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## COVID-19 and the *Emergencies Act* (Canada) Redux

By: Shaun Fluker

**Legislation Commented On:** *Emergencies Act*, [RSC 1985, c 22 \(4th Supp\)](#); Order in Council, [PC Number: 2022-0106](#) (February 14, 2022), [SOR/2022-20](#); *Emergency Measures Regulation*, [SOR/2022-21](#); *Emergency Economic Measures Order*, [SOR/2022-22](#)

On February 14, the federal Minister of Justice and Attorney General announced the [declaration](#) of a public order emergency under the *Emergencies Act*, [RSC 1985, c 22 \(4<sup>th</sup> Supp\)](#). The emergency was formally declared by proclamation made by the Governor in Council under section 17 of the Act with Order in Council, [PC Number: 2022-0106](#) (February 14, 2022), [SOR/2022-20](#). This proclamation provides for the exercise of extraordinary powers to take measures to end the blockades and occupations across Canada; actions that were initiated as a protest against restrictions on individual and economic liberties imposed by COVID-19 public health measures, but which quickly morphed into [#freedomconvoy](#), weaponized [extremism](#), threats of [insurrection](#), and significant [economic](#) losses. The emergency powers have initially been set out in the *Emergency Measures Regulation*, [SOR/2022-21](#) and the *Emergency Economic Measures Order*, [SOR/2022-22](#). As is required by the Act, the declaration and these powers will be the subject of a [debate in Parliament](#) this week.

[Protests matter](#) when it comes to bringing critical attention to the (mis)direction of public policy on any range of subjects, but as we now seem to witness on a very regular basis, protests can also become the thin edge of the wedge towards a very serious legitimacy crisis for a democratic government and its [enforcement](#) power. It is a mistake to think that this declaration of a public order emergency is solely in response to [#freedomconvoy](#). We also find ourselves here today because of decisions made by the executive branch of governments in most provinces that have shown almost no regard for basic democratic practices, and have governed COVID-19 largely immune from legal scrutiny because the courts refuse to question even the most obvious arbitrary decisions for which no rational explanation is offered (e.g. see *Hudson's Bay Company ULC v Ontario (Attorney General)*, [2020 ONSC 8046 \(CanLII\)](#)). Slowly but surely over the course of two years, voluntary compliance with the COVID-19 rules was going to end because the rules were (1) too often announced for the first time, and without any advance public notice, at media scrums; (2) made with little or no explanation for where the lines between acceptable and unacceptable conduct were drawn; and (3) often difficult to understand or even incoherent. And the longer this messy lawmaking went on, the uglier it would be when defiance overshadowed compliance.

It has been a truly unbelievable year and a bit for the state of democracy and the rule of law in Canada and the United States, with riots and occupations questioning the very legitimacy of elected governments. That alone invites a deeper dive into theories on the legitimacy of government and

obedience with the exercise of legal power. However, I am only going to dabble at the surface here.

Social contract theories explain that the legitimacy of a government to exercise its power and compel obedience with its rules, rests on the consent granted by those persons who are liable to that power. These theories employ an imagined or hypothetical agreement by which consent is granted; however, they diverge on why persons would consent to having their liberties curtailed and obey obligations imposed on them. These theories also differ on the terms of the bargain.

One camp (I label it ‘authoritarian’ in the spirit of [Hobbes](#)) asserts that consent is granted in order to avoid the anarchy and dangers of a grim existence where one is constantly living in fear of others. A life that Hobbes described as ‘nasty, brutish, and short’. The price to pay for self-preservation, and a stable and ordered society that protects us from others, is obeying the commands of a strong ruler, even when you do not agree with those commands or otherwise view them as unjust. Disobedience with the rules is not tolerated in this absolute bargain. Presumably in this understanding of government, the State can ticket and arrest its way out of an occupation or blockade without problem. Clearly this theory does not explain how Canadian governments initially responded to the COVID-19 anti-vaccine mandate blockades and occupations, for which disobedience with the law was tolerated for weeks and government officials spoke of [negotiating](#) with organizers of the protests. Interestingly perhaps, the federal proclamation of a national emergency makes reference to the potential for anarchy in the streets as one justification for the exercise of authoritarian powers now: “. . . the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians.”

