



PDF # 10-4

**Daoust Vukovich Baker-Sigal Banka LLP**  
BARRISTERS & SOLICITORS

## **"TECHNOLOGY AND TENANTS: THE FLEXIBILITY IMPERATIVE, AND THE FIFTH DIMENSION"**

Prepared By: J.E. Dennis Daoust

Prepared For: • Canadian Shopping Centre Law Conference  
Delta Chelsea Inn, Toronto  
March 1-2, 2001

• BOMEX 2000 - Building Owners and Managers Association  
National Conference, Metro Toronto Convention Centre  
November 28, 29 and 30 and December 1, 2000

• Lexpert Seminar - The Annual Commercial Leasing Institute  
Toronto, November 23-24, 2000

## TABLE OF CONTENTS

The Impact on Office Space.....	1
Special Premises - Fixturing and Service Issues.....	2
New Uses for Office Space.....	5
Effect on Market Values.....	7
Impact on Term and Renewals.....	8
Impact on Lease Negotiations.....	9
The Fifth Dimension and the Fifth Party.....	9
Lease Clause Concerns.....	17
Acting Reasonably Clauses.....	23
Conclusion.....	24

## **TEC HNOLOGY AND TENANTS THE FLEXIBILITY IMPERATIVE, AND THE FIFTH DIMENSION**

J.E. DENNIS DAOUST  
DAOUST VUKOVICH BAKER-SIGAL BANKA LLP

Computers, telecommunications, technology, internet resources and commerce, new advances in wireless transmission and reception facilities; the use of fibre optics, copper cable with highspeed capacity, and a thousand other related technology and communications improvements are changing the way we do business. That is also having a dramatic effect on the physical uses of commercial space. The bewildering pace of change, exponential growth rates, mergers, acquisitions, emerging new companies, IPO offerings, advances in communication that allow people to work from home and to work together in real time while occupying distant spaces and locations all mandate flexibility and a greatly enhanced awareness of the communications requirements relating to business in space planning.

### **The Impact on Office Space**

The old model of office space comprised of corridors, discreet offices, boardrooms and a reception area is no longer prevalent in large sectors of the office space market. Open space concepts, local area networks ("LANs") connecting offices spaces and people at different locations within a complex or a building, teleconferencing facilities, paging, email, and other internet based communication systems makes it very difficult to predict space requirements for a tenant on a long term basis. Downsizing, expansions to accommodate mergers,

amalgamations, e-commerce and other changes in the method by which business is conducted all dictate flexibility.

### **Special Premises - Fixturing and Service Issues**

- It is no longer sufficient to consider fixturing and improvements for office premises purely from the perspective of space, and furnishings. The need for flexibility makes open space concepts that accommodate fluctuations in the density of persons per square foot of office space. Equally important, is connect ability of computers and telecom equipment in numerous locations within the premises. It is now necessary to consider office space from a telecommunications and computer friendly perspective. This dictates looking behind the walls, under the floors and above the ceilings, well beyond the physical boundaries of the premises. Washrooms, elevators, a fancy downstairs lobby, an attractive building exterior and interior finishes, and a "prestige location" do not serve adequately for many tenants any more. Following is a list of special issues that can have critical importance to a tenant and may cause very serious difficulties if they are not addressed at the site investigation stage of lease negotiations.
- Availability of rooftop or exterior building antenna or satellite dishes.

- Broadband, highspeed telecommunication cable capacity within the building accessible to the premises.
  
- Compatibility of the building for local area networks ("LANS") where the tenant is likely to require additional space in the building or where its space is not all situated within the same area.
  
- Riser capacity of the building to enable the introduction of additional cable and conduits if required for the tenant's needs and, capacity for additional phone lines.
  
- For some types of tenants:
  - space within the building for back-up generators and, batteries to ensure emergency power.
  
  - storage facilities for diesel fuel and, space capacity within risers or other passageways for diesel lines connecting to the diesel generators.
  
  - upgraded heating, ventilating and air-conditioning capacity.
  
  - availability of redundant telecom lines for backup service.

