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Canada Commercial Rent Assistance Program: Details and Practical Considerations

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The Canada Mortgage and Housing Corporation (CMHC) has begun accepting applications for the Canada Emergency Commercial Rent Assistance Program (CECRA) for small businesses affected by the COVID-19 pandemic, a program that had initially been announced on April 29.

The program involves a two-step process. Initially, property owners can register on the CECRA website and create an account. Once property owners are registered, they can access the CECRA portal, which is available 24/7 for applicants to input data and upload documents. Property owners will be able to formally apply through the portal for an interest-free, forgivable loan (program loan) until August 31, 2020.

CMHC will administer the program on behalf of the federal government and the provinces. CMHC has engaged MCAP, which is working with First Canadian Title, to assist it with this administration. The terms and conditions of the program are the same for all provinces.

To benefit from the program, the applicant will be the qualifying property owner (not the qualifying small business tenant). It is therefore an "opt in" program, which is made clear in the program. The online application process will require the property owner to provide information to prove eligibility, including by providing a copy of the following documents (forms of which have been released by CMHC):

- a rent-reduction agreement with the tenant that reduces the tenant's gross rent (including percentage rent) by at least 75% for April, May and June 2020 and includes a moratorium on delivery of default notices or eviction for the period during which the tenant receives such rent reduction. According to the documentation released by CMHC, this moratorium does not apply to the tenant's failure to pay its reduced 25% gross rent for April, May and/or June 2020;
- an attestation signed by the property owner confirming that the information relating to the property owner and the property provided in the application is correct and confirming it meets the program requirements; and
- an attestation signed by the tenant confirming it meets the program requirements (including confirming that a 70% decline in its revenue has occurred, as described below).

In addition, the property owner will need to provide information related to the property, the property owner and the tenant, including the latest rent roll for tenants that are qualifying tenants under the program.

A small business tenant (which includes a non-profit or charitable organization) will qualify for the program if it meets all the following conditions:

- It pays no more than \$50,000 in monthly gross rent per location.
- It generates no more than \$20 million in gross annual revenues, calculated on a consolidated basis (at the ultimate parent level).
- It has experienced at least a 70% decline in pre-COVID-19 gross revenues (gross revenues in April, May and June of 2020 compared with the same months of 2019 or compared with an average of gross revenues earned in January and February of 2020). Tenants that opened on or after March 1, 2020, are not eligible for the program. The revenue decline is determined by taking into account declines that have already been experienced to the date of the application and any additional forecasted declines during the period

from April 1 to June 30, 2020. The June forecast must be guided by the average revenue reduction for April and May and the forecasted change, based on the guiding principles for reopening the economy in the affected tenant's province or territory.

CMHC has also clarified that for the calculation of the tenant's 70% revenue loss, the revenue must

- consist of revenue earned from ordinary activities in Canada;
- be calculated using the tenant's normal accounting method;
- exclude revenues from extraordinary items; and
- be calculated at the entity level (and not on a consolidated basis or on a property-specific basis).

For registered charities and non-profit organizations, the calculation would include most forms of revenue, excluding revenues from non-arm's-length persons. These organizations would then be allowed to choose to include revenue from government sources as part of the calculation.

To qualify for the program, a property owner must satisfy various requirements, including that it has declared commercial rental revenue from the property on tax returns for the 2018 and/or 2019 taxation years, or the property has commenced generating commercial rental revenue in 2020. The program does not apply to any property owned, in whole or in part, by a federal, provincial or municipal authority, subject to certain exceptions, including, most notably, a pension fund or a Crown corporation designated as eligible by CMHC.

Under the program, a program loan will be granted to a qualified property owner for an amount equal to 50% of the gross rent that is payable (before the reduction set forth in the rent-reduction agreement) by a qualified tenant for April, May and June of 2020. The loan amount will be reduced by the pro rata portion of insurance proceeds available to the property owner and/or the qualified tenant 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 the qualified tenant in respect of April, May and June of 2020.

The sample attestations released show that the property owner and the tenant must each attest that they have sought to receive funding from other rent relief government programs and rental insurance. It appears that the program loan amount received under the program may subsequently be adjusted should the property owner or tenant receive such other funding and/or proceeds.

To qualify for the program, a property owner that has collected rent for April, May and/or June 2020 must use the funds in the following order:

- first, reimburse a tenant for any rent paid above 25% during the eligible period or, if the tenant chooses, credit the tenant against future rent; and
- second, pay for costs and expenses relating directly to the property, including the payment of any debt service (principal and interest) owed by the property owner, and including the costs of operation and maintenance and repair obligations (such as common area maintenance, property taxes, insurance and utilities).

CMHC will forgive the program loan on December 31, 2020, provided that the property owner complies with all program terms and conditions, including

- complying with the terms and conditions of the program loan agreement, the rent-reduction agreement and the program, including by not attempting to use any means or mechanisms whatsoever, direct or indirect, to recover the forgiven amounts that were agreed to in the rent-reduction agreement, during or after the program (including through significant or disproportionate rent increases);
- ensuring that the attestation and application (including supporting documentation) does not contain false or misleading information; and

- not filing for bankruptcy, restructuring, reorganizing or dissolving its business.

In the event of a default under the program loan agreement, CMHC has full recourse to recover the full amount of the program loan from the property owner. Additionally, the program loan agreement provides that a defaulted program loan can be recovered by the Canada Revenue Agency, which grants CMHC a powerful remedy in the event of a default.

The following additional details are of particular relevance:

- Properties with or without a mortgage or hypothec are eligible under the program.
- Mixed-use properties are eligible for the program with respect to their qualifying small business tenants.
- A qualifying tenant that is in a sub-tenancy arrangement is also eligible if the lease structure meets the program criteria.
- A qualifying property owner can apply for all qualifying tenants at a property at once, in which case it will need to provide an attestation for each qualifying tenant.
- A qualifying tenant that has multiple locations with multiple qualifying property owners must work with each of its respective property owners that are applying for the program.
- The rent-reduction agreement may be conditional upon final approval of the application by CMHC.
- The property owner and tenant are permitted to enter into their own form of rent-reduction agreement, provided that such agreement is in a form compliant with the requirements of the program. However, any prior agreement providing for rent reduction in respect of April, May and/or June of 2020 (including, presumably, any rent-deferral agreement) that does not comply with the program must be superseded by the program-compliant rent-reduction agreement.

Even with these additional details, there remain numerous practical and business questions raised by the program framework, including the following:

- Will certain non-corporate tax-exempt entities be excluded from the program, in light of the requirement for 2018 and/or 2019 income tax returns and/or commercial rental revenue in 2020?
- Will the prohibition to use any direct or indirect means to recover the forgiven amounts result in restrictions on property owners obtaining what would have otherwise been market increases in rent?
- When will CMHC designate the Crown corporations that are eligible property owners under the program?
- The documentation states that the program loan amount is reduced by rental interruption insurance and 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. Additionally, the property owner must notify CMHC if it, or to its knowledge, the tenant receives any such amounts. The documentation does not clarify the level of effort that the property owner and the tenant must take to collect such proceeds.
- Property owners should review the covenants in their financing documents to determine whether they would be permitted to participate in the program and offer rent reductions to their tenants. This is particularly important given that the property owner's attestation includes a provision whereby the property owner attests that it has obtained any consent required from its lenders, and a breach of such provision could trigger an event of default in the program loan agreement.
- Property owners will also need to carefully consider the potential tax consequence of receiving a program loan.

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