

COMMERCIAL LEASES – PROCEDURE

INTRODUCTION

This checklist is designed to be used with the *Commercial Leases – Drafting* checklist (RE-3). A checklist such as this could be attached to each file and updated as the transaction proceeds. The checklist must be considered in relation to the particular facts at hand, and augmented and revised as appropriate. This checklist is primarily intended for use by the lawyer acting for the landlord and is intended as a *guide* to matters which should be considered. The checklist will assist a practitioner in a variety of aspects of a commercial lease transaction, from the initial receipt of instructions through to the report to the client.

LIST OF AUTHORITIES

Commercial Leases (1991), Continuing Legal Education Society of B.C.

Haber, *Commercial Lease – A Practical Guide* (4th ed.), (Toronto: Canada Law Book Company, 2004).

Haber, *Commercial Lease*, (Vancouver: Canada Law Book Company, 1989).

Haber, *Understanding the Commercial Agreement to Lease*, (Toronto: Canada Law Book Company, 1991).

Posner, *Leasing Process: A Guide for the Commercial Tenant*, (Toronto: Captus Press, 1990).

Ross, *Drafting and Negotiating Commercial Leases* (3rd ed.), (London: Butterworths, 1989).

CONTENTS

A.	Initial Contact	RE-2-2
B.	Initial Interview.....	RE-2-2
C.	After Initial Interview	RE-2-3
D.	Offer or Agreement to Lease	RE-2-4
E.	Prepare Lease.....	RE-2-5
F.	Concluding the Agreement	RE-2-5
G.	Closing the File.....	RE-2-6

Notes:

CHECKLIST

A. INITIAL CONTACT

1. Ensure that there is no conflict of interest.

B. INITIAL INTERVIEW

1. Collect information and discuss provisions of lease, referring to *Commercial Leases – Drafting* checklist (RE-3) and noting any special features of the transaction. Include:
 - 1.1 Ask client to advise of municipal and legal address. Determine if real property report (surveyor's certificate) exists.
 - 1.2 Type of building or development (e.g., shopping centre, office).
 - 1.3 Whether building is old (and, if so, whether there are existing tenants) new, or planned. Is the property heritage property?
 - 1.4 Type of tenants who are or will be leasing and whether their leases are or will be similar.
 - 1.5 Landlord's costs, including which costs he or she will absorb and which are to be recovered from tenants.
 - 1.6 Way in which amounts (e.g., rent, costs) payable by each tenant are to be determined and allocated.
 - 1.7 Financing arrangements and lender's requirements. If landlord has not yet obtained financing, consider provisions allowing for cancellation if he or she fails to do so, and for tenant compliance with lender's requirements.
 - 1.8 Insurer's requirements.
 - 1.9 Whether estoppel certificates are required.
 - 1.10 Whether any inducements are to be given to any tenants.
 - 1.11 Special shopping centre considerations:
 - 1.11.1 Whether rent should allow landlord to participate in profits.

Notes:

- 1.11.2 Whether terms of leases should be shorter for higher risk tenants.
- 1.11.3 Whether landlord wants to control tenant use and tenant mix.
- 1.11.4 Joint landlord and tenant actions (e.g., promotion fund, official opening of centre).
- 1.11.5 Remedies of each party in event of non-compliance with provisions of lease.
- 1.12 Various types of defaults and proposed consequences.
- 1.13 Circumstances in which lease can or will be terminated.
- 1.14 Whether any security will be taken by landlord to secure payment of rent.
- 1.15 Whether there are to be any guarantors or indemnifiers.
- 2. Discuss nature of offer or agreement to lease and determine whether it is desirable to use one.
- 3. Obtain instructions to draft lease and any supplementary documents required.

