

How In-House Lawyers Should be Responding to the Coronavirus Pandemic: The Canadian Perspective¹.

What should in-house lawyers be doing now while the world is in lock down?

The COVID-19 pandemic has presented a unique set of challenges for Canadian in-house lawyers. Business are facing serious questions of viability as social distancing has slowed many facets of the Canadian economy. In these circumstances, in-house lawyers have the opportunity to be problem solvers and help their businesses by providing practical, risk-based solutions in real time. Some of the areas where in-house lawyers may focus include:

- Monitoring and timely applying for government relief programs. The Canadian federal government along with each of the provinces has announced a myriad of government programs designed to assist businesses. Many of these programs are evolving daily and many of them, such as the announced Canadian Emergency Wage Subsidy which will cover up to 75% of employee wages for eligible employers, are significant. In-house counsel can help ensure that their businesses are aware of these programs and ensure they are eligible to participate.
- Helping safeguard and enhance the remote office. Many businesses are working completely remotely. This brings with it new challenges, including ensuring all employees continue to feel secure and connected to their teams and reviewing security processes to ensure personal and client information is safeguarded. In-house lawyers can help ensure thoughtful protocols are in place that prevent significant business risk while balancing the practical need for work to continue to get done and for communications to flow. For businesses that are providing essential services and are continuing to operate at physical locations, workplace safety for employees, suppliers and customers should be top of mind of internal legal teams.
- Navigating workforce issues. Many businesses, despite the promise of significant government assistance programs, have been forced to significantly reduce operations. Others have shut down altogether. This had led many to have to make difficult decisions on workforce numbers. Canadian labour and employment laws are employee-friendly and navigating workforce reductions can come with significant cost to businesses if not handled directly. In-house lawyers can help design programs that do not expose their businesses to more risk than is necessary while also recognizing the hardships that employees are facing and avoid being unnecessarily heavy-handed. Creative solutions such as work sharing arrangements and temporary furloughs (including general pay reduction) can potentially offer short term cash relief to businesses and also allow employees to take advantage of individual focused governmental programs such as the Canadian Emergency Response Benefit.

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- **Contract and Counterparty Evaluation.** In-house counsel will be called on to evaluate the risks of contractual non-performance, both from their own business's perspective and for counterparties. Important and other sensitive key contracts should be scrutinized for potential force majeure, Material Adverse Effect or Change provisions and other possible "outs" and associate consequences such as penalties or loss of deposits. Many tenants will consider withholding rents for premises that they cannot effectively make use of during this period and many landlords will have to evaluate the benefit of insisting on full payment of rents in the short-term versus ensuring they have viable tenants in the long-term. Previously reliable counterparties will suddenly present significant – though potentially temporary – risks. In many of these situations, a negotiated solution driven by lawyers taking an efficient and practical approach will lead to the best outcome. Careful review of business interruption insurance policies and other available coverage and ensuring claims are preserved and timely submitted are also critical.
- **Dispute Resolution Management.** Most of our courts are functioning at a very base level. While certain courts are providing for the electronic processing of court documents, only urgent matters are being addressed by telephone or by "virtual" attendance. There are indications that non-urgent matters may soon be heard by the courts. Certain mediations and arbitrations are being conducted "virtually". In-house counsel will be called on to monitor access to the courts and/or to alternative dispute resolution mechanisms that may be of interest and to adapt strategies accordingly.
- **Insurance coverage review and policy compliance.** Along with company risk management in-house counsel will be called on to identify and assess the scope of available insurance coverage(s) for COVID-19 events. The company may have Commercial General Liability, Commercial Property and Business Interruption, Contingent Business Interruption, Event Cancellation, Professional Liability, Cyber Liability and/ or Directors & Officers Liability coverage in place. Is there coverage for a particular claim or potential claim, or are there policy exclusion issues? Is the company compliant with relevant notice provisions and policy conditions?
- **Insolvency issues.** In-house counsel should be called on to evaluate if the business needs to restructure its financial affairs to avoid bankruptcy, through a formal plan of arrangement under the laws applicable in case of insolvency or otherwise.

What should in-house lawyers be doing to prepare for when the workforce comes out of lockdown?

When the COVID-19 lockdown ends, it is likely that we will be coming back to a workplace that is permanently changed from the pre-pandemic world. There will be opportunities to capitalize on

- **Continuing to monitor government programs.** It is likely that Canadian government assistance programs will continue to evolve and be available for business recovery

purposes beyond the immediate crisis period. In-house lawyers can monitor for these programs and also ensure that their businesses continue to be eligible for the current subsidies and deferrals.

- Evaluating the physical workplace. As we noted, many employees have been introduced to working remotely as a result of COVID-19, often with better than expected results. Employers are likely to re-evaluate their workspace needs and related costs. In-house lawyers can play a role in shaping the business's approach to physical space and in helping design more robust - and less crisis-reactive - remote work protocols.
- Workforce Issues. Most businesses will have taken temporary measures to rationalize employment expenses during the crisis through layoffs, paycuts or other means. A return to normalcy will mean a need to evaluate which of these measures can be rolled back and which should become permanent. In addition, many of the rationalization measures will have been taken while in crisis mode with a view to short term survival and may have consequences in the medium-term. Paycuts and layoffs, for example, may lead to a surge in constructive dismissal claims that legal teams will be called upon to advise on.
- Contractual Remedies. Less than perfect performance under many contracts will have occurred as a result of the crisis. For example, a party may have relied upon a force majeure clause to excuse performance. A return to normal will mean legal teams will be able to consider whether any non-performance was proper and which of the their contractual relationships need waivers, amendments or resolution through the court system. In worst cases, counterparties may no longer be solvent and recovery through collections or the insolvency process may be necessary.
- Risk Management Post-Mortem. The experience of the crisis will lead businesses to re-evaluate all aspects of their risk management strategy, including insurance coverage, counterparty risk and specifically allocating for pandemic risks in some contracts. In-house lawyers with their knowledge of the business and understanding of underlying legal risks will be uniquely situated to provide solutions.