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WHO IS YOUR LANDLORD?
HOW TO PROTECT YOURSELF AS A TENANT

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INTRODUCTION

What do you know about your Landlord and how can you protect yourself as a Tenant? Is your Landlord properly named in your leasing documents? Does it exist? Does it own the interest it is purporting to convey to you? Did it sign the document correctly? What is its financial covenant? Why do you as a tenant even care? This paper is intended to answer those questions and other questions to assist tenants to ensure they are getting what they bargained for. Essentially, this paper is intended to be a practical tool for tenants and those who represent them.

There are a number of ways that you as tenant can protect yourself, such as searching to confirm the existence of your landlord, confirming the landlord's proper legal name and including it in your lease documents, subsearching title to the land and perhaps conducting a financial search of the landlord. Each of these is discussed below. However, two initial comments should be made: (1) the searches and protections advisable will often depend on the level of care tenant or its counsel wishes to take, in consideration of the risk involved (e.g. the size and importance of the lease transaction and considerations specific to that transaction); and (2) the most beneficial time to conduct any or all of these searches discussed herein is clearly at the beginning of the matter, meaning prior to execution of even the offer to lease or any letter of intent. In fact, the sooner these searches are completed and you know who and what you are dealing with, the better chance the tenant has of protecting itself.

This paper is set out in the following sections:

1. Types of Landlords (concerns relating to the type of landlord)
2. General Concerns (regardless of the type of landlord)
3. Acknowledgement and Related Materials

1. TYPES OF LANDLORDS

Your landlord may be any of the following:

- Individual
- Trust (Real Estate Investment Trust or other)
- Corporation
- Co-Owners
- Limited Partnership
- General Partnership
- Pension Fund
- Foreign Entity (any of the above but outside Ontario or Canada)
- Agent (claiming authority to act/sign on the landlord's behalf)

How you protect yourself as a tenant will depend on which category above your landlord falls into. Each of the above categories is discussed below. First however, the list of types of landlords above must be boiled down to categories in order to determine how they can be searched and to determine who is to execute lease documents.

As noted in many sources, only individuals and corporations are separate legal entities. It is a basic legal principle that “the law regards as persons with distinct and separate legal rights, only

individuals and corporations.”¹ Partnerships are not considered legal entities, separate from their partners and it is the partners that own the property, not the partnership. Likewise, trusts are not separate legal entities (despite being taxed separately) but are a fiduciary relationship. Further, a “fund” is not a legal entity. Describing your landlord as co-owners does not tell you what type of entity each co-owner is or is purporting to be (corporation, etc.). Finally, a “foreign entity/owner” also does not tell you what type of entity your landlord is. In order to know your landlord, and to know how it must execute your lease documents, the task is to trace everything back to an individual or corporation as outlined below. This is because although only individuals or corporations are separate legal entities, partnerships and trusts can be identified on lease documents (as long as the appropriate entities or individuals actually execute the lease document on behalf of the partnership or trust).

Therefore, what you need to know is whether your landlord is:

- (a) an individual
- (b) a trust (real estate investment trust or any other trust) and if so:
 - (i) the names of all the trustees; and
 - (ii) the type of entity each trustee purports to be if other than an individual; or
- (c) a corporation; or
- (d) a partnership and if so, whether it is a general partnership or limited partnership; and
 - (i) if a general partnership:
 - a. the name of each partner;
 - b. and the type of entity each partner purports to be, if other than an individual; and

¹ Kucor Construction v. Canada Life Assurance Co., 32 O.R. (3d) 548 at 554.

- (ii) if a limited partnership:
 - a. the name of each general partner; and
 - b. the type of entity each general partner purports to be if other than an individual.

This can be a bit of an onion-peeling exercise, to use the old analogy. Because only individuals and corporations are considered separate legal entities/persons, in the end, to determine how to search and who will be required to execute the lease documentation, you typically keep going until every entity has uncovered a corporation/corporations or an individual/individuals or a combination of the two (e.g. if one of your trustees is a limited partnership, you go to (d) (ii) above and continue your detective work) which will tell you how to search to protect yourself or your tenant client.

Each of these categories and the other categories first listed under Types of Landlords is discussed below.

