

May 2020

Management Orders for Long-Term Care Homes

I. Overview

The Ontario Hospital Association (OHA) has prepared this Backgrounder to provide members with a detailed review of recent government measures related to the management of long-term care (LTC) homes in Ontario during the COVID-19 pandemic.

II. Background

Emergency Order for Management of Long-Term Care Homes

On May 12, 2020, the Province issued an Order¹ under the *Emergency Management and Civil Protection Act* (EMCPA) (“the EMCPA Order”) with respect to LTC homes.

According to the Government News Release, this Order “would support the use of rapid, immediate and effective management alternatives to protect residents and staff within a [long-term care] home. The manager could be any person, including a corporation or a hospital.”²

The EMCPA Order permits the Director³ of Long-Term Care (who represents the Ministry of Long-Term Care) to make a management order under subsection 156(1) of the *Long-Term Care Homes Act, 2007* (LTCHA) with respect to a LTC home, if at least one resident or staff member in the LTC home has tested positive for the coronavirus (COVID-19) in a laboratory test. As outlined below, this is a narrower threshold than is currently set out in the LTCHA.

The EMCPA Order also applies despite any requirement or grounds set out in the LTCHA or Ontario Regulation 79/10 (General) made under that Act, and despite any other statute, regulation, order or policy.

Subsection 156(1) of the LTCHA is directed at the licensee of a LTC home. It outlines the requirements for the issuance of a mandatory management order. In particular, it provides that “the Director may order a licensee to retain, at the licensee’s expense, one or more persons acceptable to the Director to manage or assist in managing the long-term care home.”

Subsection 156(2) indicates that certain threshold requirements must be met before a management order is issued, as further outlined below.

The relationship between the EMCPA Order and the issuance of a management order under the LTCHA is also detailed below.

¹ O. Reg. 210/20 under the *Emergency Management and Civil Protection Act*, available [online](#)

² Ontario Government News Release, “Ontario Takes Steps to Better Protect Long-Term Care Residents and Staff During the COVID-19 Outbreak” (May 13, 2020) available [online](#)

³ “Director” means the person appointed under section 175 of the *Long-Term Care Homes Act, 2007* as the Director – i.e. an individual appointed by the Minister of Long-Term Care.

III. Legal Context

Requirements of the *Long-Term Care Homes Act, 2007*

As noted above, subsection 156(1) of the LTCHA authorizes the Director to put in place a management order – i.e. to order a licensee to retain one or more persons to manage or assist in managing the LTC home. This provision also requires that the manager be approved by the Director; and directs the licensee to pay the costs associated with retaining the manager.

A management order under the LTCHA can be made when two requirements are met:⁴

- (a) the licensee has not complied with a requirement under the Act; and
- (b) there are reasonable grounds to believe that the licensee cannot or will not properly manage the long-term care home, or cannot do so without assistance.

Both requirements must be met before an Order can be issued under subsection 156(1) of the LTCHA.

A corollary provision to subsection 156(1) is the requirement around management service contracts. Subsection 110(1) of the LTCHA provides that “a licensee of a long-term care home shall not allow anyone else to manage the home except pursuant to a written contract approved by the Director.” Therefore, subsection 110(1) puts in place a requirement that management orders under subsection 156(1) be in writing, and any accompanying written arrangements be approved by the Director.

On a practical level, the key steps with respect to a management order and management service contract under the LTCHA are as follows:

1. The Director finds that the two requirements are satisfied to issue an order under subsection 156(1);
2. The Director issues an order under subsection 156(1), and directs the licensee to select a manager (who must be acceptable to and approved by the Director);
3. The licensee is also directed to pay the costs associated with retaining the manager;
4. The manager and the licensee enter into a written contract, pursuant to the requirements of subsection 110(1). This contract may cover a number of issues, including costs as outlined above; and
5. The section 110(1) written contract is approved by the Director. Typically, this means a separate tripartite agreement between the Director (representing the Ministry of Long-Term Care); the licensee and the manager, indicating that approval under section 110 is granted.

The overlay of an EMCPA Order into this process is considered further below.

Issuance of an EMCPA Order

The EMCPA Order introduces an additional ground on which an order can be made under subsections 156(1) and 156(2) of the LTCHA. In particular, the EMCPA Order would allow the Director to make a management order where “at least one resident or staff member in the LTC home has tested positive for the coronavirus (COVID-19) in a laboratory test.”

⁴ Subsection 156(2) of the LTCHA

This threshold in the EMCPA Order is different from the threshold requirements of the LTCHA, since the latter requires both evidence of non-compliance with the Act, and evidence that the licensee cannot or will not manage the LTC home properly without assistance.

