

CLIENT ALERT

CECRA UPDATE | May 22, 2020

By Andrew Skinner and Jacky Cheung

On May 19, 2020, Canada Mortgage and Housing Corporation (“**CMHC**”) published further information on the previously announced Canada Emergency Commercial Rent Assistance Program (“**CECRA**”). Dickinson Wright’s previous Client Alerts on the CECRA can be found [here](#) and [here](#).

In accordance with an announcement made on May 20, 2020 the application portal for the CECRA will open on May 25, 2020. Registration will be staggered. Landlords with 10 Tenants or less will be able to apply before Landlords with more than 10 Tenants. Registration will be available to all Landlords five days after the application portal is opened.

Gross Rent

CMHC has clarified their meaning of gross rent for the purposes of the CECRA. The following are included in the calculation of gross rent:

1. Net rent / minimum rent / base rent (in a net lease)
2. Regular monthly installments of operating costs (in a net lease)
3. Regular monthly installments of property taxes payable to the Landlord by the Tenant
4. Regular monthly installments of other additional rent amounts payable to the Landlord such as maintenance costs, repairs, utilities, and management fees.
5. “Gross rent” as described as such in a gross lease
6. Percentage of sales rent paid by the Tenant (if included in the lease arrangement)

The following are excluded from the calculation of gross rent:

1. Damages
2. Indemnity payments

CLIENT ALERT

3. Payments/costs arising due to Tenant default / Landlord enforcement
4. Payments/costs arising due to Landlord exercise of self-help remedies
5. Interest and penalties on unpaid amounts
6. Fees payable for special services such as fees to Landlord for reviewing plans, supervising work, considering requests for consent and performing exceptional tasks at Tenant's request
7. Reconciliation adjustment payments
8. Amounts required under the lease agreement to be paid separately by the Tenant to 3rd parties (for example: property taxes, utilities, insurers)
9. Costs of non-monetary obligations such as repairs and maintenance charges
10. Insurance proceeds or proceeds from other rent subsidy programs

Other Non-Eligible Tenants

Small businesses that have opened on or after March 1, 2020 are not eligible for this program.

Forms Required for CECRA

CMHC has provided the form of Attestation Statement that will be required from Landlords and Tenants, as well as the form of Rent Forgiveness Agreement and the Forgivable Loan Agreement. Below are some new aspects about the program that are reflected in these documents.

[Tenant/Sub-Tenant Attestation](#)

- Tenants/Sub-Tenants are expected to have investigated and applied for other available government rent relief programs and any applicable insurance claims relating to rental payment obligations prior to applying for the CECRA. Tenants are required to disclose any amounts they have received or expect to receive from these sources.

CLIENT ALERT

- Tenants/Sub-Tenants must not be subject to any insolvency proceedings nor have made any filings for creditor relief or bankruptcy proceedings.
- The subject lease must expire later than August 31, 2020, and the Tenants/Sub-Tenants must be committed to the lease for the balance of the lease term.
- Non-arm's length Tenants and Sub-Tenants are also eligible, provided that they attest that the sub-lease is on fair market terms, the total gross rent payable under the sub-lease is not higher than fair market rent and that the sub-lease has not been created or amended after April 1, 2020.
- Tenants/Sub-Tenants will be required to sign an Integrity Declaration, to the effect that the Tenant and its affiliates have not, among other things, been convicted of a crime or regulatory offence with respect to financial related matters.

Landlords must obtain an attestation for each applicable Tenant/Sub-Tenant.

[Property Owner's Attestation](#)

- The Landlord must continue to carry on business in accordance with good business practices and prudent cash flow measures.
- Landlords are expected to have investigated and applied for other available government rent relief programs and any applicable insurance claims relating to rental revenue prior to applying for the CECRA. Landlords are required to disclose any amounts they have received or expect to receive from these sources.
- The Landlord must enter into a binding Rent Forgiveness Agreement with its Tenant substantially in the form provided.
- The property cannot be owned, in whole or in part, by a government or an agent of the Crown, subject to certain exceptions, including airports, hospitals, pension funds, and post-secondary institutions.
- Landlords must also sign an Integrity Declaration.

