

PROVISIONS TO BE CONSIDERED	NOTES
<p style="text-align: center;">INTRODUCTION</p> <p>Purpose and currency of checklist. This checklist is designed to be used with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) and COMMERCIAL LEASE PROCEDURE (B-10) checklists. It must be considered in relation to the particular facts in the matter at hand, and augmented and revised as appropriate. This checklist is primarily intended for use by the lawyer acting for the landlord. It is current to September 1, 2016.</p> <p>New developments:</p> <ul style="list-style-type: none"> • Law Society Rules. On July 1, 2015, revised and consolidated Law Society Rules came into effect. See www.lawsociety.bc.ca/page.cfm?cid=4089&t=Law-Society-Rules-2015. • Articled students permitted to act as commissioners for taking affidavits. Effective September 1, 2015, articled students and temporary articled students are prescribed as persons who are commissioners for taking affidavits in British Columbia (B.C. Reg. 142/2015, pursuant to s. 60(1) of the <i>Evidence Act</i>, R.S.B.C. 1996, c. 124). Principals remain responsible for students' actions and will need to ensure that students understand the effect of acting as commissioner. • Code of Professional Conduct for British Columbia (the "BC Code"). In July 2015, rule 3.7-9 was amended to require that a lawyer promptly notify the client, other counsel, and the court or tribunal of the lawyer's withdrawal from a file. Rule 3.6-3, commentary [1] of the <i>BC Code</i> was amended in June 2015 regarding the duty of candour owed to clients respecting fees and other charges for which a client is billed. <p>Of note:</p> <ul style="list-style-type: none"> • General duty of honesty in contractual performance. In <i>Bhasin v. Hrynew</i>, 2014 SCC 71, the Supreme Court of Canada recognized the general duty of honesty in contractual performance: parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of a contract. • Additional resources. See <i>Commercial Leasing: Annotated Precedents</i>, looseleaf and online (CLEBC, 1996). <p style="text-align: center;">CONTENTS</p> <ol style="list-style-type: none"> 1. Initial Contact 2. Date of Agreement 3. Introductory Clauses 4. Identification of Parties 5. Description of Premises 6. Words of Present Demise 7. Term of Lease 8. Rent 9. Use of Premises 10. Initial Construction to Complete the Premises 11. Alterations and Improvements 12. Maintenance and Repairs 13. Services to Be Furnished by Landlord 14. Common Areas 15. Parking 	

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<p>16. Operating Costs 17. Taxes 18. Utilities and HVAC 19. Insurance and Indemnity 20. Damage and Destruction 21. Changes in Parties 22. General Rights of Landlord 23. General Covenants of Tenant 24. Tenant's Options 25. Merchants' Association or Promotion Fund for Shopping Centre 26. Registration 27. Overholding 28. Termination of Lease 29. Default 30. Interpretation and General Provisions 31. Third-party Indemnity</p>	
<p>CHECKLIST</p>	
<p>1. INITIAL CONTACT</p>	
<p>1.1 Confirm compliance with Law Society of British Columbia Rules 3-98 to 3-109 on client identification and verification, and complete the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist.</p>	
<p>2. DATE OF AGREEMENT</p>	
<p>3. INTRODUCTORY CLAUSES</p>	
<p>3.1 Whether made under the <i>Land Transfer Form Act</i>, R.S.B.C. 1996, c. 252 (consider whether this is advisable). 3.2 Recitals setting out the special features of the transaction. 3.3 Consideration clause.</p>	
<p>4. IDENTIFICATION OF PARTIES</p>	
<p>4.1 Landlord. 4.2 Tenant. 4.3 Third-party indemnifier (if any).</p>	
<p>5. DESCRIPTION OF PREMISES</p>	
<p>5.1 Legal description and street address. 5.2 Clear description of the part leased, including: .1 Reference to a marked plan attached as a schedule (avoid using colours as they will not show on black and white photocopies/scans). .2 Area, or procedure for calculating the area (e.g., indication that the area is grossed-up for common areas and hallways), which must accord with the plan.</p>	

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<p>.3 Boundaries relative to outside walls, corridor walls, walls of demise, windows, etc.</p> <p>.4 Description of premises vertically, if necessary.</p> <p>.5 If the premises to be leased are an unsubdivided portion of a legal lot, consider, the effect and application of <i>Land Title Act</i>, R.S.B.C. 1996, c. 250, ss. 73(1)(b) and 73.1. Note that s. 73(3) provides that s. 73(1) does not apply to a subdivision for the purposes of leasing a building or part of a building. <i>International Paper Industries Ltd. v. Top Line Industries Inc.</i> (1996), 20 B.C.L.R. (3d) 41 (C.A.), held that any lease that offends s. 73 is not only unregistrable, but unenforceable as an illegal contract. However, in 2007, s. 73.1 was enacted, providing that a lease or an agreement for lease of a part of a parcel of land is not unenforceable between the parties by reason only that it does not comply with Part 7 of the <i>Land Title Act</i> or that an application to register it may be refused or rejected. In <i>Idle-O Apartments Inc. v. Charlyn Investments Ltd.</i>, 2010 BCCA 460, the court held that while s. 73.1 is remedial legislation, in effect to prevent the hardship caused by <i>Top Line</i>, it does not operate retroactively. Subsequently, in <i>Idle-O Apartments Inc. v. Charlyn Investments Ltd.</i>, 2014 BCCA 451, the court held that where the non-retroactive nature of s. 73.1 results in hardship, equitable remedies may be appropriate. The court upheld the trial judge's use of proprietary estoppel as a basis for granting a replacement lease but emphasized that there can be no retroactive reliance on s. 73.1 in reaching such a conclusion. The court varied the trial judge's finding that the replacement lease should be under the exact same terms as the lease signed by the parties, saying that the terms should strike a balance between the parties' expectations and the public policy impacts of creating an equitable exception to the requirements of the <i>Land Title Act</i>.</p> <p>5.3 Whether the landlord has the right to expand, relocate, change, or upgrade the leased premises or development containing the leased premises, or the right to alter the design or merchandising plan or the common areas or facilities, before or during the term, and if so:</p> <p>.1 The tenant's remedy, if any, if there is a material change (if you are acting for the tenant, consider limits on the landlord's rights).</p> <p>.2 Amendments to rent, additional rent, calculation of proportionate share, etc.</p> <p>.3 Qualifications as to location, size of, and access to new premises.</p> <p>.4 Improvement allowances, payment of undepreciated cost of existing improvements, and extent of landlord's and tenant's work.</p> <p>.5 Minimum period, if any, of the remaining term in which relocation can occur.</p> <p>.6 Notice requirement.</p> <p>5.4 Specified exceptions (e.g., the exterior face of the building, roof areas not leased to full floor tenants, such as vertical shafts for elevators or utilities). Describe such exceptions carefully, and if applicable, refer to a marked plan attached as a schedule.</p> <p>5.5 Specified appurtenances included in the demise, such as parking (see item 15), basement, storage space, fixtures, furnishings, machinery. Describe them carefully. (If equipment is leased, consider registration requirements under the <i>Personal Property Security Act</i>, R.S.B.C. 1996, c. 359.)</p>	

