

CANADA EMERGENCY COMMERCIAL RENT ASSISTANCE: RELIEF IS ON THE WAY, BUT THE DEVIL MAY BE IN THE DETAILS

by Alex Kolandjian, Steven Cygelfarb and Teodora Prpa

Canadian individuals and businesses in all industries are experiencing financial hardships as a result of the 2019 novel coronavirus disease ("COVID-19"). Those in the commercial real estate business are no exception, as landlords, tenants, real estate developers, and property managers are all attempting to navigate the pandemic's effects. While tenants attempt to negotiate relief from their lease obligations, landlords are concerned with the absence of relief from mortgage or realty tax payments, creating a clear tug-of-war between these parties during an increasingly difficult time.

On April 16, 2020, the federal government announced that it had reached an agreement in principle with the provincial and territorial governments on an aid program, known as the Canada Emergency Commercial Rent Assistance program ("CECRA")¹, which would provide loans to commercial property owners to help lower or defer rent payable by small businesses for April (retroactively), May and June 2020.

On April 24, 2020, the federal government provided additional details regarding CECRA's implementation. CECRA will be administered and delivered by the Canada Mortgage and Housing Corporation ("CMHC"), with the provincial and territorial governments agreeing to share the implementation costs (up to 25%, determined through negotiated agreements with the federal government) with the federal government contributing 75% of the program's budget. Over \$900 million is expected to be delivered to affected parties through CECRA, with the Government of Ontario committing \$241 million to the program².

How will CECRA be implemented?

CECRA's overall outcome will be to lower 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 rent, with commercial property landlords absorbing 25% of



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¹ Canada, "Canada's COVID-19 Economic Response Plan", April 24, 2020, online: <<https://www.canada.ca/en/department-finance/economic-response-plan.html>>; Canada, "Prime Minister announces partnerships with provinces and territories to deliver the Canada Emergency Commercial Rent Assistance for small businesses", April 24, 2020, online: <<https://pm.gc.ca/en/news/news-releases/2020/04/24/prime-minister-announces-partnerships-provinces-and-territories>>.

² Ontario, Ontario-Canada Emergency Commercial Rent Assistance Program, April 24, 2020, online: <<https://news.ontario.ca/opo/en/2020/4/ontario-canada-emergency-commercial-rent-assistance-program.html>>.

the remaining 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 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 mortgaged commercial property owner agrees to reduce the eligible small business tenants' rent by at least 75% under a **rent forgiveness agreement**, 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**.

Eligibility as a Commercial Property Owner

The Government of Ontario has provided some guidance as to what constitutes a "qualifying commercial property owner". The property owner must be the registered owner and landlord of the commercial real estate property. Commercial properties with a residential component, and residential mixed-use properties with a 30 per cent commercial component are both eligible for CECRA with respect to their small business tenants.

For commercial property owners who do not have a mortgage, the Government of Ontario has advised that the commercial property owner should contact CMHC to discuss options, which may include applying the funds against other debt facilities or fixed cost payment obligations (i.e. utilities).

Note that the property owner must agree to forgo its profits from rental income from the property for the three-month loan period, a concept which is not entirely clear with respect to its implementation.

Eligibility as a Small Business Tenant

As for "eligible small business tenants", the federal government has indicated that an impacted small business tenant is a business paying less than \$50,000 per month in rent payments and one which has temporarily ceased operations (a non-essential small business) or has experienced at least a 70% decrease in pre-COVID-19 revenues.

The federal government has not provided final confirmation as to whether the \$50,000 per month rent payments are to be calculated on a gross or net basis, but the Government of Ontario has indicated that the monthly rent is calculated on a gross rent basis³.

Small business tenants can calculate the decrease by comparing revenues in April, May or June to the same months in 2019 or compared to average revenues for January and February 2020. However, the current guidelines do not indicate who is to verify the tenant's eligibility for CECRA. The following small businesses are excluded in Ontario:

³ Ontario, Ontario-Canada Emergency Commercial Rent Assistance Program, April 24, 2020, online: <<https://news.ontario.ca/opo/en/2020/4/ontario-canada-emergency-commercial-rent-assistance-program.html>>.

- Entities owned by individuals holding political office;
- Entities that promote violence, incite hatred or discriminate on the basis of race, national or ethnic origin, color, religion, sex, age or mental or physical disability; and,
- An entity in the Lenders special accounts or Restructuring Group prior to March 1, 2020.

The Canadian Federation of Independent Businesses ("**CFIB**") estimates that more than 40% of small businesses have experienced a 70% decrease in pre-COVID-19 revenues⁴, meaning a number of small business tenants would qualify for the rent assistance. CECRA will also be available to non-profit and charitable organizations, but it is unclear whether the same thresholds will be required to be satisfied by such organizations.

Outstanding Questions and Concerns

Limited guidance is provided on the structure of any "rent forgiveness agreement", beyond its inclusion of a moratorium on evictions. Notwithstanding that requirement, it remains unclear whether the moratorium on evictions applies to non-rent related defaults. Further, as landlords are required to forgo any profits derived from rental income during the loan period, it remains to be seen how this will be done, what elements of rent, if any, must be factored out and how this may be enforced.

An important note about CECRA is that the program appears to be optional. Commercial property owners and landlords are not required to opt into the program according to CFIB⁵. Though landlords and tenants alike should be encouraged to be agreeable to solutions which will increase a tenant's likelihood of meeting its rent obligations under its lease and allowing a landlord to recover as much of the rent due to it as possible, whether the program is an attractive alternative to some other solution (i.e. a rent deferral agreement) should be determined for each tenancy on a case-by-case basis.

Further Updates

CECRA is expected to be operational by mid-May and would be available until September 30, 2020. Additional guidance from the governments of Ontario and Canada is expected in the near future, once the final terms and conditions are available. Fogler, Rubinoff LLP will continue to monitor these and other developments to help you keep up to date. In the meantime, please contact Alex Kolandjian or Steven Cygelfarb if you have any questions about CECRA or if you have any additional questions about how COVID-19 affects your lease obligations.

⁴ Canadian Federation of Independent Businesses, "CFIB Statement of Canada Emergency Commercial Rent Assistance Announcement", April 24, 2020, online: <<https://www.cfib-fcei.ca/en/media/news-releases/cfib-statement-canada-emergency-commercial-rent-assistance-announcement>>.

⁵ Canadian Federation of Independent Businesses, "CFIB Statement of Canada Emergency Commercial Rent Assistance Announcement", April 24, 2020, online: <<https://www.cfib-fcei.ca/en/media/news-releases/cfib-statement-canada-emergency-commercial-rent-assistance-announcement>>.