

WEEKDAY UPDATE: MORATORIUMS ON EVICTIONS AND DISTRAINT PROCEEDINGS AGAINST COMMERCIAL TENANTS

by Alex Kolandjian, Steven Cygelfarb and Sahar Sayyad

In a bid to assist commercial tenants, there are currently two moratoria in place on the exercise of eviction and distress rights against commercial tenants, one which relates to the now defunct Canada Emergency Commercial Rent Assistance ("CECRA") program and the other which is tied to the Canada Emergency Rent Subsidy ("CERS") program. A summary of each is contained below:

CECRA

[Bill 229, Protect, Support and Recover from COVID-19 Act \(Budget Measures\), 2020 \("Bill 229"\)](#)¹ received royal assent on December 8, 2020. Among other things, Bill 229 revives Part IV of the *Commercial Tenancies Act*, extending the moratorium on commercial evictions and distraint proceedings with respect to small business tenants that were, or would have been, eligible for CECRA. This moratorium is set to expire on January 31, 2021, subject to extension.

This most recent incarnation of a moratorium tied to CECRA is retroactive to October 31, 2020. If a landlord did exercise a right of re-entry between October 31, 2020 and December 8, 2020, the landlord must restore possession of the premises to the tenant or, if unable to do so, must compensate the tenant for damages. If a landlord did seize a tenant's goods between October 31, 2020 and December 8, 2020, as a distress for arrears of rent, the landlord must return any unsold goods to the tenant.

As a reminder, in order to be eligible for CECRA, a commercial tenant was required to:

- (a) pay no more than \$50,000 in gross rent each month, per location;
- (b) experience at least a 70% drop in pre-COVID-19 revenues, determined by comparing average gross revenues from April, May and June of 2020 to either:
 - (i) the same months in 2019 (if the small business was operating during April to June 2019), or
 - (ii) the average gross revenues for January and February 2020 (if the small business was not operating during April to June 2019); and



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¹ <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-229>

- (c) generate \$20 million or less in gross annual revenues, calculated on a consolidated basis (at the ultimate parent level).

CERS

[O Reg 763/20: Non-Enforcement Period — Prescribed Tenancies](#)², enacted under Bill 229 and effective as of December 17, 2020, introduces a new moratorium on distraint proceedings and commercial evictions for non-payment of rent for tenants who are approved for the new rent subsidy program, CERS. Tenants approved for CERS are protected from distraint proceedings and evictions based on the non-payment of rent for a period of 12 weeks from the date of approval, provided proof of such approval has been provided to their landlord. The protection renews after each new approval under the CERS program and provision to the landlord of proof of such approval. The latest that the new moratorium could possibly end is April 22, 2022, despite the CERS program currently having an end date of June 30, 2021. Perhaps an extension of the program is already being considered.

Unlike the CECRA moratorium, the CERS moratorium does not operate retroactively and does not protect against a landlord's exercise of a right of re-entry or the remedy of distress prior to December 17, 2020.

The eligibility criteria for CERS also differ from those of CECRA and capture a wider range of entities. The applicant must be an individual, a taxable corporation or trust, a non-profit organization, or a registered charity. The applicant must also have experienced a drop in eligible revenue during the relevant time period, although there is no required minimum revenue drop. Moreover, the benefit applies both to entities that rent and those that own the real property used in the course of their business. See our previous article on the CERS program for more details³.

It should be noted that while landlords may be allowed to exercise their right of re-entry or distress if (a) a tenant that is in default of its rental obligations has not provided proof of CERS approval or (b) if a tenant's default is unrelated to the payment of rent, they should nevertheless exercise extreme caution in doing so. The law in this area is new and ever-changing, and landlords should consider all uncertainties before taking action.

Please contact Alex Kolandjian or Steven Cygelfarb if you have any questions about the moratoria or if you have any additional questions about how COVID-19 affects your lease obligations.

² <https://www.ontario.ca/laws/regulation/r20763>

³ http://foglers.com/uploads/press/file/843/COME_SEE_THE_MANY_SIDES_OF_CERS.pdf