

LEGISLATIVE UPDATE

November 2020

Bill 218: Supporting Ontario's Recovery and Municipal Elections Act, 2020

Context

On November 20, 2020, Bill 218, *Supporting Ontario's Recovery and Municipal Elections Act, 2020* received Royal Assent and came into effect.

Schedule 1 of this legislation is intended to provide protections from legal action for any person (legally defined to include both individuals and organizations), arising as a direct or indirect result of an individual being or potentially being infected with or exposed to coronavirus (COVID-19), based on good faith efforts to comply with applicable law and public health guidance. The protections are retrospectively effective as of March 17, 2020 – the day the provincial government declared a state of emergency.

The Ontario Hospital Association (OHA) has prepared this Backgrounder to provide members with a high-level overview of this legislation. For further information, please refer to a copy of the Bill ([here](#)) and the government's news release ([here](#)).

Key Highlights of the Changes

This legislation:

- Provides protections based on good faith efforts from legal action related to specific types of COVID-related claims;
- In its retrospective effect, dismisses certain legal proceedings related to specific types of claims started on or after March 17, 2020;
- Carves out exceptions that would allow certain causes of action (those related to employment and performance of work) to proceed; and
- Takes effect upon Royal Assent (November 20, 2020).

Nature and Scope of Legal Protections

No cause of action in certain circumstances

Section 2 of the legislation provides that no cause of action arises against any person¹ 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 COVID-19 that applied to the person, and

¹ Under corporate law and other applicable legislation, the term "person" includes both natural persons and corporate bodies.

LEGISLATIVE UPDATE

- ii. any federal, provincial or municipal law relating to COVID-19 that applied to the person; and
- b) the act or omission of the person does not constitute gross negligence.

It is important to note that the protection from immunity is intended to be limited only to claims arising (directly or indirectly) from a person being infected with or exposed to COVID-19, based on the direct or indirect acts or omissions of others.

The immunity is not intended to cover other types of actions that might be brought on issues other than COVID infection and exposure.

It should also be noted that the legislation outlines several key definitions to capture the scope of legal protections:

- “good faith effort” includes an honest effort, whether or not that effort is reasonable; and
- “public health guidance” is given a broad definition, to capture not only legal instruments (such as Orders), but also advice, recommendations, directives, guidance, and instructions given by provincial and federal public health officials, the Government of Ontario and Canada, and provincial regulatory bodies.

The term “gross negligence” is not defined in the legislation and would receive its ordinary interpretation in common law (i.e. through case law).

Vicarious Liability

Section 2(8) of the legislation specifically covers the issue of vicarious liability (a situation in which one party, such as an employer, is held legally responsible for the acts or omissions of another party, such as an employee).

The legislation provides that a person (such as an employer) could not be held vicariously liable, where another person (such as the employee) could not be held liable themselves, given the statutory bar on a cause of action described above.

In other words, the legislation would make it impossible to bring a cause of action against an employer on the grounds provided in the legislation, if an employee is protected by the scope of the legal immunity provided in the legislation.

Bar on proceedings and retrospective effect

The legislation would bar all proceedings after March 17, 2020 that are directly or indirectly based on the grounds outlined above. Proceedings that are directly or indirectly based on or related to any such matter may not be brought now that the legislation has come into force.

In addition, any actions that exist when the legislation came into force would be deemed to have been dismissed without costs (i.e. the legislation will have retrospective effect). No compensation would be payable for the extinguishment or termination of such rights.

LEGISLATIVE UPDATE

Exceptions to the general bar on claims

The legislation sets out a number of exceptions to the general bar on claims. A claim falling into one of the categories below would not be subject to the legislation (i.e. such claims could proceed):

1. A cause of action of a worker who is or was employed by a Schedule 1 employer or Schedule 2 employer, 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.
2. A cause of action of 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*.
3. A cause of action of 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.
4. A proceeding arising from a cause of action referred to in paragraph 1, 2 or 3 above.

The legislation also clarifies that existing rights under section 31 of the *Workplace Safety and Insurance Act* (i.e. decisions regarding benefits claimed under the *Insurance Act*) would not be affected. This preserves the rights of applicants seeking determinations before the Appeals Tribunal on specific statutory accident benefits matters.

Effective date

The legislation took effect on the day that it received Royal Assent (November 20, 2020). It does not require further proclamation.

Comparable Legislation

It should be noted that there is comparable legislation in other jurisdictions in Canada. For example, in British Columbia, legislation bars legal proceedings arising directly or indirectly from an individual being, or likely being, infected from COVID-19, except in cases of gross negligence.² The civil liability protections provided by the law extend to any person (including hospitals) engaged in a number of activities, including operation or provision of an essential service; or activities that have the purpose of benefiting the community or any aspect of the community. For a person to be protected under the regulation, they must have been acting in accordance with, or had reasonable belief that they were acting in accordance with, all applicable emergency and public health guidance.

Similarly, in Nova Scotia, a Direction (Order) has been issued by the Minister of Health under applicable emergency legislation, indicating that long-term care homes cannot be held liable for damages resulting directly or indirectly from an individual being, likely being or put at risk of

² BC Reg 204/2020 – Limits on Actions and Proceedings (made under *the COVID-19 Related Measures Act*)

LEGISLATIVE UPDATE

being infected with COVID-19.³ For a person to be protected under the regulation, they must have been acting in accordance with, or had reasonable belief that they were acting in accordance with, all applicable emergency and public health guidance; and exclusions are made for gross negligence. Hospitals do not appear to be covered by the Direction.

Timeline and Next Steps

The legislation has received Royal Assent and is now in effect.

The OHA continues to monitor issues around COVID-related liability and will provide members with further updates as they become available.

For more information, please contact Alice Betancourt, Senior Legal and Policy Advisor at abetancourt@oha.com or 416 205 1365.

³ Direction of the Minister under a declared state of emergency (section 14 of the Emergency Management Act) – 20-012.