

# Pandemic Preparedness for Building Owners and Managers

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## LEGAL CONSIDERATIONS FOR PROPERTY OWNERS AND MANAGERS<sup>1</sup>

### Is There a Legal Obligation for Owners and Managers to Have a Pandemic Plan?

The first consideration for owners and managers of properties is whether there is a legal requirement for them to have a pandemic or health emergency plan. At this time, there is no express legislation in Canada or Ontario which requires owners or managers of properties to have a specific health emergency plan in place. Having said that, there are some provinces which do require employers to perform risk assessments and this of course may imply an obligation to prepare such a plan if in fact a risk is identified.

Notwithstanding this, a legal obligation to prepare for a potential pandemic event may exist for reasons which include:

- (1) As an employer in Canada, applicable legislation requires employers to create and maintain a safe workplace for its employees.
- (2) The possibility of a pandemic or health emergency is now well known to be a significant possibility or likelihood. The relevant government agencies are suggesting businesses have plans in place. Many businesses and industries are preparing and publishing plans. The possibility that a claim may be made

<sup>1</sup> Of Solmon Rothbart Goodman LLP. Some material for this section has been drawn from the Continuity Planning Guide for Canadian Business dated March, 2006 prepared by the Canadian Manufacturers and Exporters Association and the author gratefully acknowledges the excellent guide prepared by the said Association.

Please note that this section provides only a brief overview of some of the legal issues that you may have to consider when developing a pandemic or health emergency plan. No legal advice is being provided that may be relied upon by anyone for any reason in this section and any appendices hereto. The author accepts no responsibility whatsoever for any liability for any acts or omissions done or omitted in reliance, in whole or in part on any information contained in this section or any liability for any claims for loss, damage or other consequence, whether in contract, equity, tort, statute or law of any kind, whether such losses be direct or indirect, special, incidental, consequential or punitive that may relate to the use of this information, howsoever caused. In order to ensure that you have a clear understanding of any legal rights and obligations that you may have, you must obtain proper legal advice from a lawyer and refer to any and all relevant legislation and regulations.

against an owner or manager of a property in negligence for not having a pandemic plan or health emergency plan in place, given the above, is an open question.

Aside from the legal issue, the practical reality for owners and managers is that given all of the public interest and concern relating to the possibility of an avian flu pandemic at this time, tenants are looking to landlords and managers for leadership and co-operation in planning for a possible pandemic event. The National Pandemic Task Force recently conducted focus groups with tenants and suppliers. It is clear that these issues raise serious concerns for owners, landlords, managers, tenants and suppliers alike.

Some limited experience also suggests that landlords that do address potential pandemic or health emergency issues are perceived by tenants to be proactive. A landlord in Quebec that recently installed hand sanitizing stations outside washroom facilities throughout the office tower received positive feedback from tenants who were impressed that the landlord was acting in a proactive manner.

Owners and managers that have well structured workable pandemic or health emergency plans in place that have been communicated to tenants, may well be in a better position to protect the property and rental income from the property. The more prepared tenants are to weather any pandemic emergency, the more likely it is that they will be in a position to continue to carry on their businesses and comply with their rental obligations. Furthermore, owners and managers that have prepared plans and communicated with tenants concerning these matters will be in a better position to resist or better negotiate requests by tenants for rent relief or forbearance agreements in the event of a health emergency.

#### **Relevant Federal Legislation – Pandemics and Other Emergencies**

It is outside the scope of this chapter to deal with all the various legislation federally and provincially which may come into play in a health emergency situation. Listed below are some of the statutes which may be of importance.

##### *Relevant Federal Legislation – Pandemics and Other Emergencies*

###### *Canada Emergencies Act*

The federal *Emergencies Act*<sup>2</sup> (replaces the *War Measures Act* — 1914) is a tool of last resort that covers four classes of emergency: public welfare, public order, international affairs and war. It is intended to respond to an

<sup>2</sup> R.S.C. 1985, c. 22 (4th Supp.).

emergency at the national level and can only be invoked after it has been determined that a critical situation cannot be effectively dealt with under any other law in Canada and that the situation is either:

- of such proportions as to exceed the capacity or authority of a province to deal with it (such as during a pandemic); or
- it seriously threatens the Government of Canada's ability to preserve sovereignty, security or territorial integrity.

*Emergency Management Act*<sup>3</sup>

The *Emergency Management Act* requires every federal ministry to develop and implement emergency preparedness measures. Since its inception, this Act has led to the development of several federal emergency response plans, including Health Canada's Canadian Pandemic Influenza Plan.

