LANDLORDS AND TELECOM SERVICE PROVIDERS:

10 ESSENTIAL RECOMMENDATIONS

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TELECOM ACCESS AGREEMENTS

There has been a proliferation of access agreements signed by telecom service providers (TSPs) and landlords over the past 24 months. TSPs typically table a one page agreement while landlords have been encouraged to table a 40 page agreement. Third party consultants have fostered an adversarial environment when it comes to negotiating agreements. Ironically, as soon as the CRTC made rulings designed to foster competition and promote end user choice, the consultants have encouraged landlords to be cautious gatekeepers and slow down the deployment of facilities by TSP competitors.

Fortunately, landlords are now becoming wary of the promises made by third party consultants of substantial additional revenues at no cost. Landlords are also beginning to realize that third party consultants are often standing in the way of harmonious, strategically sound relationships with the TSPs which result in happy, well-served tenants, a landlord's real assets.

As landlords become educated about what it really takes to deliver services - staggering amounts of capital and good technology and as TSPs have become educated about the concerns of landlords, I predict that landlords and TSPs will soon be able to negotiate simple standard agreements that acknowledge and deal appropriately with the legitimate interests of both parties.

At the risk of over simplification, I am listing 10 key issues and a recommendation that should assist landlords and TSPs to resolve these issues in a mutually beneficial manner.

1. & 2. TERM & RENTAL FEES

A TSP needs a long term and cost certainty. There is absolutely no profit in the short term for TSPs. They are prepared to pay all reasonable costs that a landlord may incur to protect its interests and a reasonable fee for access. Reasonable costs would not include fees charged by the landlord's consultants to educate themselves. Five years plus three five year renewals at market is often the best solution. A landlord can protect itself by having comprehensive termination rights if the TSP does not perform.

3. RELOCATION

Relocation can be expensive and a landlord should not automatically assume it can reserve the right to require the TSP to relocate unless it is prepared to pay the costs associated with it. If relocation is required to accommodate another TSP, that's easy. The next TSP should pay the

cost. During the first 10 years the landlord should be prepared to pick up the costs or at least share them equally.

4. CDS

A Central Distribution System is nice in theory but objectionable if it creates an unlevel playing field. A landlord and third party telecom manager should be prepared to treat everyone equitably and be prepared to assume liability for consequential loss if the telecom manager is negligent. The landlord can protect itself and the TSP by requiring a telecom manager to carry adequate insurance and be liable to the landlord and the TSP if it is negligent. The telecom manager should make a persuasive case as a facilitator of services not a toll collector and most landlords must consider which relationship may be more important in the long run - its relationship with the telecom manager or its relationship with its TSPs that have direct relationships with its tenants. Telecom managers must be held accountable. Landlords can rest assured that any telecom manager that assists the TSP will be enthusiastically embraced by the TSP. If the landlord wants to take ownership of a TSP's wiring or requires it to migrate to a CDS, the landlord should be prepared to compensate the TSP for the unamortized cost of installing the wiring.

5. & 6. INDEMNITIES AND INSURANCE

Landlords have recently been insisting on one sided indemnities. The CRTC has suggested that one sided liability provisions are inappropriate. (CRTC Ledcor Decision Jan 25, 2001) TSPs and carriers that colocate on each other's facilities once thought one-sided provisions were appropriate. However, out of mutual respect and fair business practices, TSPs and carriers soon realized that one-sided indemnity clauses were inappropriate. So a truce was made. Each party would step up and be liable for its own negligence and carry appropriate insurance. One caveat, neither party would be liable for consequential damages. I hope landlords can start to see it this way. Maybe it will not happen until a landlord asks for a TSP to be in its building because it has a tenant that is demanding the TSP's service. Maybe the TSP will be spiteful and do a reverse on the landlord. I hope not and I doubt it. The TSPs and carriers have been down this path and hopefully landlords will soon see it the same way.

7. ASSIGNMENT

Everyone knows that TSPs and carriers are spending incredible sums of money. Whether they start generating meaningful cash flows, are acquired, merge, reorganize, consolidate or sell assets, a prudent landlord knows that for a TSP or carrier to survive, it must be able to effect transfers and assignments in a simple and straightforward manner. Onerous assignment and transfer provisions are completely inappropriate. To think that the lease or easement or license is an asset without an infrastructure, a network, programming and software, a sales force and administrative staff is ludicrous. Is the landlord going to stop the TSP from financing installations intended for use in its buildings? Is a landlord going to stop the sale of a television and radio station? Is a landlord going to stop Rogers and Shaw from swapping territories? Is a

landlord going to stop Telus from acquiring Clearnet or AT&T from acquiring MetroNet? Liberal assignment rights are an absolute must for TSPs and carriers.
So what are a landlord's legitimate concerns on transfers? A landlord wants to stop a TSP from providing free access to others. A landlord does not want the TSP to assign or sublease for a profit. A landlord wants the assignee to be a reputable service provider. Fortunately, most landlords are quite accommodating to TSPs and carriers when negotiating assignment provisions but it would be best if its agreements were fairly written in the first place and the lawyers put out of business (on the issue of assignments, that is).