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<p>5.6 Right to use common areas (see item 14). (If the premises are a strata lot, consider whether an easement is required from the strata corporation.)</p> <p>5.7 Obligation or right of the landlord to build expansion space in the future. Set out details very clearly.</p> <p>6. WORDS OF PRESENT DEMISE</p> <p>6.1 Include the landlord’s agreement to lease premises to the tenant, and the tenant’s agreement to lease premises from the landlord.</p> <p>7. TERM OF LEASE</p> <p>7.1 Commencement date:</p> <ol style="list-style-type: none"> .1 Whether it is tied to completion of the work, and if so: <ol style="list-style-type: none"> (a) Method for determining when completion occurs and for documenting the commencement date. (b) Whether, in the event that the tenant finds the premises to be deficient, the tenant has the ability to give notice within a specified time after taking possession, or whether taking possession is deemed acceptance. .2 Whether it is tied to an official opening date, and if so: <ol style="list-style-type: none"> (a) Whether the date is certain, is subject to change by landlord, or is yet to be determined (and the tenant is to be notified). (b) Whether the tenant must open on that date and not before. (c) Whether the date is contingent on anything (e.g., the opening of specified other businesses at the same time). .3 Whether it is dependent on any previous tenant vacating the premises. .4 Whether it is dependent on landlord obtaining financing. .5 Insert “outside date” or other mechanism to avoid certainty problems. <p>7.2 Consequences of landlord’s failure to deliver the premises on the commencement date, for example:</p> <ol style="list-style-type: none"> .1 Cancellation of the lease; whether the mortgagee is entitled to cure the default. .2 Adjustment of the commencement date: <ol style="list-style-type: none"> (a) Whether this is to involve an abatement of rent and other charges. (b) Whether there is any effect on the term of the lease and expiry date. (c) Whether a memorandum is required between the parties to confirm. .3 Liquidated damages for delay. .4 Force majeure considerations. <p>7.3 Whether the tenant may take possession prior to commencement and, if so:</p> <ol style="list-style-type: none"> .1 Obligations as to payment of rent and other charges. .2 Whether the remaining provisions of the lease apply (e.g., insurance, utilities). .3 Whether there is any effect on the term of the lease. .4 Length of fixturing period, and whether the tenant can begin operating from the premises before the commencement date. 	

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<p>.5 Whether such occupation is exclusive or is shared with the landlord (e.g., if the landlord is concurrently undertaking landlord's work).</p> <p>7.4 Whether offer to lease merges on commencement or taking of possession.</p> <p>7.5 Whether any of the tenant's obligations begin before the commencement date.</p> <p>7.6 Length of term and expiry date.</p> <p>7.7 Whether renewal terms are defined as an extension of the lease term, or separately (see item 24.3).</p> <p>8. RENT</p> <p>8.1 Payment details:</p> <p>.1 Time of payment (e.g., monthly installments to be paid in advance on the first day of each month).</p> <p>.2 Place at which payments are to be made.</p> <p>.3 When payments are to commence (e.g., any provision for a rent-free period).</p> <p>.4 Provision for partial months.</p> <p>.5 No deductions or set-offs.</p> <p>.6 Whether there is interest on late payment of rent, additional rent, or other charges (must comply with the <i>Interest Act</i>, R.S.C. 1985, c. I-15).</p> <p>.7 How payments of percentage and additional rent are to be made (see items 8.3 and 8.4).</p> <p>.8 Provision that the obligation to pay survives the lease where calculations are not made until after the termination of the lease.</p> <p>8.2 Basic or minimum rent:</p> <p>.1 Amount of annual rent and installments.</p> <p>.2 Adjustment of rent necessitated by use of estimates if the rentable area changes, or is not the same as the specified estimate.</p> <p>.3 Whether the rent is fixed for the term or adjusted at specified intervals to take into account inflation, market value, etc.</p> <p>.4 Methods for calculating the rent and adjustments (e.g., Statistics Canada cost of living adjustment, fair market rental value, arbitration).</p> <p>.5 Post-dated cheques or automatic debit payments.</p> <p>8.3 Additional rent (required payments should be characterized as rent):</p> <p>.1 Taxes payable by the landlord (see item 17).</p> <p>.2 Operating costs (see item 16).</p> <p>.3 Insurance taken out by the landlord (see item 19).</p> <p>.4 Amounts that the tenant should have paid, or for which the landlord is entitled to reimbursement.</p> <p>.5 The tenant's right to audit, inspect the landlord's records, or obtain information to verify amounts; periods in which adjustments, if any, must be made.</p>	