Individual

An individual is perhaps the simplest type of landlord to deal with. An individual is a legal person and can enter into contracts (leases or otherwise) presuming the individual has the capacity to do so. Capacity for individuals is a three pronged requirement; an individual must be 18 years of age or over, must not be of unsound mind and must not be bankrupt. While many landlords will request a copy of an individual's identification to confirm the individual's full legal name (and perhaps confirm age), and may conduct bankruptcy and Official Receiver searches against that individual (Insolvency Name Search with the Official Receiver is issued by the Office of the Superintendent of Bankruptcy Canada (as an agent of Industry Canada) and a

bankruptcy petitions search at the Ontario Super Court of Justice (petitions records and Superior Court computer database is searched; note that this only exists in the Toronto courthouse at 361 University Avenue), tenants rarely do the same for an individual landlord. Perhaps this is because the risk is low that an individual landlord will not have capacity. However depending on the situation and your concerns or your tenant client's instructions, there may be some circumstances in which identification could or should be requested and where a bankruptcy and Official Receiver search would be advisable, since it is well established at law that a bankrupt does not have capacity to enter into a contract and therefore any contract entered into with an individual is likely void ab initio. Mental capacity is more difficult to determine as we are dealing with the opposing party. Luckily the risk is quite low of mental incapacity (although you may have experiences where you thought the landlord was out of his/her mind) and unless you notice highly unusual behaviour, this concern is typically cast aside and a reasonable leasing lawyer would not concern themselves with questions of mental capacity of a landlord absent highly unusual behaviour.

An individual must execute documents personally (a registered business name on its own is not enough) and the signing line should show the individual's full legal name, although the individual may use a signature that is the individual's typical signature. Although an individual's signature is not required to be witnessed in Ontario on lease documents, a witness is often added/required as an evidentiary tool, and in some provinces or foreign jurisdictions, an affidavit of execution by a witness and perhaps an affidavit of age may be required or may be practice.

Trust

A trust is not a legal entity but is a fiduciary relationship where the beneficial interest in property is held by the trustees for the beneficiaries.² Trusts are not recognized by the Land Titles System (only the trustees of a trust will appear on a parcel register, presuming the trustees are individuals or corporations). If your landlord is a trust (real estate investment trust or any trust), you need to determine the names of all the trustees (and if any of the trustees are a partnership, the names of the partners or general partners as described above). Typically all trustees must execute the lease document (subject to any exception in the trust agreement allowing less than all the trustees to enter into contracts relating to the trust or trust property). Although the name of a trust may appear on a lease document, it is the trustees that must execute the document and that take on the liability and obligations. Typically trustees are individuals and so the comments above regarding individuals would apply, however trustees may be corporations (or even perhaps partners on behalf of a partnership) and in such cases, the comments regarding the type of entity that the trustee is, would also apply.

Corporation

It is a well established legal principle that corporations are separate legal entities with the rights of a natural person (Section 15 of the OBCA and Section 15(1) of the CBCA). If your landlord is a corporation, a search of the appropriate government records should be completed to confirm the exact legal name of your landlord (or any corporation required to execute the lease document such as a trustee that is a corporation or a general partner of a limited partnership or a partner of a general partnership, if a corporation). In Ontario, this of course is achieved for most

² Trust and Estate Planning, Law Society of Upper Canada , 2006 Bar Admissions Materials.

corporations, through a corporate profile search or certificate of status search of the corporation in question, issued by the Ministry of Government Services. However, the appropriate search of government records needs to be done in the jurisdiction in which the landlord (or whatever corporate entity you are searching) was incorporated or amalgamated. In the event of a federal corporation incorporated under the Canada Business Corporations Act (and in some circumstances, some other federal statutes), a certificate of compliance can be obtained (in place of a certificate of status) and a federal profile can be obtained (in place of a corporate profile search), which are issued by Industry Canada (also known as a Strategis search).

Note that some corporations (e.g. banks, not-for-profit corporations) are incorporated pursuant to special statutes and may not be capable of being searched through the traditional channels. This is outside the scope of this paper, and accordingly I will not discuss this in detail, however in such cases, it may be prudent to obtain a copy of the statute that created the corporation in question to check the exact legal name or the corporation's constating documents. If you regularly conduct these searches, then you will know that it is not that rare to be given the name of a landlord or tenant (even a large institutional landlord or tenant), only to discover upon a corporate search that the entity's name was not provided correctly.

