



Open Session

Executive Committee Meeting

October 14, 2020

KCCA Administration Centre

8:00 a.m.

Audio/Video Recording Notice

"Board members, staff, guests and members of the public are reminded that the Full Authority Board/Committee meeting is being recorded, and will be posted to the Authority's web site along with the official written minutes. As such, comments and opinions expressed may be published and any comments expressed by individual Board members, guests and the general public are their own, and do not, represent the opinions or comments of the Full Authority and/or the KCCA Board of Directors.

The recorded video of the Full Authority meeting is not considered the official record of that meeting. The official record of the Full Authority meeting shall consist solely of the Minutes approved by the Full Authority."

Introductions and Declarations of Pecuniary Interest

Open Session

- a) Canadian Emergency Wage Subsidy.....2

Closed Session - Confidential

- a) Personnel Matter – Identifiable Person: 2020 Salary Proposal and Staffing
Considerations.....
- b) Personnel Matter – Identifiable Person: GM Performance Appraisal

TO: Executive Committee

FROM: Elizabeth VanHooren

Date: October 14, 2020

Subject: Canadian Emergency Wage Subsidy

Recommendation: For Discussion and Consideration



Purpose

To seek discussion and a recommendation on whether to pursue an application for the Canadian Emergency Wage Subsidy.

REPORT SUMMARY

- The Canadian Emergency Wage Subsidy supports Canadian employers who have seen a drop in revenue as a result of the Covid-19 pandemic.
- In April Conservation Ontario secured a legal opinion on behalf of the collective that CAs would likely be considered ineligible and if they did secure funding risked potentially having to pay the funding back at a later date.
- Despite CO’s legal opinion, Toronto Region Conservation Authority worked with their tax consultant (KPMG) and the CRA and submitted three claim periods successfully this fall. While TRCA has a memorandum written by their tax consultant justifying eligibility, a blanket opinion was not feasible and each CA was advised to seek their own independent tax advice.
- Management sought advice from Graham, Scott Enns. Jim Frederick provided the attached opinion advising that, “we do not see any reason why you should not apply for the CEWS subject to the comments related to potential penalties”
- Staff seek input from the Executive and submit a summary of the pros and cons of applying below for discussion.

Recommendation: For Information.

What is the CEWS?

The Canadian Emergency Wage Subsidy (CEWS) supports Canadian employers who have seen a drop in revenue as a result of the Covid-19 pandemic. The subsidy is available for wages paid in ten 4-week periods from 15 March 2020 to 19 December 2020.

Employers are eligible for the subsidy if they have a qualifying revenue decline. The revenue decline required for eligibility is 15% for March, and 30% for April, May and

June. For July onwards, employers are eligible for the subsidy if in a period they have any revenue decline.

For Periods 1 to 4, the subsidy is 75% of wages up to the lesser of the weekly cap or wages actually paid). For new employees, the subsidy is 75% of wages paid up to the cap. For Periods 5 to 10, the subsidy rate that an employer will receive depends on the extent of the employer's revenue losses in the corresponding calendar month (for the base subsidy) and the preceding three calendar months (for the top-up). The employee remuneration eligible for subsidies is capped at \$1,129 per week.

Are CAs eligible?

Eligible employers include individuals, taxable corporations, and partnerships as well as non-profit institutions and registered charities. Public bodies are not eligible. Registered charities are eligible provided they are not public institutions.

KCCA is a registered charity and operates in Ontario as a Conservation Authority under the Conservation Authority Act. As noted in the attached memo from Jim Frederick's, Graham Scott Enns, the question becomes whether KCCA is a "municipal or public body performing a function of government in Canada" – and that is the question that no one can answer.

In April Conservation Ontario sought legal advice on whether CAs would be eligible. CO's solicitor was of the opinion that the Canada Revenue Agency (CRA) would quite likely determine that a conservation authority is not an "eligible entity" under the CEWS program. They indicated that until there is further written guidance from CRA, eligibility for CEWS by conservation authorities may possibly remain a somewhat open question and therefore their opinion cannot be a binding opinion.

Also in April, Ministry of the Environment Conservation and Parks (MECP) was asked to provide guidance to CAs on whether they were considered essential businesses under the Emergency Orders. In an April 23, 2020 letter to Conservation Ontario the province stated, "the general exemption in section 1(5)2 of Schedule 1 to the Emergency Order does not apply to Conservation Authorities. Although Conservation Authorities provide certain services to both the provincial and municipal levels of government, they operate independently, and their activities are not primarily directed toward delivering or supporting government operations or services."

This was a provincial ruling and does not speak to how the CRA would view the status of CAs as a municipal or public body.

