Details announced on the Canada Emergency Commercial Rent Assistance program

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The Canada Emergency Commercial Rent Assistance program (the CECRA) will provide a 75 per cent reduction to the monthly gross rent of eligible businesses who are experiencing hardship due to COVID-19.

What you need to know

- The application portal opened on May 25, 2020 and the deadline to apply is August 31, 2020
- The CECRA provides:
    - that the provincial and federal governments will jointly provide to the property owner a forgivable loan to cover 50 per cent of the gross rent owed by an Eligible Tenant (defined below) for April, May and June 2020;
    - the Eligible Tenant will be responsible for no more than 25 per cent of the gross rent payable during that same period; and
    - the property owner will be responsible for (forgive) no less than 25 per cent of the total gross rent payable during that same period.
- An Eligible Tenant will be eligible for the CECRA if it meets all of the following criteria:
    - the Eligible Tenant pays less than $50,000 per month in gross rent per location;
    - the Eligible Tenant generates a maximum of $20 million in annual revenue (including the parent level); and
    - the Eligible Tenant has experienced at least a 70 per cent drop in pre-COVID-19 revenues.
- The CECRA requires that the property owner and the Eligible Tenant enter into a "rent reduction agreement", which contains a moratorium on evictions related to COVID-19 related defaults until the later to occur of: (i) three months after application for the CECRA; or (ii) the duration of the agreement.
- The loan to the property owner will be forgiven if the property owner complies with all applicable terms and conditions of the CECRA including not seeking to recover rent abatement amounts after the program is over.

Canada Emergency Commercial Rent Assistance program

The Prime Minister first announced the CECRA on April 24, 2020, stating that an agreement in principle had been reached with all provinces and territories to support small businesses across the country. Details of the program can be found on the CMHC website, and the program will be delivered through MCAP and First Canadian Title.

Eligible Tenants

$50,000 per month in gross rent per location: For a tenant to be eligible for the CECRA they must pay less than $50,000 per month in gross rent per location (as defined by a valid and enforceable lease agreement) and have experienced at least a 70 per cent drop in pre-COVID-19 revenues (an Eligible Tenant). To determine the revenue reduction, tenants may compare current revenues to revenues in April, May and June of 2019, or if the tenant is a new business and was not in operation during 2019, they can use an average of revenues from January and February of 2020. If the tenant's business opened on or after March 1, 2020, it is not eligible.

Gross rent includes base rent, monthly installments of operating costs, property taxes, and other additional rent such as utilities, and will include a percentage of sales rent paid if applicable and included in the lease arrangement. The rent is to be determined on an adjusted basis, which is the gross rent minus a pro rata portion of business interruption or similar insurance proceeds available to the Eligible Tenant and/or nonrepayable received or receivable proceeds of other federal or provincial government programs regarding commercial rent assistance during COVID-19.

Annual gross revenues maximum of $20 million (at the parent level): The tenant (at the ultimate parent level) must also generate no more than $20 million in annual gross revenues, calculated on a consolidated basis, based on 2019 financial revenues, and using whatever 12-month period that specific company/business used to calculate its financial statements. When determining the $20 million maximum, it is relevant whether the tenant (or its ultimate owner) produces consolidated financial statements for a group of companies. If it does, then the tenant is to use the revenue reported in such consolidated financial statements when determining whether the $20 million maximum is exceeded. If the tenant's revenues are not part of consolidated financial statements but are instead specific only to the tenant, then it currently appears that the specific revenue of the tenant applies when determining eligibility under the $20 million maximum.

Application to other programs and insurance proceeds: Eligible Tenants must have investigated and applied (when eligible) for non-repayable proceeds of any other government programs targeted at commercial rent assistance instituted in response to COVID-19, and have pursued any insurance proceeds available in respect of any impairment of revenue. Any funds received must be disclosed to CMHC.

Subtenants and subordinate occupancy: Based on the forms provided on the CMHC website, property owners with eligible subtenants may also apply under the CECRA, with the intervening sublandlord needing to rely on the property owner's application. If there are one or more subleases in place, each tenant, subtenant and further inferior

tenant that is a potential Eligible Tenant must provide the required attestation. The tenant/subtenant attestation includes various statements for completion by the head tenants/sublandlords and subtenants. A rent reduction agreement must be entered into for each lease and sublease in order to ensure the benefits under the CECRA are allocated to the appropriate party. The sublease must expire after August 31, 2020.

