GREEN BUILDINGS AND GREEN LEASES

The Environmental Background

All buildings, including residential, commercial and industrial buildings have a significant impact on our environment. For example, buildings:

- consume vast amounts of our natural resources;
- responsible for 1/3 of Canada's energy consumption;
- emit 1/3 of Canada's greenhouse gases;
- contribute ¼ of Canada's solid waste/land fill

Increased public awareness and genuine overall concern for Planet Earth's continued wellbeing, and some would even argue its existence, in connection with the ever increasing levels of carbon co2 emissions (more frequently being referred to as and commonly called "greenhouse gases" which have been confirmed and reconfirmed scientifically on an almost daily basis as being the primary driving force causing erratic climate fluctuations and changes) has led to a recent surge in popularity as well as increasing acceptance of many of the ideas and goals espoused by the green building and environmentally sustainability movement.

Surveys carried out by leading industry associations, including BOMA Canada, have all confirmed that the Canadian commercial real estate industry by and large have bought into the green building movement. Embracing "green" as a key component of developing, building, renovating, managing, leasing and operating commercial buildings, can greatly reduce a significant portion of the harmful environmental impacts referred to above.

Green Buildings

What is a "green building"?

A true "green building", according to governmental agencies and non-governmental organizations dedicated to promoting the benefits of environmental sustainability, is a structure purposely designed to reduce both the direct and indirect environmental consequences associated with its design, development, construction, renovation, occupancy, operation, maintenance and eventual decommissioning.

Green buildings differ from conventional buildings by integrating environmental and social initiatives that result in a material reduction of their environmental impacts while at the same time improving building performance and providing safer and healthier interiors and exteriors for its occupants. There is a misconception by some people that a green building will require sacrifice in terms of comfort. While this may have been the case during the infancy of the green building movement, there are strategies today that can provide the same level of comfort with much less energy cost.

Along with the same misconception about comfort and luxury, also comes a genuine fear and concern with respect to the way a green building might look. However, by choosing a creative architect and/or engineer for the design team, you can have a green building that looks like any other builder if that's truly what the owner wishes and desires. It is important to understand and recognize that for a green building to be truly "green", and to achieve the ultimate in sustainable design it requires the owner and his/her architect and/or engineer to work with surrounding climatic and geographic conditions instead of against them (i.e, year-round weather conditions, topography, prevailing winds, indigenous trees, shrubs and plants, etc).

A failure to properly take into account the buildings surroundings, climate and geographic conditions will inevitably result in increased costs, which is something every owner wants to avoid.

Examples of working with surrounding climatic and geographic conditions instead of against them include incorporating into your green building project, one or more of the following sustainable strategies for your building:

Passive solar heating, external solar shading, solar water heating, xeriscaping, wind power, photovoltaics, geothermal, garden roofs, energy recovery ventilation, vegetative wind breaks, evaporative cooling, cross ventilation, night cooling, rainwater harvesting, daylighting, displacement ventilation, mixed-mode (hybrid) ventilation and passive stack ventilation.

A four (4) page detailed explanation and illustration of these sustainable strategies, how they work, when and where to use them, will be provided as a hand out to participants of this presentation.

From the foregoing, it is a readily observable that constructing a Green Building requires the full and complete co-operation of everyone involved in the design, development and building process. Furthermore, to truly get the best "green" building possible under the circumstances requires the owner's full commitment, dedication and financial support.

Codes, Standards and Green Rating Systems

Constructing a Green Building requires everyone involved in the design, development and building process to follow and adopt all applicable standards, codes and green rating systems. Codes require mandatory compliance, [code is the Law] and a building either complies with building codes or it doesn't. Code is the minimum set of requirements a building must meet to be considered a lawfully constructed building. On the other hand, standards and green rating systems are, for the most part voluntary, exceed the minimum code construction requirements and the parties have more choice and selection as to which of the standards and green rating systems they wish to have incorporated into their commercial building. Note: Codes often incorporate by reference one or more specific standards which are deemed necessary and/or appropriate for the building matter at hand. It is then up to legislators and/or law makers, as applicable, to adopt and enforce or cause to be enforced the code as being the law of the land in their respective jurisdictions.