A corporation is to sign by its full corporate name, which must end in either Limited, Ltd., Incorporated, Inc., Corporation or Corp. pursuant to Section 10(1) of the Ontario Business Corporations Act ("OBCA") for corporations incorporated/amalgamated pursuant to the OBCA and Section 10(1) of the Canada Business Corporations Act ("CBCA") for corporations incorporated/amalgamated pursuant to the CBCA (subject to limited exceptions in the acts).

Do you need to inquire as to whether the corporation you are dealing with has authority to enter into the lease document at hand? If you are concerned regarding capacity, a bankruptcy and Official Receiver search can be performed, as described in the section on Individuals above. However, as relates to authority, unless an exception applies, when dealing with an OBCA or CBCA company, typically the answer is no. Section 15 of the OBCA and Section 15(1) of the CBCA state that a corporation incorporated or amalgamated thereunder has all the capacity and the rights, powers and privileges of a natural person (which of course includes entering into of contracts). Section 17(2) of the OBCA provides that a corporation shall not perform any act outside restricted by its articles, however Section 17(3) provides that no act of a corporation (including a transfer of property) is invalid by reason only that the act is contrary to the corporation's articles, by-laws, a unanimous shareholder agreement or the OBCA [Sections 16(2) and (3) of the CBCA are equivalent]. Further, Section 17(1) of the OBCA (and Section 16(1) of the CBCA) provide that a by-law need not be passed to confer any particular power on a corporation or its directors. These sections taken together, alleviate the need to inquire as to the corporation's authority, however remember that this only applies with respect to OBCA and CBCA companies. For other corporations (whether foreign or outside the OBCA or CBCA), equivalent rules may or may not apply and therefore authority of the corporation to enter into the lease document may be an issue and should be considered. It may be that a legal opinion from counsel in the jurisdiction of the corporation and/or resolutions of the corporation will suffice, but that will depend in every case on your tenant client's instructions and for a tenant, upon the size and importance of the transaction at hand versus the potential risk.

Do you need to inquire as to whether the signing officer(s) of the corporate landlord have authority to execute the lease document? I do not intend to reiterate the common law regarding

apparent and ostensible authority, but will include a very brief summary on the Indoor Management Rule as every discussion of corporate authority must necessarily include this. For a detailed discussion of the evolution of the Indoor Management Rule, discussion of apparent and ostensible authority, and determination of authority for non-OBCA or CBCA corporations, please see Ramsey Ali's paper, "Indoor Management Rule: Understanding the Rule and its Limitations" noted in the Acknowledgement section below. The Indoor Management Rule is codified in Section 19 of the OBCA as follows:

19. A corporation or a guarantor of an obligation of a corporation may not assert against a person dealing with the corporation or with any person who has acquired rights from the corporation that,

- (a) the articles, by-laws or any unanimous shareholder agreement have not been complied with;
- (b) the persons named in the most recent notice filed under the *Corporations Information Act*, or named in the articles, whichever is more current, are not the directors of the corporation;
- (c) the location named in the most recent notice filed under subsection 14 (3) or named in the articles, whichever is more current, is not the registered office of the corporation;
- (d) a person held out by a corporation as a director, an officer or an agent of the corporation has not been duly appointed or does not have authority to exercise the powers and perform the duties that are customary in the business of the corporation or usual for such director, officer or agent;
- (e) a document issued by any director, officer or agent of a corporation with actual or usual authority to issue the document is not valid or not genuine;
or
- (f) a sale, lease or exchange of property referred to in subsection 184 (3) was not authorized,

except where the person has or ought to have, by virtue of the person's position with or relationship to the corporation, knowledge to that effect. R.S.O. 1990, c. B.16, s. 19.

Further, Section 18 of the OBCA provides that "no person is affected by or is deemed to have notice or knowledge of the contents of a document concerning a corporation by reason only that the document has been filed with the Director or is available for inspection at an office of the

corporation.” [Sections 18(1) and (2) of the CBCA is equivalent to Section 19 of the OBCA and Section 17 of the CBCA is equivalent to Section 18 of the OBCA].