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<p>8.4 Percentage rent:</p> <ul style="list-style-type: none"> .1 Whether this is in addition to the basic rent; whether it is payable only if certain thresholds are met. .2 Calculation: <ul style="list-style-type: none"> (a) Method, including whether the rate is fixed or graduated, and whether it applies only above a stated amount of gross sales, etc. (b) Clear definitions of factors and terms involved (e.g., “gross sales”). (c) Specified inclusions and exclusions for gross sales. (d) Whether a minimum payment is required. (e) Method of payment (e.g., monthly, together with monthly statement of “gross sales”). (f) Annual adjustments (e.g., specify timing and whether audited; see also items 8.2.2 and 8.4.6). .3 Tenant’s obligations: <ul style="list-style-type: none"> (a) To operate the business continuously and to use the entire premises. (b) To operate during specified business hours; to be open for business when the building is open for business. (c) To keep adequate stock and staff to produce maximum revenues. (d) To use a specified trade name. (e) To maintain a specified ratio of selling area to floor space. (f) To keep records as specified (e.g., what type, where, for how long) and to allow the landlord to examine them. (g) To provide specified documentation (e.g., sales records) upon payment of rent or at specified intervals. (h) To honour credit cards. (i) To not operate a similar business within a given radius (otherwise gross sales of other business will be subject to payment of percentage rent). (Extend to related companies.) .4 Whether the landlord is obliged to keep information confidential. .5 Audit rights and notice requirements. .6 The landlord’s right to an independent audit (for which the landlord will pay, unless statements are wrong by a specified amount—e.g., greater than 5 per cent). .7 The landlord’s remedies in the event of default: <ul style="list-style-type: none"> (a) Termination of the lease. (b) Right to employ an auditor. (c) Payment of audit costs, interest, liquidated damages, etc. (Such amounts to be owing “on demand” by the landlord, to avoid automatic goods and services tax (“GST”) payments.) .8 Statement that sums are paid as rent and not as a share of the tenant’s profits; negation of partnership or joint venture. .9 GST. <p>8.5 Intent: whether net lease.</p> <p>8.6 Mechanism to settle disputes as to costs.</p>	

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<p>9. USE OF PREMISES</p> <p>9.1 The tenant's obligations:</p> <ul style="list-style-type: none"> .1 To take possession, continuously occupy the entire premises, carry on business continuously in, and not abandon the premises. .2 To use the premises for the specified uses only (particularly important where exclusive rights are given to other tenants). .3 Not to engage in prohibited uses of the premises. .4 Not to permit the premises to be occupied by anyone other than the specified persons (e.g., permitted subtenants, employees); not to permit the premises to be used by anyone other than the specified persons (e.g., licensees, concessionaires, franchisees). .5 Not to commit waste or nuisance, and not to interfere with other tenants or obstruct the movement of persons in the building. .6 Not to use signs or other advertising material visible from the exterior of the premises without the landlord's approval. .7 Not to use heavy equipment without the landlord's approval. Not to use equipment that would overload the floors or the facilities. .8 To comply with applicable laws, bylaws, and regulations relative to the premises and to the business carried on. Where the premises are strata property, to comply with current bylaws, rules, and Form K (notice of tenant responsibilities, affirming that the tenant and other occupants of the premises will comply with the strata corporation bylaws and rules, which the landlord must provide to the tenant) (<i>Strata Property Act</i>, S.B.C. 1998, c. 43, ss. 130, 131, and 146, and Strata Property Regulation, B.C. Reg. 43/2000, Form K). .9 To operate the tenant's business in accordance with the specified standards (e.g., hours of operation, stocking and maintaining merchandise—see item 8.4.3). .10 To refer to the building only by the name designated by the landlord; to use that name for all business and promotional activities. .11 Not to permit hazardous substances or any prescribed waste to be brought on to, or stored or handled in or around, the premises and building, and to take any necessary remedial action in that regard. Consider requiring immediate notice to the landlord where such remedial action becomes necessary and requiring landlord's approval prior to taking remedial action; consider stipulating that the landlord has the ability to undertake such work. Consider including an indemnity regarding non-compliance and the ability of the landlord to enter the premises to conduct testing. <p>9.2 Landlord's covenants and representations:</p> <ul style="list-style-type: none"> .1 To lease the premises. .2 Quiet enjoyment. .3 Remainder of covenants and representations are negotiable and may include: <ul style="list-style-type: none"> (a) That the tenant's proposed use is permitted under zoning bylaws. (b) That the tenant's proposed use does not conflict with a use exclusively given to another tenant. 	

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<p>(c) That the tenant will have the exclusive right to operate the specified type of business in the building, subject to the landlord's obligations to comply with the <i>Competition Act</i>, R.S.C. 1985, c. C-34, or other legislation.</p> <p>(d) That the landlord will co-operate in securing any required licences.</p> <p>9.3 If a zoning change is required:</p> <p>.1 Whose responsibility this is.</p> <p>.2 Who pays the cost.</p> <p>9.4 Right to use other parts of the building (e.g., common areas—see also items 5.6 and 14).</p>	
<p>10. INITIAL CONSTRUCTION TO COMPLETE THE PREMISES</p> <p>10.1 Who is to do the work.</p> <p>10.2 Nature and extent of the work (if necessary, attach plans as a schedule).</p> <p>10.3 Who pays the cost.</p> <p>10.4 Completion date for the work (consider liquidated damages if the work is not done on schedule, and whether the commencement date/term extends by the number of days it takes to complete the work).</p> <p>10.5 Obligation to comply with building codes, etc.; to obtain required permits, insurance, etc.; and provision for payment.</p> <p>10.6 Whether the other party has the right to approve the plans, and the procedure for plan approval.</p> <p>10.7 Access to the leased premises (including times and cost).</p> <p>10.8 For work to be done by the tenant:</p> <p>.1 The tenant's obligations:</p> <p>(a) To meet specified requirements before starting work (e.g., insurance, permits, bonds, letter of credit, security).</p> <p>(b) To pay the cost of the landlord's review and approval of plans.</p> <p>(c) To use specified contractors and consultants.</p> <p>(d) To use contractors having union affiliations compatible with the landlord's contractors.</p> <p>(e) To comply with specified construction procedures and design schemes.</p> <p>(f) To submit to the landlord's supervision.</p> <p>(g) To protect the landlord re: builders liens, other liens, security interests in favour of third parties, etc.</p> <p>(h) To take out any additional insurance reasonably required by the landlord.</p> <p>(i) To do the work during specified hours only.</p> <p>(j) Not to interfere with the landlord's other construction, or use of the building by other tenants.</p> <p>(k) To pay garbage removal costs, utilities, lifting costs, loading dock charges, etc.</p> <p>.2 Whether the landlord is to pay for work or pay inducements, and if so:</p>	