*Relevant Provincial Legislation*

*Emergency Management and Civil Protection Act*<sup>4</sup>

The Ontario *Emergency Management and Civil Protection Act* empowers the Premier to declare an emergency to protect property and the health and safety of the inhabitants of the emergency area.

The *Emergency Management Statute Law Amendment Act, 2006*<sup>5</sup> amends the *Emergency Management Act, 2000*, the *Employment Standards Act, 2000* and the *Workplace Insurance Act, 1997*. The EMSLAA brings Ontario more into line with emergency legislation in other jurisdictions, and it gives the Premiers and/or Cabinet the powers to:

- order the evacuation of an area, control travel into an area and requisition property;
- stop price gouging;
- authorize those who would not otherwise be eligible to do so, to perform certain duties (e.g., allowing doctors from other jurisdictions to work in Ontario for the duration of the declared provincial emergency);
- close certain private and public places;
- authorize facilities, such as electrical generating facilities, to operate as necessary to address the emergency.

<sup>3</sup> S.C. 2007, c. 15.  
<sup>4</sup> R.S.O. 1990, c. E. 9.  
<sup>5</sup> S.O. 2006, c. 13. ("EMSLAA")

*Ontario Health Protection and Promotion Act*<sup>6</sup>

Under the *Ontario Health Protection and Promotion Act*:<sup>7</sup>

- physicians, laboratories, school principals and others must report certain diseases, including influenza, to medical officers of health;
- persons who pose a risk to the public health may be ordered to do, or to stop doing anything to reduce the risk of disease transmission;
- physicians are required to report to the medical officer of health the name and address of any person who is under the care and treatment of the physician in respect to a communicable disease and who refuses or neglects to continue the treatment in a manner and to a degree satisfactory to the physician;
- appropriate action may be taken to prevent, eliminate or decrease health risks;
- premises may be required to be used as temporary isolation facilities.

**Owners and Managers as Employers**

Any pandemic or health emergency that involves a biological virus may constitute a hazardous substance that is regulated by Part II of the *Canada Labour Code*<sup>8</sup> and its regulations and the provincial Occupational Health and Safety Acts and their regulations. Reference should be made to the applicable federal and provincial legislation. A hazardous substance is defined as “a controlled product and a chemical, biological or physical agent that, by reason of a property that the agent possesses, is hazardous to the safety or health of a person”.<sup>9</sup> The most relevant sections of the *Canada Labour Code* and the *Ontario Occupational Health and Safety Act*<sup>10</sup> are set out below:

<sup>6</sup> Comparable statutes exist in other provinces.

<sup>7</sup> R.S.O. 1990, c. H.7.

<sup>8</sup> R.S.C. 1985, c. L-2.

<sup>9</sup> *Supra*, s. 122.

<sup>10</sup> R.S.O. 1990, c. O.1.

<i>Canada Labour Code, Part II Occupational Health and Safety</i> <sup>11</sup>	<i>Ontario Occupational Health and Safety Act</i> <sup>12</sup>
<p><b>Section 124</b> Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.</p>	<p><b>Section 25(2)(h)</b> Without restricting the strict duty imposed by subsection (1), an employer shall take every precaution reasonable in the circumstances for the protection of a worker;</p>
<p><b>Section 125(1)</b> Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, . . .</p> <p>(p) ensure, in the prescribed manner, that employees have safe entry to, exit from and occupancy of the work place; . . .</p> <p>(s) ensure that each employee is made aware of every known or foreseeable health or safety hazard in the area where the employee works;</p>	<p><b>Section 25(2) (a)</b> Without restricting the strict duty imposed by subsection (1), an employer shall provide information, instruction and supervision to a worker to protect the health and safety of the worker.</p> <p><b>Section 25(2)(d)</b> Without restricting the strict duty imposed by subsection (1), an employer shall acquaint a worker or person in authority over a worker with any hazard in the work and in the handling, storage, use, disposal and transport of any article, device, equipment or a biological, chemical or physical agent.</p>
<p><b>Section 128(1)</b> Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that . . .</p>	<p><b>Section 43(3)(b) Refusal of Work</b> — A worker may refuse to work or do particular work where he or she has reason to believe that; . . .</p>

<sup>11</sup> The full *Canada Labour Code Part II—Occupational Health and Safety* is available online at: <http://laws.justice.gc.ca/en/L-2/146493.html#rid-146499>.

<sup>12</sup> The full *Ontario Occupational Health and Safety Act* is available online at: [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90o01\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90o01_e.htm).

