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"LEASEHOLD COVENANTS"

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- Covenants Concerning the Use of the Land
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Leasehold Covenants

As noted by all previous speakers at this seminar, covenants in the context of real estate agreements come in a variety of types. This segment of this seminar focuses on covenants made in commercial leases.

Examples of covenants in leases include:

- (a) *by landlord in favour of tenant* – to heat, to repair, to provide utilities, to insure, not to lease to competitors, to provide quiet enjoyment;
- (b) *by tenant in favour of landlord* – to pay rent, to maintain, to carry on only a specified use, not to commit waste, to insure, not to assign or sublet, not to open another outlet within a certain radius of the premises (to protect percentage rent based on the tenant's sales).

Sometimes leasehold covenants, like contractual terms, can be void for uncertainty/ambiguity¹. Other times, leasehold covenants have been held to be unenforceable for public policy reasons².

Some lease terms are actually considered to be separate agreements (e.g. an option to purchase³) or are not covenants at all but are mere conditions or qualifications on rights (e.g. a lease of shopping centre premises may contain a provision stipulating that if a certain number of stores are not continuously carrying on business for a set number of days or months, the rental rate will be reduced. This type of provision carries no promise of stores carrying on business; if the stores do not carry on business, the landlord is not in default and there can be no claim for damages or entitlement to other remedies. The failure to achieve the threshold level of occupancy is a condition that gives rise to an agreed set of outcomes (which typically include reduced rent and, after some time has elapsed without the occupancy levels being restored, a right of termination without liability). But there is no covenant by the landlord to maintain a certain occupancy level which would, if unfulfilled, give rise to a claim for breach.)

¹ *Hirex Holdings Ltd. v. Chrysler Canada Ltd.*, [1991] B.C.J. No. 669 (B.C.S.C.), and *Re: Spike et al and Rocca Group Ltd. et al* (1979), 107 DLR (3d) 62 (PEISC)

² *B.A.C.M. Ltd. and Kowall Holdings Ltd. et al* (1972), 28 D.L.R. (3d) 365

³ *Palmer v. Ampersand Investments Ltd.* (1984), 47 O.R. (2d) 275 (H.C.J.)

In a similar vein, a lease may contain a provision prohibiting the tenant from assigning the lease to a third party without the landlord's consent. The prohibition against assigning is a covenant and the landlord's consent might be considered a mere qualification, such that the landlord's failure to consent would not give rise to a claim for breach, although the courts have held otherwise.⁴

The topic, 'leasehold covenants' could well be explored as an analysis of remedies available for unperformed lease terms. Nevertheless, the brochure for this seminar advertised that the issues to be explored here, in relation to leasehold covenants, would be:

- **Which Leasehold Covenants run with the lease?**
- **Are there certain Leasehold Covenants that are considered to be personal covenants (vs. covenants *in rem*)?**
- **Non compete covenants**
- **Assumption agreements**

This paper is therefore confined to a consideration of the listed topics.

Covenants that Run with the Lease vs. Those that are Personal

Many landlords and tenants believe that upon a sale of a property, the transferee of the landlord's interest is obliged to perform all of the landlord's covenants under the lease and to honour all of the rights granted to the tenant thereunder. Similarly, they believe that upon an assignment of a leasehold interest by the tenant, the assignee is obliged to perform all of the tenant's covenants under the lease and entitled to demand performance of all of the covenants of the landlord therein. This is not necessarily the case.

Leasehold covenants that attach only to the parties to the lease might not transfer to the assignee of either party – they might fall away.

*Williams and Rhodes*⁵ sets out that the “following propositions or rules are laid down in or deduced from the principles formulated in [*Spencer's Case*]⁶:

- (1) all express covenants which touch or concern a thing *in esse*, being parcel of the demise at the time of the demise, whether “assigns” are named or not, run with the land;

⁴ But - that was not the ruling in *Cvokic v. Belisario*, [2008] O.J. No. 2766 nor in *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.*, [1987] B.C.J. No. 1228, in both of which cases, the landlord was liable for unreasonably withholding consent, entitling the tenant in *Cvokic* to damages and in *Lehndorff* to treat the lease as at an end.

