Government Announces Details of Rent Assistance Program for Small Business Tenants [Update]

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Commercial landlords and tenants have been monitoring government communications with the hope of hearing that some form of rental assistance is on the way.

On April 24, 2020, the federal government gave these parties cause for optimism with the announcement of an agreement in principle with the provinces and territories to provide rent reduction relief to qualifying small business tenants that have been significantly affected by the COVID-19 pandemic.

This aid program, known as the Canada Emergency Commercial Rent Assistance program ("**CECRA**"), will provide forgivable loans to qualifying commercial property owners who agree to lower the gross rent payable by their tenants for April, May and June 2020 by at least 75%.

The program will be administrated by Canada Mortgage and Housing Corporation ("**CMHC**"), with MCAP and First Canadian Title assisting in the processing of applications and delivery of loans. Each province and territory has agreed to contribute to the costs of implementation in varying proportions.

On April 29, 2020, CMHC added a page to its website (available here) outlining the application process and eligibility criteria for CECRA. On May 19, 2020, CMHC announced that applications for CECRA would be submitted through an online application portal on its website, and provided sample documents for applicants to review in advance of the portal opening. On May 25, 2020, the application portal opened for registration for certain provinces on a staggered basis. As of May 29, 2020, the portal has been open for registration by all eligible applicants.

The CECRA program is aimed at small business tenants. However, Prime Minister Trudeau has indicated that the federal government is working on some form of rent assistance program for larger business tenants and it is has been reported recently that a coalition of retailers and landlords are lobbying on behalf of larger business for the implementation of a program comparable to CECRA.

KEY ELEMENTS OF CECRA

The key elements of the CECRA program are generally described as follows:

- The government will offer forgivable loans to qualifying commercial landlords to cover up to 50% of the monthly gross rent payable by eligible small business tenants for the months of April, May and June 2020. Landlords and tenants will each be responsible for 25% of the gross rent.
- The loans will be forgiven if the landlord enters into a Rent Reduction Agreement with the eligible small business tenant under which the landlord will have agreed: (i) to reduce rent to 25% of gross rent for the months of April, May and June 2020; and (ii) not to evict the tenant during the period in which the tenant receives the rent forgiveness or rent credit contemplated under the Rent Reduction Agreement. In addition, the landlord must not seek to recover any reduced or abated rent after the program expires.
- CMHC will disburse the loans directly to the landlord’s financial institution. The landlord need not have a mortgage secured by its property to qualify; property owners with or without a mortgage are eligible for CECRA provided the other program requirements are met.
- Landlords must submit the following documents in support of their application for a CECRA loan: a Rent Reduction Agreement and attestations from each of the tenant and landlord confirming their eligibility for the program. Landlords must also agree to the terms and conditions of CECRA’s form of Forgivable Loan Agreement which is viewable once an application has been created in the application portal.
- The deadline to apply for CECRA is August 31, 2020. Landlords who have not offered rent reductions of at least 75% for April, May and June will be able to do so retroactively to qualify for CECRA.
- Landlords must submit one application for all eligible tenants at one property. Once registered, the application portal will be available on a 24/7 basis for applicants to add information and upload documents.

ELIGIBILITY CRITERIA

1. Eligible Tenants

According to CMHC, in order to qualify for a CECRA loan the tenant must: (i) pay no more than $50,000 dollars in monthly “gross rent” per location[1]; (ii) generate no more than $20 million dollars in gross annual revenues (based on the 12 month period used to calculate the tenant’s 2019 fiscal year) on a consolidated basis at the ultimate parent level[2]; and (iii) have experienced at least a 70% drop in pre-COVID-19 revenues. The 70% revenue decrease is to be determined by comparing revenues for April, May and June to revenues from the same months in 2019 or alternatively compared to average revenues for January and February 2020.

CMHC has indicated that the CECRA program will be available to non-profits and charities. Sub-tenancy arrangements are also eligible provided the other program requirements are satisfied.