Property owner requirements

Property owner: The property owner must own or be the landlord of the commercial real property that is occupied by one or more Eligible Tenants. An eligible property owner has been defined to include the registered owner (shown registered in the applicable land registry), as well as a ground lessee, emphyteuta, superficiary or usufructuary of the property (with the applicable ground lease or notice shown registered in the applicable land registry). Eligible property owners must also generate rental revenue from the property relating to commercial leases.

Beneficial ownership: If the property owner holds the property in trust or as nominee, agent or mandatary for one or more beneficial owners other than the property owner, the property owner must be authorized in accordance with the terms of such trust, nominee agreement or mandate to submit its application to the CECRA program and enter into the agreement.

Excluded property owners: The CECRA does not apply to properties owned by the federal, provincial, or municipal governments, with the exceptions where there are certain long-term commercial leases with third parties to operate the property.

Non arm's length relationships to "impacted tenants": If a property owner has a non-arm's length relationship with an otherwise Eligible Tenant, then to qualify under the CECRA: (a) the lease must be on fair market terms; (b) the total gross rent payable under the lease cannot be higher than fair market rent; and (iii) the lease must not have been created or amended after April 1, 2020.

Rental revenue, tax returns and rent rolls: The property owner must have declared rental revenue on tax returns for 2018 and/or 2019, or the property has commenced generating revenue in 2020 (this is to ensure those with newly developed or purchased properties are eligible to apply). The owners must provide to CMHC, as part of the application process, rent rolls for the property in question as of June 1, 2020 (or if not yet available, a copy of the current rent roll for the property).

Application to other programs and insurance proceeds: The owner must have investigated and applied (when eligible) for all non-repayable proceeds of any other government programs for rent assistance, and have sought to obtain any insurance proceeds available to it in respect of impairment of the rental revenue. All non-repayable amounts received by the owner must be disclosed to CMHC. The owner also must notify CMHC if it receives further amounts from such other funding sources and must pay some or all of such amounts to CMHC in accordance with the terms of the loan agreement.

Due diligence and knowledge about the tenant: The owner's required attestation includes language that the owner has no knowledge, acting reasonably and without investigation, of any falsehood or misrepresentation contained in the attestation

submitted by the tenant in connection with the CECRA application, and that, to the best of an owner's knowledge and belief, the tenant is eligible to receive benefits under and subject to the CECRA program requirements.

Loan details

The loan and its use: The CECRA provides a forgivable loan to the property owner to cover 50 per cent of the monthly gross rent payments by an Eligible Tenant for April, May, and June 2020, which can be applied for retroactively. The loan will be forgivable if:

- the property owner reduces the Eligible Tenant's rent by at least 75 per cent for the corresponding months; and
- the property owner does not seek to recover the abated amounts after the program is over.

The Eligible Tenant will remain responsible for 25 per cent of their rent obligations, while the property owner will be responsible for the remaining 25 per cent of the rent otherwise owed. If the property owner has already collected rent for April, May, or June 2020, they must refund the amounts paid either by a direct refund or by a credit to the tenant for a future month's rent if agreed to by both parties. Property owners can still apply if the Eligible Tenant cannot pay the 25 per cent contribution.

The property owner is required to use the loan in the following priority:

1. Firstly, to reimburse the applicable Eligible Tenant for any gross rent paid above the initial 25 per cent during the eligible period, except the Eligible Tenant may choose to have the overpayment in rent instead applied against future rent; and
2. Secondly, to be applied to any costs and expenses relating directly to the property, including any financing held by the property owner, operation and maintenance and repair obligations (such as costs of common area maintenance, property taxes, insurance and utilities).

A property owner may only apply once per property. Thus, before an application is submitted, a property owner should ensure that all eligible tenants are included.

Required forms: The application process opened on May 25, 2020 and is available online via an application portal on the CMHC website. As part of the online application process, property owners will be required to provide the following four documents and information for each Eligible Tenant in order to apply:

- **Tenant's or Subtenant's Attestation and Integrity Declaration.** This form is mandatory and is addressed directly to CMHC. It attests to the tenant or the subtenant being an Eligible Tenant.
- **Property Owner's Attestation and Integrity Declaration.** This form is mandatory and is addressed directly to CMHC. In it, the property owner confirms their eligibility for the CECRA.
- **Rent Reduction Agreement.** The form on the CMHC website appears to be a sample document to "assist in meeting the CECRA program requirements", but it is the parties' responsibility to ensure that the document is appropriate under the

relevant circumstances and meets legal requirements of the governing jurisdiction. The document is discussed in more detail below.

