

A PRACTICAL OVERVIEW AND EXAMPLE OF QUALIFYING FOR GOVERNMENT COVID-19 FUNDING

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AGENDA

Overview of the Federal Programs (CEWS, CERB, CEBA, and CECRA)

Review hypothetical examples for relief programs available

Discuss cash flow management commentary – what will cash flow look like?

Risk Management

- a) Force majeure clauses
- b) Employment contractual considerations
- c) Additional issues (real property, commercial contracts)

LEGAL DISCLAIMER

- The presentation today is not intended as legal advice.
- Because this is a high level overview, it is impossible to cover all relevant details, and available rights and remedies will depend on the unique facts of each situation.
- For specific advice, please consult with your qualified legal counsel before making any decisions or taking any action.
- As you know, the situation is extremely fluid and is changing on a daily basis. As things evolve, your best course of action could also evolve. Follow up to date and reliable sources for your information. **This information is up to date as of April 29, 2020.**
- Every province and territory has its own legal regime; our focus today is primarily on the Federal Programs.

WHAT SUPPORT PROGRAMS ARE AVAILABLE?

Our selection of the most relevant government policy releases:

- 1. Work-Sharing Program**
- 2. 75% Wage Subsidy (Canada Emergency Wage Subsidy (“CEWS”))**
- 3. Canada Emergency Response Benefit (“CERB”)**
- 4. Canada Emergency Commercial Rent Assistance (“CECRA”)**
- 5. Canada Emergency Business Account Loans**
- 6. Tax Return Deadline Extension**

1. WORK-SHARING PROGRAM

- **It is a 3-way agreement (employees, employer, and Service Canada)**
- EI will pay for hours not worked by employees
- Approval process takes 10 days (reduced from 30 days)
- No longer requires proof of downturn
- No longer requires written recovery plan
- Does require approval (within 10 days)

1. WORK-SHARING PROGRAM

- **COVID-19 measures are effective from March 15, 2020 to March 14, 2021 across all industries**
- **Extension of the maximum possible duration of an agreement is extended to 76 weeks, instead of 38 weeks**

1. WORK-SHARING PROGRAM

ELIGIBILITY REQUIREMENTS FOR EMPLOYERS

- **Year-round business in Canada for 1 year**
- **Private business, publicly held company or not-for-profit organization**
- **Have at least 2 employees in a work-sharing unit**

1. WORK-SHARING PROGRAM

What does not apply?

- A labour dispute
- A seasonal shortage of work
- A pre-existing and/or recurring production slowdown, or
- A decrease in business activity due to a recent increase in the size of the workforce

1. WORK-SHARING PROGRAM

ELIGIBILITY REQUIREMENTS FOR EMPLOYEES

- Year-round, permanent, full-time or part-time employee needed to carry day-to-day functions of business – “core staff”
- Eligible to receive EI benefits
- Agreed to reduce normal working hours by same percentage and share available work

→ Core tactical point: early, comprehensive communication is key. What is the plan?

1. WORK-SHARING PROGRAM

WHO IS INELIGIBLE?

- Seasonal employees and students hired for the summer or co-op
- Casual or on-call employees (or through a temp. help agency)
- Employees needed to help generate work and/or who are essential to the recovery of the business.
 1. senior management
 2. executive-level marketing/sales agents
 3. outside sales reps
 4. technical employees engaged in product development
- employees with more than 40% of the voting shares (owners)

1. WORK-SHARING PROGRAM

Core observations:

- Any amounts received by employee for EI work-sharing reduces, dollar for dollar, the amount of wage subsidy available
- If you qualify for CEWS, run the numbers and consider whether you should cancel or end EI workshare agreement
- Unclear if any post-COVID 19 workshare payments have actually been paid out or not

1. WORK-SHARING PROGRAM

Core recommendations/ observations:

- Work Sharing is only applicable to employees earning \$63,500 or less from all sources. After that, there will be a claw back to EI.
- Work Sharing time does NOT reduce eligibility for regular EI.
- There is a 30 day waiting period for the program to take effect (assuming the application is approved). Thus, apply earlier vs. later.

