

The *Quarantine Act*: Beware of the Criminal Consequences for Corporations, Directors and Officers

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The Canadian government has announced an Emergency Order under the *Quarantine Act* requiring any person entering Canada by air, sea or land to self-isolate for 14 days whether or not they have symptoms of the COVID-19 virus (the "**Mandatory Isolation**"). Announced on March 25, 2020, the Mandatory Isolation is in effect until June 30, 2020.

The Pertinent Sections of the Act

The offence for a person who fails to comply with the Mandatory Isolation can lead to a fine of a maximum of \$750,000 and/or imprisonment for six months. In addition, any person who causes a risk of imminent death or serious bodily harm to another person while wilfully or recklessly contravening the Act (including the Mandatory Isolation) can be liable for a fine with a maximum of \$1 million and/or to imprisonment of up to three years. The Public Health Agency of Canada confirmed that spot checks will be conducted to verify compliance with the Mandatory Isolation and the Act.

The Mandatory Isolation can also have significant implications for corporations and their executives, particularly for industries designated as essential services, because the Act expressly imposes a duty to ensure compliance on pain of prosecution for a maximum fine of \$750,000 and/or six-months' imprisonment.

First, section 73 of the Act requires every director and officer of a corporation to take *all reasonable care* to ensure that the corporation complies with the Act.

Second, section 74 of the Act provides that to engage a corporation's criminal liability, *it is sufficient to prove that an offence under the Act was committed by an employee, agent or mandatary*. In such cases, the sole defence available is establishing that (i) the offence was committed without the corporation's knowledge or consent **and** (ii) the corporation exercised all due diligence to prevent the commission of the offence. For example, an employee returned to Canada from the United States five days ago. No one in the corporation knew the employee was out of the country. The employee goes to work the next day, thereby disregarding and violating the Mandatory Isolation.

Less apparent is that unless the corporation and/or the directors and officers can point to proactive steps that were taken to prevent the employee's violation and to prevent certain risks caused to other employees, they could be exposed to potential investigation and prosecution.

The Interpretation of Corporate and Director Liability

The Canadian courts have never ruled on sections 73 and 74 of the Act. Nevertheless, inferences can be drawn from judgments dealing with the duties to "*exercise all due diligence*" and "*take all reasonable steps*" in other federal legislation. Thus, the determination of what constitutes due diligence is an objective and highly fact-specific analysis. It requires consideration of what a reasonable person would have done in similar circumstances.

At a minimum, the standards of due diligence and reasonable steps require the corporation to establish a protocol to ensure compliance with the law. The protocol must provide for confirmation that employees are aware of the legal requirements and for efficient channels of communication. Employees must be able to seek clarification from the proper authority if they have any doubt as to the meaning of any rule or instruction.

The Best Practices to Ensure Compliance

The measures implemented to fulfill the duties required under the Act should be communicated to employees in both official languages, when necessary. Furthermore, all employees should be required to confirm that they received and reviewed the new policies. Finally, it is important that sanctions for non-compliance are enforced and communicated to employees.

The following are examples of best practices that can be included in such a policy. Naturally, this extensive and non-exhaustive list should be adapted to the realities of each business, particularly for industries designated as essential services.

- Designate someone for the employees to report to.
- Provide all employees with updates on a regular basis.
- Ban all non-essential business travel.
- Ensure employees' past and upcoming business and personal travel plans are reported to Human Resources, preferably a designated individual.
- Whenever possible, impose a temporary shutdown on internal and external in-person activities.
- Deny employees who are subject to the Mandatory Isolation from accessing the corporation's premises and, when possible, permit them to work remotely.
- Create a phone line or email address to allow for confidential reporting of any actual or suspected non-compliance.
- Ensure regular reporting from management to the board regarding compliance with both legislation and internal policies.