

**COURT OF APPEAL FOR ONTARIO**

IN THE MATTER OF THE BANKRUPTCY OF  
CURRICULUM SERVICES CANADA/  
SERVICES DES PROGRAMMES D'ÉTUDES CANADA  
OF THE CITY OF TORONTO, IN THE MUNICIPALITY OF TORONTO  
IN THE PROVINCE OF ONTARIO

MEDALLION CORPORATION, in its capacity as authorized agent for 280  
RICHMOND STREET WEST LIMITED

Appellant

- and -

RSM CANADA LIMITED in its capacity as trustee in bankruptcy of  
CURRICULUM SERVICES CANADA/SERVICES DES PROGRAMMES  
D'ÉTUDES CANADA

Respondent

**RESPONDENT'S COMPENDIUM**

July 2, 2019

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Lawyers & Trade-Mark Agents  
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Suite 300  
Mississauga, Ontario  
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Lawyers for the Respondent, RSM Canada Limited  
In its capacity as trustee in bankruptcy of  
Curriculum Services Canada/Services des  
Programmes d'Études Canada

TO: **MINDEN GROSS LLP**  
Barristers and Solicitors  
2200 - 145 King Street West  
Toronto, ON M5H 4G2

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Tel: 416-369-4137  
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Lawyers for the Appellant,  
Medallion Corporation as authorized  
agents for 280 Richmond Street West  
Limited

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# TAB 1

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**CURRICULUM SERVICES CANADA  
SERVICES DES PROGRAMMES D'ÉTUDES CANADA**

**NOTICE OF DISCLAIMER OF LEASE  
PURSUANT TO THE *BANKRUPTCY AND INSOLVENCY ACT*,  
R.S.C. 1985, c. B-3, AS AMENDED (the "Act")**

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**To: 280 Richmond Street West Limited, Landlord**

**Date: April 23, 2018**

Take notice that:

1. On March 29, 2018, Curriculum Services Canada Services Des Programmes D'Études Canada ("CSC") became bankrupt as a result of an assignment in bankruptcy filed by CSC, and the undersigned, RSM Canada Limited, was appointed as Trustee of the Estate of CSC.
2. The Trustee hereby disclaims any and all leases entered into between 280 Richmond Street West Limited, as lessor, and CSC, as lessee, including the lease dated as of May 26, 2017 between the lessor and "Curriculum Services Canada" named as lessee, in respect of the leased premises situated at Suite 600, 150 John Street, Toronto, Ontario.
3. This disclaimer of lease is effective immediately.

**DATED** at Toronto on April 23, 2018.

**RSM CANADA LIMITED, in its capacity as  
Trustee in Bankruptcy of Curriculum  
Services Canada Services Des  
Programmes D'Études Canada and not in  
its personal capacity**

Per:



Name: Daniel Weisz, CPA, CA, CIRP, CFF, LIT  
Senior Vice President

**RSM Canada Limited**  
11 King Street W.,  
Suite 700, PO Box 27  
Toronto, Ontario  
Canada  
M5H 4C7

Tel: 416 480 0160

## TAB 2

Court No.

File No.

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In the matter of the bankruptcy of  
Curriculum Services Canada / Services Des  
Programmes D'Études Canada  
of the City of Toronto, in the Municipality of Toronto  
in the Province of Ontario

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Form 78 (Bill C-12)  
Statement of affairs (Business bankruptcy)

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RSM Canada Limited - Licensed Insolvency Trustee

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11 King Street W., Suite 700, Box 27  
Toronto ON M5H 4C7  
Phone: (416) 480-0160 Fax: (416) 480-2646

RSM Canada Limited  
11 King Street W., Suite 700, Box 27  
Toronto ON M5H 4C7  
Phone: (416) 480-0180 Fax: (416) 480-2046

District of: Ontario  
Division No. 09 - Toronto  
Court No. 31-2360759  
Estate No. 31-2360759

FORM 31  
Proof of Claim  
(Sections 50.1, 81.5, 81.6, Subsections 65.2(8), 81.2(1), 81.3(8), 81.4(8), 102(2), 124(2), 128(1),  
and Paragraphs 51(1)(e) and 66.14(b) of the Act)

In the matter of the bankruptcy of  
Curriculum Services Canada / Services Des Programmes D'Études Canada  
of the City of Toronto, in the Province of Ontario

All notices or correspondence regarding this claim must be forwarded to the following address:  
c/o Minden Cross LLP, 145 King Street West, Suite 2200, Toronto, Ontario M5H 4G2 Attention: Mr. Timothy R. Dunn

In the matter of the bankruptcy of Curriculum Services Canada / Services Des Programmes D'Études Ca of the City of Toronto in  
the Province of Ontario and the claim of MEDALLION CORPORATION, authorized agents for 280 Richmond Street West Limited, creditor.

