

**Topic: Emergency Powers in Response to COVID**  
**Last Revised: April 17, 2020, 4:00pm**  
**From: Daniel Sheppard**

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## **I. Introduction**

In emergency situations, both provincial and federal law grants each level of government with extraordinary powers. Originally designed to deal with war and insurrection, these regimes have evolved to be responsive to a wide range of crises, including pandemics like COVID-19.

Currently, several provinces, including Ontario, have invoked their emergency powers. The Federal government has indicated that, while it is assessing the need to invoke federal emergency powers, it does not have a present intention to do so.

The purpose of this memo is to provide an overview of the scope and limits of provincial and federal emergency powers, and, in the case of Ontario, set out how the powers have been invoked so far.

## **II. Provincial Emergency Powers**

Ontario's framework for dealing with serious emergencies is the *Emergency Management and Civil Protection Act* [EMCPA].<sup>1</sup> The statute contains a number of provisions related to emergency planning. However, the statute's most significant provisions relate to declarations of states of emergency, and emergency powers that may be exercised during a declared emergency.

### **Declaring Emergencies**

Cabinet or, in particularly urgent circumstances, the Premier, may declare an emergency throughout Ontario, or in any part of the province.<sup>2</sup> Before doing so, Cabinet or the Premier must be satisfied that an emergency – defined as a danger of major proportions that could result in serious harm to persons or substantial damage to property – exists and requires immediate action to reduce or mitigate it.<sup>3</sup> Further, they must be satisfied that at least one of three circumstances exist:

1. The resources normally available to the government – including existing legislation – cannot be relied upon without the risk of serious delay;

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<sup>1</sup> *Emergency Management and Civil Protection Act*, RSO 1990, c E.9 [EMCPA].

<sup>2</sup> EMCPA, s. 7.0.1(1).

<sup>3</sup> EMCPA, ss. 1 (s.v. "emergency"), 7.0.1(3)1.

2. The resources normally available to the government may be insufficiently effective to address the emergency; or
3. It is not possible, without the risk of undue delay, to ascertain whether the resources normally available to government can be relied upon.<sup>4</sup>

On March 17, 2020, at 7:30 am, an emergency was declared throughout the entirety of Ontario related to COVID-19.<sup>5</sup> Originally set to expire on March 31<sup>st</sup>, it was extended by cabinet order to April 14, 2020.<sup>6</sup> On April 14, 2020, the Legislature extended the emergency for an additional 28 days, to May 12, 2020.

### **Powers of the Premier**

During a declared emergency, the Premier gains a number of specific powers, which he may delegate to a Cabinet minister, or to the Commissioner of Emergency Management.<sup>7</sup>

The Premier is empowered to exercise any power or perform any duty conferred on a minister of the Crown or any employee of the Crown under any provincial law.<sup>8</sup>

The Premier also has the power to exercise broad powers over municipalities that are within the scope of an emergency if he or she considers it necessary. In particular, the Premier may direct and control the administration, facilities and equipment of a municipality, or require *any* municipality to provide such assistance as the Premier considers necessary to an area outside of the jurisdiction of the municipality.<sup>9</sup>

When subject to an order or direction of the Premier, a municipality may exercise its municipal powers to comply, even if there is no by-law authorizing them to do so.<sup>10</sup>

To date, we are not aware of the Premier (or any delegate) exercising any of his powers under this provision in respect of the COVID-19 emergency.

### **Emergency Orders**

During a declared emergency, Cabinet is authorized to make emergency orders for the purpose of promoting the public good by protecting health, safety and welfare in a manner that is subject

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<sup>4</sup> *EMCPA*, s. 7.0.1(3)2.

<sup>5</sup> *Declaration of Emergency*, O.Reg 50/20.

<sup>6</sup> *Order Made Under the Act -Extension of Emergency*, O.Reg. 105/20.

<sup>7</sup> *EMCPA*, s. 7.0.4(1).

<sup>8</sup> *EMCPA*, s. 7.0.3(1).

<sup>9</sup> *EMCPA*, s. 7.0.3(2).

<sup>10</sup> *EMCPA*, s. 7.0.3(3). Ordinarily, municipalities are only permitted to exercise their capacities, rights, powers or privileges by by-law: *Municipal Act, 2001*, SO 2001, c. 25, s. 5(3).

to the *Charter of Rights and Freedoms*.<sup>11</sup> The power to make orders may be delegated to an individual Cabinet minister, or to the Commissioner of Emergency Management.<sup>12</sup>

The *EMCPA* empowers Cabinet to make a wide range of orders.<sup>13</sup> These include:

1. Implementing emergency plans adopted by municipalities, ministries, public bodies, or at the provincial level;
2. Regulating or prohibiting movement to, from or within any area;
3. Evacuating individuals, animals or property, and making arrangements for their adequate care;
4. Establishing facilities for care, welfare, safety or shelter of individuals, including emergency hospitals;
5. Closing any public or private place;
6. Constructing works or appropriating, destroying or removing property;
7. Collecting, transporting, storing, processing or disposing of any waste;
8. Authorizing facilities to operate as necessary, including electrical generation facilities;
9. Using, making available or distributing any goods, services or resources located in Ontario;
10. Procuring goods, services or resources;
11. Fixing or regulating prices of goods, services or resources;
12. Authorizing (but not requiring) persons to render services of a type that the person is reasonably qualified to provide;<sup>14</sup>
13. Requiring person to collect, use or disclose information;<sup>15</sup>

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<sup>11</sup> *EMCPA*, s. 7.0.2(1).

<sup>12</sup> *EMCPA*, s. 7.0.4(1). As noted below, the duration of orders made by the Commissioner is shorter than for orders made by Cabinet or a minister.

<sup>13</sup> *EMCPA*, s. 7.0.2(4).

<sup>14</sup> When an order is made under this paragraph, it may provide for terms and conditions of service for the person(s). Further a person who provides service pursuant to such an order may not be terminated from their employment due to the fact that they provide such service: ss. 7.0.2(5)-(6).

<sup>15</sup> The collection, use or disclosure of information under such an order must be used *solely* for the purpose of alleviating the effects of the emergency. When the emergency is terminated, any personal information that has been collected, used or disclosed is subject to the any laws related to privacy and confidentiality of personal information. However, such information may be used for research purposes if it is anonymized or if the person to whom it relates provides consent: ss. 7.0.2(7)-(9).

Beyond these specified types of orders, Cabinet may make an order to take such other actions or measures that Cabinet considers necessary to prevent, respond to or alleviate the effects of the emergency. Such orders must be “consistent” with the power to make the other orders listed above.<sup>16</sup>

Orders may be retroactive,<sup>17</sup> and they prevail over any statute, regulation, rule, bylaw or other order or instrument on legislative nature unless the other instrument states that it applies notwithstanding the *EMCPA*.<sup>18</sup>

However, an order may not override the *Occupational Health and Safety Act*, or a regulation made under that *Act*.<sup>19</sup>

To make an order, Cabinet must be satisfied that the order is necessary and essential in the circumstances to reduce or mitigate serious harm to persons or substantial damage to property. Moreover, Cabinet must be of the opinion that it is reasonable to believe that the order will alleviate the harm or damage, and that the order is a reasonable alternative to other measures that could be taken.<sup>20</sup>

Further, orders must only apply to those areas of the province that are necessary, and only for so long as is necessary.<sup>21</sup> Actions that are taken pursuant to an order must be done in a manner that limits their intrusiveness, while at the same time being consistent with the objectives of the order.<sup>22</sup>

### **Exemptions to, and Modification of Legislation During Emergencies**

The *EMCPA* provides for a narrow, but powerful ability for Cabinet to override and even re-write existing legislation on a temporary basis without the involvement of the legislature.

The purpose of this power is solely to provide aid to victims of emergencies who need greater services, benefits or compensation than Ontario law provides, or who may be prejudiced by the operation of Ontario law.<sup>23</sup>

The only laws subject to this power are those that govern compensation (such as fixing amounts, establishing eligibility, restricting how often a benefit may be given or its duration, etc.), establish limitation periods or set out periods of time by which steps in a proceeding must be taken, or requiring fees to be paid in respect of proceedings or the administration of justice.<sup>24</sup>

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<sup>16</sup> *EMCPA*, s. 7.0.2(4)14.

<sup>17</sup> *EMCPA*, s. 7.2(1)(b).

<sup>18</sup> *EMCPA*, s. 7.2(4).

<sup>19</sup> *EMCPA*, s. 7.2(8).

<sup>20</sup> *EMCPA*, s. 7.0.2(2).

<sup>21</sup> *EMCPA*, s. 7.0.2(3)2-3.

<sup>22</sup> *EMCPA*, s. 7.0.2(3)1.

<sup>23</sup> *EMCPA*, s. 7.1(1).

<sup>24</sup> *EMCPA*, s. 7.1(3)2.

Cabinet has the power to issue an order temporarily suspending the provision of such a statute, regulation, rule, by-law or order and, if appropriate, to set out a replacement provision that applies during that temporary period.<sup>25</sup> Given the ameliorative purpose of this power, an order may not have the effect of reducing services, benefits or compensation, increase fees, or shorten limitation periods or periods of time in which steps in a proceeding must be taken.<sup>26</sup> These suspension orders may be made retroactive.<sup>27</sup>

Cabinet may only make such an order on the recommendation of the Attorney General of Ontario.<sup>28</sup>

An order suspending the operation of a law may not exceed 90 days. However, Cabinet has the power to renew (with or without modifications) such order for further 90-day periods.<sup>29</sup> There is no upper limit to the number of renewals that may be made.<sup>30</sup>

As with the emergency order power, suspension orders prevail over any statute (including the *Occupational Health and Safety Act*), regulation, rule, bylaw or other order or instrument on legislative nature unless the other instrument states that it applies notwithstanding the *EMCPA*.<sup>31</sup>

### **Duration of Emergencies & Orders**

By default, an emergency, and therefore any emergency orders based on the existence of an emergency, lasts 14 days (unless Cabinet terminates it earlier).<sup>32</sup> An emergency may also be terminated early if the Legislature passes a resolution disallowing the declaration of emergency.<sup>33</sup>

The *EMCPA* also permits emergencies to be extended without any legislative authorization for one additional period of up to 14 days.<sup>34</sup> Cabinet invoked this authority on March 30, 2020, to extend the COVID-19 emergency to April 14, 2020.<sup>35</sup>

Further extensions beyond this 28-day period requires a resolution from of the Legislative Assembly of Ontario. In this regard, on the recommendation of the Premier, the Legislature may consider a resolution to extend an emergency for further periods not exceeding 28 days each.<sup>36</sup> There is no maximum number of extensions that the Legislature itself may grant. If there is a

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<sup>25</sup> *EMCPA*, s. 7.1(2).

<sup>26</sup> *EMCPA*, s. 7.1(8).

<sup>27</sup> *EMCPA*, s. 7.2(1)(b).

<sup>28</sup> *EMCPA*, s. 7.1(2).

<sup>29</sup> *EMCPA*, s. 7.1(4).

<sup>30</sup> *EMCPA*, s. 7.1(5).

<sup>31</sup> *EMCPA*, s. 7.2(4).

<sup>32</sup> *EMCPA*, s. 7.0.7(1).

<sup>33</sup> *EMCPA*, s. 7.0.9(1).

<sup>34</sup> *EMCPA*, s. 7.0.7(2).

<sup>35</sup> *Order Made Under the Act -Extension of Emergency*, O.Reg. 105/20.

