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"LANDLORDS, TENANTS AND TECHNOLOGY"

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LANDLORDS, TENANTS AND TECHNOLOGY

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Technology's impact on business requires an enhanced awareness of the communications requirements relating to business and space planning and a new expanded perspective in lease negotiations.

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. It is now necessary to consider office space from a telecommunications perspective. This dictates looking behind the walls, under the floors and above the ceilings, well beyond the physical boundaries of the premises and into the risers, communications pathways, telephone closets, equipment facilities, and sometimes into the roof of the building. Following is a list of special issues that can have critical importance to a tenant and may cause 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") or wide area networks ("WANS") may be important if a tenant needs to occupy space that 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 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.

New Forms of License Agreements and Lease

The TLA

The impact of new developments in the telecommunication industry has necessitated the development of new forms of agreements to allow parties to address the need for cable and other facilities to be installed and used outside of the leased premises. The best starting point for considering these agreements is the comprehensive agreement typically entered into between a building owner and a telecommunication services provider (a "TSP") to allow the TSP to install equipment, and cable in a building and to market and provide its services to tenants and occupants of the building. This form of agreement, commonly referred to as a "TLA" (telecommunications license agreement) has some similarities to a lease because it will usually make provision for the TSP to have the use of an equipment room or a portion of an equipment room for the installation of its switching and other telecommunications

equipment and will sometimes also give to the TSP the right to use a portion of a roof area. However, because the agreement makes provision for the installation of cable throughout the building and governs activities that affect the risers, communications pathways, and various other components of the building which form an in-building network, the space for which is shared among providers, the form of agreement is usually that of a license agreement and not a lease. It is not within the scope of this paper to deal with the details of typical TLA's because this paper is concerned primarily with the clauses and agreements that landlords and tenants need to deal with tenants' technology and telecommunication needs (including internet and data services). However many of the concerns addressed in the typical TLA must also be addressed in agreements between landlords and tenants that address telecommunication facilities. The TLA, which tends to be comprehensive, is a kind of "granddaddy" to the other forms dealt with in this paper. For that reason a check list is attached as Exhibit 1 of this Agreement. It provides insight into the content of typical TLAs. The check list is also useful because it identifies several areas of concern that must also be addressed in the several forms of agreement that need to be completed between a landlord, a tenant and the tenant's communications facilities or service providers.

Incidentally, the writer has prepared on behalf of the Canadian Institute of Public and Private Real Estate Companies, (CIPPREC) a Model TLA which is now being circulated for comment to the members of CIPPREC and to the telecommunication industry and is intended to be made available to the public when it is finalized.

The Bay Station License (Lease)

Another form which has been developed and will inevitably be required to be used by any building owner with a tall building is the so called "Bay Station" form. This form is essentially, a form of license or lease of a roof top area upon which the licensee (or tenant) installs antennae which serve as relay or rebroadcasting base. The licensee or tenant obtains

no right to install cable within the risers of the building or to provide telecommunication services to the tenants of the building. It is a simpler form of agreement than the TLA but, there are a number of points that require special attention. For example where antennae are involved, radio frequency emissions can be a concern. In addition, aesthetic concerns, roof top safety, and structural issues associated with antennae need to be addressed. A sample is attached as Exhibit 2.

New Telecom Related Clauses and Forms of Ancillary Agreements

A tenant with special telecommunication needs must 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 and at a reasonable price. If the Tenant's proposed telecommunications service provider has not signed a TLA with the building owner, the tenant may encounter delays and may even have to change its provider. The situation with which we are most familiar involves the tenant obtaining its telecommunication needs from whatever TSP is already serving the building (in Eastern Canada invariably this would be Bell Canada until competition was opened up in 1997). In a situation where the service provider is already situated within the building and has signed a TLA with the landlord, matters can proceed with very little, if any negotiation. Where the TSP (for example Bell) installed its equipment but has not signed an access agreement with the building owner delays and unexpected cost can be incurred. The building owner may take the position that it will not permit the TSP to expand or extend its facilities if expansion or extension is needed to serve the tenant. To date, Bell Canada and the building owner industry have not settled a mutually acceptable form of access agreement and some building owners would prefer to see tenants utilize other service providers until a mutually satisfactory form is settled. If the TSP has not signed a TLA for the building, the building owner may simply refuse to allow it to install equipment needed to serve the tenant. There may not be room in the building to

accommodate the additional equipment and in any case, the landlord would not be happy to have the TSP install equipment without a comprehensive TLA signed. These agreements and the negotiation of fees associated with the agreements can be time consuming and costly.

When time does not permit the negotiation of a comprehensive TLA with the tenant's provider, a temporary interim, or restricted access agreement might be entered into to allow the TSP to provide service solely to the tenant (and no others) in the building. Also, the tenant may require supplementary cables or facilities which will allow the operation of a local area network to allow it to communicate directly with other locations leased by it or by other related suppliers, or companies in other buildings. Frequently the tenant and the telecom service provider need to obtain so called "dark fibre" or additional cable to be installed by a fibre network owner, such as Toronto Hydro, Hydro One, or Stream Intelligent Networks and access agreements allowing installation by these providers will need to be settled.

