
Don't Let Agreement to Lease Provisions Trap You in a Bad Lease

When a landlord's commercial premises are up for lease and the leasing broker locates an interested tenant, it is quite common for the prospective landlord and tenant to sign an agreement to lease as a first step towards putting in place a final lease agreement.

While an agreement to lease is no substitute for a final lease, it is important for prospective landlords and tenants to understand that signing an agreement to lease often has the same legal effect as signing a final lease itself.

Ontario's Courts have said that, to be valid and enforceable, an agreement to lease must show the parties, give a description of the premises, set out the commencement and duration of the term, the rent, and all the material terms of the contract that are not just incidental to the relationship of landlord and tenant. If these requirements are met, then an agreement to lease may be legally enforced, even though the parties did not ultimately agree on the final form of lease.

If the requirements for a binding agreement to lease are not met, then an agreement to lease will usually only be considered an "agreement to agree" or an "agreement to negotiate". In law, such "agreements to agree" are not generally treated as legally enforceable contracts. However, even an agreement to agree may have enforceable provisions with respect to certain matters, such as forfeiture of deposit monies, and the entering into of an agreement to lease may trigger broker commission obligations.

Often agreements to lease contain a clause that says that the tenant will accept the landlord's standard form of lease when presented subject only to minor modifications to make it consistent with the terms of the agreement to lease. It is one thing to have such a clause included when the landlord's standard form of lease is available to the tenant and reviewed before the tenant signs the agreement to lease, but potentially unfair to the prospective tenant if the landlord's standard form of lease is not provided to the tenant until after the agreement to lease is signed. Notwithstanding the potential unfairness, the Courts will enforce such agreements to lease if the legal requirements set out above are met.

To avoid problems, parties to an agreement to lease should always ensure that:

- the agreement to lease is clearly drafted and fully understood by both parties;
- the agreement to lease clearly states whether it is intended to be a binding agreement to lease or non-binding in nature;
- the agreement to lease clearly sets out the rights of the parties insofar as preparation and acceptance of the final lease agreement is concerned;
- the agreement to lease clearly sets out what happens in the event the parties fail to agree upon a final form of lease (e.g., Are parties entitled to walk away? Are deposit monies forfeited?); and



- any conditions included in the agreement to lease with respect to lawyer approval are clearly drafted, reflect realistic timelines, and confer sufficient rights as to allow for meaningful lawyer review and comment.

Before signing any agreement to lease, landlords and tenants should ensure that their interests are fully protected and should ask themselves if they could abide by the terms of the agreement if it were legally enforced even in the absence of a separate finalized lease agreement.

About the Author

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