

CANADA EMERGENCY COMMERCIAL RENT ASSISTANCE UPDATE: RELIEF IS ALMOST HERE, BUT WILL EVERYONE PLAY BALL?

by Alex Kolandjian, Steven Cygelfarb and Teodora Prpa

General Update

On May 1, 2020, the Canada Mortgage and Housing Corporation ("CMHC") provided its update on the Canada Emergency Commercial Rent Assistance program ("CECRA") as the body charged with CECRA's implementation and administration¹. On May 14, 2020, additional details were provided by CMHC on eligibility for the program and on the application process². On May 19, 2020, CMHC provided guidance on how the application process will proceed, and provided sample documents for commercial property owners to review in advance of the application portal opening in mid-May 2020³. Further, CMHC has included reasons compelling landlords to apply for the program (as it has not been generally well-received by landlords) including, but not limited to, the lack of rental income for a landlord if a tenant cannot afford to pay its rent (i.e., 75% of rent is better than nothing) and the costs of finding new tenants.

Recap: How will CECRA be implemented?

CECRA's overall outcome will be to lower 'gross' rent by 75% for small business tenants facing hardship as a result of COVID-19, which will in turn alleviate some of the rent shortfalls that commercial property owners have been experiencing. Following a loan from the federal and provincial governments, small business tenants would be responsible for 25% of the 'gross' rent, with qualifying commercial property owners absorbing 25% of the remaining 'gross' rent. The details of the mechanism through which CECRA will achieve its objective remains to be finalized, but in general:

- CECRA will provide forgivable loans to qualifying commercial property owners to cover 50% of three monthly 'gross' rent payments that are payable by eligible small business tenants who are experiencing financial hardship during April, May, and June;
- The loans provided to qualifying commercial property owners will be forgiven if the commercial property owner agrees to reduce the eligible small business tenants' 'gross' rent by at least 75% under a rent forgiveness agreement,



[Alex Kolandjian](#)
Partner

t: 416.849.4103

akolandjian@foglers.com



[Steven Cygelfarb](#)
Partner

t: 416.941.8806

scygelfarb@foglers.com

[Teodora Prpa](#)
Articling Student

t: 416.365.3716

tprpa@foglers.com

¹ Canada Mortgage and Housing Corporation, "COVID-19: CECRA for Small Businesses", 1 May 2020, online: <<https://www.cmhc-schl.gc.ca/en/finance-and-investing/covid19-cecra-small-business>>.

² Canada Mortgage and Housing Corporation, "COVID-19: CECRA for Small Businesses", 14 May 2020, online: <<https://www.cmhc-schl.gc.ca/en/finance-and-investing/covid19-cecra-small-business>>.

³ Canada Mortgage and Housing Corporation, "COVID-19: CECRA for Small Businesses", 19 May 2020, online: <<https://www.cmhc-schl.gc.ca/en/finance-and-investing/covid19-cecra-small-business>>.

which will include a term not to evict the tenant while the agreement is in place; and

- The federal and provincial governments would distribute the forgivable loans directly to the lender holding the mortgage secured against the commercial property where the property has been mortgaged.

Update: Eligibility Criteria

Property Owners

CMHC has added to the requirements for the "qualifying commercial property owner", meaning in order to be eligible, the commercial property⁴ owner must own revenue-generating property in Canada and must have declared rental income on its personal or corporate tax returns in 2018 and/or 2019. Newly constructed or newly purchased developments may also be eligible, provided that the other requirements of the program are met. CMHC had been planning to introduce a separate mechanism to be used by commercial property owners who do not have a mortgage, but have now decided that CECRA for small businesses will be "administered undifferentiated for properties with mortgages, other forms of debt or no mortgages at all." Consequently, funds received from the program must be applied to reimburse tenants for rent paid above the 25% threshold during the forgivable loan period first and then may be applied to any costs and expenses relating directly to the property, including financing costs and operation and maintenance and repair obligations (such as costs of common area maintenance, property taxes, insurance and utilities). The program does not apply to properties owned by the government, subject to specific exceptions.

Tenants

As for eligible small business tenants, CMHC has added that subtenants are eligible along with tenants and has provided some clarity to the \$50,000 per month rental payments. The amount is to be representative of monthly 'gross' rent per location pursuant to a valid lease agreement. Included in 'gross' rent (for the purposes of the program) under a net lease are items such as minimum rent, operating costs (CAM or TMI), property taxes, maintenance costs, repairs, utilities, management fees and percentage rent. Excluded from 'gross' rent are penalties and additional costs such as, but not limited to, damages, indemnity payments, lease enforcement costs, landlord self-help costs, interest and penalties on unpaid amounts, supervision fees, consent fees, reconciliation adjustment costs and insurance proceeds. The introduction of exclusions in calculating gross rent (the list is set out in its entirety on CMHC's website) is an attempt to deal with the earlier issue of landlords "forgoing profits", which was initially set out in materials pertaining to the program. Landlords who enroll in the program will have to be mindful of the exclusions or could see CMHC seeking to recover the proceeds of the loan.

The eligible small business owner must generate no more than \$20 million in gross annual revenues, calculated on a consolidated basis (at the ultimate parent level). Note that if the small business tenant or its ultimate owner produces consolidated statements, then the tenant would use revenues reported for the group level of companies and not from the tenant level. CMHC has noted that the revenue must consist of revenue earned from ordinary activities in Canada, calculated using the tenant's normal accounting method and must

⁴ As discussed in the previous update, CMHC defines "commercial real property" as commercial properties with small business tenants. Commercial properties with a residential component and multi-unit residential mixed-use properties would equally be eligible with respect to their small business tenants."

exclude revenues from extraordinary items. However, no guidance is provided on what constitutes an "extraordinary item."