⁵ *Williams & Rhodes*, Canadian Law of Landlord and Tenant, 6th ed. by C.A.W. Bentley, J.H. McNair and M.J. Butkus (Toronto: Carswell, 1988).

⁶ *Spencer's Case* (1583), 77 E.R. 72.

- (2) all express covenants which extend to a thing not *in esse* at the time of the demise, but which directly concern or benefit the land, being parcel of the demise, run with the land, if “assigns” are expressly named in the covenants;
- (3) all implied covenants run with the land;
- (4) covenants under which the thing to be done is merely collateral to the land and does not touch or concern the land demised in any sort of way, do *not* run with the land, even though “assigns” are named.⁷

It is virtually impossible to find, from the case law, any meaningful guidance as to whether or when it is necessary/beneficial to import a reference to ‘assigns’ to achieve or avoid a covenant that runs with the lease.

To displace doubts in relation to whether covenants ought to or will run with the leasehold interest or not, it is widely accepted in the commercial leasing industry as a best practice by landlords, that special rights (such as rights to signage, exclusivity, expansion, co-tenancy protection, exclusive parking, no-consent Transfers) should be qualified as only available to the named tenant, to ensure that they do not flow-through to an assignee (if that is the deal).

In the case of *Merger Restaurants v. D.M.E. Foods Ltd.*⁸, a lease clause granting a tenant, its employees and invitees the right to use parking in common with others entitled thereto was held to be a covenant running with the land. It is not difficult to conclude that such a restriction ‘touched and concerned the land’. In *Nylar Foods v. Roman Catholic Episcopal Corp. of Prince Rupert*⁹, the court held:

⁷ Briefly, the meaning of ‘*in esse*’ is ‘in existence’, i.e. this relates to something that exists, i.e. an existing lease interest, a building on a property, not something that will exist in the future.) Williams & Rhodes gives examples of express covenants which touch or concern a thing *in esse*, including the covenant to pay rent, to render services in the nature of rent, to pay taxes, to repair and leave in repair, to repair and renew fixtures, to build a mill in place of an old one, to erect a building, not to erect a building in a prescribed area, to pay for improvements made by the tenant, to conduct business properly, to use the premises for a restricted purpose, to allow access by the landlord to supply utilities, to provide janitorial services, to heat, to insure, and many other covenants. An option to renew the term is a covenant by the landlord to grant the tenant a further term and as such, is a covenant that touches or concerns a thing *in esse*. Hence, a covenant to renew binds the purchaser of the landlord’s interest and is available to the tenant’s assignee, whether or not there is any express statement to that effect.

⁸ [1990] M.J. No. 319 (Man. C.A.) (QL)

⁹ (1988), 48 D.L.R. (4th) 175 (B.C.C.A.)

If it is not entirely clear from the language that the parties intended to create an equity or correlative burden on the land, the restrictive covenant will be treated merely as a personal covenant between the parties who made it.

It follows that if a covenant is merely personal, then it will be enforceable as a matter of the law of contract but not enforceable in accordance with the principles of real property.

A consideration of the so-called special rights is apt, as this is where the need to distinguish covenants *in rem* from covenants *in personam* is most likely to arise. In commercial leases, the most commonly negotiated 'special rights' include: rights to signage, storage, parking, patio use, exclusivity of use, expansion, co-tenancy, no-consent Transfers, rights of first offer and/or refusal, rights to renew.

As noted earlier in this paper (footnote 7), an option to renew is an *in rem* covenant, concerns a thing *in esse* and runs with the land (and correspondingly, the leasehold interest). A restriction against competitors concerns use and therefore touches and concerns land and is an *in rem* covenant.

