

# 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>

