

CMHC Updates on the Canada Emergency Commercial Rent Assistance Program – May 19

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May 20, 2020

On May 19, Canada Mortgage Housing Corporation (CMHC) provided additional information on the [Canada Emergency Commercial Rent Assistance](#) (CECRA) program. The recent update provides clarification on the program and the application process. We have summarized [CMHC's update](#).

Timing of Application

CMHC announced that the application portal for CECRA will open starting on Monday, May 25. In anticipation of a large volume of applicants, the portal will open for certain provinces through staggered access as shown in the Application Schedule listed below.

Application Schedule

- **Monday, May 25** - Property Owners in Atlantic Canada, BC, Alberta, and Quebec, with up to 10 tenants who are eligible for the program.
- **Tuesday, May 26** - Property Owners in Manitoba, Saskatchewan, Ontario, and the Territories, with up to 10 tenants who are eligible for the program.
- **Wednesday, May 27** - all other Property Owners in Manitoba, Saskatchewan, Ontario, and the Territories.
- **Thursday, May 28** - all other Property Owners in Atlantic Canada, BC, Alberta, and Quebec may apply.
- **Friday, May 29** - portal opens to all Property Owners.

Once active, the application portal may be accessed 24/7 by the relevant applicants to upload documents and input information. Presumably, this will allow applicants to continue to submit relevant and supplementary information as it becomes available (e.g., tenant's proof of loss of revenue for June 2020).

The Application Documents

CMHC released sample application documents on their website: <https://www.cmhc-schl.gc.ca/en/finance-and-investing/covid19-cecra-small-business>. At this stage, these sample forms are for illustrative purposes only. CMHC will provide final versions of the documents, which

will be available within the application portal when it becomes active. It remains unclear whether applicants will be required to use CMHC's forms or may adapt the forms, based on party preferences.

The documents provided by CMHC include:

1. Tenant/Subtenant Attestation and Integrity Declaration
2. Property Owner's Attestation and Integrity Declaration
3. Rent Reduction Agreement
4. Forgivable Loan Agreement between CMHC and the Property Owner

Clarifying details on Applicant Eligibility contained in the Sample Documents

- To qualify, the term of the lease must expire after August 31, 2020.
- The forms note that the concept of "**lease**" and all related concepts are used broadly and encompass sub-leases and licenses. Accordingly, the word "**lease**" includes "licence", "sub-lease" includes "sub-licence", "**tenant**" includes "licensee", "sub-tenant" includes "sub-licensee", "**landlord**" includes "licensor", "sub-landlord" includes "sub-licensor", and so on."
- An "eligible commercial property owner" includes registered owners, ground lessees, emphyteutae, superficiaries, or usufructuaries of the Property who generate rental revenue from the Property relating to commercial leases.
- Property Owners who hold the Property in trust or as a nominee, agent, or mandatary for one or more beneficial owners other than the Property Owner are eligible to apply for CECRA.
- "Impacted Tenant" means a for-profit, not-for-profit, charitable entity or individual carrying on activities at the Property, pursuant to a lease, who or which:
 1. typically (i) pay no more than \$50,000 in monthly rent payments in respect of the relevant Property; and (ii) generate no more than \$20,000,000 in gross annual revenues; and
 2. taking into account both declines that have already been experienced to date and any additional forecasted declines during the period from April 1 to June 30, 2020, will experience a decline in gross monthly revenues of at least seventy per cent (70%) from pre-COVID-19 emergency revenues (determined by comparing the gross monthly revenues in April, May or June 2020 to: (i) the corresponding month in 2019; or (ii) average revenues for January and February 2020).

Revenue is calculated using recognized accounting standards (and, in the case of an Impacted Tenant that is not an individual, on a consolidated entity level) and excluding revenue from extraordinary items), as a result of the COVID-19 emergency.

- Both the Property Owner and the Impacted Tenant must attest that they have investigated and, where possible, made an application for available non-repayable proceeds of any other government programs targeted at commercial rent assistance instituted in response to the

COVID-19 emergency. All non-repayable amounts received by the Property Owner must be disclosed to CMHC.

- Both the Property Owner and the Impacted Tenant must attest to having pursued any insurance proceeds available to it in respect of any impairment of rental revenue or rental payment obligations.
- Owners must provide rent roll for the Property as of June 1, 2020 (or if not yet available, a copy of the current rent roll for the Property).