Many leasehold covenants are not susceptible to easy analysis as to whether they are *in personam* vs *in rem* covenants. Others are more obvious. For example, a landlord may lure an accounting firm tenant to its office building with a promise that the accounting firm will be assured of a minimum level of annual billings (for services to be performed by the accounting firm for the landlord). If the landlord sells the building, is the successor landlord bound to perform that covenant? Probably not.

In the case of *Re Dollar Land Corporation and Soloman*¹⁰, the tenant had paid a security deposit to the landlord. Dollar Land Corporation later purchased the property from the landlord, subject to all the leases pertaining to the property. At issue was whether Dollar Land Corporation was liable to the tenant for the security deposit. In finding that the new landlord was not liable to account for the security deposit, the court held that the covenant to repay the security deposit did not run with the land and was, therefore, not binding on the assignee. Although *Re Dollar Land* concerned a residential tenancy, it has since been followed in several cases concerning commercial tenancies.¹¹

¹⁰ [1963] 2 O.R. 269.

¹¹ See for example: *Devon Estates Limited v. Royal Trust Co.*, [1995] 2 W.W.R. 293 (Alberta Queen's Bench) and *Canada Trustco Mortgage Co. v. Mundet Industries Ltd.*, [1996] O.J. No. 3746 (Ontario Ct. (Gen. Div.)).

A successor landlord under a commercial lease is not liable to account for pre-paid rent paid to a former landlord. This position was first articulated in *Cavell v. Canada Dry Ginger Ale*¹². In that case, the Court held:

Payment of rent before it is due is not fulfillment of the obligation imposed by the covenant to pay rent, but is in fact an advance to the landlord with an agreement that on the day the rent becomes due such advance will be treated as a fulfillment of the obligation to pay rent: see *DeNicholls v. Saunders et al* (1870), L.R. 5 CR 589.

Cavell was followed twenty years later in the case of *Danforth Discount Ltd. v. Humphries Motors Ltd*¹³, dealing with a tenant who prepaid rent to a landlord and was at risk to re-pay the already-paid rent to the mortgagee when it accrued due after notice of attornment was served.

*Devon Estates Limited v. Royal Trust Co.*¹⁴ concerned a tenant who occupied certain office space in Calgary under leases granted by Olympia & York Developments Limited. As the result of a refinancing by Olympia in 1991, Royal Trust became the trustee of bondholders and in 1993 commenced foreclosure proceedings, took possession of the premises and executed a request to attorn to the tenant. The application by the tenant related to possible overpayments of so-called “additional rents” - as was to be determined by an arbitration then underway. These payments had been made to the former landlord. In finding Royal Trust not liable to account for the overpayments, MacLeod J. reviewed a number of cases including two from Ontario (*Dollar Land Corp* and *Chiappino v. Bishop*¹⁵) and several English authorities including a 1987 decision of the Privy Council wherein their Lordships concluded that the decision of the Ontario High Court of Justice in *Dollar Land Corporation* was rightly decided. Moreover, according to MacLeod J., the request to adjust the difference between estimated and actual operating costs was not an adjustment in the amount of rent; it was an obligation to repay a sum of money that was triggered by the arbitration process. The obligation to repay was therefore no different from the obligation to return a deposit.

¹² [1945] O.W.N. 799.

¹³ [1965] 2 O.R. 765 (C.A.).

¹⁴ Supra, note 11.

¹⁵ [1988] O.J. No. 763 (Ontario Ct. (Gen. Div.)).

Similarly, in *Canada Trustco Mortgage Co. v. Mundet Industries Ltd.*¹⁶, the Court held that the tenant had no claim against the current landlord for the return of a GST payment made to the former landlord. In MacFarland J.'s view, the decision of the Alberta Court in *Devon Estates Limited* "may be viewed as good authority in [Ontario]". Moreover, MacFarland J. also pointed out that while the *Devon Estates Limited* decision specifically related to the rights of a mortgagee in possession, the authorities which the Alberta Court relied upon were not all cases which involved a mortgagee in possession.