The [former Chief of Ottawa Police](#), who resigned on February 15, remarked early on in the Ottawa downtown occupation that there may not be a ‘policing solution’ to the crisis. While this statement was definitely a surprising admission to me, it did highlight the arguably much more serious long-term problem for the legitimacy of a government that sometimes follows an authoritative approach towards disobedience, and sometimes does not: Canada appears to have no problem finding a ‘policing solution’ to other protests and blockades. Very recent examples of this include the [heavy police response](#) to blockades along the Coastal Gaslink pipeline in Wet’suwet’en Territory, where not only protestors but even [journalists](#) on scene were arrested. Similarly, approximately 1000 arrests were made in 2021 at the [Fairy Creek](#) logging blockade, along with reported use by police of aggressive and heavy-handed tactics with protestors. Even just with the COVID-19 restrictions themselves, I do not recall ever hearing an admission by Canadian enforcement authorities that there wasn’t a ‘policing solution’ to widespread disregard by many for the requirements on social distancing, gathering numbers, masking, and the like – even if it was true that enforcement and sanctions would never ensure widespread compliance with these requirements.

Being selective on when to exercise authoritarian rule significantly impairs the legitimacy of government precisely when it is needed the most. This also raises very disturbing questions about [discrimination](#) at the highest levels of the executive branch, and the motivations underlying legislation such as the *Critical Infrastructure Defence Act*, [SA 2020, c C-32.7](#) in Alberta, when such anti-protest legislation is not promptly used to decisively dismantle a blockade of a major transportation route at Coutts.

Another camp (I label it ‘parliamentarian’ in the spirit of [Locke](#)) asserts that the bargain between the government and the governed is not absolute, but rather is conditional and depends on the ongoing consent of the governed who provide it in exchange for a representative government that implements a system of Law that governs the exercise of government power and the adjudication of civil disputes. These theories are often critiqued on the basis of whose or what sort of interests are excluded from protection in democratic and legal forums. However, the point I want to emphasize for present purposes is that obedience with the ruler need not be absolute under these ‘parliamentarian’ theories of government. [Civil disobedience](#) with legal rules is not only tolerated in some instances, but it might even be required where the government has failed to uphold its side of the [democratic bargain](#) and the only apparent means to challenge unjust law is disobedience and perhaps outright rebellion. This camp would assert that the failure on the part of the legislative and judicial branches to ensure adherence with even the most basic of democratic practices by the executive in its exercise of power to address COVID-19 over the past two years, particularly when that power appears to be exercised on arbitrary or incoherent grounds, will almost certainly lead to strong defiance.

My colleague Lorian Hardcastle and I recently published our analysis on the democratic shortcomings in how the provinces have implemented COVID-19 public health rules on matters such as social distancing, gathering restrictions, masking, and business closures. In [Executive Lawmaking and COVID-19 Public Health Orders in Canada](#), we explain how the inherent shortcomings in due process, transparency and accountability (democratic and legal) familiar to delegated lawmaking by the executive branch, have produced a messy landscape of COVID-19 public health rules. We also demonstrate that public health legislation across Canada provides a very inadequate governance framework for effective and legitimate general lawmaking. While many of these shortcomings can be pinned on executive decision-makers such as ministers or chief medical officers, it is also noteworthy that legislatures have done almost nothing to even try and address these problems, and the judiciary has largely relied on an untenable conception of a rigid separation of powers to avoid applying legal scrutiny to these COVID-19 decisions. Moreover, as I discussed in [COVID-19 and Enforcement of Public Health Orders](#), the courts have been very (I would say too) lenient on granting requests for injunctions to facilitate enforcement action.

Perhaps the most significant implication of deciding not to invoke federal emergency powers in March 2020 was that it assured the COVID-19 pandemic would become highly politicized as individual provinces charted their own direction on public health measures. Although I doubt anyone could have envisioned just how bad this would get. So, the proclamation of a public order emergency under the federal *Emergencies Act* this week might just as well be more about restoring some faith in democracy, the rule of law, and legitimacy in government. Even if many of these powers are ultimately not used.

