



By Judith Rae, OKT

## **Updated: Can my Indigenous government or organization use the new COVID-19-related federal programs for employment and unemployment?**

Updated on May 29, 2020

*NOTE: This blog has been updated in May 2020. More businesses owned by Indigenous governments are now eligible for the wage subsidy program.*

In the wake of COVID-19, a lot is going on. Many Indigenous governments and organizations are struggling to deal with this public health emergency, such as putting travel restrictions in place, circulating public health information, and figuring out how essential services will be delivered.

They are also employers. The shutdown or reduced operations of, well, almost everything these days has affected Indigenous governments and organizations too, and their employees.

This blog has information on two new federal programs designed to help with employment and unemployment. It focuses on questions for Indigenous governments and other Indigenous organizations (non-profits, businesses, charities).

Please note that the information in this blog is updated to May 29, 2020.

There are two major programs to discuss:

1. Wage Subsidies – This is to help employers keep people on their payroll. It is paid to employers.
2. Canada Emergency Response Benefit (CERB) – This is to help people who are no longer being paid by an employer. It is paid to individuals. It is similar to EI but has differences, as discussed below.

### ***1. Wage Subsidies for Employers to Keep People on their Payroll – Canada Emergency Wage Subsidy (75%) and Temporary Wage Subsidy (10%)***

Employers may be eligible for wage subsidies from the federal government. The goal is to help the employer keep people on their payroll.

There are two versions of this program: a 10% version called the [Temporary Wage Subsidy](#) and a 75% version called the [Canada Emergency Wage Subsidy](#). You can't double up. (More specifically, if you use both, the 10% amount will be deducted from your subsidy under the 75% program.)

Both versions of the program apply a subsidy that the employer can use to support the wages/salary of any employee in Canada.

Does it matter if the employee whose pay is being subsidized is exempt from tax because they are a Status Indian earning income on reserve? No, it doesn't matter. The employer would still be eligible **regardless of the tax status of their employees**. However the employer does need to have a business number registered with the Canada Revenue Agency (CRA).

### **THE 75% CANADA EMERGENCY WAGE SUBSIDY**

This is the bigger type of wage subsidy, which will be worth more money to the employer. But its eligibility criteria are more strict.

How much money is it? Well, if eligible, the amount of the subsidy to the employer is generally 75% of **each employee's** gross pay, up to a maximum of \$847/week per employee. Eligibility is determined in 4-week segments, for up to 24 weeks going up to August 29, 2020.

If the employer qualifies, they can get this subsidy for all of their paid workers in Canada. There is **no overall maximum for the employer** as a whole, it just depends on how many employees they have. For some organizations, this will be worth quite a lot.

Can your organization get this? Well, it depends on two things: your organization has to meet the revenue loss test, and it also has to be an eligible type of employer.

The revenue loss test is applied month by month. Roughly, it means that revenues in March 2020 were at least 15% worse for the organization than usual, or 30% worse for April, May, June, July or August 2020. There are many details on how this is measured, and sometimes there are options the employer can choose. There will be a form for employers to apply to this program through the CRA. You can consult [this government website](#), and other blogs such as [this one](#), or [this one](#), for details on the revenue loss test. (OKT has no responsibility for external content. If you're feeling very brave, you could even try reading the [legislation](#) – but honestly don't, tax law is not a DIY kind of thing!)

Assuming the revenue loss test is met, **what kind of employers will be eligible?** Here are some comments specific to the Indigenous sector:

***First Nations that are bands under the Indian Act will not be eligible.***

The definition of an “eligible entity” in the wage subsidy legislation does not include anything that would fit the description of a band. It has a specific list (an individual, a corporation, etc.), and a band would not fit anywhere in that list. Plus, the wage subsidy does not intend to capture Indigenous governments generally, given the “public institutions” exception described below.

***Other Indigenous governments will generally not be eligible.***

Unincorporated Indigenous governments, such as self-governing First Nations, have the same issue as bands. They do not fall into the list of “eligible entity” categories, so will not be eligible.

In addition, Indigenous governments that are incorporated will still not be eligible because the wage subsidy has exceptions for “public institutions”. Public institutions are not eligible.

The definition of this term includes those bodies that are exempt from tax as a “public body performing a function of government” under s. 149(1)(c) of the *Income Tax Act*. This will capture most bands under the Indian Act (which are not eligible in the first place, as noted above), as well as most other types of Indigenous governments as well.

Some will have had this tax status already confirmed by the Canada Revenue Agency when they registered as a “qualified donee”. Others could still count as a “public body” [if the organization meets the CRA’s description](#) of what that means.

It’s worth noting that for most First Nations and other Indigenous governments, revenues are heavily government-based, and will hopefully be stable. There are also [other sources](#) of funding designed to help Indigenous governments with COVID-19, such as the [Indigenous Community Support Fund](#). There might be a few cases, however, where an Indigenous government feels a big revenue impact but cannot access the wage subsidy for employment support, perhaps if they normally have a lot of own source revenues from business sectors that took a downturn.

***What else might fall under the “public institutions” exception?***

Incorporated Tribal Councils, PTOs and Indigenous regional organizations of various sorts might be considered “public institutions” (and therefore not eligible) depending on the circumstances. For most it will depend on whether they are considered a “public body performing a function of government” (see above, and for ease of reference, [this link from the CRA](#)). There’s such a wide diversity of Indigenous organizations out there, it’s not possible to make a blanket statement about this.