Despite CO's legal advice some CAs pursued applications with varying results. Toronto Region Conservation Authority, based on advice from CRA, pursued advice from their

own tax consultant before applying. After months of working with their tax consultant and the CRA, TRCA received notification of approval for their first three claim periods this fall. Conversely, other CAs have applied, been granted the subsidy for initial claim periods but were later told by the CRA they do not qualify calling into questions the original award.

What is the impact to KCCA?

Below is a summary of revenue month over month for 2019 and 2020.

CEWS Period	Month	2019 Revenue	2020 Revenue	Percentage Drop
	January	\$30,954.45	\$20,914.08	Not Eligible
	February	\$988,112.30	\$1,026,609.42	Not Eligible
1	March	23,649.46	81,049.09	Not Eligible
2	April	26,724.15	7,261.32	72.83%
3	May	488,220.31	40,408.07	91.72%
4	June	151,918.95	541,763.47	Not Eligible
5	July	159,693.41	227,902.23	Not Eligible
6	August	226,081.52	139,605.86	38.25%

Up until August, based on the parameters of the program, and the necessary revenue drop over 2019, KCCA would qualify for 3 funding periods. Calculations would need to be refined, but KCCA may qualify for as much as \$94,373 in CEWS funding to the end of August. The actual claim amount may be less if the Authority chose only to submit a claim based on employees related to the campground – the program area most impacted by a loss of revenue.

Discussion

Based on CO’s legal advice at the time, management did not pursue a CEWS application but rather based staffing levels on available funds and reserves. After learning of the

recent success of TRCA, staff did ask Graham Scott Enns for a formal opinion on KCCA's eligibility. While GSE recommends applying there are pros and cons that members should weigh in a final decision.

KCCA would definitely benefit from funding as it would reduce the drawdown on reserves for 2020 putting the Authority in a better position to weather the pandemic in 2021. However, whether KCCA is a public body as defined by the provincial or federal government, the public may very well view KCCA as providing services on behalf of the government – municipal, provincial or otherwise. Despite TRCA's success there still seems to be some question as to CAs eligibility – leading to the possibility that KCCA – if initially successful - could be asked to pay the funds back at a later date.

Staff are seeking discussion and final direction from members on whether or not to pursue a CEWS funding application.

Recommendation: For Discussion and Consideration



October 2, 2020

Kettle Creek Conservation Authority
44015 Ferguson Line
St. Thomas, Ontario
N5P 3T3

Attention: Elizabeth VanHooren, General Manager

Re: Canada Emergency Wage Subsidy (CEWS)

You have asked us to comment on your ability to access the CEWS.

Summary:

Based on the following information, we do not see any reason why you should not apply for the CEWS subject to the comments related to potential penalties.

The decision to apply for the CEWS is a difficult one for any organization in the absence of clear and concise language as to whether the organization qualifies or not. You have received information informally that certain organizations have successfully applied that you view are constituted similarly to yourselves. We would note that you cannot necessarily rely on this information as the matter has not been considered by a court.

The question facing you is whether you are a “municipal or public body performing a function of government in Canada”, and that seems to be the question that no one can answer.

The benefit to applying for the CEWS is obvious from a financial point of view. If you do not apply at all, then you receive zero.

The risk of successfully applying and later finding out that you were not eligible is the risk of being penalized and the cost of any interest charges for the time period that you had funds in your possession that you were not entitled to.

We also encourage you to continue to reach out to the MP's and particularly the Minister of Finance of Canada who presumably would have the power with the backing of Parliament to clarify this issue.

Background Information:

Kettle Creek Conservation Authority (KCCA) is a registered charity and operates in Ontario as a Conservation Authority under the Conservation Authority Act.

The Canada Emergency Wage Subsidy (CEWS) was announced starting March 15, 2020 to support Canadian employers who have seen a drop in revenue as a result of the Covid-19 pandemic.

The main question is whether KCCA is eligible to participate in the CEWS?

Applicable Legislation:

The following are the actual definitions of who is eligible for the CEWS in section 125.7 of the Income Tax Act:

eligible entity means

- (a) a corporation, other than a corporation that is exempt from tax under this Part or is a public institution;
- (b) an individual;
- (c) a registered charity, other than a public institution;
- (d) a person that is exempt from tax under this Part because of paragraph 149(1)(e), (j), (k) or (l), other than a public institution;
- (e) a partnership, all of the members of which are described in this paragraph or any of paragraphs (a) to (d); or
- (f) a prescribed organization.

public institution means

- (a) an organization described in any of paragraphs 149(1)(a) to (d.6); or
- (b) a school, school board, hospital, health authority, public university or college.

Analysis Related to Definition of Eligible Entity:

As noted in 125.7 (c) and (d) above, there are a number of possible ways for an entity to be exempt from income tax under section 149 of the Income Tax Act.

