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AN UPDATE ON THE CERS AND A REFRESHER ON ONTARIO'S MORATORIUM ON EVICTIONS

The Canada Emergency Rent Subsidy (“CERS”) program has been extended to continue until September 2021, but on somewhat different terms. This development occurred on April 19, 2021, as part of the federal government’s 2021 budget (the “Budget”) announcements.

The CERS Update

Originally, the CERS program was to end in June 2021. The final claim period ran from May 9 to June 5, 2021. The Budget added four new CERS claim periods: June 6 to July 3, 2021, July 4 to July 31, 2021, August 1 to August 28, 2021, and August 29 to September 25, 2021.

For the original claim periods, CERS subsidizes up to 65% of eligible expenses for businesses, charities and non-profits that suffered a decline in revenues. The amount of subsidy correlates to the decline in revenues suffered by the applicant. For the base rent subsidy, *any* amount of revenue decline compared to either the same period in the previous year or the average of January and February 2020 entitles the applicant to the subsidy, subject to a cap on the amount of rent for which tenants may claim the base rent subsidy of \$75,000 per month per location and \$300,000 per month for all locations in a chain.

For the original claim periods, if an eligible tenant was forced to temporarily shut down, or have its activities significantly restricted for a week or more due to a mandatory public health order issued by a public health authority, that tenant could obtain an additional 25% rent subsidy. This portion of the CERS is known as lockdown support.

Notably, the CERS program requires tenants to pay their monthly rent (**all of it**) within 60 days of receiving the CERS funding.

Per the Budget, for the first of the four new claim periods, June 6 to July 3, these parameters are unchanged. However, for the last three claim periods, July 4 to September 25, the amount of the base rent subsidy has been modified such that applicants must experience a minimum revenue decline of 10% in order to receive the base rent subsidy as follows:

- July 4 to July 31: up to 60% of eligible expenses;
- August 1 to August 28: up to 40% of eligible expenses; and
- August 29 to September 25: up to 20% of eligible expenses.

Lockdown support is unchanged for all four new claim periods.

According to the Budget, the rationale for the gradual decrease of the amount of the base rent subsidy starting on July 4 is to “ensure an orderly phase-out of [the] program as vaccinations are completed and the economy reopens”. But, acknowledging that this might not play out as planned, the Budget provides that the federal government will seek the legislative authority to be able to extend the CERS program via regulation until November 20, 2021. The Budget does not set out the base rent subsidy rates that will apply if the program is extended beyond September 2021.

The Budget provides that the federal government is allotting \$1.9 billion to the extension of the CERS program and notes that it has provided \$2.6 billion to businesses to date.

The Moratorium on Evictions: A Refresher

In Ontario, Part IV of the *Commercial Tenancies Act*, and its accompanying regulation, stipulate that during the period

from December 17, 2020 until April 22, 2022, where a tenant meets the ‘prescribed criteria’, landlords are prevented from (a) exercising a right of re-entry for arrears of rent, or (b) distraining against goods or chattels for arrears of rent. In addition, judges are prevented from ordering a writ of possession for arrears of rent against tenants that meet the prescribed criteria. Failure of a landlord to restore possession of the premises to the tenant (unless the tenant declines) or return any distrained goods, will result in the landlord being responsible to compensate the tenant for all damages.

The ‘prescribed criteria’ set out in the *Commercial Tenancies Act* regulation are:

- (1) The tenant has been approved to receive the CERS;
- (2) The tenant has provided proof of that approval to their landlord; and
- (3) Not more than 12 weeks have passed since the day the tenant was approved.

A tenant may satisfy the above criteria for more than one CERS approval. (A tenant must apply separately for the CERS for each claim period.)

In other words, so long as a tenant provides proof of CERS approval to its landlord for a particular claim period, the tenant will be a “prescribed tenant” who is protected from eviction or distraint. That protection lasts for

12 weeks and it runs from the date the tenant is CERS-approved for a claim period.

As noted above, tenants are required to pay their monthly rent (**all of it**) within 60 days of receiving CERS funding. The moratorium does not kick in until the tenant is approved for CERS (i.e., a tenant remains exposed to the Landlord’s remedies for non-payment until then). Therefore, if a tenant provides proof to its landlord that it has been approved to receive CERS for a certain claim period but fails, within 60 days after being approved, to pay the rent for that claim period, then the landlord may assert that the approval is not valid, and that the tenant is not protected from eviction or distraint.

Currently, Ontario is the only province with a moratorium on evictions tied to the CERS. Several provinces had moratoria on evictions in 2020 but those have since expired. There is one other province - Nova Scotia - that has imposed a moratorium on eviction or distraint but with no tie-in to CERS.

In Nova Scotia, commercial landlords are prohibited from exercising their remedies of re-entry or distress for rent due from a tenant who has been “required to close their business or their business has been substantially and directly restricted under the requirements of a Medical Officer’s order issued under the Health Protection Act”. This will continue until the end of the current state of emergency.

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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