2. 75% TEMPORARY WAGE SUBSIDY (CEWS)

- April 1, 2020, Finance Minister Bill Morneau released details re: CEWS ([link](#)).
- CEWS is a \$71 billion subsidy intended to support workers, maintain employment relationships and reduce claims on the employment insurance regime.

2. 75% TEMPORARY WAGE SUBSIDY (CEWS)

- CEWS is different from the previously announced 10% Wage Subsidy
- CEWS is a cash subsidy paid by the government to employers vs. a reduction of payroll remittances employer is obliged to make to the government.
- Eligible employers can apply for both CEWS and previously announced 10% subsidy. However, assistance received under the 10% subsidy will reduce amount an eligible employer can receive under CEWS.

2. 75% TEMPORARY WAGE SUBSIDY (CEWS)

- **Key difference:**
 - the 10% wage subsidy program is more limited in application – it provides for a \$25,000 max per employer.
 - CEWS does not have an employer max.
 - If you qualify for the 10% wage subsidy, you will automatically receive it (reducing CEWS by 10%).

2. 75% TEMPORARY WAGE SUBSIDY (CEWS)

- **Eligible employers are given (i) a temporary wage subsidy of 75% of remuneration paid for a period of three months up to max of \$847 per week per employee or (ii) or (ii) 75% of the employee's pre-crisis weekly remuneration.**
- **Observation: CEWS may actually cover 100% of the eligible remuneration paid to an employee, if that remuneration has dropped from the pre-crisis level.**
 - We are awaiting the release of further information.
- **The wage subsidy is backdated to March 15, 2020**

2. 75% TEMPORARY WAGE SUBSIDY (CEWS)

- **Note: non-arm's length employees limited to \$847 per week or 75% of employee's pre-crisis weekly remuneration.**

2. 75% TEMPORARY WAGE SUBSIDY (CEWS)

- **Eligible remuneration:**
 - Working in Canada
 - Includes non-arm's length employees and employers can put employees back on payroll retroactively to claim CEWS
 - includes salary, wages, and other remuneration, but excludes severance pay, value of stock option benefits, value of non-cash benefits and any salary paid to employee while employee eligible under CERB (i.e. within the 4 week period).
 - Note: an employer that calls back an employee and commences to pay the employee remuneration may not be able to claim CEWS with respect to the same 4 week period covered by CERB.

2. 75% TEMPORARY WAGE SUBSIDY (CEWS)

- There will be no overall cap on the amount of subsidy that an employer may claim.
- An employer may claim the subsidy in respect of remuneration paid to new employees.
- The CEWS is for remuneration paid to employees and does not extend to payments to independent contractors. Contractors may consider applying for the CERB.

2. 75% TEMPORARY WAGE SUBSIDY (CEWS)

TYPES OF ELIGIBLE EMPLOYERS

- **CEWS is available to any type of employer in Canada, whether an individual, partnership, corporation, non-profit or charity, but excluding public sector entities, such as municipalities, crown corporations, public universities, colleges, schools and hospitals.**

2. 75% TEMPORARY WAGE SUBSIDY (CEWS)

QUALIFICATION REQUIREMENT

- **Employer must attest to reduction of gross revenue of 15% for March and 30% for April or May of 2020 compared to same month for 2019 (or average of Jan/Feb 2020).**
- **Employer encouraged to make best efforts to top up employee's salary to pre-crisis level. This criterion appears flexible.**

2. 75% TEMPORARY WAGE SUBSIDY (CEWS)

