

Rent relief and eviction: considerations for the commercial landlord in the age of COVID-19

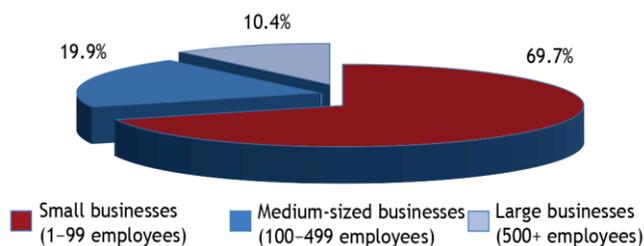
July 6, 2020

As the majority of Canadians who work in the private sector are employed by small businesses—many of which have either had to shut down or drastically reduce their operations in the past few months—there is no doubt that relief to help small businesses is essential. The government has tried to address the loss of income and hardship for small businesses through various mechanisms, including a wage subsidy program, loans to small businesses, and, most recently, the Canada Emergency Commercial Rent Assistance (CECRA) program, which attempts to provide commercial landlords with a way to supply rent relief to their small business tenants while reducing their own losses.

In addition, many provinces have implemented bans against evicting small business tenants due to rent arrears, if those tenants would qualify under the CECRA program. Such bans are generally intended to encourage more landlords to apply for the CECRA program and provide rent relief to their small business tenants.

However, landlords have expressed serious concerns about the complexity and the administrative burden of applying for the government’s CECRA program. This article explores the implications of these eviction bans for commercial landlords and some considerations to take into account when applying for the CECRA program.

Distribution of private sector employees by business size, 2017



Source: Statistics Canada, *Labour Force Survey*; and ISED calculations.

CECRA program

The CECRA program allows commercial landlords of eligible small businesses experiencing financial difficulties to apply for forgivable loans to cover up to 50% of monthly gross rent owed by their impacted tenants for the months of April, May and June 2020 (the government recently announced this will be extended into July and, in Quebec, this amount was recently increased by a further 12.5%).

However, it appears that the uptake of the CECRA program (which is not mandatory) by commercial landlords has been slower than anticipated. Landlords are grappling with the heavy administrative burden of collecting the required information and completed forms from each and every tenant, as well as some uncertainty around the terms of the program (which has had numerous changes made to its terms within the first few weeks of the program opening, e.g., some month-to-month leases may now qualify).

Faced with certain forecasts estimating that many small businesses may not be able to re-open again, some provincial governments are hoping to encourage further uptake by landlords through banning the eviction of eligible tenants.

Pre-COVID-19 terminations of commercial leases

Prior to the current bans on evictions, legislatures and courts in Canada did not often interfere in or vary the contractual terms of an agreement entered into between sophisticated commercial entities. Generally, a commercial landlord could terminate a commercial lease and re-gain possession of the premises if the commercial tenant failed to pay rent. The landlord's right to repossess the premises under a lease was typically exercisable in accordance with notice and other requirements stipulated in the lease agreement and/or in various provincial legislation. Landlords often also had the right to seize tenant assets located on the premise to satisfy the rent owing, subject to various requirements and conditions. Where a tenant continued to occupy the premises after the landlord had requested their eviction, the landlord could usually apply to the courts for an eviction order and enforcement of the same by the Sheriff's Department.

COVID-19 commercial eviction bans

Provinces across Canada have now implemented bans on evictions of commercial tenants, in some cases tying the ban on landlords from evicting tenants to eligibility for the CECRA program. For example, on June 18, 2020, Bill 192, *Protecting Small Business Act, 2020* (the "Act"), received Royal Assent from the Ontario legislature. The Act prevents commercial landlords from exercising any right of re-entry, retroactive to May 1, 2020 (if the landlords are eligible to receive assistance under CECRA, or would be eligible to receive assistance under CECRA if the landlord entered into a Rent Reduction Agreement with an effected tenant).

So, if a landlord exercised a right of re-entry since that time, the landlord must now restore possession of the premises to the tenant unless the tenant declines to accept possession, in which case the landlord must compensate the tenant for all damages sustained by the tenant by reason of the inability to restore possession. Landlords are also not permitted to seize goods or chattels for arrears of rent and are required to return any such seized goods and chattels which are unsold.

This ban on evictions will likely mean that commercial landlords will have another reason to consider applying for the CECRA program, not least of all to demonstrate that they have mitigated against their losses if they intend to pursue legal action to try to recover any rent arrears from tenants. This is even more relevant in provinces where the ban is only applicable based on the tenant's CECRA eligibility.

Conclusion

With concerns growing about the survival of many small businesses, the federal and provincial governments created the CECRA program to try to ensure the right support reaches the right entities in time. Since many small businesses are also tenants under commercial leases, the CECRA program attempts to provide assistance to those small business owners by providing funds to commercial landlords to enable them to reduce one of their tenants' largest overheads—their rent.

Many of our landlord clients understand that their tenants' success and survival will be the key to their own prosperity and survival as landlords. Even before the launch of the CECRA program, many of our commercial landlord clients were entering into rent deferral and rent reduction agreements with their commercial tenants in an attempt to help these small businesses survive these unprecedented times. After the launch of the CECRA program, we have been and continue to help both our landlord clients and our tenant clients with determining eligibility for the program and guiding them through the process. We see that many landlords are willing to use the program once they understand the requirements and policies behind it.

However, we are also seeing that smaller landlords may simply not have the infrastructure and human capital to fully utilize the CECRA program, and this may be the biggest contributing factor to the slow uptake of the CECRA program. That said, once our landlord clients are presented with a solution to this problem, it is expected that most would opt to help their tenants. This is evident by the level of interest we witnessed upon launch of our CECRA automation tool, where landlords and tenants can efficiently complete and submit their application to CECRA.

Contact us

Ali Baniasadi
Partner, Business Law
(Real Estate)

KPMG Law LLP
abaniasadi@kpmg.ca

Sawsan Selwyn
Associate, Business Law
(Real Estate)

KPMG Law LLP
sselwyn@kpmg.ca

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

KPMG Law LLP is a law firm affiliated with KPMG LLP, each of which is a Canadian limited liability partnership. KPMG LLP is a member firm of the KPMG network of independent member firms affiliated with KPMG International. KPMG Law is a registered trademark of KPMG International and is used under license by KPMG LLP.

© 2020 KPMG LLP, a Canadian limited liability partnership and a member firm of the KPMG network of independent member firms

[kpmg.ca](https://www.kpmg.ca)