<sup>36</sup> *EMCPA*, s. 7.0.7(3).

pending resolution before the Legislative Assembly for an extension, the emergency is extended until the resolution is actually voted on by the Assembly.<sup>37</sup>

Emergency orders are subject to similar rules as the declared emergency itself. Most emergency orders expire by default after 14 days, and may be terminated sooner by Cabinet.<sup>38</sup> For so long as an emergency has been declared, orders may be extended by further 14 day periods by Cabinet.<sup>39</sup>

With respect to the COVID-19 emergency, on March 31, 2020, Cabinet invoked this extension power to renew all emergency orders (discussed below) that were set to expire prior to April 13, 2020 to continue to that date.<sup>40</sup> A further set of extension orders were issued on April 9<sup>41</sup> and 10,<sup>42</sup> extending emergency orders to April 23, 2020.

There is no maximum number of extensions to an order that may be made by Cabinet, and the Legislature is not required to approve of extensions. The Legislature's oversight role over orders is exercised by their power to disallow the existence of a state of emergency. If the Legislature passes a resolution disallowing an emergency or an extension of an emergency, any emergency orders that were made under that emergency are also automatically terminated.<sup>43</sup>

An emergency order does not automatically expire when the declared emergency expires (as opposed to when an emergency is disallowed by the Legislature). Cabinet has the power to extend existing orders for additional 14-day periods after the expiry of the emergency if it is necessary to do so to deal with the effects of the emergency.<sup>44</sup>

## Enforcement of Orders

It is an offence to fail to comply with an emergency order, or to obstruct any person acting pursuant to such an order. The maximum punishment is one year imprisonment or a fine of up to \$100,000 for an individual, \$500,000 for a director of a corporation, or \$10,000,000 for a corporation itself.<sup>45</sup> If the defendant gained a financial benefit from their violation of an emergency order, the Court may increase the maximum fine to match the benefit the defendant received.<sup>46</sup> A person may not be charged with conduct that violated a retroactive emergency order if the conduct in question occurred prior to the actual date on which the order was made.<sup>47</sup>

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<sup>37</sup> *EMCPA*, s. 7.0.7(4).

<sup>38</sup> *EMCPA*, s. 7.0.8(1). Orders made by Commissioner of Emergency Management expire after two days, unless confirmed by Cabinet, the Premier, or by a Minister who is delegated the power to make such an order: s. 7.0.8(2).

<sup>39</sup> *EMCPA*, s. 7.0.8(3).

<sup>40</sup> *Order Made under the Act – Extensions and Renewals of Orders*, O.Reg. 106/20.

<sup>41</sup> *Order Made Under the Act – Extensions and Renewals of Orders*, O.Reg. 138/20.

<sup>42</sup> *Order Made Under the Act – Extensions and Renewals of Orders*, O.Reg. 143/20.

<sup>43</sup> *EMCPA*, s. 7.0.9(2).

<sup>44</sup> *EMCPA*, s. 7.0.8(4).

<sup>45</sup> *EMCPA*, s. 7.0.11(1)-(2).

<sup>46</sup> *EMCPA*, s. 7.0.11(3).

<sup>47</sup> *EMCPA*, s. 7.0.11(4).

The act also empowers the Province to apply to the Superior Court for an order restraining any person from contravening an emergency order. The Court is empowered to make any order to this end.<sup>48</sup>

## Reporting Obligations

During the course of an emergency, the Premier (or a Minister the Premier designates) is obligated to regularly report to the public with respect to the emergency.<sup>49</sup>

Within 120 days of the conclusion of an emergency, the Premier must also table a report in the Legislative Assembly that explains the legal basis upon which any emergency orders or orders directed at municipalities were made.<sup>50</sup> The Assembly is required to consider the report within 5 days of it being tabled.<sup>51</sup>

## Liability and Compensation

The *EMCPA* relieves against any liability for any person for the good faith acts or omissions done under the *Act* or pursuant to any power or duty under an emergency order. However, neither the Crown, nor municipalities are relieved of liability.<sup>52</sup>

The *Act* specifically deems that nothing done under the *Act* or an emergency order constitutes an expropriation or injurious affection, and that there is no right to compensation for any loss, including a taking, or any real or personal property.<sup>53</sup>

Provincial Cabinet is, however, *permitted* to provide compensation for the loss of property resulting from an emergency order, as well as for the cost of providing any assistance that arises under the *Act* or as a result of the emergency.<sup>54</sup> While the *Act* does not say so, a decision of Cabinet not to offer compensation could potentially be subject to judicial review.

## Orders Made to Date

To date, Cabinet has issued 37 emergency orders and 3 orders relieving against compliance with Ontario law. Several other orders have been issued to amend or extend the provisions of these orders. While issued at different times, most of the emergency orders are currently set to expire

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<sup>48</sup> *EMCPA*, s. 7.0.5.

<sup>49</sup> *EMCPA*, s. 7.0.6.

<sup>50</sup> *EMCPA*, s. 7.0.10(1)-(2).

<sup>51</sup> *EMCPA*, s. 7.0.10(3).

<sup>52</sup> *EMCPA*, s. 1.

<sup>53</sup> *EMCPA*, s. 13.1.

<sup>54</sup> *EMCPA*, ss. 13.1(2)-(3).

at the end of the day on April 23, 2020,<sup>55</sup> though are likely to be extended so long as the state of emergency itself is extended.

The rules implemented by these orders can be roughly organized into five categories:

- A. Orders requiring the closure of workplaces, spaces, events and activities;
- B. Orders impacting the operation of workplaces and collective agreements;
- C. Orders imposing various price control or economic measures;
- D. “Other” emergency orders; and
- E. Orders relieving against compliance with legislative provisions.

Links to the various orders issued under the *EMCPA* are contained at the end of this memo in Appendix A.

#### A. Orders Requiring Closures of Workplaces, Spaces, Events and Activities

The earliest emergency orders issued by Cabinet in respect of the COVID-19 emergency related to closing various locations and events in an attempt to control the spread of the disease. These restrictions have generally increased over time, though there have been some targeted loosening.

##### *Gatherings & Public Spaces*

On March 17, 2020 at 7:30am, the first emergency orders under the COVID-19 emergency were issued. One of them prohibited all organized public events of over 50 people, including communal services within places of worship.<sup>56</sup> On March 28<sup>th</sup>, that order was expanded significantly.<sup>57</sup> It now prohibits organized public events (including those held in private homes), social gatherings or religious services involving more than 5 persons.<sup>58</sup> Exceptions are made only for a gatherings of members of a single household (no maximum) and funeral services (maximum of 10 persons).<sup>59</sup>

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<sup>55</sup> *Order Made Under the Act – Extensions and Renewals of Orders*, O.Reg. 106/20.

<sup>56</sup> *Emergency Order Under Subsection 7.0.2(4) of the Act – Organized Public Events, Certain Gatherings*, O.Reg 52/20.

<sup>57</sup> O.Reg 99/20.

<sup>58</sup> O.Reg 52/20, Sched., ss. 1(1), (2).

<sup>59</sup> O.Reg 52/20, Sched., s. 1(3).



On March 27, 2020, an order was made to expand the powers of the government to keep roadways clear.<sup>60</sup> Ordinarily, only a police officer is permitted to control traffic or close a roadway.<sup>61</sup> The emergency order extends this authority to Ministry of Transportation Officers.<sup>62</sup>

The order also expands the powers of police and MTO officials to close roadways and clear them of vehicles. Normally, a roadway can only be closed to traffic in accordance with a specific set of rules set out in regulations to the *Highway Traffic Act*.<sup>63</sup> Under the order, when it is not feasible to comply with these rules, a police or MTO officer may close a roadway using any reasonable means that is likely to make it obvious to the travelling public that the road is closed.<sup>64</sup>

The order also grants police and MTO officers broad powers to ensure that vehicles do not remain on a closed road, or when emergency-related reasons requires a road to be cleared of vehicles.<sup>65</sup> These powers include the ability to designate a place as an emergency parking location, including a business location that is not a dwelling place. Officers may require the operator or owner of any vehicle that is stopped (or likely to become stopped) on a roadway to move to an emergency parking location to keep a roadway clear. Owners or occupiers of places designated as emergency parking locations must permit the parking of any vehicle directed there by an officer, and must provide reasonable access to those vehicles by their owners.

On March 30, 2020, all “outdoor recreational amenities” that are intended for use by more than one family were ordered closed.<sup>66</sup> This includes outdoor playgrounds, sport facilities and multi-use fields; off-lead dog areas; portions of parks containing fitness equipment; allotment and community gardens; and picnic sites, benches and shelters in park and recreational areas.<sup>67</sup> The ban applies whether or not such amenities are located on public or private property, but does not operate to prevent individuals from using parts of a park that are not otherwise closed and which do not contain such amenities.<sup>68</sup>

On April 9, 2020, the government issued an order prohibiting recreational camping on public lands.<sup>69</sup> Under this order, individuals are prohibited from occupying public lands within the meaning of the *Public Lands Act* for the purposes of outdoor recreational accommodation, including the use of tent, camper or watercraft equipped for overnight accommodation.<sup>70</sup> The orders specifically exempts camping done as an exercise of an Aboriginal or treaty right, or where it is incidental to the operation of an essential business under the non-essential businesses

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<sup>60</sup> *Order under Subsection 7.0.2(4) of the Act – Traffic Management*, O.Reg. 89/20.

<sup>61</sup> *Highway Traffic Act*, RSO 1990, c H.8, s. 134.

<sup>62</sup> O.Reg 89/20, Sched. 1, ss. 1-2.

<sup>63</sup> *Highway Closings*, RRO 1990, Reg. 599.

<sup>64</sup> O.Reg 89/20, Sched. 1, s. 3.

<sup>65</sup> O.Reg 89/20, Sched. 1, s. 4.

<sup>66</sup> *Emergency Order Under Subsection 7.0.2(4) of the Act – Closure of Outdoor Recreational Amenities*, O.Reg. 104/20, Sched. 1, ss. 1(2)-(3).

<sup>67</sup> O.Reg 104/20, Sched. 1, s. 1(1)

<sup>68</sup> O.Reg 104/20, Sched. 1, ss. 1(2), (4).

<sup>69</sup> *Order Under Subsection 7.0.2 of the Act – Closure of Public Lands for Recreational Camping*, O.Reg. 142/20.

<sup>70</sup> O.Reg 142/20, Sched. 1, ss. 1-2.

order, discussed below.<sup>71</sup> The order does not prohibit walking through or using public lands for purposes other than recreational accommodation.<sup>72</sup>

### *Businesses and Specified Locations*

#### *Closure and Regulation of Businesses*

On March 17, 2020 at 7:30am an order was issued closing all facilities providing indoor recreational programs, public libraries, private schools, licensed child care centres, bars and restaurants (except to the extent that they provide takeout and delivery), theatres, and concert venues.<sup>73</sup>

The shut down of child care centres was eased slightly on March 23, 2020 in order to ease the burden on front-line essential service workers.<sup>74</sup> Under the revised rules, child care centres designated by the Minister of Education are permitted to remain open so long as the centre does not have more than 50 people present (both caregivers and children) at any one time, and provides care only for children whose parent or guardian falls into a list of person set out in a schedule. These include health care providers, police officers, firefighters, coroners, persons working in correctional institutions and youth detention facilities, animal welfare inspectors, core service providers in municipalities and First Nations communities and persons working in the child care centre itself. This list was expanded on April 16<sup>th</sup> to cover additional categories of persons, such as probation and parole officers, some employees of children's aid societies, victim services workers, homeless shelter workers, and employees of Canada Post.<sup>75</sup>

On March 24, 2020, all "non-essential" businesses were ordered closed.<sup>76</sup> Initially permitting 74 types of listed businesses to continue to operate, as of 11:59 pm on April 4, 2020, the list of essential businesses is reduced to 44. At that time, new rules for businesses that continue to operate apply.<sup>77</sup> The order operates in addition to the March 17, 2020 closure order.<sup>78</sup> In other words, businesses that were required to close down under the March 17<sup>th</sup> order are still required to be shut down, even if they would otherwise be allowed to operate under the March 24<sup>th</sup> order.