I, JOSEPH CACCIOLA (representative of the creditor), of the City of Toronto, in the province of Ontario, do hereby certify:

- 1. That I am Commercial Property Manager of Medallion Corporation, creditor.
- 2. That I have knowledge of all the circumstances connected with the claim referred to below.
- 3. That the debtor was, at the date of bankruptcy, namely the 29th day of March 2018, and still is, indebted to the creditor in the sum of  
\$ 4,128,669.82 as specified in the statement of account (or affidavit) attached and marked Schedule "A", after deducting any  
counterclaims to which the debtor is entitled. (The attached statement of account or affidavit must specify the vouchers or other evidence in  
support of the claim.)

4. (Check and complete appropriate category.)

A. UNSECURED CLAIM OF \$ 4,028,111.23  
(other than as a customer contemplated by Section 282 of the Act)

That in respect of this debt, I do not hold any assets of the debtor as security and  
(Check appropriate description.)

Regarding the amount of \$ 100,558.59 I claim a right to a priority under section 136 of the Act.

Regarding the amount of \$ \_\_\_\_\_ I do not claim a right to a priority.  
(Set out on an attached sheet details to support priority claim.)

B. CLAIM OF LESSOR FOR DISCLAIMER OF A LEASE \$ \_\_\_\_\_

That I hereby make a claim under subsection 65.2(4) of the Act, particulars of which are as follows:  
(Give full particulars of the claim, including the calculations upon which the claim is based.)

C. SECURED CLAIM OF \$ \_\_\_\_\_

That in respect of this debt, I hold assets of the debtor valued at \$ \_\_\_\_\_ as security, particulars of which are as follows:  
(Give full particulars of the security, including the date on which the security was given and the value at which you assess the security,  
and attach a copy of the security documents.)

D. CLAIM BY FARMER, FISHERMAN OR AQUACULTURIST OF \$ \_\_\_\_\_

That I hereby make a claim under subsection 81.2(1) of the Act for the unpaid amount of \$ \_\_\_\_\_  
(Attach a copy of sales agreement and delivery receipts.)



FORM 31 — Concluded

- E. CLAIM BY WAGE EARNER OF \$ \_\_\_\_\_
- That I hereby make a claim under subsection 81.3(8) of the Act in the amount of \$ \_\_\_\_\_
- That I hereby make a claim under subsection 81.4(8) of the Act in the amount of \$ \_\_\_\_\_
- F. CLAIM BY EMPLOYEE FOR UNPAID AMOUNT REGARDING PENSION PLAN OF \$ \_\_\_\_\_
- That I hereby make a claim under subsection 81.5 of the Act in the amount of \$ \_\_\_\_\_
- That I hereby make a claim under subsection 81.6 of the Act in the amount of \$ \_\_\_\_\_
- G. CLAIM AGAINST DIRECTOR \$ \_\_\_\_\_

*(To be completed when a proposal provides for the compromise of claims against directors.)*  
 That I hereby make a claim under subsection 50(13) of the Act, particulars of which are as follows:  
*(Give full particulars of the claim, including the calculations upon which the claim is based.)*

- H. CLAIM OF A CUSTOMER OF A BANKRUPT SECURITIES FIRM \$ \_\_\_\_\_

That I hereby make a claim as a customer for net equity as contemplated by section 282 of the Act, particulars of which are as follows:  
*(Give full particulars of the claim, including the calculations upon which the claim is based.)*

5. That, to the best of my knowledge, the above-named creditor is not related to the debtor within the meaning of section 4 of the Act, and has not dealt with the debtor in a non-arm's-length manner.

6. That the following are the payments that I have received from, and the credits that I have allowed to, and the transfers at undervalue within the meaning of subsection 2(1) of the Act that I have been privy to or a party to with the debtor within the three months (or, if the creditor and the debtor are related within the meaning of section 4 of the Act or were not dealing with each other at arm's length, within the 12 months) immediately before the date of the initial bankruptcy event within the meaning of Section 2 of the Act: *(Provide details of payments, credits and transfers at undervalue.)*

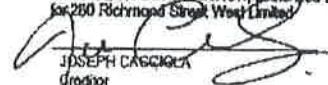
7. *(Applicable only in the case of the bankruptcy of an individual.)*

- Whenever the trustee reviews the financial situation of a bankrupt to redetermine whether or not the bankrupt is required to make payments under section 68 of the Act, I request to be informed, pursuant to paragraph 68(4) of the Act, of the new fixed amount or of the fact that there is no longer surplus income.
- I request that a copy of the report filed by the trustee regarding the bankrupt's application for discharge pursuant to subsection 170(1) of the Act be sent to the above address.

