

Commercial Tenant Relief Provided: the *Protecting Small Business Act, 2020*

June 18, 2020

By

On April 16, 2020, Prime Minister Justin Trudeau introduced the Canada Emergency Commercial Rent Assistance (CECRA) program to deliver more than \$900 million in urgent relief to small businesses and their landlords. Since applications for CECRA opened on May 25, 2020, it has been reported that an underwhelming amount of landlords have applied and applications in the first week were only for 16,000 of the at least 400,000 small businesses that should qualify for the program. While many small business tenants are eager to receive relief through the CECRA program, many landlords have still been unsure about the program due to outstanding questions or the complex and burdensome administrative work involved in the application process. As the program is not mandatory and ultimately it is in the discretion of landlords to apply, many potentially eligible tenants have yet to receive the relief they would be entitled to under the program and were once again left hanging.

Following the example of British Columbia, Alberta and Saskatchewan, on June 8, 2020, Ontario Premier Doug Ford announced the introduction of legislation to protect commercial tenants from being locked out or having their assets seized by their landlords due to the negative impacts of COVID-19, and the process for passing such legislation, known as the *Protecting Small Business Act, 2020* (the "**Act**"), started on June 17, 2020.

The Act, also known as Bill 192, amends the *Commercial Tenancies Act* by prohibiting landlords who are or would be eligible to receive assistance from the CECRA program, from evicting tenants or exercising distress; however, the restrictions do not apply after a landlord applies and is approved to receive assistance under the program. To achieve this, the Act:

- (a) prohibits judges from ordering a writ of possession that is effective during the non-enforcement period (as defined below) if the basis for ordering the writ is an arrears of rent. This restriction applies with respect to actions or applications that were commenced before, on or after the non-enforcement period;
- (b) prohibits landlords from exercising a right of re-entry during the non-enforcement period;
- (c) prohibits landlords from seizing any goods or chattels as a distress for arrears of rent during the non-enforcement period;
- (d) requires landlords who exercised a right of re-entry between May 1, 2020 and the start of the non-enforcement period to: (i) restore possession of the premises, unless the tenant declines; or (ii) if the tenant did not decline but the landlord is unable to restore possession for another reason, compensate the tenant for all damages sustained. If possession of the premises is restored to the tenant, the tenancy is deemed to be reinstated on its previous terms and conditions, unless the landlord and tenant agree otherwise; and
- (e) requires landlords who exercised distress for arrears of rent between May 1, 2020 and the start of the non-enforcement period to return to the tenant all of the unsold goods and chattels.

Given this, the Act is essentially retroactive to May 1, 2020 and the Act's moratorium on evictions is one month longer (for the months of May, June, July and August 2020) than the three-month moratorium on evictions (for the months of April, May and June 2020) required by landlords applying under the CECRA program. The landlord is liable for damages sustained by the tenant, in addition to any other remedy available by law, if it does not comply with the above.

The "non-enforcement period" means the period beginning on the day the Act comes into force (i.e. receives royal assent) and ends on "the day this particular section of the Act is repealed". The explanatory note to the Act specifies that it is anticipated that non-enforcement period would end on September 1, 2020 (or on an earlier day to be named by proclamation of the Lieutenant Governor); however, the open ended nature of the definition provided in the Act makes one wonder if there is a possibility or intention that the non-enforcement period would ultimately be extended by the government.

The Ontario government announced they were seeking unanimous consent from all parties in the legislature to expedite the passage of the Act and have it come into force by the end of June 17, 2020, however, the Act officially received royal assent and came into force on June 18, 2020.

Although the Act is already in force, there remain many outstanding issues and questions, including:

- Does the Act change the calculus for applying for CECRA? Will this lead to an increase in landlords applying for CECRA?
- Does the Act protect tenants indefinitely for rental defaults incurred during the May 1 to September 1, 2020 period and prevent landlords from ever evicting tenants or exercising distress with respect to the same? Or can landlords simply wait until after September 1, 2020 to exercise their rights of re-entry or distress? If tenants are protected indefinitely for rental defaults during the May 1 to September 1, 2020 period, is there essentially no obligation to pay rent during such period and no recourse for landlords with respect to the same? It is likely that the legislation only defers landlords' rights of re-entry or distress with respect to the May 1 to September 1, 2020 period, and tenants must cure defaults with respect to such period by September 1, 2020. The incentive for landlords to apply for CECRA seems to be that they would not want to forego rent until September 1, 2020, as they have their own expenses to account for. Instead, landlords can receive 75% of rent owing for April, May and June 2020 under CECRA and exercise their rights with respect to any rent owing after such period. This would give the landlord present income, preserve the relationship between landlord and tenant and reduce the time and money spent, instead of potentially losing months of rent in the long-run if the tenant does not have the money or assets.
- Is the Act effectively a government mandated rent deferral?
- The Act generally provides that landlords cannot exercise "a right of re-entry during the non-enforcement period", but specifically states that landlords cannot "seize any goods or chattels as a distress **for arrears of rent**". It appears that landlords cannot evict tenants for any kind of default during the non-enforcement period. So if a tenant is in default for a non-rent issue, can a landlord still evict a tenant for a non-rent default by obtaining a writ of possession? Will a judge realistically order a writ of possession during this time for a non-rent default even though they are not specifically barred from doing so under this new Act? Or does the practical outcome of the Act result in landlords not being able to evict tenants for non-rent defaults?
- The Act states that its restrictions do not apply to applications/actions for writs of possession started, or a right of re-entry/distress exercised, after a landlord is approved for assistance under CECRA. Can landlords only start such actions/applications and exercise such rights after the three-month moratorium on evictions required under CECRA? It is likely landlords cannot exercise these rights until after the three-month moratorium and only with respect to the 25% of rent tenants are required to pay under the program, although the Act does not clarify this.

If you have any questions with respect to CECRA, the Act or your rights and obligations in the face of COVID-19, please do not hesitate to contact our commercial leasing group who will be able to advise you: [Lisa Borsook](#), [Alexandra DiCenzo](#), [Robert Eisenberg](#), [Karsten Lee](#) and [David Thompson](#).

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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