On April 9, 2020, one new entry was added to the essential businesses list: construction projects related to food production and processing.<sup>79</sup> A further addition was made on April 16<sup>th</sup>: seasonal

<sup>71</sup> O.Reg 142/20, Sched. 1, ss. 3(a), (b).

<sup>72</sup> O.Reg 142/20, Sched. 1, s. 3(c).

<sup>73</sup> *Order Under Subsection 7.0.2(4) of the Act – Closure of Establishments*, O.Reg 51/20.

<sup>74</sup> *Emergency Order Under Subsection 7.0.2(4) of the Act*, O.Reg 78/20.

<sup>75</sup> *Order Under Subsection 7.0.2(4) of the Act – Closure of Establishments*, O.Reg. 155/20.

<sup>76</sup> *Order Under Subsection 7.0.2(4) – Closure of Places of Non-Essential Business*, O.Reg 82/20.

<sup>77</sup> *Amending O.Reg. 82/20 (Order Under Subsection 7.0.2(4) – Closure of Places of Non-Essential Businesses)*, O.Reg. 119/20.

<sup>78</sup> O.Reg 82/20, Sched. 1, s. 1(4).

<sup>79</sup> *Order Under Subsection 7.0.2(4) – Closure of Places of Non-Essential Businesses*, O.Reg. 136/20.

campgrounds, but only to provide space for tailers and RV's to individuals who have no other residence in Canada and are in need of housing during the emergency.<sup>80</sup>

The non-essential businesses order has three components: a schedule listing essential businesses that are allowed to continue to operate; a schedule setting out rules that essential businesses are required to follow while operating; and a schedule setting out the requirement for all other businesses to shut down, and setting out exceptions to that requirement.

The order contains a list of 44 essential businesses, services and sectors that are permitted to continue to operate.<sup>81</sup> They include supply chains and infrastructure, supermarkets, takeout & delivery restaurants, laundromats, gas stations, pharmacies, building maintenance and security, transportation, some types of manufacturing, agriculture, utilities, laboratories, long-term care facilities, shelters, social service agencies, the justice sector, regulatory authorities, capital markets, and banking. Some businesses, like dentists, are only permitted to provide urgent services.<sup>82</sup> Others, like hardware stores, may be required to utilize alternative delivery methods, like curb-side pick up, except in exceptional circumstances.<sup>83</sup> Construction work may only be done in particular circumstances, such as where it is associated with the healthcare sector.<sup>84</sup>

All essential businesses that continue to operate are required to comply with the advice, recommendations and instructions from public health officials, including with respect to social distancing, cleaning or disinfecting.<sup>85</sup> With the exception of pharmacies and businesses that sell food and beverage, all businesses must – to the extent possible – restrict public access to their places of business by using alternative methods of sale and delivery.<sup>86</sup> Short-term rentals – other than traditional hotels, motels and student residences – must only be provided to persons in need of housing.<sup>87</sup> Real estate agencies may not host or support any open house.<sup>88</sup>

Persons who are responsible for any non-essential business are required to ensure that it remains closed.<sup>89</sup> Non-essential businesses may, however, operate remotely and provide goods by delivery or providing services online.<sup>90</sup> The person responsible for a non-essential business may also permit temporary access to the place of business for the purpose of:

- Performing work at the place of business in order to comply with any applicable law;
- Allowing for inspection, maintenance or repairs to be carried out;

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<sup>80</sup> *Order Under Subsection 7.0.2(4) – Closure of Places of Non-Essential Business*, O.Reg. 153/20.

<sup>81</sup> O.Reg 82/20, Sched. 2.

<sup>82</sup> O.Reg 82/20, Sched. 2, para. 38.

<sup>83</sup> O.Reg 82/20, Sched. 2, para. 15.

<sup>84</sup> O.Reg 82/20, Sched. 2, para. 27.

<sup>85</sup> O.Reg 82/20, Sched. 3, s. 1(2).

<sup>86</sup> O.Reg 82/20, Sched. 3, s. 2(1).

<sup>87</sup> O.Reg 82/20, Sched. 3, s. 3.

<sup>88</sup> O.Reg 82/20, Sched. 3, s. 4.

<sup>89</sup> O.Reg 82/20, Sched. 1, s. 1(1).

<sup>90</sup> O.Reg 82/20, Sched. 1, s. 1(3).

- Allowing for security services to be provided at the place of business;
- Temporarily attending to access materials, goods or supplies that may be necessary for the business to be operated remotely; or
- Temporarily attending to deal with other critical matters relating to the closure of the place of business, if such matters cannot be attended to remotely.<sup>91</sup>

The order also provides that any government, or any person or publicly funded agency or organization that delivers or supports government operations and services (including in the health sector) may continue to operate in Ontario.<sup>92</sup>

Cannabis retailers are treated as a special case. Initially listed as an essential business, they were removed as part of the April 4<sup>th</sup> narrowing of the list. After push back, a separate order was issued on April 7, 2020. This order permits licensed cannabis retailers to provide delivery and curbside (but not in-store) pick up services, subject to a number of specific operational rules.<sup>93</sup>

## B. Orders Impacting Workplace Operations & Collective Agreements

### *Hospitals and Health Service Providers*

An order was made on March 21<sup>st</sup> and makes wide-ranging changes to how health service providers deal with their employees, overriding both employment legislation and collective agreements.<sup>94</sup>

This order grants health services providers with the power to take, with respect to work deployment and staffing, any reasonably necessary measures to respond to, prevent and alleviate the outbreak of COVID-19 for patients.<sup>95</sup> The order goes on to provide a non-exhaustive list of specific measures that health services providers may take, notwithstanding any other statute, regulation, order, policy, arrangement or agreement – including collective agreements:

- Identify staffing priorities and develop, modify and implement redeployment plans. Such plans need not comply with collective agreement terms, including lay-off, seniority/service or bumping provisions, and may include:
  - Redeploying staff within different locations in (or between) facilities of the health service provider;<sup>96</sup>

<sup>91</sup> O.Reg 82/80, Sched. 1, s. 1(2).

<sup>92</sup> O.Reg 82/20, Sched. 1, s. 1(5).

<sup>93</sup> *Order Under Subsection 7.0.2(4) of the Act – Pick Up and Delivery of Cannabis*, O.Reg. 128/20.

<sup>94</sup> *Order Made Under Subsection 7.02(4) of the Act*, O.Reg 74/20.

<sup>95</sup> O.Reg 74/20, Sched., s. 2.

<sup>96</sup> O.Reg 74/20, Sched., s. 3(i)(A).

- Redeploying staff to work in COVID-19 assessment centres;<sup>97</sup>
  - Changing the assignment of work, including assigning non-bargaining unit employees or contractors to perform bargaining unit work;<sup>98</sup>
  - Changing the scheduling of work or shift assignments;<sup>99</sup>
  - Deferring or cancelling vacations, absences or other leaves, regardless of whether such vacations, absences or leaves are established by statute, regulation, agreement or otherwise;<sup>100</sup>
  - Employing extra part-time or temporary staff or contractors, including for the purposes of performing bargaining unit work;<sup>101</sup>
  - Using volunteers to perform work, including to perform bargaining unit work;<sup>102</sup> or
  - Providing appropriate training or education as needed to staff and volunteers to achieve the purposes of a redeployment plan.<sup>103</sup>
- Conduct skills and experience inventories of staff to identify possible alternative roles in priority areas;<sup>104</sup>
  - Require and collect information from staff or contractors about their ability to provide services for the health service provider;<sup>105</sup>
  - Require the provision of and collect information from staff or contractors about their likely or actual exposure to the Virus, or about any other health conditions that may affect their ability to provide services;<sup>106</sup>
  - Cancel or postpone services that are not related to responding to, preventing or alleviating the outbreak of the Virus;<sup>107</sup> and
  - Suspend, for the duration of the Order, any grievance process with respect to any matter referred to in the Order.<sup>108</sup>

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<sup>97</sup> O.Reg 74/20, Sched., s. 3(i)(B).

<sup>98</sup> O.Reg 74/20, Sched., s. 3(i)(C).

<sup>99</sup> O.Reg 74/20, Sched., s. 3(i)(D).

<sup>100</sup> O.Reg 74/20, Sched., s. 3(i)(E).

<sup>101</sup> O.Reg 74/20, Sched., s. 3(i)(F).

<sup>102</sup> O.Reg 74/20, Sched., s. 3(i)(G).

<sup>103</sup> O.Reg 74/20, Sched., s. 3(i)(H).

<sup>104</sup> O.Reg 74/20, Sched., s. 3(ii).

<sup>105</sup> O.Reg 74/20, Sched., s. 3(iii).

<sup>106</sup> O.Reg 74/20, Sched., s. 3(iv).

<sup>107</sup> O.Reg 74/20, Sched., s. 3(v).

<sup>108</sup> O.Reg 74/20, Sched., s. 3(vi).

### *Long-Term Care Homes*

On March 23, 2020 a similar order was issued targeting long-term care homes.<sup>109</sup> As with the hospital order, the long-term care home order directs service providers take any reasonably necessary measures related to staffing to respond to, prevent and alleviate the COVID-19 outbreak.<sup>110</sup> To that end, providers are directed and empowered to develop, modify and implement redeployment plans that may override collective agreement terms. The order was slightly modified on April 14, 2020, to align with the prohibition, discussed below, on working at more than one long-term care home.<sup>111</sup>

The non-exhaustive list of things that may be done under such plans are identical to those set out in the hospital order (above), with the following exceptions:

- The power of re-deploying employees is only for the purpose of ensuring that they do not provide services at more than one long-term care home operated by the same provider;<sup>112</sup>
- The long-term care home order does not refer to redeploying staff to COVID-19 assessment centres;
- The long-term care home order refers to conducting skills inventories to identify possible alternative roles in “any area” as opposed to “priority areas”, which is the language used in the hospital order;<sup>113</sup> and
- The long-term care home order does not refer to the cancellation or postponement of services unrelated to COVID-19.

On March 27, 2020, a second order was issued at the long-term care home sector authorizing it to engage in a range of practices that would otherwise be unlawful under the *Long-Term Care Homes Act, 2007* and its regulations.<sup>114</sup> The order authorizes licensed long-term care home operators to take any reasonably necessary measures in accordance with the order to respond to, prevent and alleviate the outbreak of COVID-19 in a long-term care home, so long as they are consistent with ensuring a safe and secure environment for residents.<sup>115</sup>

The order then authorizes operators of long-term care homes to do or refrain from doing things, notwithstanding their normal legislative, regulatory and policy obligations. The order permits the following:

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<sup>109</sup> *Order Under Subsection 7.0.2(4) of the Act – Work Deployment Measures in Long-Term Care Homes*, O.Reg 77/20.

<sup>110</sup> O.Reg 77/20, Sched. 1, s. 2.

<sup>111</sup> O.Reg 147/20.

<sup>112</sup> O.Reg 77/20, Sched. 1, s. 3(i)(A).

<sup>113</sup> O.Reg 77/20, Sched. 1, s. 3(ii).

<sup>114</sup> *Order Under Subsection 7.0.2(4) of the Act – Streamlining Requirements for Long-Term Care Homes*, O.Reg. 95/20.

<sup>115</sup> O.Reg 95/20, Sched., ss. 2, 4.

