

Are you essential?: COVID-19 business closure orders in Canada

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As the coronavirus crisis deepens in Canada, the regulatory and business landscape continues to rapidly change. The provinces of Ontario and Québec have now ordered the mandatory closure of all non-essential workplaces in those provinces. Companies have only a day's notice to determine whether they qualify as an essential service and assess the implications of that determination. Similar restrictions have been implemented in certain U.S. states. Boards and management teams must adapt and make strategic decisions in unprecedented circumstances.

What you need to know

- **Business closure orders issued in Ontario and Québec.** The governments of Ontario and Québec have issued similar orders mandating the closure of all “non-essential” (Ontario) or “non-priority” (Québec) workplaces for two weeks in Ontario and three weeks in Québec (with possible extensions).
- **Remote work arrangements and online commerce are permitted.** Telework and online commerce are permitted for all businesses.
- **Essential/priority services can continue to operate.** Essential/priority services may continue in order to maintain supply chains and ensure the public's access to necessities. The scope of essential/priority services is defined on the [Ontario](#) and [Québec](#) provincial websites, with some material differences between the two jurisdictions. The lists of essential/priority workplaces are extensive. Many businesses that might not typically be considered “essential” are permitted to continue operating. In Québec, the continued operation of some businesses seems to be mandatory (see our comparative list below).
- **Changes to the lists of permitted services.** Both governments are working in real time in assembling and revising the lists of workplaces that are not required to close. Several additions have already been made to the Québec list since it was first issued. Further additions may be possible.

- **Inquiries and disputes.** The governments have indicated that they will provide a forum for inquiries today. It is unclear what the availability and functionality of those mechanisms will be until they are up and running. To the extent companies disagree with a determination, legal remedies may be impractical in the current environment. There are penalties for organizations that do not comply with the business closure orders.
- **Implications to your business.** Companies facing business closure orders must quickly assess the various implications to their business—including the impact on their workforce, business continuity, financial and liquidity issues, timely disclosure issues, the performance of contractual obligations, counterparty risk, force majeure assertions, litigation and reputational risks—while trying to both mitigate these impacts and understand the economic support measures and relief being offered by governments, lenders and other creditors.

Overview of current government action

Declarations of emergency and social distancing orders

There have been a substantial (and growing) number of orders made by provinces and territories relating to the COVID-19 outbreak. Most provinces have declared “states of emergency”, while others have declared “public health emergencies” under their various legislation. Many provinces have banned large gatherings and issued “social distancing” orders. Several provinces have issued business closure orders.

There have been increasing levels of enforcement measures to ensure compliance. Non-compliance with these orders is generally punishable by fines (ranging from \$100 to \$25,000, depending on the province) and in some cases prison sentences of up to 6 months or 1 year. Ontario has the stiffest penalties: non-compliance with emergency orders carries a maximum fine of \$10 million in the case of a corporation and \$500,000 in the case of a director or officer of a corporation.

Business closure orders in Ontario and Québec

On March 23, 2020, both the Ontario and Québec governments announced they will be ordering the mandatory closure of all “non-essential workplaces” (“non-priority” in Québec), effective midnight on Tuesday March 24/Wednesday March 25. The closures will be in effect for 14 days in Ontario, and 21 days in Québec, with the possibility of extending the orders as the situation evolves.

- The orders provide that essential/priority services may continue their operations to maintain supply chains and ensure the people of Ontario and Québec have access to groceries, medicines and other essential products. Several additions have already been made to the Québec list since it was first issued.
- The lists of essential/priority services were published on March 23rd on each government’s websites. The lists may be updated as the situation evolves.
- In Québec, the continued operation of certain businesses seems mandatory rather than simply permissive.
- In both provinces, telework and online commerce are permitted at all times for all businesses.
- Telephone inquiry lines and websites will be made available for inquiries.
- In Québec, if a business activity is not listed, but a company believes that it is providing essential services or functions, it can apply for a designation as an essential business.

