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## THE CANADA EMERGENCY RENT SUBSIDY: AN UPDATE

On November 2, 2020, Finance Minister Chrystia Freeland introduced the legislation that will implement the Canada Emergency Rent Subsidy (“CERS”). The new bill, called Bill C-9, *An Act to Amend the Income Tax Act (Canada Emergency Rent Subsidy and Canada Emergency Wage Subsidy)*, has recently passed its third reading in the House of Commons and should receive royal assent and become law soon.

On November 5, 2020, Ottawa released two technical backgrounders describing the CERS and what has been termed “Lockdown Support” (being the additional subsidy available to businesses significantly affected by public health orders).

While the CERS is still not yet available (and there is no indication as to when it will be), by introducing Bill C-9 into Parliament and releasing the initial technical backgrounders, the government has provided a glimmer of hope that relief will soon be accessible (for those that are eligible).

This News ReLease provides an update on what is known to date.

### The Update

#### For what Period will the CERS be available?

The CERS will apply retroactively (as of September 27) and remains available until June 2021. Currently, the CERS appears to provide coverage only until December 19, 2020, but it is speculated that this was done to allow a re-set based on the status of the pandemic and economy after December 19, 2020.

Applicants will be able to apply for three periods: (1) September 27 to October 24, 2020; (2) October 25 to November 21, 2020; and (3) November 22 to December 19, 2020. They must apply no later than 180 days after the end of each period.

#### What Relief will be Available?

Qualifying applicants will be eligible for a subsidy for their eligible expenses. For each period, the subsidy amount will be based on the decline in revenues for that period relative to either

the same period in 2019, or the average revenue during January and February 2020. (Applicants may select their preferred reference period, but they will only be able to do so once and that selection will apply to all application periods.)

If an eligible entity’s revenues have declined by: (a) over 70%, they will be eligible for a subsidy of 65% of eligible expenses; (b) between 50% and 69%, the subsidy will be between 40% and 64% of eligible expenses; or (c) between 1% and 49%, the subsidy will be between 1% and 39% of eligible expenses. This means that, to qualify for the CERS, there is no revenue decline threshold that must be met; if an applicant’s revenues have declined in any way, they will be entitled to a subsidy.

#### Lockdown Support

Eligible entities who are temporarily forced to close or whose business activities are significantly restricted (meaning they were forced to cease activities that were responsible for approximately 25% of that entity’s revenues) by a public health order, will qualify for Lockdown Support. Lockdown Support will provide an additional subsidy of 25% of eligible expenses over the base subsidy amount.

#### What Entities will be Eligible for the CERS?

Property owners and tenants can both apply for the CERS, each for their own subsidy. Individuals, corporations, trusts, non-profit organizations, and registered charities will be eligible for the CERS. Eligible entities must: (a) have a payroll account as of March 15, 2020 or have been using a payroll service provider; or (b) have a business number as of September 27, 2020 (and satisfy the CRA that its CERS claim is *bona fide*). Bill C-9 outlines that other conditions may be prescribed in future regulations.

#### What Expenses are Eligible for the CERS?

Under the CERS, eligible expenses depend on whether a tenant or property owner is applying for the subsidy. Commercial tenants will be eligible for the subsidy in respect of their commercial rent expenses, less any revenues they receive under a sublease

arrangement. For the purpose of the CERS, commercial rent includes all amounts regularly paid as rent, excluding sales tax, under a lease with an arm's length entity.

A property owner will be eligible for the subsidy in respect of its realty taxes, insurance and mortgage interest (subject to certain limitations), but only if it does not use the property primarily to earn rental income, or if the property is used to earn rental income from a non-arm's length entity. In other words, the CERS is not a subsidy for commercial landlords, but rather, it is for commercial property owners who need help with carrying costs.

One potential issue is that Bill C-9 currently provides that the CERS will be based on *paid* eligible expenses. Tenants hoping they would be able to use the funds received through the CERS to pay their rent are concerned that they will have a cash flow problem as they must prove that they paid their rent prior to applying for the subsidy. It is our understanding that amendments to Bill C-9 to solve this problem are in the works.

#### Maximum Subsidy Amounts

Eligible expenses will be limited to those paid under agreements in writing entered into **before** October 9, 2020 (or pursuant to an agreement assigning or extending these agreements). Notably, new tenants will not be eligible for the CERS.

Eligible expenses for each monthly period will be capped at \$75,000 per location and \$300,000 as

between affiliated entities. However, for the purposes of the Lockdown Support, the overall cap of \$300,000 does not apply. This seems to mean that a company with multiple locations or businesses (such as a chain of theatres or gyms, assuming they suffer from lockdown restrictions) will remain subject to the \$75,000-per-location cap, but not the \$300,000 cap on affiliated entities with respect to the Lockdown Support.

#### Which types of Property will qualify for the CERS?

Residential property, or property that is below or immediately contiguous with residential property which may be reasonably regarded as "contributing to the use and enjoyment" of the residential property, will not enjoy the benefit of the CERS. The CERS is a commercial business program for commercial real property used by an eligible entity in the course of its ordinary business activities.

#### Questions Answered

While Bill C-9 has not yet passed and is therefore subject to potential tweaks and changes, it appears to be essentially in final form and has answered many of the questions that arose in the aftermath of the initial announcement of the CERS. We now know that it is for commercial tenants and property owners, but **not** for landlords. However, there are two fundamental pieces of information that we eagerly await, namely: (1) when will the CERS finally be available; and (2) what if tenants receive the subsidy and do not pay their rent?

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*This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.*



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