In Canada, the National Research Council Canada ("NRC") is responsible for building the nation's physical infrastructure. For over sixty years, NRC has provided significant scientific research and development in support of the construction sector through its NRC Institute for Research in Construction. To keep pace with the changes, and to ensure that the latest innovations and applications are applied safely by the construction industry, a new version of the National Building Code ("NBC") is prepared and published approximately every five years. The Canadian Commission on Building and Fire Codes, an important branch of NRC, and its related committees, are responsible for and tasked with the ongoing development of the national model construction codes. The relevant codes are the following:

National Building Code of Canada 2010
National Fire Code of Canada 2010
National Plumbing Code of Canada 2010
National Building Code of Canada 2005
National Fire Code of Canada 2005
National Plumbing Code of Canada 2005
National Housing Code of Canada 1998 and Illustrated Guide Model National Energy Code of Canada for Buildings 1997
Model National Energy Code of Canada for Houses 1997
National Farm Building Code of Canada 1995.

Standards are consensus based and industry accepted instructions and/or explanations on what, when, where and how to satisfy the construction requirements referred to in the abovementioned codes. Historically and traditionally, standards were established and set by stakeholders. Standards are useful in driving greener building practices. In Canada, the Canadian Standards Association ("CSA") is engaged in the development of consensus standards in the areas of safety, quality and performance as well as the assessment and certification of conformance to various standards. CSA's five stated core values, which are those values which truly and accurately reflect who they are and how they do business, are: accountability, continuous learning, integrity & mutual respect, safety and sustainability. Regarding CSA's last mentioned core value, CSA has a long and distinguished track record in supplying solutions for environmental management and energy efficiency. It is newsworthy to note that in 2010/2011, CSA has partnered with the U.S. Environmental Protective Agency to establish a testing lab under its Energy Star program so as to enable Canadian companies market their qualified products and services with the benefit of the Energy Star label. CSA is also expanding its services and solutions relating to alternative fuels, hydrogen, fuel cells, electric vehicles, wind power and other renewable energy technologies. Augmenting its climate change solutions, CSA has also introduced a new carbon performance program that provides organizations with credible third-party recognition for their efforts to reduce green house gas emissions.

Prior to making a substantial financial investment in adopting green initiatives, prospective owners and developers of green buildings often turned to their professional trade association for direction, leadership and guidance.

Obvious that another tool and/or set of driver initiatives was desperately needed in addition to existing codes and standards when responding to the demands of the green building movement, professional trade associations representing the commercial real estate industry were quick to assume a leadership role in promoting energy, sustainability and green programs and initiatives, and in the process of doing so, Green Building Rating Systems were established along with their complimentary certification requirements to verify and confirm to all concerned compliance had been achieved with the green program being carried out.

Most if not all professional real estate industry associations claim that obtaining a green building rating certification, provides the owner and/or developer with the following additional benefits:

- i. Gain recognition for sustainable and green building efforts;
- ii. Validate achievement through independent third party review;
- iii. Qualify for a growing array of government grants and incentives; and
- iv. Contribute to a growing green building knowledge base.

BOMA BESt (Building Environment Standards)

In 2005, BOMA Canada rolled out its green building rating system then called BOMA Go Green and Go Green Plus. BOMA Canada's program was designed to be practical and assessable, while providing marketing and cost-saving opportunities obtained from lessening and reducing environmental impacts. Its aim was to increase energy efficiency while integrating sustainability in the building.

In 2009, BOMA Go Green and Go Green Plus were integrated into the current BOMA BESt program. By the fall of 2009, over 1200 buildings had been certified with some of the older buildings already in the recertification cycle.

Using and online audit, BOMA BESt assesses and rates existing commercial buildings against best practices, standards and principles of green building systems and management. BOMA International has the largest database for externally verified existing buildings in North America.

BOMA BESt program generates ratings and recommendations for improvements such as accelerating programs towards meeting commercial real estate including targets for energy consumption of 20 Equivalent Kilowatt Hour per Square Feet Per Year (eKwh/sq.ft/year) by 2015.

This new national energy consumption target for Canadian Office Buildings would make Canada a world leader in conservation/sustainability.