8. & 9. SUBORDINATION AND TERMINATION ON SALE CLAUSES

TSPs can understand a landlord's need to protect its financing but landlords must understand that TSPs do not want to see their own rights cancelled by a mortgagee or on a sale. Too much capital has been invested. I know of no instance where a mortgagee has not provided a non-disturbance agreement to a TSP. Termination on sale clauses are simply unacceptable. Registration on title will always be the simplest and best way to ensure a TSP's interest in not cancelled. In Quebec it is mandatory and therefore not an issue.

In Ontario and other provinces that permit off title agreements, a major landlord will agree that it will remain liable to the extent that a purchaser does not assume the access agreements and this is satisfactory. But if the landlord is a shell company this will not comfort the TSP and registration is appropriate unless the owners are prepared to give personal guarantees that actual notice will be given to the purchaser.

10. TENANTS/CUSTOMERS COME FIRST
Landlords must ensure their tenants come first and TSPs must ensure their customers come first. Since the tenants and customers are one and the same, the landlords and TSPs have a common interest. If every provision in the access agreement is drafted bearing in mind the needs and interests of these customers/tenants, a very fair agreement will be the result and the probability of having a TSP providing excellent service to the landlord's tenants will be greatly enhanced. If a landlord is too tough it will have no access agreement, no fees, no control, no choice of providers for its tenants, but then it will have an incumbent that will continue laughing all the way to the bank. It may sign an agreement with a MaxLink or a Look but how long will the TSP be there to perform? If the landlord really wants to see choice in Canada, it will have to help create and sustain an environment where alternative TSPs are able to grow and flourish.

Special Note:

Mobile Carriers - are not TSPs in the ordinary sense. The landlord's form of agreement that BOMA or Riser Management has recommended are designed to deal with fixed telecom service providers which provide service to tenants renting space from the landlords. Many landlords attempt to adapt this POP form of agreement to deal with mobile carriers. Antennas are a completely different animal and I strongly recommend landlords look more carefully at the agreements signed between carriers (eg. between Rogers and Clearnet) as a more appropriate

template for protecting their interests. These are reasonably short agreements that deal appropriately with relocation, reconfiguration, approvals, interference and cooperation issues in addition to the items outlined in this paper.

LAND TITLES ACT - DEMISE OF ACTUAL NOTICE

A carrier will invoke the doctrine of actual notice in Ontario as the holder of an unregistered interest in land when a subsequent transferee tries to take the position that since the carrier's interest (whether by lease or easement) is not registered on title, it takes free and clear of the carrier's rights.

In William v. Ducks Unlimited (Canada), [2003] M.J. No 62, Man. Q.B. Menzies J. Mar. 24/03, it was determined that the purchaser, who knew of the existence of a lease extending agreement that was not registered on title when he purchased was not bound by it. The original lease on title was coming to an end and he could terminate it on one year's notice. The extending agreement that gave the tenant an extra 30 years was not binding on the purchaser. The judge found that Section 80 of the Real Property Act (Manitoba) makes it clear that actual notice of an unregistered interest does not affect a person relying on a certificate of title. His knowledge of the 30 year unregistered extension agreement could not lead to a finding of fraud under the Act. The statutes in Alberta and Saskatchewan also clearly eliminate the doctrine of actual notice.

Section 72 of the Land Titles Act (Ontario) states that no person other than the parties to the agreement shall be deemed to have any notice of the contents unless registered.

The Supreme Court of Canada in United Trust Co. v. Dominion Stores Ltd. [1977] 2 S.C.R. 915, by a four to one decision, Chief Justice Laskin dissenting, affirmed that the doctrine of actual notice was alive and well in Ontario as the legislation did not clearly abrogate the doctrine. Will a court in Ontario one day agree that Laskin C.J. was correct and find a way to distinguish the facts of a case before it or will the legislature amend the Act? Who knows? Prudence dictates that notice of extension agreements be registered in addition to the original.