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Ontario passes Bill 218 to provide COVID-19 liability protection

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An Ontario act providing targeted liability protection against lawsuits arising out of exposure to and contraction of COVID-19 came into force last month.

Bill 218 – Supporting Ontario's Recovery Act (the Act) arose out of feedback from Ontarians, Attorney General Doug Downey said in the original news release. "After listening to the concerns of Ontarians, we want to ensure people can seek redress against gross negligence, intentional misconduct and bad actors who fail to make an honest effort to follow COVID-19 guidance and laws."

Protection from liability

The Act applies broadly to individuals, corporations, and the Crown in the right of Ontario (collectively, "any person"). Under section 2(1), the Act provides that no cause of action arises against any person as a direct or indirect result of an individual being or potentially being infected with or exposed to coronavirus (COVID-19) on or after March 17, 2020 as a direct or indirect result of an act or omission of the person if,

a) at the relevant time, the person acted or made a good faith effort to act in accordance with,

i) public health guidance relating to coronavirus (COVID-19) that applied to the person, and

ii) any federal, provincial or municipal law relating to coronavirus (COVID-19) that applied to the person; and

b) the act or omission of the person does not constitute gross negligence.

These protections also apply with respect to a person who is vicariously liable for the acts or omissions of another person, if the other person's liability is negated in relation to any such act or omission under subsection 2(1).

These protections do not apply with respect to acts or omissions of any person that,

a) occurred while a law required the person's operations to close, in whole or in part; and

b) relate to an aspect of the person's operations that was required to close under the law.

The protection provided under the Act is also specifically noted not to limit any defence or immunity that already exists at law or at common law.

The liability protection under the Act does not extend to certain claims that arise in the employment context. The Act incorporates the definition of "workers" in the *Workplace Safety and Insurance* Act, 1997, which is broader than just employees. Under the Act, workers retain a broad right to commence an action in relation to actual or potential COVID-19 exposure or infection that occurred as a result of working for or supplying services to a person. Workers' rights to make claims in respect of occupational disease or injury under the *Workplace Safety and Insurance Act* are also broadly preserved.

Proceedings barred

Under subsection 2(4), the Actbars proceedings if a person is able to avail themselves of the Act's protection from liability. The Act states that no proceeding that is directly or indirectly based on or related to anything referred to in section 2(1) may be brought or maintained against a person. Further, subsection 2(6) provides that any proceeding started before the day the Act comes into force (Nov. 20, 2020) is deemed to have been dismissed, without costs.

Good faith effort and public health guidance

"Public health guidance" is defined to mean advice, recommendations, directives, guidance or instructions given or made in respect of public health, regardless of the form or manner of their communication, by a number of health officials. These officials include, as set out further in the Act, the Chief Medical Officer of Health, a public health official of the Government of Canada, a minister or ministry of the Government of Ontario, and an employee of a municipality.

Over the past few months, concerns have been expressed that guidance from different public health officials has not been consistent. The Act recognizes this possibility and states that the protection in section 2(1) applies regardless of any conflict or inconsistency in the public health guidance or laws applicable to the person. It appears that this is an effort to extend the protection to those persons who made a "good faith effort" to abide by public health guidance from one health official, which may have at the time been in conflict with that of another health official.

Further, the Act does not appear to require complete compliance with public health guidelines, but rather a "good faith effort" to act in accordance with applicable public health guidance and laws relating to COVID-19. Good faith effort is defined under the Act to include an honest effort, whether or not that effort is reasonable.

Gross negligence

The protection under the Act does not apply to an act or omission of a person that constitutes “gross negligence.” However, gross negligence is not defined in the Act.

Gross negligence is a fact-driven and somewhat nebulous concept. The standard of “gross negligence” is utilized in other statutes, such as those concerning municipal liability – the *Municipal Act*, 2001, S.O. 2001, c. 25. In the context of municipal liability, there was a time when the Court defined gross negligence as “very great negligence.” In more recent times, although a precise definition has not been given, the courts have found that there must be more than a breach of a duty of care; the breach must rise to a level that can properly be described as gross negligence, however, it does not require proof of misconduct that is “willful, wanton or flagrant.”

The limits of the gross negligence standard in the context of COVID-19-related liability will have to be defined by the Court. The publicly-available information regarding COVID-19 has rapidly shifted over the last several months. Given the fact-driven nature of the gross negligence standard, it is likely that the assessment of this standard would change depending on the information publicly available and public health guidance available at the material time.

Similar legislation in British Columbia and Nova Scotia

Both British Columbia and Nova Scotia have similar legislation in place, with the intention to help protect workers supporting communities during the COVID-19 pandemic.

On Aug. 6, 2020, Order in Council No. 459 was passed in BC, bringing into effect *COVID-19 (Limits on Actions and Proceedings) Regulation*, BC Reg 204/2020. The Regulation is retroactive to Jan. 1, 2020 and provides greater clarity regarding the COVID-19-related liability protections set out in section 5 of the *COVID-19 Related Measures Act*.

Section 5 of the *COVID-19 Related Measures Act* provides that no legal proceeding for prescribed damages related to the COVID-19 pandemic lies or may be commenced or maintained against a prescribed person or a person in a prescribed class of persons because of

a) any prescribed act or omission of the person, or

b) any act or omission of the person in a prescribed class of acts or omissions.

Like the proposed Ontario legislation, the protection in BC does not apply in relation to damages caused by gross negligence and is only available if, at the relevant time, when engaged in an act a prescribed person:

a) was engaging in the act in accordance with all applicable emergency and public health guidance, or

b) had a reasonable belief that the person was engaging in the act in accordance with all applicable emergency and public health guidance.

The Nova Scotia Minister of Municipal Affairs and Housing issued Directions 20-012 and later 20-013, regarding liability protection for licensed homes for special care.

The Direction provides that all homes licensed by the Minister of Health and Wellness or the Minister of Community Services under the *Homes for Special Care Act*, as well as their directors, officers and employees, are not liable for damages resulting, directly or indirectly, from an individual being, likely being or put at risk of being infected with COVID-19 on or after Aug. 20, 2020 as a result of such home, director, officer or employee operating under or providing services under the *Homes for Special Care Act*, if, at the relevant time:

a) they were doing so, or reasonably believed they were doing so, in accordance with the *Homes for Special Care Act*, the *Homes for Special Care Regulations* and all applicable government orders and guidance, including emergency and public health orders and guidance, and

b) they were not grossly negligent.

Looking ahead

Since coming into force in November, the Act has not yet been considered in any reported decisions. It will be interesting to see how COVID-19-related lawsuits proceed and the impact of the legislation on those lawsuits.

Reach out to any of the key contacts listed below if you have questions about the Act.

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