The balance of this paper will deal with the specific types of clauses and forms of agreements that these special needs demand.

Telecom Facilities Clauses and Third Party Agreements

Where it is determined that the tenant does have special requirements a set of clauses ("telecom facilities clauses") will be required. Attached as Exhibit 3 is a schedule of clauses that are intended to address these needs at the juncture of negotiations when they need most to be attended to. Note also that these clauses contemplate the need for additional agreements to be entered into with other parties. When the special telecommunications requirements of the tenant and these other agreements are not addressed during the initial phases of negotiation and the needs of the tenant do not present themselves until after the deal is completed, the landlord and tenant relationship will be strained and, unexpected

delays, expense and frustration will occur. This will be aggravated by the fact that in many cases the participation, cooperation and agreement of additional parties such as a TSP or a dark fibre provider may be required. If a TLA has not been signed with the Tenant's proposed TSP, an interim or restricted access agreement might need to be settled with the TSP which would enable the service to be provided solely to the particular tenant. It may also be necessary to have cable installed by a dark fibre provider that does not provide telecommunication services through the cable which it installs. The dark fibre provider would be retained by either the tenant or the TSP to install the cable required to enable the TSP services to be provided to the tenant or to enable the tenant to obtain connection with other locations leased or operated by it either in the building or elsewhere. Attached to this paper as Exhibits 4 and 5 respectively are a sample of a TSP Restricted Access Agreement and, a Dark Fibre Restricted Access Agreement which illustrate the forms of agreement that may be required in conjunction with the lease to enable the tenant to install the facilities that it requires.

It should be apparent from what is stated above that in addition to telecom facilities clauses set out on Exhibit 3, new forms of agreement must now be added to the list of agreements with which solicitors involved in commercial leasing have already become familiar. Now, in addition to such forms of agreement as Storage Area Agreements, Parking Space Agreements, Non-Disturbance Agreements, and Attachment Agreements, the solicitor involved with leases of commercial space must become familiar with:

- (a) TSP Interim Restricted Access Agreements (Exhibit 4);
- (b) Dark Fibre Restricted Access Agreements (Exhibit 5);
- (c) Tenant Roof Top Antenna Agreements (these are similar to the Bay Station Antenna Form attached as Exhibit 2, except that they allow for the tenant to install cabling within the communication pathways through the risers of the building to connect the

leased premises to the roof area where the antenna is situated). A sample is attached as Exhibit 6; and

- (d) Inter Premises Cable Connection Agreements (These agreements are frequently needed when a tenant operates within a local area network or wide area network which links its several business locations or which may link key locations or business centres associated with the tenant's business operations). A sample is attached as Exhibit 7.
- (e) Uninterrupted Power Supply ("UPS") Facilities Agreements (These agreements are needed to enable the tenant to install back up generators, batteries, store fuel, and install fuel lines to ensure that interruptions of electricity will not disrupt the operation of the tenants business in the premises).

The content of the last three (3) forms of agreement noted above (the Tenant Antenna Agreement, Inter Premises Connecting Agreement, and the UPS Agreement) is contained in the Telecom Facilities Schedule attached as Exhibit 2 and discussed above. In the situation where the need for these facilities has not been addressed until after the lease has been signed a separate agreement will need to be negotiated or, an amendment of the lease will be required. This might be achieved by simply agreeing to attach the telecom facilities schedule to the lease as an additional schedule or, a separate agreement might be entered into that contains the relevant content of the schedule. The Exhibits attached as No's 6 and 7 are examples of such agreements. I have also attached as Exhibit 8 a rider setting out clauses that would be useful in a UPS agreement.

Common Provisions

Listed below are a number of points which will almost invariably need to be addressed in whichever form of agreement is used in any of the circumstances noted above:

- Access and Security Restrictions - Restrictions on the time, routing, method of access and activities of the tenant or the service provider are particularly important having regard to the fact that sensitive areas of the building and sensitive equipment within the building are likely to be impacted by the activities contemplated by the agreement.
- Insurance - Exculpatory Clauses and Indemnity Provisions - It is essential that thorough understanding of the kinds of activities, the services to be installed, the contractors involved, and the risks associated with these activities be fully understood and addressed in specifically tailored insurance, release, and indemnity clauses. Generally, it is not sufficient to simply rely upon the insurance and indemnity clauses that are already contained in the lease document because these clauses are not drafted with the particular exposures in mind that telecommunications facilities will bring to a building. It is critical to keep in mind that telecom facilities are often connected to networks that may impact operations of third parties over a wide area and the potential for damages arising from disruption or interruption of use of the facilities can be very high and extensive.
- Relocation and Reconfiguration - When network facilities and other kinds of equipment are installed by a third party in a building the probability that a need to relocate or reconfigure that equipment will arise at some time during the term is high. It is critical to include provisions enabling the building owner to relocate the equipment and facilities at the tenant's expense or at the expense of a third party.
- Plans and Specifications - The landlord will need to have a right of approval of all plans and specifications and they must be prepared in accordance with appropriate engineering standards. A related requirement concerns the need to have as-built drawings available at all times and to ensure that all cable that is installed is

labeled in a very careful and thorough manner to avoid the risk of inadvertent damage and to enable building management to function properly.

