Submission in Response to the Consultation on the Canada Emergency Wage Subsidy:

Keeping Medical Clinic Employees on the Payroll

June 5, 2020

ASSOCIATION MÉDICALE CANADIENNE
CANADIAN MEDICAL ASSOCIATION

Introduction

The Canadian Medical Association (CMA) submits this brief in response to Finance Canada's May 25 to June 5, 2020, consultation on the Canada Emergency Wage Subsidy (CEWS).

The CMA is the national voice of Canada's doctors. Since its creation in 1867, the CMA has championed improving the health of Canadians and strengthening the health care system. A voluntary professional organization representing physicians across all regions in Canada, the CMA is comprised of 11 provincial and territorial medical associations and more than 60 national medical organizations.

Since the outset of the COVID-19 pandemic, the CMA has been actively engaged as part of Canada's domestic response. In addition to our engagement on key public health issues such as the supply and distribution of personal protective equipment, the CMA has addressed physician practice needs, including releasing a Virtual Care Playbook to support the rapid conversion of medical practices to virtual care delivery.

In the context of physician practices operating as small businesses, the CMA strongly supports the federal government's emergency economic relief programs. Access to these programs is critical to the viability of many physician practices — and the ability of medical clinics across Canada to retain vital front-line health care workers (FLHCWs) and keep their doors open to continue serving the needs of their patient population.

However, despite the dire need for these programs by medical professionals — who constitute a strategic resource and sector at the best of times, but particularly in a pandemic — presently, the CMA is concerned that many physicians are experiencing administrative barriers to accessing these critical federal support programs for their employees.

This submission provides a briefing on physician practices and the need to access the CEWS, an overview of the technical and administrative factors impeding access, as well as proposed remedies to enable a rapid federal response.

The CMA's recommendations in this brief ensure that Finance Canada and the CRA's implementation of the CEWS program is:

Aligned with its policy intent: Ensure physicians will be able to rehire workers previously laid off because of COVID-19 and prevent further job losses. This will position front-line health care workers to readily respond to the ensuing pandemic.

Inclusive: Ensure access to the CEWS for **all** businesses that operate through a cost-share arrangement. Cost-share arrangements are utilized in many businesses where there is a combination of **commercial activities and exempt supplies** (e.g., health care providers, residential landlords, financial service businesses).

Consistent with relevant legislative frameworks: Ensure the CRA is consistent in its recognition of agency relationships for purposes of the CEWS.

Physician Practices and Access to the CEWS

While health care in Canada is predominantly publicly funded, it is primarily privately delivered. In Canada's health care system, the vast majority of physicians are self-employed professionals operating medical practices as small business owners. Physician-owned and -run medical practices ensure that Canadians are able to access the health care they need, in communities across all jurisdictions. In doing so, Canadian physicians are directly responsible for 167,000 jobs across the country, contributing over $39 billion to Canada's GDP. Including the expenses and overhead associated with running physician practices, nearly 289,000 jobs indirectly relate to physician practices.[1]

However, as much as physician practices resemble small businesses on the basis of key criteria like employing staff and paying rent, it is imperative to recognize that they are in fact core stewards of a substantial portion of Canada's health care system and critical health system infrastructure.

It is a national imperative to ensure the viability of such a core component of Canada's health care system as our medical clinics and the staff they employ. To this end, both federal and provincial/territorial governments have a role in ensuring Canada's medical clinics are there to serve the health care needs of Canadians, through the pandemic and beyond.

Physician practices have experienced significant impacts related to changing volumes of patient care and delivery models of care in light of public health restrictions since the pandemic was declared on Mar. 11, 2020. The CMA commissioned an economic impact analysis to better understand the impacts across various practice settings. This analysis reveals that across the range of practice settings, the after-tax monthly earnings of physician practices are estimated to decline between 15% and 100% in the low-impact scenario, and between 25% and 267% in the high-impact scenario.[2]

Despite meeting the revenue reduction and employer eligibility factors, the CMA is concerned that many physicians are ineligible for the CEWS because of technical and administrative factors that are inconsistent with other existing federal legislative frameworks.

