

## COVID-19 RENT RELIEF FOR COMMERCIAL LANDLORDS AND TENANTS

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### A. INTRODUCTION

To provide rent assistance for commercial landlords and tenants impacted by the COVID-19 pandemic, the federal government, in partnership with provincial and territorial governments, announced the creation of the Canada Emergency Commercial Rent Assistance (“CECRA”) for small businesses on April 24, 2020.<sup>1</sup> Relief under CECRA would be available for charities and not-for-profits (“NFPs”), whether they are commercial landlords or small business tenants, provided that both the landlord and tenant meet the program’s eligibility requirements, discussed below.

In addition to financial assistance through CECRA, the Ontario government also passed Bill 192, *Protecting Small Business Act, 2020* (“Bill 192”)<sup>2</sup> on June 18, 2020. Bill 192 amends Ontario’s *Commercial Tenancies Act*<sup>3</sup> to temporarily protect tenants, including charities and NFPs, from being evicted or locked out, and from having their assets seized by their landlords, even if they have defaulted

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<sup>1</sup> Prime Minister of Canada, News Release “Prime Minister announces partnerships with provinces and territories to deliver the Canada Emergency Commercial Rent Assistance for small businesses” (24 April 2020), online: <https://pm.gc.ca/en/news/news-releases/2020/04/24/prime-minister-announces-partnerships-provinces-and-territories>. For further information on CECRA, see Terrance S Carter & Luis R Chacin, *Charity & NFP Law Bulletin No. 471*, “COVID-19 Federal Government Support for Charities and NFPs” (30 April 2020) online: <<http://www.carters.ca/pub/bulletin/charity/2020/chylb471.pdf>>, as well as Terrance S Carter & Luis R Chacin, *May 2020 Charity & NFP Law Update*, “New Details on COVID-19 Federal Response Programs” (28 May 2020) online: <<http://www.carters.ca/pub/update/charity/20/may20.pdf>>.

<sup>2</sup> Bill 192, *Protecting Small Business Act, 2020*, 1st Sess, 49th Parl, Ontario, 2020 (assented to 18 June 2020), SO 2020, c 10.

<sup>3</sup> RSO 1990, c L.7.

on their rent payments. This *Bulletin* outlines the temporary relief provided to charities and NFPs as both landlords and tenants through CECRA and Bill 192.<sup>4</sup>

## B. RENT RELIEF THROUGH CECRA

The application process for CECRA, which is administered by Canada Mortgage and Housing Corporation (“CMHC”), was opened to the public on May 25, 2020 and CMHC will be taking applications until August 31, 2020.<sup>5</sup>

Through CECRA, commercial rent payments may be lowered by 75% for small businesses that rent property from qualifying commercial landlords. The relief is provided by the federal and provincial governments by way of forgivable loans to qualifying commercial property owners in an amount equivalent to 50% of three monthly rent payments for the months of April, May and June, 2020.

### 1. Eligibility for CECRA

While there is no specific rent relief for charities and NFPs, they are not excluded from CECRA and would qualify for relief under CECRA, whether they are landlords or tenants. As indicated above, both the property owner and tenant must meet the program’s eligibility requirements.

In order to qualify, commercial property owners must:

- own and lease commercial real property to one or more impacted small business tenants;
- enter into a legally binding Rent Reduction Agreement with impacted small business tenants containing, at minimum:

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<sup>4</sup> For additional commentary and practical considerations on Bill 192, see Sean S. Carter and Heidi Leblanc, *Charity & NFP Law Bulletin No. 476*, “Mitigating Financial Losses and Navigating the Courts During COVID-19” (25 June 2020) online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2020/chylb476.pdf>>.

<sup>5</sup> See Canada Mortgage and Housing Corporation, “COVID-19: CECRA for small businesses” (last updated 5 June 2020), online: <https://www.cmhc-schl.gc.ca/en/finance-and-investing/covid19-cecra-small-business>.

- a term that the agreement is conditional upon final approval of the landlord's CECRA application to CMHC;
  - a term that, for April, May and June 2020, the landlord reduces the tenant's rent by at least 75%, with the tenant remaining responsible for covering 25% of the rent. The landlord would cover 25% of the rent and the federal government and provinces would cover the remaining 50%;
  - a moratorium on eviction for the rent reduction period; and
  - a declaration of rental revenue in the Attestation that must be submitted with the application.
- enter into a Forgivable Loan Agreement agreeing to the terms of CECRA as part of the application.

Although the initial government announcement was unclear in this regard, the CMHC has now clarified that CECRA is available to property owners regardless of whether their property is subject to a mortgage.