The definition in 149(1)(f) reads as follows - **registered charities** a registered charity is exempt from tax under 149(1)(f).

Pursuant to the definition of eligible entity above in 125.7 a registered charity is eligible for the CEWS so long as it is not a “public institution”.

The definition in 149(1)(e) reads as follows - **certain organizations** an agricultural organization, a board of trade or a chamber of commerce, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof;

It is not my view that KCCA is tax exempt because of this section of the Income Tax Act, but it may be that it is. These organizations are also eligible for the CEWS so long as it is not a “public institution”.

The definition in 149(1)(l) reads as follows - **non-profit organizations** a club, society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor,

member or [shareholder](#) was a club, society or association the primary purpose and function of which was the promotion of amateur athletics in [Canada](#);

Since it is stated in the above that it is an entity that was not a charity, it would seem 149(1)(l) does not apply to KCCA.

Neither of 149(j) or (k) would seem to apply to KCCA.

Analysis Related to Definition of Public Institution:

It seems pretty clear that item (b) in the definition is not applicable to KCCA.

Item (a) refers to section 149(1)(a) to (d.6).

All of items (a) to (d.1) except for (c) do not appear to be applicable to KCCA.

The definition in 149(1)(c) reads as follows - **municipal authorities [and First Nation bands]** a municipality in [Canada](#), or a municipal or public body performing a function of government in [Canada](#);

KCCA is not a municipality as such. The question therefore is whether it is a “municipal or public body performing a function of government in Canada”, and that seems to be the question that no one can answer. In very general terms, the Conservation Authorities Act postulates that a Conservation Authority is created by the Province at the behest of municipalities situated within a watershed.

I reached out to Karen Vecchio in April and she indicated that because public bodies are ineligible for the wage subsidy, many Conservation Authorities will be unable to access this program as it currently exists.

I do not believe this response was much help but include it for completeness. I would note that the word “many” is used and not “all” regarding the ability to access CEWS. The rules of CEWS are of course a Federal matter and I did not receive what I viewed as any helpful communication from the Provincial representative.

Penalties:

Below I reproduced the information posted on the CRA website related to non-compliance with the CEWS claims. As you can see, there are references to “participates in a plan”, “fraudulent claims”, “false statements”, “gross negligence”. Where an entity has applied and is determined not to be eligible where none of these items is involved there should not be any penalty. However, the judgement on intent falls to the CRA, at least initially.

34. Are there penalties for non-compliance? Updated: August 11, 2020

Yes. Due to a specific anti-avoidance rule, an employer will not be eligible to claim the wage subsidy for a claim period if the employer (or a person or partnership that does not deal at arm's-length with that employer) participates in a plan that has the effect of reducing the employer's qualifying revenues for the current reference period, one of the main purposes of which is to cause the employer to qualify for the subsidy or in respect of claim periods 5 to 9, to increase the amount of wage subsidy in any of those claim periods. Where this anti-avoidance rule applies, the employer will be liable to a penalty equal to 25% of the amount of wage subsidy that is claimed in its application, and will have to pay back any wage subsidy that it received. If an employer knowingly, or under circumstances amounting to gross negligence, generally

makes, or is involved in the making of a false statement or omission in its wage subsidy application for a claim period, the employer is liable to a penalty (commonly referred to as the “gross negligence penalty”) of up to 50% of the difference between the amount of wage subsidy that it claimed in its application and the amount of wage subsidy to which it is actually entitled.

Penalties may apply in cases of fraudulent claims. The penalties may include fines or even imprisonment.

Finally, if a person (such as an accountant or tax preparer) files or prepares the wage subsidy application on behalf of the employer, they could be subject to a third-party penalty under the Act, if they know, or would reasonably be expected to know, that the application contains false statements, including an omission of information. Third-party penalties are explained in detail in the CRA's [Information Circular IC01-1, Third-Party Civil Penalties](#).

Qualifying Revenue:

Also from the CRA website, shown below is the special rules for calculating the qualifying revenue of a registered charity including the need to “elect” to exclude funding received from government sources.

7. Are there special rules for calculating the qualifying revenue of a registered charity or non-profit organization? Updated: August 11, 2020

Yes. In addition to the qualifying revenue inclusions specific to registered charities and non-profit organizations (including prescribed organizations that are public institutions) (see Q6), these eligible employers may elect (see note below) to exclude funding received from government sources when determining their qualifying revenue.

This election applies to the determination of qualifying revenue for all of an eligible employer's prior reference periods and current reference periods.

An eligible employer can make an election retroactively but must amend all previously submitted applications to reflect the change.

If you have any questions regarding this information do not hesitate to contact us.

Yours very truly,

GRAHAM SCOTT ENNS LLP



James G. Frederick, CPA, CA
Partner