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<p>(a) Whether there is any security for this (e.g., tenant fixturing loan agreement—see item 3.9.9 in the COMMERCIAL LEASE PROCEDURE (B-10) checklist).</p> <p>(b) When this is payable (e.g., on completion of the work in accordance with specifications, on tenant’s furnishing proof that related obligations have been paid and no builders liens filed on expiry of lien claim period, on commencement of the lease, on tenant opening for business, or amortized over the period of the lease).</p> <p>(c) Whether inducement payments include GST component.</p> <p>.3 Filing of notice of interest under the <i>Builders Lien Act</i>, S.B.C. 1997, c. 45, before commencement of any work by tenant (see item 11.1.5).</p> <p>.4 The landlord’s remedies, if the tenant defaults in construction.</p> <p>10.9 Acceptance of the premises by the tenant (see item 7.1.1(b)).</p> <p>10.10 Unavoidable delay.</p>	
<p>11. ALTERATIONS AND IMPROVEMENTS</p> <p>11.1 The landlord’s rights:</p> <p>.1 To make changes to the leased premises before the commencement date (see item 5.3).</p> <p>.2 To make changes to the building:</p> <p>(a) Qualifications (e.g., whether the leased premises can be adversely affected).</p> <p>(b) The landlord’s rights with respect to the leased premises (e.g., right of entry, support).</p> <p>(c) Restrictions on the tenant’s ability to claim breach of quiet enjoyment or to claim compensation.</p> <p>.3 To grant, modify, or terminate easements or other agreements pertaining to the use and maintenance of the building.</p> <p>.4 To use and make changes to pipes, wires, conduits, etc. in the leased premises (the tenant will permit reasonable access). Consider whether the landlord can interfere materially with the use and enjoyment of the premises, or if the landlord must use reasonable efforts to minimize disruption, and whether the landlord is to pay damages or compensation.</p> <p>.5 To file a notice of interest under the <i>Builders Lien Act</i>.</p> <p>11.2 Tenant’s rights and obligations:</p> <p>.1 Right to alter the premises and install and remove trade fixtures; whether the landlord’s approval is required, and is not to be unreasonably withheld.</p> <p>.2 Obligations are similar to those set out in item 10.8.1.</p> <p>.3 Obligation to protect the landlord from liability on builders’ liens, etc.</p> <p>11.3 Ownership of fixtures; obligation to repair. Consider prohibiting the tenant from creating a security interest in the fixtures except in favour of the landlord or with the landlord’s prior consent.</p> <p>11.4 On termination of the lease:</p>	

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<p>.1 Whether trade and other fixtures can or must be removed (consider whether the landlord can require the tenant to remove fixtures that the tenant did not install); whether the landlord can require that the premises be returned to their original condition (deal with refusal or neglect of the tenant to remove).</p> <p>.2 Whether the landlord has a lien for unpaid rent or other default under the lease. (Note: the landlord will be required to rely on its rights under a security interest or the <i>Rent Distress Act</i>, R.S.B.C. 1996, c. 403.)</p> <p>.3 Ownership of leasehold improvements; ability to remove and store at a different location at the tenant's cost; any right in favour of the tenant to recover fair value if the landlord becomes owner.</p>	
<p>12. MAINTENANCE AND REPAIRS</p>	
<p>12.1 Consider a covenant from the landlord at the commencement of the lease dealing with habitability, the state of repair of the premises, related portions of adjacent premises, common areas, heating, ventilation, air conditioning ("HVAC"), etc. (Note: if premises are a strata lot, the strata corporation must keep the premises in a good state of repair and properly maintain common areas and facilities.)</p>	
<p>12.2 The landlord's obligation to make specified repairs or replacements; an exception where there is serious damage (see item 20) or where damage is caused by the negligence or willful misconduct of the tenant; whether repair costs are recoverable from the tenant as operating costs.</p>	
<p>12.3 The landlord's right to make other specified repairs.</p>	
<p>12.4 The tenant's obligation to make specified repairs or replacements, including:</p> <p>.1 Whether the landlord's approval is required.</p> <p>.2 Whether the landlord may inspect and give notice requiring the tenant to make repairs.</p> <p>.3 Whether there is a right to be reimbursed by the landlord.</p>	
<p>12.5 The tenant's responsibility for its own acts or omissions, and those of its employees or customers.</p>	
<p>12.6 Replacement of mechanical equipment.</p>	
<p>12.7 Exclusions (e.g., ordinary wear and tear, structural repair and latent defects, damage by perils, whether insurance is relevant).</p>	
<p>12.8 Responsibility for:</p> <p>.1 Maintenance of building systems.</p> <p>.2 Janitorial services (see item 13.1.5).</p> <p>.3 Painting and decorating.</p> <p>.4 Compliance with building codes and building standards.</p>	
<p>12.9 Procedures for determining standards of repair.</p>	
<p>12.10 Procedures for determining responsibility for rectifying environmental hazards on the premises or in the building.</p>	