Dated at Toronto this 20th day of April, 2018

  
 Witness

MEDALLION CORPORATION, authorized agent  
 for 280 Richmond Street West Limited

Per:   
 Name: JOSEPH CACCIOLA  
 Title: Director  
 Phone Number: 416-659-7220  
 Fax Number:  
 E-mail Address: JCACCIOLA@MEDALLIONCORP.COM

**NOTE:** If an affidavit is presented in Form 31, the debtor must be a person qualified to file a statement.  
**WARNING:** A payment made, pursuant to subsection 128(7) of the Act, to settle a liability or payment to the secured creditor of the debt or the value of the security to be accepted, is a payment of security, by the secured creditor.  
 Subsection 20(17) of the Act prohibits certain practices for making any false claim, proof, declaration or statement of account.

**Instructions to Creditors**

**General**

Creditors are required to file their claims with the Trustee prior to the time appointed for the meeting of creditors in order to be eligible to vote.

The proper name of the claimant and its complete address, to which all notices or correspondence are to be forwarded, must be shown.

The proof of claim form must be completed by a person, not by a corporation. The person completing the proof of claim form on behalf of a corporation shall indicate his official capacity, such as "Credit Manager", "Secretary", "Authorized Agent", etc.

All sections of the proof of claim must be completed. Any non-applicable wording should be crossed out.

The signature of the creditor or declarant on the claim must be witnessed.

**Paragraph 3**

Insert the total amount owed and attach supporting documentation which agrees to the amount owed. The supporting documentation can be in the form of an invoice or a detailed statement of account which shows the date, the number and the amount of all the invoices or charges, together with the date, the number and the amount of all credits or payment. A statement of account is not complete if it begins with an amount brought forward.

**Paragraph 4**

Complete the subsection(s) that applies depending on the nature of your claim. Strike out those subsections which do not apply. For example, trade creditors complete subsection A and secured creditors complete subsection C. In subsection A, the total amount of your unsecured claim is inserted in the first space, and the portions claimed as priority versus no priority are split out in the following two spaces. The priority under section 136 of the Act referred to in subsection A may include the claims of employees of the bankrupt for wage arrears, commissions or expenses; a landlord for rent arrears and acceleration rent, if included in the lease; municipalities, if their claims are not a charge against title; and departments of federal and provincial governments.

All Secured Creditors must attach to their proofs of claim, a certified true copy of their security documents and details of registration.

**Paragraph 5**

All claimants must indicate whether or not they are related to the debtor, as defined by The Bankruptcy & Insolvency Act, by striking out "AM" or "AM NOT" and "HAVE" or "HAVE NOT".

**Paragraph 6**

All claimants must attach a detailed list of all payments or credits received or granted, as follows:

- a) within the three (3) months preceding the bankruptcy or the proposal, in the case where the claimant and the debtor are not related.
- b) within the twelve (12) months preceding the bankruptcy or proposal, in the case where the claimant and the debtor are related.

**Voting/Proxy**

Any unsecured creditor may vote in person or by proxy, but when a proxy is attending the meeting, he must be so appointed by the creditor. When the creditor is a corporation, the person attending the meeting of the creditors, including the declarant, must be appointed proxy by an officer of the corporation having status to make such an appointment.

**Note**

Section 201(1) of The Bankruptcy & Insolvency Act states: "Where a creditor, or a person claiming to be a creditor, in any proceedings under this Act, willfully and with intent to defraud, makes any false claim or any proof, declaration or statement of account, that is untrue in any material particular, he is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars, or to imprisonment for a term not exceeding one year, or both."

Please return your completed proof of claim form and proxy to:

RSM Canada Limited  
11 King Street West, Suite 700, P.O. Box 27  
Toronto, ON M5H 4C7

Attention: Donna Nishimura

Fax: (416) 480-2646 / Email: donna.nishimura@rsmcanada.com

**SCHEDULE "A"**

**STATEMENT OF INDEBTEDNESS**

1. Medallion Corporation, as authorized agent for 280 Richmond Street West Limited (the "Landlord"), entered into a Lease, as Landlord, with Curriculum Services Canada (the "Tenant"), as Tenant, dated as of May 26, 2017 (the "Lease") for the property known municipally as 150 John Street West, Toronto, Ontario (the "Premises").
2. The term of the Lease expires on December 31, 2027 (the "Term").
3. A copy of the Lease is attached as Schedule A(1) hereto.
4. The claim of the Landlord is as follows:
  - (a) Preferred claim for three (3) months accelerated rent in the amount of \$100,558.59;
  - (b) Unsecured claim for the unexpired portion of the Term of the Lease in the amount of \$4,028,111.23.