An overview of the BOMA BESt program is as follows:

To achieve certification, all buildings must meet BOMA's Best Practices at a minimum. The performance levels are established based on the score achieved on the online BOMA BESt Assessment and a third-party onsite verification process. The certification levels are:

BOMA BESt Level 1

indicates that a building has met all of the BOMA BESt Practices. This includes performing an energy audit and a water audit, continually monitoring resource consumption and having a preventative maintenance program.

BOMA BESt Level 2

certified buildings not only meet all of the BOMA BESt Practices, but also achieve a score of 70-79% on the BOMA BESt Assessment. The certification demonstrates that a building is moving towards excellence in energy and environmental performance through better management.

BOMA BESt Level 3

certification is for buildings that meet all of the BOMA BESt Practices and achieve a score of 80-89% on the BOMA BESt Assessment. Buildings at this level of certification have achieved higher performance and demonstrate excellence in management.

BOMA BESt Level 4

the highest level of certification, is for buildings that achieved a score of over 90% on the BOMA BESt Assessment and meet all of the BOMA BESt Practices. These buildings are high performers with low energy consumption, excellent management and often combine new technologies and industry leadership.

The BOMA BESt program provides building owners and managers a framework for environmental management and improvement. It is a tool that gives managers the opportunity to identify their baseline performance, and then work towards improvement over a period of years as they go through cycles of recertification. Applicants can also use BOMA BESt as a tool for improvement before achieving certification by taking advantage of the recommendations in their assessment report to improve the property before submitting for certification.

A growing number of building owners and managers, including major property management firms and many government organizations are measuring the energy and environmental performance of their buildings using BOMA BESt.

Before moving on and examining LEED®, another popular and state of the art green building rating system, it is newsworthy to highlight BOMA International's recent roll out and initiation of its new BOMA 360 Performance ProgramTM which, as it more implies, is a holistic approach to rating operations and management practices.

Leadership in Energy and Environmental Design (LEED[™]) Green <u>Prorgam</u>

The LEED® green building certification program is a voluntary, consensus-based national rating system for buildings designed, constructed and operated for improved environmental and human health performance. LEED® addresses all building types and emphasizes state-of-the-art strategies in five areas: sustainable site development, water savings, energy efficiency, material and resource selection, and indoor environmental quality.

The LEED® rating system is an adaptation of the United States Green Building Council (UsGBC) LEED Green Building Rating System for which the Canadian Green Building Council (CaGBC) is the sole licensee. The Canadian LEED rating systems are tailored specifically for Canadian climates, construction codes, standards and regulations. CAGBC is a non-profit national organization which was created in 2003 to further the expansion of green building in Canada by promoting the use of the LEED® rating system. Its mission is to "Lead and

accelerate the transformation to high-performing, healthy green buildings, houses and communities throughout Canada".

Like several other green rating systems in North America, LEED® is an independent 3rd party certification program based on the total point score achieved, following an independent review.

The LEED rating system accommodates a wider range of green building strategies that best fit the constraints and goals of particular projects through the establishment of four (4) possible levels:

- i. Certified;
- ii. Silver;
- iii. Gold; and
- iv. Platinum.

From a review of the newspapers and trade journals, one can see firsthand the Canadian Real Estate industry 's growing popularity in the green building rating systems, both in numbers and depth of contribution, and professional industry associations, such as BOMA Canada and the Canadian Green Building Council, just to mention a few, deserve much credit for providing stellar stewardship and leadership in this very important area of environmental sustainability.

GREEN [GREENER] LEASES

Introduction

Having just provided the reader with a general and rather simplistic overview of green buildings and green building systems in Canada, we are ready now to graduate and move onto the next level of the presentation and discuss Greener Leases. I use the word green and greener interchangeably in this presentation with the acknowledged reservation that since the concept of environmental sustainability is still very much an evolving process, there really can be no one perfect "green" lease at this time or for the near future, only leases which aim for and target "greener" applications and implementations of the principles of environmentally sustainability.

Outside of owner-occupied commercial buildings, most commercial office premises are leased to third party tenants which have their own specific office space requirements, needs and standards.

