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## ONTARIO'S MORATORIUM ON COMMERCIAL EVICTIONS: THE SAGA CONTINUES

On December 17, 2020, Ontario passed Ontario Regulation 763/20 (the “**Regulation**”), under the *Commercial Tenancies Act*, to supplement the moratorium on commercial evictions originally instituted by Schedule 5 of the *Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020* (the “**Act**”).

In our last News ReLease, we outlined Schedule 5 of the Act (formerly known as Bill 229). In summary, Schedule 5 of the Act prohibits Ontario landlords who were (or would have been) eligible to (or did) receive assistance under the Canada Emergency Commercial Rent Assistance programme (“**CECRA**”), from evicting eligible tenants (or distraining against their goods). Under the Act, the moratorium applies to CECRA eligible tenants during the period beginning October 31, 2020 and ending on an unspecified future date (the “**CECRA Tenant Non-Enforcement Period**”). (For a refresher, refer to our last News ReLease [here](#)).

The end date of the CECRA Tenant Non-Enforcement Period was left blank, to be completed by a future regulation. There was another important blank: Schedule 5 of the Act states that it applies to tenancies that satisfy the “prescribed criteria”. This opened the door to expanding the group of tenants to which the Act applies.

The Regulation fills in these blanks. It provides: (1) the end date of the CECRA Tenant Non-Enforcement Period and (2) the “prescribed criteria”. A new group of Ontario tenants is now protected from eviction: those who have been approved to receive assistance through the Canada Emergency Rent Subsidy (“**CERS**”).

### The Non-Enforcement Period(s)

There is no longer just one “non-enforcement period” but two: one for CECRA eligible tenants and one for CERS-approved tenants (the “**CERS Tenant Non-Enforcement Period**”).

The CECRA Tenant Non-Enforcement Period will end on **January 31, 2021**.

The CERS Tenant Non-Enforcement Period pertains to tenants eligible and approved for the CERS. It began on **December 17, 2020** and will end on **April 22, 2022**. At present, the CERS programme is supposed to end by June 30, 2021. Of course, it could be extended by the federal government. Time will tell.

Because tenants have a period of up to 180 days from the end of each CERS claim period to apply for CERS for that period and the moratorium applies to CERS-approved tenants for 12 weeks from the date they are approved, the last theoretical date is way off in 2022. If a tenant waits to the last possible day to apply for the last CERS claim period (assuming it will end on June 30, 2021), that tenant can submit its CERS application on December 27, 2021. The tenant would then receive protection against its landlord’s re-entry and distraint for arrears of rent for 12 weeks from the date it is approved to receive CERS (i.e., the tenant would receive such protections until late March or early June 2022, depending on when the tenant’s CERS application is approved).

### The “Prescribed Criteria”

The Regulation sets out the “prescribed criteria”, which, if met by tenants, would result in their receiving the protection of Schedule 5 of the Act. The “prescribed criteria” are as follows:

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

The Regulation further provides that a tenant may satisfy the above criteria for more than one CERS approval (as tenants must apply for the CERS for each claim period vs. making a single application).

In other words, a tenant will be a “prescribed tenant” who is protected from re-entry or distraint for 12 weeks from the date the tenant is approved to receive CERS, provided the tenant provides proof of that approval to its landlord. For each CERS claim period, the 12-week moratorium starts as of the date of approval of the subject CERS application.

The three CERS claim periods that tenants can apply for (currently) are September 27 – October 24, 2020, October 25 – November 21, 2020 and November 22 – December 19, 2020. This means that the latest dates tenants can apply for the first three claim periods are April 22, 2021, May 20, 2021 and June 17, 2021, respectively. If a tenant waits until the last day to apply for a period, it will meet the prescribed criteria once approved and be protected from eviction in respect of that period. If a tenant applies for CERS and is approved for one of the next claim periods (the upcoming CERS claim periods announced so far are December 20, 2020 – January 16, 2021, January 17 – February 13, 2021, and February 14 – March 13, 2021), the tenant’s 12-week protection period for that period starts from the date of CERS approval.

Significantly, until the tenant is approved for CERS, it is exposed to the landlord’s remedies for non-payment. Also, the CERS programme requires tenants to pay their monthly rent (**all of it**) within 60 days of receiving the CERS funding. Therefore, if a tenant provides proof to its landlord that it has been approved to receive CERS for a certain claim period but fails to pay the rent for that claim period within 60 days after being approved, the landlord would be in a

position to assert that the approval is not valid and the tenant is no longer protected by the Act.

### **What does this leave Landlords and Tenants?**

We now know that Schedule 5 of the Act will not suspend the rights of landlords indefinitely: the CECRA Tenant Non-Enforcement Period will end on January 31, 2021 and the CERS Tenant Non-Enforcement Period will end on April 22, 2022.

We also now know that the Act protects CERS tenants. Essentially, the only requirement tenants must meet to apply for the CERS is a decline in revenue. Tenants of all sizes are able to apply for CERS and, if approved, will be protected by the moratorium on evictions and distraint. (However, there is a cap on the amount of rent for which tenants can claim CERS, of \$75,000 per month per location and \$300,000 per month for all locations in a chain. This was explained in our last News ReLease.)

One aspect of the CERS programme that has troubled landlords is that there has been no ability to ascertain if their tenants have applied for CERS. Now, if a tenant wants to be protected by the moratorium on evictions, it must prove to its landlord that it has been approved to receive CERS. This approval indicates that the tenant has been subsidized with government funds to pay rent. If a tenant does not prove to its landlord that it has been approved to receive CERS, it is not protected by the moratorium. And as stated above, the tenant is exposed if it fails to pay rent when due, prior to being approved. This new programme should promote open lines of communication between struggling tenants and their landlords.

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