- availability of equipment room ("point of presence room" or "POP Room") space within the building for installation of telecom equipment by telecom suppliers where the tenant may need service from a supplier that is not already present in the building.
- an environment free of magnetic fields and radiation that might interfere with the use of computer and telecom equipment.
- For tenants such as telecommunication companies ( there are many of them) that need office space for head office operations or business office operations, antenna privileges on the roof and, access to building risers for cables, as well as a POP Room to allow them to service other tenants in the building may be needed.
- For certain tenants, high ceiling heights to accommodate cable trays, or raised floors to accommodate cable raceways within the space will be critical.
- For uses involving high density personnel occupancies, enhanced parking facility capacity, and availability of food (meals) in the complex may be key.

In addition to these critical requirements, a tenant may also be interested in knowing whether the building is served with a concierge service that may be internet based, whether there is an internet based retail shopping drop-off and order facility, web site hosting services within the building and "other nice to have" features that are beginning to appear in downtown core areas in first class buildings.

### **New Uses for Office Space**

The vacancy rate in downtown urban cores is lower now than it has ever been. This is due indirectly to the surge in business activity that is driven by the technology sector but, it is also attributable to a large extent, to the direct impact of technology tenants (tenants whose businesses are based on providing new technology services) and their own requirements for space. Office space that traditionally has been used only for business head offices, professional offices and other conventional uses is now being converted to new uses that maximize attractive features of buildings which in past year may have gone largely unnoticed.

Here are some examples of these new uses:

- Call Centres - Governments, institutions, large service oriented corporations, such as banks, insurance companies, and financial institutions require around the clock capacity to deal with customer enquiries and other customer relations related matters. This involves a high concentration of computer

equipment and telecommunication equipment as well as a high concentration of individuals that occupy space around the clock.

- "Central Office Sites" - With the rapid increase in the number of telecommunication companies that are now competing with Bell Canada in the local exchange, and other telecommunication areas, the practice of leasing "local loops" (local exchange phone lines from other communication carriers), creates a need for a central location to install switching, monitoring, and operating equipment that requires a computer friendly, controlled environment.
- Telecommunication hub sites, antenna farms, etc. - Telecom providers require sites where they can interconnect, monitor and control the various cables and telecom lines that they utilize and, the rapidly increasing use of wireless transmission reception in the telecommunication industry has also created a need for rooftop space with clear site lines to allow telecommunication antenna to operate in a manner that emulates cable transmissions.
- Telecom Buildings - Some buildings are actually being converted and for use solely by telecommunication carriers and service providers because physical features of the buildings such as high ceilings, proximity to conduit trunk lines in the exterior roadways or nearby railways, or proximity to large



antenna sites (i.e. the C.N. Tower), the availability of high capacity HVAC plant, large capacity freight loading facilities, and facilities for diesel fuel storage and power generator sites make the building particularly attractive). Using a building for these purposes reduces the amount of pedestrian traffic through the building and also enables the building owner to convert some elevator banks to riser space to accommodate communication cables. When telecom providers locate in a central location such as this, it enables them to interconnect with each other with great benefits in convenience and cost savings.

- Central Provisioning Offices - Certain companies that install their own networks in cities and surrounding areas need office facilities to allow them to monitor and operate their networks from a central computer control office.

#### **Effect on Market Values**

The developments referred to above are having a dramatic upward effect on market values of office space by creating need for office space. The demand for office space that is benefitted by advanced telecommunication services and technology is also seen as affecting market value. A survey was circulated to building owners and managers by BOMA International between November 1, 1999 and January 7, 2000, to identify what telecommunication services tenants wanted, and the nexus of tenant attraction, retention and telecommunications and technology. The results are reported in the book, "Critical

Connections" published by BOMA, in partnership with Riser Management Systems, OnSite Access, Metro Media Fiber, and SBC. The owner sample represented just under 4 million square feet of space, drawn from records of 2,097 buildings, averaging about 200,00 square feet in size in the US. The survey indicates that although there is little direct evidence that advanced telecommunication services in a building and other technology features allow owners to charge higher rents, owners do believe that there is a strong connection between advanced telecom features, improved tenant retention, and marketability of their buildings.