- Other than “critical incident reports” under s. 107 of O.Reg. 79/10, operators are not required to make statutorily required reports to the Director of Long-Term Care Homes;<sup>116</sup>
- Numerous documentation requirements do not need to be performed, though incidents and changes of a “significant nature” or which are required to ensure the proper care and safety of a resident must still be documented;<sup>117</sup>
- Operators are not required to post any information, except for essential information, such as materials related to COVID-19 from the Ministry of Health and Long-Term Care;<sup>118</sup>
- Operators do not need to meet the minimum staffing hours for positions imposed by law. Instead, they must only ensure that “all of the care requirements associated with that position are met”;<sup>119</sup>
- Staffing positions may be filled by anyone who, in the reasonable opinion of an operator, has adequate skills, training and knowledge to perform the duties required of the position.<sup>120</sup> In doing so, they are not required to comply with normal staff screening or training requirements, but are still required to adopt measures to ensure resident care and safety.<sup>121</sup> While this order does not specifically say that this may be done in violation of collective agreements, it must be read in conjunction with the provision of the March 23<sup>rd</sup> order that permits the use of part-time, temporary, contract or volunteer staff to do bargaining unit work;<sup>122</sup>
- Care conferences and patient examinations are not required to occur at the frequency required by law. They are only required to occur “based on the clinical needs of the resident” and “within a reasonable period of time after the resident’s last examination” respectively;<sup>123</sup>
- Operators may adopt “flexible practices” with respect to the administration of drugs to residents. The term “flexible practices” is not defined by the order but such practices must not provide for someone to administer a drug outside of their scope of practice, or deny a patient any right to self-administer that they may have under the applicable regulations;<sup>124</sup>

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<sup>116</sup> O.Reg 95/20, Sched., s. 3(i)(A).

<sup>117</sup> O.Reg 95/20, Sched., s. 3(ii).

<sup>118</sup> O.Reg 95/20, Sched., s. 3(ii)(D).

<sup>119</sup> O.Reg 95/20, Sched., s. 3(iii)(B).

<sup>120</sup> O.Reg 95/20, Sched., s. 3(iii)(A).

<sup>121</sup> O.Reg 95/20, Sched., ss. 3(iii)(C)-(D).

<sup>122</sup> O.Reg 77/20, Sched., ss. 3(i)(F)-(F).

<sup>123</sup> O.Reg 95/20, Sched., s. 3(iv).

<sup>124</sup> O.Reg 95/20, Sched., s. 3(vii).

- Operators are permitted to use “flexible processes” for admission, transfer and discharge of residents. The requirements to seek consent from residents under the *Long-Term Care Homes Act* does continue to apply;<sup>125</sup>
- The process for seeking the Director’s approval for obtaining licenses and management orders under the *Long-Term Care Homes Act* no longer needs to be complied with unless the Director specifically requires it.<sup>126</sup>

On April 14, 2020, the government issued a third order directed at workers in long-term care homes designed to ensure that they do not work at more than one health service-related workplace at a time.<sup>127</sup>

The order applies to any employee of a long-term care home who is also an employee of a retirement home or any other “health service provider” (which includes other long-term care homes, hospitals, community health centres, hospices, family health teams, etc.).<sup>128</sup> By 5:00 pm on April 17, 2020, these workers must inform each of their health system and retirement home employers that they are subject to the order.<sup>129</sup>

Starting at 12:01 am on April 22, 2020, workers subject to the order are prohibited from working as an employee of more than one health system provider or retirement home. Where their employer operates more than one long-term care home, they may only work at one location.<sup>130</sup> Employers have a corresponding duty to ensure that workers do not work at other health service providers or retirement homes.<sup>131</sup> The employee’s obligation under this order overrides any provision of a collective agreement.<sup>132</sup>

The order contains provisions that appear designed to protect long-term care home employees from negative employment consequences. The order states that employees subject to it are also subject to the provision of the *EMCPA* that protects persons from termination of employment when they provide work pursuant to an emergency order.<sup>133</sup> The preamble to the order also makes reference to section 50.1 of the *Employment Standards Act, 2000*, which provides job protected leaves for workers unavailable to work for certain reasons related to designated infectious diseases such as COVID-19.<sup>134</sup>

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<sup>125</sup> O.Reg 95/20, Sched., s. 3(v).

<sup>126</sup> O.Reg 95/20, Sched., s. 3(vi).

<sup>127</sup> *Order Under Subsection 7.0.2(4) of the Act – Limiting Work to a Single Long-Term Care Home*, O.Reg. 146/20.

<sup>128</sup> O.Reg. 146/20, Sched. 1, s. 3(1).

<sup>129</sup> O.Reg. 146/20, Sched. 1, ss. 3(2)-(3).

<sup>130</sup> O.Reg. 146/20, Sched. 1, s. 4.

<sup>131</sup> O.Reg. 146/20, Sched. 1, s. 6.

<sup>132</sup> O.Reg. 146/20, Sched. 1, s. 5(b).

<sup>133</sup> O.Reg. 146/20, Sched. 1, s. 5(a), referring to *EMCPA*, s. 7.0.2(6).

<sup>134</sup> For more information on s. 50.1 of the *ESA*, see [these resources](#) from Goldblatt Partners.



### *Water and Sewage Systems*

On March 23, 2020, the same day that the first long-term care home order was issued, a second order was issued targeting the Drinking Water System and Sewage/Wastewater systems. This order was similar to the hospital and first long-term care home order, but went further to override a variety of licensing requirements established by law.<sup>135</sup>

Municipal drinking water systems are authorized to take measures with respect to work deployment and staffing to respond to operational challenges posed by COVID-19 to the extent that the measures are necessary to ensure the provision of safe drinking water.<sup>136</sup> Municipalities are authorized to take similar measures where necessary to ensure a sewage works is properly operated.<sup>137</sup>

As with hospitals and long-term care homes, water and sewage systems are authorized to take a variety of specific actions, notwithstanding the terms of a collective agreement, or a statute, regulation, policy or arrangement.<sup>138</sup> The non-exhaustive list of things that may be done under such plans are identical to those set out in the long-term care order (above), with the following exceptions:

- As with the hospital order, the water and sewage order refers to skills inventories to identify possible alternative rules in “priority areas”, not “any area” as is the case for long-term care homes;<sup>139</sup> and
- Operators are authorized to provide supports and services to staff and contractors to enable them to continue to carry out their duties to operate drinking water systems and sewage works.<sup>140</sup>

With respect to drinking water systems, the order overrides a number of provisions of the *Safe Drinking Water Act, 2002*<sup>141</sup> and its associated *Certification of Drinking Water System Operators and Water Quality Analysis* regulation<sup>142</sup> related to training, licensing and approval of system operators, overall responsible operators, and supervisors. Under the order, a system may be operated by professional engineers, certain former certificate holders, or certain workers in job classification who have a minimum of 5 years’ experience working on a particular subsystem.<sup>143</sup> The order also provides that existing certifications set to expire while the order is in effect are automatically extended.<sup>144</sup> Finally, the order permits required testing to be done by persons not

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<sup>135</sup> *Order Under Subsection 7.0.2(4) of the Act – Drinking Water Systems and Sewage Works*, O.Reg. 75/20.

<sup>136</sup> O.Reg 75/20, Sched. 1, s. 5.

<sup>137</sup> O.Reg 75/20, Sched. 2, s. 4.

<sup>138</sup> O.Reg 75/20. Sched. 1, s. 6 & Sched. 2, s. 5.

<sup>139</sup> O.Reg 75/20. Sched. 1, s. 6(b) & Sched. 2, s. 5(b).

<sup>140</sup> O.Reg 75/20. Sched. 1, s. 6(e) & Sched. 2, s. 5(e).

<sup>141</sup> SO 2002, c. 32, ss. 11(1)3, 5.

<sup>142</sup> O.Reg 128/04, ss. 22, 23, 25.

<sup>143</sup> O.Reg 75/20. Sched. 1, s. 1.

<sup>144</sup> O.Reg 75/20. Sched. 1, s. 2.

normally authorized to conduct such testing, so long as they receive training to do so, work under the supervision of a certified operator and advises them of all test results.<sup>145</sup>

The order contains a substantially similar set of exceptions to rules established under the *Ontario Water Resources Act*<sup>146</sup> and the *Licensing of Sewage Works Operators* regulation,<sup>147</sup> with respect to who may operate a wastewater treatment facility or a wastewater collection facility and the automatic extension of expiring certificates.<sup>148</sup> It does not contain parallel rules with respect that loosen the rules respecting who may conduct certain kinds of tests.

### *Traffic Management*

The March 27, 2020 order respecting traffic management also contains provisions that authorize actions contrary to collective agreements. The Ministry of Transportation is authorized to assign MTO officers to perform duties related to any provision of the order notwithstanding the provisions of a collective agreement.<sup>149</sup>

### *Boards of Health*

On April 1, 2020, an emergency order was issued dealing with work deployment measures for Boards of Health in Ontario.<sup>150</sup> It is substantially similar to the hospital and long-term care home orders, particularly in its direction to permit Boards of Health to take any reasonably necessary measures related to work deployment and staffing to respond to, prevent and alleviate COVID-19.<sup>151</sup>

As with the hospital and the first long-term care orders, the boards of health order contains a non-exhaustive list of specific measures that may be taken, notwithstanding the terms of any law, regulation, or collective agreement.<sup>152</sup> Its terms are essentially identical to those in the hospital and long-term care orders, including the ability to use non-bargaining unit workers and volunteers to do bargaining unit work,<sup>153</sup> cancelling vacations and leaves and changing shift assignments,<sup>154</sup> and re-deploying workers to different job sites.<sup>155</sup> Boards may suspend the operation of the grievance procedure with respect to matters under the order.<sup>156</sup>

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<sup>145</sup> O.Reg 75/20, Sched. 1, s. 3.

<sup>146</sup> RSO 1990, c. O.40.

<sup>147</sup> O.Reg. 129/04, ss. 14, 15, 17.

<sup>148</sup> O.Reg 75/20, Sched. 2, ss. 1-2.

<sup>149</sup> O.Reg. 89/20, Sched. 1, s. 5.

<sup>150</sup> *Order Under Subsection 7.0.2(4) of the Act – Work Deployment Measures for Boards of Health*, O.Reg. 116/20.

<sup>151</sup> O.Reg 116/20, Sched. 1, s. 2.

<sup>152</sup> O.Reg 116/20, Sched. 1, ss. 3-4.

<sup>153</sup> O.Reg 116/20, Sched. 1, ss. 3(1)(ii), (v), (vi).

<sup>154</sup> O.Reg 116/20, Sched. 1, ss. 3(1)(iii), (iv).

<sup>155</sup> O.Reg 116/20, Sched. 1, s. 3(1)(i).

<sup>156</sup> O.Reg 116/20, Sched. 1, s. 3(6).

The order does not make reference to re-deploying workers to COVID assessment centres as the hospital order does. The order’s language on conducting skills and experience inventories of workers uses hospital order’s language of “priority areas” rather than the long-term care home’s language of “any area”.<sup>157</sup> Other differences in the structure of the order appear to reflect an evolving drafting style, and likely does not indicate other substantive differences in the order’s scope or impact.<sup>158</sup>

### *Retirement Homes*

On April 2, 2020, an emergency order was issued dealing with work deployment measures in retirement homes.<sup>159</sup> While sharing many similarities with the hospital, boards of health and the first long-term care homes orders, the retirement homes order has several additional features not found in those orders.

As with the other orders, operators of retirement homes are directed to take any reasonably necessary measures related to work deployment and staffing to respond to, prevent and alleviate COVID-19.<sup>160</sup> They are given the same non-exhaustive list of steps that they make take, notwithstanding collective agreement terms.<sup>161</sup> This includes conducting skills and experience inventories to identify alternative roles for staff in “priority areas”.<sup>162</sup>

In addition, retirement homes are exempted from the following requirements:

- Conducting screening and criminal record checks of potential new staff and volunteers under s. 64 of the *Retirement Homes Act, 2010*;<sup>163</sup>
- Reporting an outbreak of COVID-19 in their facility to the Retirement Homes Authority. This is replaced by an obligation to report such an outbreak to the local medical officer of health;<sup>164</sup>
- Conducting interdisciplinary care conferences that are not related to responding to, preventing or alleviating the outbreak of COVID-19;<sup>165</sup> and

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<sup>157</sup> O.Reg. 116/20, Sched. 1, s. 3(2).

<sup>158</sup> For example, the numbering system used in this order is slightly different than in previous orders, and a reference to overriding collective agreement provisions - while using identical language - is shifted to the end of the order.

