

COVID-19: NEW EMERGENCY RULES FOR OPERATING BUSINESSES IN BC: HOW TO COMPLY WITH BC'S "ESSENTIAL BUSINESS" AND PUBLIC HEALTH ORDERS

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On March 18, 2020, following on the heels of the provincial health officer's declaration of a province-wide public health emergency due to COVID-19, the British Columbia provincial government declared a provincial state of emergency under the *Emergency Program Act* ^[1] (the "**BC Emergency Act**"). The order is in effect for 14 days, but it may be extended in increments of 14 days until cancelled. ^[2]

Under a declaration of a state of emergency, the BC Emergency Act empowers the Minister for Emergency Management (the "**Minister**"), for the duration of the state of emergency, to do all acts and implement procedures that he considers necessary to prevent, respond to or alleviate the effects of an emergency, including the powers to implement a provincial emergency plan or provincial emergency measures, to provide for the distribution of essential supplies, and to provide, maintain and coordinate emergency medical, welfare and other essential services. ^[3] Pursuant to the *BC Emergency Act's* Regulations, the Minister's emergency plans and procedures must set out, in business continuation plans and procedures, the manner in which and the means by which each minister in government will continue to provide essential services despite an emergency or disaster. ^[4]

Orders Made Under the BC Emergency Act on March 26, 2020 ^[5]

Pursuant to these broad powers, on March 26, 2020, the Minister made a series of orders under the *BC Emergency Act* to maintain the supply chain of essential goods and services, protect consumers, increase enforcement and ensure access to travel, protect the most vulnerable, and coordinate emergency response measures as follows:

A Provincial Supply Chain Coordination Unit is established to coordinate goods and services distribution in partnership with industry, as well a Coordinated Provincial Air Service to manage all air service required to transport essential goods, services or personnel. Any bylaws that restrict the delivery of goods at any time of day are repealed. The Province will take an active role in coordinating essential services and goods delivery. Retailers and suppliers must report on inventory of critical supplies, including supplies for health.

The resale of food, medical supplies, cleaning and other essential supplies and personal protection equipment is prohibited. The quantity of essential goods that are permitted to be sold at point of sale retailers will be restricted.

Municipal bylaw officers are redeployed to assist local authorities with ensuring compliance with the Provincial Health Officer recommendations and orders (physical distancing, businesses that are ordered to stay closed stay closed, and the prohibition on gatherings over 50 people). While non-compliance with these orders carry fines and jail time, the bylaw officers are not authorized to detain an individual as a result of a contravention or suspected contravention of a public health order, issue a fine or penalty, including an administrative penalty, under the *BC Public Health Act*. Instead, they have to refer any compliance issues to provincial health officers, who have the authority to impose penalties.

Permitting passenger and car ferry operators to operate at minimum service levels and provide priority access for residents, and essential goods and workers.

Regulatory and administrative barriers have been lifted to make it easier to support critical services for the vulnerable, such as food banks and shelters. Evictions due to loss of income have also been suspended.

Municipal states of emergency are suspended, with the exception of the City of Vancouver. However, the City of Vancouver is not permitted to issue any further orders under their state of emergency. This will ensure a coordinated approach under the provincial state of emergency. Local governments are being asked to identify and make available any publicly owned facility that may be used for pandemic response including facilities for self-isolation, medical care, and testing. Local governments must respond to any requests from the province to identify resources and critical supply and service needs. In addition, hotel operators or commercial lodging operators are ordered to provide accommodation services for the purposes of self-isolation, supporting essential workforces or for other purposes identified by the province.

The Minister also promulgated a list of “Essential Services” and ordered the closure of all businesses that do not fall within the categories of providing “essential goods and supplies”, except for those “non-essential” businesses that can adapt their services and workplace to the orders and recommendations of the public health officers, effective immediately.^[6] All non-essential businesses that cannot comply with the orders and recommendations of the provincial health officer must close immediately. The Minister has ordered that “essential goods and supplies” means any goods and supplies that are necessary for the health, safety and welfare of people, including, without limitation, the following:

- a. food, water and other beverages;
- b. fuel and gasoline;
- c. health care goods, pharmaceuticals and medical supplies;

d. personal hygiene, sanitation and cleaning goods.