APPLYING FOR CEWS

- **CRA *My Business Account* portal will be modified to accept applications.**
- **Timeline: 2 to 5 weeks, with payments to follow.**
- **Goal of CEWS: employers maintain current levels of employment, or re-hire laid-off employees, pay their wages and receive the subsidy in due course.**
- **Challenge: with time lag between payment of wages and receipt of the subsidy, employers must finance the amount of the subsidy**

2. 75% TEMPORARY WAGE SUBSIDY (CEWS)

- **CEWS is included in employer's income (deduction provided for amount of remuneration paid to employees)**

2. 75% TEMPORARY WAGE SUBSIDY (CEWS)

Next Steps for Employers :

- Employers should ensure that they are registered with the CRA for direct deposit
- Employers should also assemble records to demonstrate the 30% reduction in gross revenues and the amount of remuneration paid to employees.

3. CANADA EMERGENCY RESPONSE BENEFIT (CERB)

- CERB ([link](#)) provides \$500 a week for up to 16 weeks.
- Applications opened April 6, 2020
- Applicants re-apply every 4 weeks, up to max of 16 weeks
- Note: the benefits are taxable

3. CANADA EMERGENCY RESPONSE BENEFIT (CERB)

- **Eligible applicants for CERB:**
 - Have stopped working **because of COVID-19** or are eligible for Employment Insurance regular or sickness benefits (note: no more than \$1,000 income).
 - Had income of at least \$5,000 in 2019 or in the 12 months prior to the date of their application; and,
 - Who are or expect to be without employment or self-employment income for at least 14 consecutive days in the initial four-week period.

3. CANADA EMERGENCY RESPONSE BENEFIT (CERB)

- **The \$5,000 income requirement:**
 - The income of at least \$5,000 may be from any of the following sources: employment; **self-employment**; maternity and parental benefits under the Employment Insurance program and/or similar benefits paid in Quebec under the Quebec Parental Insurance Plan.

3. CANADA EMERGENCY RESPONSE BENEFIT (CERB)

- **How to apply**
 - Online with CRA My Account (recommended)
 - Over the phone with an automated phone service

4. CANADA EMERGENCY COMMERCIAL RENT ASSISTANCE

- The federal government has reached an agreement with all provinces and territories.
- Rent will be lowered by 75% for small businesses affected by COVID-19 who:
 1. Pay less than \$50,000 per month in rent; and
 2. Have temporarily ceased operations or have experienced at least a 70% drop in pre-COVID-19 revenues.
- Non-profit and charitable organizations can also receive this benefit.

4. CANADA EMERGENCY COMMERCIAL RENT ASSISTANCE

- Will provide forgivable loans to qualifying commercial property owners to cover 50% of three monthly rent payments by eligible small business tenants during April, May and June.
- Loans forgiven if the mortgaged property owner agrees to reduce rent by at least 75% for three months under a rent forgiveness agreement, which will include a term not to evict the tenant while the agreement is in place
 - Note: we expect they may adjust to expand to non-mortgaged properties. Stay tuned.
- Small business tenant would cover the remainder
- Expected to be operational by mid-May; more information expected soon

5. CANADA EMERGENCY BUSINESS ACCOUNT LOANS

- **Banks can offer loans of \$40,000, which will be guaranteed by the government**
- **Interest free for the first-year**
- **Purpose is to help cover operating costs during a period where revenues have been temporarily reduced**
- **Repaying the balance of the loan on or before December 31, 2022 will result in loan forgiveness of up to \$10,000**

5. CANADA EMERGENCY BUSINESS ACCOUNT LOANS

ELIGIBILITY REQUIREMENTS FOR NFPs and small businesses

- Demonstrate that \$20,000 to \$1.5M in total payroll was paid in 2019

6. TAX RETURN DEADLINE EXTENSION

- **For your employees:**
 - Individual filing due date (for employees) deferred until June 1, 2020.
 - Payment date for new income tax balances deferred until after August 31, 2020 without incurring interest or penalties.
- **For businesses:**
 - Defer until June 30, 2020 payments of the GST/HST, as well as customs duties owing on their imports.
 - Defer until after August 31, 2020 payments of income tax owing on or after March 18.

