

# RealEstateBrief

Summer 2008

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Being (or being seen as) “green” is high on many agendas these days. Leases are no exception to this trend. In our first article Annie Thuan discusses green leases, being a lease that incorporates environmental sustainability principles and practices relating to the manner in which the building is to be managed and occupied.

In our second article Matthew German reviews the very recently enacted *Mortgage Brokerages, Lenders and Administrators Act*. This Act sets out the licensing regime for and regulatory requirements applicable to mortgage agents, brokers, brokerages and administrators who act as mortgage brokers in Ontario.

## Leases: It's Not Easy Being Green – Or Is It?



Annie M. Thuan

Issues relating to climate change and the “green” agenda are affecting many areas of law and industry. The commercial property market is no exception and is increasingly feeling the impact of the green trend as environmentally concerned landlords and tenants push for “green leases.”

A green lease is a lease between a landlord and tenant that incorporates environmental sustainability principles and practices relating to the manner in which the building is to be managed and occupied. The lease may be for a new “green building” or an existing conventional building that is proposed to be renovated as a green building. This article explores some of the key challenges in ensuring the viability of a green lease.

### The Case for Going Green

From a landlord’s perspective, a green lease provides the advantage of reducing the environmental footprint of the building, which could translate to significant cost savings. There is also the added benefit of an enhanced social and environmental image while simultaneously avoiding the negative perception of owning a poorly designed and energy inefficient building, both of which are positive from a public relations and brand perspective.

From a tenant’s perspective, a green lease may be appealing due to the resulting cost savings, perhaps through reduced rent and/or energy costs. A tenant may also benefit from the positive environmental image of leasing space in a green building. Additionally, improved indoor space has the benefit of boosting employee well-being, which has been linked to reduced absenteeism and increased productivity.

Despite the obvious appeal of a green lease, the reality is that a lease is a contract in which the landlord’s objective is to maximize rental returns and occupancy rates. If the upfront costs in developing a green building or renovating an existing conventional building exceed those of a conventional commercial building, then the owner will have to either bear these costs or recover them from the tenants. If the additional costs are passed on to the tenants, then the prospective tenants will have to consider whether the “green” building, with all things being equal, is worth paying the premium to lease.

A landlord could attempt to overcome a tenant’s resistance to entering into a green lease by structuring the lease to allow tenants to benefit from the “green measures.” For example, the landlord could install smart meters so that tenants in a net lease situation could benefit from the costs savings resulting from reduced energy and water consumption.

### Green Building versus Retrofitting

Compared to leasing a new green building, landlords looking to retrofit an existing conventional building face additional difficulties.

For a new green building, provided that the landlord has decided that it is a worthwhile investment and can recoup the costs, it is a matter of negotiation with the tenant. The tenant may wish to include in the lease certain provisions that ensure the environmental performance of a building. This may include incorporating green building standards such as LEED® or Go Green BOMA Plus. Due diligence by the tenant would be important in this regard to ascertain whether the stated building standard has in fact been achieved. There should also be provisions in the lease dealing with situations where the landlord does not meet the prescribed standard. Examples of provisions that might be incorporated include reduced rent, other financial compensation or the right to terminate the lease (all of which the landlord, and its lender, will strongly resist). Conversely, landlords should ensure that they understand the requirements of these standards and are prepared to meet these requirements before agreeing to provide a representation or warranty that a building will meet a certain building standard.

Retrofitting an existing building into a “green building” presents a whole different set of obstacles. Firstly, there is the issue of whether the existing lease contains provisions that could accommodate the retrofit and would allow the landlord to recover the costs of the retrofit. This will require a review of the terms of the existing lease for such provisions. Secondly, buildings with multiple tenants may be problematic. The landlord may have to wait until the end of most of the lease terms before undertaking such renovations or alternatively seek support from the tenants. Depending on the retrofit, it may require buy-in from all tenants as the landlord may need to seek agreement from the tenants to accept any interruption or interference with the tenant’s use of the leased premises resulting from the retrofit.

In an existing building with existing leases there is also the question of whether the lease terms support other green initiatives. For example, existing leases are unlikely to require tenants to use green products in cleaning and may prohibit tenants from using used or recycled fixtures.