The test, set down in *Rogers v. Hosegood*¹⁷, is that "the covenant must either affect land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land".

Courts have held that the covenant not to build on adjoining land is a covenant *in rem* that runs with the land¹⁸. But landlord covenants that have been held by the courts as not being ones that touch and concern the land, include: the covenant to grant an option to purchase the lands¹⁹, the covenant to keep other properties (not the leased premises) in repair²⁰, and the covenant not to open a competitive enterprise within a radius from the leased premises²¹.

Following is a brief listing of some tenant's covenants that have been held to touch and concern the land:

- Pay rent²²
- Pay taxes²³
- To repair²⁴
- To insure against fire²⁵
- Not to assign without the landlord's consent²⁶

¹⁶ *Supra*, note 11.

¹⁷ [1900] 2 Ch. 388 at p. 395 (C.A.).

¹⁸ *Dewar v. Goodman*, [1909] A.C. 72 (H.L.); *Ricketts v. Enfield Churchwardens*, [1909] 1 Ch. 544.

¹⁹ *Woodall v. Clifton*, [1905] 2 Ch. 257 (C.A.).

²⁰ *Supra*, note 18.

²¹ *Thomas v. Hayward* (1869), L.R. 4 Ex. 311.

²² *Williams v. Bosanquet* (1819), 1 Brod. & B. 238, 129 E.R. 714, *Parker v. Webb* (1963), 3 Salk. 5

²³ *Mackinnon v. Crafts, Lee & Gallinger* (1917), 33 D.L.R. 684 (Alta. C.A.)

²⁴ *Perry v. Bank of Upper Canada* (1866), 16 U.C.C.P. 404

²⁵ *Douglass v. Murphy* (1858), 16 U.C.Q.B. 113

²⁶ *Goldstein v. Sanders*, [1915] Ch. 549; *Cohen v. Popular Restaurants Ltd.* [1917] 1 K.B. 480

- To buy particular goods from only the landlord²⁷

as well some tenant's covenants that have been held to NOT touch and concern the land:

- To pay a third party annually²⁸
- To pay taxes imposed on another property²⁹
- To replace personal property³⁰

In *Brennan v. Dole*³¹, neighbouring townhouse owners engaged in a dispute over snow removal costs. The townhouse developer executed an agreement with each initial owner that provided for the sharing of costs of snow removal from a common right of way and for resolution of disputes under the Agreement by arbitration. A successor in title to one of the five original townhouse owners did not want to go to arbitration to settle the dispute. She argued that the arbitration clause was unenforceable because it was a positive covenant that did not bind her (as a successor in title who did not specifically assume the obligations of the covenant), and that it did not run with the land. The Court of Appeal agreed. Leasehold covenants are not of the same nature as terms in a cost-sharing agreement between landowners, yet *Brennan* was referred to in a commercial lease dispute, in the case of *678400 Ontario Inc. v. Roehampton Apartments Ltd.*³² (where the landlord and tenant were disputing the rent to be paid for a renewal period). The original lease stipulated arbitration as the dispute resolution mechanism. The landlord and tenant were not the original parties to the lease. The tenant submitted that the agreement to arbitrate is a positive covenant that does not run with the land. The tenant relied on the decision in *Brennan* and the decision in *4348037 Manitoba Ltd. v. 2804809 Manitoba Ltd.*³³. The court rejected the tenant's argument, finding that the arbitration clauses were not collateral covenants to the lease.

²⁷ *Rudd v. Manahan* (1913), 11 D.L.R. 37 (Alta. C.A.), affg 5 D.L.R. 565 (Alta. S.C.)

²⁸ *Mayho v. Buckhurst* (1617), Co. Jac. 438

²⁹ *Gower v. Postmaster-General* (1887), 57 L.T. 527

³⁰ *Gorton v. Gregory* (1862), 3 B & S 90, 122 E.R. 35

³¹ [2005] O.J. No. 3904 (C.A.)