A high-level summary of the essential/priority services published on the websites of the governments of Ontario and Québec is below.¹ Organizations should consult the actual government lists in each province to assess whether some or all aspects of their business are required to close. Given the changes already made to the lists, and the detailed

definitions and exceptions in each list, consulting the lists directly is critical.

Limited business closures in other provinces

Certain provinces previously implemented limited business closure measures. New Brunswick has ordered that all retail business cease operations, with some exceptions for those supplies deemed essential (largely pharmacy and grocery). Prince Edward Island recently limited services in the public sector to those that are deemed “essential” government services.

Border controls within Canada

The federal government has instituted increasingly strict border control measures over time. With respect to the recently imposed U.S.-Canada border controls, border authorities are broadly allowing “trade” while restricting recreational travel and tourism. To date, cross border trade is not being limited to “essential” trade or services. Within Canada, the Northwest Territories and Nunavut have enacted border controls restricting land and air travel to their territories, while permitting certain essential services and certain categories of transient workers.

Local restrictions

Local governments have the authority to make similar orders, although there is no central repository of municipal orders and they would have to be investigated on a municipality-by-municipality basis. The municipal orders, to the extent invoked, are often subsequently overridden by stricter provincial requirements. Notably, Vancouver Mayor Kennedy Stewart declared a state of emergency in Vancouver on March 19, and yesterday, Toronto Mayor John Tory declared a state of emergency in Toronto².

Which services are “essential”?

Within many businesses, there may be cross-over of business activities and services, some of which are required to close under the recent business closure orders and some of which are not. This may lead to confusion and difficulty distinguishing businesses and individual workers who often perform services in both categories. If an organization is permitted to remain open because it falls within one or more of the categories on the essential services list, an assessment should be made of whether it is reasonable or practicable to close some but not all of the business, and whether it would serve the underlying purpose of the business closure orders to do so.

It is important to distinguish between an “essential service” for purposes of the business closure orders (which permit the operation of a wide array of organizations), and other, narrower essential services designations under other legislation or government orders. In the latter context, designation as an “essential service” may carry the responsibility of making those services available, and companies may not be able withhold or limit services. For example, Ontario recently issued a temporary order in the health care sector effectively overriding the terms of the applicable collective agreements for hospital staff. If the federal Emergencies Act is invoked (i.e., if a public welfare emergency is declared), then the federal government is empowered to force into action workers who are qualified to provide essential services. There also may be labour challenges and disputes if workers do not want to provide those services (for example, if they do not feel their own health and well-being are being adequately protected).

Clarifications and disputes on what is “essential”

Many governments are providing the opportunity for businesses to seek clarification on determinations of “essential services”. The governments of Ontario and Québec have indicated that they will provide a mechanism and resources for inquiries relating to their business closure orders. The government of Québec has already made several additions to its list of “priority services.” Both governments are operating in real time, and there may be opportunities to communicate with government through appropriate channels to recommend changes to the business closure orders.

Certain statutes expressly permit individuals or businesses affected by an order to seek administrative reconsideration, directly to the authority that made the order. In other provinces, there are no equivalent provisions allowing for administrative review. There is nothing prohibiting an affected party from asking for reconsideration, even if the statute does not contain a specific mechanism permitting it. However, such reconsideration is unlikely to be dealt with expeditiously in the current political environment.

It is possible to challenge these orders in court, but the courts are closed for everything but emergencies, and the likelihood of success is limited given the discretion provided to public health and elected officials in emergencies.

Health and safety

As an overriding consideration, businesses are concerned with protecting their workers' health and safety in this rapidly changing environment. Employers have obligations under provincial occupational health and safety legislation to ensure the workplace meets certain health and safety requirements and to report injuries which occur in the workplace. In most Canadian jurisdictions, applicable occupational health and safety legislation gives a worker the right to refuse work that he or she believes is unsafe to himself/herself or another worker.

