

New Details Emerge about Ontario-Canada Emergency Commercial Rent Assistance Program – but Questions Still Remain

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On April 16, 2020 Prime Minister Justin Trudeau introduced the **Canadian Emergency Commercial Rent Assistance (CECRA)** program to help landlords and tenants weather the impact of the COVID-19 pandemic. At that time, program details were limited because the federal government was still in the process of negotiating the CECRA program with the provinces and territories, who would be backing the program as partners.

Since Trudeau's announcement, more details of the CECRA program have been provided through press releases by the federal and provincial governments, and by the Canada Mortgage and Housing Corporation ("**CMHC**"). The Ontario government refers to the program as the **Ontario-Canada Emergency Commercial Rent Assistance (OCECRA)** (Note: we will use the term "OCECRA" to refer to the program hereinafter):

- the OCECRA program will be administered and delivered by CMHC based on a collaboration between the federal, provincial and territorial governments. The Ontario government will be partnering with the Government of Canada to implement these rent relief measures through the new OCECRA program and has committed to contribute \$241 million towards the program and deliver more than \$900 million in urgent relief to small businesses and their landlords;
- the government will offer forgivable loans to qualifying commercial landlords to cover 50% of the monthly gross rent payable by eligible tenants for the months of April, May and June 2020. The forgivable loans would be disbursed directly to the mortgage lender;
- these loans will be forgiven if the landlord agrees to reduce the eligible tenants' rent by at least 75% for the three months of the agreement. The tenant would be responsible for covering no more than 25%, the landlord no less than 25%, and the federal and provincial governments would share the remaining 50%. In its initial press release, the Ontario government said that this type of rent sharing agreement would apply only to before profit costs (i.e. to "fixed" costs), and landlords would be required to forego profits during the three-month period. **That press release has since been updated** to replace language around "before profit costs" with the "tenant's total rent";
- landlords and tenants must sign a rent forgiveness or reduction agreement in which the landlord agrees to reduce the eligible tenant's rent in accordance with the above and must include a moratorium on evictions for the time the program is in effect;
- landlords and tenants can agree to defer the tenant's rent for April, May and June, but the tenant's total rent for these months cannot exceed 25% of the gross monthly rent;
- the loan will be forgiven December 31, 2020 if the landlord complies with the rent reduction agreement and ensures that the attestation and application provided is accurate and truthful. The loan is interest free as long as the landlord does not default on its obligations. If the landlord files for bankruptcy, restructures, reorganizes or dissolves its business, it will be required to pay back the loan;
- commercial landlords who have not offered rent reductions of at least 75% for April and May will be able to do so

retroactively to qualify for OCECRA. Landlords must refund amounts paid by tenants for April, May or June, however, if rent has been collected for that three-month period at the time of approval, a credit to the tenant for future months rent is acceptable (provided the same is agreed upon by both the landlord and the tenant);

- landlords must apply by August 31, 2020.

Eligible landlords for the purposes of OCECRA:

- landlords who are the registered owners of commercial real property in Ontario which is occupied by an eligible small business tenant. Landlords of commercial properties with a residential component and residential mixed-use properties with commercial tenants are also eligible, however, for the purposes of OCECRA, these properties must include at least a 30% commercial component to be eligible;
- landlords who have declared rental income on their tax return (personal or corporate) for the 2018 and/or 2019 tax years, however landlords who do not meet this criteria because their property is newly constructed or recently purchased may still be eligible if they met the other program requirements;
- the program does not apply to properties owned by the federal, provincial or municipal government, but there are exceptions where there is a long-term commercial lease with a third party to operate the property including: airports, post-secondary institutions, hospitals, a pension fund, First Nation and any indigenous organizations and governments, or a Crown corporation with limited appropriations, designated as eligible under CECRA by CMHC.

Previously, it was stated that OCECRA only applied to landlords who have a mortgage loan secured by the commercial real property (however, landlords without a mortgage also would qualify for rental assistance and an alternative mechanism would be implemented and outlined). **However**, CMHC's press release now states OCECRA is administered undifferentiated for properties with mortgages, other forms of debt or no mortgages at all.

Landlords and tenants who are not at arm's length (ex. a property owner's small business is the only tenant) will also be eligible for the OCECRA program so long as there was a valid and enforceable lease agreement in place prior to April 1, 2020, on no greater than market terms.