CONCLUSION

- **Every organization needs a funding plan, including an employee action plan**
- **Competent, multilayered (tax, employment, etc.) advice is critical**
- **Those plans will change as the situation evolves**

Accounting Mechanics Under CEWS (& CECRA?)

Profit-oriented businesses

Measurement of Revenue

1

Method

2

Adjustments

3

Consolidate?

4

Comparable
Periods

Method

Method

How to Account for Revenue

- Flexible
- Choice of:
 - Accrual method
 - general accounting rules which include sales on account (A/R), work-in-process (WIP)
 - Cash method
 - Based on actual cash receipts
- Required to follow the same method for all qualifying periods

Adjustments

What to Include in Revenue

Adjust for:

- Items not in the course of ordinary activities (i.e. sale of capital items)
- Extraordinary items (i.e. insurance proceeds, expropriation)
- Revenue from non-arm's length parties
- Related subsidies received or receivable

Other adjustments to revenue?

- Think regular year end process
- WIP to be written off?

Consolidate

Consolidate

To Consolidate or Not

- Again, flexible
- Can consolidate financial results of:
 - An affiliated group of corporations/businesses
 - Joint Venture
 - Partnerships
- Limited restrictions to consolidate:
 - Previous consolidated financials not required
 - No requirement for same or similar type of business

Comparable Periods

Comparison of Revenue

- Again, flexible
- Can compare to:
 - Same calendar month of 2019
 - Average of January and February 2020
- Meant to address some high-growth and start-up businesses
- Can be very beneficial for businesses with seasonal revenues
- Required to follow the same basis of comparison for all qualifying periods



Practical Example of Relief Programs Available

Facts

- Affiliated group of corporations:
 - 11 operating corporations
 - 4 passive corporations
(3 real estate; 1 investment holdings)
- All Canadian-controlled private corporation (CCPC)
- Associated group had less than \$15M of taxable capital in 2019
- Operating results in March:
 - Some companies hit hard
 - Others experienced smaller reductions in revenue
 - Others experienced increased revenues
- All but one operating company had salaries in 2019 between \$20,000 and \$1.5M
- 142 total employees with an average salary of \$61,000

CEWS (& CECRA?)

Calculation of Revenue Reduction

	Opco A	Opco B	Opco C	Passiveco	Total	
Jan/Feb 2020 (Avg)	400,000	300,000	250,000	50,000	1,000,000	
Mar 2019	510,000	420,000	260,000	50,000	1,240,000	
Mar 2020	355,000	210,000	265,000	50,000	880,000	
Compare to Jan/Feb	-11%	-30%	+6%	0%	-12%	
Compare to 2019	-30%	-50%	+2%	0%	-29%	

Total wage subsidy per week (approx.) = 142 x \$847 = **\$120,000**

Caution: Must utilize the 10% Temporary Wage Subsidy if you qualify!

Other Relief Programs

TWS (10% wage subsidy)

- Qualify as they are CCPCs < \$15M of taxable capital in 2019 for associated group

CEBA

- Remember facts:
 - All but one operating company with 2019 salaries between \$20K & \$1.5M
 - 11 operating corporations
- Therefore, \$400,000 received (10 x \$40K)
 - \$100K potentially forgiven if \$300K repaid by Dec. 31, 2022

BDC

- Received \$2M additional financing

CECRA

- Likely won't benefit (ops haven't ceased; revenue drop is < 70%)

Cash Flow Management Commentary

What Happened?



A Shift in Focus

Immediate shift from the long-term strategic view to a short-term 'weather the storm' view



Faced with Uncertainty

Cash inflow is greatly reduced while demand for cash outflows has remained the same.