Clarification on Sub-leases

- To qualify, the term of the sub-lease must expire after August 31, 2020.
- If there are one or more sub-leases in place, each tenant, subtenant, and further inferior tenant that is an Impacted Tenant, must provide an attestation.
- A rent reduction agreement must be entered into for each lease and sub-lease to ensure that the benefits under the CECRA program are allocated to the appropriate party.
- As of now, it appears that ground lessees and lessors may apply as Property Owners. However, sub-landlords must rely on the Property Owners to apply on behalf of eligible subtenants. We expect further clarification on this process once the application process is finalized.

Rent Reduction Agreement (“RRA”)

- The RRA is conditional on the final approval of the application by CECRA.
- Any prior binding agreement between the Landlord and Tenant for the reduction of rent must be amended, as applicable, to be subject to the terms of the RRA. In the event of any conflict between any prior agreement and the RRA, the RRA will prevail.
- The Landlord must acknowledge that the rent that is forgiven and reduced by the RRA will never be recoverable by the Landlord and that the Landlord will never attempt to recover these reduced and forgiven amounts.
- The RRA provides the following information about false or incorrect tenant/subtenant attestations:
 - **Tenant:** If any of the information and declarations provided in the Tenant’s attestation are false or misleading and the CECRA administration finds that the Tenant is not eligible to receive financial benefits from 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.
 - **Subtenant:** If the Landlord notifies the Tenant that any information or declarations provided in a subtenant’s attestation are false or misleading, the Tenant (sub-landlord) 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.

- The RRA provides that from April 1, 2020, until the later of (i) three months after the date of the application for CECRA and (ii) the date on which the Tenant is no longer receiving any rent reduction or forgiveness or rent credit under the RRA (the "Suspension Period"), the Landlord may not serve the Tenant with any default notice or seek 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. Any proceeding initiated by the Landlord during the Suspension Period is suspended and stayed throughout the period.
 - Given that Landlords may apply for CECRA up until August 31, 2020, this means that in some cases, the Suspension Period may run until November 30, 2020.

Forgivable Loan Agreement

- The loan amount will be equal to: up to 50% of the rent owed to the Property Owner by the Impacted Tenant(s) from April to June minus a pro rata portion of any insurance proceeds available to it in respect of any impairment of the rental revenue from the Property or any non-repayable proceeds of any federal or provincial government programs (other than the CECRA Program) targeted at commercial rent assistance instituted in response to the COVID-19 emergency, received or receivable by the Property Owner and/or any Impacted Tenant.
- The Property Owner must promptly notify CMHC of the receipt by it or by any Tenant of any insurance proceeds available to it in respect of any impairment of the rental revenue from the property or any non-repayable proceeds of any federal or provincial government programs (other than the CECRA Program) targeted at commercial rent assistance instituted in response to the COVID-19 emergency, that were not already deducted in the calculation of the loan amount.
- If the loan becomes repayable, the loan shall bear interest at 5% per annum on the unpaid principal amount thereof.

Additional Application Requirements

Each **Property Owner** must provide:

- **Property information:** property address, property type, property tax statement, latest rent roll for each property and the number of commercial units.
- **Applicant information:** banking information (including bank statement), Property Owner contact information, co-ownership information and contact details for co-owners.

Each **Tenant** must provide:

- Contact information
- Registered business name

- Lease area
- Monthly gross rent for April, May, and June 2020.

Additional Details on CECRA

Additional clarifying details provided by CMHC on CECRA include:

- CMHC clarified that the loan funds may only be used by the Property Owners for, in order of priority
 1. Reimbursing Impacted Tenants for any rent paid above 25% during the eligible period unless the Impacted Tenant chooses to apply the previously paid rent against future rent, and
 2. 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).
- The loan will be forgiven December 31, 2020, provided that the Property Owner is in compliance with the RRA, the attestation and application is accurate and truthful, and all terms and conditions of the loan are followed, unless:
 - ◆ The Property Owner files for bankruptcy, restructures, reorganizes, or dissolves the business. In this case, the loan will need to be repaid.
 - ◆ There is default under the loan. In this case, CMHC has full recourse to recover the CECRA funding from the Property Owner.
- The \$20 million gross annual revenue is calculated based on the small business tenant's 2019 revenue. 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. Alternatively, if the small business tenant does not produce consolidated statements, then it is the specific revenue of the tenant that applies for the \$20 million test.
- The CMHC clarified what is included and excluded in monthly gross rent.
 - ◆ Included:
 - Net rent / minimum rent / base rent (in a net lease)
 - Regular monthly installments of operating costs (in a net lease)
 - Regular monthly installments of property taxes payable to the landlord (in a net lease)
 - Regular monthly installments of other additional rent amounts payable to the landlord (e.g., maintenance costs, repairs, utilities, management fees, etc.) (in a net lease)
 - Gross rent (in a gross lease)
 - Percentage of sales rent paid (if included in the lease arrangement)

