

Topic: Emergency Powers in Response to COVID
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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].¹ 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.² 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.³ 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;

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

² EMCPA, s. 7.0.1(1).

³ 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.⁴

On March 17, 2020, at 7:30 am, an emergency was declared throughout the entirety of Ontario related to COVID-19.⁵

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.⁶

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.⁷

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.⁸

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.⁹

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

⁴ *EMCPA*, s. 7.0.1(3)2.

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

⁶ *EMCPA*, s. 7.0.4(1).

⁷ *EMCPA*, s. 7.0.3(1).

⁸ *EMCPA*, s. 7.0.3(2).

⁹ *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*.¹⁰ The power to make orders may be delegated to an individual Cabinet minister, or to the Commissioner of Emergency Management.¹¹

The *EMCPA* empowers Cabinet to make a wide range of orders.¹² 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;¹³
13. Requiring person to collect, use or disclose information;¹⁴

¹⁰ *EMCPA*, s. 7.0.2(1).

¹¹ *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.

¹² *EMCPA*, s. 7.0.2(4).

¹³ 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).

¹⁴ 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.

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.¹⁵

Orders may be retroactive,¹⁶ 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*.¹⁷

However, an order may not override the *Occupational Health and Safety Act*, or a regulation made under that *Act*.¹⁸

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.¹⁹

Further, orders must only apply to those areas of the province that are necessary, and only for so long as is necessary.²⁰ 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.²¹

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.²²

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.),

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).

¹⁵ *EMCPA*, s. 7.0.2(4)14.

¹⁶ *EMCPA*, s. 7.2(1)(b).

¹⁷ *EMCPA*, s. 7.2(4).

¹⁸ *EMCPA*, s. 7.2(8).

¹⁹ *EMCPA*, s. 7.0.2(2).

²⁰ *EMCPA*, s. 7.0.2(3)2-3.

²¹ *EMCPA*, s. 7.0.2(3)1.

²² *EMCPA*, s. 7.1(1).

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.²³

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.²⁴ 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.²⁵ These suspension orders may be made retroactive.²⁶

Cabinet may only make such an order on the recommendation of the Attorney General of Ontario.²⁷

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.²⁸ There is no upper limit to the number of renewals that may be made.²⁹

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*.³⁰

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).³¹ An emergency may also be terminated early if the Legislature passes a resolution disallowing the declaration of emergency.³²

The *EMCPA* also permits emergencies to be extended without any legislative authorization for one additional period of up to 14 days.³³

²³ *EMCPA*, s. 7.1(3)2.

²⁴ *EMCPA*, s. 7.1(2).

²⁵ *EMCPA*, s. 7.1(8).

²⁶ *EMCPA*, s. 7.2(1)(b).

²⁷ *EMCPA*, s. 7.1(2).

²⁸ *EMCPA*, s. 7.1(4).

²⁹ *EMCPA*, s. 7.1(5).

³⁰ *EMCPA*, s. 7.2(4).

³¹ *EMCPA*, s. 7.0.7(1).

³² *EMCPA*, s. 7.0.9(1).

³³ *EMCPA*, s. 7.0.7(2).

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.³⁴ There is no maximum number of extensions that the Legislature itself may grant. If there is a pending resolution before the Legislative Assembly for an extension, the emergency is extended until the resolution is actually voted on by the Assembly.³⁵

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.³⁶ For so long as an emergency has been declared, orders may be extended by further 14 day periods by Cabinet.³⁷ 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. At the same time, the Legislature may by resolution disallow an order or an extension of an order at any time. If they do so, the order terminates immediately.³⁸

An emergency order does not automatically expire when the declared emergency expires. 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.³⁹ The legislation does not have a specific provision allowing for the further extension of statutory extension orders after the termination of an emergency.

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.⁴⁰ 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.⁴¹ 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.⁴²

³⁴ *EMCPA*, s. 7.0.7(3).

³⁵ *EMCPA*, s. 7.0.7(4).

³⁶ *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).

³⁷ *EMCPA*, s. 7.0.8(3).

³⁸ *EMCPA*, s. 7.0.9(2).

