

Further Details on the Canada Emergency Commercial Rent Assistance Program for Small Businesses

May 25, 2020

Further to our articles on April 24, 2020 and April 27, 2020, the Canada Mortgage and Housing Corporation (CMHC) has provided additional information and resources regarding the Canada Emergency Commercial Rent Assistance (CECRA) program for small businesses in anticipation of the launch of the CECRA registration portal on May 25, 2020. The website for the CECRA program may be found [here](#). In this update we will discuss the recent changes to the CECRA program, the eligibility criteria for tenants and property owners, the application process and the steps both landlords and tenants should take to prepare.

What We Currently Know

As set out in our previous articles, the program is designed to provide forgivable loans of 50% of the gross monthly rent payments to qualifying commercial property owners for the benefit of eligible tenants for April, May and June of this year. The loan will be forgiven if the commercial property owner agrees to reduce an eligible tenant's rent by at least 75% for April, May and June of 2020 under a rent reduction agreement.

In anticipation of the upcoming launch of the CECRA program, CMHC released the following four template agreements that will be required as part of the property owner's application: (i) a property owner attestation; (ii) a tenant or subtenant attestation; (iii) a rent reduction agreement; and (iv) a forgivable loan agreement. These agreements are discussed further below and legal versions of these agreements are available in the CECRA application portal. CMHC has also provided the following information:

- the loans will be forgiven on December 31, 2020, provided that certain conditions are met, pursuant to a forgivable loan agreement with CMHC (the Loan Agreement). However, should an event of default occur under the Loan Agreement, the loan becomes due and payable immediately upon demand by CMHC, together with interest in the amount of five percent (5%) per annum on the unpaid principal amount;
- contrary to the initial announcement, it is no longer required that the commercial property in question be secured by a mortgage;
- CMHC has engaged MCAP and First Canadian Title (FCT) to administer CECRA for small businesses, and applicants may be contacted by either throughout the validation and funding processes;
- the property owner or landlord, and each tenant forming part of the application, will be required to provide a form of attestation confirming their eligibility to participate in the CECRA program;

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- each property owner must enter into a legally binding rent reduction agreement with the eligible tenant to confirm the rent reduction in accordance with the program terms and conditions. The rent reduction contained in the agreement will be conditional upon the property owner receiving final approval of its CECRA application;
- the definition of "lease" under the program includes all arrangements of a similar nature, including, but not limited to, a licence, sublease, and ground lease, emphyteusis, or rights of superficies or usufruct. An eligible ground lease is required to be registered on title to the commercial property. To be eligible for the program all leases must expire after August 31, 2020;
- small business tenants who are in a sub-tenancy arrangement are eligible if the lease structure meets the program's criteria. However, a sublandlord will need to rely on the property owner's CECRA application, and a rent reduction agreement must be entered into for each level of the lease structure to ensure the benefits of the program are allocated to the appropriate parties. A tenant attestation will also need to be provided for each tenant and subtenant in the lease structure;
- in situations where the registered owner of the commercial property holds such property in trust or as nominee, agent or mandatary for one or more beneficial owners other than the registered owner, the registered owner is required to be duly authorized to submit an application to the CECRA program and enter into the Loan Agreement under the terms of such trust, nominee agreement or mandate;
- applications for CECRA will be property specific. A tenant with multiple locations will need to submit their documentation separately for each location through their respective landlord;
- the deadline for submitting an application is August 31, 2020, and the program will be applied retroactively for the months of April, May and June of 2020;
- the loan funds may be used to refund amounts in excess of 25% already paid by the tenant for the months of April, May and June 2020, or, at the option of the tenant, can be applied to future rent owing; and
- the funds made available pursuant to the Loan Agreement are to be transferred to the property owner's financial institution directly.

What Tenants are Eligible?

A tenant is eligible for the CECRA program if (i) its gross monthly rent per location is less than \$50,000; (ii) it generates no more than \$20,000,000 in annual revenue (including the parent level); and (iii) the tenant has experienced at least a 70% reduction in its pre-COVID-19 revenues. In order to demonstrate the reduction in revenue, a tenant is to compare its current revenues for April, May and June of 2020 to its revenues in April, May and June of 2019. If revenue figures are not available for June 2020, a tenant is permitted to use forecasts for the month of June. In the case of new businesses that were not in operation during April to June of 2019, the average revenues of January and February of 2020 may be used for the purposes of the comparison to the April, May and June 2020 period. It should be noted that (i) businesses that opened on or after March 1, 2020 are not eligible for the CECRA program; and (ii) the temporary closure of operations of

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a tenant's business is no longer an alternative criterion under clause (iii) above. Presumably this criterion regarding temporary closures was removed given the gradual opening of the economy currently taking place.