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<p>13. SERVICES TO BE FURNISHED BY LANDLORD</p> <p>13.1 Services:</p> <ul style="list-style-type: none"> .1 Hot and cold water. .2 Electricity. .3 Heat, climate control, ventilation. .4 Elevator service. .5 Janitorial services (see item 12.8.2). .6 Removal of garbage and rubbish. .7 Private security service. .8 Building directory board listing the tenant's name. .9 The landlord is not liable for service interruption, but is required to pursue rectification. <p>13.2 Standards.</p> <p>13.3 Whether the tenant will pay for services in addition to rent; ability of the landlord to reallocate costs if the tenant is a heavy user of services.</p> <p>13.4 The tenant's obligations (e.g., energy conservation).</p> <p>14. COMMON AREAS</p> <p>14.1 Description of common areas (e.g., entrance foyer, lobby, parking lot, public entrance doors, halls, stairways, elevators, lavatories, shipping and receiving areas).</p> <p>14.2 Parties who share common areas.</p> <p>14.3 Whether the landlord has the exclusive right of control over common areas, and the right to make rules and regulations. If the premises are strata property, consider the strata corporation's right of control over common areas.</p> <p>14.4 Whether the landlord is entitled to change the common areas, and whether there are any qualifications on the right (e.g., protection of the tenant's right of access to the premises).</p> <p>14.5 The tenant's right to use common areas, subject to the landlord's rules and regulations, strata corporation bylaws (if applicable), and any other specified restrictions (non-exclusive, non-transferable licence).</p> <p>14.6 The landlord's obligation to maintain common areas for the use and benefit of all tenants, including:</p> <ul style="list-style-type: none"> .1 Hours of operation. .2 Conditions for altering or closing common areas. .3 Standard of maintenance and operation required of the landlord. .4 Restrictions on merchandising in common areas. .5 Whether revenue from common areas is offset against the maintenance and operating costs of these areas. 	

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<p>14.7 The tenant's obligation to pay for a portion of specified common area costs (e.g., maintenance, snow removal, cleaning, lighting, signs, liability insurance, real estate taxes, replacing light fixtures, repaving, restriping, heating and cooling of mall areas).</p> <p>14.8 The potential liability of the tenant for accidents that occur in common areas.</p>	
<p>15. PARKING</p>	
<p>15.1 Whether parking is included in the leased premises or is the subject of a separate agreement (whether lease or licence).</p>	
<p>15.2 Location, and whether it can be changed by either party.</p>	
<p>15.3 The landlord's obligations:</p> <ul style="list-style-type: none"> .1 To maintain parking facilities. .2 To maintain a ratio of public parking stalls to rentable area. 	
<p>15.4 The tenant's costs.</p>	
<p>15.5 Whether the landlord receives revenue from common-area parking facilities and, if so, whether this revenue is offset against expenditures.</p>	
<p>15.6 The landlord's right to charge the public for parking in a retail facility. Consider whether the landlord will reimburse the tenant's customers for all or a portion of the cost of parking.</p>	
<p>16. OPERATING COSTS</p>	
<p>16.1 Clear and comprehensive definition:</p>	
<p>.1 Inclusions:</p>	
<ul style="list-style-type: none"> (a) General (all costs of operating, maintaining, repairing, replacing, rebuilding, insuring, supervising, managing, and administering). 	
<ul style="list-style-type: none"> (b) Specific. 	
<p>.2 Possible exclusions:</p>	
<ul style="list-style-type: none"> (a) Structural repairs. 	
<ul style="list-style-type: none"> (b) Improvements, additions or alterations (except those made to reduce operating costs or to comply with changes in the law). 	
<ul style="list-style-type: none"> (c) Costs for which the landlord is reimbursed or which are covered under contractor warranties. 	
<ul style="list-style-type: none"> (d) Interest on capital retirement of debt. 	
<ul style="list-style-type: none"> (e) Costs incurred for the direct account of a specific tenant, or for unleased space. 	
<ul style="list-style-type: none"> (f) Management costs not related to maintenance or operation (e.g., leasing expenses, promotional expenses). 	
<ul style="list-style-type: none"> (g) Capital cost allowance, depreciation, expensing capital repairs and replacements. 	
<ul style="list-style-type: none"> (h) Lease rentals for land. 	
<ul style="list-style-type: none"> (i) Capital tax, income tax, profits tax, GST for which landlord receives an input tax credit, and other similar taxes. 	
<ul style="list-style-type: none"> (j) Costs for public facilities or costs incurred to meet development agreement obligations. 	

