

Wednesday, April 29, 2020

Hon. Lori Carr
Minister of Government Relations
Government of Saskatchewan
2405 Legislative Dr., Room 30
Regina SK S4S 0B3

Re: Proposal for Statutory Liability Immunity for Essential Services & Products

Minister Carr:

The current pandemic has created an unprecedented demand for essential services, and for products designed to manage and contain the COVID-19 virus. Many businesses are transitioning to provide these critical products and services in response to the prevailing public health threat. As a result, these businesses — and the individuals responsible for them — will also face uncertain liability risk.

It is therefore imperative that statutory protection against civil liability be established as soon as possible for those providing COVID-19 countermeasure products and services under the *Emergency Planning Act, SS 1989-90, c E-8.1* (the 'Act'). We have prepared a suggested statutory civil liability immunity provision, set out as Appendix 'A' to this letter, that would accomplish these important public policy objectives.

It does not appear that the *Emergency Planning Act, SS 1989-90, c E-8.1*, as written would duly authorize the proposed order. Given the scope of the pandemic and the requirement for broad countermeasures, it is our recommendation that the required statutory protections be established by way of a two-stage process:

1. An amendment to the Act, to:
 - a. Establish statutory protections against civil liability for providing COVID-19 countermeasure products and services; and
 - b. Grant Cabinet the express authority to make orders/regulations with respect thereto, including with respect to the scope of countermeasure services and products and the entities, organizations, corporations, and individuals covered by the protections, as well as the duration of such statutory protections; and
2. The enactment of such an order/regulation. We have prepared a draft (please see attached).

We propose that the amendments to the Act in respect of the new statutory protection against civil liability for COVID-19 countermeasure services and products provide as follows:

- That the protection does not apply to gross negligence or willful misconduct;
- That the protection applies notwithstanding anything contained in the Act or any other act;
- That the protection applies to all persons (including entities, organizations, corporations, and individuals):
 - Engaged in providing countermeasure services; and
 - Who modify their usual business operations to engage in the manufacture and supply of countermeasure products;
- That the protection and any associated orders/regulations apply commencing on the date on which the declaration of a COVID-19 state of emergency was made and for such duration as the Cabinet may determine, despite provisions in the Act, which may otherwise restrict the maximum timeframe that orders/regulations may be in effect;
- As noted, that Cabinet be granted the express authority to make orders/regulations with respect to the statutory protection for COVID-19 countermeasures, including with respect to the scope of countermeasure services and products and the entities, organizations, corporations, and individuals covered by the protection; and
 - That such orders/regulations may be made, despite provisions in the Act which may otherwise define or restrict the scope of the order/regulation-making power thereunder (including provisions which may prohibit an order/regulation from amending the Act).

We believe that legislation of this type is a crucial lever to encourage the production of essential services and products in response to the pandemic, and also to provide reasonable liability protection to those individuals and organizations that are helping both Saskatchewanians and Canadians respond to this unprecedented public health threat.

Regards,



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CC: Hon. Donna Harpauer, Minister of Finance, Government of Saskatchewan
 Hon. Jeremy Harrison, Minister of Trade & Export Development, Government of Saskatchewan
 Kent Campbell, Deputy Minister, Ministry of Trade & Export Development, Government of Saskatchewan

PROVINCE OF [PROVINCE NAME]

Date Minister of [NAME OF MINISTRY]

Authority under which Order is made:

Act and section: [*EMERGENCY ACT*]

ORDER OF THE MINISTER OF [NAME OF MINISTRY]

[*EMERGENCY ACT*]

Ministerial Order No. [###]

WHEREAS a declaration of a state of emergency throughout the whole of the Province of [PROVINCE NAME] was declared on [DATE], 2020 because of the COVID-19 pandemic;

AND WHEREAS section [] of the [*EMERGENCY ACT*] provides that I may do all acts and implement all procedures and order production of countermeasure products that I consider necessary to prevent, manage, respond to or alleviate the effects of any emergency or disaster;

AND WHEREAS the threat of the COVID-19 pandemic to the health, safety or welfare of people has resulted in guidelines, recommendations or requirements to limit in person-contacts;

AND WHEREAS it is necessary to support the provision of daily services essential to preserving life, health, public safety and basic social functioning;

AND WHEREAS the COVID-19 pandemic has or threatens the supply of products essential to preserving life, health and welfare of people, and as such the Government is calling upon service providers and product suppliers to rapidly produce and supply essential health products and other critical products and supplies needed to fight the spread of the COVID-19 pandemic;

AND WHEREAS the Government has also encouraged service providers and product suppliers to modify or adapt their services and facilities to contribute to these objectives;

AND WHEREAS it is in the public interest to protect service and product suppliers that have responded to the Government request or order from liability as set out in this Order.

I HEREBY order that the attached Protection Against Liability (COVID-19) Order is made.

[Name]

[Title]

[DATE]

[ORDER NO.]

(This part is for administrative purposes only and is not part of the Order.)

PROTECTION AGAINST LIABILITY FOR COUNTERMEASURERS (COVID-19) ORDER

Definitions

1 In this order:

“Act” means the [EMERGENCY ACT];

“Covered Countermeasure” means collectively Covered Countermeasure Product and Covered Countermeasure Service.

“Covered Countermeasure Product” means any

- (a) product as set out in Schedule A, including all components and constituent materials of such product; and
- (b) manufactured and supplied by a person that adapts or modifies its usual business operations as they existed immediately prior to the date the state of emergency was declared in order to design, develop, test, manufacture, label, and/or supply a Covered Countermeasure Product.