## Introducing Environmental Principles and Best Practices

Typically, a green lease will identify the environmental goals and objectives, as well as targets and benchmarks, relating to various matters such as energy use, water consumption, reduction in use of certain chemicals and improved waste management practices. The green lease will also set out the landlord and tenant’s respective obligations for meeting the prescribed goals and targets.

For the environmental targets prescribed by a lease to be feasible, they must be achievable. The targets should be developed in cooperation with the tenant to ensure the tenant’s continued support. In the case of a new green building, it may be necessary to involve the architect and/or developer when marketing the building to prospective tenants.

A green lease may also contain consequences that would apply to both the landlord and tenant if they fail to comply with their prescribed obligations or achieve their environmental targets. As a result, it is important that the lease contains provisions for reliable means of continued monitoring, auditing and reporting of data to provide accountability of all parties. Outlining a dispute resolution mechanism may also assist in resolving any disagreement relating to the reasons for missing a particular target.

## Conclusion

Green leasing does not have to be so hard to achieve. With the mutual support and commitment of the landlord and tenant, both parties could reap the benefits of improved building performance while at the same time providing each with shared bottom-line business benefits.

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*This article originally appeared in the June 27, 2008 issue of The Lawyers Weekly published by LexisNexis Canada Inc.*

## The New Mortgage Brokerages, Lenders and Administrators Act



**Matthew German**

The new *Mortgage Brokerages, Lenders and Administrators Act* (the “New Act”) came into effect in Ontario on July 1, 2008. This represents the first major overhaul of the current *Mortgage Brokers Act* (the “Old Act”) in about 35 years and will change the licensing regime and requirements for mortgage agents, brokers, brokerages and administrators who act as mortgage brokers in Ontario. While changes to the Old Act have been discussed for many years, it is the increase in mortgage fraud cases over the last few years that gave urgency to the new legislation. The provincial govern-

ment’s goal in introducing this new legislation was not only to reduce mortgage fraud, but also to improve consumer protection, enhance and modernize financial services regulations and encourage greater competition and choice for consumers.

### Regulated Activities and Parties

The New Act is much more expansive in its regulatory regime as it has significantly widened the definition of mortgage brokerage. Under the New Act, you must have a brokerage licence before you are able to carry on the business of dealing or trading in mortgages, mortgage lending or administering mortgages.

Corporations, partnerships, sole proprietorships and prescribed entities that carry on the business of dealing in mortgages, trading in mortgages or lending money on the security of real property will be required to have a brokerage licence. If they carry on the business of administering mortgages, they will be required to have a mortgage administrator's licence.

Individuals who are compensated for dealing or trading in mortgages in Ontario, as employees or otherwise, will be required to be licensed as a mortgage broker or mortgage agent. In order to become licensed, mortgage brokers and agents will be required to meet certain educational standards approved by the Financial Services Commission of Ontario ("FSCO"). The Regulations provide that mortgage agents must successfully complete an approved education program within two years before applying for a licence. As for mortgage brokers, they must successfully complete an educational program and pass an approved qualifying exam within three years before applying for a licence. The Superintendent of the FSCO has the discretion to waive these education criteria if satisfied that the individual has a combination of education and experience equivalent to the requirements.

The New Act also provides that mortgage brokerages must ensure that every mortgage broker or agent who is authorized to deal or trade in mortgages on their behalf complies with the requirements of the New Act. Every mortgage brokerage must also appoint a principal broker who will oversee the organization and act as the "chief compliance officer."

Those who may be affected the most by the licensing requirements under the new regime are private lenders. Under the Old Act, private mortgage lending was a completely unregulated market. However, under the New Act, any private lender who is in the business of lending money will no longer be allowed to make mortgage loans unless they obtain a brokerage licence. While many private lenders may view this licensing requirement as a hassle, the hope is that such licensing requirements will better protect the consumer.

### Exemptions from Licensing Requirements

The New Act stipulates a number of general and specific exemptions from the licensing requirements. For instance, Section 6 of the New Act provides that financial institutions are exempt from having to be licensed because they are already highly regulated and have substantial consumer protection measures in place.

