

COVID-19: "ESSENTIAL" INFORMATION ABOUT THE CONSEQUENCES OF CONTINUING TO OPERATE A "NON-ESSENTIAL BUSINESS" IN ONTARIO AND QUÉBEC

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In response to ever-growing concerns about COVID-19, the Ontario and Québec governments have both declared states of emergency and made a series of orders to combat the spread of the virus.

On March 23, both governments ordered the mandatory closure of all non-essential businesses and workplaces effective as of midnight Tuesday, March 24, 2020.^[1] In broad strokes, the orders mean that some businesses will be permitted to open while others will not. Consequentially, the continued viability of some businesses and the employment of some individuals is heavily impacted by these government decisions. These are important interests at stake.

It is essential for Ontario and Québec businesses to consider how these regimes will affect their operations. This Bulletin outlines the potential consequences for individuals and businesses that violate these provincial emergency orders.

Notably, other jurisdictions have issued similar notices (e.g. New Brunswick, Prince Edward Island). Others are expected to follow. McMillan can assist with analysis in each jurisdiction in which a company operates and provide insights to assist interprovincial businesses.

Ontario

Ontario's regime involves an order made under emergency legislation.

The Ontario *Emergency Management and Civil Protection Act*^[2], permits the making of emergency orders.^[3] These orders can include orders closing businesses, establishments and institutions.^[4]

It appears that Premier Doug Ford outlined his "List of Essential Workplaces" under this authority, as the internet page refers to the list as "this order", although it does not refer to the Ontario Emergency Act or any other provision.^[5] From earlier steps taken by the Ontario government ^[6] we can expect the order to be given effect by way of regulation made under section 7.0.1 of the Ontario Emergency Act.

It is an offence to fail to comply with the emergency order or to interfere with or obstruct any person exercising a power or a performing a duty conferred by such an order.^[7]

The penalties for violating an order issued under the Ontario Emergency Act can be significant. Individuals convicted of this offence may be liable to a fine of up to \$100,000 and a term of imprisonment of up to one year. If the convicted individual is a director or officer of a corporation, they may be liable to a fine of up to \$500,000 and a term of imprisonment of up to one year. While corporations obviously cannot be imprisoned, if convicted of this offence, they may be liable to a fine of up to \$10,000,000. These fines can be imposed for each day that the offence was committed. ^[8] That there are no minimum sentences suggests that the government was content to allow a significant amount of discretion when imposing sentence on the court hearing the matter.

In addition, an individual or corporation can also be fined an amount equal to the financial benefit that was acquired by or that accrued as a result of the commission of the offence.^[9] If a non-essential business remains open, the court could order the corporation to forfeit the financial gain obtained from being open and/or an individual to forfeit remuneration obtained.

In addition to fines, forfeitures and imprisonment, any person violating an emergency order can also be restrained by court order.^[10] The Ontario Emergency Act allows the Crown in right of Ontario, a member of the Executive Council or the Commissioner of Emergency Management to apply to the Superior Court of Justice to seek to restrain related conduct. Presumably the government would resort to this if a business does not close when being provided notice that they are to close.

There are no statutory defences under the Ontario Emergency Act. The Act does contain a provision against the application of retroactive penalties.^[11]

If a business fails to comply with the order, a Court might entertain “due diligence” or similar defenses to a prosecution under the Ontario Emergency Act, but the availability of such defenses is not without doubt.

Québec

Québec's regime is structured differently than that of Ontario. So far, the province has proceeded to deal with the pandemic as a "Public Health Emergency". This is a designation available under the *Public Health Act*^[12] (the “**Québec Health Act**”).

We have also included, below, information regarding the potential consequences for individuals and businesses under the *Civil Protection Act*^[13] (the “**Québec Civil Protection Act**”), which would apply in the event a National State of Emergency is declared.

Québec Public Health Act

In comparison with the Ontario Emergency Act, the Québec Health Act identifies a wider range of activities as offences but with notably lighter penalties.

Under the Québec Health Act, it is an offence to: (1) impede or hinder the Minister of Health and Social Services, the national public health director, or a person authorized to act on their behalf; (2) refuse to obey an order those individuals are entitled to give; (3) refuse to give access to or communicate information or documents they are entitled to they are entitled to demand; and (4) conceal or destroy documents or other things relevant to those individuals exercising their functions.^[14] It is also an offence to report or provide false, incomplete, or misleading information or documents to the Minister of Health and Social Services, the national public health director, or a person authorized to act on their behalf.^[15] Notably, assisting, inciting, advising, encouraging, allowing, authorizing or ordering another person to commit one of the above offences is an offence itself.^[16]

The consequences of these obligations are that it is not only an offence to keep a business open if ordered to close, but it is also an offence if a person provides misleading information or assists someone else in doing so.