³⁹ *EMCPA*, s. 7.0.8(4).

⁴⁰ *EMCPA*, s. 7.0.11(1)-(2).

⁴¹ *EMCPA*, s. 7.0.11(3).

⁴² *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.⁴³

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.⁴⁴

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.⁴⁵ The Assembly is required to consider the report within 5 days of it being tabled.⁴⁶

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.⁴⁷

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.⁴⁸

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.⁴⁹ 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 ten emergency orders and one order respecting limitations periods and timelines.

⁴³ *EMCPA*, s. 7.0.5.

⁴⁴ *EMCPA*, s. 7.0.6.

⁴⁵ *EMCPA*, s. 7.0.10(1)-(2).

⁴⁶ *EMCPA*, s. 7.0.10(3).

⁴⁷ *EMCPA*, s. 1.

⁴⁸ *EMCPA*, s. 13.1.

⁴⁹ *EMCPA*, ss. 13.1(2)-(3).

A. Orders Impacting Closures of Workplaces, Spaces and Events

The first two were made on March 17, 2020 at 7:30am. One ordered the closure of 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.⁵⁰ The second prohibited all organized public events of over 50 people, including communal services within places of worship.⁵¹

A further order was made on March 23, 2020, easing the restriction on the operation of licensed child care centres.⁵² 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) 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.

On March 24, 2020, a more expansive closure order was issued, significantly limiting the operation of all businesses deemed “non-essential”.⁵³ The order has two components: a schedule listing essential businesses that are allowed to continue to operate; 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 74 essential businesses, services and sectors that are permitted to continue to operate.⁵⁴ They include supply chains and infrastructure, supermarkets, takeout & delivery restaurants, laundromats, gas stations, hardware stores, pharmacies, building maintenance and security, transportation, some types of manufacturing and construction, agriculture, utilities, laboratories, long-term care facilities, shelters, social service agencies, the justice sector, regulatory authorities, capital markets, banking and professional services.

Persons who are responsible for any place of business that is not deemed to be essential is required to ensure that it remains closed.⁵⁵ Such businesses may, however, operate remotely and provide goods by delivery or providing services online.⁵⁶ 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;

⁵⁰ *Emergency Order Under Subsection 7.0.2(4) of the Act*, O.Reg 51/20.

⁵¹ *Emergency Order Under Subsection 7.0.2(4) of the Act*, O.Reg 52/20.

⁵² *Emergency Order Under Subsection 7.0.2(4) of the Act*, O.Reg 78/20.

⁵³ *Order Under Subsection 7.0.2(4) – Closure of Places of Non-Essential Business*, O.Reg 82/20.

⁵⁴ O.Reg 82/20, Sched. 2.

⁵⁵ O.Reg 82/20, Sched. 1, s. 1(1).

⁵⁶ 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.⁵⁷

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.⁵⁸

The order operates in addition to the March 17, 2020 closure order.⁵⁹ In other words, businesses that were required to close down under the March 17th order are still required to be shut down, even if they would otherwise be allowed to operate under the March 24th order.

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

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*.⁶³ 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.⁶⁴

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.⁶⁵ 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.

⁵⁷ O.Reg 82/80, Sched. 1, s. 1(2).

⁵⁸ O.Reg 82/20, Sched. 1, s. 1(5).

⁵⁹ O.Reg 82/20, Sched. 1, s. 1(4).

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

⁶¹ *Highway Traffic Act*, RSO 1990, c H.8, s. 134.

⁶² O.Reg 89/20, Sched. 1, ss. 1-2.

⁶³ *Highway Closings*, RRO 1990, Reg. 599.

⁶⁴ O.Reg 89/20, Sched. 1, s. 3.

⁶⁵ O.Reg 89/20, Sched. 1, s. 4.

