

GOLDBLATT PARTNERS LLP

M E M O R A N D U M

TO: OCHU

FROM: Goldblatt Partners LLP (Ext. 6422)

DATE: March 23, 2020 Our File No. 20-486

RE: Emergency Powers in Response to COVID Pandemic

I. Introduction

This is a summary of the *Emergency Management and Civil Protection Act*, with a focus on the health service order issued on March 21, 2020 and its impact on OCHU central collective agreement language.

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.

As of the writing of this memo, 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.

Part II, immediately below, deals in general terms with provincial emergency powers and the power to make specific emergency orders, which may override other laws, arrangements and agreements, including collective agreements.

Part III below, **beginning on page 9**, then specifically addresses the March 21 order relating to the health sector and health service providers and bargaining agents.

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;
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

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.

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).

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 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;

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).

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).

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

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 cannot 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

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. 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).

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

To date, Cabinet has issued three orders. The first two were made on March 17, 2020 at 7:30am.

The first requires 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.²²

The second prohibits all organized public events of over 50 people, including communal services within places of worship.²³

The third, described more fully in Part III below, makes wide-ranging changes to how health service providers deal with their employees, overriding both employment legislation and collective agreements.

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.²⁴

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.²⁵

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

²³ *Emergency Order Under Subsection 7.0.2(4) of the Act*, O.Reg 52/20.

²⁴ *EMCPA*, s. 7.1(1).

²⁵ *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.²⁶ 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.²⁷ These suspension orders may be made retroactive.²⁸

Cabinet may only make such an order on the recommendation of the Attorney General of Ontario.²⁹

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.³⁰ There is no upper limit to the number of renewals that may be made.³¹

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*.³²

On March 20, 2020, Cabinet invoked its power under this provision to suspend all limitation periods and periods of time to take steps in any proceeding, including intended proceedings. This suspension was made retroactive to March 16, 2020.³³ 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.³⁴

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).³⁵ An emergency may also be terminated early if the Legislature passes a resolution disallowing the declaration of emergency.³⁶

²⁶ *EMCPA*, s. 7.1(2).

²⁷ *EMCPA*, s. 7.1(8).

²⁸ *EMCPA*, s. 7.2(1)(b).

²⁹ *EMCPA*, s. 7.1(2).

³⁰ *EMCPA*, s. 7.1(4).

³¹ *EMCPA*, s. 7.1(5).

³² *EMCPA*, s. 7.2(4).

³³ *Order Under Subsection 7.2(2) of the Act*, O.Reg 73/20.

³⁴ *EMCPA*, s. 7.2(6).

³⁵ *EMCPA*, s. 7.0.7(1).

³⁶ *EMCPA*, s. 7.0.9(1).

The *EMCPA* also permits emergencies to be extended, without any legislative authorization, for one additional period of up to 14 days.³⁷

However, any further extensions beyond this 28-day period require a resolution from 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.³⁸ 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.³⁹

Emergency orders are subject to similar rules. Most emergency orders expire by default after 14 days, and may be terminated sooner by Cabinet.⁴⁰ For so long as an emergency has been declared, orders may be extended by further 14-day periods by Cabinet.⁴¹ 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.⁴²

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.⁴³ 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.⁴⁴ 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

³⁷ *EMCPA*, s. 7.0.7(2).

³⁸ *EMCPA*, s. 7.0.7(3).

³⁹ *EMCPA*, s. 7.0.7(4).

⁴⁰ *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).

⁴¹ *EMCPA*, s. 7.0.8(3).

⁴² *EMCPA*, s. 7.0.9(2).

⁴³ *EMCPA*, s. 7.0.8(4).

⁴⁴ *EMCPA*, s. 7.0.11(1)-(2).

received.⁴⁵ 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.⁴⁶

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.⁴⁷

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.⁴⁸

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.⁴⁹ The Assembly is required to consider the report within 5 days of it being tabled.⁵⁰

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.⁵¹

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.⁵²

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.⁵³ While the *Act* does not say so, a decision of Cabinet not to offer compensation could potentially be subject to judicial review.

⁴⁵ *EMCPA*, s. 7.0.11(3).