- **CECRA Small Business Property Owner Forgivable Loan Agreement.** This form contains required terms and conditions between CMHC and the property owner for the applicable loan. Assignment of this agreement requires written consent by CMHC.

Rent Reduction Agreement:

- The Rent Reduction Agreement should be conditional on final approval of the CECRA application made by the property owner, which final approval should include both funding and forgiveness of the applicable loan to the property owner.
- The CMHC sample agreement suggests a requirement for a comparison of the "contract rent" for the "Target Months" (being April, May and June) and the reduced rent.
- The Rent Reduction Agreement is to prohibit the landlord during a suspension period (described below) from serving the tenant with any notice of default or seeking to effect or proceed with an eviction, where the basis for such default notice or eviction is a lease default in which the tenant has been prevented from performing the obligation(s) in default because of the COVID-19 emergency. The suspension period starts on the commencement of the "Target Months" until the date on which the tenant is no longer receiving any rent reduction or forgiveness or rent credit under the rent reduction agreement. Any proceeding initiated by the landlord after April 1, 2020 and prior to the effective date (defined as the date that the CECRA application has received final approval) is suspended and stayed for the duration of the suspension period.
- If any information and declarations provided in the tenant's attestation (including the integrity declaration) are false or misleading and the CECRA administration finds that the tenant is not eligible to receive financial benefits from the CECRA, the contract rent (being the rent originally set out in the lease) must be paid to the landlord within 30 days from the date of notice by the landlord to the tenant of its ineligibility. Non-payment of these amounts constitutes arrears of rent under the Lease.
- If the landlord notifies the tenant that any information or declarations provided in a subtenant's attestation are false or misleading, the tenant (sublandlord) must make commercially reasonable efforts to recover rent amounts previously forgiven under the applicable subtenant's rent reduction agreement and remit the same to the landlord.
- If the tenant has not yet paid any of the reduced rent for April, May and June 2020 (if then due), then the tenant must pay the same within 30 days after the effective date of the agreement.
- If the parties have entered into prior binding agreements for the reduction of any rental amounts, the same are deemed to be amended by the terms set out in the rent reduction agreement set out on the CMHC website.
- Rent forgiven and reduced by the agreement can never be recovered and the landlord cannot attempt to use any means or mechanisms (direct or indirect) to recover the forgiven amounts.

Information required in forms: The four described forms require the completion of significant details including:

- For property owners
    - property address and 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,
    - leased area, and
    - the monthly gross rent for the period of April, May and June 2020.
- There are other statements and provisions relating to owner eligibility in the attestation and integrity declaration (*i.e.* provisions pertaining to lender consents, violation of laws or other agreements to which the business is subject to, relationship to government entities, human rights violations, criminals, bankruptcy and insolvency).

Timing for application

The program is voluntary for both the property owner and the Eligible Tenant. Property owners can still apply until August 31, 2020 if they can prove eligibility during April, May, and June 2020.

CMHC's CECRA portal opened on May 25, 2020.

CMHC has set out a staggered approach for property owners to register on the following days once the application process has opened:

- Day 1 – Atlantic Canada, British Columbia, Alberta and Quebec, with up to 10 eligible tenants
- Day 2 – Manitoba, Saskatchewan, Ontario and the Territories, with up to 10 eligible tenants
- Day 3 – All other property owners in Manitoba, Saskatchewan, Ontario and the Territories
- Day 4 – All other property owners in Atlantic Canada, British Columbia, Alberta and Quebec
- Day 5 – All

Once a property owner has registered, the portal will be available 24/7 for applicants to input data and upload documents.

Next steps for property owners

Property owners should reach out to tenants who may qualify for the CECRA to determine if those tenants are eligible, and rent reduction agreements and attestations should be drafted for all Eligible Tenants once the form of those documents are finalised in accordance with the CMHC portal.

BLG is happy to advise on and assist with the drafting and execution of those agreements, or to answer any questions that you may have regarding the CECRA, your property or your various leases.

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