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<p>(k) Costs recovered directly from a tenant for separate charges relating to his or her other premises.</p> <p>(l) Revenue received for common areas and facilities.</p> <p>(m) Costs reimbursed by an insurer.</p> <p>(n) Inherent structural/construction defects.</p> <p>(o) Amounts required to rectify environmental hazards existing before the tenancy.</p> <p>.3 How capital costs and depreciation are dealt with (see also item 16.1.2(g)).</p> <p>.4 How operating costs are calculated, including procedures for adjustment if:</p> <p>(a) Estimates are used.</p> <p>(b) Different items are included in operating costs for different years.</p> <p>(c) There are changes in the area of the premises, the amount of unleased space, or the total rentable area.</p> <p>16.2 The tenant's share of operating costs:</p> <p>.1 Whether the tenant must pay a proportionate share; if so, whether there is to be a gross-up for lobby and washroom areas.</p> <p>.2 How the tenant's share is calculated:</p> <p>(a) Method (e.g., payment on monthly estimates, payment on request, adjustment when final costs are known, documentation required from the landlord).</p> <p>(b) What areas of the premises or building are included; the denominator to be the building area from time to time, to give flexibility for future expansion.</p> <p>(c) Whether the tenant must pay a share of all, or only some, operating costs (e.g., costs of various types allocated to different parts of the building or types of premises).</p> <p>.3 Whether the landlord reserves the right to allocate costs on an equitable basis.</p> <p>.4 Whether all tenants must pay a proportionate share, or whether some are given special treatment, in which case the proportionate share may be required to be adjusted.</p> <p>16.3 Management fees. Consider limit on amount (e.g., 10 per cent of operating costs excluding insurance and property taxes).</p> <p>16.4 Strata fees. If the premises are strata property and you are acting for the tenant, ensure that there is no overlap between the definition of operating costs in the lease and strata fees payable to the strata corporation. Note that the strata corporation will incur most of the expenses that are typically operating costs in a lease, and that the landlord's expenses may be only strata fees, property taxes, and insurance. Also, consider what expenses forming part of the strata fees should be excluded from the fees payable by the tenant (e.g., capital expenses for repairs or replacements, and expenses incurred in maintaining limited common property for the exclusive use of other strata lots).</p>	
<p>17. TAXES</p> <p>17.1 The landlord's obligation to pay specified taxes (e.g., property taxes) and whether the obligation depends on payment by the tenant.</p> <p>17.2 The tenant's obligation to pay (prior to the due date):</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>.1 Property taxes:</p> <ul style="list-style-type: none"> (a) On the leased premises. (b) On a proportionate share of the taxes for the building, if the premises are not assessed separately (define and specify exclusions, e.g., improvements made by the landlord or other tenants that result in taxes). (c) On fixtures or improvements to the premises. <p>.2 Business taxes.</p> <p>17.3 Method of calculating and adjusting present and future payments (generally the same as used for operating costs—see item 16).</p> <p>17.4 Whether the tenant has a right to contest taxes and, if so, security and indemnity provisions.</p> <p>17.5 Whether the tenant must furnish evidence of payment.</p> <p>17.6 The tenant will pay GST assessed on the rent and on any other items paid for by the tenant under the lease, as well as provincial sales tax (“PST”) if it applies to any such items. (Effective April 1, 2013, the harmonized sales tax (“HST”) was eliminated and the PST reinstated under the <i>Provincial Sales Tax Act</i>, S.B.C. 2012, c. 35. GST (rather than HST) applies under the <i>Excise Tax Act</i>, R.S.C. 1985, c. E-15. Commercial lease payments due or paid before April 1, 2013 may be subject to HST, but commercial leases would not generally include PST, which applies to tangible personal property and some services. Both PST and GST are generally applicable to legal services. Further information about the GST and PST can be found at www.cra-arc.gc.ca and www2.gov.bc.ca.)</p>	
<p>18. UTILITIES AND HVAC</p> <p>18.1 The landlord’s obligation to provide:</p> <ul style="list-style-type: none"> .1 Type of service (e.g., hydro, heating, ventilation, air conditioning). .2 Hours of operation. .3 Standards (e.g., provision for an initial adjustment period; not liable if services are interrupted for repairs, etc.). <p>18.2 The tenant’s obligations:</p> <ul style="list-style-type: none"> .1 To pay: <ul style="list-style-type: none"> (a) Own costs, where there is separate metering. (b) Proportionate share of costs for the building (e.g., see items 16 and 17); whether the landlord may allocate on the basis of use. .2 Regarding energy conservation. .3 To maintain sufficient heat or air conditioning so as not to affect the overall temperature in the rest of the building. <p>18.3 Provisions relating to excessive use by a tenant.</p>	
<p>19. INSURANCE AND INDEMNITY</p> <p>19.1 Landlord’s obligation to insure. Where the premises are strata property, the strata corporation must insure the buildings (<i>Strata Property Act</i>, ss. 149 to 152).</p> <ul style="list-style-type: none"> .1 Types of insurance required, for example: 	

PROVISIONS TO BE CONSIDERED	NOTES
<p>(a) All-risk insurance for building, improvements, common facilities; fire and extended coverage; consider also building bylaw endorsement.</p> <p>(b) Boilers, pressure vessels.</p> <p>(c) Third-party liability (including personal injury and property damage).</p> <p>(d) Business interruption.</p> <p>.2 Whether waiver of subrogation is made in favour of the tenant.</p> <p>.3 Whether the tenant must be named as co-insured in liability policies, and whether the landlord must obtain a cross-liability clause.</p> <p>19.2 The tenant's obligation to insure:</p> <p>.1 Types of insurance required, for example:</p> <p>(a) All-risk insurance for stock-in-trade, furniture, etc., and leasehold improvements (full replacement cost).</p> <p>(b) General liability insurance (including public liability and property damage).</p> <p>(c) Legal liability.</p> <p>(d) Business interruption.</p> <p>(e) Contractor's insurance, if the tenant is improving the premises.</p> <p>(f) Such other insurance as the landlord or the mortgagee may reasonably require.</p> <p>.2 Endorsements required (e.g., waiver of subrogation, inclusion of additional named insureds, cross-liability and severability of interests clause, waiver of breach of conditions clause, contractual liability, non-owned automobile, notice of amendment or cancellation given to the landlord, notice of non-payment given to the landlord, requirement that the tenant's insurance be considered primary and will not require contribution from the landlord's policies).</p> <p>.3 Whether minimum amounts are specified.</p> <p>.4 Whether the landlord must be named as a co-insured (e.g., for improvements paid for by landlord).</p> <p>.5 The landlord's rights:</p> <p>(a) To approve policies or insurers.</p> <p>(b) To be given evidence of coverage.</p> <p>(c) To insure and recover the cost if the tenant fails to insure or if the insurer threatens to cancel the policy.</p> <p>19.3 The tenant's covenant to indemnify the landlord (e.g., for breach of covenant, property damage, injury).</p> <p>19.4 The landlord's waiver of responsibility (e.g., for property damage, injury), except where caused by the landlord's negligence or willful acts.</p> <p>19.5 The tenant's responsibility for any increase in the landlord's insurance premiums and the tenant's ability to terminate the lease if the insurance is cancelled.</p> <p>19.6 The landlord's covenant to indemnify the tenant (e.g., for breach of covenant or for damages resulting from interruptions in the tenant's business as a result of the operation of the building systems).</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>20. DAMAGE AND DESTRUCTION</p> <p>20.1 Type of peril (all, or only those insured by the landlord).</p> <p>20.2 Degree of damage (consider substantial damage to building or to the anchor tenant, but not to the premises, etc.).</p> <p>20.3 Effect on lease, for example:</p> <ul style="list-style-type: none"> .1 Abatement of rent; extent of abatement. .2 The landlord’s obligation or option to repair or rebuild (consider use of insurance proceeds); the tenant’s obligations. Should be consistent with maintenance and repair obligations (see item 12). If the premises are strata property, the strata corporation is responsible for reconstruction and repairs to the building, including the common property (<i>Strata Property Act</i>, ss. 72, 157, and 159). .3 Rights of parties to terminate the lease (see item 28.2). <p>20.4 The landlord is not responsible for specified types of loss or damage.</p> <p>20.5 Provisions for expropriation and condemnation.</p> <p>21. CHANGES IN PARTIES</p> <p>21.1 Assignment and subletting:</p> <ul style="list-style-type: none"> .1 Right to assign, sublet, or otherwise part with possession; in what circumstances; whether prior written approval is required; whether approval is not to be unreasonably withheld; tests for withholding approval; ensure that tests for withholding approval are “without limitation” to other reasonable tests; information about assignee and subtenant is required to be delivered to the landlord. .2 Whether successive assignees and any subtenants are required to become contractually bound to the landlord in writing. .3 Whether the original tenant remains liable under the lease, subject to a release by the landlord. .4 Manner in which the provisions of the lease apply to the assignee or subtenant. .5 Provisions regarding: <ul style="list-style-type: none"> (a) Right of first refusal in favour of the landlord. (b) Sharing of profit rent with the landlord. (c) Assignment of subtenant’s rent to the landlord. (d) The landlord’s right to terminate the lease. .6 Provisions regarding subsequent assignment, subletting, etc. .7 Whether the tenant is prohibited from advertising the premises for rent, sublease, etc. .8 Whether the landlord may charge an assignment fee; the tenant’s responsibility to pay all legal and other fees and disbursements incurred by the landlord in considering the tenant’s request for an assignment and documenting same. 	

