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Analysis of the Impact on the Collectively Bargained Rights of Employees in Ontario of Bill 195 "Reopening Ontario (A Flexible Response to COVID-19) Act, 2020"

Overview

On March 17, 2020, the province declared a state of emergency, pursuant to the *Emergency Management and Civil Protection Act (EMCPA)* in relation to COVID-19.[1] The *EMCPA* provides the government with broad powers to issue orders under sections 7.0.2 and 7.1. The purpose of such orders is "to promote the public good by protecting the health, safety and welfare of the people of Ontario in times of declared emergencies in a manner that is subject to the *Canadian Charter of Rights and Freedoms*."[2] Most of the orders were imposed during the peak of the health crisis, when health care workers and unions were dealing with urgent issues amid the first wave of the pandemic in Ontario. As such, there have been few legal challenges to such orders.

In July, Bill 195 enacted the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020 (ROA)*, which allows the government to continue emergency orders made under sections 7.0.2 and 7.1 of the *EMCPA*.[3] Bill 195 received Royal Assent and the *ROA* came into force on July 24, 2020, which marked the end of the declared emergency.[4]

During the Bill's third reading on July 21, 2020, Hon. Sylvia Jones, Solicitor General, stated that the "legislation would bridge the gap between the public health measures that were needed to respond to the immediate threat of the virus in the earliest moments of the global public health emergency and those now needed to support the province's safe recovery as the virus continues to spread around the world."[5] The Office of the Premier later emphasized that these measures were necessary to ensure that the province had the flexibility to address the ongoing risks of the COVID-19 outbreak as the province moves toward recovery.[6]

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[1] *Emergency Management and Civil Protection Act*, RSO 1990 c E.9 [*EMCPA*].
[2] *EMCPA* s. 7.0.2(1).
[3] *Reopening Ontario (A Flexible Response to COVID-19) Act*, *2020*, S.O. 2020, c. 17 [*ROA*].
[4] *Bill 195, Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, Legislative Assembly of Ontario <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-195>.
[5] "Bill 195, Reopening Ontario (A Flexible Response to COVID-19) Act, 2020", 3rd reading, *Ontario Legislative Assembly Debates*, 42-1, No 178 (July 21st 2020) at 8902 (Hon Sylvia Jones), online: <https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2020/2020-07/21-JUL-2020_L178.pdf>.
[6] Office of the Premier, News Release, "Ontario Legislature Adjourns after Significant Sitting in Response to COVID-19" (22 July 2020), online: <https://news.ontario.ca/opo/en/2020/07/ontario-legislature-adjourns-after-significant-sitting-in-response-to-covid-19.html>.

However, the *ROA* has also brought uncertainty into the workplaces of many frontline workers who can no longer rely on the rights in the collective agreements that they bargained for. This analysis will briefly outline the powers to extend and amend orders under the *ROA*, the threshold criteria within the Work Deployment Orders, and the types of collective agreement provisions that have been affected by the orders, along with the government's reporting obligations under the *ROA*. It will demonstrate the impacts that the *ROA* has had and will have on workers, and will present possible challenges to the *ROA* and the emergency orders that may be brought in the coming months.

The continuation of orders under the *ROA* (s. 2 of the *ROA*)

Several orders that were made under subsection 7.02 of the *EMPCA* have been extended under the *ROA* and affect workplace operations and collective agreements.[7] These orders impact the rights of unionized workers, primarily those working in the health and social service sector. They can be extended, for an additional 30-day period at a time (as opposed to every 14 days under the *EMCPA*), up until one year after their initial continuance.[8]

Hospitals and Health Service Providers	**O.Reg. 74/20** Work Redeployment for Certain Health Service Providers, made March 21, 2020
Long-Term Care Homes	**O.Reg. 77/20** Work Redeployment Measures in Long-Term Care Homes, made March 23, 2020 **O.Reg. 95/20** Streamlining Requirements for Long-Term Care Homes, made March 27, 2020 **O.Reg. 146/20** Limiting Work to a Single Long-Term Care Home, made April 14, 2020
Boards of Health	**O.Reg. 116/20** Work Deployment Measures for Boards of Health, made April 1, 2020
Retirement Homes	**O.Reg. 118/20** Work Deployment Measures in Retirement Homes **O.Reg. 158/20** Limiting Work to a Single Retirement Home, made April 16, 2020
Service Agencies for Adults with Developmental Disabilities	**O.Reg. 121/20** Service Agencies Providing Services and Supports to Adults with Developmental Disabilities and Service Providers Providing Intervenor Services, made April 3, 2020
Agencies Providing Crisis Line Services for Victims of Violence Against Women	**O.Reg. 145/20** Work Deployment Measures for Service Agencies Providing Violence Against Women Residential Services and Crisis Line Services, made April 14, 2020

[7] *ROA* s. 2.
[8] *ROA* s. 8(1).