The converse is that office buildings that lack the capacity to provide broadband telecommunication service, that have risers that are crowded and leave no room for adding extra capacity, will suffer relatively. Even first class buildings that do not have a good riser management strategy or where the management has failed to keep up with the extra services such as internet concierge services and other telecom related benefits will suffer in comparison to others. Moreover for buildings benefitted with access to telecommunication trunk lines, antenna facilities, high ceiling heights, structural capacity for heavy floor loads, generous riser capacity, and facilities for back up generators, and enhanced HVAC, the upward pressure on market value can be dramatic.

#### **Impact on Term and Renewals**

As one might expect, the need for flexibility, combined with ascending market rates indicates shorter initial terms and more renewal terms (at market rates). Initial lease terms of five (5) years for many tenants are common.

### **Impact on Lease Negotiations**

This new dynamic and the requirement to deal with the telecommunication perspective in lease negotiations is changing the way leases must be negotiated and drafted.

### **The Fifth Dimension and the Fifth Party**

Traditionally leased space has been considered in four dimensions: the physical three dimensional aspect of vertical and horizontal boundaries, and position within a building or on a plot of land and, time (being the fourth dimension). Today in most cases, leases must often also be negotiated having regard to a fifth dimension, the telecommunications perspective. Telecommunications for many businesses are the main driver of and vehicle for activity, and profit. This fifth dimension also introduces a very important fifth party into lease negotiations. Traditionally, lease negotiations needed to be conducted only, or at least primarily between the landlord, the tenant. In many cases, those negotiations would also be influenced by the requirements the tenant's lender and the landlord's lender. There must now be, in many cases, a very important fifth party at the negotiating table. Until the CRTC regulations opened up competition in the telecommunication industry in 1997, generally, tenants and landlords took the telecommunication service which came from Bell Canada for granted. There was really nothing to discuss or negotiate. Bell provided service to the building; the tenants contracted directly for that service with Bell, and the landlord was happy to have Bell do so. Competition has created choice and alternatives. This, combined with the rapid development of new technologies and new means of providing telecommunication service, as well as new demands for different types of telecommunication service, has

presented to landlords (owners) of buildings the challenge and opportunity of controlling which service providers will be permitted to have access to their buildings and on what terms. They are standing at the gates and the hoards of telecommunication providers are banging to get in. In addition, many of the risers in buildings have been clogged by copper cables that have been added over the years without much thought to removing surplus cable and to monitoring, auditing or controlling the locations. The risers in many buildings contain a mess of wires that nobody knows what to do with. Telecommunication providers often require POP Rooms, conduit space, rooftop space, and entrance conduit privileges in order to provide telecom services. This right to obtain the use of space within the building does not come automatically or without a price. Therefore, a tenant with special telecommunication needs to examine the business relationships, agreements, and arrangements that are already in place in a building in order to satisfy itself that it will be able to conduct business effectively and that those arrangements will continue to be available to it without interruption at a reasonable price. If the facilities are not there the tenant needs to know on what terms they can be brought in. In both these cases, direct contact and negotiation involving the telecom provider and the building owner are essential. Even the most physically attractive space will be of little value if, from a telecommunication perspective it is inadequate. In the writer's experience, on a daily basis, urgent demands are being made on landlords by tenants or potential tenants for the resolution of access rights agreements in favour of telecom providers from whom the tenant needs service. The tenant may also require supplementary service which will allow the operation of a local area network, or to allow it to communicate directly with another location leased by it in another

building. Solicitors involved with landlord and tenant lease negotiations have always been required to be aware of the common types of related agreements such as storage area agreements, non-disturbance agreements with lenders, parking agreements, notices of lease, and similar agreements traditionally used in conjunction with commercial leases. Now there is an additional set of agreements that need to be considered and with which the solicitor must be familiar. These include:

- (1) rooftop antenna or satellite dish agreements;
- (2) intra building cabling and riser use agreements;
- (3) three party telecom service agreements; and
- (4) telecommunications access agreements.

Each of these agreements involves the installation and may also involve the operation of improvements such as cable, conduit, antennas, connecting equipment, and electronic equipment by a third party in space outside of the leased premises.