The CMA conducted a survey of its membership between May 22 and June 1 to better understand physicians' experiences accessing the federal economic relief programs; 3,730 physicians participated in this survey. Overall, about a third (32%) of physicians polled had attempted to apply to at least one of the federal programs available and 15% of all physicians who responded applied for the CEWS, making it the second most applied-to program. Of those physicians who applied to the CEWS, 60% were successful, 7% were denied and the remaining 33% were still awaiting response at the time of the survey. Of those who applied but were denied the CEWS, a third (33%) indicated it was because of their cost-sharing structure, 3% responded it was because they worked in a hospital-based setting and a further 22% simply didn't know. Finally, as part of the survey, physicians shared comments that speak to the issues outlined in this brief. A few excerpts are below:

- "We are a group of 4 surgeons and have a cost sharing agreement to pay our office expenses. Our office is outside of the hospital. We tried to apply for the CEWS but have recently received accounting advice supported by legal advice that cost sharing agreements will not be candidates for the CEWS. We are therefore presently exploring other options such as a work share situation or temporary/permanent layoffs." CMA member, survey respondent
- "I work in a group with 11 other OBGYNs. We are still unsure to this point about whether the CEWS applies to our situation. Our revenue is certainly down by ~30% or more. The issue is that our structure doesn't fall into one of the neat categories for CEWS … We are awaiting clarification from our accountant on our status but it seems that the way the rules are currently written, we will not benefit from CEWS, and unfortunately, we are reducing staff hours to cope with our reduction in revenue." CMA member, survey respondent
- "My main frustration is that I can't find a clear answer on whether a clinic made up of multiple doctors with a cost sharing agreement is eligible for CEWS for our employees. I imagine many family practice clinics are set up this way … So as it stands we have not been able to access any financial programs in order to help pay our overhead/staff despite 50% reduction in patient volume." CMA member, survey respondent

A. Cost-Sharing Arrangements — Front-Line Health Care Workers Employed in Physician Clinics

One of the main types of practices that are unable to access the CEWS because of technical administrative barriers, despite meeting the key eligibility criteria, are physicians operating independently within a cost-sharing business structure.

Like many other independent professionals, physicians operate in group settings. In fact, according to the Canadian Institute for Health Information,[3] in 2019, 65% of family practices operated in a group setting. However, unlike other independent professionals, physicians have been encouraged to operate in a group setting, both by accreditation bodies as well as by provincial health authorities, to meet system delivery goals.

Appendix A provides a case study based on Sudbury Medical Associates (SMA), an illustrative example of three doctors (Dr. Brown, Dr. Lee and Dr. Assadi) who coordinated the operations of their medical practices together to open an integrated health care clinic. While they provide care to their own respective patient rosters, these three physicians share in the clinic space rent and employ 10 employees together. Because of the way SMA is structured, these physicians are unable to access the CEWS for their proportionate share of their employees' salaries. Each physician has met all the CEWS criteria except for the fact that SMA administers the payroll for their 10 employees under its own payroll number.

SMA illustrates a typical family medicine clinic representative of the many medical practices in Canada who employ numerous FLHCWs.

B. Cost-Sharing Arrangements — Front-Line Health Care Workers Employed by Specialist Physicians Practising in a Hospital-Based Environment

Another type of physician structure unable to access the CEWS because of the use of cost-share arrangements are specialist physicians practising in a hospital-based environment or academic health science centre (an "AHSC").[a] The purpose of an AHSC is to provide specialized health care services, carry out medical research and train the next generation of Canada's health care professionals.

Provincial funding agreements are designed to align the interest of all parties in an AHSC (clinical care, teaching, research and innovation) and often contain governance and accountability requirements. In order to discharge responsibilities under provincial funding agreements and to run a practice that can meet certain metrics, physicians are required to hire their own staff. Consequently, cost-sharing arrangements are utilized by these physicians to efficiently hire staff while meeting their other responsibilities.