2. Eligible Landlords

CMHC advises that an eligible landlord (referred to as an "eligible commercial property owner") is one that: (i) is the registered owner of commercial property in Canada where the impacted small business tenant is located; and (ii) has declared rental income in its personal or corporate tax return in years 2018 and/or 2019 or has commenced generating commercial rental revenue on or before April 1, 2020. CMHC has indicated that commercial properties with a residential component or a mixed use which includes at least 30 per cent commercial component are also eligible for the program.

REQUIRED DOCUMENTATION

As mentioned, all CECRA applications must include a Rent Reduction Agreement and attestations from each of the tenant and landlord. CMHC has provided sample forms of these documents on their website. Landlords must also agree to the terms and conditions of a form of Forgivable Loan Agreement, which is viewable once an application has been created in the application portal. Certain key provisions of these documents are summarized below. It remains unclear how negotiable the terms in these documents will be, and whether CMHC will expect each applicant's documentation to mirror the terms of the samples.

1. Rent Reduction Agreement

The applicant landlord must enter into a Rent Reduction Agreement with each impacted tenant to document the required 75% gross rent reduction over the eligible three month period in accordance with the program terms and conditions. Key provisions of CMHC's sample form of Rent Reduction Agreement include the following:

- The agreement is conditional upon, and not binding until, final approval of the CECRA loan application. Accordingly, by entering into this agreement a landlord would not be committing itself to providing a rent reduction in the event the CECRA application is rejected.
- The agreement may apply retroactively so as to enable the parties to apply for a CECRA loan after the eligible three month period has ended, so long as they are able to prove eligibility during that period. If gross rent has already been paid in full for the eligible three-month period, the landlord must agree to either reimburse the tenant for the amount of gross rent paid in excess of the reduced rent payable during that period or provide a credit for future instalments of rent. If the parties have already entered into a prior rent deferral or reduction agreement for the eligible three-month period, the prior agreement is deemed amended to conform to the CMHC form of agreement and such amounts will be included in calculating the total amount of the required rent forgiveness.
- The tenant is required to confirm, to the best of its knowledge, that all information and declarations provided in connection with the CECRA application are true and correct, and acknowledge that any false or misleading information in the tenant's attestation may result in ineligibility (in which case the forgiven rent less any amounts paid by the tenant shall be due and owing to the landlord within 30 days' notice of ineligibility).

- The landlord agrees that it will not seek to either evict the tenant or recover the rent forgiven under the agreement for the period commencing on April 1, 2020 until the date on which the tenant is no longer receiving rent relief under the agreement.

2. Forgivable Loan Agreement

The landlord must also enter into a Forgivable Loan Agreement with CMHC which documents the terms and conditions of the CECRA loan. A sample Forgivable Loan Agreement was originally provided on the CMHC site, but has since been removed. Key provisions of the sample agreement include the following:

- The loan will be an unsecured, interest free, forgivable loan of up to 50% of the gross rent payable by the tenant minus a *pro rata* portion of any insurance proceeds available to the landlord or any non-repayable proceeds of any other federal or provincial commercial rent assistance programs which are received or receivable by the parties in respect of the eligible three month period.
- The loan proceeds must be used: (i) first, to reimburse or credit the eligible tenant(s) for any gross rent paid during the eligible three month period in excess of 25% of the gross rent during that period; and (ii) second, towards any costs and expenses relating directly to the property, including financing costs and operation, maintenance and repair obligations (e.g., common area maintenance, property taxes, insurance and utilities).
- The landlord must repay the loan on December 31, 2020, unless it is forgiven by CMHC on such date. The loan will be forgiven by CMHC unless an "Event of Default" occurs, which are as follows: (i) the landlord fails to comply with the terms and conditions of the CECRA program, Forgivable Loan Agreement or Rent Reduction Agreement; (ii) the landlord makes false or misleading representations in its application and documents; (iii) the landlord commits fraud or misconduct; or (iv) events of bankruptcy and insolvency occur. If an Event of Default occurs, CMHC may terminate the loan and require immediate repayment with interest and exercise any rights and remedies under any documents or conferred by law, including assigning the loan to Canada Revenue Agency.
- The landlord must not seek to evict the tenant nor attempt to recover any gross rent that has been forgiven except if the tenant is determined to have given false or misleading information in the tenant's attestation. In such event, the landlord is required to use commercially reasonable effort to recover the gross rent that was previously forgiven and to use such amounts to repay the loan to CMHC.