<sup>159</sup> *Order Under Subsection 7.0.2(4) of the Act – Work Deployment Measures in Retirement Homes*, O.Reg. 118/20.

<sup>160</sup> O.Reg. 118/20, Sched. 1, s. 2.

<sup>161</sup> O.Reg. 118/20, Sched. 1, ss. 3-4.

<sup>162</sup> O.Reg. 118/20, Sched. 1, s. 3(2).

<sup>163</sup> O.Reg. 118/20, Sched. 1, s. 3(1)(vi).

<sup>164</sup> O.Reg. 118/20, Sched. 1, s. 3(5); *General*, O.Reg. 166/11, s. 27(5).

<sup>165</sup> O.Reg. 118/20, Sched. 1, s. 3(6).

- The obligation to document or post new information, except for documenting incidents of a serious nature or where necessary to ensure proper care and safety of residents.<sup>166</sup>

The order goes on to provide that, notwithstanding anything that it may contain, retirement homes are required to comply with any applicable guidance given by the Chief Medical Officer of Health, or directives issued under the *Health Protection and Promotion Act*, and that nothing in the order derogates from the responsibility to ensure a safe and secure environment for residents.<sup>167</sup>

A second order impacting retirement homes was issued on April 9, 2020, which relates to agreements with hospitals for the provision of temporary accommodation and care for current or discharged patients.<sup>168</sup> The purpose of the order is to avoid certain labour relations consequences that might otherwise flow from agreements whereby retirement homes are used as facilities to care for patients in order to alleviate hospital overcrowding. Under the order, such an agreement would not:

- Impact whether the hospital or the retirement home constituted a “hospital” for the purposes of the *Hospital Labour Disputes Arbitration Act*;<sup>169</sup>
- Impact whether the hospital and the retirement home constituted a single employer for the purposes of s. 1(4) of the *Labour Relation Act, 1995*;<sup>170</sup> or
- Impact whether the hospital or the retirement home has sold part of their business for the purposes of s. 69 of the *Labour Relations Act, 1995*.<sup>171</sup>

The order makes clear that it is only the entering into such an arrangement that does not cause these labour relations consequences. For example, a retirement home that was already a “hospital” for the purposes of *HLDA* remains a hospital, and could become a hospital for reasons unrelated to entering into the kind of arrangement described in the order.<sup>172</sup>

A third order targeting retirement homes was issued on April 16, 2020, which prohibits employees in this sector from working for more than one retirement home or for other health service providers.<sup>173</sup> The rules that are imposed by the order are similar to those that were implemented in the Long-Term Care Home sector in April 14<sup>th</sup>. All retirement home employees are required to inform their employer of any other retirement home or health service provider that they are employed by, and must do so by 9am on April 20, 2020.<sup>174</sup> Starting at 12:01am on

<sup>166</sup> O.Reg. 118/20, Sched. 1, s. 3(8).

<sup>167</sup> O.Reg. 118/20, Sched. 1, ss. 5-6.

<sup>168</sup> *Order Under Subsection 7.0.2(4) of the Act – Agreements Between Health Service Providers and Retirement Homes*, O.Reg. 140/20.

<sup>169</sup> O.Reg. 140/20, Sched. 1, s. 3(1)1.

<sup>170</sup> O.Reg. 140/20, Sched. 1, s. 3(1)2.

<sup>171</sup> O.Reg. 140/20, Sched. 1, s. 3(1)3.

<sup>172</sup> O.Reg. 140/20, Sched. 1, s. 3(2).

<sup>173</sup> *Order Under Subsection 7.0.2(4) of the Act – Limiting Work to a Single Retirement Home*, O.Reg. 158/20.

<sup>174</sup> O.Reg. 158/20, Sched. 1, s. 3(2).

April 22, 2020, retirement home workers may not also perform work at another retirement home (whether or not operated by the same employer) or a health service provider (hospitals, long-term care homes, etc.).<sup>175</sup>

As with the long-term care homes order, this order provides that the employee must comply with the order notwithstanding the terms of a collective agreement.<sup>176</sup> The order also contains the same type of language that appears to protect retirement home workers from being terminated from employment for complying with the order.<sup>177</sup>

In the event of a conflict between this order, and the first retirement home order dealing with deployment and staffing, this order prevails.<sup>178</sup> This means that a retirement home operator's power to implement deployment plans would not, for example, allow them to re-deploy a worker to work at two different sites.

### *Service Agencies for Developmentally Delayed Adults*

On April 3, 2020, a similar order was issued for service agencies as defined in the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2018*.<sup>179</sup> These service providers are directed to reasonably necessary measures related to deployment and staffing to respond to COVID-19, including the same list of specific measures that it may take notwithstanding relevant collective agreement provisions.<sup>180</sup> The order uses the "any area" language contained in the long-term care home order in its provision respecting skills inventories.<sup>181</sup>

As with the retirement homes order, this order grants service providers with extensive exemptions to ordinary statutory obligations, while maintaining a general duty to ensure a safe and security environment for persons with a developmental disability.<sup>182</sup> Specifically, service providers:

- Are not required to make reports to the Ministry of Children, Community and Social Services other than serious occurrence reports;<sup>183</sup>

<sup>175</sup> O.Reg 158/20, Sched. 1, ss. 4, 6.

<sup>176</sup> O.Reg 158/20, Sched. 1, s. 5(b).

<sup>177</sup> O.Reg 158/20, preamble para. 3 and Sched. 1, s. 5(a).

<sup>178</sup> O.Reg 158/20, Sched. 1, s. 8.

<sup>179</sup> *Order Under Subsection 7.0.2(4) of the Act – Service Agencies Providing Services and Supports to Adults with Developmental Disabilities*, O.Reg. 121/20.

<sup>180</sup> O.Reg 121/20, Sched. 1, ss. 2-4.

<sup>181</sup> O.Reg 121/20, Sched. 1, s. 3(2).

<sup>182</sup> O.Reg 121/20, Sched. 1, s. 6.

<sup>183</sup> O.Reg 121/20, Sched. 1, s. 5(1).

- Are largely exempted from documentarion requirements where it is not necessary to ensure the safety, security and well-being of persons receiving services and supports. A list of documenting that remains mandatory is set out;<sup>184</sup>
- Are not required to conduct a review of behavior support plans of individuals with challenging behavior, inless there are sigifniciant changes related to the use of intrusive behavior intervention strategies;<sup>185</sup>
- May adjust staffing levels and other measures to address safety, security and wellbeing of service recipients when providers are not able to maintain support staff at the level identified in the person’s individual support plan;<sup>186</sup>
- May defer criminal background checks for new staff and volunteers, provided that they adopt appropriate measures to ensure the safety of persons with developmental disabilities;<sup>187</sup>
- Are relieved of most of the requiremnts to provide orientation training to members of their board of directors and to persons with developmental disabilities;<sup>188</sup>
- Are relieved of most of the specific training and orientation requirements for staff members. Staff must still be sufficiently trained to meet the specific needs of the individual(s) they work with. Physical restraints may only be used by staff who meet the training requirements set out in the relevant regulations;<sup>189</sup>
- May defer refresher and re-certification training for staff, including theory and practice of physical restraint holds;<sup>190</sup> and
- Are not required to meet the specific regulatory standards for alternate residential arrangements, but must still adopt measures to ensure the health and safety of persons receiving service.<sup>191</sup>

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<sup>184</sup> O.Reg 121/20, Sched. 1, ss. 5(3)-(4).

<sup>185</sup> O.Reg 121/20, Sched. 1, s. 5(5).

<sup>186</sup> O.Reg 121/20, Sched. 1, s. 5(6).

<sup>187</sup> O.Reg 121/20, Sched. 1, s. 5(7).

<sup>188</sup> O.Reg 121/20, Sched. 1, ss. 5(8), (11).

<sup>189</sup> O.Reg 121/20, Sched. 1, s. 5(9).

<sup>190</sup> O.Reg 121/20, Sched. 1, s. 5(10).

<sup>191</sup> O.Reg 121/20, Sched. 1, s. 5(13).

### *Police Services*

On April 8, 2020, an emergency order was issued relieving against some rules related to use of force and firearms training for police officers.<sup>192</sup> Under the *Equipment and Use of Force* regulation under the *Police Services Act*, police officers are required to complete training courses on use of force and firearms before they may use use of force or cary a firearm, respectively.<sup>193</sup> Normally police officers are required to re-take these courses periodically.<sup>194</sup> The emergency order permits chiefs of police to authorize officers to perform duties that may involve the use of force or carrying a firearm so long as the officer had taken the relevant courses within the previous two years. This power may be exercised notwithstanding any other statute, regulation policy or agreement, including the terms of a collective agreement.<sup>195</sup>

### *Residential and Crisis Line Service Agencies for Victims of Violence Against Women*

On April 14, 2020, the government issued an order related to staffing and deployment for agencies that provide residential and crisis line services under Ontario’s Violence Against Women Support Services program or the Anti-Humn Trafficking Community Supports program.<sup>196</sup> This order is broadly similar to other staffing and deployment orders issued under the *EMCPA*. However, whereas other orders *require* their subject (hospitals, long-term care homes, etc.) to take all reasonably necessary measures related to staffing and deployment to respond to and alieviate the outbreak of COVID-19, this order only *authorizes* such measures.<sup>197</sup>

That said, in practice this may make relatively little difference. Under this order service agencies are authorized to take the same kinds of actions notwithstanding collective agreement provisions as are authorized under the other emergency orders discussed above.<sup>198</sup>

### *District Social Services Administration Boards*

On April 16, 2020, the government issued a order related to staffing and deployment for district social services administration boards.<sup>199</sup> These are entities responsible for delivering various

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<sup>192</sup> *Order Under Subsection 7.0.2(4) of the Act – Use of Force and Firearms in Policing Services*, O.Reg. 132/20.

<sup>193</sup> *Equipment and Use of Force*, RRO 1990, Reg. 926, s. 14.2.

<sup>194</sup> In the case of firearms training, the regulation itself requires annual re-certification: RRO 1990, Reg. 926, s. 14.2(2).

<sup>195</sup> O.Reg 132/20, Sched. 1, ss. 2-3.

<sup>196</sup> *Work Deployment Measures for Service Agencies Providing Violence Against Women Residential Services and Crisis Line Services*, O.Reg. 145/20.

<sup>197</sup> O.Reg 145/20, Sched. 1, s. 2(1).

<sup>198</sup> O.Reg 145/20, Sched. 1, ss. 3-4.

<sup>199</sup> *Order Under Subsection 7.0.2(4) of the Act – Work Deployment Measures for District Social Services Administrations Boards*, O.Reg. 154/20.

types of social services (e.g. Ontario Works, ODSP, in-home care services for certain children, etc.) in larger, less densely populated regions of the Province.<sup>200</sup>

Under this order, employers are permitted to take the same kinds of actions discussed above with respect to other sectors, including overriding terms of a collective agreement and suspending grievances related to staffing and re-deployment.<sup>201</sup> However, they may only exercise these powers with respect to reducing or mitigating the impact of COVID-19 on a Board's "critical services", which are limited to the operation of homeless shelters and services for homeless persons; Ontario Works assistance; and child care programs.<sup>202</sup>

Also, unlike previous orders that authorized employers to override terms of collective agreements, this order requires employers to give impacted unions 24-hours before the employer may implement a redeployment plan under the order.<sup>203</sup>

### *Community Service Providers*

On April 16, 2020, an order was issued by the government increasing the flexibility Local Health Integration Networks (LHIN) have to contract for, and fund health care and other social services.<sup>204</sup> The scope of this order is far narrower than the orders made in other sectors, and appears to target a different set of concerns.