## TAB 3

ONTARIO  
SUPERIOR COURT OF JUSTICE  
IN BANKRUPTCY AND INSOLVENCY  
IN THE MATTER OF THE BANKRUPTCY OF  
Curriculum Services Canada/Services Des Programmes D'Études Canada  
of the City of Toronto  
in the Province of Ontario

**NOTICE OF [PARTIAL] DISALLOWANCE OF CLAIM  
(Subsection 135(3) of the Act)**

**Medallion Corporation, as authorized agents for  
260 Richmond Street West Limited, Creditor:**

TAKE NOTICE that as trustee acting in the matter of the bankruptcy of Curriculum Services Canada Services Des Programmes D'Études Canada ("CSC"), we have disallowed your claim in part pursuant to subsection 135(2) of the Bankruptcy and Insolvency Act ("BIA"), for the following reasons:

- (a) *Claim to a right to a priority for the amount of \$100,558.59 as a preferred claim under the provisions of s.136(1)(f) BIA* – The realization by the Trustee from assets on the leased premises totaled \$24,571.00, and consequently the Trustee has admitted a claim for \$24,571.00 with priority under Section 136(1)(f) BIA, and has disallowed the rest of the claim to a priority.
- (b) *Claim for unexpired portion of the term of the lease in the amount of \$4,028,111.23* - On April 23, 2018, the Trustee gave notice of disclaimer of the lease entered into between CSC and Medallion Corporation, authorized agents for 260 Richmond Street West Limited.

The landlord's claim is limited to the priority claim as set out in (a) above and not to the unexpired portion of the term under the Lease to December 31, 2027 in Ontario due to the operation of the provisions of s.146 BIA that provides that, subject to the priority of claims set out in s.136 BIA, and the provisions of s.73(4) BIA, the rights of landlords shall be determined according to the laws of the Province in which the demised premises are situated, being Ontario.

The law in Ontario as to the rights of a landlord is codified in sections 38 and 39 of the *Commercial Tenancies Act*, R.S.O. 1990, chapter L.7 (the "CTA"). While s.38 CTA provides for a preferential claim which mirrors s.136 BIA, it is s.39 CTA that provides as follows:

"The person who is assignee, liquidator or trustee has the further right, at any time before so electing, by notice in writing to the landlord, to surrender possession or disclaim any such lease..."

The Trustee's position is that the Trustee cannot allow the claim for damages for unpaid and accelerated rent for the unexpired portion of the term to December 31, 2027 which the Landlord alleges it is suffering as a result of the disclaimer of the lease by the Trustee.

Under the Jurisprudence interpreting s.39 of the CTA, the effect of s.39 of the CTA is that the disclaimer of a lease by a trustee in Ontario operates as if there was a consensual surrender of the lease by the Tenant to the landlord. As a result the lease is at an end, and no claim for damages can be founded from such a cessation of obligations under the lease. A trustee is provided in s.39 of the CTA with a statutory right to commit a breach of the bankrupt's obligations under the lease.

In addition, and in the alternative, the lease lacks an acceleration provision that accelerates the payment of the remaining months of rent for the unexpired portion of the term, only the current arrears and "...next three months of Rent..." on default, and consequently there can be no acceleration of the monthly rent payments for the unexpired term to be due and owing as of the date of the bankruptcy.

In summary, your claim has been **admitted in the amount of \$24,571.00 as a preferred claim with a priority under section 136 of the Act and disallowed as to your claim for the unexpired portion of the term of the lease in the amount of \$4,028,111.23.**

AND FURTHER TAKE NOTICE that if you are dissatisfied with our decision in disallowing your claim, you may appeal to the court within the 30-day period after the day on which this notice is served, or within such other period as the court may, on application made within the same 30-day period, allow.

Dated at the City of Toronto, in the Province of Ontario, this 19th day of September, 2018.

**RSM Canada Limited,  
In its capacity as Trustee of the Estate of Curriculum  
Services Canada Services Des Programmes  
D'Études Canada, a Bankrupt, and not in its  
personal capacity**



Per: Brenda Wong, CIRP, LIT  
Senior Manager

## TAB 4

**MEDALLION CORPORATION**  
**as authorized agent for**  
**280 RICHMOND STREET WEST LIMITED**  
**LANDLORD**

- and -

**CURRICULUM SERVICES CANADA**  
**(a Federal non-share corporation)**  
**TENANT**

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**LE A S E**

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**Project:** 150 John Street West, Toronto, Ontario  
**Premises:** Suite 600  
**Term:** Ten (10) years and six (6) months





#### 4.3 Licence to Use Common Facilities

Subject to all other relevant provisions of this Lease, Landlord grants to Tenant the non-exclusive licence during the Term to use for their intended purposes in common with all others entitled thereto, such portions of the Common Facilities as are reasonably required for the use and occupancy of the Premises for their intended purpose during Building Hours and such other hours, if any, as such Common Facilities shall be open for use, as determined by Landlord from time to time.