District Social Services Administrative Boards	**O.Reg. 154/20** Work Deployment Measures for District School Services Administration Boards, made April 16, 2020
Service Provider Organizations	**O.Reg. 156/20** Deployment of Employees of Service Provider Organizations, made April 16, 2020
Municipalities	**O.Reg. 157/20** Work Deployment Measures for Municipalities, made April 16, 2020

As noted above, orders need to be reviewed and extended less frequently under the *ROA* than under the *EMCPA*. Similarly, while an order under the *ROA* can be extended continuously for one year (and longer upon resolution by the Assembly), under the *EMCPA*, the government had to return to the Legislative Assembly every 28 days to extend the state of the emergency. The Canadian Civil Liberties Association suggests that this transition is concerning: "[returning to the Legislative Assembly is] a way to insert democratic control over the executive branch's emergency powers and the orders the Premier and Ministers make in response to an emergency. Bill 195 eliminates this requirement – leaving no meaningful democratic check on the government's power."[9]

The power to amend orders (s. 4 of the *ROA*)

The government may also amend an order that would have been authorized under section 7.0.2 of the *EMCPA*.[10] The criteria for such emergency orders is that the "Lieutenant Governor believes [they] are necessary and essential in the circumstances to prevent, reduce or mitigate serious harm to persons or substantial damage to property, if in the opinion of the Lieutenant Governor in Council it is reasonable to believe that, (a) the harm or damage will be alleviated by an order; and (b) making an order is a reasonable alternative to other measures that might be taken to address the emergency."[11] Orders must be exercised in a manner that, consistent with the objectives of the order, limits their intrusiveness, applies only to the areas of the Province where it is necessary, and shall be effective only for as long as is necessary.[12]

There are further limitations to amendments, notably that an amendment may only be made if it requires persons to act in compliance with any advice, recommendation or instruction of a public health official, or relates to specific matters:

1. Closing or regulating any place;

[9] CCLA, "CCLA to Ontario MPPs: Resist the Premier's Undemocratic Power Grab" (10 July 2020) online: <https://ccla.org/bill-195/>.
[10] *ROA* s. 4(1).
[11] *EMCPA* s. 7.0.2(2).
[12] *EMCPA* s. 3.

2. Providing rules or practices that relate to workplaces or the management of workplaces, or authorizing the person responsible for a workplace to identify staffing priorities or to develop, modify and implement redeployment plans or rules or practices that relate to the workplace or the management of the workplace, including credentialing processes in a health care facility; and
3. Prohibiting or regulating gatherings or organized public events.[13]

The *ROA* also clarifies that an amendment may: 1) impose more onerous or different requirements, including in different parts of the province, and 2) extend the application of the order being amended, including the geographic scope of the order and the persons it applies to.[14] This is concerning as an order that was originally made during the emergency could become increasingly stringent during the recovery stage of the pandemic, or rather, that emergency measures could become the "new normal."

Like the extension of orders, orders can be amended 30 days at a time, up until a year after they have been continued under s. 2 of the *ROA*.[15] The Assembly, on the recommendation of the Premier, may extend this one-year expiry date for additional periods of one year.[16]

Threshold criteria in the Work Deployment Orders (s. 2 of the Orders)

Under each Work Deployment Order, employers are authorized to override certain types of collective agreement provisions if threshold criteria are met. The threshold is a "reasonably necessary measure to respond to, prevent and alleviate the outbreak of the coronavirus."[17] The "reasonably necessary" threshold itself is relatively high, and it is applied to a specific purpose. Some of the orders for dealing with hospitals and long-term care homes, such as O.Reg. 74/20 and O.Reg 77/20, add that it must be to "respond to, prevent and alleviate the outbreak of the coronavirus for patients" or "for residents." This specifies the benefit (for the benefit of the patients or the residents), which also seems to add further constraints on the powers within this provision.

As such, it is not a generalized authorization to ease operational constraints for employers. However, it is unclear how this threshold, or "reasonably necessary" analysis, will be applied once the province transitions to the recovery stage of the pandemic.

Types of Collective Agreement provisions affected (s. 3 of the Orders)

If the threshold is met, the employer is authorized to take certain actions "despite any other statute, regulation, order, policy, arrangement or agreement, including a collective

[13] *ROA* s. 4(2).
[14] *ROA* s. 4(6).
[15] *ROA* s. 8(1).
[16] *ROA* s. 8(2).
[17] *ROA* s. 2.

agreement."[18] For example, in O.Reg 74/20, health service providers are authorized to "identify staffing priorities and develop, modify and implement redeployment plans, including those below," which include aspects of common collective agreement provisions, and are seen across Work Deployment Orders:

- Redeploying staff to different locations in (or between) facilities
- Redeploying staff to work in COVID-19 Assessment Centres
- Changing the assignment of work, including assigning non-bargaining unit employees or contractors to perform bargaining unit work
- Changing schedules of work or shift assignments
- Deferring or cancelling vacations, absences or others leaves
- Employing extra part-time or temporary staff or contractors, including for the purposes of performing bargaining unit work; hiring volunteers to perform such work
- Disregarding layoff, seniority/service or bumping provisions of collective agreements
- Suspending, for the duration of the Order, any grievance process with respect to any matter referred to in the Order

A recent decision from Arbitrator Gedalof found that the "reasonably necessary" requirement set out in s. 2 of O.Reg. 77/20 is applicable to the enumerated list of powers in s. 3.[19] This may have positive implications for workers, as it further limits the employer's authority under s. 3 to interfere with collective agreement rights.]