B. Orders Impacting Workplace Operations & Collective Agreements

An order was made on March 21st and makes wide-ranging changes to how health service providers deal with their employees, overriding both employment legislation and collective agreements.⁶⁶

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.⁶⁷ 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;⁶⁸
 - Redeploying staff to work in COVID-19 assessment centres;⁶⁹
 - Changing the assignment of work, including assigning non-bargaining unit employees or contractors to perform bargaining unit work;⁷⁰
 - Changing the scheduling of work or shift assignments;⁷¹
 - Deferring or cancelling vacations, absences or other leaves, regardless of whether such vacations, absences or leaves are established by statute, regulation, agreement or otherwise;⁷²
 - Employing extra part-time or temporary staff or contractors, including for the purposes of performing bargaining unit work;⁷³
 - Using volunteers to perform work, including to perform bargaining unit work;⁷⁴
or

⁶⁶ *Order Made Under Subsection 7.02(4) of the Act*, O.Reg 74/20.

⁶⁷ O.Reg 74/20, Sched., s. 2.

⁶⁸ O.Reg 74/20, Sched., s. 3(i)(A).

⁶⁹ O.Reg 74/20, Sched., s. 3(i)(B).

⁷⁰ O.Reg 74/20, Sched., s. 3(i)(C).

⁷¹ O.Reg 74/20, Sched., s. 3(i)(D).

⁷² O.Reg 74/20, Sched., s. 3(i)(E).

⁷³ O.Reg 74/20, Sched., s. 3(i)(F).

⁷⁴ O.Reg 74/20, Sched., s. 3(i)(G).

- Providing appropriate training or education as needed to staff and volunteers to achieve the purposes of a redeployment plan.⁷⁵
- Conduct skills and experience inventories of staff to identify possible alternative roles in priority areas;⁷⁶
- Require and collect information from staff or contractors about their ability to provide services for the health service provider;⁷⁷
- 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;⁷⁸
- Cancel or postpone services that are not related to responding to, preventing or alleviating the outbreak of the Virus;⁷⁹ and
- Suspend, for the duration of the Order, any grievance process with respect to any matter referred to in the Order.⁸⁰

On March 23, 2020, two additional orders were issued implementing nearly identical rules in other sectors.

The first targeted long-term care homes.⁸¹ 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.⁸² To that end, providers are directed and empowered to develop, modify and implement redeployment plans that may override collective agreement terms. 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 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;⁸³ and

⁷⁵ O.Reg 74/20, Sched., s. 3(i)(H).

⁷⁶ O.Reg 74/20, Sched., s. 3(ii).

⁷⁷ O.Reg 74/20, Sched., s. 3(iii).

⁷⁸ O.Reg 74/20, Sched., s. 3(iv).

⁷⁹ O.Reg 74/20, Sched., s. 3(v).

⁸⁰ O.Reg 74/20, Sched., s. 3(vi).

⁸¹ *Order Under Subsection 7.0.2(4) of the Act – Work Deployment Measures in Long-Term Care Homes*, O.Reg 77/20.

⁸² O.Reg 77/20, Sched., s. 2.

⁸³ O.Reg 77/20, Sched., s. 3(ii).

- The long-term care home order does not refer to the cancellation or postponement of services unrelated to COVID-19.

The second order, which targeted the Drinking Water System and Sewage/Wastewater systems, contains similar rules, but goes further to override a variety of licensing requirements established by law.⁸⁴

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.⁸⁵ Municipalities are authorized to take similar measures where necessary to ensure a sewage works is properly operated.⁸⁶

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.⁸⁷ 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;⁸⁸ 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.⁸⁹

With respect to drinking water systems, the order overrides a number of provisions of the *Safe Drinking Water Act, 2002*⁹⁰ and its associated *Certification of Drinking Water System Operators and Water Quality Analysis* regulation⁹¹ 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.⁹² The order also provides that existing certifications set to expire while the order is in effect are automatically extended.⁹³ Finally, the order permits required testing to be done by persons not

⁸⁴ *Order Under Subsection 7.0.2(4) of the Act – Drinking Water Systems and Sewage Works*, O.Reg. 75/20.

⁸⁵ O.Reg 75/20, Sched. 1, s. 5.

⁸⁶ O.Reg 75/20, Sched. 2, s. 4.

⁸⁷ O.Reg 75/20. Sched. 1, s. 6 & Sched. 2, s. 5.