As its name implies, a green or greener lease is a specific type of commercial real estate lease which has been modified, amended and supplemented by deleting all inappropriate terms and conditions and by adding those essential and necessary terms, conditions, warranties, representations and covenants which are required to ensure the particular green rating system or systems, including all of their special features, attributes and benefits, are obtained, maintained and the parties expectations entering into the green lease are met.

The following are just some of the main tenets or elements required for greener leases:

- Typical legal language found in lease documents which existed under the common law legal practice over the course of hundreds of years are no longer acceptable and must be superceded and replaced with new environmental terms and phraseology;
- Targets and Benchmarks the inclusion of targets and/or limits for the measurement of the environmental performer of the building for such things as water consumption, energy reduction, solid waste, recycling and/or reduction;
- Performance Standards specifications used in measuring green targets
- Environmental Management Plan (EMP) probably the most important element as it ... a green building are enjoyed and maintained throughout the duration of an office building lease which can have terms of 5, 10 or even 20 years.
- Disputes/Clarification Handling Procedure Deals with non-compliance issues as well as appropriate penalties
- Audits to determine compliance by lessor and lessee

The Role of a Green [Greener] Lease

In laymans' terms, the commercial lease controls the relationship between lessor and lessee: who can do what, when, how and who pays for it. In the office contract, the Lessor may control the exterior common areas of the office building and its operations, however the tenant normally controls what occurs within its own premises. The legal and primary role of a green lease is to ensure the expectations of lessors and lessees respect to the levels of sustainability and environmentally friendly practices are met, achieved and maintained during the life of the lease agreement. Therefore once a commercial building obtains one or more green building ratings, it is imperative that the legal contract between lessor and lessee, namely the "Green Lease", provides legally enforceable lease provisions to ensure that all criteria needed to obtain the green building rating, remain in place and/or are improved upon so as to maintain its green rating or ratings, as may be applicable. It is apparent to all, that a failure to do so is disastrous as it may result in the commercial building being downgraded or worse still, losing its green rating altogether.

A greener commercial lease can often take much more time for the parties along with their professional advisors and counsel to prepare and finalize than a conventional and traditional non-green office lease, since each of the parties will be both required to specifically identify and mutually agree upon (i) the precise green features, standards and criteria which they both wish to have adopted for the office space being leased, (ii) which party will be responsible for their respective cost& expense, and (iii) how to resolve any misunderstandings and non-compliance issues. It is obvious to professional office and commercial building lease negotiators that the expectations of the lessor and lessee may not always be the same, and this is most likely to happen in a green lease setting as well. This is so important because like the saying goes, "It is nice to be green, but it comes at a cost." With the world economy in its present state, there will certainly be cost constraints facing all stakeholders, including lessors, developers and lessees.

Legal Vocabulary, Green Clauses, And Green Sustainability Concepts

The standard commercial office lease came into existence and was originally prepared at a time when most people in the commercial real estate industry, including their legal advisors and counsel, had not even heard of green house gases nor environmental sustainability for that matter. Coupled with the fact that many of the commercial office leases presently in existence use legal concepts and archaic language having been derived from centuries of judicial precedents formulated under the English Common Law, the preparation of a green [greener] lease by lessors and lessees to meet the present modern day realities of the green movement towards environmental sustainability requires a completely new set of lens along with a legal vocabulary and green sustainability concepts for the adoption and implementation of a commercial office lease which more accurately and properly reflects the current needs and wants of today's green minded society.

An excellent Green Lease Guide for Commercial Office Tenants published by Real Property Association of Canada (REALpac) providing a detailed explanation of the relevant issues as well as valuable practical suggestions and guidance on how to use green leases, will be provided as a hand out to participants of this presentation.

Please Note: The Green Lease Guide for Commercial Office Tenants doesn't try to be brief. Like any other field of professional endeavour, doing leasing well can be hard work. The preparation of a greener lease uses new legal vocabulary and incorporates new sustainable environmental concepts and criteria not previously covered in a commercial office lease. One last final cautionary note: There's no "one form fits all" battlecry here. There is no "right" or "wrong" solution for many of the contractual issues to be inserted in a green lease. It is highly recommended and advised that where possible strive to add clarity and certainty, and if necessary, avoid brevity where the stakes are high. And after all, the stakes are indeed high.