⁴⁶ *EMCPA*, s. 7.0.11(4).

⁴⁷ *EMCPA*, s. 7.0.5.

⁴⁸ *EMCPA*, s. 7.0.6.

⁴⁹ *EMCPA*, s. 7.0.10(1)-(2).

⁵⁰ *EMCPA*, s. 7.0.10(3).

⁵¹ *EMCPA*, s. 1.

⁵² *EMCPA*, s. 13.1.

⁵³ *EMCPA*, ss. 13.1(2)-(3).

III. March 21 Order relating to Health Service Providers

The third order, and the subject of this Part of our Memorandum, 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.⁵⁴

This order grants health services providers (essentially hospitals) 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.⁵⁵

The order goes on to provide a **non-exhaustive list** of examples 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;⁵⁶
 - Redeploying staff to work in COVID-19 assessment centres;⁵⁷
 - Changing the assignment of work, including assigning non-bargaining unit employees or contractors to perform bargaining unit work;⁵⁸
 - Changing the scheduling of work or shift assignments;⁵⁹
 - Deferring or cancelling vacations, absences or other leaves, regardless of whether such vacations, absences or leaves are established by statute, regulation, agreement or otherwise;⁶⁰
 - Employing extra part-time or temporary staff or contractors, including for the purposes of performing bargaining unit work;⁶¹
 - Using volunteers to perform work, including to perform bargaining unit work;⁶² or
 - Providing appropriate training or education as needed to staff and volunteers to achieve the purposes of a redeployment plan.⁶³

⁵⁴ *Order Made Under Subsection 70.02(4) of the Act*, O.Reg 74/20.

⁵⁵ O.Reg 74/20, Sched., s. 2.

⁵⁶ O.Reg 74/20, Sched., s. 3(i)(A).

⁵⁷ O.Reg 74/20, Sched., s. 3(i)(B).

⁵⁸ O.Reg 74/20, Sched., s. 3(i)(C).

⁵⁹ O.Reg 74/20, Sched., s. 3(i)(D).

⁶⁰ O.Reg 74/20, Sched., s. 3(i)(E).

⁶¹ O.Reg 74/20, Sched., s. 3(i)(F).

⁶² O.Reg 74/20, Sched., s. 3(i)(G).

⁶³ O.Reg 74/20, Sched., s. 3(i)(H).

- Conduct skills and experience inventories of staff to identify possible alternative roles in priority areas;⁶⁴
- Require and collect information from staff or contractors about their ability to provide services for the health service provider;⁶⁵
- 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;⁶⁶
- Cancel or postpone services that are not related to responding to, preventing or alleviating the outbreak of the Virus;⁶⁷ and
- Suspend, for the duration of the Order, any grievance process with respect to any matter referred to in the Order.⁶⁸

Generally, in our view, the Order should be construed narrowly, in accordance with its specific purpose (of responding to, preventing and alleviating the COVID-19 outbreak for patients) and limited scope (work deployment and staffing). Indeed, under section 7.02(3) of the statute, actions authorized by an emergency order “shall be exercised in a manner which, consistent with the objectives of the order, limits their intrusiveness.” Moreover, locals can nonetheless take the position with hospital employers that a particular measure is not “reasonably necessary” to deal with the COVID-19 pandemic, where there are practical alternatives, although the right to grieve has been suspended.

As a result, the order should not be applied so as to suspend any and all negotiated entitlements not caught by the purpose or scope of the Order (e.g. other collective agreement provisions such as overtime entitlement and premium pay still apply). Even to the extent that work deployment and staffing protections are directly targeted by the Order, such protections should only be abrogated to the extent reasonably necessary to advance the purposes of the Order, and for the limited duration of the Order. Of course, it must be recognized that, in the emergency circumstances that currently apply, it will be very difficult to bring legal proceedings seeking to enforce these limitations.

Many of OCHU’s core job security protections are directly engaged by the Order. These are as follows:

⁶⁴ O.Reg 74/20, Sched., s. 3(ii).

⁶⁵ O.Reg 74/20, Sched., s. 3(iii).

⁶⁶ O.Reg 74/20, Sched., s. 3(iv).

⁶⁷ O.Reg 74/20, Sched., s. 3(v).