Currently, LHINs will contract with organizations to provide a number of services, including home making, personal support and other professional services under the *Home Care and Community Services Act, 1994*.<sup>205</sup> Under this order, a LHIN is authorized to request that such organizations provide other health care and related social services in settings identified by the LHIN and to fund those services.<sup>206</sup> It may make such a request notwithstanding any statute, regulation, policy, arrangement or agreement. A service provider is also authorized to accept such a request and to deploy its employees to provide such services, notwithstanding any statute or regulation that would provide otherwise.<sup>207</sup>

However, the regulation also provides that a employee of a service provider is *not* required to agree to provide the services requested by a LHIN,<sup>208</sup> and the order does not authorize a service provider to override any collective agreement provisions.

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<sup>200</sup> See generally the *District Social Services Administration Boards Act*, RSO 1990, c D.15 and O.Reg. 278/98.

<sup>201</sup> O.Reg 154/20, Sched. 1, s. ss. 5-6.

<sup>202</sup> O.Reg 154/20, Sched. 1, s. 4(2).

<sup>203</sup> O.Reg 154/20, Sched. 1, s. 7.

<sup>204</sup> *Order Under Subsection 7.0.2(4) of the Act – Deployment of Employees of Service Provider Organizations*, O.Reg. 156/20.

<sup>205</sup> SO 1994, c. 26.

<sup>206</sup> O.Reg 156/20, Sched. 1, s. 2(1).

<sup>207</sup> O.Reg 156/20, Sched. 1, s. 2(2).

<sup>208</sup> O.Reg 156/20, Sched. 1, s. 2(3).



## *Municipalities*

On April 16, 2020, Cabinet issued an emergency order granting broad powers to municipalities to override collective agreement provisions and deploy workers.<sup>209</sup> It mirrors aspects of several of the other sectoral orders discussed above, and also includes its own novel provisions.

The order only applies to municipalities that have declared an emergency under their own authority under the *EMCPA*.<sup>210</sup> Further, it does not apply to certain categories of municipal workers. In some cases, this is because these workers are already the subject of another sectoral order, such as workers regularly employed in drinking water systems, wastewater collection facilities, wastewater treatment facilities, long-term care homes or boards of health.<sup>211</sup>

However, the order also does not apply to persons normally employed as firefighters or ambulance services operators,<sup>212</sup> even though these sectors do not have any emergency order governing them.<sup>213</sup>

For those municipalities who have declared a state of emergency, they are authorized to take, with respect to work deployment and staffing, any reasonably necessary measure to respond to, prevent and alleviate the outbreak of COVID-19 so as to prevent, reduce or mitigate the effect of COVID on “critical municipal services” that are delivered by the municipalities’ employees.<sup>214</sup>

Critical municipal services are:

- The maintenance of municipal long-term care homes;
- The delivery of public health services;
- The operation of homeless shelters and the provision of services to homeless persons;
- The provision of drinking water;
- Waste management and sanitation;
- Wastewater management;
- Public transportation services;

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<sup>209</sup> *Order Under Subsection 7.0.2(4) of the Act – Work Deployment Measures for Municipalities*, O.Reg. 157/20.

<sup>210</sup> O.Reg 157/20, Sched. 1, s. 1. *EMCPA*, s. 4.

<sup>211</sup> O.Reg 157/20, Sched. 1, ss. 2(3)-(5).

<sup>212</sup> O.Reg 157/20, Sched. 1, ss. 2(1)-(2).

<sup>213</sup> However, a regulation made under the *Ambulance Act* was also enacted on April 16, 2020, significantly loosening the rules respecting who may work as an ambulance worker: see O.Reg. 159/20, amending *General*, O.Reg. 257/00.

<sup>214</sup> O.Reg 157/20, Sched. 1, s. 3(1).

- The provision of Ontario Works benefits administered by the municipality;
- The administration, operation and funding of child care programs and services;
- The enforcement of by-laws; and
- Services related to the implementation of the municipality's emergency plan.<sup>215</sup>

Notably, this list includes the three services whose workers are excluded from the scope of this order, but who are covered by other orders (i.e. water/wastewater, long-term care homes and public health). These orders therefore must be read together. They grant municipalities broad powers related to staff and redeployment across, and in between, all of these service sectors.

As with other sectoral orders, the municipalities order goes on to provide a list of more powers that a municipality has in addition to this general power to take reasonably necessary measures.

As with other orders, municipalities are granted the power to develop redeployment plans notwithstanding any provision of a collective agreement.<sup>216</sup> Such a plan may provide for redeploying staff between different locations, changing assignments of work, having non-bargaining unit members do bargaining unit work, changing schedules or shift assignment, deferring or cancelling leaves or vacations, employing extra part time, temporary, contract or volunteer staff (including to do bargaining unit work), and providing training to staff to permit them to do work in accordance with the plan.<sup>217</sup> Before implementing such a plan, a municipality must give at least 24 hours notice to every bargaining agent that represents an affected employee.<sup>218</sup>

Municipalities also have the power to conduct skills inventories, collect certain kinds of information from workers related to availability to work and health status.<sup>219</sup> They are also authorized to cancel or postpone services that are not related to responding to COVID-19 or that are not deemed to be critical under the municipality's emergency plan.<sup>220</sup>

Finally municipalities are permitted, for the duration of the order, to suspend any grievance process with respect to any matter referred to in the order.<sup>221</sup>

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<sup>215</sup> O.Reg 157/20, Sched. 1, s. 3(2).

<sup>216</sup> O.Reg 157/20, Sched. 1, s. 5.

<sup>217</sup> O.Reg 157/20, Sched. 1, s. 4(1).

<sup>218</sup> O.Reg 157/20, Sched. 1, s. 6.

<sup>219</sup> O.Reg 157/20, Sched. 1, ss. 4(2)-(4).

<sup>220</sup> O.Reg 157/20, Sched. 1, s. 4(5).

<sup>221</sup> O.Reg 157/20, Sched. 1, s. 4(6).

### C. Price Control Measures

On March 24, 2020, an order was issued impacting consumer electricity prices.<sup>222</sup> Normally under the Ontario Energy Boards *Standard Supply Service Code*<sup>223</sup> consumers pay a differential rate per kilowatt hour depending on the time of day. This is meant to encourage consumers to reduce electricity consumption during peak demand periods. Under the March 23<sup>rd</sup> order, consumers will pay 10.1 cents/kWh – the rate normally applicable for off-peak consumption – regardless of what time of day it is consumed.<sup>224</sup> The order took effect on March 24, 2020, the day it was made.

On March 27, 2020, in response to media reports that some retailers were charging high prices for that were in-demand as a result of COVID, an order was issued to prohibit price gouging.<sup>225</sup> The order bans the charging of “unconscionable” prices on “necessary goods”, which includes masks and gloves, non-prescription medications for the treatment of COVID-19 symptoms, disinfectants, and personal hygiene products.<sup>226</sup> An unconscionable price “includes” a price that grossly exceeds the price at which similar goods are available to like consumers.<sup>227</sup>

This ban on unconscionable prices applies to persons who own or operate a retail business or who did not ordinarily deal in necessary goods prior to the declared emergency (i.e. individuals who bought products and subsequently have attempted to re-sell them online at inflated prices). It does not apply to manufacturers, distributors or wholesalers.<sup>228</sup>

In early April, reports emerged that some child care providers continued to require parents to pay child care fees even though the providers had been shut down by emergency order and were not providing services. In response, an order was issued on April 9, 2020, prohibiting child care providers from charging fees unless (1) they were lawfully able to operate under the essential business order; and (2) were in fact operating.<sup>229</sup> The order also bans providers from penalizing any person who did not pay fees when the provider re-opens.<sup>230</sup> This provision appears to be directed at ensuring that parents will not lose their child(ren)’s spot when services re-open for failure to pay fees during the closure.

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<sup>222</sup> *Order Under Subsection 7.0.2(4) of the Act – Electricity Price for RPP Consumers*, O.Reg. 80/20.

<sup>223</sup> <https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2020-03/Standard-Supply-Service-Code-SSSC-20200301.pdf>

<sup>224</sup> O.Reg 80/20, s. 1.

<sup>225</sup> *Order Under Subsection 7.0.2(4) – Prohibition on Certain Persons Charging Unconscionable Prices for Sales of Necessary Goods*, O.Reg. 98/20.

<sup>226</sup> O.Reg 98/20, Sched., ss. 2(1), 3.

<sup>227</sup> O.Reg 98/20, Sched., s. 2(2).

<sup>228</sup> O.Reg 98/20, Sched., s. 1.

<sup>229</sup> *Order Under Subsection 7.0.2 of the Act – Child Care Fees*, O.Reg. 139/20, Sched. 1, s. 1.

<sup>230</sup> O.Reg 139/20, Sched. 1, s. 2.

#### D. Other Emergency Orders

As of March 31, 2020, police officers and provincial offences officers have the right to require any person who they believe on reasonable grounds has violated an order under the *EMCPA* to provide their correct name, date of birth or address.<sup>231</sup> A failure to do so is itself an offence under the *EMCPA* and subject to the penalties discussed in this memo.

On April 3, 2020, an order was issued that requires licensed laboratories and medical officers of health to disclose “COVID-19 status information” on request to several kinds of first responders, as well as potentially to the Ministry of Health.<sup>232</sup> Police, firefighters, paramedics and 911 operators may require labs and medical officers of health to provide them with the name, address, date of birth of an individual, along with whether that person has tested positive for COVID-19.<sup>233</sup> The order also authorizes the Ministry of Health to establish a system of collection and disclosure of information for use by first responders.<sup>234</sup> But-for this order, this type of information would be subject to the collection and disclosure rules in statutes such as the *Municipal Freedom of Information and Protection of Privacy Act* and the *Personal Health Information Protection Act*.

On March 23, 2020, an order was issued providing the service of documents on the government of Ontario – other than in criminal matters – must be done by electronic means as set out in the order.<sup>235</sup>

On April 7, 2020, an order was issued relieving against certain requirements for witnesses to be physically present for the making of a will or a power of attorney. Under the order, witnessing these documents may be done by way of videoconferencing technology, as long as at least one witness is an Ontario lawyer.<sup>236</sup>

On April 9, 2020, the government issued an order – retroactive to March 17 – to facilitate the construction of temporary health and residential facilities.<sup>237</sup> The overall effect of the order is that hospitals and governments (including municipalities) may construct, extend, alter or repair a building for the purpose of providing health care or sleeping accommodation on a temporary basis in response of the COVID-19 pandemic<sup>238</sup> without complying with certain legal requirements. In particular, they are not required to obtain building permits, comply with the *Building Code*, adhere to zoning bylaws or official plans of a municipality.<sup>239</sup>

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<sup>231</sup> *Order Under Subsection 7.0.2(4) of the Act – Enforcement of Orders*, O.Reg. 114/20, Sched. 1, s. 1.

<sup>232</sup> *Order under Subsection 7.0.2(4) of the Act – Access to COVID-19 Status Information by Specified Persons*, O.Reg. 120/20.

<sup>233</sup> O.Reg. 12/20, Sched. 1, ss. 1-3.

<sup>234</sup> O.Reg. 120/20, Sched. 1, ss. 3(2), 4.

<sup>235</sup> *Order Made under Subsection 7.0.2(4) of the Act – Electronic Service*, O.Reg. 76/20.

<sup>236</sup> *Order under Subsection 7.0.2 of the Act – Signatures in Wills and Powers of Attorney*, O.Reg. 129/20.

<sup>237</sup> *Order Under Subsection 7.0.2(4) of the Act – Temporary Health or Residential Facilities*, O.Reg. 141/20.

<sup>238</sup> O.Reg. 141/20, Sched. 1, s. 1.

<sup>239</sup> O.Reg. 141/20, Sched. 1, s. 2.