The government's reporting obligations under the *ROA*

Under the *EMCPA*, the Premier, or a Minister who has been delegated by the Premier, is required to regularly report to the public with respect to the emergency.[20] The Premier is also required to table a report in the Assembly within 120 days after the termination of an emergency declared under the *EMCPA*.[21]

Under the *ROA*, the Premier, or a Minister who has been delegated by the Premier, is also required to regularly report to the public with respect to the orders that have been extended under the *ROA*.[22] Further, they must report to a committee designated by the Assembly at least once every 30 days concerning orders that were extended during the reporting period and the rationale for those extensions.[23] And finally, the Premier shall table a report in the Assembly within 120 days after the first anniversary of the day orders are continued concerning orders that were extended and amended under the Act, and

[18] O.Reg. 74/20 s. 3.
[19] *Healthcare, Office and Professional Employees Union Local 2220 v Chartwell Seniors Housing Reit (The Woodhaven),* 2020 CanLII 73977 (LA) at para 3..
[20] *EMCPA* s. 7.0.6.
[21] *EMCPA* s. 7.0.10(1).
[22] *ROA* s. 11.
[23] *ROA* s. 12.

the rationale for those extensions and amendments, "including how any applicable conditions and limitations on the making of the amendments were satisfied."[24] If the one-year expiry date is extended, the Premier shall table a report in the Assembly within 120 days after the end of each extension period.[25]

Recent (and future) challenges to limit the orders

The orders were initially implemented during the first wave of the pandemic, when the majority of frontline workers who were most affected by the orders were responding to the health crisis. As such, the orders have not been broadly challenged by unions. These orders are increasingly concerning under the *ROA*, outside of the context of a declared emergency. First, and most obviously, they authorize employers to strip unionized workers of their collective agreement rights. Unions spoke out against this, and Bill 195 generally, in July. For example:

SEIU Healthcare was concerned that the *ROA* would leave "burnt-out staff without desperately needed respite and vacation after months of excruciatingly difficult circumstances."[26] This is particularly true as many frontline workers now prepare to deal with a possible second wave of the pandemic in the province.

CUPE argued that "this government needs to consult with workers and unions, not continue to violate their Charter-protected right to collectively determine their working conditions."[27] This speaks particularly to the limitations that the *ROA* places on the collective bargaining and grievance arbitration processes.

It is likely that the threshold criteria within the orders will be subject to further interpretation through arbitration, especially if (or when) orders are extended or amended. For example, SEIU brought four grievances against Heritage Green Nursing Home in July, where the employer relied on s. 3(i)(c) of O.Reg. 77/20 to argue that it had been relieved of it collective agreement obligation of daily overtime pay.[28] Arbitrator Herlich found that while the employer could scheduled longer shifts, it was not relieved of its obligation to pay daily overtime. Further, he reiterated that a suspension of the grievance process is only effective if it relates to a "matter referred to in [the] Order."

However, as employers are authorized to suspend the grievance process under emergency orders in such circumstances, challenges may need to be brought under other

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[24] *ROA* s. 12(1)(c).
[25] *ROA* s. 13(2).
[26] SEIU Healthcare, "Ford Government Must Stop Attacks on Healthcare Workers" (13 July 2020) online: <https://seiuhealthcare.ca/ford-government-must-stop-attacks-on-healthcare-workers/>.
[27] CUPE, "Front-line workers deserve better: CUPE Ontario opposes extension of emergency powers" (8 July 2020) online: <https://cupe.ca/front-line-workers-deserve-better-cupe-ontario-opposes-extension-emergency-powers>.
[28] *Heritage Green Nursing Home v Service Employees International Union, Local 1*, 2020 CanLII 50475 (ON LA).

forums. For example, such challenges may take the form of broader constitutional questions about interferences with freedom of association rights, as well as those on the grounds of sex/gender under s 15, as the orders continue to apply disproportionately to the health sector which has an overwhelmingly female work force.

To summarize, the *ROA* allows the government to continue emergency orders that interfere with workers' collective agreement rights without the accountability mechanisms of the *EMCPA*. We can anticipate challenges to such orders in the months to come – perhaps creatively, in grievance arbitration, at the Labour Relations Board, or raising constitutional questions – as health care workers continue to work on the frontlines of the pandemic, and as the province braces for a potential second wave.