Issues such as those listed below will almost always need to be addressed in these agreements:

- access and security restrictions;
- liability issues;
- insurance and indemnity;
- relocation and termination rights;
- standards of construction and operation;
- interference;
- rights to share use of equipment;
- property rights;
- rights to require removal and restoration;
- matters related to utilities, taxes and operating costs;
- fees for access; and

- administration supervision fees, and plans review fees.
  
- It is of great importance to restrict the use of cables and telecommunication equipment that might be installed for the benefit of a particular tenant so that they can be used only to service that particular tenant's needs unless a comprehensive licensing agreement is entered into by the building owner with the telecommunication provider enabling it to provide service to other tenants of the building on terms and conditions and pursuant to a fee structure that are appropriate for that kind of enhanced building access. It is also recommended that the specific nature of the telecommunication service that is to be provided be identified and restricted (i.e. highspeed internet, video, local voice, dial tone, long distance, ISDN connection, DSL, PBX etc. It is important to recognize that cable in many cases is capable of providing a wide range of services and, the building owner may wish to restrict its permission to a limited range.
  
- It is also important to ensure that if the lease is terminated for any reason then the agreement with the telecommunication provider is also terminable by the landlord. A tenant would want a corresponding provision and the telecom provider may also require such a provision for its benefit.

- Restrictions against financing of cable and conduit that might be installed by the telecom provider may be needed to ensure that third party personal property security interests do not result in an encumbrance that affects the marketability of the building.
- Ownership of items that might otherwise be considered a fixture might need to be clarified.
- Releases of liability on the part of the building owner on transfer of the building would normally be sought.
- The building owner may also need for equipment, once installed to be reconfigured where necessary to minimize crowding in the risers and communication pathways in the building and may also require the right to incorporate cable that is installed in those risers by the supplier as part of a central distribution system for the building that may be operated by the building owner through a riser manager or directly.
- An acknowledgment that control of the wire and certain other facilities installed by the provider may be assumed from the provider, the building owner, or by a professional riser manager hired by the building owner may be needed.



- Wireless communications are quickly becoming key to tenants. However, some of the equipment required to provide these services generates radio frequency ("RF") emissions which may cause a health hazard. If the emissions exceed governmentally imposed levels, there may be liability involved not only for tenant but also for the building owner. In some cases a safety plan is required, including training to ensure that tenants, employees and contractors who work in and around RF antennas are aware of the potential risks imposed by RF exposure. Before allowing any antenna to be installed the building owner should first obtain an express representation and warranty from the telecommunication provider that emissions do not exceed the maximum permissible exposure (the "MPE") and an appropriate indemnity should also be required. The tenant for whose benefit the antenna is installed should be required to take responsibility for compliance as well. Generally the following guidelines should be considered:

- (1) dishes or antennas that only receive voice, video or data would not usually violate RF emission standards;
- (2) fixed, wireless competitive local exchange carriers would not normally violate MPE standards but if the roof of the building were used as a HUB for such a fixed wireless provider it may exceed those standards;

- (3) dishes and antennas that both send and receive data are suspect for violating the MPE standards. These devices are used for providing pager services, cellular and PCS phone service, public safety and two way radio services;
  
- (4) broadcast facilities would often (almost invariably) exceed MPE standards.

The agreement with the antenna installer and operator should require it to fund an RF study and implement an RF safety program that meets governmental requirements if necessary. Moreover, it is not enough for the one specific antenna that is installed to meet MPE levels because, the accumulation of antenna in a particular location may push the levels higher than the MPE standards.

For a more comprehensive discussion concerning what is set out above, you may wish to refer to the webpage BOMA.org at [www.boma.org](http://www.boma.org) which describes this phenomenon as it applies in the United States.

### **Lease Clause Concerns**

The telecommunications and technology perspective, also demands in specific consideration of certain key issues in negotiating lease clauses.

