Bill 195 – the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*

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Overview

On July 7, 2020 the Solicitor General tabled Bill 195, the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* ("Bill 195"). Bill 195 permits the government to continue to maintain and modify emergency orders made under the *Emergency Management and Civil Protection Act* (*EMCPA*) for at least a year after the end of the declared emergency, and possibly longer. At the same time, it removes important mechanisms for democratic accountability.

Bill 195 authorizes the Government to maintain orders that interfere with the collective bargaining rights of unionized workers. With very limited exceptions, it also permits the government to increase the severity of restrictions on collective bargaining rights.

Bill 195 would appear to be more vulnerable to a constitutional challenge than orders made under the *EMCPA*. Bill 195 declares that the COVID-19 emergency is over. It is therefore harder to justify continued interference with constitutional rights, as well as a reduction in oversight. While a constitutional challenge to Bill 195 would still be difficult, and success could not be assured, the chances of success are greater than what existed when the government acted under the *EMCPA*.

The *EMCPA*

Emergency powers in Ontario are primarily governed by the *EMCPA*. When a state of emergency is declared the government is given the power to make orders to protect health, safety and welfare. These orders may override existing legislation, regulations, by-laws, or other instruments, and can restrict travel, prohibit assemblies, close businesses, fix prices, and regulate workplaces.

Emergency orders are temporary. They expire after 14 days, unless the Cabinet renews them. They may only be renewed for 14 days at a time but may be renewed any number of times. Cabinet also has the power to amend or revoke any of the orders that it has made.

A declaration of emergency is also temporary. When Cabinet declares an emergency, the default rule is that it lasts for 14 days. Cabinet can renew a state of emergency for one additional 14-day period. After this, an emergency can only be extended by the Legislature. They may extend the state of emergency for 28 days at a time, with no limit to how many times they may do so.

When the state of emergency ends, emergency orders may also terminate, but can also be continued by Cabinet. However, once the emergency is over, Cabinet loses their power to amend these orders. The *EMCPA* requires that emergency orders either continue in the form in which they exist, or else terminate.

Within 120 days of the end of an emergency, the Premier must table in the legislature a report that explains the legal basis on which all emergency orders were made. Unlike the Federal *Emergencies Act*, there is no obligation to hold a public inquiry into the declaration of emergency or the measures taken by the government in response to it.

Bill 195

Bill 195 does four main things:

a) it ends the state of emergency under the *EMCPA*;
b) it continues the operation of existing emergency orders;
c) it subjects those emergency orders to new, less stringent rules on amendment and extension; and
d) it reduces accountability mechanisms.

Emergency Ended but Emergency Orders Continue

When Bill 195 comes into force, it automatically terminates the declared emergency under the *EMCPA*. At the same time, it continues any emergency order that is in force as of that date. In effect, emergency orders are transferred from the *EMCPA* to Bill 195, which subjects them to different rules.

Orders that are continued under Bill 195 are no longer required to be renewed every 14 days. Instead, these orders last for 30 days at a time, and may be renewed by Cabinet for any number of additional 30-day periods.

Bill 195 also allows most continued orders to be amended.[1] Under the *EMCPA*, orders may only be renewed after the conclusion of the state of emergency. Under Bill 195, orders may also be amended, including to have them impose more onerous or retractive rules, or to have them apply to additional persons or groups.

There are some minimal limits to the government's power to amend orders continued under Bill 195:

- The amendment must be one that would have otherwise been authorized under the *EMCPA* had the emergency not terminated; and
- The amendment must relate to one or more the following:
    - It requires a person or persons to act in compliance with any advice, recommendations or instructions of a public health official;
    - It relates to the closing or regulation of any public or private place, including businesses, offices, schools, hospitals or other establishments or institutions;

[1] There are 14 orders that cannot be amended substantively but which may be continued and renewed. Of these, three specifically provide for the override of terms of a collective agreement: *O. Reg. 75/20 – Drinking Water Systems and Sewage Works*; *O. Reg. 132/20 – Use of Force and Firearms in Policing*; and *O. Reg. 241/20 – Special Rules Re Temporary Pandemic Pay*.

- It authorizes the power responsible for a workplace to identify staffing priorities or to develop, modify or implement redeployment plans or rules or practices that relate to the workplace or the management of the workplace; or
- It prohibits or regulates gatherings or organized public events.

So long as these conditions are met, the government may amend orders, including making them contain more onerous provisions and expanding the scope of where they apply and who they apply to.