As noted above, the fines available under Québec Health Act are paltry in comparison to those potentially levied in Ontario. The penalty for an offence under the Québec Health Act is a fine of between \$1,000 and \$6,000. In the case of subsequent offences, the minimum and maximum fines are doubled.^[17]

Unlike the Ontario Emergency Act, the Québec Health Act is not clear as to whether each day an offence occurs or continues would constitute a separate or subsequent offence.

The provincial government and the Minister of Health and Social Services are empowered to order any other measures necessary to protect the health of the population. This power could potentially be used to take action against persons contravening emergency orders.^[18]

Québec Civil Protection Act

As noted above, Québec has not yet made an order pursuant to the Québec Civil Protection Act. Additional offences may be at issue if such an order is made. It is an offence to:

- hinder the Minister of Public Security, an investigator, an inspector, a civil protection authority or one of its inspectors, an inspector of a local municipality or a
- person designated under specific provisions of the Act;
- refuse to obey an order from one of these persons or entities;
- refuses to communicate information or documents to one of these persons or entities;
- refuses to provide the help and assistance required by one of these persons or entities;

- conceals or destroys documents or other things relevant to the exercise of the one of these persons' or entities' functions; or
- provides false, incomplete or misleading information or documents to one of these persons or entities.^[19]

Those convicted of these offences are subject to fines of between \$1,000 and \$5,000 if they are a natural person and \$3,000 and \$15,000 if they are legal persons.^[20] These fines are not significantly higher than those available under the Québec Health Act.

Employers can also be liable for more specific offences, for example if they authorize the commission of an offence or engage in discriminatory measures or reprisals against an employee for having complied with the government in the course of a state of emergency under the Québec Civil Protection Act.^[21]

As with the Québec Health Act, for subsequent offences, the minimum and maximum fines are doubled but it is not clear as to whether each day an offence occurs or continues would constitute a separate or subsequent offence.^[22]

Finally, the Québec Civil Protection Act also allows judges to order an offender to remedy any contravention for which the offender was found guilty, but requires prior notice of such an application.^[23]

McMillan's COVID-19 Response Team and Essential Services Team are available to assist our clients to assess how the orders issued under the Ontario Emergency Act and the Québec Health Act affect their business and can assist in connection with stabilizing your business during any temporary shutdown period.

by Graham Bevans, Adam Chisholm, John Clifford, Thomas van den Hoogen, Timothy Murphy, Guy Pinsonnault and Ralph Cuervo-Lorens

[1] Ontario's List of Essential Workplaces is available here:

<https://s3.amazonaws.com/files.news.ontario.ca/opo/en/2020/03/list-of-essential-workplaces-2.html>; Québec's List of Priority Services and Activities is available here:

<https://www.Québec.ca/en/health/health-issues/a-z/2019-coronavirus/essential-services-commercial-activities-covid19/>.^[ps2id id='1' target='']

[2] *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9 [**Ontario Emergency Act**].^[ps2id id='2' target='']

[3] Ontario Emergency Act, s.7.0.2(4).^[ps2id id='3' target='']

[4] Ontario Emergency Act, s.7.0.2(4)(5).^[ps2id id='4' target='']

[5] <https://s3.amazonaws.com/files.news.ontario.ca/opo/en/2020/03/list-of-essential-workplaces-2.html>.^[ps2id id='5' target='']

- [6] On March 20, 2020, the Ontario government suspended all limitation periods and filing periods for legal proceedings in the Province in this way.[ps2id id='6' target=""]
- [7] Ontario Emergency Act, s.7.0.11(1).[ps2id id='7' target=""]
- [8] Ontario Emergency Act, s.7.0.11(1), (2).[ps2id id='8' target=""]
- [9] Ontario Emergency Act, s.7.0.11(3).[ps2id id='9' target=""]
- [10] Ontario Emergency Act, s.7.0.5.[ps2id id='10' target=""]
- [11] Ontario Emergency Act, s.7.0.11(4).[ps2id id='11' target=""]
- [12] *Public Health Act*, CQLR c S-2.2, ss.118 et seq. [**Québec Health Act**][ps2id id='12' target=""]
- [13] *Civil Protection Act*, CQLR c S-2.3, ss.88 et seq. [**Québec Civil Protection Act**][ps2id id='13' target=""]
- [14] Québec Health Act, s.139.[ps2id id='14' target=""]
- [15] Québec Health Act, s.140.[ps2id id='15' target=""]
- [16] Québec Health Act, s.141.[ps2id id='16' target=""]
- [17] Québec Health Act, ss.139-142.[ps2id id='17' target=""]
- [18] Québec Health Act, s.123(8).[ps2id id='18' target=""]
- [19] *Québec Civil Protection Act*, s.128.[ps2id id='19' target=""]
- [20] *Ibid.*[ps2id id='20' target=""]
- [21] Québec Civil Protection Act, s.129.[ps2id id='21' target=""]
- [22] Québec Civil Protection Act, s.131.[ps2id id='22' target=""]
- [23] Québec Civil Protection Act, s.132.[ps2id id='23' target=""]

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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