CMHC has also provided guidance on their website as to what is included in the definition of gross rent. For net leases, gross rent includes: (i) the net/minimum/base rent; (ii) the regular monthly installments of operating costs; (iii) the regular monthly installments of property taxes payable to the landlord; (iv) the regular monthly installments of other additional rent amounts captured in the lease; and (v) the percentage of sales rent payable, if applicable. For gross leases, the gross rent will be defined as the rent due under the gross lease.

The \$20,000,000 gross annual revenue threshold is based upon a tenant's 2019 financial revenue, using whatever 12-month period the company or business uses to calculate its financials. It is also relevant whether a tenant, or its ultimate owner, produces consolidated statements. If consolidated statements are produced, then the tenant would use the revenues reported for the group level of companies to determine whether the \$20,000,000 threshold has been exceeded. If the tenant does not produce consolidated statements, then the specific revenue of the tenant will apply when determining eligibility under the \$20,000,000 test.

Pursuant to the sample template of the tenant attestation that was available on the CMHC website, a tenant may be required to have investigated, and where eligible, applied for available non-repayable proceeds of any other government programs targeted at commercial rent assistance in response to the COVID-19 pandemic, and have pursued any insurance proceeds available to it due to the impairment of rental revenue or rental payment obligations. Provided this requirement is also contained in the legal form of attestation, all tenants applying for the program will be required to attest to making such efforts, as well as disclosing any amounts received (or receivable) to their landlord, and ultimately CMHC.

Requirements of Property Owners

The program will not apply to any federal, provincial, or municipally owned properties where the government is the landlord of the small business tenant. However, there are exceptions in situations in which the government is the landlord, including: (i) a long-term lease to a First Nation, or Indigenous organization or government; (ii) a long-term commercial lease with third parties to operate the property and the third party is eligible as the property owner – such as an airport; and (iii) post-secondary institutions, hospitals, pension funds, and crown corporations with limited appropriations which are designated as eligible. For purposes of CECRA, a "property owner" includes the registered owner of legal title of the commercial property in question (registered in the applicable land registry), and may also include a ground lessee, emphyteusis, superficies or usufruct of the property (with the applicable ground lease or notice registered in the applicable land registry).

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CMHC has now clarified that property owners that have a non-arm's length relationship with an eligible tenant are also eligible for the CECRA program, provided that: (i) the lease has not been created or amended after April 1, 2020; (ii) the lease is on fair market terms; and (iii) the total gross rent payable under such lease is no higher than fair market rent for the property. Should those conditions be met, all of the general program requirements apply, including providing confirmation that the property owner has declared rental revenue in their attestation.

In order to qualify, a property owner (or any applicable beneficial owner) must have declared commercial rental revenue from the property on tax returns for the tax years 2018 and/or 2019. For property owners of newly constructed or recently purchased properties, the property must have commenced generating revenue in 2020 and the property owner must have entered into a lease with an eligible tenant on or before April 1, 2020. All property owners must submit a copy of the rent roll for the property current as of June 1, 2020 with their application. For those applications submitted prior to June 1, 2020, a copy of the current rent roll for the property is sufficient.

Similar to the requirements for tenants, pursuant to the sample template property owner attestation form that was available on the CMHC website, the property owner may be required to demonstrate that they have investigated, and where eligible, applied for all available non-repayable proceeds of any other government programs targeted at commercial rent assistance in response to the COVID-19 pandemic, or have pursued any insurance proceeds available to it due to the impairment of rental revenue or rental payment obligations. Provided this requirement is also contained in the legal form of attestation, the property owner will be required to submit an attestation to this effect as part of its application to CMHC.

Required Forms and Information for Application

In anticipation of the launch of the CECRA program, CMHC made available the following four sample forms that will be required for the CECRA application.

