

Leasing Bulletin:

Update on the Commercial Eviction Ban

Bill 229, Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020

December 9, 2020

By: Minden Gross LLP's Commercial Leasing Group

The ban on commercial evictions for certain types of tenancies has once again been extended. On December 8, 2020, [Bill 229, Protect, Support and Recover from COVID-19 Act](#) (Budget Measures), 2020 ("Act") received [Royal Assent](#). The Act re-enacts provisions in Part IV of the *Commercial Tenancies Act*, with retroactive effect to October 31, 2020. These provisions limit landlords' abilities to evict tenants and exercise the right to distress.

Background

The ban on commercial evictions was first imposed through [Bill 192, Protecting Small Business Act, 2020](#). The original ban on commercial evictions applied to tenancies (the "CECRA Eligible Tenants") where either:

1. the landlord was eligible to receive assistance under the former Canada Emergency Commercial Rent Assistance program ("CECRA"), or
2. the landlord would be eligible to receive assistance under CECRA if the landlord entered into a rent reduction agreement with such tenant in compliance with CECRA.

Notably, the original commercial eviction ban did not apply to tenancies who actually were receiving assistance under CECRA (although under CECRA, landlords were required to enter into a rent reduction agreement that had its own moratorium on rent evictions until the tenant was no longer receiving a rent reduction or credit under such agreement). Bill 192 covered the period from May 1, 2020 to September 1, 2020, when it was automatically repealed. A subsequent bill, [Bill 204, Helping Tenants and Small Businesses Act, 2020](#), came into effect on October 1, 2020, and essentially extended the ban on commercial evictions to cover the period from September 1, 2020 to October 30, 2020.

The new Bill 229

Restrictions during the non-enforcement period

The passing of Bill 229 likewise extends the moratorium on commercial evictions for CECRA-eligible tenants. Similar to the previous moratoriums, judges are prohibited from ordering a writ of possession that is effective during the applicable non-enforcement period if the basis for ordering the writ is an arrears of rent. As well, the amendments prohibit landlords from seizing any goods or chattels as a distress for arrears of rent and from exercising a right of re-entry (irrespective of the nature of the tenant's default) during the applicable non-enforcement period.

Possession of the premises retroactive to October 31, 2020

Bill 229 is also effective retroactive to October 31, 2020. If a landlord exercised a right of re-entry between October 31, 2020, and the start of the new moratorium, the landlord must restore possession of the premises to the tenant or, if unable to do so, must compensate the tenant for damages. Also, if a landlord seized a tenant's goods between October 31, 2020, and the start of the non-enforcement period as a distress for arrears of rent, the landlord must return any unsold goods to the tenant.

New additions to the Bill

However, there are several notable differences in the current legislation as contrasted with the previous moratoriums:

1. **No prescribed end date:** The previous legislation provided for a prescribed non-enforcement period, which would automatically end on a fixed date. However, Bill 229 ends on a "prescribed date," which has not been announced. Currently, there is no indication as to when the moratorium will end. The amendments are only repealed **two years** from December 8, 2020, leaving the ominous possibility that this may not be a short-term moratorium.
2. **Application to a broader class of tenancies:** Bill 229 applies not only to CECRA-eligible tenants, but also to tenants who did receive assistance under CECRA. Prior to Bill 229, nothing prevented a landlord who had received CECRA assistance in respect of a tenancy from exercising its remedies of termination or distress in respect of that tenancy, subject only to the terms of the rent reduction agreement. Accordingly, a CECRA approved tenant who failed to pay the reduced rent (typically 25% of the contract rent) could have its lease terminated by its landlord. Now that Bill 229 has extended protection to tenants who received CECRA assistance, landlords can no longer exercise those remedies for default against those tenancies.

In addition, Bill 229 allows additional classes of tenancies to be prescribed and be subject to all or part of the moratorium. In other words, new regulations can be passed to apply the

moratorium not only to those tenants that were or would have been eligible for CECRA, but to other types of tenancies entirely.

Concerns

In our view, the scope and timing of the current moratorium are of concern for several reasons.