Reacting

Trying to stem the bleed

Managing Uncertainty – Avoid the Chaos

Managing Uncertainty – Avoid the Chaos



Setting Objectives

1
Set
objectives

- It's important to decide where you want to end up, before you decide how you are going to get there.
- Meeting your objectives will help you thrive as a business after 'recovery'.

Don't forget:

- Always keep your objectives in mind and try your best to center decisions around them. They become a guiding principal.
- Maintain flexibility in navigating uncertainty and volatility.

Making Decisions /1

2

Make
decisions

1. What can we do to maximize cash inflow?

- ✓ Working with customers to collect on receivables
- ✓ Accessing credit in the short-term through existing credit facilities or through relief programs (e.g. CEBA)
- ✓ Review government subsidies available to see if your business qualifies. Where uncertain, reach out and talk to your advisers.

2. What can we do to ensure we are focused on necessary spending?

- ✓ Cutting discretionary costs that are not essential in meeting objectives
- ✓ Cutting labour costs or taking advantage of work-sharing programs
- ✓ Reaching out to see if there are any abatements available (e.g. rent (CECRA), insurance, discounts on necessary supplies, etc.)
- ✓ By taking advantage of the other relief measures available for payment deferrals (e.g. payments plans with vendors, re-negotiate fixed price contracts and more)

Making Decisions /2

- Federal relief
 - ✓ Deferral on some HST payments and corporate tax instalments
- Potential areas of provincial relief
 - ✓ Deferral of WSIB payments
 - ✓ Temporary increase in EHT exemption for 2020
 - ✓ Deferral of provincial sales tax payments
- Potential areas of municipal relief
 - ✓ Deferral of utility payments
 - ✓ Deferral of property tax payments (may have ended), consider additional hardship programs available

Take Action

- Start to take action – this will begin throughout your decision-making process and not after; they will work together simultaneously
- Make contact with necessary stakeholders like banks, landlords, clients, employees, etc. and follow up
- Make your calculations to determine if you are eligible for the subsidies discussed (e.g. CEWS)
- Get registered to access your CRA My Business Account
- Reach out to your advisers for guidance

Managing Uncertainty – Avoid the Chaos

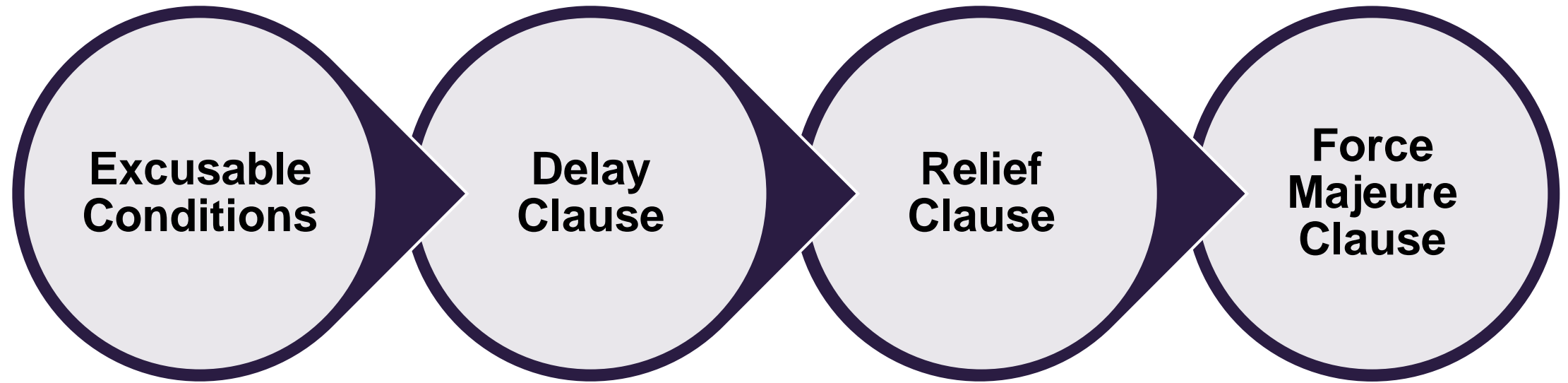
Review and Re-evaluate

- Things are changing daily, including the availability of existing or new subsidies
- Use tools to monitor the expected results of your decisions and actions
- Re-evaluate your plan and decisions regularly to ensure you're still on track relative to your objectives
- Change your mind and change it again but always with a focus on achieving your objectives

