

Commercial Leasing Bulletin:

Are you locked out of Lockdown Support?

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On April 7, 2021, the Province of Ontario enacted a new provincial emergency and stay-at-home order effective at 12:01 am on April 8, 2021. The Government made this enactment less than a week after Premier Doug Ford implemented a new province-wide COVID-19 shutdown beginning on April 3, 2021. These new shutdown measures directly respond to the sharp rise in COVID-19 infection rates and hospitalizations since the last government-mandated shutdown ended in Toronto, Peel, and North Bay Parry Sound District public health regions on March 8, 2021.

The new shutdown is expected to continue for at least four weeks and calls for various broad-ranging restrictions on business activities in the Province of Ontario. During this new shutdown, the COVID-19 Response Framework (colour-coded zones) will be paused.

We note the following **non-exhaustive** list of some of the more notable restrictions to be imposed during the new shutdown, which will inevitably impact both commercial landlords and tenants, namely:

- In-person dining will be prohibited, both inside **and outdoors**. However, businesses can still provide take-out, delivery, and drive-through service.
- The majority of **non-essential retailers** will be limited to only operate for curbside pick-up and delivery, via appointment, between the hours of 7 am and 8 pm.
- Restricting access to shopping malls to limited specified purposes, including access for curbside pick-up and delivery, via appointment.
- Restricting discount and big box stores in-person retail sales to grocery items, pet care supplies, household cleaning supplies, pharmaceutical items, health care items, and personal care items only.
- Prohibiting the provision of personal care services.
- Prohibiting the use of facilities for indoor or outdoor sports and recreational fitness (e.g., gyms) with very limited exceptions.

That being said, certain types of stores can operate for in-person retail by appointment only and subject to a 25% capacity limit and restricting allowable hours of operation to between 7 am and 8 pm. Please see the following news release for fuller details on what types of businesses will be allowed to open for in-person retail: <https://news.ontario.ca/en/release/61029/ontario-enacts-provincial-emergency-and-stay-at-home-order>.

Continuing Relevance of the Canada Emergency Rent Subsidy (“CERS”)

This third province-wide shutdown means that the CERS program remains critical to the survival of businesses forced to either close entirely or cease engaging in important components of their business operations.

As we have [discussed in past bulletins](#), the CERS program offers a base subsidy to eligible commercial tenants that have suffered a revenue drop due to COVID-19. For tenants, the base subsidy is equal to a **percentage** of the rent that is paid or payable by the tenant to its landlord for any location in respect of any CERS claim period. The base subsidy’s maximum rate is currently 65%; however, this rate is only available to eligible entities with a revenue drop of 70% or more. For tenants with a revenue drop of less than 70%, the base rate gradually declines as their revenue drop declines, based on a prescribed formula. That being said, as we discuss in more detail below, the amount of rent or eligible expenses that can be subsidized is subject to certain caps prescribed under the program.

Additionally, CERS offers a second type of subsidy to those eligible entities with locations that are forced to close or have their business activities significantly restricted by a “public health restriction” within the meaning of the program. This subsidy is called the “Lockdown Support”. Due to the new shutdown, the Lockdown Support will be critical in Ontario during the coming months. If you may be eligible for CERS, it is important to be aware of the nature of the Lockdown Support, how it is calculated, and whether or not you are eligible to receive this additional subsidy.

What is the Lockdown Support?

For tenants, the Lockdown Support is a subsidy equal to **up to 25%** of the tenant’s “qualifying rent expense” for any location in respect of any CERS claim period. A “qualifying rent expense” for any location means the regularly recurring rent (excluding sales taxes and other prescribed exceptions) that is paid or payable by the tenant to a **non-related** landlord after deducting any sublease rent received or receivable by the tenant from **non-related** parties in respect of that location. For clarity, if the tenant is entitled to receive sublease rent from an arm’s length subtenant at the subject location, this would reduce the amount of rent that can be subsidized.

Additionally, the Lockdown Support is available to those CERS-eligible property owners with **related** tenants if the tenant uses the subject property in the course of its regular activities.

However, the Lockdown Support for these property owners will be calculated based on its own eligible expenses and not the commercial rent paid or payable by the related tenant.

As a reminder, property owners are only eligible for CERS if the location is not used primarily to earn rental income. CERS-eligible property owners can only subsidize their mortgage interest, insurance costs, and property taxes for their property.

How is the Lockdown Support calculated?

The Lockdown Support will only subsidize a maximum of \$75,000 worth of rent or eligible expenses for any single location in respect of any CERS claim period. Notably, for the base subsidy, the amount of rent or eligible expenses that can be subsidized for each CERS claim period is subject to an overall cap of \$300,000 that must be shared among the eligible entity and its affiliates; however, **there is no such overall cap for the Lockdown Support.**

The percentage of rent or other eligible expenses that is subsidized by the Lockdown Support for any location in respect of any CERS claim period will depend on the number of days during the CERS claim period that the location is subject to a public health restriction (described below). For example, take a tenant who applies for the Lockdown Support for the 28-day CERS claim period between February 14, 2021 and March 13, 2021. Assume that its location was only subject to a public health restriction for 14 days during that period. In this example, the eligible entity's Lockdown Support will be equal to **12.5%** of its rent or eligible expenses for the CERS claim period, calculated as follows:

$$\text{Lockdown Support} = \frac{25\% \times 14 \text{ [# of days location subject to the public health restriction]}}{28 \text{ [# of days in the CERS claim period]}} \times 100$$

How do you qualify for the Lockdown Support?