- Interference - Telecommunications equipment may interfere with other systems or equipment in the building or with other telecommunications facilities. The risk associated with this needs to be addressed. Typically the risk would be placed upon the tenant or the service provider.
- Rights to Share Use of Equipment - Telecommunications equipment is often capable of serving the needs of more than one user. This might involve consolidating facilities to a central distribution system or, enabling use or partial use of equipment installed by or on behalf of a tenant by third parties.
- Property Rights - It is necessary invariably to clarify whether the nature of the right granted to the tenant or the service provider is a lease, an easement, or a license or some combination of those rights. Clarity concerning this intent is needed to ensure that the appropriate legal consequences and incidences associated with the rights are understood in the agreement.
- Right to Require Removal and Restoration - Typical provisions in a lease requiring the tenant to remove its leasehold improvements would not be sufficient to deal with the requirement to remove cabling and other telecom facilities that are installed by the tenant outside of the premises. These need to be addressed separately. Also, the landlord may wish to retain ownership of certain facilities that are installed by the tenant (usually cable). Often, the cost of removing cable and conduit compared to the usefulness of the cable and conduit once removed does not warrant the expenditure. The building owner will therefore often require that certain items of equipment be left behind for its ownership and use. Clarification is also required concerning whether items installed by a tenant or provider are to be treated as fixtures, chattels, or removable trade fixtures. In any case, where items are removed, restoration needs to be provided for.

- Utilities Taxes and Operating Costs - The installation, operation and use of telecom facilities in a building can result in utilities, real property taxes, and other operating costs being attracted to the building. Generally these costs are passed on to the tenant or to the service provider.
- Access Fees - Where special rights to install and operate telecom facilities are included in the building a fee is normally recovered. It is in connection with this fee negotiation that matters become most problematic if the tenant's right to install and use telecom facilities outside of the premises was not addressed at the point when the rent was being negotiated.
- Administration Supervision and Plans Review Fees - The cost of administering, supervising, and reviewing and improving plans and work all need to be addressed and it is usual to provide for these costs to be paid by the tenant and marked up by an administration fee.
- Restrictions on Use - The specific purpose and use of the telecom facilities needs to be specified. Otherwise, the problems pertaining to interference can develop and, in addition the building owner's ability to control access, and the marketing of telecom access services to the building will be compromised.
- Term - It is important to deal specifically with the term in respect of which rights to install and operate telecom facilities are given. This is particularly important in connection with third party providers. Generally, the agreement would provide that upon termination or expiry of the lease the rights of the third party provider to continue to keep their cable and equipment in the building would end.
- Restrictions on Financing - If personal property security interests are granted to lenders in respect of in-building wire cable, conduit, or other items of equipment that cannot easily be removed from the building, the building owner may find its ability to operate the building, to establish common telecommunication distribution facilities, and to obtain removal of facilities will be impaired.

- Occupational Health, Safety and Environmental Issues - Certain types of antenna equipment can cause radio frequency emissions that are dangerous to health. In addition, electronic equipment, and other equipment installed by service providers or tenants may impact the health and safety of occupants of space. Environmental concerns may also be problematic especially where batteries, transformers, and similar equipment are involved. If there are asbestos substances within the building these may be disturbed by the activities of the service provider and, there may be cost implications if disclosure of these substances has not been addressed.

The points noted above are simply set out to illustrate the kinds of considerations that must be coordinated among the landlord, the tenant, and the telecom service providers as well as the telecom facility providers. The exhibits attached illustrate how these various concerns have been dealt with but, it must be noted that each of these forms is merely a phase in the evolution of these arrangements. On a daily basis, new issues, and new ways of addressing issues are evolving in the industry. The attached exhibit should not be considered as being all inclusive, or definitive of the appropriate provisions.

Lease Clause Concerns

The telecommunications and technology perspective, in addition to demanding new clauses and agreement related leases, also demands that lease clauses with which leasing lawyers are now familiar be considered from a new perspective. Here are some examples:

- Common Area and Operating Cost Definitions - The possibility that the landlord may have 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 install 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. 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 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. An example of such clause is attached as Exhibit 9.

- 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.

- 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 takes time. It is suggested, however, that 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 new dimension of technology and telecommunications will result in lost value and poor performance.