In [COVID-19 and the Emergencies Act \(Canada\)](#), I summarized the emergency powers in the federal legislation as follows (in relation to a public welfare emergency):

The discretionary power provided to federal cabinet is constrained by two pre-conditions: one legal and the other political. The legal condition is that there must be ‘reasonable grounds’ to exercise the power. Federal cabinet must believe on reasonable grounds that a public emergency exists before it issues a proclamation under section 6 declaring an

emergency, and federal cabinet must have reasonable grounds that the exercise of any of the powers set out in section 8 is necessary for dealing with the emergency. The political condition is that, before issuing a declaration of emergency, federal cabinet must consult with each province in which the emergency powers will be exercised, and if the emergency powers are directed at only one province the Act cannot be used unless that province indicates that the emergency exceeds the capacity or authority of the province to deal with it. Neither the legal nor political pre-conditions in the legislation would seemingly be difficult to meet in times of a real emergency such as this one.

In terms of what constitutes ‘reasonable grounds’, the Emergencies Act does not prescribe any considerations other than what is set out by the terms used to define ‘public welfare emergency’ and ‘national emergency’. The rule of law would require that cabinet give reasons in support of an emergency declaration or the exercise of these emergency powers. However, so long as cabinet issues some form of reasons which provide a rational connection between the emergency and the powers to be used, I would think the declaration and exercise of emergency powers would easily survive judicial review under rule of law scrutiny.

Political accountability is the real check on the use of these emergency powers, and most of this is set out in Part VI of the Emergencies Act. Section 7 is also important because it limits an emergency declaration to 90 days, subject to being extended for further 90-day segments. Part VI ensures there would be written reasons in support of an emergency declaration, or any extension of an existing declaration, because it requires these reasons to be tabled in Parliament. Part VI also subjects to parliamentary debate the orders and regulations enacted to implement emergency powers, which is noteworthy because subordinate legislation is not normally subject to this scrutiny. Part VI also gives Parliament the power to revoke a declaration of an emergency or the exercise of emergency powers. And as noted above, Part VI requires an ex-post public inquiry into the exercise of the emergency powers. In a minority government such as this one, I suggest these provisions offer real checks on the exercise of emergency powers. Although I rarely think much of political accountability in my line of work (public interest environmental law), I do believe it would be effective here both in terms of a decision to declare a public welfare emergency over COVID-19 and the exercise of emergency powers to address the pandemic.

Looking at some of the specific powers set out in the *Emergency Measures Regulation*, it is noteworthy to compare the ‘critical infrastructure’ and ‘public assembly’ restrictions in this regulation, with the same type of powers set out in Alberta’s *Critical Infrastructure Defence Act*. For starters, as noted above, the terms of these federal powers are subject to a debate in Parliament, which can result in amendment or revocation. This amounts to real political and legal accountability, particularly in a minority government. The *Emergency Measures Regulation* prohibits participation in a public assembly which interferes with the functioning of ‘critical infrastructure’ (section 2(1)), prescribes an exhaustive list of what constitutes ‘critical infrastructure’ (section 1), and explicitly sets out exemptions to the restrictions (sections 3 and 4). In summary, these federal restrictions on protests are much more specific and directed than Alberta’s *Critical Infrastructure Defence Act* which prohibits even just setting foot on ‘critical infrastructure’ without lawful excuse (which is left undefined) and gives the executive full

discretion to determine where protests will be prohibited. It also appears that legal accountability on the *Critical Infrastructure Defence Act* may be elusive (see [here](#)).

In asserting that [federal emergency powers are not needed](#) in Alberta, Premier Kenney is misconstruing the real reason for this proclamation of a national public order emergency. The emergency is not just the blockades and occupations, which were always just a symptom of what really ails Canada as the COVID-19 pandemic nears the two-year mark. In my view, the real emergency is a governance and legitimacy crisis for government. An emergency which was created by the very sort of lawmaking practices exhibited by the Premier and his executive in addressing COVID-19, only further exacerbated the absence of any significant use of enforcement powers under the *Critical Infrastructure Defence Act* to clear out the Coutts blockade.

As it turns out, way back in March 2020, I began my journey of ABlawg posts on the legal and policy response to the COVID-19 pandemic with [COVID-19 and the Emergencies Act \(Canada\)](#) and I considered the possible implementation of the federal *Emergencies Act* to proclaim a national emergency. I was on research leave at the time, and I took advantage of this capacity to observe and write about the legal and policy response to COVID-19 in its early days. I shifted quickly to a provincial focus when it became apparent that the federal government would defer to the provinces on public health emergency measures. It has been quite the journey, and it has forever changed the trajectory of my own work. It took almost two years for the national emergency to be proclaimed, but here we are. It is definitely an emergency of a different sort than what I had envisioned two years ago.

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