⁸⁸ O.Reg 75/20. Sched. 1, s. 6(b) & Sched. 2, s. 5(b).

⁸⁹ O.Reg 75/20. Sched. 1, s. 6(e) & Sched. 2, s. 5(e).

⁹⁰ SO 2002, c. 32, ss. 11(1)3, 5.

⁹¹ O.Reg 128/04, ss. 22, 23, 25.

⁹² O.Reg 75/20. Sched. 1, s. 1.

⁹³ 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.⁹⁴

The order contains a substantially similar set of exceptions to rules established under the *Ontario Water Resources Act*⁹⁵ and the *Licensing of Sewage Works Operators* regulation,⁹⁶ with respect to who may operate a wastewater treatment facility or a wastewater collection facility and the automatic extension of expiring certificates.⁹⁷ It does not contain parallel rules with respect that loosen the rules respecting who may conduct certain kinds of tests.

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.⁹⁸

C. Other Emergency Orders

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.⁹⁹

On March 24, 2020, an order was issued impacting consumer electricity prices.¹⁰⁰ Normally under the Ontario Energy Boards *Standard Supply Service Code*¹⁰¹ 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 23rd 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.¹⁰² The order took effect on March 24, 2020, the day it was made.

D. Limitation Period and Timelines Order

On March 20, 2020, Cabinet invoked its power under this provision to suspend all limitation periods retroactive to March 16, 2020.¹⁰³ 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

⁹⁴ O.Reg 75/20. Sched. 1, s. 3.

⁹⁵ RSO 1990, c. O.40.

⁹⁶ O.Reg. 129/04, ss. 14, 15, 17.

⁹⁷ O.Reg 75/20. Sched. 2, ss. 1-2.

⁹⁸ O.Reg. 89/20, Sched. 1, s. 5.

⁹⁹ *Order Made under Subsection 7.0.2(4) of the Act – Electronic Service*, O.Reg. 76/20.

¹⁰⁰ *Order Under Subsection 7.0.2(4) of the Act – Electricity Price for RPP Consumers*, O.Reg. 80/20.

¹⁰¹ <https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2020-03/Standard-Supply-Service-Code-SSSC-20200301.pdf>

¹⁰² O.Reg 80/20, s. 1.

¹⁰³ *Order Under Subsection 7.1(2) of the Act*, O.Reg 73/20, s. 1.

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.¹⁰⁴

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, 2020.¹⁰⁵

Some courts and tribunals have announced that they have 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 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.¹⁰⁶

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*.¹⁰⁷

What the *EMCPA* means for Trade Unions

Thus far, the government has exercised its power to significantly interfere with collective bargaining rights by permitting health service providers, long-term care home operators, waste and water systems operators, and the Ministry of Transportation to override collective agreements, and to suspend the ability of unions to file grievances.

There is a serious risk that further orders could be made with respect to other sectors. For example, On March 15, 2020, the government of Quebec issued an emergency order under section 123 of the *Public Health Act*¹⁰⁸ that directly targeted collective agreements on both the public service and education sectors.¹⁰⁹ With respect to civil servants, the order provided that, notwithstanding the provisions of the collective agreement, persons may be reassigned to different jobs or locations. Unlike Ontario’s March 27th order, this was not limited to any particular Ministry, but rather applied across the civil service. With respect to teachers, the

¹⁰⁴ *EMCPA*, s. 7.2(6).

¹⁰⁵ *Order Under Subsection 7.1(2) of the Act*, O.Reg 73/20, s. 2.

¹⁰⁶ Ontario Labour Relations Board, *Notice to the Community*, March 23, 2020.

¹⁰⁷ *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).

¹⁰⁸ *Public Health Act*, CQLR c S-2.2.

¹⁰⁹ [Gazette officielle du Quebec, Vol. 152, No. 12A \(March 18, 2020\), p. 767A.](#)

provisions of their collective agreements respecting assignment, replacement, scheduling, and overtime were effectively suspended.

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.

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. Its successor, the *Emergencies Act*,¹¹⁰ 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.

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,

¹¹⁰ *Emergencies Act*, RSC 1985, c 22 (4th Supp) [EA].