#### 4.4 Quiet Enjoyment

Subject to all of the terms of this Lease and subject to Tenant's paying all Rent and performing all obligations whatsoever as and when the same are due to be paid and performed by Tenant, Tenant may peaceably possess and enjoy the Premises for the Term without interruption by Landlord or any person claiming by, from or under Landlord.

#### 4.5 Fixturing of Premises

By the Commencement Date, Tenant shall fully finish, furnish, fixture and staff and commence business upon the whole of the Premises as permitted and required pursuant to the terms hereof.

### 5. RENT

#### 5.1 Tenant to Pay

Tenant shall pay in lawful money of Canada at par at such address as shall be designated from time to time by Landlord Basic Rent and Additional Rent (all of which are collectively herein sometimes referred to as "Rent") as herein provided without any deduction, set-off or abatement whatsoever, except as expressly and specifically set out otherwise in this Lease, Tenant hereby agreeing to waive any rights it may have pursuant to the provisions of Section 35 of the *Commercial Tenancies Act (Ontario)* or any other statutory provision to the same or similar effect and any other rights it may have at law to set-off.

On the Commencement Date and the first day of each Rental Year thereafter and at any time during any Rental Year when required by Landlord, Tenant shall deliver to Landlord post-dated cheques. If Tenant elects to pay by electronic funds transfer, it may instead provide to Landlord a requisition for pre-authorized electronic funds transfer (where Tenant pays into Landlord's bank account as opposed to having payments withdrawn from its bank account) for all payments of Basic Rent and estimates by Landlord of Additional Rent or any portions thereof payable during the balance of such Rental Year.

#### 5.2 Basic Rent

Commencing on the earlier of: (a) the Commencement Date; and (b) the date upon which Tenant opens for business in any part of the Premises, Tenant shall pay to Landlord a fixed minimum annual rent ("Basic Rent") in the amount described as Basic Rent in subsection 1(e) hereof, to be paid in equal monthly instalments in advance on the first day of each month during the Term.

If the first day upon which Basic Rent is payable is other than the first day of a calendar month, then Tenant shall pay upon such date Basic Rent from such date to the end of such month calculated at a daily rate of 1/365<sup>th</sup> of the annual Basic Rent. If an amount per square foot is specified in the description of Basic Rent in subsection 1(e), then the Basic Rent is intended to be such amount per square foot of Rentable Area of the Premises per annum. The parties confirm that the Rentable Area of the Premises has been certified as shown on Schedule "B1".

#### 5.3 Additional Rent and Management Fee

- (a) In addition to Basic Rent, Tenant shall pay to Landlord as additional rent: (i) all other amounts as and when the same shall be due and payable pursuant to the

provisions of this Lease all of which shall be deemed to accrue on a per diem basis; and (ii) all other amounts as and when the same shall be due and payable pursuant to any agreement or other obligation, whether or not related to the Premises, between Landlord and Tenant; all of such amounts other than Sales Taxes payable pursuant hereto, whether originally payable pursuant to this Lease or otherwise, being herein sometimes referred to as "Additional Rent". Tenant shall promptly deliver to Landlord upon request evidence of due payment of all payments of Additional Rent required to be paid by Tenant hereunder.

- (b) Tenant shall pay, as Additional Rent, a management fee of up to four percent (4%) of all gross amounts paid or payable by Tenant pursuant to this Lease for all items, including, without limitation, all such items as are included in this Lease as Rent (except for this management fee), disregarding any reduction, limitation, deferral or abatement of any amount in the nature of Rent.

#### 5.4 Deemed Rent and Allocation

If Tenant defaults in payment of any Rent (whether to Landlord or otherwise) or any Sales Taxes as and when the same is due and payable hereunder, Landlord shall have the same rights and remedies against Tenant (including rights of distress and the right to accelerate Rent in accordance with Section 16.1) upon such default as if such sum or sums were rent in arrears under this Lease. All Rent and Sales Taxes shall, as between the parties hereto, be deemed to be rent due or Sales Taxes due on the dates upon which such sum or sums were originally payable pursuant to this Lease and shall be paid in accordance with this Lease without any deduction, abatement or set-off whatsoever, except as expressly and specifically set out otherwise herein.

Landlord may, at its option from time to time, apply or allocate or re-apply or re-allocate any sums received from or payable by Tenant to Landlord on account of any amounts payable by Tenant hereunder in such manner as Landlord determines in its sole and absolute discretion, without regard to and notwithstanding any instructions given by or allocations in respect of such amounts made by Tenant.

