

Leasing Bulletin Update: CECRA is Dead, Long Live CERS

Exploring the Canada Emergency Rent Subsidy program

By Minden Gross LLP's [Commercial Leasing Group](#)

UPDATE: This is an update to our original bulletin “CECRA is Dead, Long Live CERS.” CERS is currently in effect by virtue of the passing Bill C-9 into law on November 19, 2020. Bill C-9 was enacted without amendment to its original draft. However, Finance Minister Freeland has publicly stated that the **Federal Government will introduce legislation to amend the contents of Bill C-9 so as to clarify that qualifying rent expenses will also include “rent payable” and not just “rent paid.”** Further, based on the Minister’s statement, the CERS application website confirms that qualifying rent expenses must be “paid or payable” and clarifies that if the applicant has not paid the amounts due for its qualifying rent expenses yet, the applicant must attest (confirm) that these amounts will be paid within 60 days of the applicant receiving its rent subsidy payment.

As this is an update to our previous bulletin, we have highlighted our amendments in **ORANGE**.

On **November 19, 2020**, **Bill C-9 entitled “An Act to amend the Income Tax Act (Canada Emergency Rent Subsidy and Canada Emergency Wage Subsidy)”** (the “Bill”) received Royal Assent. The ***Income Tax Act (Canada)*** has now been amended to implement the Canada Emergency Rent Subsidy (“CERS”) without any changes to the original version of the Bill. CERS is the spiritual successor to the Canada Emergency Commercial Rent Assistance (“CECRA”). Its purpose is to grant eligible entities relief for rent and mortgage interest relating to commercial real property in Canada. More specifically, CERS provides:

- (1) a base subsidy the amount of which is generally determined by the decline in an eligible entity’s monthly revenues, year-over-year, for the applicable calendar month; and
- (2) an additional top-up subsidy called the “Lockdown Support,” only available to certain eligible entities who are forced to temporarily close their business due to public health restrictions.

The subsidies can be effective retroactively to September 27, 2020.

For further information about the application procedure, please visit the following link: <https://www.canada.ca/en/revenue-agency/services/subsidy/emergency-rent-subsidy/cers-how-apply.html>.

Qualifying Periods

The subsidies apply to any “*qualifying rent expense*” (discussed below) for any of the following “*qualifying periods*”:

- September 27, 2020, to October 24, 2020;
- October 25, 2020, to November 21, 2020; and
- November 22, 2020, to December 19, 2020.

The Government can add more qualifying periods ending no later than *June 30, 2021*; however, program parameters may vary.

Eligibility

The subsidies are available to “*qualifying renters*”, which includes the following eligible entities:

- Individuals
- taxable corporations and trusts
- registered charities (other than public institutions)
- partnerships
- other prescribed organizations that satisfy certain prescribed eligibility requirements

The qualifying renter must meet one of the following criteria:

- (1) have a payroll account as of March 15, 2020, or have been using a payroll service provider;
- (2) have a business number as of September 27, 2020 (and satisfy the Canada Revenue Agency (“CRA”) that it is a bona fide rent subsidy claim); or
- (3) meet other conditions that may be prescribed.

Most importantly, to qualify for the subsidies for a particular qualifying period, the eligible entity must file an application with the CRA in prescribed form by **no later than 180 days** after the end of such qualifying period.

As a practical note, the qualifying renter *does* need to show a revenue decline during the qualifying period; its subsidy rate is determined based on its decline in current revenues for the applicable month, as compared to a prior reference period (detailed below).

Nature of the Base Subsidy

CERS subsidizes a portion of the qualifying renter’s “*qualifying rent expense*” during qualifying periods. Qualifying rent expenses must relate to commercial real estate in Canada, which the qualifying renter uses in the course of its ordinary activities.

They are separated into two categories. First, for commercial tenants, the qualifying rent expense captures most items that are commonly considered to be rent under a commercial lease (i.e., gross rent, percentage rent, and amounts paid under a net lease) plus amounts received by the applicable landlord under CECRA which were applied against rent payable by the qualifying renter for the qualifying period, but only if those amounts would have otherwise been required to be refunded to the qualifying renter.