These orders were made in support the orders and recommendations of the Provincial Health Officer made in March, 2020, including:

[Public Health Order dated March 16, 2020](#) – prohibiting the gathering of people in excess of 50 people anywhere. This province-wide order applies to individuals, societies, corporations or other corporations or other organizations responsible for theatres, sports arenas, conference halls, churches, casinos, parks, festival sites and other indoor or outside places. The province published further guidance on the 50 person gathering limit, with specific guidance directed towards construction sites^[7], manufacturers^[8], and mining and smelting operations.^[9]

Some of the directions apply to all industries, such as ensuring employees where possible maintained a distance of 2 metres from each other, all common areas and surfaces must be cleaned daily, and signage limiting number of occupants in an elevator to 4 people at one time. Other directions in the guidelines are specific to the industry, for example visitors to mining operations are required to be essential to the mine and its operations.

[Public Health Officer Order dated March 17, 2020](#) – ordering travelers to self-isolate.

Public Health Officer Order dated March 19, 2020 – that all people practice social distancing when in public and must not leave home except for targeted outdoor exercise, or to maintain their own supplies or help vulnerable obtain supplies.^[10]

Public Health Order dated March 19, 2020 – requiring businesses providing essential services to implement various cleaning protocols.^[11]

[Public Health Order dated March 20, 2020](#) – imposing restrictions on food and liquor operators, including providing only take out or delivery service, ensuring that all people on premises are 2 metres from one another, and ensuring no more than 50 people are present at one time on your premises.^[12]

Public Health Order dated March 21, 2020 – requiring all “personal services establishments” to close as such businesses cannot meet the requirement that all individuals remain two metres from each other.^[13]

It is not always clear whether a business will constitute an “essential service” under the provincial order. For example, the following classification of essential retail businesses is ambiguous and may or may not apply to numerous retail operations: “retail businesses that sell non-grocery products and products necessary to maintaining the safety, sanitation and essential daily operation of residences, such as home supply, hardware, building material stores, pawn brokers, and garden centres and nurseries”. It is also expected that the province

will narrow the list of essential service over time.

Unlike other jurisdictions across the country that have ordered the complete closure of non-essential businesses within their provinces (Ontario and Quebec) or issued similar notices (Prince Edward Island and New Brunswick), the British Columbia provincial government is encouraging those non-essential businesses that can adapt their operations to adhere to the recommendations and orders of the Provincial Health Officer to continue operating. While this might be possible for some, it is not for many, and inevitably the viability of many businesses in the province and the employment of many individuals in the province is severely impacted by the Minister's recent orders.

Businesses that choose to continue to operate in British Columbia must ensure strict compliance with the Public Health Orders of the Provincial Health Officer. Adapting to these requirements will mean changes in worker and employee health and safety plans and protocols; operating procedures and protocols; and the number of people working within the business at any given time.

Given this, it is essential for businesses to obtain legal advice to determine whether or not they are an essential service and whether or not their operations comply with the public health orders made by the provincial health officer.

Consequences for Breach of the Orders

It is a provincial offence to fail to comply with ministerial orders made pursuant to the *BC Emergency Act*, or its regulations, or to interfere with or obstruct any person exercising a power or a performing a duty conferred by or imposed under the Act.^[14] The penalty for committing an offence under the *BC Emergency Act* is imprisonment for a term of up to 1 year, or a fine of up to \$10,000 dollars or both imprisonment and a fine.^[15] Corporations are only subject to fines. The Minister confirmed that those who are found in violating the Orders will "be prosecuted to the fullest extent of the law."

Further, under the *BC Public Health Act*, it is an offence to fail to comply with an order of a health officer.^[16] If a corporation commits an offence under this Act, an employee, an officer, a director or an agent of the corporation who authorized, permitted or acquiesced in the offence commits the offence whether or not the corporation is convicted.^[17] In addition, if an employee commits an offence under the Act, an employer who authorized, permitted or acquiesced in the offence commits the offence whether or not the employee is identified or convicted.^[18] The penalties for violations of the *BC Public Health Act* are more extensive than those under the *BC Emergency Act*, and depending on the offence, includes fines between \$25,000 and \$3 million, or imprisonment of terms between 6 months to 36 months, or both.^[19]