³² [2006] O.J. No. 5021 (Sup.Ct.J.)

³³ [2003] M.J. No. 210. An owner of property was held to be not entitled to impose arbitration against an adjacent owner of property, both of whom bought from predecessors in title who had agreed (between the two of them) to arbitrate certain disputes.

Non-Compete Agreements/Restrictive Covenants

The general rule of common law is that exclusive covenants are in restraint of trade and therefore must be construed restrictively. However, the courts have repeatedly recognized the fact that although such covenants must be construed restrictively, each must be considered in the light of the circumstances in its case.

In *Russo et al v. Field et al*³⁴, one of the leading Canadian cases on the subject, the Supreme Court of Canada acknowledged the general principle that exclusive covenants are covenants in restraint of trade and therefore must be construed restrictively, however, went on to find that the reliance in the general principle should not fail to take into account the factual context in each particular case. The Court made the following finding:

I am therefore of the opinion that the disposition as a matter of public policy to restrictively construe covenants which may be said to be in restraint of trade has but little importance in the consideration of the covenants in the particular case.

Similarly, in *Re: Spike et al and Rocca Group Ltd. et al*³⁵, Mr. Justice McQuade said:

...Generally speaking, covenants in restraint of trade are void at common law; however, such covenants may be deemed to be lawful if in the mutual interests of the parties concerned, and not otherwise contrary to the public interest;...such covenants may be included in leases...

There is ample case law in which the courts are concerned with interpreting the scope and intent of the exclusive covenant in dispute; seldom is it advanced that an exclusive is *prima facie* unenforceable as in restraint of trade and should be rejected out of hand. In the shopping centre context, it is generally accepted that protection from competition is in the best interests of the economic success of all merchants in the shopping centre as well as the shopping centre owner. In *Canada Safeway Ltd. v. Thompson*³⁶, the

³⁴ (1973), 34 DLR (3d) 704 (S.C.C.)

³⁵ (1979), 107 DLR (3d) 62 (PEISC)

³⁶ [1996] M.J. No. 393 (Man. Q.B.) (QL)

landlord covenanted not to lease any space in the mall or expand in any way that would compete with Safeway's food retail operation. The covenant was said to attach to Phase II lands which, at the time, were not owned by the landlord but were contemplated to be acquired by the landlord for future use in the development of the shopping centre. The landlord acquired the adjacent Phase II lands and sold the mall. Then the landlord sold the Phase II lands to the city. The city claimed that it was not bound by the covenant against leasing to competitors, because the covenant was personal to the parties to the lease. The court found that the restrictive covenant was reasonable in scope and was enforceable. Reference was made to the Ontario Court of Appeal decision in *White v. Lauder Developments*³⁷, where Kelly, J.A. stated at p. 427:

For the creation of such a negative easement certain qualifying conditions must be present:

1. The covenant or agreement must be negative in essence;
2. It must affect, and to have been intended by the original parties to affect, the land itself by controlling its use,
3. Two plots of land must be concerned, one bearing the burden and one receiving the benefit, in a sense a servient and a dominant tenement.

Where any of these conditions is absent the covenant will be personal or collateral and will not impose a burden on the servient tenement nor confer a benefit on the dominant tenement.

The Manitoba Court of Queen's Bench found as a fact that it was clear from the lease that the parties contemplated and agreed to certain restrictions on the use to which the Phase II lands would be put if the landlord purchased them. Mr. Justice Clearwater said:

...any ancient or technical rules which might suggest that the parties cannot agree to create an interest in land if and when one or the other of them acquires the land is not, in my view, reasonable in today's market place.

Because at common law, restrictive covenants, in order to be enforceable against both the covenantor and its successors in title³⁸, must be negative in substance and constitute a burden on the

³⁷ (1975), 60 D.L.R. (3d) 419

³⁸ Although arguably, Ss. 4-8 of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 reversed the common law rule that positive covenants do not run with the reversion.

covenantor's lands, covenants for exclusivity of use are typically expressed with the following phraseology:

To the intent that this covenant shall run with the Lands throughout the Term, the Landlord covenants and agrees that it shall not occupy or use, nor suffer or permit to be occupied or used, any of the Lands (other than the Leased Premises), in whole or in part, for or with respect to or in connection with carrying on the business of ...