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.¹¹¹

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.¹¹² 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.¹¹³

A declaration of emergency takes effect at the time it is made.¹¹⁴ 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.¹¹⁵ Each house must, on the next sitting day, consider the motion, debating it without interruption until it is voted upon.¹¹⁶

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.¹¹⁷

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.¹¹⁸ An amendment to the scope of declaration is subject to the same requirement to be confirmed by both houses of Parliament as an initial declaration.¹¹⁹

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.

¹¹¹ *EA*, ss. 3, 5-6.

¹¹² *EA*, s. 14(1).

¹¹³ *EA*, s. 14(2).

¹¹⁴ *EA*, s. 7(1).

¹¹⁵ *EA*, s. 58(1).

¹¹⁶ *EA*, ss. 58(5)-(6).

¹¹⁷ *EA*, s. 58(7).

¹¹⁸ *EA*, s. 13(1).

¹¹⁹ *EA*, s. 13(2).

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.¹²⁰

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.¹²¹

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

¹²⁰ EA, s. 8(1).

¹²¹ EA, s. 8(3)(a).

First, no order or regulation may usurp provincial or municipal control over police forces that such governments normally have authority over.¹²²

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.¹²³

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.¹²⁴ This Parliamentary Review Committee is required to sit in private, and its members are subject to an oath of secrecy.¹²⁵

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.¹²⁶ 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.¹²⁷

Duration of Declarations, Regulations and Orders

The declaration of a public welfare emergency lasts for 90 days by default,¹²⁸ though it automatically terminates if the Parliamentary motion for confirmation fails.¹²⁹ Cabinet may also 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.¹³⁰

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.¹³¹ If at least ten Senators or twenty Members of Parliament file a motion to revoke the declaration with the Speaker of their

¹²² *EA*, s. 9.

¹²³ *EA*, s. 8(3)(b).

¹²⁴ *EA*, s. 62(1).

¹²⁵ *EA*, ss. 62(3)-(4).

¹²⁶ *EA*, ss. 61(1)-(2).

¹²⁷ *EA*, s. 62(6).

¹²⁸ *EA*, s. 7(2).

¹²⁹ *EA*, s. 58(7).

¹³⁰ *EA*, s. 11.

¹³¹ *EA*, ss. 10, 59(1)(a).

respective house, that house must consider it within 3 days.¹³² If the motion is passed, the declaration is revoked as of the date of the vote.¹³³

Cabinet also has the power to continue a declaration of emergency for an unlimited number of additional 90-day periods.¹³⁴ 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.¹³⁵ A continuation is subject to the same requirement to have Parliamentary confirmation as the initial declaration.¹³⁶

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.¹³⁷

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.¹³⁸

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.¹³⁹ The *Emergencies Act* does not set out the process by which such an 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.¹⁴⁰

¹³² *EA*, s. 59(1).

¹³³ *EA*, s. 59(3).

¹³⁴ *EA*, s. 12(1), (3).

¹³⁵ *EA*, ss. 12(1), 14(1).

¹³⁶ *EA*, ss. 12(4), 60.

¹³⁷ *EA*, s. 12(2).

¹³⁸ *EA*, s. 15.

¹³⁹ *EA*, s. 63(1).

¹⁴⁰ *EA*, s. 63(2).

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.¹⁴¹

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.¹⁴² To obtain such compensation, a person is required to sign a full release.¹⁴³

Where a person applies for compensation and is not satisfied with the government’s decision, they may appeal to an “Assessor” within three months.¹⁴⁴ Assessors are to be judges of the Federal Court.¹⁴⁵ 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.¹⁴⁶

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 dispute¹⁴⁷ 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 services¹⁴⁸ 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.

¹⁴¹ *EA*, s. 47.

¹⁴² *EA*, s. 48(1).

¹⁴³ *EA*, s. 48(2).

¹⁴⁴ *EA*, s. 51.

¹⁴⁵ *EA*, s. 50.

¹⁴⁶ *EA*, s. 52.

¹⁴⁷ *EA*, s. 8(3)(b).

¹⁴⁸ *EA*, ss. 8(1)(d), (e).