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Pandemic Updates: Commercial Landlords and Tenants

Early last week, our News ReLease outlined the Canada Emergency Commercial Rent Assistance (CECRA) Program, which is a federal rent assistance program, to be administered by the Canada Mortgage and Housing Corporation (CMHC). Soon (later in May), many landlords and small business tenants across Canada will be able to avail themselves of this program.

Late last week, CMHC updated some of the details of CECRA. In this News ReLease we report on the new changes to the CECRA program and take a look at questions that remain unanswered.

The Update: Some Questions Answered

On Thursday, May 14, 2020, CMHC provided its first major update to the CECRA program. A link to the information page is here: <https://www.cmhc-schl.gc.ca/en/finance-and-investing/covid19-cecra-small-business>.

CMHC clarified that property owners need not be the titleholder of the property in order to be eligible for the program. The information page now states that the commercial property owner must “own *or be the landlord of* the commercial property”. This suggests that the range of landlord participants has been expanded to include parties who are sublandlords or beneficial owners of nominee titleholders, etc.

Significantly, CMHC also made it clear that the property owner is **not** required to have a mortgage loan secured by the property to be eligible for the CECRA. The information page states: “CECRA for small business is administered undifferentiated for properties with mortgages, other forms of debt or no mortgages at all.”

Payment of the forgivable loan proceeds will be made to the landlord’s financial institution (i.e., there will be an electronic funds transfer to a bank vs. a cheque in the mail).

Additionally, the eligibility requirements for tenants have been expanded to include subtenants, stating that they will qualify so long as the “lease structures meet program criteria”. This change is somewhat perplexing. Recall that the rent relief benefit equals 50% of the monthly gross rent. If a subtenant franchisee pays the monthly gross rent to its sublandlord franchisor, who in turn remits monthly gross rent to the ‘true’ landlord, who will receive the forgivable loan in this scenario? The updated CMHC information page suggests that both head- and sub-landlords will be permitted to apply for CECRA for their respective “tenants”. If both receive funding, 100% of the rent will have been covered by CMHC in respect of a single location, with the sublandlord franchisor having pocketed funding that it would not otherwise have received through normal flow-through rent arrangements.

CMHC has also announced a few new details surrounding the application process: it will include fillable fields and templates of the required documents, and, when applying, landlords will be required to provide proof (1) that they have entered into a rent reduction agreement with the tenant that meets program requirements (i.e., one that reduced the tenant’s gross rent by at least 75% for April, May and June 2020, and includes a moratorium on evictions), and (2) that the tenant is eligible under the program by providing an attestation of a 70% decline in revenue. Landlords will be able to apply for all impacted tenants at once, but will have to provide separate attestations for each tenant. If a

tenant paid rent (or more than 25% of it) for April and May, it will be entitled to a refund from its landlord, which could be in the form of future rent credits. And if a tenant cannot pay its “up-to-25%” contribution, it still cannot be evicted if the landlord wishes to take advantage of the CECRA.

CMHC has indicated that the application process will be open later in May.

Many Unanswered Questions Remain

There are still many unanswered questions contributing to indecision on the part of both landlords and tenants.

For example, while the information page makes it clear that non-arm’s length tenancies will be included in CECRA for small businesses so long as there was a valid and enforceable lease agreement in place prior to April 1, 2020 on no greater than market terms, the page does not state whether relationships akin to leases (such as licenses) will qualify. As noted, franchise relationships have not been addressed. Further, does the repeated statement, “CECRA for small businesses” hint at a future development, yet to be announced, being a CECRA for large businesses?

Will Uptake Improve?

It seems likely that CMHC’s latest update will generate more enthusiasm among

landlords and tenants. The update indicates that Ottawa is listening to the commercial landlord and tenant community, to some extent. When the application facility finally becomes accessible, there will be an opportunity for the governments to evaluate whether the program has garnered traction. The August 31 deadline for applying suggests that they expect commercial landlords and tenants to take the time to do some math, talk to each other and make calculated decisions. It will be interesting to report the actual experiences. In the meantime, it seems that many landlords and tenants have slowed down on their attempts to document rent deferrals, as they accept that all of this will take some time to unfold.

Re-Opening for Commercial Activity

Various provinces have commenced re-opening their marketplaces. Newfoundland and Labrador, New Brunswick, and Saskatchewan were among the first out of the gate, followed shortly by British Columbia, Alberta, and Quebec. Manitoba, PEI and Nova Scotia followed and Ontario announced that Stage One of its re-opening plan would commence today. The most notable aspect of Ontario’s re-opening is that construction in the province will be permitted to resume.

These are welcome developments for commercial landlords and tenants who were forced to pause so many critical activities, including developments, fit-outs and planning. Though the road is long, significant steps towards normalcy are being taken.

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.



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