As previously noted, all restraints of trade are contrary to public policy and *prima facie* void unless they can be justified as being reasonable with respect to the interests of the parties and the public. Reasonableness is determined by considering circumstances existing at the time the contract is made (including the parties' expectations of what may potentially happen in the future)³⁹. The onus of establishing that restraint is in the interest of the parties is on the party seeking to enforce the contract, whereas the onus of establishing that restraint is not reasonable in the public interest is on the party seeking to oppose enforcement.⁴⁰

In *Re: B.A.C.M. Ltd. and Kowall Holdings Ltd. et al*⁴¹, the Manitoba Queen's Bench refused to uphold a restrictive covenant, given by the landlord of a shopping centre to the tenant operating a Kresge's department store, which would have prohibited the leasing or sale of lands within a three-mile radius of the shopping centre to be used for the purposes of a department store. The Court held that a covenant in restraint of trade is *prima facie* void and may only be supported if reasonable to both the interests of the public at large and those of the parties concerned. The Court went on to find that given Kresge's existing location, the three-mile restriction went an inordinate distance beyond the existing Kresge operation and the whole covenant was, therefore, invalid. Despite finding that the covenants were a part of the factors which induced the tenant to enter into the Lease, Mr. Justice Wilson of the Manitoba Queen's Bench held that:

... it may be that, at another level, the viability of such a store may find protection by way of limitations written into the municipal commercial zoning regulations.

³⁹ *Stephens v. Gulf Oil Canada Ltd.* (1975), 11 O.R. (2d) 129 pg. 138-139

⁴⁰ *Ibid.*

⁴¹ *Supra*, note 2.

Beyond that, however, the market is open to anyone who chooses to enter, and the public is entitled to the benefits (and must risk the disadvantages) of free competition as this obtains in such matters.

Assumption Agreements

As is evident from the confusion emanating from the preceding commentary, it would be useful to have a tool that would serve to clarify the answer to, “does/did the covenant run with the land/lease”?

Let’s break down the three types of situations one might encounter, in which a determination of whether the covenant ran with the land might become relevant:

1. original landlord and successor tenant;
2. successor landlord and original tenant;
3. successor landlord and successor tenant.

An assignment by the original landlord or the original tenant does not affect the privity of contract between the original tenant and original landlord (unless the parties expressly agree to a release). However, the assignment ends the privity of estate between the original tenant and original landlord. (When a tenant enters into a lease with a landlord there is not only privity of contract but also privity of estate between them . That is to say, the covenants of the landlord and of the tenant which relate to the conveyance and the real property interest, or which touch and concern the land as distinct from being mere covenants of a personal nature, can be enforced as between them. Privity of estate and tenure are essentially the same thing, in that where they are found to exist, those who hold the estate together are liable to each other to perform the covenants which relate to the estate.) However, covenants of a personal nature (such as an option to purchase) cannot be enforced between parties who are merely connected by privity of estate. Privity estate is always held by the then-current landlord and then-current tenant.

Hence, an assignor of a tenant’s interest remains liable in contract although it no longer has the estate (although a subsequent assignor will only remain liable in contract if it contracted to be bound, ie if it took on privity of contract in addition to the privity of estate that arose during its tenure).

It is common in commercial leasing practice to require that the assignee of a tenant's interest under the lease sign an agreement in which it covenants, in favour of the landlord, to perform the obligations of the tenant under the lease. This type of "assumption agreement" will create the privity of contract whereas the assignment of the interest created the privity of estate - with the result that for the landlord, both a contractual and a property law relationship are available when considering remedies for unfulfilled lease terms. In this manner, a 'gap in coverage' is avoided (if any covenants failed to attach to an assignee), and the assignee picks up each and every covenant of the tenant, whether or not it would have otherwise run with the land. A sample form of assignee covenant/assumption is attached as Exhibit "A".

