



Canada Emergency Commercial Rent Assistance (CECRA): Overview

May 29, 2020

The Canada Emergency Commercial Rent Assistance (**CECRA**) is a joint program between the Federal government and Provincial/Territorial governments which is intended to provide rent relief for eligible small businesses experiencing financial difficulties arising from the impact of COVID-19. The CECRA program will offer commercial landlords forgivable loans for up to 50% of monthly gross rent owed by their impacted tenants for the months of April, May and June 2020.

The program will be administered by the Canada Mortgage and Housing Corporation (**CMHC**) and the application portal for CECRA opened on May 25, 2020 on the CMHC website. There are staggered days for applications to be submitted from different provinces and landlord sizes and the application period for CECRA will run until August 31, 2020 (applications may therefore be made retroactively up to that date).

In order to receive the forgivable loan under CECRA, qualifying commercial landlords must enter into a Rent Reduction Agreement (**RRA**) with their qualifying tenants. The RRA must result in a reduction of at least 75% in the gross monthly rent payable by the tenants for April, May and June 2020. Additionally, the qualifying landlord must agree to a moratorium on eviction for the duration of the rent reduction period.

The loan that is provided must be used by landlords to either: (i) refund any amounts previously paid by the small business tenant exceeding 25% of the monthly gross rent payable for April, May and June 2020; or (ii) pay operating costs and expenses on the property, including property taxes, insurance, utilities, and financing obligations. The loan will be forgivable only if these, and other, conditions can be shown to have been met by December 31, 2020. For example, if insurance proceeds are received then some of the loan may become re-payable. If the loan is not forgiven then it will become repayable with 5% interest.

In addition to entering into a RRA, an “integrity declaration” must be signed by landlords and tenants as well as other various attestations confirming that they meet eligibility criteria. Furthermore, landlords must enter into a Forgivable Loan Agreement (**FLA**) with CMHC. Importantly, all impacted tenants must be included in a **single application** on a per property basis.

Eligible tenants/sub tenants

Entity type: The tenant or sub-tenant must be a business, non-profit or charitable entity.

Related entities: Commercial property owners who are themselves tenants within their own property (i.e. not at arm’s length) may apply for CECRA if they have a valid and enforceable lease agreement in place which (i) was not created or amended after April 1, 2020; (ii) is on fair market terms; and (iii) is at no more than market rent.

Monthly rent: Monthly gross rent must not exceed \$50,000 per location. Under CECRA the definition of gross rent includes various payments due to the landlord, but excludes payments due directly to third parties from the tenant.

Annual revenue: The tenant or sub tenant cannot have gross annual revenues in excess of \$20 million. Gross annual revenue under CECRA is calculated on a consolidated basis, at the ultimate parent level.

Term: The current term of the lease must at a minimum run to August 31, 2020.

Reduction in revenue: The tenant or sub-tenant must confirm that they suffered at least a 70% reduction in pre-COVID-19 revenues. Under CECRA the 70% reduction in revenues is determined by comparing revenues in April, May and June of 2020 to the same months in 2019, or alternatively compared to average revenues for January and February 2020 (they may use a forecast for June).

Excluded businesses: The CECRA program currently excludes any businesses opened after March 1, 2020 and those controlled by anyone holding federal or provincial political office.

Eligible property

Commercial real property with small business tenants are deemed to be eligible property under CECRA. Mixed use properties also qualify as eligible property with respect to their small business tenants.

Excluded property: Property owned in whole or in part by federal, provincial or municipal governments (with some exceptions) is excluded.

Outstanding issues and questions

One application only: Currently, it appears that landlords may not submit more than one application per property which they own. This could be an issue as, although some tenants might qualify immediately under the CECRA program, others may not be able to confirm if they meet the eligibility requirements until later in the year – so should Landlords wait until the end of June to ensure that they can take advantage of this loan to cover as many eligible tenants as possible? In addition, Landlords with multiple tenants may find that whilst they are ready to submit applications for some tenants they are unable to obtain the required signed attestations and RRAs back from other tenants as quickly. These delays could have serious negative impacts for existing cash flow issues if they must wait for all tenant documents to be ready to be submitted together under one application.

Use of loan: Currently the requirements under CECRA mandate that the landlord must use the loan monies for re-imbursing tenants or expenses relating directly to the property only. The current forms and information appear to indicate that there will be an assessment as to whether this (and other terms) were met by December 31, 2020 – and, if not, then the loans will be re-payable with interest and not forgiven. So what would happen if the entire loan proceeds were not all used by that date?