<b>Canada Labour Code, Part II Occupational Health and Safety</b>	<b>Ontario Occupational Health and Safety Act</b>
(b) a condition exists in the place that constitutes a danger to the employee; ...	(b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself ...  <b>Section 43(6) Refusal to work following investigation</b> — ... the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.
<p><b>Section 145 (2)</b> If a health and safety officer considers that the use of operation of a machine or thing, a condition in a place constitutes a danger to an employee while at work,</p> <p>(a) The officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to:</p> <p>(i) correct the hazard or condition or alter the activity that constitutes the danger, or</p> <p>(ii) protect any person from the danger ...</p>	<p><b>Section 43(7) Investigation by inspector</b> — An inspector shall investigate the refusal to work in consultation with the employer or a person representing the employer, the worker, and if there is such, the person mentioned in ...</p> <p><b>Section 43(8) Decision of inspector</b> — The inspector shall, following the investigation ... decide whether the machine, device, thing or the workplace or part thereof is likely to endanger the worker or another person.</p> <p>(9) <i>Idem</i> — The inspector shall give his or her decision, in writing, as soon as is practicable, to the employer, the worker, and if there is such, the person mentioned in ...</p> <p><b>Section 47 (3) Constructor's or employer's duties</b> — The constructor or employer shall immediately comply with the direction and shall ensure that compliance is effected in a way that does not endanger the person.</p>

### *Three Rights of Employees*

Both federal and provincial occupational health and safety legislation provides three rights:

- (1) *Right to Know* — Employees have the right to be informed of known or foreseeable hazards such as pandemic influenza. They must be given the information, instruction, training and supervision necessary to protect their health and safety. Effective communication will be crucial in preparing for and controlling pandemic influenza.
- (2) *Right to Participate* — Employees have the right and responsibility to identify and correct job-related health and safety issues. They could exercise this right during pandemic influenza. Employees can also participate through a complaint process and may complain if pandemic influenza has not been well handled.
- (3) *Right to Refuse* — Employees can refuse work where there is reasonable cause to believe:
  - a condition exists;
  - an activity constitutes a danger to one or more employees.

It is possible that employees may refuse work when pandemic influenza poses a danger.

### *Duties of Employers and Employees*

Under both federal and provincial occupational health and safety legislation:

- *Employers* — must ensure the health and safety of every employee is protected. This may require the implementation of programs, plans and response actions for pandemic influenza, and
- *Employees* — have obligations to prevent occupational related injuries and diseases. They must take reasonable and necessary precautions to ensure their own and others' health and safety.

In the event of pandemic influenza, employees could exercise this obligation and would require guidance, training, education, cleaning substances and protective clothing such as protective barriers, gloves and masks.

### Owners as Landlords

There are very significant and varied issues that owners as landlords will face in any pandemic or health emergency event. It is not possible to anticipate all of the legal issues that may arise however, it is possible to suggest that the following issues should be considered and included in any such discussion or plan as the case may be.

#### *Quiet Enjoyment*

- The landlord may wish to limit or restrict access to the property or any part thereof during a health emergency or pandemic. It is questionable as to whether the landlord under existing leases has the right to do so.
- Does the landlord have the right to conduct health screenings?
- Can the landlord require that only employees of the tenant are permitted to enter the building as opposed to visitors or invitees?
- Can landlords require a particular tenant or a particular type of tenant and its staff and invitees to use only one designated entrance, exit or escalator or elevator as the case may be. For example, you may have a medical clinic or doctor's office in the building. In the case of a health emergency, tenants in the building may be concerned about the fact that medical patients may be using the same entrance or elevator. The landlord may wish to have the right to designate a particular entrance or elevator to be utilized solely by a specific tenant or group of tenants in a health emergency.
- Can landlords enter a tenant's premises to decontaminate any part of the tenant's premises? It is conceivable that an employee or invitee of the tenant may suffer from an illness or disease which may contaminate the leased premises. The landlord may wish to take steps to either require the tenant to decontaminate the premises or failing that, enter the premises to decontaminate at the tenant's expense. It may be that the landlord will wish to do this prior to any possible public health order. The legal basis for the landlord entering the leased premises and taking steps to decontaminate it would be questionable without a health emergency article contained in its lease. Of course, the landlord does not want to have the obligation to do this and any health emergency regulation must provide that any steps that the landlord may choose to take or omit to take are in its sole and unfettered discretion and that there is no obligation on the landlord to take any action.



*Quarantine or Closing All or Part of Building*

- Can the landlord close all or part of the building where it has been determined that there has been a health emergency notwithstanding that there has not been a closure or quarantine order by any governmental authority?
- Can the landlord close all or part of the building where it determines that it is not safe to continue to operate the building, it does not have the available staff, equipment or ability to maintain the operations of the building?