No payment by Tenant or acceptance of payment by Landlord of any amount less than the full amount payable to Landlord, and no endorsement, direction or note on any cheque or other written instruction or statement respecting any payment by Tenant shall be deemed to constitute payment in full or an accord and satisfaction of any obligation of Tenant and Landlord may receive any such lesser amount and any such endorsement, direction, note, instruction or statement without prejudice to any of Landlord's other rights under this Lease or at law, whether or not Landlord notifies Tenant of any disagreement with or non-acceptance of any amount paid or any endorsement, direction, note, instruction or statement received.

#### 5.5 Monthly Payments of Additional Rent

Landlord may from time to time, acting reasonably, estimate any amount(s) payable by Tenant pursuant to any provisions of this Lease including, without limitation, Sections 5.3, 6.2, 6.3, 7.2, 9.1 and 9.2 for the then current or the next following fiscal period, provided that Landlord may, in respect of any particular item, shorten such fiscal period to correspond to a shorter period within any fiscal period, where such item, for example Realty Taxes, is payable in full by Landlord over such shorter period, and may notify Tenant in writing of the estimated amounts thus payable by Tenant, which notification need not include particulars. The amounts so estimated shall be payable by Tenant in advance in equal monthly instalments over the fiscal period, such monthly instalments being payable on the same day as the monthly payments of Basic Rent. Landlord may, from time to time, designate or alter the fiscal period selected in each case. As soon as practicable after the expiration of each fiscal period, Landlord shall make a final determination of the amounts payable by Tenant pursuant to Sections 5.3, 6.2, 6.3, 7.2, 9.1 and 9.2 and any other relevant provisions hereof for such fiscal period and shall furnish to Tenant, showing in reasonable detail the method by which the same has been calculated, a statement of the actual Operating Costs and Realty Taxes for such fiscal period ("Final Statement"). If the amount determined to be payable by Tenant as aforesaid shall be greater or less than the payments on account thereof made by Tenant prior to the date of such



Tenant to continue in occupation of the Premises in accordance with and subject to the terms of this Lease, on the form chosen by the holder of the Mortgage. The cost of any such agreements shall be borne by the Tenant (including the Mortgagee's and Landlord's administrative and legal fees in connection therewith).

### 15.3 Tenant's Failure to Comply

If Tenant fails to execute any certificate, agreement, instrument, or other document as required by the foregoing provisions of this Article 15 within ten (10) days after request by Landlord, then Landlord shall have the right to:

- (a) execute any such certificate, agreement, instrument or document for and on behalf of Tenant and in Tenant's name, Tenant hereby agreeing to be bound by the same, and for such purpose Tenant hereby irrevocably appoints Landlord as Tenant's attorney for and on behalf of Tenant pursuant to the *Powers of Attorney Act (Ontario)* and which appointment shall survive the death or incapacity of Tenant; and
- (b) in any event, and without being affected by the foregoing right, to exercise all rights against Tenant in respect of Tenant's default as aforesaid as Landlord might otherwise have pursuant to this Lease or at law, included in which is a claim for damages.

### 15.4 Registration

Tenant shall not register this Lease or any short form or notice hereof except in Landlord's form prepared by Landlord on Tenant's request or in such form as has been approved by Landlord in writing. The cost of preparation, approval, execution and registration of any notice or short form of this Lease or other document to be registered by Tenant shall be borne by Tenant and shall be paid by Tenant forthwith upon demand. If Tenant registers or causes or permits there to be registered against the title to the Project any short form or notice of this Lease or other document, Tenant shall forthwith provide to Landlord details of such registration and a duplicate registered copy of the registered document.

Any lease or notice or short form of this Lease registered by or at the request of Tenant shall contain an irrevocable power of attorney by Tenant in favour of Landlord, which power of attorney is also hereby irrevocably granted by Tenant to Landlord under the *Powers of Attorney Act (Ontario)* and which power of attorney shall survive the death or incapacity of Tenant, authorizing Landlord to execute on behalf of and in the name of Tenant such notices, agreements and documents as shall be required or desired by Landlord to expunge or discharge from the register of the title of the land on which the Project is located any interest of Tenant therein after the expiry or earlier termination of this Lease, or to give full effect to Landlord's rights under this Article 15.