“Covered Countermeasure Service” means any service essential to preserving life, health, public safety and basic social functioning as set out in Schedule B and/or as provided by Emergency Declaration or Order under this Act;

“Emergency and Public Health Guidance”, in relation to a Covered Countermeasure, means any of the following with respect to the COVID-19 pandemic:

- (a) an order made under the Act;
- (b) an instruction, order or request by a health officer, as defined in the [Public Health Act], Minister, Premier or other senior government official [NTD: applicable provincial designations and terms of art, including any applicable First Nations authority];
- (c) guidelines of the Public Health Agency of Canada;
- (d) guidelines published on a website maintained by or on behalf of the government;
- (e) guidelines of a health authority;
- (f) guidelines of a regulatory authority or body having jurisdiction with respect to a person that manufactures, develops, distributes or administers Covered Countermeasures;
- (g) any other applicable industry guidelines.

Application of Order

2 (1) This order applies,

- a) to those Covered Countermeasure Services that are operated or provided within this Province commencing on [DATE], being the date on which the declaration of a state of emergency was made under section [#] of the Act and ends on the date on which the declaration of a state of emergency made [DATE] under section [#] of the Act expires, or is cancelled or, if there is an extension under section [#] of the Act, the date on which the last extension of that declaration expires or is cancelled; and,
- b) to those Covered Countermeasure Products that are manufactured and supplied within Canada commencing on [DATE], being the date on which the declaration of a state of emergency was made under section [#] of the Act and ends on the date on which the declaration of a state of emergency made [DATE] under section [#] of the Act expires, or is cancelled or, if there is an extension under section [#] of the Act, the date on which the last extension of that declaration expires or is cancelled.

(2) This Order will provide protection against liability as set out in Section 3, for any Covered Countermeasure Product for which this order applies for a period of seven (7) years after the period specified in section 2(1)(b).

(3) This Order will provide protection against liability as set out in Section 3, for any Covered Countermeasures Services operated or provided during the period specified in section 2(1)(a) or, where the Covered Countermeasure Service involves administration or use of a Covered Countermeasure Product, this order will provide protection against liability as set out in Section 3 for the period specified in section 2(1)(b)

Protection from liability for Covered Countermeasures

3 (1) Any person engaged in operating or providing a Countermeasure Service is not liable for damages resulting, directly or indirectly, from an individual being or likely being infected with or exposed to COVID-19 as a result of the person's operating or providing a Covered Countermeasure Service if, at the relevant time, the person

- (a) was or reasonably believed they were operating or providing the Covered Countermeasure Service in accordance with all applicable Emergency and Public Health Guidance;
- (b) was acting in good faith; and
- (c) was not grossly negligent.

(2) Any person engaged in the design, development, testing, manufacture, labelling, and/or supply of a Covered Countermeasure Product is not liable for any claim of loss or damage caused by, arising out of, relating to, or resulting from, either directly or indirectly, such design, development, testing, manufacture, labelling, and/or supply of the Covered Countermeasures Product, provided that such loss or damage was not caused by such person's gross negligence, wilful misconduct, or breach of any applicable laws.

(3) Any person afforded protection from liability as set out in section 3(1) is also not liable for any claim of loss or damage to the extent such liability arises solely from the administration or use of a Covered Countermeasure Product that is defective provided the person was not aware of such defect at the time of its administration or use.

SCHEDULE A-COVID-19 Covered Countermeasure products

Products

Health Products

- Any alcohol-based hand sanitizers and hard surface disinfectants authorized by Health Canada under its interim expedited licensing approach during COVID-19.
- Any COVID-19 medical device authorized by Health Canada under the *Interim Order Respecting the Importation and Sale of Medical Devices for Use in Relation to COVID-19* pursuant to subsection 30.1(1) of the *Food and Drugs Act*, R.S.C. 1985, C.F.27, including ventilators, face shields, and gloves.
- Any medical device or drug manufactured at a new site approved by Health Canada during the pandemic under an existing medical device establishment licence or drug establishment license.
- Any natural health product manufactured at a new site approved by Health Canada during the pandemic.

Other Products (Non-Medical Devices)

- Any products (other than medical devices) manufactured and supplied for use as a countermeasure against COVID-19 pursuant to Emergency and Public Health Guidance.
- To the extent not otherwise covered above in Schedule A, the following products are deemed to be Covered Countermeasure Products: gowns and other protective garments and gear, barriers and partitions.

SCHEDULE B

COVID-19 Covered Countermeasure Services

- makeshift hospitals;
- delivery of supplies (use of school buses to deliver necessary supplies);
- sanitation services;
- all health care services, including acute care (hospitals), secondary or long-term care, retirement homes, coroners' services, health-care providers working within and outside an acute care setting and other health services, including public health, detox facilities, safe injection sites, COVID-19 testing, clinical research supporting the COVID-19 response, blood/plasma donation services and emergency pre-hospitalization services;
- other health services and caregivers, including physicians, dentists, psychiatrists, psychologists, mid-level practitioners, nurses and assistants, infection control and quality assurance personnel, pharmacists, physical and occupational therapists and assistants, social workers, mental health and substance use workers, including peer support workers, speech pathologists, diagnostic and therapeutic technicians and technologists, counsellors, chiropractors, naturopaths, dentists, crisis centres, outreach workers, overdose and harm reduction services, meal programs; health first responders (paramedics);
- pharmaceutical production, medical laboratories/research, medical testing, pharmacies, medical supply and equipment manufacturers, wholesale, distribution and stores;
- analytical testing labs related to testing of finished product for pathogens and contaminants;
- safety supply (e.g., work clothes, personal protective equipment, medical/pharmaceutical/ laboratory supplies, etc.) stores, manufacturers, technicians, logistics and warehouse operators;
- medical wholesale and distribution;
- health plans, billing and health information.