- **CECRA Eligibility:** The currently identified protected tenancies are still those who would have been eligible for CECRA. However, one of the main eligibility requirements for CECRA was a 70% revenue loss between April-June, 2020. This prior period may have little bearing on who needs protection at this juncture. A tenant whose business was suffering earlier this year may have turned around its business and be in a position to pay its rent to its landlord. Conversely, tenants whose fortunes may have taken a turn for the worse with the recently-mandated shutdowns may not be protected simply because they managed to tread water earlier in the year.
- **CERS Eligibility:** The CECRA program has ended and has been replaced with the Canada Emergency Rent Subsidy (CERS). One major difference between these two programs is that CECRA could only be applied for by landlords, whereas tenants can apply directly for CERS. When CECRA was in effect, the moratorium acted to incentivize landlords to participate in CECRA. The logic was simple: if a landlord did not apply for CECRA, its tenant could stop paying rent entirely, and the landlord would have little recourse. If the landlord did apply for CECRA, the landlord would no longer be subject to the general moratorium on evictions and could evict a tenant who did not pay the reduced rent. However, under CERS, tenants can apply on their own and receive the subsidy. Landlords are now faced with a situation where tenants could potentially receive a subsidy, still not remit any rent, and the landlord would still be deprived of its remedies. (Note that under CERS, the individual who is responsible for the tenant must submit an attestation to the Canada Revenue Agency confirming that the tenant has paid or will pay its landlord the full amount of the rent that has been subsidized by CERS within 60 days following the tenant's receipt of its first subsidy payment).

It is unclear why the moratorium was essentially extended in its current form when circumstances have so drastically changed. It would be somewhat understandable if the legislation was enacted only as a stop-gap measure to cover the period between the expiry of CECRA and the beginning of the disbursement of the subsidies under CERS. In this scenario, these tenants would continue to be protected until they were able to receive the CERS subsidies. At that point, the subsidies would be relied on to cover tenants' rental payments. If rent was then not paid to the landlord, the landlord would have all its rights under the lease and at law, including the right to terminate the lease. However, the lack of a prescribed end date and the implementation of the moratorium several weeks after CERS took effect seems to imply the current moratorium will remain in effect alongside CERS.

What Bill 229 means for landlords

The unfortunate result is that landlords are in a more precarious position than ever. The federal government has redirected the distribution of rental subsidies directly to tenants. In contrast, the provincial government has tied landlords' hands with respect to their ability to exercise any remedies for the non-payment of rent. While commercial tenants desperately need additional protections to survive this pandemic, it is unclear whether this moratorium will, in fact, protect the most vulnerable and deserving of this protection. Arguably this protection would be better accomplished by government programs that subsidize tenant expenses without shifting the burden to landlords to bear the risk of a tenant who may not pay any rent.

We will continue to provide updates on changes to programs and regulations related to landlords and tenants during COVID-19. If you have any questions or would like to obtain legal advice on any leasing issues or litigation associated with Bill 229 or any other commercial leasing matters, please contact any lawyer in our [Commercial Leasing Group](#).

Commercial Leasing Group

Stephen Posen

Chair – Commercial Leasing Group
e: sposen@mindengross.com
p: (416) 369-4103

Ian Cantor

Partner - Litigation Group
e: icantor@mindengross.com
p: (416) 369-4314

Christina Kobi

Partner, Commercial Leasing Group
e: ckobi@mindengross.com
p: (416) 369-4154

Benjamin Radcliffe

Partner, Commercial Leasing Group
e: bradcliffe@mindengross.com
p: (416) 369-4112

Steven Birken

Associate, Commercial Leasing Group
e: sbirken@mindengross.com
p: (416) 369-4129

Catherine Francis

Partner - Litigation Group
e: cfrancis@mindengross.com
p: (416) 369-4137

Michael Horowitz

Partner, Commercial Leasing Group
e: mhorowitz@mindengross.com
p: (416) 369-4121

Boris Zayachkowski

Partner, Commercial Leasing Group
e: bzayachkowski@mindengross.com
p: (416) 369-4117

Melodie Eng

Associate, Commercial Leasing Group
e: meng@mindengross.com
p: (416) 369-4161

Leonidas Mylonopoulos

Associate, Commercial Leasing Group
e: lmylonopoulos@mindengross.com
p: (416) 369-4324

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