## 16. DEFAULT AND REMEDIES

### 16.1 Default and Remedies

If any of the following shall occur:

- (a) Tenant shall fail, for any reason, to make any payment of Rent as and when the same is due to be paid hereunder and such default shall continue for five (5) days after written notice is given to Tenant;
- (b) Tenant shall fail, for any reason, to perform any other covenant, condition, agreement or other obligation on the part of Tenant to be observed or performed pursuant to this Lease (other than the payment of any Rent), the Rent Deposit Agreement or any other agreement between the parties, whether or not related to the Premises, and such default shall continue for fifteen (15) days after written notice thereof or such shorter period as expressly provided herein (or such longer period as may be necessary to cure the default if the default is curable and is not

reasonably susceptible of being cured within such fifteen (15) day or shorter period, and the Tenant does not commence to cure such default within said period and thereafter proceed to cure same with all due diligence, and thereafter actually cure such default within a period of time deemed reasonable by the Landlord);

- (c) Intentionally Deleted;
- (d) any of Landlord's policies of insurance on the Project or any part or contents thereof shall be actually or threatened to be cancelled or adversely changed as a result of any use of articles on or about or occupancy of or contents in the Premises;
- (e) Tenant shall purport to make a Transfer affecting the Premises, or the Premises shall be used by any person or for any purpose, other than in compliance with and as expressly authorized by this Lease;
- (f) Tenant, any assignee or a subtenant of all or substantially all of the Premises makes an assignment for the benefit of creditors or becomes bankrupt or insolvent or takes the benefit of any statute for bankrupt or insolvent debtors or makes any proposal, assignment, arrangement or compromise with its creditors or Tenant sells all or substantially all of its personal property at the Premises other than in the ordinary course of business (and other than in connection with a Transfer requiring Landlord's consent and approved in writing by Landlord), or steps are taken or action or proceedings commenced by any person for the dissolution, winding up or other termination of Tenant's existence or liquidation of its assets (collectively called a "Bankruptcy");
- (g) a trustee, receiver, receiver-manager, manager, agent or other like person shall be appointed in respect of the assets or business of Tenant or any other occupant of the Premises;
- (h) Tenant attempts to or does abandon the Premises or remove or dispose of any goods and chattels from the Premises so that there would not, in the event of such removal or disposal, be sufficient goods of Tenant on the Premises subject to distress to satisfy all arrears of Rent payable under this Lease and all Rent payable hereunder for a further period of at least twelve (12) months;
- (i) this Lease or any goods or other property of Tenant shall at any time be seized or taken in execution or attachment which remains unsatisfied for a period of five (5) business days or more or a writ of execution has been filed against Tenant with respect to the Premises;
- (j) termination or re-entry by Landlord is permitted under any provision of this Lease or at law; and
- (k) there is a default under any Rent Deposit Agreement or Tenant default under any other agreement relating to the Premises;

then, without prejudice to and in addition to any other rights or remedies to which Landlord is entitled hereunder or at law, the then current and the next three (3) months' Rent shall be forthwith due and payable and Landlord shall have the following rights and remedies, all of which are cumulative and not alternative, namely:

- (i) to terminate this Lease in respect of the whole or any part of the Premises by written notice to Tenant (it being understood that actual possession shall not be required to effect a termination of this Lease and that written notice, alone shall be sufficient); if this Lease is terminated in respect of part of the Premises, this Lease shall be deemed to be amended by the appropriate amendments, and proportionate adjustments in respect of Rent and any other appropriate adjustments shall be made;

