

# **PROTECTING SMALL BUSINESS ACT, 2020 - ONTARIO'S TEMPORARY BAN ON COMMERCIAL TENANT EVICTIONS**

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## **Background:**

A typical commercial lease will contain a long list of tenant defaults that will give the landlord a full range of remedies. The types of tenant defaults can generally be grouped into two main categories: (1) monetary defaults, i.e., where the tenant fails to pay rent, taxes, utilities, etc. when due under the terms of the lease; and (2) non-monetary defaults, i.e., where the tenant fails to perform an obligation under the lease that does not relate to the payment of money. Generally speaking, following a default that is not cured within the required notice and cure period in the lease, the landlord has rights that include re-entering and terminating the lease, bringing an action against the tenant for damages resulting from the tenant's breach, or commencing an application for a writ of possession. In addition, for a monetary default where the landlord is not re-entering and terminating, a landlord may be entitled to exercise its right to seize (distrain) and sell the tenant's goods or chattels left on the premises and apply the proceeds to arrears of rent.

Under the current climate of the COVID-19 pandemic, businesses that were forced to close entirely or to restrict their operations due to government order have been generating zero revenues or have suffered unsustainable revenue declines. In response, governments across the country are spending unprecedented amounts and have, in many cases, enacted legislation or implemented various programs in an effort to counteract the negative effects of the COVID-19 pandemic on businesses on a temporary basis until the emergency is over.

## **Federal Government's CECRA Program:**

On April 24, 2020, the Government of Canada, in partnership with the provinces and territories, announced the creation of the Canada Emergency Commercial Rent Assistance ("**CECRA**") to provide relief to small businesses experiencing financial hardship due to COVID-19. Rather than providing direct rent relief to impacted small business tenants or subtenants, the CECRA for small businesses provides unsecured forgivable loans to qualifying commercial property owners to cover up to 50% of gross rent for the months of April, May and June 2020 that are payable by their eligible small business tenants. This, in turn, enables commercial property owners to forgive or offer a minimum of a 75% rent reduction for those same months to their impacted small

business tenants. (On June 29, 2020, the federal government announced that the CECRA will be extended by another month through to the end of July 2020, provided agreement can be reached with the provinces and territories.)

Administered by Canada Mortgage and Housing Corporation (CMHC) and delivered by MCAP and First Canadian Title (FCT), the application process for the CECRA for small businesses opened on May 25, 2020. In order to be eligible for the CECRA program, the commercial property owner will be required to meet the following criteria:

- the applicant must own commercial real property, which is occupied by one or more impacted small business tenants;
- the applicant has entered or will enter into a legally binding rent reduction agreement for the period of April, May, June, and July 2020, that will reduce impacted small business tenants' rent by at least 75%; and
- the applicant must ensure that the rent reduction agreement with each impacted tenant includes a moratorium on eviction for the period during which the property owner agrees to apply the loan proceeds, and a declaration of rental revenue included in the attestation.

Although the federal, provincial, and territorial governments have been encouraging commercial property owners to apply for the CECRA benefits for small businesses, many commercial property owners and landlords have not to date applied for relief under the CECRA program. Certain provinces have enacted legislation or implemented other measures to fill the gap of CECRA as well as to prohibit or limit the remedies normally available to commercial landlords.

#### **Ontario's New Act:**

The *Protecting Small Business Act, 2020* (the "**Ontario Act**"), which received Royal Assent on June 18, 2020, was introduced by the Ontario government with the stated purpose to protect commercial tenants from being locked out or having their assets seized by their landlords due to the negative impacts of COVID-19. The Ontario Act essentially bans evictions by commercial landlords who are not applying for the CECRA relief program despite their tenants being eligible for the program. Rather than being a general moratorium on all evictions for commercial tenants in rent arrears as a result of the effects of COVID-19, the Ontario Act only applies to a tenancy in respect of which: (i) the landlord is eligible to receive assistance under CECRA, or (ii) the landlord would be eligible to receive assistance under CECRA if the landlord entered into a rent reduction agreement with the tenant containing a moratorium on eviction. There may be a range of reasons why landlords do not apply for relief under CECRA, however, if landlords do not proceed with an application this means that their tenants will be unable to receive the rental assistance. Essentially, the moratorium on evictions provides further

incentive for landlords to apply for rental relief under the CECRA program on behalf of their struggling tenants. This moratorium is in effect until August 31, 2020 and applies retroactively to the period from May 1, 2020 to June 17, 2020.