The Government's power to extend orders for 30-day periods and to amend them exists for one year after Bill 195 comes into force. This period may be further extended by the Legislature for additional periods of up to 1 year. There is no limit to the number of times the Legislature may do this.

Bill 195 contains two reporting requirements. First, within 120 days of the first anniversary of Bill 195 coming into force, the Premier is required to table a report to the legislature outlining which orders were extended or amended, and the rational and legal basis for those extensions and amendments. If the Legislature renews Cabinet's power to extend and amend orders, this reporting obligation must be complied with within 120 days of the end of each extension.

The second reporting requirement requires the Premier or the Minister to appear before a committee of the legislature every 30 days to report on what orders have been extended and the rationale for those extensions.

Eroded Accountability Mechanisms

The *EMCPA* already provides the government with extraordinary powers that are in tension with public accountability and democratic norms. The *EMCPA* therefore contains mechanisms to enhance accountability. While these measures may be inadequate, particularly compared to the provisions of the federal *Emergencies Act*, they are still important.

Bill 195 significantly erodes these mechanisms and reduces public accountability.

Bill 195 removes the Legislature's role in maintaining or ending a state of emergency. Under the *EMCPA*, a state of emergency may only continue for so long as the Legislature wishes. If the legislature disallows a declaration of emergency or fails to renew it at least once every 28 days, the emergency ends, and Cabinet's power to make or amend existing orders ends with it. This means that orders can only be made or amended for so long as the Legislature consents. Under Bill 195, this system is removed. Cabinet's power to amend and extend orders exists notwithstanding there being no declared emergency at all. The Legislature has no power to remove Cabinet's power to further amend orders under Bill 195 for at least one full year. This is a dramatic reduction in the role of the Legislative Assembly.

Bill 195 also permits Cabinet to renew orders for 30 days at a time, rather than 14. The requirement to renew serves an important function. It forces Cabinet to turn its mind to whether there is a need to continue a measure, and whether it still has lawful authority to do so. Under bill

195, Cabinet's obligation to turn their mind to whether orders should be continued is cut by more than half.

The reporting obligations under Bill 195 are weaker than under the *EMCPA*. Both statutes require the Premier to table a report to the Legislative Assembly. In the case of the *EMCPA*, the report must be filed within 120 days of the end of the emergency. In the case of Bill 195, it is within 120 days of the 1-year university of the legislation coming into force. Even if the COVID-19 pandemic comes to an end earlier, and all orders are allowed to expire in a few months' time, the Premier would not be under any duty to make a timely report to the Legislature.

Reports under both the *EMCPA* and Bill 195 must similar information. However, whereas the *EMCPA* requires the Legislature to consider (i.e. debate) the report within 5 days, Bill 195 does not require the Legislature to do anything at all with respect to a report.

The only added accountability measure that Bill 195 introduces is the requirement for the Premier or a Minister to appeal before a committee of the Legislature every 30 days. However, the Premier or the Minister is only required to report on which orders have been extended and why. The Premier is *not* required to explain any amendments made to orders. The Committee has no powers to do anything other than hold a hearing. It cannot, for example, decide that the Ministerial justification for extending an order is inadequate and deciding to terminate the order.

Bill 195's Constitutional Frailties

Bill 195 is more constitutionally problematic than the *EMCPA*. While there is no guarantee that Bill 195 would be struck down by the courts, there are a number of reasons to view it as more vulnerable to challenge than the *EMCPA* regime.

Like the orders under the *EMCPA*, Bill 195 authorizes the continual application of orders that permit the overriding of collective agreement terms and the suspension of grievance processes. These orders can be challenged as violations of the s. 2(d) *Charter* right to collectively bargain. Bill 195 also permits other apparent violations of freedom of assembly by permitting the regulation of group gatherings. In some applications, this may also violate freedom of religion.

During the COVID-19 emergency, the *EMCPA* was likely to withstand a *Charter* challenge due to s. 1, which permits the government to impose reasonable limits on constitutional rights. Limiting rights to respond to a serious global pandemic is textbook example of the application of s. 1. Unless an order was extreme in its application, courts would likely defer to the government.

However, under Bill 195, there is no state of emergency. One of the main purposes of Bill 195 is to declare the COVID-19 emergency at an end. In light of this, it is harder to understand why the government should be allowed to maintain orders that interfere with collective bargaining and other constitutionally protected rights. If the government's position is that there is no longer a need to renew the state of emergency under the *EMCPA* – which the legislature clearly would have the power to do – it becomes significantly harder for it to defend these kinds of orders.