There are statutory defences available under the *BC Public Health Act*. Pursuant to s. 103 of the *BC Public*

Health Act, however, the statutory defences are not available to corporations, as the section specifies that to successfully defend against conviction of an offence under the *Act*, the person, “he” or “she”, must prove that any one of the statutory defences applies. As noted above, if a corporation commits an offence under this *Act*, an employee, an officer, a director or an agent of the corporation who authorized, permitted or acquiesced in the offence commits the offence whether or not the corporation is convicted. Businesses should therefore take heed of the exposure to liability their personnel may face. The defences available include proof that the person (a) exercised the appropriate due diligence by taking all the necessary steps to avoid committing the offence, and (b) reasonably believed in the existence of certain facts that, if true, would establish that the person did not contravene the *Act*.^[20] While these defences are available, they have not yet been tested in court, and the standard of taking all reasonable steps to prevent an offence from occurring or a reasonable belief in facts will likely be challenging to meet. Something beyond ignorance of the law will likely be required.

There are no statutory defences for offences under the *BC Emergency Act*. If a business fails to comply with any of the orders, such failure will likely result in a regulatory offence charge. Regulatory offences can have different standards when it comes to knowledge and intention, particularly as they apply to businesses accused of offences. Strict liability is likely the standard that will be applied, and where this is the case, the law affords a defence of due diligence. What comprises due diligence will depend on the circumstances, but it usually requires a demonstration that the business took all reasonable steps to avoid the compliance failure and so should not be convicted. As noted above, the standard of taking all reasonable steps to prevent an offence from occurring is unlikely to be easy to meet.

We encourage businesses across the province to reach out to us for any advice required.

by Shea Coulson and Thelma Zindoga

[1] *Emergency Program Act*, 1996 R.S.B.C. c. 111 (“**BC Emergency Act**”), s. 9(1).^[ps2id id='1' target='']

[2] See full text of the Order here: [Order of the Minister of Public Safety and Solicitor General](#)^[ps2id id='2' target='']
[target=''\]](#) ^[ps2id id='2' target='']

[3] *BC Emergency Act*, s. 10 (1)(a), (g).^[ps2id id='3' target='']

[4] *Emergency Program Management Regulation*, BC Reg 477/94, s. 3(3)(b).^[ps2id id='4' target='']

[5] The full text of the each the orders are available here: [2020_M082](#), [2020_M083](#), [2020_M084](#)^[ps2id id='5' target='']
[target=''\]](#)

[6] [British Columbia's List of Essential Workplaces](#).^[ps2id id='6' target='']

[7] “[Guidance to construction sites operating during COVID-19](#)”.^[ps2id id='7' target='']

[8] “[Guidance to B.C. manufacturers during COVID-19](#)”.^[ps2id id='8' target='']

[9] “[Guidance to mining and smelting operations during COVID-19](#)”.^[ps2id id='9' target='']

[10] Order not available yet, but access CBC.ca news [video](#).^[ps2id id='10' target='']

[11] Order not available yet, but access CBC.ca news [video](#). [ps2id id='11' target='']

[12] [Order of the Provincial Health Officer to Food and Liquor Operators](#). [ps2id id='12' target='']

[13] Order not yet available but access CTV News [video](#). [ps2id id='13' target='']

[14] *BC Emergency Act*, s. 27(1). [ps2id id='14' target='']

[15] *BC Emergency Act*, s. 27(2) [ps2id id='15' target='']

[16] *BC Public Health Act*, s. 99. [ps2id id='16' target='']

[17] *BC Public Health Act*, s. 100 (1). [ps2id id='17' target='']

[18] *BC Public Health Act*, s. 100(2) [ps2id id='18' target='']

[19] *BC Public Health Act*, s. 108. [ps2id id='19' target='']

[20] Additional defences under s. 103 of the *BC Public Health Act* include: [ps2id id='20' target='']

(c) relied on information or an instruction provided to the person by a health officer who was exercising a power or person a duty under this Act, if the person had no reason to believe that the information may have been false or instruction authorized, or

(d) acted under the order of a health officer who was exercising a power or performing a duty under this Act, if the person had no reason to believe that the order may have been authorized under this Act or any other enactment.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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