In response to the COVID-19 pandemic, hospitals have implemented strategies designed to protect the health care system from collapsing or being overwhelmed. For example, many hospitals have cancelled elective surgeries; coupled with the fear many patients have of going to the hospital, this has resulted in a decline in patient care volume as hospitals and physician practices adhere with public health guidelines. This has led to a significant decline in revenue, requiring physicians to access the CEWS program in order to continue to employ their staff.

a Typically, AHSCs are defined as the grouping of a university with a school of medicine. This involves a fully affiliated teaching hospital and medical staff who hold both privileges at the teaching hospital and an academic appointment at the university.

Like all physicians in Canada, specialist physicians practising in a hospital-based health care setting are responsible for significant levels of fixed overhead expenses related to a medical practice. This includes medical insurance, licensing fees, maintaining an office and other professional fees. As a standard practice, employees of physicians who practise in AHSCs are often paid by a third party. In many instances, physicians have established an agency relationship pursuant to which they delegate authority to the hospital to act as their agent with respect to withholding taxes, source deductions and filing T4 returns. The main reason for this agency is to ensure that the physician focuses on teaching, researching and patient care. *For clarity, the administrator (hospital) has no legal authority to conclude on any employment matter such as the determination of a bonus or a wage increase or the payout of any severance. All these matters would be the responsibility of the physician in his/her capacity as employer.*

Anticipating a second wave of COVID-19, many physicians are concerned about maintaining their staff during a future work stoppage given their current inability to apply for the CEWS. As employers, physicians can appreciate that the hospital's payroll number is creating additional administrative complexity for the Canada Revenue Agency (CRA). However, as an employer and small business, their ability to access the CEWS program is an integral part of their strategy to retain and maintain their staff.

C. Technical Analysis — CEWS Legislation and the Principal-Agent Relationship

i) CEWS Legislation — Qualifying Entity

Pursuant to the *COVID-19 Emergency Response Act*, an entity will qualify for CEWS to the extent that it is a Qualifying Entity under ss. 125.7(1) of the *Income Tax Act* (ITA). One of the criteria to be a qualifying entity is that the entity had, on Mar. 15, 2020, a business number in respect of which it is registered with the Minister to make remittances required under ITA s. 153. By virtue of how cost-sharing arrangements are structured, the administrator (agent) handles the payroll filings using their own payroll number, which can be different from the employing physician (principal). On the basis of the uniqueness of cost-sharing structures and the definition in the legislation, physicians who employ individuals under these arrangements need to rely on principal-agent concepts in order to qualify for the CEWS provided all other criteria are met.

Presently, the CEWS application portal does not recognize principal-agent arrangements, which are common among physician practices as they employ FLHCWs. It is recognized that each participant or physician in a cost-sharing arrangement is in fact its own business[4] and that physicians share the costs of certain overhead expenses, which include wage-related costs for FLHCWs. In these structures, the payroll number for the employee(s) may be associated with one of the independently operating physicians or it may be associated with a separate entity. As such, these physicians are not likely to have a distinct payroll number associated with their eligible employee under the CEWS. The case law and the administrative position of the CRA demonstrate the following:

1. The principals in a cost-sharing arrangement are the employers; and
2. The agent's payroll number should be considered the payroll number for the principal for the purposes of making a CEWS application.

ii) Case Law

Subsection 9(1) of the ITA provides for the basic rules as they relate to computing the income or loss from business or property. In both *Avotus Corporation v The Queen*[5] and *Fourney v The Queen*[6], the Tax Court of Canada determined that where a person carries on business as agent for another, it is the principal that is carrying on the business and not the agent.

The *Fourney* case provides for several concepts that extend to the unique nature of cost-sharing arrangements. These concepts should provide clarity about a principal's ability to make a CEWS claim if it had a payroll agent that had a business number to make remittances before Mar. 15, 2020. The concepts are summarized as follows:

1. *Corporations can act as Agent*
   In Fourney, at paragraphs 41 and 42, it was concluded that a corporation can act as its shareholder's agent:

   It is established, then, that corporations can act as agents, and this concept is not repugnant to the rule that corporations have separate legal personality a matter addressed in the oft-cited Salomon case.

