

Rooftop Solar Leasing Seminar

Legal Issues

Prepared by: Pamela Green, B.A. (Hons), LL.B., LEED® Accredited
Professional, Partner Commercial Real Estate

Presented by: Murray Box, B.A., LL.B., Partner Commercial Leasing

Pallett Valo LLP
February, 2011

Green Energy Act, 2009 (“GEA”)

The GEA promotes the growth of clean, renewable sources of energy (like wind, solar, hydro, biomass and biogas) and a new green economy, by:

- ▶ Creating a Feed-in Tariff that guarantees specific rates for energy generated from renewable sources (the “FIT Program”).
- ▶ Establishing a one stop streamlined approvals process at the provincial level.
- ▶ Requiring “Made in Ontario” content.

The Ontario Power Authority (OPA) is responsible for implementing the FIT Program.

DUE DILIGENCE

You must conduct appropriate due diligence.

That means:

- ▶ Appropriate physical due diligence on your roof by qualified professionals.
- ▶ Appropriate research and due diligence on the solar provider.
- ▶ And of course, appropriate legal due diligence.

Review Existing Lease Provisions

- ▶ Does the landlord even have a right to use the roof?
- ▶ Has the entire building been demised to the tenant such as a whole building lease?
- ▶ Will a rooftop facility interfere with existing equipment or rights of tenants to use the roof?

Green Office Lease (REALpac)

“Operating Costs” include costs of:

- ▶ Providing, installing, modifying and upgrading energy and water conservation equipment and systems
- ▶ Making Alterations, replacements or additions to the Building intended to reduce Operating Costs, utility consumption, and/or Greenhouse Gas emissions, improve the operation of the Building and the systems, facilities and equipment serving the Building, or maintain their operation
- ▶ Developing, and/or modifying and operating the Building to achieve the objectives of the Environmental Management Plan, including, without limitation, the costs of data collection, reporting, commissioning and re-commissioning the Building or any part of it

Licensing of Roof Rights

The Landlord may at any time, and from time to time, prior to or during the Term, grant licenses (a “License”) to third parties (a “Licensee”) for the purpose of installing, operating and maintaining equipment (such as, by way of example only, solar panels or cellular towers) (collectively, the “Licensee’s Equipment”), on the roof of the Building for such purposes as the Landlord may permit, provided that the operation of the Licensee’s Equipment does not materially interfere with the Tenant’s business operations in the Premises.

Review Existing Lease Provisions (cont'd)

Leases may require amendment to allow for installation and/or to address tenant concerns.

What are some of those tenant concerns:

- ▶ Operating costs (solar tenant uses electricity (!) and may have use of storage areas and parking areas for which they should contribute to operating costs (at least in the eyes of the other tenants)).
- ▶ Increase in insurance premiums?
- ▶ Increase in real property taxes?

Review Existing Lease Provisions (cont'd)

Would the cost of due diligence and/or construction be considered an operating cost or capital expenditure.

- ▶ Interruption to tenants during due diligence, installation, repair and/or replacement. Solar tenant should be responsible for damage caused to tenant's property.
- ▶ Mortgagee's consent (may or may not be required under the terms of the loan, but the solar provider will require a non-disturbance agreement).

Pros & Cons of a 20-year Lease

- ▶ FIT contract term is 20 years.
- ▶ Cost of equipment and installation requires a long-term lease for feasibility.
- ▶ Technology rapidly changing – Can the solar provider be forced to upgrade (ie. same output/less space)?
- ▶ Long period of time to restrict the landlord's ability to use and/or alter the roof and/or building.
- ▶ Bankruptcy of solar tenant (security for cost of removal of equipment and repair of any damage to roof increased over time by CPI).

Letters of Intent

A Letter of Intent allows the parties to review the engineering, design and cost analysis for the proposed project to determine feasibility. If project is not feasible, saved costs of negotiating lease.

An LOI must clearly state it is non-binding, save for confidentiality and costs to be borne by solar provider.

Due Diligence:

Be clear on costs and who bears them.

All reports should be addressed to the owner (and solar tenant).

Leases

Lease terms must be discussed in advance. Do not agree to sign a standard form lease before it is reviewed by legal counsel.

- ▶ Term
- ▶ Rate (understand terminology)
- ▶ Security (both for initial due diligence costs and long-term)
- ▶ Operating costs contribution (especially realty tax/insurance)
- ▶ Maintenance/upgrade obligations & Safety Precautions
- ▶ Indemnity (damage to roof and damage to tenant's property)
- ▶ End of term options (removal/purchase/rollover)
- ▶ FIT contract precondition
- ▶ Relocation/Interruption without liability for loss of income to tenant

Thank you.

Questions?

Pamela Green

pgreen@pallettvalo.com

905-273-3022 ext. 265

Murray Box

mbox@pallettvalo.com

905-273-3022 ext. 240