Small businesses that commenced operation on or after March 1, 2020 are not eligible for the program.

For registered charities and non-profit organizations, CMHC has advised that the calculation would include most forms of revenue, excluding revenues from non-arm's length persons. These organizations would then be allowed to choose to include revenue from government sources as part of the calculation. Landlords and tenants who are not at arm's length will also be included in CECRA so long as, prior to April 1, 2020, there was a valid and enforceable lease agreement in place on no greater than market terms.

Rent Reduction

It remains the case that in order to be eligible for CECRA, property owners must offer a minimum of a 75% rent reduction for the months of April, May, and June 2020. If any amounts have been paid by small business tenants during the April-June 2020 period as gross rent, the loan agreement with the property owner will stipulate that the owner should send the tenant the funds directly or should provide a credit for future rental payments. CMHC has also confirmed that one of CECRA's terms and conditions will be that the property owner must not seek to recover abated rent amounts after the program has completed. These covenants are included in the Rent Reduction Agreement and the Forgivable Loan Agreement provided by CMHC.

Application Process

The deadline to apply for CECRA is August 31, 2020 according to CMHC. CMHC continues to anticipate that the application process will open in the second half of May 2020, and MCAP and First Canadian Title will assist in delivering CECRA and processing applications. When the application process opens, property owners will need to provide the following information to prove eligibility:

1. Proof of an existing rent reduction agreement;
2. Proof of a moratorium on eviction;
3. Proof of small business tenant financial hardship.

Proof of the property owner and the tenant's (or subtenant's) eligibility for CECRA will be provided to CMHC by way of "attestations", and samples of both Property Owner and Tenant Attestations have been provided online and are available for review. Property owners must have the tenants complete the Tenant Attestation and must submit the same as part of their application, but tenants are responsible for confirming their own eligibility for the program. The attestations include integrity declarations whereby the landlord or the tenant, as the case may be, declares, among other things, that it and its affiliates have not been convicted of any criminal, penal or regulatory offences with respect to any financial matters.

Samples for the Rent Reduction Agreement⁵ and for the Forgivable Loan Agreement⁶ have also been provided by CHMC, providing a clear framework of the obligations and covenants property owners, tenants, and the government are bound to under CECRA (i.e. moratorium on eviction clauses, rent credit clauses where payment has occurred; inability to recover forgiven amounts following CECRA). Under the Forgiveness Loan Agreement, the property owner's loan will be forgiven and will remain interest-free, so long as an Event of Default (defined in the Agreement but includes failing to comply with the CECRA Terms and Conditions or breaching any of the Agreements between the parties) has not occurred. Otherwise, the loan will become repayable on December 31, 2020.

What remains unclear is how negotiable the terms are in these "sample" agreements, and whether CMHC will expect the agreements to look identical to the samples provided, given that all of the sample agreements are watermarked "Do Not Use". Beyond the agreements, CMHC has also provided further guidance on what general information property owners will need to provide as part of their application, which will include:

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

In order to manage the volume of applications, CMHC has planned a staggered approach to the registration and application process, to be executed as follows (exact dates are not yet known):

1. On the first day of the application process, property owners who are located in Atlantic Canada, BC, Alberta and Quebec, with up to 10 tenants who are eligible for the program will register in the portal;
2. On the second day, property owners who are located in Manitoba, Saskatchewan, Ontario and the Territories, with up to 10 tenants who are eligible for the program will register in the portal;
3. On the third day, all other property owners in Manitoba, Saskatchewan, Ontario and the Territories who are eligible for the program will register in the portal;
4. On the fourth day, all other property owners in Atlantic Canada, BC, Alberta and Quebec who are eligible for the program will register in the portal;
5. On the fifth day, all property owners can register for CECRA.

Each province and territory will likely introduce its own terms and conditions with respect to the program. CMHC's website also allows individuals to subscribe to a newsletter to receive these details as they become available.

⁵ Online: <<https://assets.cmhc-schl.gc.ca/sites/cmhc/finance-investing/covid19-cecra-small-business/sample-rent-reduction-agreement-en.pdf?rev=21c2c7a5-04fe-4edd-8ed2-b56cf5b0a737>>.

⁶ Online: <<https://assets.cmhc-schl.gc.ca/sites/cmhc/finance-investing/covid19-cecra-small-business/forgivable-loan-agreement-terms-conditions-en.pdf?rev=1f3ddb73-e5ba-4c6a-bb8a-8b9586ea3ffb>>.

What About My Rent Deferral Agreement?

The terms (and specifically, deferrals of rent) under previously entered into rent deferral agreements may conflict with the terms of the program. The sample Rent Reduction Agreement does state that any binding agreements are subject to the terms of the Rent Reduction Agreement with respect to reductions of rent and that in the event of conflict, the terms of the Rent Reduction Agreement with respect to reductions of rent are to prevail. That being said, when reached for comment, CMHC indicated that it is not yet entirely clear if CMHC will be reviewing parties' rent deferral agreements for compliance or whether they will expect parties who apply for the program to cancel their agreements and enter into the Rent Reduction Agreement online. CMHC plans to announce this information before the portal opens for applications.

If you have further questions about the program or the various documents you will be required to provide to CMHC in order to obtain relief under CECRA, please reach out to [Alex Kolandjian](#) or [Steven Cygelfarb](#) for further information.