2. *Business Activities belong to the Principal*
   At paragraphs 60 and 65 of *Fourney*, the Tax Court examined the following activities and ultimately concluded that the activities were in fact the activities of the principal and not the agent. The following conclusions can be drawn from the case:

   - Payments made to the corporate agent were found to be revenues of the principal.
   - Contracts entered into by the corporate agent were contracts entered into by the principal.
   - T4s issued under the corporate agent's name were deductible expenses to the principal.

Lastly, at paragraph 65, the Tax Court characterized the corporate agent as a mere conduit for the appellant.

Revisiting our case study in Appendix A:

SMA is a corporation that functions as an agent on behalf of the three physicians. Each physician would record their own revenues and expenses because each physician operates their own distinct business with their own employees. For clarity, even though T4s are issued in SMA's name, the physicians would be the legal employers. SMA has no authority under the agency agreement to hire or dismiss employees or exert any control over the three distinct physician businesses.

iii) Administrative Policy

For GST/HST purposes, the CRA accepts the concept of an agency relationship typically utilized by physicians in cost-sharing practices.[7] In RITS 142436[8] "Implementation of Cost Sharing Arrangement," the CRA concluded that GST/HST does not apply to payments made to "Company A" because it was an agent in relation to remuneration paid to the employees of Company B and Company C. In this ruling, Companies A, B and C were all employers with Company A administrating the payroll as agent.

The CRA's conclusions appear to take the follow matters into account:

- Employees are jointly employed by the principals in the cost-sharing arrangement.
- Principals have legal responsibility for the employees.
- The principals would delegate responsibility or authority to an agent, which could be a corporation or another physician.
- That agent would be given discretion to pay the employees, withhold and remit the appropriate amount of taxes, file T4 slips, hire and terminate at the determination of the principals.
- Each principal would pay the agent for their proportionate share of payroll and report such payroll on their respective financial statements and tax returns.

The CRA also concluded that the "employment status of a person for GST/HST purposes is the same for income tax purposes."

The Department of Finance provides that the CEWS helps businesses keep employees on the payroll, encourages employers to rehire workers previously laid off, and better positions businesses to bounce back following the crisis. In keeping with this objective, a payroll number for an agent should extend itself to the principals for the purposes of applying for the CEWS because it is supported by case law and the administrative practices of the CRA. Application of any federally legislated program should be conceptually consistent with historical frameworks already established.

Recommendations:

The CMA holds that the legislation as written can remain as currently drafted as it provides for the majority of applicants looking to access the CEWS. However, to address the unintended exclusion of cost-sharing arrangements, the CMA recommends that the CRA provide administrative guidance consistent with and based on existing case law and administrative positions.

The CMA recommends that the Federal Government and the CRA enable physicians to claim their proportionate share of *eligible remuneration* paid through a cost-sharing arrangement provided all other program eligibility criteria are met.

Administratively, this may be achieved by the following:

- a "check-box" on the application denoting the applicant is a participant in a cost sharing arrangement
- identification of the cost-sharing arrangement payroll number
- a joint election between the agent and employer allowing the employer to utilize the agent's payroll number and denoting the percentage allocation of salary costs to the particular employer

If this recommendation is not feasible, the CMA recommends that the Federal Government and the CRA implement an alternate approach whereby a cost-share administrator is permitted to make a CEWS claim in their capacity as agent on behalf of each *eligible entity* (principal). Since period 3 is almost complete, there could be less administration regarding these claims as agents have not made application.

Similar to the preferred remedy above, this may be achieved by the following:

- a "check box" on the application indicating that an "agent" is filing the claim on behalf of *eligible employers*
- the applicant could also provide (either initially or upon desk audit) the business numbers to CRA for each employer
- a joint election among the agent and the employers allowing the agent to act on behalf of the employers for purposes of the CEWS

This would provide ease of audit for the CRA as the claim can be verified against the T4 and payroll remittances. The election and disclosure requirements would also alleviate any concerns the CRA or Department of Finance may have regarding potential abuse of the program.

