

September 30, 2020

ONTARIO'S NEW *HELPING TENANTS AND SMALL BUSINESSES ACT, 2020*

With the expiration of Ontario's *Protecting Small Business Act, 2020* (the "PSBA") on September 1, 2020, and the federal government's September 17th announcement that the Canada Emergency Commercial Rent Assistance ("CECRA") program was extended for the month of September, the government of Ontario tabled the *Helping Tenants and Small Businesses Act, 2020* (the "HTSBA").

In this News ReLease we provide an update on the CECRA program, an overview of the HTSBA and outline the tenancies to which it applies.

Extension of the CECRA Program

On September 8, 2020, the federal government announced that the CECRA program would be extended to include the month of September, and it re-opened the application portal for new applications, which it had closed as of August 31, 2020. At this time, it declared that the September extension would be the final extension of CECRA.

Landlords may submit **new** applications for the CECRA program until September 30, 2020, and thus may opt-in to the extension periods (i.e., July, August, and September), until October 30, 2020.

The federal government also announced that it is exploring "options to support small businesses as they face ongoing challenges of the COVID-19 pandemic". (At the time of publishing this News ReLease, the federal government has not yet announced any new tenant-centred programs.)

The Helping Tenants and Small Businesses Act, 2020

When it comes into force, the HTSBA will be retroactive to September 1, 2020 (the day the PSBA expired) and will be in effect until October 30, 2020 (the "Non-Enforcement Period").

The HTSBA is designed to support tenants by restricting lease remedies. It provides that during the Non-Enforcement Period:

(i) judges will be prevented from ordering a writ of possession with respect to that tenancy if the basis for the writ is an arrears of rent, and (ii) landlords will be prevented from (a) exercising a right of re-entry, or (b) seizing any goods or chattels as a distress for arrears of rent as against the applicable tenant.

If a landlord exercises its right of re-entry or seizes any goods or chattels as a distress for arrears of rent between September 1, 2020 and the day the HTSBA comes into force, the landlord must return any unsold goods or restore possession of the premises to the tenant. (If it is unable to do so for any reason other than the tenant declining possession, the landlord must compensate the tenant for all damages.)

Landlords who fail to comply with these restrictions are liable to the tenant, or "the person aggrieved," for any damages sustained.

The HTSBA only applies to landlords that:

- (i) are eligible to receive CECRA assistance with respect to a tenancy;
- (ii) would have been eligible to receive CECRA assistance with respect to a tenancy had the landlord entered into a rent reduction agreement with the tenant preventing eviction for non-payment of rent; or
- (iii) would have been eligible to receive CECRA assistance (with respect to a tenancy as described in (i) and (ii)) if not for CECRA applications no longer being accepted by the program.

Notably, the HTSBA provides that if an eligible landlord is "approved" to receive assistance under [the CECRA program] in respect of the tenancy", the HTSBA will not apply to the landlord. This is applicable even if the landlord was approved only once to receive assistance under the CECRA program in respect of the tenancy, but did not subsequently continue applying for CECRA benefits.

To which tenancies does the HTSBA apply?

The applicability of the HTSBA, and its intersection with the CECRA program, is easily misconstrued. A way to determine whether the HTSBA applies to a tenancy is to establish into which of the following three categories the tenancy fits:

- (1) **The tenant is ineligible for CECRA benefits (either because the tenant does not meet the program criteria or is not co-operating with the landlord in the application process).**

The HTSBA does **not** apply with respect to this type of tenancy and, correspondingly, the landlord may exercise all of its rights and remedies under the lease and at law if the tenant defaults.

- (2) **The tenant is eligible for CECRA benefits and the landlord has applied for the CECRA program and been approved to receive funding under it.**

In this case, the HTSBA does **not** apply; however, the landlord may only exercise its lease remedies pursuant to the rules of the CECRA program.

The CECRA rules hold that while the tenant is receiving a rent reduction, forgiveness or credit under the CECRA program, the landlord may **not** default or evict a tenant **if** the basis of the default or eviction is a lease default arising from COVID-19, except for the tenant's non-payment of the CECRA mandated reduced rent (i.e., the tenant's 25%). A tenant has 30 days from the date the landlord receives

the initial CECRA loan funds to pay its reduced rent. If, 30 days from the date on which it receives the initial loan funds, the landlord has not been paid, it can terminate the tenant's lease, so long as it follows any notice/cure period requirements in the lease.

- (3) **The tenant is eligible for CECRA benefits, but the landlord has failed to apply for the CECRA benefits.**

The HTSBA applies to this type of tenancy. The landlord may **not** exercise any of its lease remedies until the HTSBA expires on October 30, 2020.

To sum it up, the HTSBA provides that a landlord is free to exercise its rights under a lease if (1) the tenant is not eligible for the CECRA program (for a reason other than the landlord failing to apply), or (2) the landlord has applied for the CECRA program and has been approved (subject to the tenant's grace period of 30 days after the landlord receives the initial advance of the forgivable CECRA loan to pay the reduced rent).

By suspending a landlord's remedies when failing to apply for the CECRA benefit in respect of its eligible tenants, the HTSBA (and the PSBA before it) is designed to encourage landlords to apply for the CECRA program to support those tenants. However, an unintended consequence seems to have arisen. Landlords are able to avoid the HTSBA restrictions once they are approved to receive **any** portion of the CECRA benefits, even if only for the initial period (April, May and June), which begs the question: by not compelling landlords to apply for all available months of benefit under the CECRA program (April to September), does the HTSBA fully achieve its goal to support eligible tenants?

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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