C. AFTER INITIAL INTERVIEW

- 1. Open file: place checklist in file and make entries in diary.
- 2. Send letter to client, confirming retainer and instructions, setting out manner in which you will determine your fee for services, stating conditions upon which you have agreed to act and summarizing points discussed.
- 3. Send letter to counsel for other party, advising of your involvement. If that party has not retained counsel, send letter to him or her advising to do so.
- 4. Conduct relevant searches, such as:
 - 4.1 Land Titles Registry (search of title and Writ Registry).
 - 4.2 Corporations Branch search on corporate parties.
 - 4.3 Personal Property Registry (check encumbrances against tenants).
 - 4.4 *Bank Act* search.
 - 4.5 Zoning and occupancy.
 - 4.6 Taxes (real property and business).

Notes:

- 4.7 Environmental inquiries (asbestos and other toxic substances).
- 4.8 Other.
- 5. Advise client of results of searches.
- 6. Prepare or obtain any required supplementary documents, such as:
 - 6.1 For corporate parties:
 - 6.1.1 Certificate or opinion letters from solicitors, to include matters such as: corporate status, good standing, incumbency, authorization and execution.
 - 6.1.2 Directors' resolution and shareholders' resolution if required (certified copies).
 - 6.2 Estoppel certificates.
 - 6.3 Consents.
 - 6.4 If acting for tenant, nondisturbance and attornment agreements.
 - 6.5 Subordination agreements.
 - 6.6 Insurance policy (if acting for tenant, ask for certificate of insurance only).
 - 6.7 Real property report (surveyor's certificate).
 - 6.8 Building and development permits (for building or, in case of tenant, for tenant improvements).
 - 6.9 Occupancy certificate.

D. OFFER OR AGREEMENT TO LEASE

- 1. If so instructed, draft offer or agreement to lease, including:
 - 1.1 Parties.
 - 1.2 Offer, acceptance and consideration.
 - 1.3 Basic provisions to be included in lease (see *Commercial Leases – Drafting* checklist (RE-3)).
 - 1.4 Work to be done by both parties.
 - 1.5 Provide that tenant's interest in affixed goods (fixtures) does not arise until 24 hours after affixation to attempt to avoid application of s. 36 of *The Personal Property Security Act, 1993*.

Notes:

- 1.6 Cancellation.
 - 1.7 Security deposit/security for rent under lease.
 - 1.8 Lease form as attachment.
 - 1.9 Legal effect of offer after lease is executed.
 - 1.10 Plan of premises as attachment.
 - 1.11 Inducements to be offered, including free rent. Consider effect of GST on inducements.
 - 1.12 Subdivision requirements of *The Planning and Development Act, 1983*, as amended by s. 134(3) of *The Planning and Development Act, 1989*, if lease of portion of lands.
2. Have offer or agreement executed by both parties.

E. PREPARE LEASE

1. Prepare first draft.
2. Review first draft, checking each segment to ensure that it achieves client's objectives, and checking document as a whole to ensure that it is internally consistent. Make necessary corrections and prepare second draft.
3. Go over second draft with client or send to client with a request that client review it and note any changes or questions. Discuss with client.
4. Make any changes required to the second draft and send copies to the other party or his or her solicitor for comment. Send a copy of correspondence and draft agreement to your client. Review any alterations with client.
5. Prepare final lease and arrange for signing.

F. CONCLUDING THE AGREEMENT

1. Update searches.
2. Ensure proper signing and execution of lease.
3. Ensure proper signing and execution of other necessary documents.
4. Register Interest in respect of lease (if acting for tenant) (any special rights to cover by Interest Registration e.g., right of first refusal, right to renew).

Notes:

5. Consider obtaining security interest in fixtures in premises from tenant and registering financing statement in Personal Property Registry.
6. Consider obtaining priority agreements from tenant's creditors who may have taken security interest from tenant in respect of fixtures. Consider registering priority agreements at Land Titles Registry and Personal Property Registry.
7. Consider taking security to ensure rent is paid (e.g., security agreement, indemnity or guarantee).

G. CLOSING THE FILE

1. Send reporting letter and statement of account to client. Include copies of relevant documents, details of registration and details regarding your searches. Advise client (in letter) that he or she is solely responsible for renewals, exercising of options, etc.
2. Close file.