- (ii) to terminate this Lease by notice to Tenant without re-entering the Premises provided that such termination notice permits Tenant to remain on the Premises as a tenant at will; Tenant agrees that, if Landlord serves a notice of termination which, among other things, permits Tenant to remain in possession of the Premises as a tenant at will, this Lease will thereupon be terminated and Tenant shall be a tenant at will and Landlord may re-enter the Premises at any time thereafter without further notice;
- (iii) to enter the Premises as agent of Tenant and as such agent to relet them for whatever term (which may be for a term extending beyond the Term) and on whatever terms and conditions as Landlord in its sole discretion may determine and to receive the rent therefor and, as the agent of Tenant, to take possession of any furniture, fixtures, equipment, stock or other property thereon and, upon giving written notice to Tenant, to store the same at the expense and risk of Tenant or to sell or otherwise dispose of the same at public or private sale without further notice, and to make such alterations to the Premises in order to facilitate their reletting as Landlord shall determine, and to apply the net proceeds of the sale of any furniture, fixtures, equipment, stock or other property or from the reletting of the Premises, less all expenses incurred by Landlord in making the Premises ready for reletting and in reletting the Premises, on account of the Rent due and to become due under this Lease and Tenant shall be liable to Landlord for any deficiency and for all such expenses incurred by Landlord as aforesaid; no such entry or taking possession of or performing alterations to or reletting of the Premises by Landlord shall be construed as an election on Landlord's part to terminate this Lease unless a written notice of such intention or termination is given by Landlord to Tenant;
- (iv) to remedy or attempt to remedy any default of Tenant in performing any repairs, work or other covenants of Tenant hereunder and, in so doing, to make any payments due or claimed to be due by Tenant to third parties and to enter upon the Premises, without any liability to Tenant therefor or for any damages resulting thereby, and without constituting a re-entry of the Premises or termination of this Lease, and without being in breach of any of Landlord's covenants hereunder and without thereby being deemed to infringe upon any of Tenant's rights pursuant hereto, and, in such case, Tenant shall pay to Landlord forthwith upon demand all amounts paid by Landlord to third parties in respect of such default and all reasonable costs of Landlord in remedying or attempting to remedy any such default plus ten percent (10%) of the amount of such costs for Landlord's inspection and supervision plus a further ten percent (10%) for overhead and profit;
- (v) to obtain damages from Tenant including, without limitation, if this Lease is terminated by Landlord, all deficiencies between all amounts which would have been payable by Tenant for what would have been the balance of the Term, but for such termination, and all net amounts actually received by Landlord for such period of time;
- (vi) to suspend or cease to supply any utilities, services, heating, ventilating, air conditioning and humidity control to the Premises, all without liability of Landlord for any damages, including indirect or consequential damages, caused thereby;
- (vii) to obtain the Termination Payment from Tenant;
- (viii) if this Lease is terminated due to the default of Tenant, or if it is disclaimed, repudiated or terminated in any insolvency proceedings related to Tenant (collectively "Termination"), to obtain payment from Tenant of the value of all tenant inducements which were received by Tenant pursuant to the terms of this Lease, the agreement to enter into this Lease

or otherwise, including, without limitation, the amount equal to the value of any leasehold improvement allowance, tenant inducement payment, rent free periods, lease takeover, Leasehold Improvements or any other work for Tenant's benefit completed at Landlord's cost or any moving allowance, which value shall be multiplied by a fraction, the numerator of which shall be the number of months from the date of Termination to the date which would have been the natural expiry of this Lease but for such Termination, and the denominator of which shall be the total number of months of the Term as originally agreed upon.

#### 16.2 Reasonability of Termination Payment and Mitigation

- (a) Given a number of factors, included in which is the nature of this transaction and that Landlord is concerned that the Premises may not be capable of being rented at any relevant time in the open market for the amount of the Rent payable hereunder, the parties agree that the provisions of subsection 16.1(k)(vii) are reasonable protection for Landlord.
- (b) If this Lease is terminated pursuant to the provisions of Section 16.1 above and provided that Tenant pays to Landlord the entire Termination Payment within the time as aforesaid and to the extent only of the amount thereof paid to Landlord within such time;
  - (i) Landlord shall remit to Tenant ("Tenant's Mitigation Recovery") the net amount, if any, of all net rents received by Landlord from the rental of any portion of the Premises for the period from the Termination Date to the date which would have been the last day of the original Term or Extension Term, as the case may be, but for such termination ("Mitigation End Date"), after deducting all costs of any kind incurred by Landlord in effecting any such rental including, without limitation, commissions, allowances, inducements and the cost of all work performed in respect of the Premises and interest on all of the foregoing at the interest rate set out in subsection 16.3(a) below from the date such costs are incurred to the date of recovery of the amount of such costs (the "Net Mitigation Rent"). Landlord shall not have an obligation to re-rent the Premises but, if it does not do so, and if Tenant has paid to Landlord the Termination Payment within the time as aforesaid, Tenant shall have the right to re-rent the Premises for a term to expire no later than the Expiry Date, subject to Landlord's prior written approval of the terms and party to whom the Premises are re-rented, such approval not to be unreasonably withheld;
  - (ii) if, prior to the Mitigation End Date, the whole or any portion of the Premises are sold by Landlord without their having been re-rented as contemplated in subsection 16.2(b)(i) above, then, for the purpose of calculating Tenant's Mitigation Recovery, for the period from the date of completion of such sale to the Mitigation End Date, Landlord shall be deemed to have received Net Mitigation Rent in an amount equal to the market rent for the Premises, "as is, where is", for such period determined by agreement between the parties and failing such agreement, to be determined by the procedure set out in subsection 16.2(b)(iii) below; and
  - (iii) either Landlord or Tenant (the "Requesting Party") shall be entitled to notify the other party hereto (the "Receiving Party") of the name of an expert for the purpose of determining the Market Rent. Within fifteen (15) days after such notice from the Requesting Party, the Receiving Party shall notify the Requesting Party either approving the expert proposed by the Requesting Party or proposing another expert for the purpose of determining the Market Rent. Should the Receiving Party fail to give notice to the Requesting Party within the said fifteen (15) day period, the expert named in the notice given by the Requesting Party shall perform the