With regard to tenant eligibility, tenants must be small businesses impacted by COVID-19, and must:

- be paying less than \$50,000 per month in gross rent per location (as identified by a valid and enforceable lease agreement);
- generate no more than \$20 million in gross annual revenues, calculated on a consolidated basis at the ultimate parent level; and

- have experienced a drop in pre-COVID-19 revenues of at least 70% (determined by either comparing revenues in April, May and June 2020 to the same months in 2019 or, alternatively, compared to average revenues for January and February 2020).

Small business tenants who are in sub-tenancy arrangements may also be eligible for CECRA, provided that they meet the above-noted requirements.

## 2. Applying for and Receiving CECRA Funding

Applications for CECRA are made through the CMHC's online portal.<sup>6</sup> Commercial property owners must have all eligible tenants and/or subtenants sign an Attestation as to the tenants' eligibility with the program requirements. Similarly, commercial property owners must also sign an Attestation regarding the property and their eligibility for CECRA.

CECRA is delivered through MCAP and First Canadian Title ("FCT"), and either MCAP or FCT may contact applicants during the validation and funding processes. Application decisions are made within 2 weeks of the application.

Where parties qualify for the program, funding is provided to property owners as a forgivable government loan. Property owners are expected to use funds, in order of priority, (1) to reimburse impacted tenants for rent paid above 25% during the eligible period (except where the tenant otherwise chooses to apply that previously paid rent against future rent); and (2) towards costs related directly to the property such as financing, maintenance of common areas, property taxes, insurance and utilities.

The forgivable government loan is an interest-free loan, exempt from sales taxes (in Ontario, HST), and will be automatically forgiven on December 31, 2020, provided the landlord complies with the terms of the Rent Reduction Agreement, Forgivable Loan Agreement, and submitted an accurate and truthful attestation and application.

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<sup>6</sup> *Ibid.*

**C. RELIEF THROUGH BILL 192**

Bill 192 was introduced on June 17, 2020, and came into force on June 18, 2020. It introduces a new and temporary Part IV to the *Commercial Tenancies Act*, which provides for a “non-enforcement period” that would prohibit landlords from taking certain action against any tenants who have defaulted, notwithstanding any lease terms or common law rules to the contrary. The non-enforcement period commences on June 18, 2020 and terminates on September 1, 2020, unless it is otherwise proclaimed to terminate on an earlier date.<sup>7</sup>

Part IV only applies to landlords that either are eligible for rent assistance under CECRA or who would otherwise be eligible for rent assistance under CECRA if they entered into a Rent Reduction Agreement with a moratorium on eviction with their tenant. Where Part IV applies, landlords would not be able to seek a court order for a writ of possession to evict a tenant that is effective during the non-enforcement period because the tenant failed to pay rent. However, after a landlord has been approved to receive assistance under CECRA, they may subsequently apply for writs of possession.<sup>8</sup>

Landlords are also prohibited from exercising the right of re-entry and right of distraint (*i.e.* the right to seize the tenant’s goods or chattels for sale to cover rent arrears) during the non-enforcement period. However, once landlords have been approved for CECRA rent assistance, they may exercise their rights of re-entry or distraint.

Additionally, landlords that exercised a right of re-entry to seize possession of the leased premises or to distraint goods for rent arrears, between May 1, 2020 and June 17, 2020, are required to restore possession of the leased premises to the tenant (except where the tenant declines to accept possession), and return any goods seized during that period that remain unsold as of June 18, 2020. Specifically with regard to re-entry, where the landlord cannot restore possession of the leased premises, they would then be required to compensate the tenant for damages resulting from their inability to restore possession. Where possession

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<sup>7</sup> *Supra* note 2, s 3.

<sup>8</sup> *Ibid*, s 2.

of the leased premises is restored, Part IV deems the tenancy to have been reinstated. Failure to comply with these requirements may result in the landlord being liable to the tenant for damages.<sup>9</sup>

## D. CONCLUSION

With the sharp economic downturn triggered by the COVID-19 pandemic, commercial landlords and tenants are facing extremely difficult decisions regarding the future of their businesses over the next few weeks and months. Both CECRA and Part IV of the *Commercial Tenancies Act*, like other federal and provincial government relief programs and initiatives introduced in recent months, are temporary measures, with CECRA being subject to public policy changes and Part IV being subject to early revocation. As such, this Bulletin is only intended to provide a general overview of these measures. Additional information regarding CECRA, including answers to frequently asked questions, may be found on the CMHC website. For more complex situations, legal advice should be sought.

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<sup>9</sup> *Ibid.*