PROVISIONS TO BE CONSIDERED	NOTES
<p>21.2 Change in control of a party:</p> <ul style="list-style-type: none"> .1 What constitutes a “change in control”. .2 Effect. .3 Whether this is different for a public corporation traded and listed on a recognized stock exchange. .4 The tenant’s obligation to furnish share records. <p>21.3 Transfer of property by the landlord; the landlord is not liable if the transferee assumes obligations.</p> <p>21.4 Whether the tenant has the right to finance operations by mortgaging the lease.</p> <p>21.5 Consider prohibiting the tenant from creating a security interest in fixtures without the landlord’s prior written consent.</p>	
<p>22. GENERAL RIGHTS OF LANDLORD</p>	
<p>22.1 Right to make rules and regulations:</p> <ul style="list-style-type: none"> .1 Type of rules and regulations; whether they apply to common areas and the premises, and to all visitors to the premises; whether the landlord must enforce against all tenants. .2 Relationship to the lease (e.g., whether they become part of the lease; whether they may be in conflict with the lease). .3 Notice requirements. 	
<p>22.2 Right to enter the premises:</p> <ul style="list-style-type: none"> .1 For specified purposes (e.g., to inspect, make repairs or alterations—whether this includes the ability to leave materials and equipment on the premises without constituting default of the landlord’s obligations). .2 At specified times; notice of requirements. 	
<p>22.3 Right to exhibit the premises:</p> <ul style="list-style-type: none"> .1 For specified purposes (e.g., for rental, for financing, for prospective sale of the building). .2 At specified times (e.g., within a certain period of time before the lease expires); notice of requirements. 	
<p>22.4 Designation of building manager.</p>	
<p>23. GENERAL COVENANTS OF TENANT</p>	
<p>23.1 To pay rent as provided in the lease.</p>	
<p>23.2 To perform the covenants in the lease.</p>	
<p>23.3 To pay costs incurred by the landlord in enforcing the provisions of the lease.</p>	
<p>23.4 To subordinate the lease to any mortgages or to register the lease in priority to any mortgage. Consider also:</p> <ul style="list-style-type: none"> .1 Whether the subordination clause is operative without further documentation (i.e., not an agreement to subordinate in the future). Whether attornment is operative without the express agreement of the lender. .2 The tenant’s requirement for a non-disturbance agreement from the landlord’s mortgagee. 	