Employees of financial institutions are also exempt from being licensed as mortgage brokers or agents.

Individuals and businesses providing simple referrals will also be exempt from the licensing requirements. A simple referral is where a person or entity refers a prospective borrower to a prospective lender, or vice versa.

There is also an exception from the licensing requirements for lawyers. The Regulations state that lawyers do not need to be licensed where "the lawyer as part of acting in his or her professional capacity as a lawyer on behalf of a client engages in one of the regulated activities of mortgage brokerage and the lawyer does not hold himself or herself out as engaging in any activity regulated under the New Act." This does not mean a lawyer could become a mortgage broker without being licensed, but does provide lawyers with the ability to assist a client where they have otherwise been retained to perform legal work.

The New Act also provides exemptions for some other parties as prescribed in the Regulations, including trustees in bankruptcy, directors, officers and employees of crown agencies as well as certain statutory corporations.

*Under the New Act, you must have a brokerage licence before you are able to carry on the business of dealing or trading in mortgages, mortgage lending or administering mortgages.*

### Regulation and Enforcement

In an attempt to better protect consumers, all licensees will be required to comply with the standards of practice as prescribed by the Regulations under the New Act. These obligations include the requirement for mortgage administrators and brokerages to carry errors and omissions insurance with extended coverage for loss resulting from fraudulent acts. In addition,

there must be prescribed disclosure to each borrower of the cost of borrowing associated with any mortgage.

In order to ensure compliance with the New Act, the Superintendent of the FSCO has the authority to conduct inquiries and examinations of the business and activities of each licensee. Some of the powers given to the Superintendent include the right to search the premises of any licensee and seize or freeze a licensee's assets. Moreover, the Superintendent can issue compliance orders or impose summary administrative penalties if there are grounds to believe that there is a contravention or non-compliance with the New Act or Regulations. Failures to comply with the New Act could result in administrative fines of up to \$25,000 for mortgage administrators and up to \$10,000 for brokers or agents. Upon conviction for a criminal offence under the New Act, the penalty for individuals would be up to \$100,000 or a year in jail, and the penalty for corporations would be up to \$200,000.

## Conclusion

The goal of the new licensing regime, which in Ontario came into full force and effect on July 1, 2008, is to protect lenders and borrowers alike by introducing mandatory controls into the world of mortgages. Hopefully, ensuring that every mortgage agent, broker, brokerage and administrator gets licensed will

reduce the instances of fraud in the mortgage industry. However, only time will tell whether the New Act will actually have this desired effect.

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## Events

### 2008 RealLeasing Conference

Presented by Real Estate Property Association of Canada  
September 18, 2008, Toronto, ON

The Lang Michener Real Estate Group is a proud sponsor of RealLeasing 2008. This conference provides an opportunity for high-level executives to analyze and enhance their leasing strategies and to gain greater insight into the trends, challenges and issues that permeate the industry.

### 8<sup>th</sup> Tax Planning for Real Estate Transactions Course

Presented by The Federated Press  
October 7–8, 2008, Toronto, ON

**Cyndee Todgham Cherniak** is speaking at the 8<sup>th</sup> Tax Planning for Real Estate Transactions Course. The course will focus on topics including: real estate investments, alternatives from a tax

perspective, the REIT exception to the new tax on income trusts, tax-deferred transfers of real estate, property purchase tax implications, tax issues in donations and eco-gifting of land, real estate transaction GST and provincial tax issues, and much more.

### ICSC 2008 Canadian Convention – Deal Making and Trade Exposition

Presented by the International Council of Shopping Centers  
October 27–29, 2008, Toronto, ON

Lang Michener is proud to be an exhibitor at the International Council of Shopping Centers' (ICSC) 2008 Canadian Convention – Deal Making and Trade Exposition. ICSC is the definitive international association for the shopping centre industry and the annual Canadian Convention attracts thousands of participants from the Canadian real estate industry.

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Please visit <http://lawoftheland.blogs.com/> to read the Lang Michener Real Estate Group's blog titled *Law of the Land: Canadian Commercial Real Estate Law Blog*. The blog provides up-to-date and relevant information about current issues in commercial real estate.

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Publication Mail Agreement Number 40007871

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