The order imposes some safety requirements on the construction of these temporary facilities. This includes the requirement for facilities to be subjected to safety inspections by building inspectors,<sup>240</sup> as well as a requirement for those buildings that were not yet occupied by April 9<sup>th</sup> to have plans prepared by architects and engineers and reviewed by building officials prior to opening.<sup>241</sup>

#### E. Orders Granting Relief from Legislation

Three orders have been issued granting relief from compliance with provisions of Ontario law. Two relate to limitations periods in legal proceedings, and the third modifies the rules for holding certain types of corporate meetings.

On March 20, 2020, Cabinet invoked its power under this provision to suspend all limitation periods retroactive to March 16, 2020.<sup>242</sup> This effect of this order is essentially to “freeze” all such periods as they stood as of March 15, 2020. When the order expires, all limitation periods and periods of time in which to take steps in proceedings will continue where they were as of that date. They do not ‘reset’ as a result of the order.<sup>243</sup>

The order also suspended periods of time to take steps in any proceeding, including intended proceedings, that exist under any statute, regulation, rule, by-law or order of the Government of Ontario, “subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding”. This portion of the order was also made retroactive to March 16, 2020.<sup>244</sup>

On April 9, 2020, two narrow carve-outs were made to these broad orders. First, as of April 9<sup>th</sup>, the suspension was lifted for periods for proceedings or intended proceedings set out in the *Niagara Escarpment and Development Act*<sup>245</sup> or its regulations.<sup>246</sup> Second, as of April 16, the suspension was lifted for periods for proceedings or intended proceedings set out in the *Construction Act*<sup>247</sup> or its regulations.<sup>248</sup>

Some courts and tribunals also exercised their discretion not to suspend time periods under their applicable statutes and rules. Most notably, the Ontario Labour Relations Board announced on March 23, 2020, that it would not be suspending any time periods. Instead, it announced that for certification, termination and displacement applications, no votes would be held for workplaces that were not continuing to operate and carry on business. Similarly, for grievance referrals in the

<sup>240</sup> O.Reg 141/20, Sched. 1, ss. 5-6.

<sup>241</sup> O.Reg 141/20, Sched. 1, ss. 3-4.

<sup>242</sup> *Order Under Subsection 7.1(2) of the Act – Limitation Periods*, O.Reg 73/20, s. 1.

<sup>243</sup> *EMCPA*, s. 7.2(6).

<sup>244</sup> *Order Under Subsection 7.1(2) of the Act – Limitation Periods*, O.Reg 73/20, s. 2.

<sup>245</sup> RSO 1990, c N.2.

<sup>246</sup> O.Reg 73/20, s. 3, as amended by O.Reg. 137/20, s. 3.

<sup>247</sup> RSO 1990, c C.30.

<sup>248</sup> O.Reg 73/20, s. 4, as amended by O.Reg. 137/20, s. 3.

construction industry, the Board indicated that no default decisions would be issued until the applicant confirms with the Board that the employer continues to operate and carry on business.<sup>249</sup>

The Ontario Court of Justice has also indicated that it will continue to adhere to statutory timelines for urgent family matters, including refraining motions under the *Family Responsibility and Support Arrears Enforcement Act*, urgent custody/access motions, motions for restraining orders, Hague Convention applications, and various urgent matters under the *Child, Youth and Family Services Act*.<sup>250</sup>

On March 30, Cabinet issued an order – retroactive to March 17, 2020 – modifying a number of requirements under the *Corporations Act*<sup>251</sup> and the *Business Corporations Act*<sup>252</sup> related to the holding of certain types of required meetings.<sup>253</sup> The changes are:

- Any corporation that is subject to any part of the *Corporations Act* may hold a members' meeting by electronic means, regardless of the terms of their letters patent or by-laws.<sup>254</sup> Normally the rule permitting electronic meetings applies only to Corporations governed by Part III of the *Act*, and is subject to contrary rules in the corporation's letters patent or bylaws;<sup>255</sup>
- Any corporation that is governed by the *Business Corporations Act* may hold a members' meeting by electronic means, regardless of the terms of their articles or by-laws.<sup>256</sup> Normally the rule permitting electronic meetings is subject to contrary rules in the corporation's articles or by-laws;<sup>257</sup>
- All meetings of Boards of Directors of corporations to which Part VII of the *Corporations Act* applies may be held by electronic means, regardless of the terms of their letters patent or by-laws.<sup>258</sup> Normally electronic meetings may only occur with the consent of all participating directors and is subject to contrary rules in the corporation's letters patent or bylaws;<sup>259</sup>
- All meetings of Boards of Directors of corporations to which the *Business Corporations Act* applies may be held by electronic means, regardless of the terms of their letters patent

<sup>249</sup> Ontario Labour Relations Board, *Notice to the Community*, March 23, 2020.

<sup>250</sup> *Notice to the Profession – CYFSA Statutory Timelines and the Emergency Management and Civil Protection Act; Notice to the Profession – COVID-19 Pandemic Planning – Scheduling of Family Matters in the Ontario Court of Justice* (March 20, 2020).

<sup>251</sup> *Corporations Act*, RSO 1990, c C.38.

<sup>252</sup> *Business Corporations Act*, RSO 1990, c. B.16.

<sup>253</sup> *Order Under Subsection 7.1(2) of the Act – Meetings for Corporations*, O.Reg. 107/20.

<sup>254</sup> O.Reg 107/20, Sched. 1, s. 1.

<sup>255</sup> *Corporations Act*, s. 125.1.

<sup>256</sup> O.Reg 107/20, Sched. 2, s. 1.

<sup>257</sup> *Business Corporations Act*, s. 94(2).

<sup>258</sup> O.Reg 107/20, Sched. 1, s. 3.

<sup>259</sup> *Corporations Act*, s. 283(3.1).

or by-laws.<sup>260</sup> Normally electronic meetings may only occur with the consent of all participating directors and is subject to contrary rules in the corporation's articles or by-laws;<sup>261</sup>

- An annual meeting of an Insurance Corporation governed by Part V of the *Corporations Act* may occur within 90 days of the termination of the COVID-19 emergency.<sup>262</sup> These meetings must normally take place within the first three months of a calendar year;<sup>263</sup>
- For other corporations under the *Corporations Act*, an annual meeting must normally be held within 18 months of its initial incorporation, and thereafter within 15 months of their last annual meeting.<sup>264</sup> Where these timelines would require an annual meeting during the COVID-19 emergency, the meeting may now be held within 90 days of the termination of the emergency; where the normal timelines would require an annual meeting within 30 days of the termination of the COVID-19 emergency, the meeting may now be held within 120 days of the end of the emergency;<sup>265</sup>
- For corporations under the *Business Corporations Act*, an annual meeting must normally be held within 18 months of its initial incorporation, and thereafter within 15 months of their last annual meeting.<sup>266</sup> Where these timelines would require an annual meeting during the COVID-19 emergency, the meeting may now be held within 90 days of the termination of the emergency; where the normal timelines would require an annual meeting within 30 days of the termination of the COVID-19 emergency, the meeting may now be held within 120 days of the end of the emergency.<sup>267</sup>

### What the *EMCPA* means for Workers & Trade Unions

What started with a single emergency order permitting hospitals to override collective agreement provisions has ballooned into authorization to override collective bargaining in several sectors in Ontario: long-term care home operators, retirement home operators, service providers for persons with a developmental disability; waste and water systems operators, boards of health, the Ministry of Transportation, and violence against women service providers also may override certain collective agreement provisions and can suspend the ability of unions to file grievances.

Earlier versions of this memo predicted the risk that further orders could be made with respect to other sectors. While Ontario has not gone as far as Quebec has under section 123 of the *Public Health Act*<sup>268</sup> (targeting collective agreements on in the public service generally, as well as the

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<sup>260</sup> O.Reg 107/20, Sched. 2, s. 2.

<sup>261</sup> *Business Corporations Act*, s. 126(13).

<sup>262</sup> O.Reg 107/20, Sched. 1, s. 2.

<sup>263</sup> *Corporations Act*, s. 159(1).

<sup>264</sup> *Corporations Act*, s. 293.

<sup>265</sup> O.Reg 107/20, Sched. 1, s. 4.

<sup>266</sup> *Business Corporations Act*, s. 94(1).

<sup>267</sup> O. Reg 107/20, Sched. 2, s. 1.

<sup>268</sup> *Public Health Act*, CQLR c S-2.2.

education sector)<sup>269</sup> it has come very close to doing so. Significant swaths of public service providers – including now many municipalities – are exempted from compliance with collective agreement terms.

Ontario has also started to directly interfere with collective agreement provisions. The order banning long-term care home and retirement home workers from working at other health service provider or retirement home locations specifically permits collective agreement provisions to be overturned. While some effort has been made to protect worker’s jobs after the pandemic has ended, the order may have significant consequences for these worker’s incomes. Given the already low-wages paid to many such workers (not to mention the extraordinary circumstances that they are required to work under during the pandemic) this result is cannot be ignored.

Orders made by the government are, of course, subject to the limits set out in the *Charter of Rights and Freedoms*. However, even if an order were found to infringe on *Charter* rights, including freedom of association, section 1 of the *Charter* allows governments to justify a limitation on *Charter* rights. In our view, the existence of the COVID-19 pandemic would very likely be considered by the courts to be a very significant factor in support of finding any *Charter* violation to be a justified and reasonable limit under s. 1. Thus, even if it were possible to obtain a court hearing in an expedited manner to challenge an emergency order for violating the *Charter*, a court could still uphold orders as reasonable limits, thus permitting them to stand.

For businesses that are required to close down due to emergency orders, unions should be mindful of any rights or entitlements members have in the event of lay-off or termination. Unlike the orders targeting the health, care home and water sectors, the shutdown orders do not purport to override any collective agreement terms.

Finally, unions that employ corporations to hold property or for other purposes should be aware of the additional flexibility that they now have for holding annual and director’s meetings.

### III. Federal Emergency Powers

The federal government has had emergency powers legislation since the early days of the First World War. The *War Measures Act* was famously invoked with respect to both world wars, as well as during the October Crisis of 1970. It’s successor, the *Emergencies Act*,<sup>270</sup> grants the Federal Cabinet sweeping powers to deal with four distinct types of emergencies. Part I of the *Act*, “Public Welfare Emergencies”, addresses emergencies arising from *inter alia* diseases.

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<sup>269</sup> [Gazette officielle du Quebec, Vol. 152, No. 12A \(March 18, 2020\), p. 767A.](#)

<sup>270</sup> *Emergencies Act*, RSC 1985, c 22 (4<sup>th</sup> Supp) [EA].



## Declaring Emergencies

The federal Cabinet may declare a public welfare emergency where it believes on reasonable grounds that there is an emergency that

- is caused by a real or imminent disease in human beings, animals or plants;
- results or may result in a danger to life or property, social disruption, or a breakdown in the flow of essential goods, services or resources;
- constitutes an urgent and critical situation of a temporary nature that is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada; and
- cannot be effectively dealt with under any other law of Canada.<sup>271</sup>

Before doing so, federal Cabinet must consult with the cabinets of each province where the effects of the emergency are felt with respect to the proposed declaration.<sup>272</sup> Where the effects of a public welfare emergency are confined to, or occur principally in a single province, Cabinet may not make a declaration unless the Province indicates that the emergency exceeds its capacity or authority to deal with it.<sup>273</sup>

A declaration of emergency takes effect at the time it is made.<sup>274</sup> However, within 7 days of an emergency being declared, a minister of the Crown must table a motion to confirm the declaration of emergency before both houses of Parliament. The motion must be accompanied by an explanation for the reasons for the declaration, and a report on the consultations with provincial cabinets.<sup>275</sup> Each house must, on the next sitting day, consider the motion, debating it without interruption until it is voted upon.<sup>276</sup>

If the motion to confirm is rejected by either the House of Commons or the Senate, the declaration of emergency is revoked as of that day.<sup>277</sup>

If, after making a declaration that applies to only part of Canada, Cabinet concludes that the emergency has extended to any new part, it may amend the declaration to cover the new area. Prior to doing so, Cabinet must consult with all Provincial Cabinets, whether or not they previously fell within the scope of the declaration.<sup>278</sup> An amendment to the scope of declaration

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<sup>271</sup> EA, ss. 3, 5-6.