*Force Majeure Clauses*

- Most sophisticated leases have a well-defined force majeure clause but it may not include provisions that do not expressly include a health emergency such as a pandemic or epidemic.

*Limitation of Liability*

- Ensure that lease provisions adequately protect the landlord, its officers, directors, property managers and agents from liability in carrying out the terms of any pandemic plan or in dealing with any health emergency situation.
- As an example, consider the situation where the cleaning staff (independent contractors) inadvertently spread a virus or other health emergency biohazard in the building. If there is any suit, it is likely that the “deep pocket” landlord defendant will be included in any negligence claim.

*Tenant Reporting to Landlord*

- Landlords will have an interest in knowing if there have been any incidences of illness experienced in a tenant’s premises or amongst the tenants’ employees. Can the landlord require the tenant to report any incidences of illness amongst its employees to the landlord?
- Are there privacy issues which put the landlord in a position where it cannot communicate the fact of illness in a particular tenant’s premises? Can it generally disclose the fact of illness in the building? Does it have a duty to disclose the fact that there have been any incidences of illness in the building to other tenants?

*Rent Defaults*

- In any health emergency, it is likely that there will be tenants that will default in the payment of rent. Landlords may wish to

determine in advance what criteria they may utilize to decide whether any tenants may be offered rent relief and on what terms. In some circumstances, landlords may decide to request further security in exchange for any forbearance agreement.

#### *Services to Leased Premises*

- In a health emergency, the landlord may wish to reduce or cease any particular services to the leased premises or common areas. In particular, the landlord may be in a position where it must reduce cleaning and trash removal services. Cleaning staff will be on the front line of dealing with any health emergency and many may become ill or not report to work. The landlord may wish to have a step down plan for certain services. It is probably a good strategy to have those discussions with tenants well before any emergency situation arises. Tenants will, therefore, be in a position to include in their own plans the fact that they may have to take on some of the cleaning or other obligations in the leased premises.
- Can the landlord download some of its obligations pursuant to the lease on the tenant in the case of a health emergency?
- Given the fact that social distancing would be a very significant strategy employed by many tenants to maintain their business operations, landlords may find many tenants requesting that the building hours of operation be extended to facilitate employees working in shifts which may include late evening hours. This is especially the case if there is a transit shutdown or limitations placed on public transit given potential staff reductions. In those circumstances, many more employees may find that the only way for them to travel to work is to drive to the office. Evening shifts will allow for tenants to maximize the parking facilities in the building to facilitate evening workers that have to drive to the office. There are of course significant building operation issues that flow from this concerning building services and the costs relating to those services.

#### *Emergency Drills*

- Tenants generally understand that they have to participate in fire drills. At some point, a landlord may wish to conduct a health emergency drill in all or part of the building. Can the landlord require tenants to participate in health emergency drills?

### **Existing Leases versus New Leases**

Many of the above-noted issues may be considered by the owner/landlord as a basis for amending their lease forms to include expanded health emergency rights or powers. These lease forms may include a specific definition of a health emergency and include a section on health emergency or general emergency powers that a landlord may invoke. Any rights of the landlord will likely be structured in permissive terms so as to avoid the same creating any duty on the landlord. Likely these provisions will have clear exclusionary wording to expressly exclude the imposition of any duty on the landlord to declare a health emergency or invoke any positive duty on the landlord to take any steps that it may have the power to decide to take.

Insofar as existing leases are concerned, it is unlikely that the landlord can make any amendments to the lease form itself without the consent of the tenant. Having said that, most commercial leases do give the landlord the power to pass regulations relating to the operation of the building on an ongoing basis and landlords may wish to utilize that right to draft and deliver a set of health related regulations that may deal with a number of the issues set out above.

The question as to whether the landlord will wish to make amendments to its lease form to include rights concerning health emergency issues is one that will be of course specific to each landlord's situation and experience. Some experienced leasing counsel suggest that including these types of rights in favour of the landlord may spur further negotiations of these clauses by tenants and increase the time, effort and expense in negotiating leases. Each landlord will of course have to balance the risks and rewards in its decision-making process.

A draft form of a proposed health emergency article has been prepared for discussion purposes only and is attached to the end of the chapter as Appendix A. To be clear, it has been prepared solely for the purposes of this section and is not intended to be relied upon as a comprehensive health emergency article for insertion into a lease document.