- ◆ Excluded:
 - Damages
 - Indemnity payments
 - Payments arising due to tenant default / landlord enforcement
 - Payments arising due to landlord exercise of self-help remedies
 - Interest and penalties on unpaid amounts
 - Fees payable for discrete items or special services (e.g., fees to landlord for reviewing plans, supervising work, considering requests for consent, performing exceptional tasks at tenant's request)
 - Reconciliation adjustment payments
 - Amounts required under the lease agreement to be paid separately by the tenant to 3rd parties (e.g., property taxes, utilities, insurers)
 - Costs of non-monetary obligations (e.g., repairs and maintenance)
 - Insurance proceeds or proceeds from other rent subsidy programs (Note: applying for insurance coverage does not remove you from being eligible for the program, but it may adjust the amounts received if you successfully receive payments from insurance claims or other programs to cover rent)
- As mentioned earlier, the CMHC has added a qualifier concerning the mechanism for Impacted Tenants to demonstrate the 70% loss in gross monthly revenue. This must be determined by comparing the average gross monthly revenues for April, May, and June 2020 to the corresponding months in 2019.
 - ◆ Only an Impacted Tenant that is a new business that was not in operation during 2019 can compare the average gross monthly revenues for April, May, and June 2020, with January and February 2020.
 - ◆ The Impacted Tenant must attest to a 70% drop in gross monthly revenue for all three months (April-June 2020). For an application submitted before June 2020 revenues are available, the Impacted Tenant's eligibility will be determined on the average of April, May, and then, forecasting June revenues.
- Where the Property is newly constructed or recently purchased and therefore has no declared rental income for 2018/2019, the Property Owner may be still eligible for CECRA for small business, provided the other program requirements are met. This includes having entered into a lease with the eligible tenant on or before April 1, 2020.
- Small businesses that opened on or after March 1, 2020, are not eligible for CECRA.
- CECRA does not apply to any Properties owned by the federal, provincial, or municipal governments, except for airports, post-secondary institutions, hospitals, pension funds, First Nations and any indigenous organizations and governments, and non-agent Crown corporations with limited appropriations, designated as eligible under CECRA by CMHC.

- CMHC has engaged MCAP and First Canadian Title to deliver CECRA for small businesses.

The benefit of CECRA is debatable as there is a significant administrative burden to landlords and tenants in applying. It is not clear whether landlords can recover any of their costs in connection with this application process. It is also not clear whether in limiting the use of loan funds to costs and expenses relating to the property the intent is that the loan funds cannot be applied to the minimum rent payable under the applicable lease - which would seem to be at odds with the expressed intent of CECRA.

While the program targets the months of April through June, it is unfortunate that it will only become available at the end of May. This may act as a further disincentive for landlords to participate in CECRA, particularly where other rental relief arrangements may have already been made.

For more detailed information on CECRA or COVID-19 leasing issues, please see the CMHC website: <https://www.cmhc-schl.gc.ca/en/finance-and-investing/covid19-cecra-small-business> or our articles:

- May 15 - [Updated Canada Emergency Commercial Rent Assistance to assist more landlords and tenants](#)
- April 30 - [Ontario and Canada Emergency Rent Assistance Programs](#)
- April 14 - [Force Majeure and the Doctrine of Frustration: How may COVID-19 impact obligations under my lease?](#)
- April 8 - [Rent Deferral and Rent Abatement Agreements](#)
- March 17 - [Tips for Commercial Landlords and Tenants in Navigating the COVID-19 Crisis](#)

As more information is released, we continue to provide updates. In the interim, if you have any questions or would like to obtain legal advice on the CECRA, please contact any lawyer in our [Commercial Leasing Group](#). For more information on managing your business during COVID-19, visit our resource page at: <https://www.mindengross.com/our-firm/covid-19-response>.

Thank you to Jennifer Katz, Student-at-Law, for her help in creating this post.

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