The reduced accountability mechanisms outlined above further impugn the constitutionality of Bill 195. It is unclear why, if the COVID-19 emergency is now less serious than it was before, it is justifiable to impose *fewer* checks and balances against extraordinary government power, particularly when it overrides existing laws or constitutional rights like s. 2(d) of the *Charter*.

Finally, it is unclear what the government's purpose actually is in enacting Bill 195, perhaps other than to gain political points by declaring the emergency over, while also reducing the restrictions on its powers. For its part, the government may claim that, while the emergency is at an end, there is good cause to suspect that a second wave may come and that there is need for the government to respond quickly if this occurred. However, the reality is that in those circumstances, Cabinet would be free to appropriately declare a new state of emergency under the *EMCPA* and exercise emergency powers again, albeit subject to that statute's greater accountability mechanisms. Absent a better justification for having Bill 195 at all, a court is less likely to view it as constitutional.

Overall, while a constitutional challenge to Bill 195 would still be a challenge in light of the continuing need to respond to COVID-19, this legislation is far more vulnerable than the *EMCPA* is.

Possible Reform to Bill 195

Bill 195 is still before the Legislative Assembly, and is expected to be referred to committee, where some number of public hearings will be held. Further, there will be opportunities for all political parties to offer amendments. Below, we set out some possible modest amendments that might be proposed, although to be clear, they would not comprehensively deal with or remedy the fundamental constitutional concerns with the Bill as outlined above.

Remove any power to override collective agreements and grievance procedures

Most significantly from a labour relations perspective, and certainly in the absence of an true emergency, it is difficult to justify the Bill's proposed continuing interference with the constitutionally protected right to engage in collective bargaining, including the overriding of collective agreements, which is protected by the Charter section 2(d) guarantee of freedom of association. As a result, the Bill should be amended to provide that no emergency order that is continued or amended can authorize or provide for the overriding of the terms of a collective agreement or of a grievance and arbitration procedure.

Allow the Legislature to Order an Early End to the Government's Amendment/Extension Power

Under the *EMCPA*, the Legislature has the power to disallow the existence of a state of emergency at any time. There is no reason why the Legislature should not have a similar power under Bill 195. At a minimum, the Legislature should have the power to terminate the government's power to amend orders. This would match the *EMCPA* regime, in which the effect of a disallowance of an emergency would allow orders to be extended, but not amended.

Remove the Power of the Legislature to Renew the Government's Amendment/Extension Power

There is no justification for permitting the legislature to make successive 1-year extensions to the government's power to renew or amend orders under Bill 195. The initial 1-year grant of power is already an unprecedented delegation of power. There would be more than enough time to enact new legislation though the normal parliamentary process if continued powers were needed past the 1-year mark. Requiring new legislation would have the further benefit of subjecting legislation to public comment and consultation through the committee process.

Reduce the Government's Power to Extend Orders from 30 Days to 14 Days

Permitting 30-day extensions of orders is unnecessary. The COVID-19 emergency has demonstrated that, even at the height of the pandemic the government could go through the process of renewing orders ever two weeks. If the situation is improving enough to allow the state of emergency to end, there is no rationale for doubling the duration that orders may be in force before Cabinet has to take action to continue them.

Require the Premier to Justify Amendments to Orders as Well as Extensions

Bill 195 only requires the Premier of a Minister to appear before a Legislative committee every 30 days to explain why emergency orders have been extended. It does not require them to explain why any amendments that they have made. Given that the government has the power to make existing orders more onerous, requiring them to explain amendments to the Legislature would be an important mechanism for public accountability.

Give the Legislature the Power to Disallow Orders

Under the *EMCPA*, the Legislature does not have the power to disallow an emergency order. Its power is restricted to disallowing a state of emergency, which does not necessarily have the effect of terminating orders. This can be contrasted with the federal *Emergencies Act*, which does allow emergency orders and regulations to be revoked by Parliament. Bill 195 should be amended to permit the Legislature to revoke an order if it concludes that Cabinet's rationale for continuing it is inadequate.

Within the framework of Bill 195, the most logical way to implement this would be to empower the committee that receives monthly reports from the Premier or a Minister to have the power to disallow any order that is continued or amended. Alternatively, the Committee should have the power to report an order that it believes should not continue to the Legislature and require the legislature to vote – within a fixed period of time – on whether to revoke the order.