

Commercial Rent Relief - Implications for Landlords and Tenants

April 27, 2020

Introduction

On April 24, 2020, the Government of Canada, along with its provincial and territorial partners, announced additional details on the much anticipated Canada Emergency Commercial Rent Assistance (CECRA) program. This program, which will also apply in Ontario, will be structured as a forgivable loan for qualifying commercial landlords and is intended to create a mechanism whereby 50% of commercial rent that would otherwise be owed by eligible tenants will be paid through CECRA. The announcement comes after the program was first unveiled by Prime Minister Justin Trudeau on April 16, 2020.

The loans are expected to become available in mid-May and to remain accessible through September 30, 2020. They will be administered through the federal crown corporation, Canada Mortgage and Housing Corporation (CMHC), with the provinces and territories providing implementation assistance and participating in the allocation of up to 25% of the costs. While the federal government's most recent announcement provides that a deal with the provinces and territories has been reached "in principle," the exact mechanism of the loan application, distribution of funds, and ultimate forgiveness of the loan have not been released as of yet.

Amounts and Eligibility

The following are the details that have been disclosed to date in terms of the application of CECRA to commercial landlords and commercial tenants in Ontario:

- 1) CMHC will issue loans to qualifying landlords that will amount to 50% of the rent owed by eligible tenants for the applicable months of April, May, and June.
- 2) Landlords are required to reduce rent for their eligible tenants for the applicable months by 75% to qualify for the program. Rent reductions for April and May may be made by landlords retroactively.
- 3) Tenants that are paying less than \$50,000 per month in total rent, **and** who have lost 70% of pre-COVID-19 revenue¹, or who are a non-essential small business that has temporarily closed, are eligible tenants for the program, along with non-profit and charitable organizations.

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Ontario has indicated that for landlords to qualify, they must also be the registered owner on title for the leased property. Mixed-use properties comprised of both commercial and residential tenants may also qualify so long as the commercial component of the property comprises 30% (however, it is not clear if the 30% threshold is based on rent revenue, square footage, or other criterion).

Public Policy

Both the federal and provincial governments have framed the program as urgent relief for small businesses from the impacts of the COVID-19 pandemic, and as a way to incentivize commercial landlords to be flexible with their tenants. The plan has been framed as a cost sharing measure between the government, landlords, and tenants, with each party contributing to 50%, 25%, and 25% of the monthly rent, respectively. The government has indicated that the program is not intended to reimburse landlords for a loss of net rental profits, which seems to be one reason why the loans are being disbursed directly through a landlord's mortgage lender. If a landlord does not have a mortgage on the property, the government has suggested that CMHC will work with applicants so that funds may possibly be applied against other fixed costs that the landlord may have in respect of the subject property.

Legal Considerations for Landlords and Tenants

The government has advised that the loans under CECRA will be forgivable, provided that the landlord and eligible tenants have entered into a "rent forgiveness agreement" to reflect the 75% reduction in rent for the eligible months. This agreement must also contain a provision temporarily prohibiting the landlord from taking steps to evict the tenant from the premises during the applicable time.

Given CECRA is being rolled out in the form of a loan that will be forgiven, without further detail on exactly how and when the loan qualification and distribution process will take place, there is a risk that participating landlords are left in a situation where they or their tenants have not qualified for the forgivable loan while they have accepted or agreed to accept only 25% of rent owed by tenants for the applicable month(s). Accordingly, we recommend that landlords who are considering participating in CECRA do so under a carefully drafted agreement with their tenants outlying the above-noted rent reduction and the moratorium on evictions, but with full reservation of all other rights and remedies, to make it clear to the contracting parties that, should the landlord not ultimately qualify for the forgivable loan, the balance of the rent would still be owed and payable by the tenant. Tenants are well advised to clarify in the agreement that their payment of only 25% of the payable rent otherwise due under the original lease for the eligible months would not be deemed now or in the future to be a default under the lease (so as to protect any tenant rights in the lease that may be contingent on the tenant not having been in default, including renewal rights).

Prior to the execution of the agreement, given mortgaged property owners are typically not permitted under

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their mortgage documents to accept rent abatements and/or amend the terms of a lease beyond the ordinary course without the prior consent of their lenders, and are obligated to maintain certain debt-service coverage ratios, it would be prudent for a landlord to also ensure that it has the consent of its mortgage lender (if applicable) to enter into the rent forgiveness agreement and participate in the program.

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¹ Compared to tenant's revenues in April, May and/or June of the same month in 2019 or, alternatively, compared to average revenues of tenant for January and February 2020.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.