

# Leasing Bulletin: Update on Bill 229

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## Bill 229: Update on Ban against Exercising Eviction and Distress Rights against Commercial Tenants - O. Reg. 763/20

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This bulletin is an update to our bulletin "[Bill 229 - Protect, Support and Recover from COVID-19 Act \(Budget Measures\), 2020: Update on the Commercial Eviction Ban](#)" at [https://www.mindengross.com/docs/default-source/publications/leasing-bulletin-update-on-the-commercial-eviction-ban--bill-229-protect-support-and-recover-from-covid-19-act-\(budget-measures\)-2020.pdf?sfvrsn=e8eea34a\\_4](https://www.mindengross.com/docs/default-source/publications/leasing-bulletin-update-on-the-commercial-eviction-ban--bill-229-protect-support-and-recover-from-covid-19-act-(budget-measures)-2020.pdf?sfvrsn=e8eea34a_4).

Bill 229 extended Ontario's ban on a landlord's eviction and distress rights vis-à-vis commercial tenants that were, or would have been, eligible for the Canada Emergency Commercial Rent Assistance ("CECRA") program (the "CECRA moratorium").

The Government of Ontario has now enacted a regulation to Bill 229. [O. Reg. 763/20: Non-Enforcement Period – Prescribed Tenancies](#) (the "Regulation") is effective as of **December 17, 2020**, introduces an end date to the existing CECRA moratorium, and also introduces a new moratorium tied to the Canada Emergency Rent Subsidy ("CERS") program (the "CERS moratorium").

Firstly, the Regulation confirms that the CECRA moratorium will end on **January 31, 2021** (the 45<sup>th</sup> day after the Regulation came into force), although this can again be extended by the Government of Ontario.

Secondly, the Regulation adds a new class of protected tenancies, which includes any tenancy that satisfies all of the following criteria:

1. the tenant has been approved to receive CERS;
2. the tenant has provided proof of the CERS approval to its landlord; and
3. not more than 12 weeks have passed since the day the tenant was approved for CERS.

The CERS moratorium differs from the CECRA moratorium in some important areas, namely:

- The CERS moratorium does not extend retroactively to October 31, 2020, and does not include protections relating to a landlord's exercise of a right of re-entry or the remedy of distress prior to the CERS moratorium coming into effect.
- The CERS moratorium would expire 12 weeks after the day the tenant was approved for CERS. However, a tenant can qualify for the CERS moratorium for more than one approval of CERS. If a tenant reapplies and is approved for a new CERS payment, the moratorium would expire 12 weeks after the date of the new CERS approval. The CERS moratorium period will differ from case to case (i.e., the start and end dates will be a moving target dependent on the facts of any given case). The earliest possible start date for the CERS moratorium is **December 17, 2020**, and the latest possible end date for the CERS moratorium is **April 22, 2022**.

As a reminder, tenants may apply for CERS for various qualifying periods starting as early as **September 27, 2020**, and ending *potentially* as late as **June 30, 2021**. As of the date of this bulletin, the last qualifying period ends December 19, 2020; however, the [Federal Government's economic statement released November 30, 2020](#), confirmed that the next three qualifying periods would run from December 20, 2020, to March 13, 2021. These qualifying periods are not yet enacted into law (for clarity, the Federal Government can prescribe additional qualifying periods ending no later than June 30, 2021). The deadline for a tenant's CERS application is 180 days after the end of each qualifying period.

The Government of Ontario has a webpage summarizing the applicability and effect of the moratorium (see <https://www.ontario.ca/page/renting-commercial-property-ontario>). Information on the website will not be determinative of the legal effect of the legislation. However, there appears to be some uncertainty about the commencement date for each CERS moratorium. According to the Government's webpage, a tenant is protected under the CERS moratorium for a *12 week period from the date of CERS approval and the 12 week ban is effectively restarted from the date of the new CERS approval*. However, there are some lingering questions, which include:

- A tenant only qualifies for the CERS moratorium if it is approved for CERS *and* gives its landlord proof of such approval, but in many cases, these criteria will be satisfied on different dates. For example, if the tenant only gives its landlord proof of CERS approval, say, one week *after* the actual date of CERS approval, query whether the tenant is protected:
  - a. for the full 12 week period after the date of CERS approval (even though for part of such period the landlord was not aware that its tenant qualified for this protection); or

- b. for the 11 week period starting on the date its landlord actually received proof of CERS approval, since it took the tenant one week after CERS approval to deliver proof thereof to its landlord (i.e., does the tenant lose the benefit of the protection for each day the tenant fails to give its landlord proof of such approval?).

Of course, if the delivery of proof of approval does not affect the start date, how is a landlord to know whether a tenant is entitled to the benefit of the CERS moratorium when determining whether it can exercise certain self-help rights?

- Is the intent of the CERS moratorium to be effective retroactive to December 17, 2020 (the date the Regulation comes into effect), or only following the CERS approval? For example, what would be the effect if a landlord terminated a lease following December 17, 2020, but prior to such tenant being approved for CERS?

Based on the existing legislation, theoretically, there may be periods between December 17, 2020, and April 22, 2022 during which a landlord is free to evict a tenant or levy distress against the goods of a tenant who is receiving subsidies under CERS. Practically, however, it may be very difficult for landlords to determine with certainty whether they are permitted to do so for any given tenant at any given time.

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](#).

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