In addition, the “public institutions” exception also includes “a school, school board, hospital, health authority, public university or college”. There’s nothing in this definition that would appear to limit these terms to those entities within provincial jurisdiction as opposed to those established by First Nations or other Indigenous governments. So Indigenous school boards, health authorities and so on would not be eligible for the 75% wage subsidy.

However, many of these corporations will be eligible for the 10% version of the subsidy that is summarized below. If your organization is incorporated and expecting substantial revenue loss, you might want to take a closer look at the 75% version but we recommend getting legal advice.

### ***Other Indigenous non-profits and charities***

If your organization is a charity or non-profit and does not fit within the exceptions for “public institutions”, then it should be an eligible type of employer. And, note that there are rules about the calculation of revenue loss that are designed to be more relevant for charities and non-profits.

### ***What about Indigenous businesses?***

Most for-profit Indigenous businesses can be eligible assuming the revenue loss test is met.

This includes businesses owned or partly owned by an Indigenous government. In May, the federal government expanded eligibility to more of these businesses. Previously some of them may have been considered “public bodies performing a function of government”, if most of their income came from activities on reserve or on modern treaty lands. These businesses are now eligible. Specifically, eligible businesses include:

- Businesses 90%+ owned by Indigenous governments that are tax-exempt under s. 149(1)(d.5) of the Income Tax Act;
- Businesses owned by subsidiaries of the above that are tax exempt under s. 149(1)(d.6); and
- Partnerships involving Indigenous governments, where other partners are eligible employers for the wage subsidy.

### **THE 10% TEMPORARY WAGE SUBSIDY: A BACK-UP FOR SOME**

The 10% Subsidy is a back-up option available in a few cases. It has a smaller dollar value: 10% of payroll up to a maximum of \$1,375 per employee and a total maximum of \$25,000 for the whole organization. But it is available whether or not the employer can demonstrate that they have lost revenue during the pandemic.

For Indigenous organizations, it is also worth noting that the 10% version has slightly broader criteria in terms of what kinds of employers are eligible. It includes:

- Non-profit organizations;
- Registered charities;
- Individuals who are employers;
- Canadian-controlled private corporations with less than \$15 million in taxable capital employed in Canada, a measure also used to calculate the existing small business deduction. This is intended to capture “small businesses”; and
- Partnerships if all members are one of the above.

This list does not include bands or other unincorporated Indigenous governments. However, this 10% program does not have a “public institutions” exception. So incorporated Indigenous governments and non-government or quasi-governmental organizations like regional bodies, Tribal Councils, PTOs, as well as school boards and health authorities – they seem to be eligible.

This 10% program does not need a separate application to the CRA like the 75% version does. The employer accesses the program by doing their own calculation and reducing their CRA payroll remittances accordingly.

#### **NOTE TO EMPLOYERS**

If you are unsure about where your entity fits in and whether you might be eligible for these wage subsidies, we recommend seeking specific legal advice. For the 75% program, you might need accounting advice too, to help you assess your revenue loss according to the rules.

## ***2. Help for Individuals Who Lost Paid Work – Canada Emergency Response Benefit (CERB)***

The [Canada Emergency Response Benefit \(CERB\)](#) is for people who are no longer being paid from work, for reasons due to COVID-19. For instance, they could have been fired, temporarily laid off, or on an unpaid leave due to illness or caregiving obligations. They could also be self-employed and no longer able to earn an income.

It is paid to the individual, not to their current or previous employer.

This program is being managed by Service Canada in tandem with the Employment Insurance (EI) program. Starting April 6<sup>th</sup>, [this website](#) is accepting applications.

You cannot get both EI and CERB at the same time. The **CERB replaces EI** for a large set of people who lost paid work due to COVID-19.

#### **Here are some differences between the CERB and EI:**

- CERB will be available to a wider group of people than EI. EI is only available to people who paid into the program and meet the test for qualifying hours. CERB will be available to anyone age 15 and over who lost all their paid income due to COVID-19 and who made at least \$5000 in the previous year. (This is a summary; please consult the link above.) It does not matter whether the person is Indigenous or not, has *Indian Act* status or not, lives on a reserve or not, or whether or not their previous income was tax exempt. Even if the person did not pay into EI, they could still be eligible.
- CERB will pay the same amount for each person in the program: \$500/week. EI, in contrast, pays 55% of the person's average income, up to a maximum of \$573/week. Note that many people will earn more on the CERB than they would have on EI, but some people (those with higher salaries) will earn a bit less. This will not be optional.
- CERB is paid every 4 weeks. EI is paid every week.

- CERB will be available for up to 16 weeks per person (up to 4 payments). In contrast, the length someone can be on EI varies according to their qualifying hours and also according to the unemployment rate in their region.
- CERB starts after you have lost income for 2 weeks. EI starts after a 1-week waiting period, or no waiting period if the person is quarantined due to COVID-19.

If a person is eligible for CERB, they will get that instead of EI. However, they do not lose their entitlement to EI. If they were entitled to EI, and they use up their 16 weeks of CERB payments and still need help, they will be able to start using their EI.

\* \* \*

**Plus** – There is a separate benefit available for post-secondary students and recent grads, including Indigenous students and graduates. This is the [Canada Emergency Student Benefit](#). It can provide \$1,250 for each 4-week period, or \$2,000 for each 4-week period if you have dependants or a disability. This program is for students and graduates who are looking for work but unable to find work.

\* \* \*

For more information, please contact Judith Rae or another OKT lawyer.

Judith Rae: [jrae@oktlaw.com](mailto:jrae@oktlaw.com) 416-981-9407

[www.oktlaw.com](http://www.oktlaw.com)