- Common Area and Operating Cost Definitions - The possibility that the landlord may established a central telecommunications distribution system in the building to serve the needs of all telecom providers in the building, or may have taken over responsibility or control of in-building wire from the telephone company raises questions of what should be included in the common area and facility definitions of the building. Even where the landlord does not take control of the in-building wire, it may instal or assume obligations in relations of components of telecom cable and equipment in a building. Most common area definitions would allow these facilities to be included as part of the common areas of the building in respect of which the tenant pays its share of operating costs. Keeping in mind that the telecom providers should be paying the landlord a fee for use of this facility or for the privilege of installing its telecom equipment, and would also be required to pay operating costs related to the operation of these facilities and equipment, it is important to clarify what is agreed to on this point. Moreover it is not uncommon for the landlord to receive equity interests in telecom suppliers as part of their access licensing arrangements. Capital costs may be incurred by the landlord to provide cable and telecom facilities for a building. Some landlords are also hiring specialized riser management companies to administer, control, coordinate and operate the telecom facilities in their buildings. Telecom providers will normally attempt to get the landlord to pass the costs of operation, and of management, and administration of the telecom facilities in the building onto tenants so that they do not have to reflect them in their fee structure for services to the tenants. In the "Critical Connections" survey

referred to above, the majority of the building owners did not think it appropriate to pass these costs onto tenants as operating costs but a significant percentage (35%) thought otherwise. It would be of use for both the landlord and the tenant to be clear in the lease document concerning how these costs are to be treated.

- Realty Taxes - The ability of the landlord to generate revenue by providing access to telecom providers to the building may impact the market value of the building and that would in addition, have the impact of increasing realty taxes of which tenants often pay a proportionate share. A well drafted telecom access agreement will entitle a landlord to pass on these incremental realty tax costs to telecom providers but, in many cases it is possible that the tenant will find that it is paying a share of taxes attracted to the building by the telecom service providers. It is a concern which the tenant should address.
- Damage and Destruction Issues - The clauses in leases that deal with the respective rights and obligations of the parties when there is substantial damage to the leased premises or to the building and its systems are usually predicated on the tenant being able to relocate temporarily while the damage is being repaired, and to operate in temporary premises. For many telecommunications based tenants this may not be feasible. The ability to operate is too dependant on cable and facilities within the building outside the premises to permit temporary operations, and the gross revenue potential from their operations may not be realistically insurable because of its

volume . Termination rights are probably more important to these tenants than rent abatement rights.

- Relocation Issues - The right of a landlord to relocate a tenant in a building is usually negotiated having regard to the size and configuration of the replacement space, and the costs of moving and of re fixturing. This is may not be enough for a telecom and technology dependent tenant. Business disruption, connectedness, cable and conduit access and relocation and similar issues will need to be addressed.
- Rights of First Refusal, Expansion and Similar Rights - In determining whether to take advantage of an opportunity to lease additional space in a building, especially if it is not connected to the initial premises, may present logistical problems that can't be sorted out in a short time frame. The tenant may need to know what capacity there is in the building to instal wire or cable to connect to the expansion premises, and may have forgotten when negotiating its expansion right to address the matter of rights to install or alter cable or equipment needed to operate a local area network, or to integrate operations between the new and original premises.
- Exculpatory and Indemnity Clauses - The provisions of a lease requiring the tenant to release the landlord from liability for damage and loss to the tenant's property and business operations, and requiring the tenant to indemnify and save the landlord harmless from claims, (including third party claims) arising from the tenant's use of

the premises, take on a heightened importance. If damage occurs, and the landlord is at fault, the exposure can be daunting. Entire networks might be shut down, large segments of the business community can be affected where they are dependent on the telecom services of or communication with a tenant.

- Insurance Limits - For the reasons stated above, for technology based tenants liability insurance limits of tenants should be high, and it is important for the liability policy to contain a contractual liability endorsement, for the policy to name the Landlord as an insured, for it to contain severability of interest, and cross liability endorsements. Most import also is that the policy should be primary and not call into contribution other insurance of the landlord.
- Telecom Service Control Clauses - Landlords are well advised to include in their leases clauses that specifically recognize the landlord's right to control what telecom service providers are allowed access to the building, that require the tenant to take responsibility for the telecom providers that they bring to the building and that allow the landlord to require the tenant to change providers in certain circumstances.
- Special Termination Rights - Some telecom dependent tenants will need rights to terminate where adequate telecom service to the building is unreliable, or is lost or where the nature of the tenant's business requires telecom service that is beyond what was originally satisfactory, but is no longer adequate, or where telecom service

becomes too expensive due to charges or fees that the landlord imposes on the tenant's telecom provider.

