

GOVERNMENT EXPANDS ENTITLEMENT TO THE CANADA EMERGENCY WAGE SUBSIDY

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On May 15, 2020, the Federal Government announced an extension of the Canada Emergency Wage Subsidy program (the “**CEWS**”) for a further 12 weeks, and amended the Income Tax Regulations (the “**Regulations**”) to expand the types of employers eligible to participate in the CEWS. The Federal Government also announced an intention to further amend the provisions of the *Income Tax Act* (Canada) (the “**Tax Act**”) governing the CEWS.

This bulletin supplements the analysis of the CEWS released by McMillan when the CEWS was first announced in April, 2020. McMillan’s detailed analysis of the CEWS is available [here](#).

Extension of the CEWS

The CEWS is designed to encourage employers that have been grappling with financial challenges to recall employees from layoff, or keep employees on payroll, during the COVID-19 crisis. Wage subsidies under the CEWS were originally intended to be available for up to 12 weeks, retroactive to March 15, 2020.

However, as the COVID-19 crisis continues, the Federal Government has decided to extend the CEWS for an additional twelve weeks to August 29, 2020.

Finance Minister Bill Morneau also announced the intention to consult with key business and labour organizations over the next month to discuss future amendments to the CEWS, including a possible adjustment to the 30% revenue decline threshold for eligibility for the CEWS.

Expanding Access to the CEWS

The Federal Government has amended the Regulations to expand the types of entities that are “prescribed organizations” for the purpose of the definition of an “eligible entity” in subsection 125.7(1) of the Tax Act and are thus eligible to participate in the CEWS. Each amendment to the Regulations is retroactive to April 11, 2020, meaning it applies with respect to the first CEWS “qualifying period”, which began on March 15, 2020, as well as subsequent “qualifying periods”.

First, the Government is allowing partnerships with one or more “non-eligible members”^[1] to qualify as

“eligible entities” in respect of a particular “qualifying period”, provided the aggregate fair market value of all the interests in the partnership that are held by “non-eligible members” is less than 50% of the fair market value of all interests in the partnership throughout that qualifying period (the “**50% Threshold**”).^[2] Note that if the aggregate fair market value of the interests in the partnership held by “non-eligible members” exceeds the 50% Threshold at any time within a “qualifying period”, the partnership will lose its “eligible entity” status in respect of that qualifying period. Partnerships with “non-eligible members” that apply for and receive a subsidy under the CEWS will need to ensure that any changes in the capitalization of the partnership do not imperil the partnership’s CEWS eligibility in respect of a particular “qualifying period”.

Second, the amendments seek to increase Indigenous government-owned corporations’ participation in the CEWS by removing the requirement that such corporations be taxable. Specifically, Indigenous government-owned corporations carrying on a business that are tax-exempt under paragraph 149(1)(d.5)^[3] of the Tax Act, or their subsidiaries that are tax-exempt under paragraph 149(1)(d.6) of the Tax Act, can now qualify as “eligible entities”^[4] for the purposes of the CEWS, provided all other eligibility requirements are met.^[5]

Third, under the amendments, a person or partnership operating a private college or a private school will qualify as an “eligible entity” for purposes of the CEWS. This amendment is intended to allow non-public educational and training institutions to qualify for the CEWS, including for-profit and not-for-profit educational institutions, such as arts schools, language schools, driving schools, flight schools and culinary schools.^[6]

Finally, Registered Canadian Amateur Athletic Associations that are exempt from tax pursuant to paragraph 149(1)(g) of the Tax Act and Registered Journalism Organizations that are exempt from tax pursuant to paragraph 149(1)(h) of the Tax Act will be able to qualify as “eligible entities” for purposes of the CEWS.

Upcoming Legislative Amendments

The Federal Government also announced its intention to propose certain amendments to the Tax Act to ensure that the CEWS meets its objectives of supporting Canadians and protecting jobs.

First, the Government proposes to allow employers greater flexibility in calculating the “eligible remuneration” of employees in respect of which the CEWS will be paid. When the CEWS legislation was first enacted, the per week subsidy for an employee was equal to the greater of (i) 75% of the “eligible remuneration” paid to the employee in the week, up to a maximum of \$847/week, and (ii) the lesser of (A) the amount of remuneration paid to the employee in the week, up to a maximum of \$847/week; and (B) 75% of the average weekly “eligible remuneration” paid to the employee during the period that began on January 1, 2020 and ended on March 15, 2020 (the “**Original Period**”).

The Government now proposes to allow employers to compute average weekly “eligible remuneration” based

on the Original Period, or based on the period that began on March 1, 2019 and ended on May 31, 2019 (the “**2019 Period**”), and to allow employers to choose which of the Original Period or the 2019 Period to use on an employee-by-employee basis. The Government hopes this new flexibility will resolve certain unintended consequences of the original rules, including situations where employees were on certain types of leave during the Original Period or are employed on a seasonal basis, such that computing average weekly “eligible remuneration” based on the Original Period was not possible.

Second, the Government intends to amend the Tax Act so that corporations formed as a result of an amalgamation can calculate their “qualifying revenue” for purposes of determining whether they have met the required revenue decline threshold using the combined revenue of two or more predecessor corporations, unless it is reasonable to consider that one of the main purposes of the amalgamation was to qualify for the CEWS. A similar rule is proposed to apply in respect of situations where a corporation is wound-up into another corporation. These proposed amendments will apply retroactive to April 11, 2020, meaning they will apply with respect to the first CEWS “qualifying period”, which began on March 15, 2020, and subsequent “qualifying periods”.

Finally, the Government is proposing to amend the CEWS to better align the tax treatment of corporations and trusts,^[7] for CEWS purposes. The Government proposes that trusts continue to be eligible for the CEWS subject to the following new exceptions:

- (i) If the trust is a tax-exempt entity (other than a public institution), it would qualify only if it is a registered charity or one of the other eligible tax-exempt entities; and
- (ii) If the trust is a public institution, it will only qualify if it is a prescribed organization.

This amendment is proposed to only apply in respect of the third “qualifying period” (May 10 to June 6) and any subsequent “qualifying period”.

Draft amendments to the Tax Act reflecting the above legislative changes have not yet been released.

by Michel M. Ranger and Michael Friedman

[1] Initially, in order for a partnership to be eligible to participate in the CEWS, all of its members were required to be “eligible entities”, which generally captures individuals, taxable corporations, as well as certain non-profit organizations and registered charities.[ps2id id='1' target='']

[2] See new Regulation 8901.1(d).[ps2id id='2' target='']

[3] Generally, because they carry on a business of providing municipal government-like functions.[ps2id id='3' target='']

[4] Eligible entities will also include partnerships, the members of which are Aboriginal governments (as

defined in subsection 241(10) of the Tax Act) or a similar indigenous governing body described in paragraph 149(1)(c) of the Tax Act (see new Regulation 8901.1(c)).[ps2id id='4' target='']

[5] See new Regulations 8901.1(a)-(b).[ps2id id='5' target='']

[6] See new Regulation 8901.1(f).[ps2id id='6' target='']

[7] Under the current rules, trusts are eligible for the CEWS as they are generally considered “individuals” for tax purposes.[ps2id id='7' target='']

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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