agreement. It was sufficient that there be a meeting of minds as to the essential terms. Although a few details regarding construction and rent payable on exercise of a renewal option were not specifically addressed, there were enough other essential terms present to constitute a binding contract and therefore, the letter agreement constituted a valid and binding lease agreement.

19. ***Hillmond Investments Ltd. v. The Regional Municipality of Peel,* Ontario Court of Justice, Unreported, No. 14632/86Q, O'Leary, J., March 24, 1992**

An offer to lease stated that the term was to commence on the latter of March 1, 1985 or the date on which the tenant was in occupancy of the leased premises, and that it was conditional upon the landlord being able to obtain a building permit to construct the premises without having to provide any additional parking structures. The landlord was aware that the tenant urgently needed the space and expected to be able to take possession within six months after the date of the offer. The landlord encountered problems in obtaining a

building permit. Two years after the date of the offer, the tenant advised the landlord that it could no longer wait and that it was withdrawing its offer. The landlord sued for a declaration that the offer was valid and binding and sought damages for breach of contract.

The Court held that the offer contained a condition precedent, which the landlord had not satisfied and that in order to be valid and binding, an offer to lease must contain a date of commencement and duration of the term. The commencement date can either be a specific date or the offer can provide for circumstances from which the commencement date can be accurately ascertained. The Court held that the offer to lease was not valid and binding, as the commencement date was neither expressed as a particular date or referenced to some date which could be ascertained, such as, for example, the date the premises are fit for occupation.

20. ***Bentall Properties Ltd. v. Zenon Environmental Inc.*, (1992) 23 R.P.R. 204 (B.C.S.C.)**

The landlord sent an offer to lease to the tenant. The tenant advised that its acceptance was conditional on five items, all of which were accepted by the landlord. Subsequently, the parties were unable to agree on the cost of improvements to be made to the premises and the tenant withdrew from the transaction. The landlord sued for damages.

The Court held that the original offer did constitute an offer to lease, that the tenant gave a conditional acceptance and that the landlord had accepted the tenant's condition. A binding agreement existed between the parties and the parties conducted themselves as if a contract had been concluded. The landlord was entitled to recover as damages the cost of designs, drawings, lost rent, lost taxes, and other expenses incurred a result of the tenant's breach of the contract to lease.

21. ***414113 B.C. Ltd. v. Powell River Transport Limited et al.*, Supreme Court of British Columbia, Unreported, No. S0363, Thackray, J., March 11, 1993.**

A lease contained an overhold provision which stated that if the tenant continued to occupy the premises after the expiration of the term and the landlord accepted rent, the tenancy was deemed to be a monthly tenancy subject to the covenants and conditions contained in the lease. The tenant remained in possession after expiry of the term and the landlord brought an action for possession of the premises. The tenant alleged that as a result of negotiations with the landlord following the expiration of the lease, an agreement to lease was signed which allowed the tenant to remain in possession for another three years. The landlord argued that no agreement existed and that there had only been a written offer from the tenant which was unacceptable to the landlord.

The Court held that for there to be a valid agreement for lease, there must be a consensus ad idem. All there ever was was an offer made by the tenant which was unacceptable to the landlord. The offer purported to contain substantial changes to the terms and conditions of the lease agreement. As neither the tenant nor the landlord could agree upon the terms of the agreement for lease, there was no agreement between them and therefore there was no agreement for lease. As there was no further agreement, the tenant held the premises on a monthly tenancy pursuant to the terms of the lease.

22. ***British Columbia (Egg Marketing Board) v. Jansen Industries Ltd.*, (1992) 24 R.P.R. 36 (B.C.S.C.)**

A landlord and tenant of shopping centre premises signed a letter agreement which included a term stating that the agreement was "subject to the execution by the parties of a mutually satisfactory lease agreement". The tenant asked the landlord to prepare the lease, but the landlord did not do so. The tenant took possession of the premises and began constructing leasehold improvements. The tenant then prepared a lease and sent it to the landlord, but the landlord did not execute it. Two and a half years later, the landlord's lawyers prepared a lease which the tenant found to be unacceptable. The landlord sold the property, and the new landlord took the position that no lease agreement existed. The tenant sued both the original landlord and the new landlord, seeking a declaration that the letter agreement was an enforceable lease.

The Court held that the letter agreement was in fact an enforceable lease since it contained the four essentials: the identity of the landlord and tenant, a description of the premises, the date of commencement of the term, and the rent. The term requiring a formal lease was not a condition precedent, but instead was a term of the contract.