COVID-19 risks may lead to employee claims if employees who are continuing to work do not consider their workplace to be safe. Governments have made it clear that, for essential services, social distancing, cleaning and safe work practices should be maintained. The intersect between employees who are mandated to work and employees who feel that their own safety and welfare is at risk may create unique legal and moral dilemmas for businesses.

Operational considerations

Companies facing business closures (whether mandatory or voluntary) must quickly assess the various implications to their businesses and available mitigation steps (read our bulletin covering key issues for boards and management [here](#)), including:

- **the impact to the workforce**, the ability for employees to continue to work remotely and through telecommerce, the need for layoffs and other cost-cutting and capital-preserving steps (get our latest on COVID-19-related Canadian employment issues [here](#));
- **measures to create a safe work environment** and communication with employees regarding their safety and workplace practices for those in essential services, as well as providing employees with written correspondence from the company reflecting their status as an essential service provider in case they are questioned by enforcement authorities;
- **financial impacts to the business**, liquidity issues, business continuity plans and potential relief and economic support measures being offered by governments, landlords, lenders and other creditors (see our [key issues bulletin](#) for more);
- **the performance of contractual obligations**, the parties' willingness to negotiate a mutually acceptable resolution, the ability to assert [force majeure](#), the overall relationship between the contracting parties, potential litigation and reputational risks (read our bulletin on COVID-19 M&A considerations [here](#));
- timely disclosure considerations for public companies;
- **risks of non-compliance** with regulatory requirements and orders, and relief measures being offered by regulators;
- the availability of business interruption insurance or other mitigation measures; and
- the availability of government assistance programs.

Boards and management teams will need to continue to monitor evolving regulatory requirements, evaluate related

impacts and risks, and make strategic decisions in real time.

Read all our coronavirus-related updates on our COVID-19 guidance for organizations [resource page](#).

Summary of essential/priority businesses: Ontario and Québec

Category of business	Essential in Ontario	Priority in Québec
Essential healthcare services and medical supply businesses	X	X
Seniors' homes and homecare services	X	X
Pharmacies and drugstores	X	X
Transportation, logistics and postal services (including private transportation services)	X	X
Banking and financial sector (including insurance and capital markets)	X	X
IT and telecom	X	X
Energy production, procurement, transmission and distribution	X	X
Motor vehicle service stations and repairs	X	X
Food (including beverage) retail and production	X	X (excluding a "megastore" located inside a shopping centre)
Media	X	X
Restaurants: takeout and delivery only	X	X
Construction and maintenance services (categories of essential construction and maintenance services vary by province)	Construction "in the industrial, commercial, institutional and residential sectors"	Construction, maintenance and operation of essential public infrastructure; and emergency construction and trades
Businesses that supply other essential businesses or services (as defined by each province)	X	X

Manufacturing (categories of essential manufacturing and production services vary by province)	Businesses that extract, manufacture, process and distribute goods, products, equipment and materials, including businesses that manufacture inputs to other manufacturers	Food and beverage; medical instruments; chemical products; health products; microelectric components; defence sector; and manufacture of inputs or raw materials necessary for other sectors deemed essential
Alcohol and cannabis production	X	X
Alcohol and cannabis retail	X (authorized retailers)	X (SAQ/SQDC only)
Hardware stores	X	Only if located in a “megastore” outside of a shopping centre
Car dealerships	X	No
Waste management services	X	X
Forestry, aggregate and mining	X	Industrial and mining complexes (especially the aluminum sector) required to “reduce to a minimum their activities”
Environmental management, monitoring, and consulting, and related professional services	X	Companies associated with environmental emergencies

¹ This summary does not include all categories; for a full listing of essential businesses / services, consult the [Ontario](#) and [Québec](#) provincial websites.

² “[Toronto’s mayor declares state of emergency amid COVID-19 pandemic](#),” CBC News.

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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