- Transfer and Subletting Rights - These rights are of critical importance having regard to the "flexibility imperative" described earlier in this paper. A tenant may unexpectedly outgrow its space, may need to lease excess space to anticipate business expansion, or may quickly and unexpectedly find that it has surplus space as the result of a merger or takeover. The ability to assign and to sublet without penalty and without lengthy delays and negotiations with the landlord can not be undervalued.
- Representations and Warranties - Tenant's with special needs should consider obtaining representations and warranties from the landlord concerning such matters as:
  - the availability of the range of telecommunication services which the tenant requires for the operation of its business within the building.
  - the names of the telecommunication providers that have access to the building.
  - whether a riser management program is in place within the building and if so, general information concerning the riser management agreement.

- the terms of the license agreements of the telecommunication suppliers for the building and rights to renew those terms.
- the capacity within the building for the introduction of additional telecommunication services to the building.
- the heating, ventilating and air-conditioning, electrical, structural loading capacity and parking availability for the building.
- the guarantee of reasonable access to the in-building wire facilities within the building.
- the right of the tenant to bring in batteries, and other items which may be required for its operation (diesel fuel storage) and diesel lines despite environmental restrictions contained in standard lease forms for the building.

#### **Acting Reasonably Clauses**

Tenants will often seek a clause requiring the landlord to act reasonably in connection with any requests for consent, approval or review of plans submitted by the tenant. In the context of telecommunication matters, this kind of clause can be particularly risky for a landlord. The reason is that the nature of the business of many telecommunication and technology based tenants is such that delays may cause very large financial losses in the form of lost



opportunities. In addition, the difficulties associated with (a) the crowding that exists within the risers and communication pathways of buildings; (b) the complex and technical nature of information, plans, and design issues that are associated with technology tenants needs; and (c) the general level of activity within this sphere make the process of reviewing and approving plans, and the decisions concerning approvals more difficult than in the ordinary sphere of fixturing and improving space. Few landlords are equipped with the staff that are able to address these decisions, reviews and approvals within a time frame that would suit all tenants and their technology and telecommunication suppliers. The potential therefore of making a decision which a court might consider to be unreasonable or, of taking too long to deal with matters is high. A landlord that agrees to act reasonably in connection with all of these matters will invariably find itself threatened with a law suit when the tenant is delayed or blocked from doing what it wishes to do. If a landlord is forced into agreeing to a clause under which it accepts the principle that it will act reasonably and will not unduly withhold or delay approvals, then, it should, as a minimum include an acknowledgment and agreement by the tenant that the landlord will not be exposed to damages should it be determined that it has breached this clause (so long as the landlord acts in good faith). This limits the tenant's remedy to an application for an order forcing the landlord to give its consent. From the tenant's perspective this, is of course, much less desirable because a court application unvariably take time. It is suggested, however, seeking to impose a sanction on the landlord in this situation is simply the wrong approach. It would be better to take a proactive approach by obtaining and providing for the benefit of the landlord, expertise and staff where the landlord lacks it and, giving the landlord as much time as possible in all the

circumstances. An alternative approach may be to include an obligation for the landlord to act reasonably but to include an express acknowledgment that the landlord's resources may be limited, that the landlord is dealing with a large volume of similar requests from other tenants and suppliers, and that the landlord may not be able to deliver its approvals within a time frame that is acceptable to the tenant. The landlord should agree to make efforts in good faith (on a commercially reasonable basis having regard to the benefit to the landlord and the cost of meeting the tenant's time frames), to satisfy the tenant's scheduling requirements.

### **Conclusion**

The rapid changes, new needs, and new challenges that technology and telecommunications have brought to the real estate industry have created a dynamic environment that can be exciting and full of opportunity for the well advised tenant and landlord, but failure to move beyond the traditional, conventional space and time dimensions into a full appreciation of the fifth dimension of technology and telecommunications will result in lost value and poor performance.