In an overly simple attempt to summarize the protection of the Indoor Management Rule (please see Ramsay Ali’s paper for a more fulsome summary), essentially no corporation may assert against a person dealing with that corporation, or obtaining rights from that corporation, that a person held out by the corporation as a director, officer or agent of the corporation has not been duly appointed or has no authority to exercise the customary powers and duties of the corporation usual for a director, officer or agent, that the constating documents or shareholders agreement have not been complied with, that a document issued by such person with actual or usual authority to issue the document is not valid or genuine, or that a sale, lease or exchange of property was not authorized, except where such person knew or ought to have known of a situation described above, by virtue of their relationship to the corporation. What this essentially means for the purposes of this discussion of proper execution of lease documents by the landlord, is that provided the corporation held out someone as having authority generally to act for the landlord in lease matters, you needn’t inquire further about that person’s authority to execute the document as a signing officer of the landlord. For a discussion of what constitutes “holding out someone as having authority to act, see Ramsey Ali’s paper noted above.

Remember however, that the Indoor Management Rule applies only to OBCA and CBCA companies. There may or may not be an equivalent rule for other entities, and certainly the inquiry would have to be made for corporations falling outside the Indoor Management Rule. In the event that your corporate landlord was not incorporated or amalgamated under the OBCA or the CBCA (for example, a foreign corporation), you may be able to request and obtain a resolution of the corporation, authorizing the corporation to enter into the lease document. This

may not be bulletproof if the action is ultra vires the corporation in the first place, but can be used again as part of a belt and suspenders approach. The best approach however, in the writer's opinion, is an opinion from the landlord's corporate counsel as to due authorization, execution, delivery and enforceability of the lease document.

Can you draft provisions into the lease that protect the tenant regarding the authority of the signing entity or the landlord to enter into the lease document? Inserting the words "I/we have authority to bind the corporation" may help and certainly cause no harm, however may not be enough on its own. It is likely better to determine whether authority exists in the beginning than to deal with a problem or claim later.

Co-Owners

Describing your landlord as co-owners does not tell you what type of entity your landlord actually is or is purporting to be (corporation, etc.). You need to know what type of entity each co-owner is (corporation, individual or other) in order to know how to protect yourself as tenant. Once you have determined whether your co-owners are individuals, corporations, etc., the comments herein relating to that category of landlord would apply.

Partnership (General Partnership or Limited Partnership)

It is commonly held that partnerships are not legal entities, separate from their partners but are only juristic entities. As noted in *Kucor Construction v. Canada Life Assurance Co.*, "the concept of partnership property is also recognized in law but this does not mean that it is property owned by the partnership but rather property in which all of the partners have undivided

interests.”³ Further, partnerships are not recognized by the Land Titles System (only partners/general partner(s) of partnerships will appear on a parcel register, presuming they are individuals or corporations). If your landlord is a partnership, you need to know whether it is a general or limited partnership, and the names and types of entities of the general partner(s) of a limited partnership and all partners of a general partnership.

Although a partnership is not a legal entity, separate from its partners, and cannot own property, it may be referenced on your lease document so long as the appropriate partners sign as required. Accordingly, it makes sense to conduct a search to confirm the existence of the declaration of partnership and to confirm the exact name of the partnership. This may seem counter-intuitive. Why would you search something that does not legally exist as a separate entity? For two reasons. Firstly, consider the partnership name like a business name. If you were going to reference a business name under which a corporation operated, you would want to ensure it is referenced correctly. In addition, the partnership search can tell you who the partners are (for a general partnership) or who the general partner(s) is/are for a limited partnership, which is your confirmation of which entity(ies) need to execute the lease document in question. This search, for partnerships declared in Ontario, is called an Enhanced Business Names Search which will provide you with a Business Names Report (for a general partnership) or a Limited Partnership Report (for a limited partnership) which are issued by the Ministry of Government Services.

Pension Fund

A “fund” (pension or otherwise) is not a legal entity and is not recognized by the Land Titles System. Typically a fund is not encountered as a landlord since a nominee corporation is often

³ Supra, footnote no. 1.

incorporated for the purpose of holding title to real property that forms part of the property of a fund, which results in a tenant dealing with a landlord that is a corporation.

Foreign Entity

Should your landlord be a foreign entity, the tenant needs to determine what type of entity the landlord is (corporation or otherwise) and would be well advised to obtain a search of the foreign entity similar to the corporate profile search described above, but in the appropriate jurisdiction. In addition, it may be necessary to seek counsel in the jurisdiction of the foreign corporation either to provide the search(es) required and/or to provide any opinions required as to existence and/or subsistence of the entity, whether it is a legal entity that can execute documents, and opinions regarding due authorization, execution, capacity and/or enforceability. Full corporate and enforceability opinions may be prudent in certain transactions.

