

ONTARIO BILL PROPOSES TO LIMIT LIABILITY FROM COVID-19

*By Terrance S. Carter and Sean S. Carter**

A. INTRODUCTION

IN A MOVE to provide protection for workers, volunteers and organizations from certain types of liability related to COVID-19, the government of Ontario introduced [Bill 218, *Supporting Ontario's Recovery and Municipal Elections Act, 2020*](#)¹ on October 20, 2020, which was most recently carried on division and referred to the Standing Committee on Justice Policy on October 27, 2020. If passed, Schedule 1 of Bill 218 will enact the *Supporting Ontario's Recovery Act, 2020* upon Royal Assent (the "Act"), which will protect persons from legal liability from claims where other individuals either have, or potentially have been, infected with or exposed to COVID-19.

According to the government's October 20th [announcement](#) of the draft measures, the Act is intended to protect those who "make an honest effort to follow public health guidelines and laws relating to exposure to COVID-19. At the same time, it will maintain the right of Ontarians to take legal action against those who willfully, or with gross negligence, endanger others."² The government further indicated that this targeted protection will be available to a range of persons, including healthcare workers and institutions,

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¹ Bill 218, *An Act to enact the Supporting Ontario's Recovery Act, 2020 respecting certain proceedings relating to the coronavirus (COVID-19), to amend the Municipal Elections Act, 1996 and to revoke a regulation*, 1st Sess, 42nd Leg, Ontario, 2020 (second reading 27 October 2020) ["Bill 218"].

² Attorney General of Ontario, "Ontario Protects Workers, Volunteers and Organizations Who Make Honest Efforts to Follow COVID-19 Public Health Guidelines and Laws" online: Government of Ontario <<https://news.ontario.ca/en/release/58886/ontario-protects-workers-volunteers-and-organizations-who-make-honest-efforts-to-follow-covid-19-pub>>.

charities, non-profit organizations, and coaches, volunteers and minor sports associations. This *Bulletin* provides a brief summary of the Act and its impact on charities and not-for-profits, if passed.

B. PROPOSED PROVISIONS UNDER THE ACT

THE ACT PROVIDES that no person will be held liable where, as a direct or indirect result of that person's act or omission, another person has actually or potentially been infected with or exposed to COVID-19, on or after March 17, 2020. However, to be protected from liability, the person must have acted or made a "good faith effort" to act in accordance with COVID-19-related "public health guidance" and federal, provincial and municipal law (including regulations, orders, by-laws and other statutory instruments) (the "Protected Grounds").

The Act defines a "good faith effort" as including "an honest effort, whether or not that effort is reasonable",³ but does not otherwise provide clarity on what else might or might not constitute a good faith effort. With respect to "public health guidance", the Act broadly defines this as meaning:

advice, recommendations, directives, guidance or instructions given or made in respect of public health, regardless of the form or manner of their communication, by any of the following:

- i. The Chief Medical Officer of Health appointed under the Health Protection and Promotion Act, an Associate Chief Medical Officer of Health under that Act or the Office of the Chief Medical Officer of Health.
- ii. A person appointed as a medical officer of health or associate medical officer of health of a board of health under the Health Protection and Promotion Act, or an employee of a board of health.
- iii. A public health official of the Government of Canada.
- iv. A minister or ministry of the Government of Ontario or Canada, or an officer or employee in such a ministry.
- v. An agency of the Government of Ontario or Canada or an officer or employee in such an agency.
- vi. A municipality or an officer or employee of a municipality.

³ Bill 218, *supra* note 1, s 1(1).

vii. A regulatory body having jurisdiction over a person, or an officer or employee of such a regulatory body.⁴

In addition to acting or making a good faith effort to act in accordance with public health guidance and federal, provincial and municipal law, persons must also not have acted or omitted to act in a manner that constitutes gross negligence in order to be protected from liability. In this regard, the threshold of liability for gross negligence under the Act is higher than that of mere negligence. Further, the Act also specifically bars proceedings that are directly or indirectly based on, or related to, the Protected Grounds. As part of barring such proceedings, the Act deems any proceedings concerning actual or potential COVID-19 infection or exposure that are commenced prior to the date that the Act comes into force to have been dismissed without costs if they do not meet the Act's requirements. In this regard, the Act provides protection from liability retroactively.

However, the protection from liability under the Act would not apply with respect to acts or omissions that occurred while a law required the organization's or business' operations to close, in whole or in part, and relate to an aspect of the organization's or business' operations that was required to close under the law.⁵ As well, pursuant to subsection 4(2) of the Act, protection from liability is not offered with respect to a cause of action or proceeding arising from a cause of action of: i) "an individual in respect of an actual or potential exposure to or infection with coronavirus (COVID-19) that occurred in the course, or as a result, of employment with a person or in the performance of work for or supply of services to a person;"⁶ ii) "workers employed by a Schedule 1 or Schedule 2 employer [as identified in the *Workplace Safety and Insurance Act, 1997*,⁷] or of the worker's survivor, in respect of a personal injury by accident arising out of and in the course of the worker's employment or an occupational disease;"⁸ or iii) "a worker who is or was employed by a Schedule 1 employer or Schedule 2 employer, or of the worker's survivor, to which the Workplace Safety and Insurance Board or Schedule 2 employer, as the case may be, is subrogated under section 30 of the *Workplace Safety and Insurance Act, 1997*."⁹ As such, the Act, as currently drafted, does not protect employers from liability with respect to claims launched by their employees.

⁴ *Ibid.*

⁵ *Ibid.*, s 3.

⁶ *Ibid.*, s 4(2)3.

⁷ SO 1997, c 16, Sched A.

⁸ Bill 218, *supra* note 1, s 4(2)1.

⁹ *Ibid.*, s 4(2)2.

C. CONCLUSION

IF ENACTED, the Act will provide broad and retroactive protection against liability for charities and not-for-profits, as well as other organizations, against claims from third parties related to actual or potential infection or exposure to COVID-19 where those organizations have made a “good faith effort” to comply with public health-related guidance and laws, and will impose high evidentiary requirements (*i.e.* a finding of gross negligence) on individuals seeking to bring action against such organizations for such claims. Nonetheless, and given the remaining potential for liability that will still exist for instances of gross negligence, charities and not-for-profits should continue to monitor and ensure they are complying with all public health-related guidance and laws when carrying out their activities. Further, as the Act has not yet received Royal Assent, charities and not-for-profits will need to closely monitor the Act, as it may be amended prior to Assent, and should seek legal advice concerning the application of the Act or in the event of a COVID-19 liability claim.



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