PROVISIONS TO BE CONSIDERED	NOTES
<p>.3 Whether a non-disturbance agreement is subject to the tenant not being in default or the landlord otherwise being entitled to terminate.</p> <p>23.5 To peaceably surrender the premises at the end of the term, in good condition. Restoration obligations; obligations to remove improvements, fixtures, etc., and repair damage caused thereby.</p> <p>23.6 To deliver estoppel certificates from time to time in the form and substance as reasonably required by the landlord.</p>	
<p>24. TENANT'S OPTIONS</p> <p>24.1 Option or right of first refusal to rent other space in the building.</p> <p>24.2 Option or right of first refusal to purchase the premises.</p> <p>24.3 Option to renew or extend:</p> <p>.1 Whether term, rent, and essential conditions are certain. Consider the test for fair market rental value if rent during a renewal or extension term is to be agreed or arbitrated. Consider whether rent during a renewal or extension term is to be not less than rent during the preceding term. Clarify whether rent is based on improved or unimproved premises; see <i>Fire Productions Ltd. v. Lauro</i>, 2006 BCCA 497, which held that the phrase "fair market rent" in a renewal clause meant the rent the premises would attract if exposed to the market at the time of the renewal, taking into account the value of the tenant's improvements.</p> <p>.2 Method and timing for determining the terms.</p> <p>.3 Method and timing of the exercise of the option.</p> <p>.4 Whether there are conditions precedent to the exercise of the right (e.g., no existing default, no default during the term of the lease, and no assignment of the lease).</p> <p>.5 Whether the guarantor, indemnifier, or tenant who has assigned its leasehold interest during the initial term must join in the exercise of the option and execute a new indemnity covenant.</p> <p>.6 Whether the option may be assigned.</p> <p>.7 Whether, on renewal or extension, there is an option to renew or extend again.</p> <p>.8 Whether the renewal or extension is on the same terms as in the original lease, or on the landlord's then-current terms (if on original terms, set out exceptions such as rent, inducements, and renewal clause).</p>	
<p>25. MERCHANTS' ASSOCIATION OR PROMOTION FUND FOR SHOPPING CENTRE</p> <p>25.1 Merchants' association:</p> <p>.1 The tenant's covenants:</p> <p>(a) To join, maintain membership, and pay dues.</p> <p>(b) To comply with rules.</p> <p>(c) To promote the shopping centre in its advertising.</p> <p>.2 The landlord's covenants (e.g., to contribute to promotion).</p> <p>.3 Rules to be approved by the landlord.</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>25.2 Promotion fund:</p> <ul style="list-style-type: none"> .1 The tenant's covenant to contribute. .2 The landlord's covenant to contribute. .3 Promotion director. .4 Fund to be used to promote the centre. 	
<p>26. REGISTRATION</p> <p>26.1 Whether the lease is to be prepared in registrable form, and, if so, at whose expense; whether the lease may be registered; consider <i>Property Law Act</i>, R.S.B.C. 1996, c. 377, s. 5(2), and <i>Land Title Act</i>, s. 20(2). Determine if a short form of lease is to be registered (see the COMMERCIAL LEASE PROCEDURE (B-10) checklist, item 2.7.18).</p> <p>26.2 Responsibility for cost of the plan.</p> <p>26.3 Responsibility for cost of preparing the general instrument (Form C).</p> <p>26.4 The tenant will pay property transfer tax (if the lease term, including renewals, is more than 30 years). Even if the lease is exempt, file the special property transfer tax return.</p>	
<p>27. OVERHOLDING</p> <p>27.1 Status of tenant (must be month-to-month, otherwise possible renewal of term).</p> <p>27.2 Obligations of parties (e.g., tenant to pay double rent).</p>	
<p>28. TERMINATION OF LEASE</p> <p>28.1 At the option of one or both parties.</p> <p>28.2 Whether specified events will terminate the lease or may terminate it at the landlord's option (if not, make other provisions for these events):</p> <ul style="list-style-type: none"> .1 Bankruptcy, insolvency, etc. of tenant, guarantor, and assignee (note <i>Commercial Tenancy Act</i>, R.S.B.C. 1996, c. 57, s. 29, and <i>Bankruptcy and Insolvency Act</i>, R.S.C. 1985, c. B-3, ss. 30, 65.1, 65.2, 65.21, 65.22, 69, and 69.1). .2 Damage or destruction to a specified degree (e.g., that will take a specified time to repair, or that affects a specified percentage of the leasable premises). .3 Expropriation of the interest of one or both parties. .4 Redevelopment by the landlord. <p>28.3 On default (see item 29.6).</p> <p>28.4 Whether the landlord has the right to terminate the lease early for sale, demolition, or redevelopment, and if so, what notice requirements must be satisfied or what compensation provided to the tenant.</p>	
<p>29. DEFAULT</p> <p>29.1 Provisions regarding violation by the tenant of the obligations set out in the items above (consider including these with the clauses creating each obligation).</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>29.2 Description of events of default (e.g., for the tenant, these would include non-payment of rent, insolvency, abandonment of premises); whether delay constitutes default and whether the time for performance may be extended.</p> <p>29.3 Force majeure clause.</p> <p>29.4 Whether notice must be given; whether the party is entitled to a reasonable time to cure the default and, if so, what is a reasonable time in different circumstances.</p> <p>29.5 Whether default may be cured by the non-defaulting party; whether the defaulting party is liable for the costs.</p> <p>29.6 Remedies (in addition to any provisions included throughout the lease):</p> <p>.1 The landlord's remedies:</p> <ul style="list-style-type: none"> (a) Remedies are cumulative and in addition to any other remedies. (b) Interest (on demand). (c) Collection of rent; acceleration. (d) Re-entry. (e) Re-letting as tenant's agent, and collection of rent. (f) Seizure. (g) Damages, including the present value of the rent for the balance of term. (h) Whether the tenant waives any statutory protection against distress. (i) Circumstances in which the lease may be terminated. (j) Waiver of a default does not affect the rights arising from subsequent defaults. <p>.2 Notice requirements.</p>	
<p>30. INTERPRETATION AND GENERAL PROVISIONS</p> <p>30.1 Definitions (consider putting them at the beginning of the lease or in a schedule).</p> <p>30.2 Choice of law.</p> <p>30.3 Principles that govern the interpretation of the agreement (e.g., use of the masculine form, insertion of headings for convenience only).</p> <p>30.4 Whether the lease constitutes the entire agreement; its relationship to the offer to lease (e.g., merger).</p> <p>30.5 Severability (consider carefully, as it may create a lease that is missing certain key provisions).</p> <p>30.6 Time is of the essence.</p> <p>30.7 Notices.</p> <p>30.8 Enurement.</p> <p>30.9 Amendment.</p> <p>30.10 Arbitration and other methods for resolving disagreements (consider including specific provisions with the relevant clauses of the agreement).</p> <p>30.11 Costs.</p> <p>30.12 Statement of relationship (i.e., negation of partnership or joint venture).</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>30.13 Application or waiver of the <i>Commercial Tenancy Act</i>.</p> <p>30.14 Security for the tenant’s performance of its obligations:</p> <ul style="list-style-type: none"> .1 Security deposit. .2 Letter of credit. .3 Security agreement. .4 Provision for the landlord’s remedies being exclusive or cumulative if the landlord realizes on security. <p>30.15 Schedules.</p>	
<p>31. THIRD-PARTY INDEMNITY</p> <p>31.1 Obligations for which the indemnity is given and whether there is a “cap” or maximum amount of liability under the indemnity.</p> <p>31.2 Whether it is absolute and unconditional—set out events that can occur without release (e.g., extensions of time, waivers, assignments, etc.).</p> <p>31.3 Waiver of notice of default by the tenant and waiver of any obligation to proceed against the tenant or other indemnifier/security.</p> <p>31.4 Survival of indemnity—but see <i>KKBL No. 297 Ventures Ltd. v. IKON Office Solutions, Inc.</i>, 2004 BCCA 468, regarding survival of indemnity after disclaimer of a lease by the trustee.</p> <p>31.5 Whether an indemnifier is a primary obligor to the same effect as if the indemnifier had entered the lease as the tenant; whether the indemnifier is obligated to enter a new lease on the same terms as the tenant, if the lease is terminated, disclaimed, or surrendered.</p>	