### **Landlord/Tenant Co-Operation in Health Emergency**

During a pandemic or other emergency, it is important for landlords and tenants to work together. During a pandemic, medical officers of health, as well as other medical health professionals are expected to be given expanded powers to protect public health and safety. For instance, if a health professional identifies a patient as being a suspect, or confirmed case of seasonal influenza or pandemic influenza, then that health professional will be required to commence contact tracing procedures (like they did during the SARS epidemic) in accordance with the protocols set by the medical officer of health at that time. This is likely to involve

making contacts with the patient's workplace so that those exposed to the infected person can be formally identified, notified and ordered into isolation or quarantine for time periods specified by public health officials.

Under Ontario's Health Plan for an Influenza Pandemic (September, 2006) several new reporting requirements are proposed to increase surveillance activities during the pandemic period. Among the proposals, Ontario workplaces will be required to report employee absenteeism rates to the medical officers of health. Such a requirement will put the onus on all Ontario employers—whether they are landlords or tenant employers—to develop pandemic response plans, or at the very least a disease surveillance and infection control program for their ill employees and those they come into contact with.

If a landlord or tenant worker gets sick at work, strict procedures will be needed to minimize the risk of exposing others in the building to infection. For example, the infected person's workstation and other personal objects will need to be disinfected, whether that responsibility rests with the landlord or tenant employer.

### Property Managers

- Property managers and agents managing properties for owners will be charged with managing the building through any health emergency or pandemic event. They may be called upon to implement the owner/landlord pandemic plan and should of course become familiar with it or alternatively, they may be requested by the owner/landlord to prepare a plan.
- Property managers may wish to ensure that their contracts of engagement with owners properly cover off and indemnify them for any claims that may be made in relation to their operation of the property on behalf of the owner during a pandemic or other health emergency.
- Property managers may wish to suggest to owners/landlords that they consider preparing or adopting a health emergency or pandemic plan as part of their business continuity planning and address the issues referred to above.<sup>13</sup>

<sup>13</sup> This paper is the work product of a legal sub-committee to the National Pandemic Task Force as prepared for the Influenza Pandemic Planning Guide for Commercial Buildings which legal sub-committee was chaired by Wayne Banting P-Eng, Director — Environmental & Health and Safety Services National Operations, Cadillac Fairview Corporation. Other committee members include Randall M. Rothbart, B.A., LL.B., Solmon, Rothbart, Goodman, LLP; J.E. Dennis Daoust, LLB, Daoust Vukovich LLP; Deborah Rogers, Senior Vice President, Legal Eastern Canada, Brookfield Properties; Ellen Williamson, Senior Director of Legal Services, Cadillac Fairview Corporation and Jeffrey Lem, LL.B., Davies Ward Phillips & Vineberg LLP.

**Appendix A**  
**Health Emergency Article<sup>14</sup>**

1. In this Article the following definitions apply:

**Landlord Person:**

a human being that is an officer, director, employee or agent of the Landlord, of a management business employed by the Landlord, of a contractor that does work, in connection with the Building or of supplier of services in connection with the Building.

**Tenant Person:**

a human being that is an officer, director, employee of any tenant or occupant of the Building, of a contractor that does work for any tenant or occupant of the Building, or of a supplier of services in connection with any areas or space suitable for use or occupation in the Building.

**Health Emergency:**

a situation in which the Landlord determines, based on advice from a medical professional, or a directive, bulletin, notice or other form of communication from a public health official, that Landlord Persons or Tenant Persons are or may be exposed in or at the Building to imminent danger from any diseases, viruses or other biological or physical agents that may in any way be detrimental to human health which include by way of example, SARS and Avian Flu (H5N1).

2. If the Landlord, acting in good faith, determines, that a Health Emergency exists:
- (a) The Landlord may amend, supplement or otherwise enforce any existing health emergency rules or regulations in existence; may pass additional rules and regulations and may impose restrictions, to mitigate or minimize the effects of the Health Emergency by controlling access, to parts of the Building, imposing sanitization requirements, and implementing health precautions consistent with advice from medical experts or public health officials.
  - (b) The Landlord will not be in default by reason of:
    - (i) anything it does pursuant to Section 2(a) above
    - (ii) by reason any decision it makes in good faith in response to the Health Emergency and will not be liable in contract, tort or on any other basis of liability statutory or otherwise, by

<sup>14</sup> This draft article was in substance prepared by J.E. Dennis Daoust of Daoust Vukovich LLP.

reason of any actions, omissions or failure to act in connection with or as the result of a Medical Emergency.

- (c) If the Landlord, due to a Health Emergency acting in good faith, determines that it needs to suspend, reduce, or restrict Building Services, in whole or in part including but not limited to janitorial services, it will not be considered to be in default under this Lease.