You must satisfy two criteria to qualify for the Lockdown Support for any location in respect of any CERS claim period, namely:

- (1) you must qualify for a base subsidy rate of more than 0%; and
- (2) the location must be subject to a “public health restriction,” meaning an order or decision for which all of the following conditions are satisfied:
 - a) it is made under a law of Canada or a province, or the authority granted under such a law;
 - b) it is made in response to the COVID-19 pandemic;
 - c) it is limited in scope based on one or more factors, such as: (1) defined geographical boundaries; (2) type of business or other activity; or (3) risks associated with a particular location;

- d) non-compliance with the order or decision is a governmental offence or can result in the imposition of an administrative monetary penalty or other sanction by the government;
- e) it does not result from a violation by the eligible entity of an order or decision that meets the conditions set forth in the preceding bullet points;
- f) as a result of the order or decision, **some or all** of the activities of the eligible entity at, or in connection with, the location (that it is reasonable to expect the eligible entity would, absent the order or decision, otherwise have engaged in) are required to cease **based on the type of activity rather than the extent to which an activity may be performed or limits placed on the time during which an activity may be performed**;
- g) it is reasonable to conclude that at least approximately 25% of the revenues of the eligible entity for the “prior reference period” (as defined by the program) generated at the location were derived from the restricted activities; and
- h) the restricted activities **are required to cease for a period of at least one week**.

The [CERS website](#) adds that: (1) an order that merely restricts or reduces certain activities but doesn't require you to close or stop those activities does not qualify for the Lockdown Support; and (2) an eligible entity will not qualify for the Lockdown Support if it is already restricted or closed because it failed to comply with a previous public health order or decision.

Moreover, the Government of Canada provides the public with the following **non-exhaustive** list of examples of possible circumstances where you would **not** be eligible for the Lockdown Support, namely:

- **Reduction in business hours:** rules about when you can perform your regular activities (i.e., restricted or reduced service hours or hours of operation). For example, a bar that is subject to a restriction requiring bars in a region to shut down by 10:00 pm each day would not qualify, as their activities would not be required to cease for a period of at least one week.
- **Requirements for physical distancing:** a restaurant that earns most of its revenues in connection with indoor dining would not qualify due to a public health restriction limiting patrons to six persons per table, **as it could continue to carry on its indoor dining activities**.
- **Restrictions on travel:** travel restrictions that reduce the number of customers. For example, a business that sees a decrease in the number of clients due to travel restrictions would not qualify as it can continue to operate, and there is no order to cease its activities.
- **Reduction in the number of clients at any one time:** a business that is merely required to limit the number of clients would not qualify because it would not be required to cease any of its activities [see “Restrictions on indoor dining” below].

- **Violation of a public health order:** a business that is required to close down due to violating a public health restriction would not qualify because the shutdown resulted from a contravention of public health orders.
- Any other restrictions that do not specifically order you to stop or close an activity (e.g., **reduced seating capacity or other physical distancing strategies**).

Additionally, the Government of Canada provides the public with the following non-exhaustive list of examples of possible circumstances where you **would** generally be eligible for the Lockdown Support, namely:

- **Restrictions on indoor dining:** if a business normally earns approximately 25% or more of its revenues in connection with indoor dining, it could qualify for the Lockdown Support due to its dining room being shut down even if it shifts its activities to take-out orders to make up some of the lost revenues from indoor dining.
- **Closure of bars:** a bar that is ordered to close down due to a public health restriction, and, anticipating low demand for take-out, does not continue operating, could qualify.
- **Closure of fitness centres:** a fitness center providing group fitness classes that is ordered to close down could qualify, even if, for instance, it moves to online instruction.
- **Closure of retail stores:** a retail store that is ordered to close down its location in a shopping mall, but that continues to operate providing online sales and curbside pick-up, could qualify so long as its in-store sales normally accounted for at least approximately 25% of its revenues.
- **Restrictions on types of personal services:** a business that earned most of its pre-pandemic revenues from services that cannot be performed while wearing a mask and can no longer be provided due to a public health restriction, could qualify.
- **Other closures of certain indoor activities:** a business that is ordered to close down would qualify.
- **Closure in relation to a COVID-19 outbreak on the premises:** a business that is ordered to close down due to a specific public health restriction arising from a number of its employees contracting COVID-19 would qualify.

We will continue to provide regular updates on commercial leasing issues in Canada, especially COVID-19 updates as landlords and tenants struggle with the economic challenges brought on by the pandemic. If you have any questions or would like to obtain legal advice on any commercial leasing issues or litigation, please contact any lawyer in our Commercial Leasing Group below.

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