CLIENT ALERT

- Landlords must not be subject to any insolvency proceedings nor have made any filings for creditor relief or bankruptcy proceedings.
- Landlords must provide CMHC with a current rent roll.

[Forgivable Loan Agreement](#)

- The loan amount a Landlord would receive under the CECRA is equal to 50% of the rent minus a *pro-rata* portion of any insurance proceeds available to it for impairment of rental revenue or any other non-repayable proceeds of any other Federal or Provincial government program.
- The Landlord must agree to use commercially reasonable efforts to recover any rent amounts previously forgiven under the Rent Reduction Agreement if the Landlord discovers the Tenant's attestation is false. Any such amounts shall be applied against the Landlord's forgivable loan.
- The loan to the Landlord would be forgiven on December 31, 2020, subject to full compliance by the Landlord with the terms of the program.
- The loan to the Landlord would be interest-free unless the Landlord "defaults," in which case, interest will accrue monthly at the rate of 5% per annum.

[Rent Reduction Agreement](#)

- The Rent Reduction Agreement confirms any prior rent reduction agreement entered into by the Landlord and Tenant, but subject to any overriding terms of the CECRA Rent Reduction Agreement.
- The Landlord must acknowledge that any rent that is forgiven and reduced will never be recoverable and that the Landlord shall not attempt to use any means, directly or indirectly, to do so. For example, if the Tenant pays additional rent and a subsequent reconciliation for the 2020 year results in a credit in favour of the Landlord, such credit for

CLIENT ALERT

the months that the Rent Reduction Agreement is in place shall be reduced in proportion to the reduction of rent (i.e. 75% or more) provided for in the Rent Reduction Agreement.

- Landlords are prohibited from serving a default notice or taking any steps to evict the Tenant for any default of obligations under the lease due to COVID-19 during the period from the date of the application until the later of (1) three months thereafter; or (2) the date the Tenant is no longer receiving rent reduction under the Rent Reduction Agreement.

Our Comments

It does not appear that these details of the CECRA released by CMHC will make the program materially more attractive to Landlords. This is regrettable for commercial Tenants and Landlords who have been hopeful and perhaps, in serious need to receive rent-related COVID-19 relief.

It would make sense for commercial Landlords to participate in the program with regard to exceptional situations where a Tenant is insolvent or on the verge of bankruptcy. On the other hand, Landlords may be more inclined to directly negotiate with Tenants to reach rent relief agreements where, in the Landlord's judgment, the Tenant will survive the COVID-19 crisis.

The fact that the program is based on the fully encompassing amount of "gross rent" (i.e. net rent + operating costs) makes the program comparatively unattractive for Landlords in that the higher the amount of "gross rent," the more "costly" the program is to the Landlord. The deduction of insurance proceeds from the calculation of loan forgiveness and the inability of Landlords to fully recover additional costs through subsequent reconciliations, as noted above, were not previously announced by CMHC and may be further factors that make the program less attractive to Landlords.

At this point, further clarification and details concerning the program and how it will operate in practice are required. As the program proceeds and more details become available, the program inevitably becomes more complex. For example, it is not clear how the bankruptcy regime will impact a Landlord who elects to participate in the program. It is not clear, for example, the nature and scope of a Landlord's obligations to demonstrate "commercially reasonable efforts" to recover any forgiven rent amounts in the event that any part of the Tenant's attestation is untrue.

CLIENT ALERT

Clearly in varying degrees, both Tenants and commercial Landlords have suffered considerably in light of COVID-19. It remains to be seen as we move forward how and to what degree Landlords and Tenants in Ontario will participate in the CECRA. Hopefully the Province and the Federal Government can be responsive to feedback they have been receiving and consider any necessary modifications to the program so that there will be greater participation by Landlords and Tenants.

ABOUT THE AUTHORS



Andrew J. Skinner is a Partner in Dickinson Wright's Toronto office. He can be reached at 416-777-4033 or ASkinner@dickinsonwright.com.



Jacky Cheung is a Student at Law in Dickinson Wright's Toronto office. He can be reached at 416-646-6878 or JCheung@dickinsonwright.com.