Eligible tenants for the purposes of OCECRA:

- Small business tenants who are paying less than \$50,000 per month in gross rent (as defined by a valid and enforceable lease agreement) and who have temporarily ceased operations (i.e. are generating no revenues) or experienced a drop of at least 70% in pre-COVID-19 revenues. For the purposes of OCECRA, the Ontario government initially stated the small business must be "non-essential", though no similar language was used in the CMHC release, **however**, this qualification has been removed from Ontario's press release. The \$50,000 monthly rent cap applies per location and not across all outlets of a chain, but the tenant must not generate more than \$20 million in gross annual revenues, calculated on a consolidated basis using whatever 12-month period the company uses to calculate its financials at the ultimate parent level. If the small business tenant or its ultimate owner produces consolidated statements, then the tenant would use the revenues reported for the group level of companies. Otherwise, it is the specific revenue of the tenant that applies in relation to the \$20 million threshold.
 - A business' decrease in revenues is determined by comparing revenues in April, May or June to the same month in 2019 or to average revenues in January and February 2020. Revenues are to be based on ordinary activities using normal accounting methods and should exclude extraordinary items. While Industry Canada defines small-sized businesses as those with between five and 100 paid employees, it is unclear if the OCECRA program will follow a similar definition;
 - Monthly gross rent includes: gross rent; net rent/minimum rent/base rent; regular monthly installments of operating costs; regular monthly installments of property taxes payable to the landlord; regular monthly installments of

additional rent amounts payable to the landlord such as maintenance, repairs, utilities, management fees; and percentage rent;

- Monthly gross rent **does not** include: damages; indemnity payments; payments arising due to tenant default/landlord enforcement; payments arising due to landlord exercise of self-help remedies; interest and penalties paid on unpaid amounts; fees payable for discrete items or special services (such as fees to landlord for reviewing plans, supervising work, considering requests for consent or performing exceptional tasks at tenant's request); reconciliation adjustment payments; amounts required under the lease agreement to be paid separately by the tenant to third parties; costs of non-monetary obligations (such as repairs and maintenance); and insurance proceeds or proceeds from other rent subsidy programs.
- Non-profit and charitable organizations are also considered eligible tenants;
 - For non-profit and registered charity organizations, the calculation with respect to decrease in revenues will include most forms of revenue, excluding revenues from non-arm's length persons, and these organizations are allowed to choose to include revenue from government sources as part of the calculation;
- Small business tenants who are in sub-tenancy arrangements, if their lease structure meets program criteria;
- As yet there is no rent relief for larger tenants who do not meet these criteria, but the federal government has introduced the Large Employer Emergency Financing Facility (LEEFF) to help large companies obtain financing to continue operations during the pandemic in addition to the other assistance programs available.

Tenants excluded for the purposes of OCECRA:

- Small businesses that opened on or after March 1, 2020;
- 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 OCECRA program is not mandatory and does not impact the ability of landlords and tenants to reach alternate agreements. Ultimately, it is in the discretion of landlords to apply for relief through this program.

CMHC anticipates that the application process for OCECRA will open in the second half of May 2020. To manage the volume of applications in the first few days after launch, only landlords in certain provinces or with fewer than 10 tenants will be able to register, but registration will be available to all by the fifth day.

The application forms are now available on [CMHC's website](#). Both landlords and tenants are required to complete forms attesting to their eligibility within the program requirements. Applicants will also be asked to provide:

- Property information such as property address, property type, property tax statement, latest rent roll for each property and the number of commercial units;
- Application information such as banking information (including bank statement), property owner contact information, co-ownership information and contact details for co-owners; and
- Tenant information such as tenant contact information, registered business name, lease area and monthly gross rent for April, May and June 2020.

Program details including how funds will be disbursed and how to apply are being finalized and will be available soon, and individuals can [sign up](#) to receive these details as they become available on the CMHC website.

Outstanding Questions:

Despite the announcement of further program details, there remain many outstanding questions about the structure and administration of the CECRA program, including:

1. No evictions – presumably this is limited to termination of the lease for non-payment of rent, though it is unclear if it would preclude a landlord from terminating for non-rent defaults or pursuant to other contractual rights under the lease. What if the tenant fails to pay its 25%? Can landlords use other remedies provided under their lease or by law, such as distress? It is possible that the mandatory moratorium is an absolute prohibition with respect to all remedies for all defaults, however, more guidance is required from the government.
2. Must the rent forgiveness or reduction agreement only include the requirements prescribed by the government? Or can the agreement include other provisions such as amendments to the lease or the inclusion of a personal indemnity? Can a provision be included that allows for the termination of the agreement? Will a copy of the agreement be required to be sent to CMHC?
3. What happens if the landlord's application is ultimately rejected after it has forgiven the tenant's rent?
4. Is the \$50,000 rent threshold inclusive or exclusive of HST? If rent is forgiven, how will HST payments be affected? Since the threshold is based on gross rent, will it be based on current estimates for additional rent? What happens if later reconciliations drop the number below \$50,000? Given that the program is retroactive, if the number drops, it appears that landlords can apply at a later date. However, a more potentially-problematic issue arises where a tenant's rent falls below the threshold, but later reconciliations raise the rent payable above \$50,000.
5. Is the landlord obligated to verify that the tenant complies with the eligibility requirements? Will the government later be auditing applicants? What if the tenant misrepresents and ultimately does not qualify for the program after the landlord has forgiven their rent? Will the landlord be liable to repay the loan?
6. Will landlords be restricted from suing for arrears while agreement is in place (for pre-existing arrears or if the tenant fails to pay the 25%)?
7. What if the lease has already been terminated? Can the parties reinstate it and take the benefit of this program?
8. What if the parties have already agreed on a rent deferral agreement for these months – is the \$50,000 rent threshold based on pre-deferral or post-deferral amounts?
9. Do the updates to the Ontario government's press release mean that landlords are no longer expected to forego profit to participate in the program? If landlords are expected to forego profit, how is before-profit rent to be calculated for the purpose of a rent sharing agreement under the program? Are the landlord's administration costs considered to be before profit rent? What does it mean for a landlord to forego profit during the three-month period? Are property management costs considered profit?
10. Must landlords and tenants comply with the eligibility requirements for the full three-month period? Or can the parties be eligible for select months? Will the approach be similar to the Canada Emergency Wage Subsidy, where if you qualify for the first month you automatically qualify for the second month? What if rent increases under a lease agreement in the middle of the three-month period allowing you to qualify only for part of the period?
11. With respect to the limit of \$20 million in gross annual revenues, what does it mean to calculate gross annual revenues on a consolidated basis (at the ultimate parent level)? What if there are locations outside of Canada? How does this apply to franchisors/franchisees? Who is the ultimate parent of the business? It is likely that the \$20 million gross annual revenue threshold applies to whoever is on the lease (i.e. is it the franchisor or the franchisee who is the direct tenant). What if a tenant has not been operating for more than a year, will there be an attribution rule?
12. How will the requirement with respect to tenants having no revenue or a revenue decline of at least 70% be calculated for tenants with multiple locations? Will this requirement be applied per location like the \$50,000 gross rent cap?
13. Must landlords have declared rental income for the 2018 and/or 2019 tax years for all properties they own or only the property they are requesting rent relief for?
14. What does it mean that small business tenants who are in sub-tenancy arrangements are eligible, if their lease structure meets program criteria? Must the subtenant, head tenant (i.e. sublandlord) and property owner (i.e. head landlord) all be involved in the application? Would the property owner have to apply for relief through OCECRA with respect to the head tenant, and the

- head tenant would then provide relief to the subtenant? Would the head tenant and subtenant have to enter into a rent forgiveness or reduction agreement which includes a moratorium on evictions as well? Are subtenants eligible if the head tenant is not? Can the head tenant, as sublandlord, apply for relief through the program without the property owner?
15. What happens if the total applications for OCECRA exceed the amount of funding for the program? Will the funding be distributed on a pro-rata basis to all applicants? Will the program be closed once funding runs out and will the landlords who are late to apply not receive any loan proceeds even if they have already waived rent for April, May and June?
 16. If landlords defer realty taxes will this affect the rent abatement granted to the tenant pursuant to OCECRA? Will rent be lowered due to tax deferrals?
 17. Given that landlords must be the registered owner of the property to apply, are landlords who hold title to their properties through a trustee or nominee or have a leasehold interest in the property through a ground lease ineligible?
 18. What does it mean to be an "entity in the Lenders special accounts or Restructuring Group"? Special accounts refers to a bank's collections/delinquent loans department, and it is likely that a lender's "Restructuring Group" is related to the department that deals with the Companies' Creditors Arrangement Act (CCAA), bankruptcy, receiverships and/or proposals.
 19. With respect to non-arm's length leases being required to be on no greater than market terms, how are "market terms" defined? Who decides what market terms are? Will proof be required?

Please continue to check this article as we will be updating it as more information on CECRA becomes available.

Should you have any questions about CECRA, the emergency relief programs being offered by the government or any landlord-tenant matters during this difficult time, please contact one of the lawyers in our [Commercial Leasing Practice Group](#) and we would be pleased to assist you.

The information and comments herein are for the general information and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, please contact any of our lawyers for further guidance.

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