<sup>272</sup> EA, s. 14(1).

<sup>273</sup> EA, s. 14(2).

<sup>274</sup> EA, s. 7(1).

<sup>275</sup> EA, s. 58(1).

<sup>276</sup> EA, ss. 58(5)-(6).

<sup>277</sup> EA, s. 58(7).

<sup>278</sup> EA, s. 13(1).

is subject to the same requirement to be confirmed by both houses of Parliament as an initial declaration.<sup>279</sup>

A federal declaration has not yet been made. However, the Prime Minister – when questioned about the possibility of invoking the *Emergencies Act* – has referenced the fact that he has been in regular communication with the provinces. This appears to be a reference to the Cabinet consultations the *Act* requires before a public welfare emergency may be declared. As such, the federal government is at least keeping open the option of declaring an emergency.

### **Emergency Orders & Regulations**

While a declaration of a public welfare emergency remains in effect, Cabinet may make orders or regulations with respect to the following matters that it believes on reasonable grounds are necessary to deal with the emergency:

1. Regulating or prohibiting travel to, from or within any specified area when necessary for the protection of the health or safety of individuals;
2. Evacuating persons or removing property from specified areas, and making arrangements for their adequate care;
3. Requisitioning, using or disposing of property;
4. Authorizing or directing persons or classes of persons to render essential services of a type that the person(s) is/are competent to provide, and to provide for reasonable compensation in respect of such services;
5. Regulating the distribution and availability of essential goods, services and resources;
6. Authorizing the making of emergency payments;
7. Establishing emergency shelters and hospitals;
8. Providing for the assessment of damage to any work or undertaking, and the repair, replacement or restoration thereof;
9. Providing for the assessment of damage to the environment and eliminating or alleviating that damage;
10. The imposition of sentences for the contravention of other emergency orders and regulations, with maximum penalties of up to 5 years imprisonment.<sup>280</sup>

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<sup>279</sup> *EA*, s. 13(2).

<sup>280</sup> *EA*, s. 8(1).

Regulations and orders – and any power, duty or function conferred or imposed pursuant to them – must be exercised in a manner that does not unduly impair the ability of a Province to take measures to deal with the emergency. Further, the power must be used with the view of achieving, to the extent possible, concerted action with each province in which the power is exercised.<sup>281</sup>

The *Emergencies Act* imposes more specific limits on Cabinet’s power to make regulations and orders.

First, no order or regulation may usurp provincial or municipal control over police forces that such governments normally have authority over.<sup>282</sup>

Second, the power to make emergency orders and regulations, or any power exercised pursuant to such an order or regulation, shall not be exercised for the purpose of terminating a strike or lock-out or imposing a settlement in a labour dispute.<sup>283</sup>

### **Parliamentary Oversight During Emergencies**

When an emergency is declared, a joint committee of Parliament must be established to review the exercise of powers and the performance of duties and functions pursuant to that declaration.<sup>284</sup> This Parliamentary Review Committee is required to sit in private, and its members are subject to an oath of secrecy.<sup>285</sup>

All emergency orders and regulations are subject to review by Parliament. Within two days of being made, every order and regulation must be tabled before each house of Parliament or, in certain cases, before a special Parliamentary Review Committee.<sup>286</sup> It is required to report to Parliament at least every sixty days, and also following the taking of certain actions related to the revocation or continuation of an emergency.<sup>287</sup>

### **Duration of Declarations, Regulations and Orders**

The declaration of a public welfare emergency lasts for 90 days by default,<sup>288</sup> though it automatically terminates if the Parliamentary motion for confirmation fails.<sup>289</sup> Cabinet may also

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<sup>281</sup> *EA*, s. 8(3)(a).

<sup>282</sup> *EA*, s. 9.

<sup>283</sup> *EA*, s. 8(3)(b).

<sup>284</sup> *EA*, s. 62(1).

<sup>285</sup> *EA*, ss. 62(3)-(4).

<sup>286</sup> *EA*, ss. 61(1)-(2).

<sup>287</sup> *EA*, s. 62(6).

<sup>288</sup> *EA*, s. 7(2).

<sup>289</sup> *EA*, s. 58(7).

revoke a declaration any time. This may be with respect to the declaration as a whole, or with respect to any specified area of Canada.<sup>290</sup>

The House of Commons or the Senate also has the power to revoke a declaration of emergency, either in whole or with respect to a specified area of Canada.<sup>291</sup> If at least ten Senators or twenty Members of Parliament file a motion to revoke the declaration with the Speaker of their respective house, that house must consider it within 3 days.<sup>292</sup> If the motion is passed, the declaration is revoked as of the date of the vote.<sup>293</sup>

Cabinet also has the power to continue a declaration of emergency for an unlimited number of additional 90-day periods.<sup>294</sup> The Federal Cabinet is required to consult with provincial Cabinets prior to each extension, in the same manner as when an initial declaration is made.<sup>295</sup> A continuation is subject to the same requirement to have Parliamentary confirmation as the initial declaration.<sup>296</sup>

The Federal Cabinet is also required to conduct a review of all orders and regulations made pursuant to the declared emergency prior to each continuation. If Cabinet concludes that they no longer have reasonable grounds to believe any such order or regulation is necessary to deal with the emergency, they must be revoked or amended to the extent that they are no longer necessary.<sup>297</sup>

While the *Emergencies Act* does not expressly say so, Cabinet's power to make regulations and orders during a declared emergency extends to the power to amend or revoke such orders and regulations.

Regulations and orders are also automatically revoked when the underlying declaration of emergency is also revoked, whether due to expiry, early termination by Cabinet, a successful motion to revoke in Parliament, or the failure to pass a motion to confirm.<sup>298</sup>

### **Inquiry Following End of Emergency**

After the end of a declaration of an emergency, Cabinet is required to cause an inquiry to be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency.<sup>299</sup> The *Emergencies Act* does not set out the process by which such an

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<sup>290</sup> *EA*, s. 11.

<sup>291</sup> *EA*, ss. 10, 59(1)(a).

<sup>292</sup> *EA*, s. 59(1).

<sup>293</sup> *EA*, s. 59(3).

<sup>294</sup> *EA*, s. 12(1), (3).

<sup>295</sup> *EA*, ss. 12(1), 14(1).

<sup>296</sup> *EA*, ss. 12(4), 60.

<sup>297</sup> *EA*, s. 12(2).

<sup>298</sup> *EA*, s. 15.

<sup>299</sup> *EA*, s. 63(1).

inquiry is to be conducted, other than requiring that a report of the inquiry be made and laid before each house of Parliament within 360 days of the end of the emergency.<sup>300</sup>

## **Liability and Compensation**

The *Emergencies Act* relieves individuals – including Ministers of the Crown, Crown servants, or persons providing services pursuant to an emergency regulation or order – from liability for good faith acts or omissions done or purported to be done pursuant to a declaration of emergency. Crown liability, however is preserved.<sup>301</sup>

The *Act* establishes a specialized administrative compensation scheme. Persons who suffer loss, injury or damage as a result of anything done or purported to be done pursuant to a declaration of emergency has a right to reasonable compensation.<sup>302</sup> To obtain such compensation, a person is required to sign a full release.<sup>303</sup>

Where a person applies for compensation and is not satisfied with the government’s decision, they may appeal to an “Assessor” within three months.<sup>304</sup> Assessors are to be judges of the Federal Court.<sup>305</sup> Assessors may confirm the government’s compensation decision, refer the matter back for further action, or may vary the government’s decision itself. Notably, if the Assessor decides to set an amount of compensation herself, they may award more than the maximum that may be established under a regulation under the *Act* governing the compensation scheme.<sup>306</sup>

## **What the *Emergencies Act* Means for Trade Unions**

The *Emergencies Act*’s specific prohibition against using emergency powers for the purpose of terminating a strike or lock-out or imposing a settlement in a labour dispute<sup>307</sup> is certainly welcome.

However, there are many other ways in which the powers could be exercised in a way that impacts trade unions and their members. Notably, the power to direct persons to provide essential services, set the rates of remuneration for such services, and regulating the distribution of goods and services<sup>308</sup> could significantly impact the provisions of collective agreements. While such interference would be subject to s. 2(d) of the *Charter*, the existence of an emergency would weigh heavily in any s. 1 justification analysis.

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<sup>300</sup> *EA*, s. 63(2).

<sup>301</sup> *EA*, s. 47.

<sup>302</sup> *EA*, s. 48(1).

<sup>303</sup> *EA*, s. 48(2).

<sup>304</sup> *EA*, s. 51.

<sup>305</sup> *EA*, s. 50.

<sup>306</sup> *EA*, s. 52.

<sup>307</sup> *EA*, s. 8(3)(b).

<sup>308</sup> *EA*, ss. 8(1)(d), (e).

## APPENDIX A – PROVINCIAL EMERGENCY ORDERS

[Declaration of Emergency, O.Reg. 50/20](#)

[Extension of Emergency, O.Reg. 105/20](#)

[Organized Public Events, Certain Gatherings, O.Reg. 52/20](#)

[Closure of Outdoor Recreational Amenities, O.Reg. 104/20](#)

[Traffic Management, O.Reg. 89/20](#)

[Closure of Public Lands for Recreational Camping, O.Reg. 142/20](#)

[Closure of Establishments, O.Reg. 51/20](#)

[Closure of Places of Non-Essential Businesses, O.Reg. 82/20](#)

[Pick Up and Delivery of Cannabis, O.Reg. 128/20](#)

[Order Made Under Subsection 7.0.2\(4\) of the Act, O.Reg. 74/20](#) (hospital staffing & labour relations)

[Work Deployment Measures in Long-Term Care Homes, O.Reg. 77/20](#)

[Streamlining Requirements for Long-Term Care Homes, O.Reg. 95/20](#)

[Limiting Work to a Single Long-Term Care Home, O.Reg. 146/20](#)

[Work Deployment Measures in Retirement Homes, O.Reg. 118/20](#)

[Agreements Between Health Service Providers and Retirement Homes, O.Reg. 140/20](#)

[Limiting Work to a Single Retirement Home, O.Reg. 158/20](#)

[Work Deployment Measures for Boards of Health, O.Reg. 116/20](#)

[Service Agencies Providing Services and Supports to Adults with Developmental Disabilities, O.Reg. 121/20](#)

[Drinking Water Systems and Sewage Works, O.Reg. 75/20](#)

[Use of Force and Firearms in Policing Services, O.Reg. 132/20](#)

[Work Deployment Measures for Service Agencies Providing Violence Against Women Residential Services and Crisis Line Services, O.Reg. 145/20](#)

[Work Deployment Measures for District Social Services Administration Boards, O.Reg. 154/20](#)

[Deployment of Employees of Service Provider Organizations, O.Reg. 156/20](#)

[Work Deployment Measures for Municipalities, O.Reg. 157/20](#)

[Access to COVID-19 Status Information by Specified Persons, O.Reg. 120/20](#)

[Signatures in Wills and Powers of Attorney, O.Reg. 129/20](#)

[Electricity Price for RPP Consumers, O.Reg. 80/20](#)

[Prohibition on Certain Persons Charging Unconscionable Prices for Sales of Necessary Goods, O.Reg. 98/20](#)

[Child Care Fees, O.Reg. 139/20](#)

[Electronic Service, O.Reg. 76/20](#)

[Temporary Health or Residential Facilities, O.Reg. 141/20](#)

[Limitation Periods, O.Reg. 73/20](#)

[Meetings for Corporations, O.Reg. 107/20](#)

[Extensions and Renewals of Orders, O.Reg. 106/20](#)

[Enforcement of Orders, O.Reg. 114/20](#)