

BRIEFING NOTE

BC Ombudsperson rules certain Covid related Ministerial Orders invalid: BC passes the *Covid Related Measures Act*

This Briefing Note provides an update on the status of B.C. Ministerial Orders pertaining to limitation periods and protection from liability.

In response to the World Health Organization’s Covid-19 pandemic declaration, the Government of British Columbia declared a province-wide state of emergency on March 18th, 2020 under the *Emergency Program Act* (RSBC 1996 Ch. 111 – the “EPA”). Since then, Cabinet has renewed that declaration every 14 days, and the state of emergency remains in effect (currently until July 21st).

Pursuant to section 10(1) of the *EPA*, the Minister of Public Safety and Solicitor General (the “Minister”) was empowered to, inter alia, “do all acts and implement all procedures that the minister considers necessary to prevent, respond to or alleviate the effects of an emergency or a disaster,…” In reliance on that provision, the Minister issued a number of Ministerial Orders, including M098 (suspension of limitation periods), M120 (protection from liability for certain essential workers), and M183 (protection from liability of certain non-profit and amateur sporting organizations).

On June 5th, the Ombudsperson released to the Government, the preliminary results of his enquiry into two of the Ministerial Orders issued under the *EPA*. As is more fully explained in the Ombudsperson’s Report released June 22nd,¹ the Ombudsperson concluded that two Ministerial Orders (one of which was M098), were not authorised under section 10 of the *EPA*, or any other statute. He provided two options for the BC government to rectify the issue: one was for the Government to enact subject specific legislation, and the other was to amend the *EPA* to include a provision expressly granting the Minister power to suspend or amend provisions of other statutes.

In its letter of response to the preliminary results, the Government maintained the Ministerial Orders were not within the scope of the *Ombudsperson Act* (RSBC 1996 Ch.340) and so were not open to investigation by the Ombudsperson. Nevertheless, it advised that it intended to introduce legislation to clarify that the Ministerial Orders were valid from the date they were issued, and amend the *EPA* to clarify the Minister’s authority to amend or suspend provisions of other statutes. That legislation was passed into law on July 8th, as the *Covid-19 Related Measures Act* (the “Act”).²

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¹ https://bcombudsperson.ca/investigative_report/extraordinary-times-extraordinary-measures/

² https://www.bclaws.ca/civix/document/id/bills/billscurrent/5th41st:gov19-3/search/CIVIX_DOCUMENT_ROOT_STEM

By section 3 of the *Act*, each of the 27 Ministerial Orders that are scheduled to the *Act* (which include those noted above) is enacted as a provision of the *Act*, and the corresponding Ministerial Order is repealed. Thus, while the wording of each provision remains the same, it is now enacted as a section of a statute, rather than a Ministerial Order.

Also by section 3 of the *Act*, subject to modification by Regulation, certain (now former) Ministerial Orders will be repealed 45 days, and others 90 days, after the date on which the last extension of the declaration of the state of emergency expires.

Under the common law, a repealed statute is deemed never to have existed, and when repealing a statute that supplanted a former law, parliament is deemed to have revived the former law.³ However, some protection against this is provided in the *Interpretation Act* (RSBC 1996 Ch.238). Under section 35(1)(c) of that Act, the repeal of a statute does not “...*affect a right or obligation acquired, accrued, accruing or incurred under the enactment so repealed.*” We return to the effect of the repeal provisions, under our discussion of M098, below.

For ease of reference, and assuming the state of emergency is not extended beyond July 21st:

1. Limitation periods:

Ministerial Order M086 was made on March 26th. It was repealed by Ministerial Order M098 (the “*Limitation Periods (Covid-19) Order No.2*”), made on April 8th.

M086 provided that “*Every mandatory limitation period and any other mandatory time period that is established in an enactment or law of British Columbia within which a civil or family action, proceeding, claim or appeal must be commenced in the Provincial Court, Supreme Court or Court of Appeal is suspended.*” M098 essentially continued the provisions of M086, albeit with a carve-out for limitation periods under the *Builders Lien Act* and division 5, part 5 of the *Strata Property Act*.⁴ The Ministerial Order applied during the period that the state of emergency remained in force.

On May 7th, in response to calls for clarification by the Law Society of British Columbia, the Government issued guidance as to the effect of M098⁵. Essentially, while the wording could have been clearer, it advised that the intent was to toll the limitation period while the Ministerial Order remains in effect.