Qualifying rent expenses do not include:

- (1) sales taxes;
- (2) amounts paid in satisfaction of damages;
- (3) amounts paid under a guarantee, security or similar indemnity covenant;
- (4) payments arising due to a default under the lease by the qualifying renter;
- (5) interest and penalties on unpaid amounts;
- (6) fees payable for discrete items or special services; and
- (7) reconciliation adjustment payments.

Second, if the qualifying renter owns the qualifying property, the qualifying rent expense includes mortgage interest (subject to certain limitations), insurance costs, and realty taxes. That being said, the qualifying renter will only be eligible for the subsidies if either of the following conditions is satisfied:

- (1) it does not use the qualifying property primarily to earn rental income; or
- (2) if it *does* use the qualifying property primarily to earn rental income from a non-arm's length person or partnership, the qualifying property is not used by such other person or partnership to earn rental income.

The text of the legislation strictly limits qualifying rent expenses to amounts that are paid by the qualifying renter to an arm's length party for the qualifying period, all pursuant to a written agreement entered into before October 9, 2020 (or pursuant to the renewal (on substantially similar terms) or assignment of a written agreement entered into before October 9, 2020). However, Finance Minister Freeland has publicly stated that the **Federal Government will introduce legislation amending the contents of the Bill so as to clarify that qualifying rent expenses will also include "rent payable" and not just "rent paid."** Further, based on the Minister's statement, the CERS application website confirms that qualifying rent expenses must be "paid or payable" and clarifies that if the applicant has not paid the amounts due for its qualifying rent expenses yet, the applicant must attest (confirm) that these amounts will be paid within 60 days of the applicant receiving its rent subsidy payment.

Lastly, we note that the amount of the qualifying rent expense that can be subsidized for a qualifying property during a qualifying period is determined by deducting all rent received or receivable by the qualifying renter from arm's length parties.

Cap on Amount of Qualifying Rent Expenses That Can Be Subsidized

For any qualifying period, the amount of qualifying rent expenses for *a single* qualifying property that the base subsidy can subsidize is capped at \$75,000.00. Additionally, for any qualifying period, the amount of qualifying rent expenses for *all* of the qualifying renter’s qualifying properties that the base subsidy can subsidize is capped at \$300,000.00. However, if the qualifying renter is affiliated at any time during the qualifying period with one or more other qualifying renters, the \$300,000.00 cap would be shared between or amongst all such affiliated qualifying renters.

It is important to note these caps relate to the qualifying rent expenses, but the amount of the subsidy is calculated as a percentage of these amounts. In other words, based on the maximum base subsidy of 65% (and excluding Lockdown Support), the maximum “take home” subsidy per qualifying period (roughly per month) would be \$48,750.00 per qualifying property, with an aggregate subsidy for all qualifying properties for such qualifying period of \$195,000.00.

Calculation of Base Subsidy

For any qualifying period, the base subsidy amount is determined based upon the decline in current revenues. The revenue decline is measured by comparing revenues during a current reference period to such revenues during a prior reference period (being either the previous calendar year or the average of January and February 2020), as further detailed in the following table:

Qualifying Period	Reference Period – General Approach	Reference Periods – Alternative Approach
September 27, 2020, to October 24, 2020	October 2020 over October 2019 <u>or</u> September 2020 over September 2019	October 2020 or September 2020 over average of January and February 2020
October 25, 2020, to November 21, 2020	November 2020 over November 2019 <u>or</u> October 2020 over October 2019	November 2020 or October 2020 over average of January and February 2020
November 22, 2020, to December 19, 2020	December 2020 over December 2019 <u>or</u> November 2020 over November 2019	December 2020 or November 2020 over average of January and February 2020

The qualifying renter can choose to compare its current revenues to gross revenues in the same period for the prior year or its average revenues in January and February 2020. The qualifying renter must adopt the same comparative approach for all qualifying periods. For any qualifying

period, if the qualifying renter’s revenue decline was *higher* in the immediately-preceding qualifying period, their subsidy rate will be determined based on the higher revenue decline experienced during such prior qualifying period.