- **Tenant or Subtenant's Attestation:** This is a mandatory form on which each eligible small business tenant, sublandlord and/or subtenant must attest that they are eligible for the CECRA program based on the requirements outlined above, amongst others. The sample attestation also includes an integrity declaration which is required to receive the benefits from CMHC under the CECRA program;
- **Property Owner's Attestation:** This is a mandatory form that the property owner is required to complete. Like the Tenant Attestation, it contains an attestation that the property owner is eligible for the CECRA program and includes an integrity declaration. Of note, the property owner is required to declare that it has no knowledge (acting reasonably and without investigation) of any falsehood or misrepresentation contained in the Tenant Attestation(s) in connection with its application. The sample attestation also specifically requires that the property owner obtain any consents required by

its lenders to enter into the rent reduction agreement, the forgivable loan agreement, and to provide the attestation;

- **Rent Reduction Agreement:** As a requirement of the program and discussed in our April 27, 2020 article, each property owner must enter into a legally binding rent reduction agreement with the eligible tenant to confirm the rent reduction in accordance with the program terms and conditions. Final approval of the CECRA application will be dependent on this agreement, with the terms of the rent reduction agreement being conditional on the property owner receiving final approval of its CECRA application. CMHC had made a sample rent reduction agreement available on its website with legal versions available in the CECRA application portal. This agreement would restate or amend (as applicable) any prior rent abatement agreements the property owner has entered into with an eligible tenant so as to be compliant with the terms and conditions of the CECRA program. The agreement also requires the property owner not to serve the tenant with any default notice or seek to effect or proceed with an eviction where the basis for such enforcement is the COVID-19 emergency. Given that the program may be applied retroactively, any enforcement proceedings that have been commenced by the landlord after April 1, 2020 would be suspended and stayed until the later of: (i) three (3) months after the date of the CECRA application; and (ii) the date on which the eligible tenant is no longer receiving any rent reduction or forgiveness or rent credit under the rent reduction agreement. Regarding the tenant's portion of the gross monthly rent pursuant to the CECRA program, the agreement also requires that the tenant pay any reduced rent outstanding for April, May and June 2020 within thirty (30) days of the effective date of the rent reduction agreement, or such later date as may be agreed to by the property owner and tenant; and
- **Forgivable Loan Agreement:** This agreement between the property owner and CMHC sets out the terms and conditions for the loan under the CECRA program. It outlines, among other things, the purpose of the loan, the terms by which the loan will be forgiven, and the events of default and CMHC remedies under the loan.

The forms that were made available on the CMHC website were sample documents only and were provided to assist property owners and tenants with their preparation for the application process. Legal versions of the documents are available in the online application portal available to the public on May 25, 2020 and should be reviewed together with your legal counsel.

In anticipation of submitting their information, the property owner and tenant should gather the following information as it will be required for the application:

- **For the Property Owner:** Property address; property type; property tax statement; latest rent roll for each property; number of commercial units; banking information (including bank statement); property owner contact information; co-ownership information; and contact details for co-owners.
- **For Tenants:** Tenant contact information; registered business name; number of employees; lease area; and the monthly gross rent for the period of April, May and June 2020.

The Online Application

Due to the anticipated large volume of applications, CMHC is taking a staggered approach for registration by property owners once the online portal becomes available. Commencing May 25, 2020, property owners may register on the applicable day set out here. Once a property owner is registered, the online portal will be available 24/7 for applicants to input data and upload their documents.

Next Steps for Property Owners and Tenants

In the event they wish to participate in the CECRA program, property owners should begin contacting their tenants to determine whether or not they are eligible for the CECRA program, and to begin making preparations for the completion of the relevant attestations and the rent reduction agreement (whether on the form provided by CMHC or on a form negotiated between the property owner and tenant which complies with the terms and conditions of the CECRA program). Property owners should also make note that attestations will be required for each tenant that is seeking assistance under the CECRA program.

In situations where a small business tenant may not be able to make its 25% contribution of the gross monthly rent, the property owner should take the time to weigh its options. The Government of Canada offers other programs that may be able to assist tenants who may struggle to pay the remaining portion of their rent. In addition, landlords do have the option of providing rent forgiveness above the minimum 25% threshold, or deferring the payment of the 25% contribution. In such cases, the landlord's 25% of the gross monthly rent must continue to be forgiven entirely, will never be recoverable, and may not form part of the rent deferral.

In the event a property owner chooses not to apply for the CECRA program, there are other programs available for tenants to obtain support from the Government of Canada. These programs include the Canada Emergency Business Account, funding through the EDC Loan Guarantee for small and medium-sized enterprises (SMEs), and the BDC Co-Lending Program for SMEs. The information for these programs is available on the CMHC CECRA website.

Cassels is here to provide advice on, and assist with the drafting and execution of, any required agreements in connection with the CECRA program, and to answer any questions regarding CECRA, your property or your commercial leases.