Now, with the passage of the *Act*, the effect of the former M098 ought to be to toll limitation periods for civil & family law actions, including those under the *Limitation Act* (SBC 2012 Ch. 13), for the period March 18th – October 19th, 2020 (the former being the date on which the provincial state of emergency was first declared, and the latter being 90 days after July 21st).

This is a significant extension within which claims may be brought given the original intent of the Ministerial Order was to alleviate difficulties with

³ See e.g. *McLeod v MacLeod*, 1980 CarswellBC 181, 22 BCLR 51 & *Yeung (Guardian ad litem of) v Au*, 2006 BCCA 217

⁴ https://www.bclaws.ca/civix/document/id/mo/mo/2020_m098

⁵ <https://www.lawsociety.bc.ca/Website/media/Shared/docs/about/covid-MinisterialOrders.pdf>

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commencing actions (both as to filing and service); however, all court registries are now open, and arguably most businesses are operational. It may be good news for plaintiffs (including insurers pursuing subrogated claims), but for those with active claim files, it may elongate cycle-times where matters are being monitored until limitation passes.

However, issues arise from the use of the word “repeal” treatment of the former Ministerial Orders:

The protection afforded under the *Interpretation Act* against the common law effect of repeal is limited to a “right ... acquired, accrued, accruing or incurred under the enactment”. If a court were to find that the tolling of the limitation period under the former Ministerial Orders is not a “right or obligation accrued” so as to fall within the protection of the Interpretation Act, the tolling of limitation under the former M098 may not survive past October 19th. This is compounded by the fact the *Act* has a saving provision for the repeal of section 5 (dealt with below) in section 6: “for certainty despite the repeal of section 5, the repeal does not affect any protection acquired in that section”. However, there is no similar provision for the repeals under section 3.

Given that a failure to file a claim within an applicable limitation period is likely to result in a claim against counsel, the practical effect of the repeal provisions in section 3 of the *Act* may well be to negate tolling for claims filed after October 19th.

2. Limitation of Liability:

Ministerial Order M094 was made on April 2nd. It was repealed by Ministerial Order M120 (the “*Protection Against Liability (Covid-19) Order No.2*”), made April 22nd. It provided, inter alia, protection from liability as a result of a person being infected with or, exposed to, the coronavirus as a result of the person’s operating or providing an essential service, provided they were doing so (or reasonably believed they were doing so) in accordance with all applicable emergency and public health guidance. There was no protection for gross negligence. What qualified as an “essential service” was scheduled to the Ministerial Order and included, amongst others, transportation, restaurants, grocery stores, financial institutions, and certain manufacturing.⁶

In response to concerns expressed by amateur sporting organisations over their inability to obtain insurance coverage to reopen activities, on June 10th the Minister enacted M183 (the “*Protection Against Liability for Sports (Covid-19) Order*”). In essence, this extended the same sort of protection under M120, to certain defined non-profit and amateur sporting organisations, their directors, officers, employees and volunteers.⁷

The May 7th guidance issued by the Government mentioned above also provided advice regarding M094.⁸ The Government advised that “*The order is intended to protect against claims for all types of damages including damages for personal injury or death as well as economic losses, caused by exposure to the pathogen SARS-CoV2. Exposure is defined as including risk of exposure. The order does*

⁶ https://www.bclaws.ca/civix/document/id/mo/mo/2020_m120

⁷ https://www.bclaws.ca/civix/document/id/mo/mo/2020_m183

⁸ (supra, note 5)

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not protect against liability for other causes of loss such as negligent driving or slip and falls.”

Following the passage of the *Act*, the *Protection Against Liability (Covid-19) Order No.2* will remain in force until September 4th (45 days after July 21st), while the *Protection Against Liability for Sports (Covid-19) Order* will remain in force until October 19th (90 days after July 21st). Depending upon the progress of the pandemic, and in particular whether there is a “second surge”, we may see amendments to either or both of these expiration dates.

However, the *Act* also provides, in section 5, an additional protection against liability in terms that appear wider than those provided under the Ministerial Orders. In particular, the section provides:

...no legal proceeding for prescribed damages related to the Covid-19 pandemic lies or may be commenced against a prescribed person or a person in a prescribed class of persons because of

- (a) any prescribed act or omission of the person, or*
- (b) any act or omission of the person in a prescribed class of acts or omissions.*

Unhelpfully, we have not yet seen any Regulations setting out what damages, persons, classes of persons, or acts or omissions, are “prescribed”. We hope that information is forthcoming shortly, as it is difficult to consider the application of section 5 without it.

Finally, section 7 of the *Act* provides that sections 1 to 5 are repealed on the one year anniversary of the coming into force of the *Act*.



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