In Appendix B we also outline supporting documentation to be retained for a CEWS Claim by a Cost-Sharing Entity, which will ensure cost-sharing entities have the appropriate documentation to submit a claim and also assist the CRA in conducting pre-assessment audits.

The CMA would be pleased to provide further detail on this issue or consider other alternatives to ensure FLHCWs receive wages during these unprecedented times.

Conclusion

Canada's physicians are important employers. Not only are they responsible for almost 167,000 in direct employment, together with their staff, they are at the front lines of Canada's response to the COVID-19 pandemic. Our health care system cannot withstand loss of employment or risks to the viability of medical clinics, at this crucial time — and indeed at any time. The CMA strongly encourages the Federal Government to address the issues outlined above in preventing physicians from accessing this critical economic relief program. On behalf of the doctors of Canada, the CMA stands ready to collaborate in resolving these technical and administrative barriers.

Appendix A: Welcome to Sudbury Medical Associates (SMA)

Dr. Christopher Brown (60) settled in his hometown of Sudbury to practise family medicine about 30 years ago. He operated in his own space, with his own employees until SMA was formed.

Dr. Jennifer Lee (45) has been practising in Sudbury for her entire career. Dr. Lee handles all family patients with a special focus on maternity and young family care.

Dr. Sarah Assadi (30) recently completed her residency. Dr. Assadi spent time in Sudbury as a locum and enjoyed the strong community feel.

Dr. Brown and Dr. Lee are long-time colleagues and recently approached Dr. Assadi to open an integrated health care clinic. Together they would require 10 employees (comprised of nurse practitioners, medical assistants and receptionists) to effectively operate the clinic. Optically, SMA appears to be one business when in fact it is comprised of three distinct medical practices. Each physician or their professional corporation maintains their own distinct patient list. Upon the advice of professional advisors, the physicians entered into a cost-sharing agreement to realize cost efficiencies related to the integrated health care clinic (administration and lease). This structure will ensure the needs of the community are met by the expansion of operating hours facilitated by a flexible staffing model. Understanding that cost-sharing arrangements are accepted by provincial health authorities and the Canada Revenue Agency (CRA), Dr. Brown, Dr. Lee and Dr. Assadi documented this arrangement, which includes the following details:

	Dr. Brown	**Dr. Lee**	**Dr. Assadi**	**SMA**[b]
Legal entity	Prof corp	Prof corp	Sole-proprietor	Corp
Proportionate share of costs	20%	40%	40%	• 0%
Legal employer (10 staff)	✓	✓	✓	
Legally responsible — all contracts	✓	✓	✓	
Payroll, T4 and remittances				✓
Report for income tax purposes: • Individual billings • Proportionate share of costs administered by SMA including payroll	✓	✓	✓	

[b] Administers payroll, suppliers, rent and utilities on behalf of physicians.

The impact of COVID-19 resulted in a significant slowdown of patient visits between Mar. 15 and May 31 as the residents of Sudbury were social distancing and were only leaving their homes for urgent matters. Dr. Brown, Dr. Lee and Dr. Assadi are concerned about keeping their front-line health care workers employed and at the same time maintaining a sufficient level of family health care in the community. Considering a possible second wave of COVID-19, these physicians need to ensure that their community health clinic remains open and safe so there is no unintended stress on hospitals.

Like many small businesses that have experienced significant revenue declines, these physicians are hopeful to access the Canada Emergency Wage Subsidy (CEWS) to ensure they can retain their specialized employees and pivot to the new environment they need to operate within. Upon further review, only Dr. Lee and Dr. Assadi experienced sufficient revenue declines to access the CEWS, but currently they do not qualify because of how they structured the payroll for these 10 employees.[c] They are concerned that without the CEWS, they will not be able to retain all of their staff or see as many patients. The following table summarizes the CEWS analysis:

