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ONTARIO EXTENDS THE MORATORIUM ON EVICTIONS: WHERE DO LANDLORDS STAND?

On December 8, 2020, the Ontario legislature passed Bill 229 under the name “*Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020*” (the “**Act**”). Schedule 5 of the Act prohibits landlords who were (or would have been) eligible to (or did) receive assistance under the Canada Emergency Commercial Rent Assistance programme (“**CECRA**”), from evicting or distraining against the goods of CECRA-eligible tenants for the period beginning October 31, 2020 and ending on an unspecified future date (the “**Non-Enforcement Period**”).

A brief refresher on CECRA’s eligibility requirements may be helpful. To have been eligible for CECRA, a tenant must: (a) not pay more than \$50,000 in monthly gross rent; (b) have experienced a 70% reduction in revenues in April, May and June 2020 as compared to the same period in 2019 or the average revenues from January and February 2020; and, (c) not have generated more than \$20 million in gross annual revenues at its ultimate parent level. The programme entitled tenants to pay 25% of the monthly rent, with the government subsidy covering 50% and the landlord forgoing 25%. CECRA was extended to cover the months of July through and including September.

Ontario’s *Protect, Support and Recover from COVID-19 Act, 2020*

The Non-Enforcement Period is intended to support tenants by restricting landlord lease remedies. 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, as against eligible tenants. Judges are prevented from ordering a writ of possession for arrears of rent against eligible tenants. Failure of a landlord to restore possession of the premises to the eligible tenant or return any distrained goods (unless the tenant declines), will result

in the landlord being responsible to compensate the tenant for all damages.

The Act differs from previous similar statutes (the *Helping Tenants and Small Businesses Act, 2020* and the *Protecting Small Business Act, 2020*), in that it applies to a larger class of landlords. The Act applies to landlords that:

- (i) are or were eligible to receive CECRA assistance with respect to a tenancy;
- (ii) are receiving or have received CECRA assistance with respect to a tenancy;
- (iii) 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 (but not if the tenant’s refusal to participate was the reason that no rent reduction agreement was entered into); or
- (iv) would have been eligible to receive CECRA assistance (with respect to a tenancy as described in (i) and (iii)) if not for CECRA applications no longer being accepted by the programme (i.e., missing the deadline is no excuse).

The Act is also exceptional in that it applies to tenancies that satisfy the “prescribed criteria”. There is no indication from the government at this time as to what the prescribed criteria may be. It seems possible, theoretically, that the government might further expand the eligibility requirements through future regulations. At this time, there have not been any regulations passed to expand the scope of the Act. It is not clear if regulations are on the way or what they may say. We have repeatedly reached out to the

Minister of Finance (who tabled the Act) to seek clarity on the Act and on the potential regulations. Unfortunately, despite repeated assurances that our inquiries would be responded to promptly, we have not yet heard back.

Where does this leave us?

No one knows (yet) when the Non-Enforcement Period will end.

If the words of the Act are to be interpreted literally, landlords' rights under their leases and at law to re-enter or seize any goods or chattels as a distress for arrears of rent (all arrears, not just the 25% portion that CECRA tenants were to pay from April through September) are suspended indefinitely, for all CECRA eligible tenants (unless the sole reason that the tenant was not eligible for CECRA assistance was that it refused to participate in the programme).

In our opinion, this would be commercially untenable and could not be the intended spirit of the Act.

On November 23, tenants were able to begin applying for the Canada Emergency Rent Subsidy Programme ("CERS") to subsidize their commercial rent expenses. The amount of such subsidy for each tenant depends on its decline in revenues as a result of the pandemic. Under CERS, nearly all tenants have access to some funds as essentially the only eligibility requirement is that applicants have experienced a decline in revenues. Despite CERS being provided to assist tenants

to withstand the pandemic, the Act continues to use the long-gone CECRA programme as a benchmark.

Tenants applying for CERS must attest and certify that they have paid, or will pay, all subsidized expenses within 60 days of receiving CERS assistance. Given that the Act does not tie-in to CERS, it does not seem that the Act intends to strip landlords of their ability to enforce ongoing rent obligations. The intent seems more likely to have been to deny landlords' rights to act on their lease rights and remedies for a tenant's unpaid 25% portion of "CECRA rent". Those arrears were formerly subject to potential rights of eviction and distraint (whereas now, due to the Act, they are not).

Clearly, the government is trying to protect struggling tenants. However, by referencing the expired CECRA programme as a benchmark and failing to clarify which rental obligations are captured by the Act, there is a gap. It would be nice if the government would clarify the applicability and reach of the Act.

Considering the current commercial realities of landlords and tenants, a more reasonable interpretation of the Act is that it applies for an indefinite period to protect tenants who did not pay the 25% rent required under CECRA. A blanket suspension of the rights of landlords to evict any historically-CECRA-eligible tenants for non-payment of "post-CECRA" rent, for an indefinite period, would not only be illogical, but potentially unconstitutional.

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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The energy our lawyers invest in the deal is palpable; it makes our clients' experience of the law invigorating.

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