It is far less common in commercial leasing practice that a tenant obtains a covenant, from a purchaser of the landlord's interest in the lease, to perform and observe all of the terms and conditions of the lease. Under the *Commercial Tenancies Act*⁴², ss.4 - 8, the common law rule that positive covenants do not run with the reversion was, by and large, reversed. But it is not clear that these provisions will help the tenant in all disputes against a successor tenant over its failure to perform a lease covenant.

It is a common step in real estate conveyancing transactions that the vendor extracts from the purchaser an assumption of all leasehold covenants. A sample form is attached as Exhibit "B". Note that the benefit of the assumption of covenants flows only to the vendor, ie this not an agreement that benefits a tenant against a successor landlord.

Fundamentally, assumption agreements are useful and reliable as a means of confirming which leasehold covenants transfer to a successor.

⁴² R.S.O. 1990, c. L.7

EXHIBIT "B"

ASSIGNMENT & ASSUMPTION OF LEASES

THIS ASSIGNMENT made as of the * day of *, *.

B E T W E E N:

*
(hereinafter referred to as the "Assignor")

OF THE FIRST PART,

- and -

*
(hereinafter referred to as the "Assignee")

OF THE SECOND PART.

WHEREAS the Assignor is the owner of the lands and premises municipally known as *, and legally described as *, identified by PIN * (the "Property");

AND WHEREAS the Assignor and the Assignee entered into an agreement of purchase and sale accepted on *, as amended from time to time (the "Purchase Agreement") pursuant to which the Assignor agreed to sell and the Assignee agreed to purchase the Property;

AND WHEREAS the Purchase Agreement provides that on closing the Assignor shall transfer and set over unto the Assignee all of its right, title and interest in all leases, indemnities, agreements to lease and tenancies of space in the Property which leases are listed in Schedule "A" hereto (the "Lease Documents");

AND WHEREAS the Purchase Agreement further provides that on closing, the Assignee shall be given possession of the Property subject to the Lease Documents.

NOW THEREFORE THIS ASSIGNMENT WITNESSETH that in consideration of the sum of TWO (\$2.00) DOLLARS now paid by each of the parties to the other, and other good and valuable consideration (the receipt and sufficiency of which is hereby acknowledged by each party), the parties hereto agree as follows:

1. The Assignor hereby assigns, transfers, sets over and conveys unto the Assignee, its successors and assigns, all of its right, title, estate and interest in and to the Lease Documents and the benefit of all the covenants therein by the tenants.
2. The Assignor shall indemnify and save harmless the Assignee from and against any and all actions, suits, costs, losses, charges, demands and expenses arising as a result of any default in the performance or observance by the Assignor of the covenants and obligations to be performed or observed by the landlord under the Lease Documents occurring or arising prior to the delivery of this Assignment.
3. The Assignee does hereby covenant and agree to perform all the obligations of the landlord under the Lease Documents arising after the delivery of this Assignment. The Assignee shall indemnify and save harmless the Assignor from and against any and all actions, suits, costs, losses, charges,

demands and expenses arising as a result of any default in the performance or observance by the Assignee of the covenants and obligations to be performed or observed by the landlord under the Lease Documents occurring or arising after the delivery of this Assignment.

4. The parties agree that this Assignment may be executed in counterparts and such counterparts together shall constitute one and the same instrument.
5. This Assignment shall enure to the benefit of and shall bind the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF the parties have hereunto executed this Assignment.

*

(Assignor)

Per: _____

Name:

Title:

Per: _____

Name:

Title:

I/We have authority to bind the Corporation.

*

(Assignee)

Per: _____

Name:

Title:

I have authority to bind the Corporation.

SCHEDULE "A"

Particulars of Leases