3. Tenant Attestation

The landlord must also obtain from each eligible tenant a signed attestation confirming the tenant's eligibility under the CECRA program requirements.

Under the form of attestation provided by CMHC, the tenant must declare and confirm, among other things, that: (i) it meets the eligibility requirements described above, (ii) has investigated, and where possible, made application for, any available business interruption insurance proceeds and commercial rent assistance offered by the government and must disclose any such proceeds which are receivable or received, and (iii) it is not subject to any actual or pending proceedings under any bankruptcy or insolvency legislation.

4. Landlord Attestation

The landlord must sign an attestation confirming that the information provided in the CECRA application is correct and attesting to the parties' eligibility under the CECRA program requirements.

Under the form of attestation provided by CMHC, the landlord must declare and confirm, among other things, that it: (i) has no knowledge, acting reasonably and without investigation, of any falsehood or misrepresentation contained in the tenant's attestation, (ii) has investigated, and where possible, made application for, any available rental loss insurance proceeds and commercial rent assistance offered by the government, (iii) has disclosed any such proceeds which are receivable or received to CMHC and shall pay some or all of such proceeds to CMHC in accordance with the Forgivable Loan Agreement, and (iv) has obtained any consents that may be required from its lenders to permit the parties to enter into the Rent Reduction Agreement and Forgivable Loan Agreement.

Both the landlord's and tenant's attestations also include integrity declarations whereby the attestor is required to declare and confirm that, among other things, the attestor and its affiliates have not been convicted of any criminal, penal or regulatory offences with respect to any financial matters and have not been declared by the federal or any provincial or territorial government to be ineligible to do business with such government body.

As mentioned, any false or misleading information contained in the landlord's or tenant's attestations may result in the CMHC rendering the applicant ineligible to benefit from the CECRA program, thereby entitling the CMHC to remedies for recovery of any benefits conferred.

5. Additional Information

In addition to the documentation noted above, CMHC has indicated that an application for CECRA must also include supporting information regarding the parties and the subject property, including: property address and type, property tax statement, the latest rent roll for each property and the number of commercial units, contact information for the tenant, the landlord and any co-owners, banking information (including a bank statement), the tenant's registered business name, lease area and monthly gross rent for the eligible three-month period.

CONCLUDING REMARKS

The roll out of the CECRA program is certainly welcome news for small business tenants who have been significantly impacted by the COVID-19 pandemic. However, questions remain about the program's mechanics and eligibility criteria. What is the process for verification of a tenant's 70% decline in revenues and annual gross revenue? Would retailers and restaurants who have closed for business and shifted to operating pick-up and delivery services be excluded from the program if they are unable to demonstrate a 70% decline in revenues? We suspect these issues will be clarified in the course of CMHC's administration of the program.

Further, as the CECRA program remains voluntary, many eligible landlords have been reluctant to participate. As a result, there have been calls for government intervention to protect tenants from eviction or seizure of their property due to their inability to pay rent during the COVID-19 shutdown. On June 8, 2020, the Ontario Government responded to these calls with the announcement of proposed changes to the *Commercial Tenancies Act* which would, if passed, temporarily halt evictions of tenants that are eligible for the CECRA program and reverse evictions that occurred on or after June 3, 2020. It remains to be seen how the announcement of these legislative changes will impact the success of the CECRA program.

Should you have any questions about the CECRA program or require assistance with any other leasing matters, please contact one of the lawyers in our Commercial Leasing Group.

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[1] The term “gross rent” for the purposes of the program includes base, net or minimum rent or gross rent, monthly instalments of operating costs, property taxes and other additional rent amounts payable to the landlord (e.g., maintenance costs, repairs, utilities, management fees) and, percentage rent. A number of additional costs and penalties are excluded from “gross rent” (such as interest and penalties on unpaid amounts and insurance proceeds) and are itemized on CMHC’s website.

[2] If the tenant or its ultimate owner produces consolidated financial statements, then the tenant would use revenues reported for the group level of companies.