For example, the cost of maintenance work to the property is a permitted expense for which the loan proceeds may be used by the landlord. However, there are currently delays in carrying out such work across some Provinces and Territories, due to social distancing and new health and safety criteria that must be met for such work to be carried out. So what is to happen if this required maintenance work to the property cannot be completed by December 31, 2020? Can the funds be carried forward to utilize for maintenance works at the property in 2021, or would the loan then become repayable if not used by the end of 2020?

Conditional RRA: Whilst the form of RRA provided by CMHC does provide that the RRA (and therefore the rent reduction) shall remain conditional until the “final approval of the application for CECRA made by the Landlord”, it is not clear if this condition is met (i) once the loan is approved (and disbursed to the landlord?); or (ii) once the loan is eventually forgiven on December 31, 2020.

This is particularly concerning since the loan may not be forgiven if a landlord does not comply with any of the terms and conditions of the FLA, one of which is that the landlord must use commercially reasonable efforts to pursue any tenant who does not meet their projected 70% decline in revenues for repayment of any reduction given. In such case, consider section 6(b) of the FLA which states:

"If, following any advance under the Loan, the Property Owner becomes aware that the Attestation of any Impacted Tenant is false or misleading in any material respect, the Property Owner must promptly report the same in reasonable detail to CMHC *and will make commercially reasonable efforts to recover rent amounts previously forgiven* under the applicable Rent Reduction Agreement and shall use such rent amounts collected to repay CMHC the portion (which may be all) of the Loan advance allocated or allocable to such Impacted Tenant." (*emphasis added*)

The landlord's cost for pursuing repayment of the forgiven rent from their tenants does not appear to be deductible from the rent which would be returnable to the CMHC in such case. If the landlord's efforts to recover such rents are not seen to have met the bar for "commercially reasonable efforts", then the landlord risks the entire loan not being forgiven, as the landlord is now in breach of one of the terms and conditions in FLA and this is an "event of default". In this case, the landlord would be left with a liability for repayment of the loan with 5% interest (as the loan is only to be "forgiven" if there is no "event of default"). In addition, the landlord would not be permitted to try to recover from its other tenants the previously discounted rents to repay this loan, as the RRA makes it clear that the discounted amount will "never be recoverable by the Landlord" unless the tenant is found to be ineligible for the CECRA program.

GST/HST implications of using this program: At this point the GST/HST implications of the CECRA program remain unclear. Clarification has been requested from the Canada Revenue Agency (CRA) but at the time of this publication it has not yet been received.

Based on our review of the underlying documents and the other information provided in the CMHC portal we have found that the wording describing the new program is not always clear, leaving room for uncertainty from a GST/HST perspective.

For example:

- The CRA has previously indicated that a mere notification of rent reduction or deferral is not sufficient to super-cede the lease terms indicating when and how much rent (and GST/HST thereon) is payable by the tenant. The CRA expects amendments to lease agreements and/or credit notes issued pursuant to section 232 of the ETA to effect a reduction in the landlord's GST/HST remittance obligations. Will the CRA accept the form of "RRA" (RRA) which is required as part of the CECRA application to an amendment to the lease agreement or should this be labelled as such?

If the RRA is not accepted by CRA as an amendment to the lease this would mean that landlords would have to continue to remit the GST/HST on the full un-discounted rent throughout the COVID crisis, despite rent reductions and deferrals, and the fact that much of the tax may never be collected from the tenant. This would create a cash-flow challenge for landlords (until they officially write-off the rent for accounting purposes and recover the excess GST/HST remitted from the government), and may undermine the purpose of CECRA, which is to encourage landlords to give relief to tenants.

- Assuming that the CRA accepts the RRA as a true amendment of the lease (which we expect is likely) and if the landlord meets the conditions for having the loan forgiven on December 31st, 2020, then how should the amount of the loan forgiven be treated for GST/HST purposes (e.g., non-taxable government grant or additional taxable rent)?
- Some items that are included or excluded from the term "gross rent" for the purposes of the CECRA do not align with existing CRA policies on what constitutes "additional rent" under net leases for GST/HST purposes. For example the CRA's current policy allows items that are paid directly by the tenant to third parties (e.g., to utility companies, property tax authorities, etc.) to count as "additional rent". However, under the CECRA program such amounts payable to third parties by the tenant appear to not qualify as gross rent. Based on our understanding, the landlord may be able to adjust, refund or credit such amounts to the impacted tenant and apply the forgivable loan funding to cover these amounts since the funding can be used to "pay operating costs and expenses on the property, including property taxes, insurance, utilities, and financing obligations". If this is the case, then the exclusion of such amounts from "gross rent" under the CECRA would appear to only be relevant for applying the \$50,000 gross rent threshold.

Most of these issues may be largely academic insofar as all GST/HST remittances for the spring have been postponed to June 30, 2020, so the CRA does have some time to give guidance which we will continue to monitor.

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