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

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Legislation Commented On: *Emergencies Act*, [RSC 1985, c 22 \(4th Supp\)](#)

As we move deeper into the COVID-19 pandemic in Canada, provincial, territorial and municipal governments are now using legal rules to impose self-isolation and social distancing measures for the common good of preventing community transmission of the virus. The narrative in daily updates from government leaders and public health officials has shifted away from encouraging voluntary practices and more towards invoking command and control, as evidence mounts that voluntary suggestions are not being followed. Command and control is, however, largely going to be a general deterrence measure because actual enforcement in individual cases will be very difficult and resource intensive (hence why some jurisdictions, such as the [State of Oregon](#), are encouraging citizens to help with enforcement by reporting violators of public health orders). All of this underscores the fact that we are truly in the midst of a socio-economic crisis, and has led to suggestions (e.g. see [here](#) and [here](#)) that federal cabinet issue a proclamation of national emergency under the *Emergencies Act*, [RSC 1985, c 22 \(4th Supp\)](#) and exercise the powers granted thereunder.

The federal government has authorized an initial aid package with the enactment of the [COVID-19 Emergency Response Act](#). The *Emergencies Act* authorizes broad executive federal powers which would be more in line with the emergency measures now being implemented by the provinces and territories across Canada. Perhaps the most significant federal contribution under the *Emergencies Act* would be the ability to ensure some of these measures are implemented consistently and concurrently across the nation, as well as ensuring there is accountability and debate in our legislatures on what measures are implemented and how they are implemented. For example, what constitutes an ‘essential service’ which is allowed to remain operational during an emergency is [not consistent](#) across the provinces which have implemented this restriction thus far. As well, the *Emergencies Act* would ensure a comprehensive public inquiry is conducted into how the emergency was addressed once the COVID-19 crisis has passed.

These emergency powers are also of the sort which could, under normal circumstances, violate all of the fundamental tenets of our legal and political system: the rule of law, democratic accountability, liberty, equality, federalism, etc. Obviously individual liberties have already been severely curtailed, and inequalities created, by orders under public health legislation. However, the *Emergencies Act* would take this to another level and, as the preamble to the Act puts it, allow for the use of power that “may not be appropriate in normal times”. The *Emergencies Act* was enacted in 1988 as the successor to the now-repealed *War Measures Act*, which is perhaps associated most closely with the late Right Honourable Pierre Trudeau’s statement [‘just watch](#)

[me'](#) when questioned about the extent to which he would invoke emergency powers to curtail liberties in order to resolve the FLQ crisis in late 1970.

The *Emergencies Act* has not been used to my knowledge, but the legislation has been the subject of some relevant scholarly attention. Two articles which caught my attention on CanLII were: Peter Rosenthal, “The New Emergencies Act: Four Times the War Measures Act”, (1991) *Manitoba Law Journal* 563, [1991 CanLIIDocs 129](#) and Amir Attaran and Kumanan Wilson, “A Legal and Epidemiological Justification for Federal Authority in Public Health Emergencies”, (2007) *McGill Law Journal* 381, [2007 CanLIIDocs 134](#). Rosenthal describes the structure and powers contained in the *Emergencies Act*, and references some parliamentary materials which informed the enactment of the legislation. The Attaran and Wilson article is directly relevant to the application of the *Emergencies Act* to the COVID-19 crisis: they describe how a viral pandemic qualifies as an emergency under the legislation, why we should not hesitate to implement a nationwide response under the direction of the federal government, and argue there is no legal impediment to federal emergency action to address a viral pandemic. Both of these articles are essential reading in relation to COVID-19 and the *Emergencies Act*.

The structure of the *Emergencies Act* is familiar to other legislation granting executive power:

1. categories are used to identify situations in which emergency power may be exercised;
2. the types of power available under the legislation are set out;
3. the exercise of power is discretionary; and
4. political accountability mechanisms are used to help ensure power is not abused.

In addition to the foregoing, judicial review also offers the prospect of some legal accountability.

The *Emergencies Act* sets out four categories of emergency, and the one relevant to COVID-19 is a ‘public welfare emergency’, defined in section 5 as:

an emergency that is caused by a real or imminent

- (a) fire, flood, drought, storm, earthquake or other natural phenomenon,
- (b) disease in human beings, animals or plants, or
- (c) accident or pollution

and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.

The manner in which the category of ‘public welfare emergency’ is drafted helps to restrict when the emergency powers will be available. In this regard, the definition of ‘public welfare emergency’ includes references to ‘real or imminent’ in terms of the event and requires that it meet the test of being a ‘national emergency’. A ‘national emergency’ is defined in section 3 as:

an urgent and critical situation of a temporary nature that

(a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or

(b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada and that cannot be effectively dealt with under any other law of Canada.

In his overview of the legislation, Rosenthal (*ibid*) notes that the *Emergencies Act* is more prescriptive in the test for a public welfare emergency than it is in the other categories of emergency (public order emergency, international emergency, or war emergency). Nonetheless, it is clear that COVID-19 meets the test.

The *Emergencies Act* prescribes types of power available for each category of emergency. The class of powers available to federal cabinet in a public welfare emergency are set out in section 8. These far-reaching powers include matters such as restrictions on travel, evacuation, direction to provide essential services, the use or disposition of property, regulating the availability of essential goods and services, spending, and the establishment of health care facilities. Section 8 reflects some regard for federalism in that subsection (3) provides that these powers are not to unduly impair the ability of a province to address the emergency and that federal-provincial collaboration is preferred over unitary federal action.

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.

I do find it strange that the *Emergencies Act* is not being used to address the COVID-19 crisis. If this isn't a public welfare emergency for which the legislation was intended, then it is hard for me to envision when *Emergencies Act* will ever be used. It does seem from [media](#) reports that accountability was a primary issue in the late-night negotiations which led to this week's enactment of the federal aid package. Perhaps there too much political accountability in *Emergencies Act* for a minority government? Or significant pushback from one or more provinces? Or maybe the use of the *Emergencies Act* sends a message that, for now, we wish to avoid thinking about: We have entered a new normal, and the public health and economic impacts of the COVID-19 crisis may very well resonate for a generation or longer.

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