

How “Non-Essential” Businesses can Manage Ontario’s Business Restrictions during COVID-19

May 1, 2020

On March 24, 2020, the Province of Ontario declared a state of emergency under the *Emergency Management and Civil Protection Act* [1] in response to the COVID-19 pandemic. During this state of emergency, only “essential” businesses may remain open; all other “non-essential” businesses must be closed during this time. [2] This emergency order is effective until May 6, 2020 unless it is revoked earlier or extended by the Province.

Among the categories of “essential” businesses, the following may continue to operate in Ontario:

- **Healthcare Services** – hospitals, laboratories, health facilities, and manufacturers, wholesalers, distributors and retailers of pharmaceutical products.
- **Supply Chains** – businesses which support or supply systems or services in a supply chain such as processing, packaging, distribution, delivery, and maintenance.
- **Retail and Wholesaling** – businesses which sell food, pet foods, supplies necessary to maintain safety, sanitation, and essential operations such as grocery stores or supermarkets.
- **Agriculture, Production, and Food Services** – agricultural operations and food production businesses are allowed to remain open during this period. Restaurants will be allowed to open only for take-out or delivery options during this period.
- **Financial Services** – banks, credit unions, insurance, capital market operations (such as stock exchanges), and businesses that provide payroll or payment processing services.
- **Utilities** – utilities such as electricity generation, transmission, distribution, and storage, natural gas services, emergency first-responders (police, firefighters, paramedics), and government services.
- **Other** – childcare services for essential workers, medical research facilities, telecommunications and media, and long-term care facilities.

The full list of essential businesses in Ontario can be found [here](#).

The Province of Ontario also announced that effective May 4, 2020, certain other businesses not included on this list of “essential” services will be allowed to gradually re-open business operations. These businesses include garden centres and nurseries, lawn care and landscaping services, additional construction projects for telecommunications, shipping, schools, and construction site development. The full list of these businesses was announced [here](#).

Penalties for Non-Compliance

Businesses which do not belong to a category of “essential” business and continue to operate during this period risk incurring the following penalties under the *Emergency Management and Civil Protection Act*:

- An individual could be subject to a fine of up to \$100,000 and imprisonment of up to one year;

- An individual who is a director or officer of a corporation could be subject to a fine of not more than \$500,000 and for a term of imprisonment of not more than one year; and
- A corporation could be subject to a fine of not more than \$10,000,000.

Municipal by-law officers and municipal or provincial police officers are enforcing this emergency order. They are empowered to issue warnings, fines, or summonses to “non-essential” businesses and their directors, officers, and employees which maintain business operations during this mandatory closure. Municipalities may also have specific by-laws which further limit business operations within these jurisdictions.

Preventing Penalties

The best defence against a warning, fine or summons is to argue that the business is in fact within a category of “essential” businesses and therefore the penalty is not merited.

Some possible measures to reduce the risk of incurring a penalty include:

- Evaluating whether all or portions of your business may qualify as “essential”, as this definition becomes amended from time to time. While it may not be possible to open all of your business operations, it may be possible to partially open those sectors of your business which are “essential”.
- Identifying the key employees who are needed to work on-site and offer them defined hours of operations, have in place safety measures to limit physical contact, and make sure that their work qualifies as an “essential” category of business.
- Providing key employees with letters indicating that they are employees at an essential business and ensure they have proper credentials to confirm to property managers or authorities in case they are questioned by by-law enforcement officers or police officers.

On April 30, 2020, the Province of Ontario provided guidelines for certain business sectors to ensure that the eventual reopening of Ontario’s economy can be done safely. The six specifically listed sectors are construction, food processing, restaurant and food services, agriculture, manufacturing, and long-term care.

Ontario’s sector-specific guidelines include general public health recommendations including holding team meetings outdoors, staggering shift times and using ground markings and barriers to manage traffic flow. These guidelines also recommend installing plexiglass barriers, increasing the air intake on heating, ventilation and air conditioning systems to increase air flow, maintaining frequent cleaning for public spaces, and promoting physical distancing. Businesses that are considering plans for re-opening would benefit from considering and implementing these provincial guidelines. The full guidance and workplace posters for these sectors can be found [here](#).

These measures can enhance employee safety, help restart partial or full business operations, and reduce the risk of incurring penalties. For those businesses that cannot demonstrate that they fully or partially belong within an “essential” business category, the federal and provincial governments have offered business and employee support programs including [wage subsidies](#) and [commercial rent assistance](#).

How to Challenge a Fine

Despite the valid reasons for opening a “non-essential” business during this period and the measures that a business may take to reduce the risk of penalties, a by-law officer or police officer may still issue a ticket to employees or businesses for non-compliance with the provincial lockdown order.

To date, there is no specifically designated forum to challenge or dispute such tickets. Therefore, a business or individual will have to challenge a fine or other penalty issued under the *Emergency Management and Civil Protection Act* through Provincial Offences Court or, where applicable, municipal administrative bodies for municipal by-law offences related to COVID-19.

The [City of Toronto](#) recommends that individuals or businesses who believe they were wrongly ticketed by a by-law officer may either request an early resolution meeting with a prosecutor to resolve the matter without the need for a trial or request a trial at Provincial Offences Court. Other municipalities such as [York Region](#), the [City of Mississauga](#) and the [City of Ottawa](#) are also recommending the same methods of dispute resolution.

Formal court challenges to fines issued by by-law officers or police officers will likely not be heard until Provincial Offences Court resumes in-person hearings or commences virtual hearings. However, during this emergency period, the Province of Ontario has suspended limitation periods applicable to Ontario court matters retroactive to March 16, 2020 until the order is revoked,^[3] so in-person challenges will not likely be heard until the courts re-open. Once Provincial Offences Court re-opens and begins hearing cases, a ticketed business or individual can file an appeal for convictions within 30 days of the conviction date.

For more information about these issues, please contact our [corporate and commercial](#) and [employment and labour](#) practice groups.

[1] R.S.O. 1990, c. E.9

[2] O. Reg. 82/20: *Order Under Subsection 7.0.2 (4) – Closure Of Places Of Non-Essential Businesses*

[3] O. Reg. 73/20: *Order Under Subsection 7.1 (2) Of The Act – Limitation Periods*

The information and comments herein are for the general information and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, please contact any of our lawyers for further guidance.

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