This means that the Director may choose which threshold level has been satisfied on the facts of the case (i.e. the EMCPA Order threshold or the LTCHA threshold) and issue a subsection 156(1) management order on the basis of that threshold.

The EMCPA Order is intended to complement, rather than replace, the scheme of the LTCHA for the issuance of a management order. That is, when the threshold level to issue a management order under the EMCPA Order is met, the scheme of the LTCHA would still take effect. Therefore, the process outlined above would still be followed, including the requirements around a subsection 110(1) management services contract and consequent approval from the Director in a separate agreement. The LTC home would still be required to select an appropriate manager; and pay the costs associated with retaining the manager.

Specific Example of a Management Order

There are limited examples in Ontario of management orders for LTC homes. However, in at least one case in 2016, the Director issued a management order under the LTCHA against a LTC home with a long history of non-compliance with the LTCHA, despite repeated efforts to remediate the non-compliance.⁵

In that case, the subsection 156(1) management order directed at the licensee outlined a number of responsibilities :

- A requirement to retain a person to manage the LTC home (“the manager”);
- A requirement to submit the name of the manager to the Director within a prescribed time period;
- A requirement that the selection of the manager be approved in writing by the Director;
- A stipulation that if the name of the manager was not submitted to the Director, it would be permissible for the Director to select a person to manage the LTC home;
- A number of specified requirements for the manager, including necessary experience, skills and qualifications/background;
- A requirement that a written contract (a section 110(1) management services agreement) be put in place between the manager and the licensee within a prescribed time period;
- A requirement to submit a detailed management plan, prepared in collaboration with the manager, to specifically address strategies to achieve compliance with the LTCHA and remedy deficiencies;
- A prescribed time period for when the manager would begin managing the LTC home;
- A stipulation that the manager would be in place until advised otherwise by the Director; and
- A requirement that all costs associated with the Order, including the costs of retaining the manager; be paid by the licensee.

⁵ Ministry of Health and Long-Term Care, Orders of the Director (March 2016) available [online](#)

As evidenced by this list, subsection 156(1) orders may be quite onerous and impose significant obligations both on the licensee and the manager.

Note:

This case represents one particular situation where a management order was issued but may not necessarily reflect current government direction on management orders, particularly under the EMCPA. It is presented as an example of the particular issues that were addressed in the subsection 156(1) management order in that case.

As noted above, in the current environment, the Director may issue a management order when the threshold level in the EMCPA order is met - this does not necessarily require a long history of non-compliance with the LTCHA. Under an EMCPA Order, the elements of a subsection 156(1) management order may be different and may be governed by the principles of emergency legislation.

IV. Key Implications

Practical Considerations for Hospitals

The Government's News Release⁶ indicates that the EMCPA Order is intended to be used as tool for LTC homes that are facing significant challenges, noting:

“A long-term care home may require management assistance if they face challenges like a high number of cases among residents or staff, a high number of deaths, an outbreak that has not yet been resolved, significant staffing issues or outstanding requirements from infection prevention and control assessments. Decisions regarding when and where to assign additional management support will be made on a case-by-case basis.”

A number of hospitals have already been voluntarily engaging with LTC homes under an existing emergency order under the EMCPA to provide assistance and redeploy staff to LTC homes (“the labour redeployment order”).⁷ The new EMCPA Order is not intended to derogate from arrangements pursuant to the labour redeployment order. Hospitals should continue to use the template agreement developed by the OHA and the Healthcare Insurance Reciprocal of Canada (HIROC), as appropriate, to govern such arrangements.⁸

However, in some circumstances, a subsection 156(1) management order pursuant the EMCPA Order may be necessary. Hospitals should ensure that they are complying with the requirements of the LTCHA as outlined above, including the need for a subsection 110(1) management services agreement.

Hospitals entering into subsection 110(1) management service agreements under subsection 156(1) management orders should carefully consider liability issues, appropriate compensation, as well as indemnification by the licensee (in conjunction with their insurer).

⁶ Supra note 2

⁷ O. Reg. 174/20: Order on Redeployment to Long-Term Care Homes (April 24, 2020) available [online](#)

⁸ See OHA member communique on this issue (April 25, 2020) available [online](#) (members only)

V. Next Steps

The OHA continues to monitor the evolving situation around hospital assistance to LTC homes during the COVID-19 pandemic, and also continues to engage with government and system stakeholders on this issue. Further information will be provided to members as it becomes available.

If you have any questions, please contact:

Melissa Prokopy
Director, Legal, Policy and Professional Issues
mprokopy@oha.com
416-205-1565

Or

Alice Betancourt
Senior Legal and Policy Advisor
abetancourt@oha.com
416-205-1365