The Ontario Act, which amends the *Commercial Tenancies Act*, contains the following key provisions, with the non-enforcement period being from June 18, 2020 until September 1, 2020, or on an earlier day to be named by proclamation of the Lieutenant Governor:

1. A judge cannot order a writ of possession that is effective during the non-enforcement period in respect of a tenancy (as described above) if the basis for ordering the writ is due to arrears of rent. This applies in respect of an action that was commenced before, on, or after June 18, 2020.
2. A landlord cannot exercise a right of re-entry during the non-enforcement period. If a landlord exercised a right of re-entry between May 1, 2020 and June 18, 2020, the landlord must, as soon as reasonably possible: (i) restore possession of the premises to the tenant unless the tenant declines to accept possession; or (ii) if the landlord is unable to restore possession of the premises to the tenant for any reason other than the tenant declining to accept possession, pay the tenant for all damages sustained by the tenant by reason of the inability to restore possession. If a landlord restores possession of a premises to a tenant in accordance with the foregoing, the tenancy is deemed to be reinstated on the same terms and conditions unless the landlord and the tenant agree otherwise.
3. A landlord cannot, during the non-enforcement period, seize any goods or chattels as a distress for arrears of rent.
4. If a landlord seized any goods or chattels as a distress for arrears of rent between May 1, 2020 and June 18, 2020, the landlord must, as soon as reasonably possible, return to the tenant all of the seized goods and chattels that are unsold as of June 18, 2020.
5. A landlord who fails to comply with these provisions is liable to the person aggrieved for any damages sustained by the person aggrieved as a result of the contravention or non-compliance. This applies in addition to any other remedy available by law to the person aggrieved.

The Ontario Act is intended to fill in some of the gaps that have been identified by tenants in the CECRA program and, in particular, to provide further incentives for landlords to apply for rental relief under the CECRA program on behalf of their tenants. However, it must be noted that after a landlord applies and is approved to receive assistance under the CECRA program, the restrictions under the Ontario Act no longer apply to the tenancy agreement (including the Ontario Act's eviction moratorium until August 31, 2020), and the moratorium on evictions under the CECRA program is only applicable for the period during which the property owner agrees to apply the loan proceeds, which could be the end of July 2020, unless otherwise further extended.

## Other Provinces:

### **British Columbia**

On May 29, 2020, Ministerial Order M179, known as the Commercial Tenancy (COVID-19) Order (the “**B.C. Order**”) was made under the *Emergency Program Act*, in order to prevent the eviction of small business tenants whose landlords would be eligible for the CECRA program but for the fact that they have not entered into a rent reduction agreement with a moratorium on eviction.

If the term of the lease has not expired before the date of the B.C. Order, and the tenant has not abandoned or deserted the leased property, the landlord is prohibited from distraining the tenant’s property for rent due, and unless the tenant has consented, the landlord is also prohibited from exercising its right of re-entry to the tenant’s leased property, terminating the tenant’s lease, or taking any steps to rent out the tenant’s leased property on the tenant’s behalf.

The B.C. Order will continue in force until the expiry of either the date on which the declaration of a state of emergency in B.C. expires or is cancelled, or the date following the last date of the CECRA program, whichever is the earlier date.

### **Alberta**

Commercial tenants in Alberta may soon have their own legislative protection against evictions by landlords due to the non-payment of rent. Bill 23, enacting the *Commercial Tenancies Protection Act* (the “**Alberta Act**”), was introduced in the Legislative Assembly of Alberta on June 16, 2020, and received Second Reading on June 23, 2020. Its stated purpose is to help address gaps in the federal government’s CECRA program by protecting eligible commercial tenants from having their leases terminated if they are unable to pay rent due to the COVID-19 pandemic, and by preventing landlords from raising rent and charging late fees and penalties on missed rent. Upon receiving Royal Assent, the Alberta Act is intended to take retroactive effect starting on March 17, 2020, and would apply to commercial lease agreements in effect from that date until August 31, 2020, subject to any extensions of the province’s public health emergency. The Alberta Act would not apply to evictions or lease terminations that occurred prior to the legislation being tabled on June 16, 2020.