⁶⁸ O.Reg 74/20, Sched., s. 3(vi).

- **Reassignments:** The Order gives health services providers the power to make fundamental alterations to job assignments. Normally, under the collective agreement, reassignments are permitted only if they meet the criteria established under Article 9.08(A)(b) (the reassignment must occur in reverse order of seniority, be to an appropriate permanent position, not result in a reduction of wages or hours, be located at or near the employee's original work site, be on the same or substantially similar shift/shift rotation, reassigned employees may select vacancies on basis of seniority). If any these criteria are not met, then the reassignment constitutes a layoff which triggers all the layoff protections, including the establishment of a redeployment committee, the offering of packages and bumping rights. As well, local provisions contain additional restrictions on the management right to schedule hours of work. All of these provisions may be overridden by the order.
- **Temporary layoffs and bumping:** The Order allows health services providers to cancel or postpone services in order to prioritize their response to COVID-19. Normally, service cancellations or postponements would result in a temporary layoff, which triggers entitlements under Article 9.09 including the right to bump. These protections are overridden by the Order.
- **Work of the bargaining unit:** The Order permits health services providers to deploy non-bargaining employees and volunteers to perform bargaining unit work, a practice that would normally be significantly restricted by Article 11.01 (which prohibits the assignment of bargaining unit work to non-bargaining unit employees) and Article 11.02 (which limits the use of volunteers to the extent of the practice existing as of June 1, 1986). These provisions are also overridden by the Order.
- **Contracting out:** The Order allows health services providers to assign or employ contractors to perform bargaining unit work. Under Article 10.01, contracting out is already permitted, provided that it does not result in a layoff of an employee other than casual part-time employees. In our view, the Order ought only to be interpreted as affirming the rights of hospitals to contract out work, and not as permitting layoffs to the street, as there is no rationale for laying off employees when there is such a critical need for their services.
- **Job postings:** The Order also gives health services providers the power to reassign employees to what would normally be regarded as new positions, e.g. jobs in new COVID-19 assessment centres. If these are permanent vacancies, article 9.05 would normally require hospitals to post those positions and fill them in accordance with the seniority and other requirements set out therein. However, they are more likely temporary vacancies. Some collective agreements do include locally negotiated provisions governing temporary postings which will likely be affected by the Order.

- **Vacations and leaves:** The Order gives health services providers the power to defer or cancel vacations, absences or other leaves. Normally, vacations and leaves would be protected under the *Employment Standards Act* and the collective agreement, including Article 17 (vacation), Article 13 (sick leave) and Article 12 (other leaves). However, the extent to which the Order would permit health services providers to direct sick or vulnerable workers to attend work (e.g. workers on pregnancy leave, sick leave, emergency leave or compassionate care leave) is not clear, nor is it likely that health service providers would attempt to exercise this power in this manner.
- **Grievances:** The Order suspends the grievance process, for the duration of the Order, with respect to any matter referred to in the Order. It is unclear what this means. Arguably, it is the grievance process that has been suspended, not the right to file a grievance and have it adjudicated by an arbitrator. In our view, locals may wish to file any grievances that arise over the duration of the Order should continue to be filed, even to the extent that they concern matters referred to in the Order, with the understanding that these may be held in abeyance and addressed at a later time. Moreover, there is no suspension of the grievance procedure for matters not covered by the Order.

As explained above, to this point, the government has exercised its power to significantly interfere with collective bargaining rights by permitting health service providers to override collective agreements in relation to redeployment of staff, including lay-off, seniority/service or bumping provisions, 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*⁶⁹ that directly targeted collective agreements on both the public service and education sectors.⁷⁰ 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. With respect to teachers, the 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 the Order were found to infringe *Charter* rights, including the freedom of association guarantee, section 1 of the Charter allows government 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 section 1 of the Charter, and therefore resulting in the courts upholding an Emergency Order (even if it were possible to get a hearing and decision from a court in an expedited manner).

⁶⁹ *Public Health Act*, CQLR c S-2.2.

⁷⁰ [Gazette officielle du Quebec, Vol. 152, No. 12A \(March 18, 2020\), p. 767A.](#)