

HOME SWEET WORK? LIVE-WORK SPACES

As real estate prices continue to soar in many parts of Canada, alternative workplace arrangements are becoming more common. One type of alternative workplace that has gained traction in urban settings is live-work space.

Live-work space combines workspace and living in a single unit. Traditionally, live-work space was a ground floor office or workshop with a family dwelling above it; however, multi-use spaces have evolved in recent years to include a variety of workspace and living combinations ranging from simple to lavish.

The emergence of live-work spaces leads to many questions about the landlord and tenant relationship. Arguably, the most critical question is whether live-work spaces are governed by any particular landlord-tenant legislation. For example, in Ontario, there are two statutes that may come into play: the *Residential Tenancies Act (RTA)* and the *Commercial Tenancies Act (CTA)*. Most Canadian provinces and territories (excluding provinces, like Alberta, that do not have commercial tenancies legislation) have similar regimes. The determination of whether a tenancy is governed by residential or commercial landlord-tenant legislation has a significant impact on the parties.

THE IMPACT

From the tenant's perspective, the residential tenancy legislation is usually regarded as offering the tenant security of tenure, rent control (in some, but not all, Canadian provinces/territories), and limited repair obligations. Landlords cannot contract out of the residential tenancy legislation.

Conversely, landlords prefer that tenancies of live-work spaces be governed by commercial landlord-tenant legislation, pursuant to which most commercial tenancy restrictions can be overridden by express lease provisions. Topics such as rent, maintenance/repair obligations, use, and cost recovery are all points of negotiation.

Outlined below are a few key implications emerging in Ontario, for example, from the *CTA* vs. *RTA* debate surrounding live-work spaces.

Rent Control

In May 2017, the Ontario government passed the *Rental Fairness Act*, which extends the rent control rules prescribed by the *RTA* to all private rental units. The effect is that rent increases for residential units are limited to once per year and are capped by the Government of Ontario's Rent Increase Guideline.

Commercial tenancies are not subject to rent control provisions. Under a commercial lease, the rent payable by the tenant is generally a function of market conditions and bargaining strength.

Termination

Most commercial leases contain provisions permitting a landlord to terminate the lease in a number of circumstances, including if: (1) the tenant defaults under the lease, (2) there is damage or destruction to the property, (3) the landlord intends to renovate or redevelop the property, or (4) the tenant remains in occupation of the premises (i.e., overholds) after the expiry of the term. The commercial landlord is often entitled to exercise these termination rights without compensation to the tenant.

By contrast, a residential landlord's termination rights are limited in Ontario to certain specific grounds enumerated in the *RTA* and require the order of a tribunal to be effectuated. These limited grounds include default, demolition/renovation/conversion of the unit, and personal use of the rental unit required by landlord, landlord's family or a purchaser. Under the *RTA*, a residential landlord has no right to terminate the lease if the tenant remains in possession of the premises after the expiry of the fixed term. Instead, the lease converts to a monthly tenancy, terminable by the

tenant (not the landlord) on 60 days' notice. Under the new *Rental Fairness Act*, landlords who exercise certain no-fault termination rights under the *RTA* are required to pay compensation to the tenant.

Repair Obligations

The parties' respective maintenance and repair obligations may be hotly contested during commercial lease negotiations. Under a net lease, it is not uncommon for a commercial tenant to be responsible for all maintenance and repairs in respect of the premises, including repairs to the HVAC system, plate glass, floors, and ceiling.

By contrast, the residential tenant's sole maintenance/repair obligations under the *RTA* are "ordinary cleanliness" of the rental unit, and repair of "undue damage" to the unit caused by the willful or negligent conduct of the tenant. The landlord is responsible for all other repairs under the *RTA*.

GOVERNING LEGISLATION

In Ontario, the *RTA* offers some guidance in determining whether a live-work tenancy is governed by the *RTA* or the *CTA*. It states that the "Act does not apply with respect to premises occupied for business or agricultural purposes with living accommodation attached if the occupancy for both purposes is under a single lease and the same person occupies the premises and the living accommodation".

Most Canadian provinces and territories (excluding Nova Scotia and PEI) have similar business purpose exemptions in their residential tenancies legislation.

In determining whether this exemption applies, the Courts have looked to the "predominant purpose"

of the premises. If the living accommodation is merely ancillary to the business use of the premises, the provisions of the *RTA* will not apply.

In applying the "predominant purpose" test, the Courts have considered the following questions:

- Who pays the rent? Are cheques drawn on business or personal accounts?
- Is there signage for the business displayed at the premises?
- Where is the registered address of the business?
- What portion of the premises is occupied by the business?
- Do the occupants meet clients/customers at the premises?
- What uses do the municipal zoning bylaws permit?

These questions may be used by landlords and tenants to structure their desired relationship.

For example, parties seeking to evade the provisions of the residential tenancy legislation may: (1) require the business entity to pay the rent (and not accept rent from any other source), (2) oblige the tenant to maintain identification signage advertising the business use in the premises, and (3) stipulate that the tenant must use the address of the premises in all of its corporate documents (including on all corporate registries).

However, while these elements may be persuasive to a Court, the actual use of the premises during the term will be the determining factor as to whether the tenancy is governed by residential or commercial tenancy legislation.

Stay tuned: with time, we can expect more case law to emerge as the live-work trend continues to grow.

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.



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