It is expected that the Alberta Act will apply to commercial tenants with lease agreements that qualify for the CECRA program, but whose landlords have elected not to participate in the CECRA program, and in cases where commercial tenants have had to close their businesses as a result of public health orders or where tenants have experienced business revenue declines of 25 percent or more due to the COVID-19 pandemic.

Rather than compelling rent forgiveness or rent relief for tenants, the Alberta Act will require landlords and tenants to whom it applies to work together to develop a rental payment plan with respect to any payments

that have not been paid as required by the applicable lease agreement. The rental payment plan, which can extend beyond August 31, 2020 and which has the effect of amending the tenancy agreement to the extent necessary to give effect to the payment plan, must account for rent, fees and penalties that the landlord was prohibited from charging under the Alberta Act. Any breach of this payment plan by the tenant would entitle the landlord to access its remedies under the applicable lease agreement, including evicting the tenant or terminating a lease agreement. A tenant who is unable to reach a repayment plan with their landlord faces eviction at the end of August or extended period, unless the tenant seeks a remedy in court.

### **Saskatchewan**

On June 4, 2020, the Government of Saskatchewan issued a Minister's Order under The *Emergency Planning Act* (the "**Saskatchewan Order**") to provide commercial eviction protection for certain small business tenants during the COVID-19 pandemic.

In Saskatchewan, commercial landlords who are eligible but have chosen not to enter into a rent reduction agreement with the tenant that includes a moratorium on eviction (which is an eligibility requirement to apply for the CECRA program), are prohibited from using the tenant's failure to pay rent as a ground for distraining the tenant's property for rent due, and, unless the tenant has otherwise consented, prohibits commercial landlords from exercising re-entry rights to the tenant's leased property, giving notice of termination of the tenant's lease, or taking any steps to rent out the tenant's leased property on its behalf. The prohibition does not apply to a lease if the tenant has abandoned or deserted the leased property, nor to a lease whose term expired before June 4, 2020. If the lease expires at a time when the commercial eviction protection program is still in effect, then the restrictions cease to apply at the time of expiration.

The Saskatchewan Order will continue in force until the expiry of either the date on which the declaration of a state of emergency in Saskatchewan expires or is cancelled, or the date following the last date of the CECRA program, whichever is the earlier date.

### **Québec**

On June 3, 2020, the Québec Government tabled Bill 61 – *An Act to restart Québec's economy and to mitigate the consequences of the public health emergency declared on March 13, 2020 because of the COVID-19 pandemic* (the "**Bill**"). The Bill was designed to be a general response to the pandemic and contains emergency stimulus measures to accelerate projects in certain sectors of the economy. A number of proposed amendments to the Bill which were tabled on June 4, 2020 sought to prohibit the termination of commercial leases, prohibit the seizure of property on the premises, and to prohibit the registering of hypothec prior notices for unpaid rent March 13, 2020 to August 1, 2020.

Although the Québec Government intended to pass the Bill by June 12, 2020 at the latest, the bill did not pass prior to the National Assembly's summer recess, which will be in effect until September 2020. As a result, it remains to be seen whether or not Bill 61 will be considered again at a later date, and if so, whether any further amendments will be made.

### **Nova Scotia**

Effective March 31, 2020, by the Direction of the Minister of Municipal Affairs and Housing (the "**N.S. Direction**") under the *Emergency Management Act*, all retail and commercial landlords are prohibited from exercising the remedies of notice to quit or distress available under a commercial lease, commercial agreement, the *Tenancy and Distress for Rent Act*, or otherwise. This applies to rent due on or after March 22, 2020 from a retail or commercial tenant who has been required to close their business or whose business has been "substantially and directly restricted" under the requirements of the *Health Protection Act*. A failure to comply with the N.S. Direction could result in a summary conviction with fines between \$500 to \$10,000 for individuals and up to \$100,000 for a corporation per incident. The N.S. Direction will be in effect as long as the province's State of Emergency continues.

### **Other Provinces and Territories**

Although several Canadian provinces and/or territories have taken, or are in the process of taking, steps to assist small businesses and commercial tenants during the COVID-19 pandemic, moratoriums on evictions under commercial leases, in particular, have not (yet) been implemented in New Brunswick, Manitoba, Prince Edward Island, Newfoundland & Labrador, Yukon, Northwest Territories and Nunavut.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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