

MAY 1, 2020

Federal Government Announces Canada Commercial Rent Relief Program

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The Canada Mortgage and Housing Corporation (CMHC) has released the proposed framework for the Canada Emergency Commercial Rent Assistance Program for small businesses affected by the COVID-19 pandemic. Many material details of the program, which was announced on April 29, are missing from the framework and it is not yet possible to apply for the program. We will provide an update once these details and more information regarding the timing of the rollout of the program become available.

CMHC will administer the program on behalf of the federal government and the provinces. The terms and conditions of the program are intended to be the same for all provinces.

To benefit from the program, a qualifying landlord and a qualifying small business tenant must enter into a rent-reduction agreement. It is therefore an "opt in" program that apparently requires both landlord and tenant to apply. The rent-reduction agreement must

- reduce the tenant's gross rent by at least 75% for April, May and June 2020; and
- provide for a moratorium on eviction for April, May and June 2020.

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

- pays no more than \$50,000 in monthly gross rent per location;
- generates no more than \$20 million in gross annual revenues, calculated on a consolidated basis (at the ultimate parent level); and
- has (i) temporarily ceased operations and generates no revenues, or (ii) has experienced at least a 70% decline in pre-COVID-19 revenues (revenues in April, May and June of 2020 compared with the same months of 2019 or to an average of revenues earned in January and February of 2020).

To qualify for the program, a landlord must satisfy various requirements, including that it

- has declared rental income on its tax return (personal or corporate) for the 2018 and/or 2019 taxation years; and
- has a mortgage or hypothecary loan secured by the relevant property. The program framework mentions that an alternative mechanism will be implemented for landlords that do not have a mortgage or hypothec.

Under the program, a forgivable loan (program loan) will be granted to a qualified landlord to cover 50% of the gross rent that is payable (on a non-reduced basis) by a qualified tenant for April, May and June of 2020. The federal government's press release has indicated that such amount will be disbursed directly to the mortgage or hypothecary lenders. CMHC will forgive the program loan if the landlord complies with all program terms and conditions, including to not seek to recover abated rent after the program is over.

A program loan can be applied for at any time prior to August 31, 2020. To qualify for the program, a landlord that has collected rent for April, May and/or June 2020 must refund or credit such rent to the tenant.

A separate program for larger tenants is expected to be announced.

The program framework, as announced, raises numerous practical and business questions, including the following:

- Will the threshold of a 70% revenue decline be determined on a location-by-location basis or on a consolidated business basis? Will the tenant revenue reporting requirements be an excessive administrative burden? If a landlord and tenant opt in prior to June 30, 2020, how will the parties determine such tenant's revenue on a prospective basis?
- In what circumstances will CMHC consider that a landlord has not complied with the program's terms and conditions and that the program loan must be repaid? What will be the consequences for a landlord or a tenant that no longer complies with the requirements of the program, including by virtue of cessation of operations or loss of revenues for the tenant, or where a tenant has, intentionally or unintentionally, misrepresented its eligibility? This will be a key consideration for landlords in deciding whether to use the program.
- Will percentage rents be excluded from the calculation of the amount of a program loan?
- How will the payment of property taxes be treated if such payment has been deferred by the applicable municipality?
- Will the moratorium on tenant eviction apply even upon the tenant's failure to pay its reduced 25% gross rent for April, May and/or June 2020?
- Will the landlord and tenant be required to terminate or modify their current rent-reduction or deferral agreement in order to qualify for the program? Will they be permitted to enter into their own form of rent-reduction agreement or will the program provide for a prescribed form of rent-reduction agreement? In any event will the program permit rent reductions that are conditional upon receipt of a program loan?
- What will the terms and conditions of the program loans be for a landlord that does not have a mortgage or hypothec?
- As the program loan will apparently be disbursed directly to the mortgage or hypothecary lenders, how will it be treated if the amount of the program loan exceeds the landlord's monthly mortgage or hypothecary payment? In other words, will the balance be returned to the landlord or instead applied toward the next mortgage or hypothecary payments?
- 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?

Landlords 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.

Once the detailed terms and conditions of the program are available, landlords will also need to carefully consider the potential tax consequence of the program loans.

In light of the uncertainties raised by the program framework, the detailed terms and conditions of the program will be critical in order for landlords and tenants to decide whether to opt in to the program.

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