RISK MANAGEMENT

- **Review Commercial Contracts**
- **Communicate with landlords, tenants, vendors, suppliers, etc.**
- **Review Employment Contracts**
- **Investigate Cost Saving Programs (municipal tax relief)**

WHAT TO LOOK FOR



FORCE MAJEURE – SAMPLE – *NOT FOR USE*

Neither party shall be liable for any costs or damages due to delay or non-performance under this Agreement **arising out of** any cause or event beyond such party's control, including, without limitation, cessation of services hereunder or any damages resulting therefrom to the other party **as a result of** work stoppage, power or other mechanical failure, computer virus, natural disaster, governmental action, or communication disruption.

FORCE MAJEURE

Protects parties from impairment caused by extraordinary events (“Acts of God”)

Contractual provision that provides for how risk is allocated when an event occurs that is beyond the control of the contracting parties.

Relieves parties from some or all obligations/liability if such events occur

JURISDICTION & GOVERNING LAW



FORCE MAJEURE

ELEMENTS:

1. **Qualification:** was it described in the clause;
2. **Impossible Performance Standard:** was or is performance truly impossible;
3. **Foreseeability:** was the risk of non-performance foreseeable and able to be mitigated
4. **Remedy:** what next?

FIRST QUESTION: DOES THIS QUALIFY

- **Pandemic**
- **Public Health Emergency**
- **Government Action/Restriction/Regulation**

SECOND QUESTION: WHAT WAS THE CAUSE

- **Link to region**
- **Alternatives**
- **Business decision versus Government action**

Do the circumstances meet the impossible performance standard?

THIRD QUESTION: DID YOU SEE IT COMING

- **Forseeability Window = CLOSING**
- **Review, Analyze and Respond**

FOURTH QUESTION: WHAT DO YOU WANT

- **Verify the Contract**
- **Time period**
- **Financial solution?**

DOCTRINE OF FRUSTRATION

NO force majeure clause OR force majeure clause does not fit

- The doctrine of frustration applies where a situation has arisen for which the parties made no provision in the contract and the performance of the contract becomes “a thing radically different from that which was undertaken by the contract”
- Force Majeure = excusing a party from force majeure related obligations
- Frustration = entire contract brought to an end

REAL PROPERTY LIABILITIES

- **Ownership**
 1. Communicate with lenders
 2. Communicate with tenants
- **Tenant's**
 1. Communicate with landlords
 2. Variety of outcomes in the market
 3. Consider if municipal taxes are the tenants liability and whether municipal tax appeal rights lay with the tenant

REAL PROPERTY LIABILITIES

- **Municipal tax deferral programs**
 1. Highly contextual
 2. In Ontario, education component
- **Review quantum of taxes with your legal advisors and/or municipal tax consultants**
 1. Consider classification of property
 2. Consider valuation
 3. Evaluate rebate programs

Ontario specific article: <https://gowlingwlg.com/en/insights-resources/articles/2020/covid-19-ontario-property-tax-assessments/>

EMPLOYMENT ISSUES

“Managing your Workforce Through Crisis” Webinar

<https://gowlingwlg.com/en/insights-resources/on-demand-webinars/2020/managing-your-workforce-through-crisis/>

- **Topics include:**
 1. Temporary layoffs
 2. Employment Standards Act
 3. Job Protected Leaves
 4. Remote Work
- Contextual analysis required, different in each jurisdiction

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