CEWS criteria	Dr. Brown	Dr. Lee	Dr. Assadi	SMA
Eligible entity	✓ Prof corp	✓ Prof corp	✓ Sole proprietor	✓ Corp
Revenue decline test: March 2020	Not met	✓	✓	No revenues to report
Payroll number	•	•		✓
Payroll expense (eligible remuneration[d])	✓	✓	✓	•
Qualified for the CEWS	No (revenue decline test not met)	No (payroll account number held by SMA, which manages payroll on behalf of Dr. Lee)	No (payroll account number held by SMA, which manages payroll on behalf of Dr. Assadi)	No (has no revenue and is not the legal employer)

As employers, Dr. Lee and Dr. Assadi do not understand why their businesses are unable to access the CEWS for their proportionate share of their employees' salaries. Each has met all of the CEWS criteria except for the fact that SMA administers the payroll for their 10 employees under its own payroll number.

[c] CRA CEWS FAQ Question 3-8.
[d] Does not include any physician salary.

Appendix B: Illustration of Supporting Documentation to be Retained for a CEWS Claim by Cost-Sharing Entity

To the extent that employers operating through a cost-sharing structure are permitted to make a CEWS claim, the following documentation could be requested by the CRA to verify the claim upon desk audit.

For illustrative purposes, let's assume that Dr. Lee and Dr. Assadi both made a CEWS claim.

Supporting Documentation Request

1. The legal documentation establishing the agency relationship pursuant to which Dr. Lee and Dr. Assadi delegated authority to SMA to handle the income tax remittances, source deductions and T4 reporting.
2. The employment contracts, which clearly indicate that each of Dr. Lee, Dr. Assadi (and Dr. Brown) are the employers.

   Alternatively, confirmation from the employees that SMA is not the employer and that they are employed by Drs. Lee, Assadi and Brown.
3. SMA's accounting records or financial statements, which clearly support its position as an agent. *Note: Typically, most cost-share administrators will have NIL revenue and account for all cash inflows and outflows on their balance sheet in a manner similar to a lawyer's trust account.*
4. An analysis demonstrating the revenue decline for the relevant period for Dr. Assadi's business and Dr. Lee's business.
5. Calculations supporting the proportionate share of "*baseline remuneration*" and "eligible remuneration" paid to the employees by Dr. Assadi's business and Dr. Lee's business.
6. A reconciliation of the wage subsidy received along with their proportionate share of the wage subsidy so it can be properly accounted for and taxed.

[1] Conference Board of Canada. *The Economic Footprint of Physicians Offices*. Ottawa: Conference Board of Canada; 2020 (In Press).

[2] MNP LLP, Implications of the COVID-19 Pandemic for Physician Practices in Canada, 2020.

[3] Canadian Institute for Health Information (CIHI). *How Canada Compares: Results from the Commonwealth Fund's 2019 International Health Policy Survey of Primary Care Physicians*. Ottawa: CIHI; January 2020. Available: https://www.cihi.ca/sites/default/files/document/cmwf-2019-accessible-report-en-web.pdf (accessed 2020 Jun 15).

[4] Canada, Department of Finance, Budget Implementation Act, 2016, No. 2, Dec. 13, 2016.

[5] Avotus Corporation v. The Queen, 2006 TCC 505 (CanLII). Available: http://canlii.ca/t/1q749 (accessed 2020 Jun 15).

[6] Fourney v. The Queen, 2011 TCC 520 (CanLII). Available: http://canlii.ca/t/fnzfm (accessed 2020 Jun 15).

[7] Canada Revenue Agency. *P-238 Application of the GST/HST to Payments Made Between Parties Within a Medical Practice Organization*. Ottawa: Canada Revenue Agency, 2012 May 15. Available: https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/p-238.html (accessed 2020 Jun 15).

[8] Canada Revenue Agency, General Operations and Border Issues Division, Excise and GST/HST Rulings Directorate. *Forms, Publications, and Rulings: Headquarters Rulings. RITS 142436 GST/HST Ruling – Implementation of Cost Sharing Arrangement*. Ottawa: Canada Revenue Agency, 2012 May 15.