Agent Claiming Authority to Act or Sign on Behalf of the Landlord

In addition, any of the following could claim to have authority to act on behalf of or execute lease documents on behalf of your landlord (despite not having a direct interest in the property in which you are leasing premises):

- Someone or an entity acting as an attorney pursuant to a Power of Attorney;
- An Asset Manager;
- A Property Manager; or
- Someone acting as agent.

In addition to the concern regarding whether such person or entity has authority to actually execute lease documents on behalf of the landlord, presuming such authority exists, the same

inquiries should be made of any such entities as set out in the Types of Landlords discussion above to determine which searches should be performed.

If an individual or entity claims to be an agent with authority to execute lease documentation on behalf of the landlord, the cautious approach is to require evidence of that authority (such as a copy of the property management agreement if the agent purports to be the property manager). You can then satisfy yourself that the authority has in fact been delegated and has not been revoked. This will however depend in every circumstance on the agent purporting to have authority, how it purports to have such authority and whether you as tenant or your tenant client wish to inquire further.

If a corporation or individual is purporting to have authority to execute lease documents on behalf of the landlord due to a grant of authority pursuant to a power of attorney, a copy of the power of attorney should be obtained and examined to ensure the authority was in fact conveyed, that the authority conveyed is broad enough to capture the execution of the lease document in question, that the power of attorney is still valid, is not expired and has not been revoked and is a proper and enforceable power of attorney. All of this again, will depend on the tenant's assessment of risk and whether it wishes to inquire or have you as its counsel, inquire. However, without making the inquiries, the tenant runs the risk of not receiving the interest which it believed it was bargaining for.

2. GENERAL CONCERNS (REGARDLESS OF TYPE OF LANDLORD)

Subsearch of Title to Property:

Does your landlord own the property in which it is purporting to convey a leasehold interest to you or your client? This step may be very obvious, but many still skip this step. It is critical for the obvious reason that the tenant or its solicitor should confirm the ownership of the property by the entity claiming to be the landlord (or in the event you are subleasing premises, to confirm ownership by the head landlord and whether a notice of a head lease has been registered on title); as the latin phrase goes, “nemo dat quod non habet” or one cannot give what one does not have. Otherwise, the tenant may not actually receive the interest which the landlord is purporting to convey. This step is critical for other reasons which are outside the scope of this paper, such as including determination of encumbrances on title which may require non-disturbance agreements.

Financial Covenant of Your Landlord:

Who your landlord is, is in part a financial question. You may be concerned about your landlord's financial covenant, especially if the landlord is required to pay the tenant a tenant allowance or if the landlord has a lot of obligations in the lease (such as maintenance, repair and replacement obligations) which concern may be greater in certain situations than others (e.g. the building is old and roof replacement is soon necessary, and/or your landlord is an individual or not a large well-known institution or public company). While this topic is really outside the scope of this paper, there are ways initially to provide some comfort as to the landlord's financial covenant including conducting a search such as a Dun & Bradstreet search, a bank reference or examining the landlord's recent financial statements (if the landlord will provide those to you). If you are lucky enough to be or be acting for a very large tenant, you may be able to command

security from the landlord for its obligations, such as a letter of credit, or some other remedy such as a tenant self-help right where the tenant can then off-set the cost of such actions against its rent.

Drafting to Protect: Can You Avoid Searches:

The best answer is no! Although it is not uncommon to include or see a statement in a lease that the landlord is the registered owner of the property and/or has the right to grant the interest being conveyed, this should be used as a belt and suspenders approach only. This will not be of much assistance to you if in fact the statement is untrue, other than that you have a misrepresentation that could potentially form the basis of a claim against the landlord. However, in the meantime, you as tenant or your tenant client did not get what you bargained for and therefore you are far better to conduct the subsearch and the other searches identified above.

3. ACKNOWLEDGEMENT AND RELATED MATERIALS

I have found the following papers to be of great assistance and have borrowed somewhat from each of them:

- Ramsey Ali's paper, "Indoor Management Rule: Understanding the Rule and its Limitations" which was included in the 2006 Six Minute Real Estate Lawyer materials;
- Brian Bucknall's paper "Conventional and Unconventional Parties: How Documents are Engrossed and Executed", which was included in the 2002 Six Minute Commercial Leasing Lawyer materials; and
- Benjamin Zarnett's paper "Two Cheers for Certainty, the Rights and Liabilities of Undisclosed Parties" which was included in the Special Lectures 2002: Real Property Law materials.