NEWS Release

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Electricity Deregulation. Are You Ready?

The deregulation of Ontario's electricity market (i.e. the opening of it to competition) commences May 1, 2002. Are you ready?

Several changes are on the horizon:

- The new competitive environment allows for both electricity retailers and local distribution companies. Consumers may contract with either or both. Setting up the billing arrangement between the electricity retailer and the local distribution companies (LDCs) requires an election for either "Distributor Billing" or "Retailer Billing". Choosing one over the other affects the amount of information appearing on, and who receives, the LDC bill. Issues relating to the accounting aspect of the landlord-tenant relationship may be critical in the consideration of which approach to choose.
- Non-payment to the LDC does not allow the LDC to impose a lien on the property for the unpaid amounts, thereby making stricter security deposit arrangements inevitable - the regulations in this regard are lacking in guidelines and there is potential for significant pressure by the LDCs. Landlord-tenant and related lease negotiation implications may include discussion over whose responsibility it is to administer and fund the security deposits and whether or not interest on the landlord's security deposit held by the LDC is properly recoverable as an operating cost.
- LDCs can turn off the power for unpaid electricity supply, but electricity retailers cannot, leaving electricity retailers with few remedies for dealing with defaults. The landlord-tenant relationship may be affected as tenants seek warranties or guarantees or other security from their landlords as to the provision of electricity. Some tenants may negotiate protection in their leases to allow them to deal with alternate supply arrangements if the landlord defaults.
- We can expect tussling between landlords and tenants, where each wishes to exercise its own independence in choosing a supplier. In the case of a multi-tenanted building, a tenant seeking to place its own arrangements would require a utility company meter installed at the tenant's dedicated service panel. LDCs may not want to pursue such arrangements, but for volume consumers of electricity, it is not unreasonable to envisage supply contracts for multiple locations. The question arises as to whether landlords will need to, themselves, become licensed distributors. If a tenant has the right to arrange its own supplier, landlords may impose the requirement that license agreements for access by the supplier be signed, entailing fees for access and provisions for indemnity.
- Landlords under gross leases are not yet protected by any legislation that would allow them to charge the tenant any increased costs of providing electricity. If the competition does not have the effect of reducing costs, look for this to become a lobbyist's issue.
- Leases may require close scrutiny in terms of liability for interruption in the supply of utilities. To the extent tenants insist on choosing their own retailer and/or LDC, it may be difficult from an evidentiary standpoint to pinpoint the cause of any interruption for the purpose of applying the lease provisions to any given situation. California-style blackouts are not anticipated, but lawyers in lease negotiations will undoubtedly wish to address this worst-case scenario and provide for the consequences to the landlord-tenant relationship, if blackouts occur.
- Cost allocation, where leases require verification of the basis for arriving at the amount charged, may be difficult under the new supply arrangements. Standard lease forms will undoubtedly be modified to include

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greater flexibility in the landlord's allocation methodology and this may prove contentious.

- All costs incurred in relation to procuring electricity may not necessarily be recoverable as operating costs under any given lease. For example, consultant's fees, cost of maintaining metering systems, consumption penalties, and/or procurement/administration costs may not be recoverable under some leases. Many leases do not permit anything more than the cost of the utilities themselves to be passed on, and most leases do not provide for an administration fee. Look for this to change in future lease forms.

This is just the tip of the iceberg in relation to these issues. Stay tuned as the various affected parties gain experience in dealing with this new industry development!

Dollar Store Wars

The decision as to whether the Trustee in Bankruptcy ("Trustee") of Dylex Limited could assign 11 BiWay leases to Dollar A.M.A. Inc. ("Dollarama") was released by the Superior Court of Justice on December 19, 2001.

The court decided that Dollarama's use would be a change in use from that which was permitted in the BiWay leases. Because of the change in use, "Dollarama would not be in a position where it could observe and perform the terms of the leases", as is required under section 38(2) of the *Commercial Tenancies Act ("CTA")*. On that basis, the assignment of the leases was not permitted.

Section 38(2) of the *CTA* permits the Trustee to assign leases where the assignee (a) covenants to observe the terms in the lease and (b) is a person who will "agree to conduct upon the demised premises a trade or business which is not reasonably of a more objectionable or hazardous nature than that which was thereon conducted by the debtor."

The use clause in the BiWay leases varied from location to location, but generally reflected the use of the premises for "the retail sale of family clothing and general merchandise". Many of the BiWay leases tied the use clause to items sold in a majority of the BiWay stores.

The proposed use clause for the Dollarama leases was "the retail sale of a wide variety of general merchandise, typically found in a Dollarama store."

The judge analyzed the use differences in detail, ultimately finding that Dollarama's proposed use was substantially different from the use permitted under the BiWay leases. As a result, the court found that by virtue of the change in use, Dollarama would not be able to observe the terms of the BiWay leases.

The court addressed the issue of exclusive covenants in *other* leases and the breach of those exclusive rights if the Dollarama use were approved. Although the court made its decision on the basis of use clauses alone, Mr. Justice Spence observed that he favoured the view that dollar store exclusives should not be breached.

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