The base subsidy rate will vary according to the actual percentage revenue decline experienced by the qualifying renter, as determined using the above-mentioned comparative approach. The sliding scale for the subsidy rates is illustrated in the following table:

Revenue Decline	CERS Base Subsidy	Lockdown Support (if applicable)	Total Subsidy if Eligible for Lockdown Support
70% and over	65%	25%	90%
50% to 69%	$40\% + (\text{revenue drop} - 50\%) \times 1.25$	25%	$65\% + (\text{revenue drop} - 50\%) \times 1.25$
1% to 49%	$\text{Revenue drop} \times 0.8$	25%	$25\% + (\text{Revenue drop} \times 0.8)$

The attached Appendix “A” details the sliding scale of base subsidy rates. The formulas for calculating the base subsidy rates are subject to change if the Government elects to add qualifying periods extending beyond December 19, 2020.

Lastly, as a practical note, a qualifying renter’s revenue for CERS is its revenue from its ordinary activities in Canada earned from arm’s-length sources, determined using its normal accounting practices (excluding revenues from extraordinary items and amounts on account of capital).

Lockdown Support

If, during a qualifying period, the qualifying property is subject to a “*public health restriction*,” then the qualifying renter is entitled to receive the additional Lockdown Support for each day that the public health restriction affects the qualifying property. Generally, a public health restriction includes any order or decision made in response to COVID-19 under Federal or Provincial laws and that satisfies other prescribed criteria, the most notable of which are:

- (1) the order or decision requires the cessation of some or all of the qualifying renter’s normal activities at the qualifying property for at least one (1) week; and
- (2) at least approximately 25% of the qualifying renter’s revenues from the qualifying property during the applicable prior reference period were derived from the restricted activities.

The maximum amount of the Lockdown Support is equal to 25% of the qualifying rent expense for the qualifying period pro-rated over the number of days in such qualifying period during which the qualifying property was actually affected by the public health restriction.



Lastly, for the Lockdown Support, qualifying rent expenses would be capped at \$75,000.00 per qualifying property, but no overall cap would apply.

We will continue to provide updates on the implementation of the CERS program. If you have any questions or would like to obtain legal advice on the CERS program or any other leasing issues or litigation, please contact any lawyer in our [Commercial Leasing Group](#).

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This article is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisors.

Appendix “A”

Change in Revenue	Subsidy Rate	Change in Revenue	Subsidy Rate	Change in Revenue	Subsidy Rate
-100%	65%	-65%	59%	-30%	24%
-99%	65%	-64%	58%	-29%	23%
-98%	65%	-63%	56%	-28%	22%
-97%	65%	-62%	55%	-27%	22%
-96%	65%	-61%	54%	-26%	21%
-95%	65%	-60%	53%	-25%	20%
-94%	65%	-59%	51%	-24%	19%
-93%	65%	-58%	50%	-23%	18%
-92%	65%	-57%	49%	-22%	18%
-91%	65%	-56%	48%	-21%	17%
-90%	65%	-55%	46%	-20%	16%
-89%	65%	-54%	45%	-19%	15%
-88%	65%	-53%	44%	-18%	14%
-87%	65%	-52%	43%	-17%	14%
-86%	65%	-51%	41%	-16%	13%
-85%	65%	-50%	40%	-15%	12%
-84%	65%	-49%	39%	-14%	11%
-83%	65%	-48%	38%	-13%	10%
-82%	65%	-47%	38%	-12%	10%
-81%	65%	-46%	37%	-11%	9%
-80%	65%	-45%	36%	-10%	8%
-79%	65%	-44%	35%	-9%	7%
-78%	65%	-43%	34%	-8%	6%
-77%	65%	-42%	34%	-7%	6%
-76%	65%	-41%	33%	-6%	5%
-75%	65%	-40%	32%	-5%	4%
-74%	65%	-39%	31%	-4%	3%
-73%	65%	-38%	30%	-3%	2%
-72%	65%	-37%	30%	-2%	2%
-71%	65%	-36%	29%	-1%	1%
-70%	65%	-35%	28%	0%	0%
-69%	64%	-34%	27%		
-68%	63%	-33%	26%		
-67%	61%	-32%	26%		
-66%	60%	-31%	25%		