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by Eugene Lang
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POLICY PERSPECTIVE

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“When the country is threatened by a serious situation, the decision whether to invoke emergency powers is necessarily a judgment call—or more accurately—a series of judgment calls. It depends not only on an assessment of the current facts of the situation, but even more on judgments about the direction events are in danger of moving and about how quickly the situation could deteriorate. Judgments have to be made not just about what has happened, or is happening, but also what might happen.”

– Perrin Beatty, minister of National Defence, notes for a statement before the legislative committee on Bill C-77, *The Emergencies Act*, and proposed amendments, February 23, 1988.

More than a generation ago, the Canadian government passed Bill C-77, the *Emergencies Act*.¹ The law replaced what the government of the day regarded as the “unjust” *War Measures Act*, a statute infamously invoked only once in peacetime, in response to the FLQ crisis in 1970.²

The *Emergencies Act* was designed to modernize Canada’s approach to national emergencies, balancing the maintenance of public order with the protection of civil liberties and calibrating the powers of the federal government with provincial jurisdiction and competencies. Bill C-77 also gave Parliament approval and oversight powers, upon the declaration of a national emergency and its duration (maximum of 90 days, subject to extension through a vote in Parliament) and for any associated orders or regulations invoked in responding to the emergency, which did not exist under the *War Measures Act*.

COVID 19 and the *Emergencies Act*

Throughout the COVID-19 pandemic, members of the news media have repeatedly asked federal ministers whether they intend to invoke this statute. The government has refused to do so. Prime Minister Justin Trudeau has suggested that he is not resorting to the legislation owing to insufficient provincial support for it, though there is no requirement for the provinces to consent to the act’s invocation.³ The *Emergencies Act* is invoked when the federal government and Parliament decide that a true national emergency exists which is beyond the capacity of provincial governments and existing federal legal authorities to deal with. It would be bizarre to have a federal emergencies statute, the application of which in a national emergency (as opposed to an

¹ Government of Canada, *Emergencies Act*, July 21, 1988, <https://laws-lois.justice.gc.ca/eng/acts/e-4.5/page-1.html>.

² House of Commons Debates, November 16, 1987, <https://www.cpac.ca/en/programs/house-of-commons/episodes/90001799/>.

³ Russell Skeet, “Trudeau and Premiers Not Ready for National Emergency Act Yet,” High River Online, March 24, 2020, <https://www.highriveronline.com/local/trudeau-premier-s-not-ready-for-national-emergency-act-yet>. The law requires consultation with provinces prior to the invocation of the *Emergencies Act* and the submission of the results of those consultations in Parliament. If the legislation is to be invoked in only one province, the consent of the Lieutenant-Governor in Council of that province is required, giving that province a de facto veto. Government of Canada, *Emergencies Act*, July 21, 1988, <https://laws-lois.justice.gc.ca/eng/acts/e-4.5/page-1.html>.



emergency that affected only one province) was subject to a veto by every sub-national government in Canada.

Which begs a fundamental question: If Ottawa is not going to invoke the *Emergencies Act* to deal with the COVID-19 pandemic, just when would we resort to it?

The preamble to Bill C-77 defines a national emergency as: “an urgent and critical situation of a temporary nature that imperils the well-being of Canada as a whole or that is of such proportions or nature as to exceed the capacity or authority of a province to deal with it and thus can be effectively dealt with only by Parliament in the exercise of the powers conferred on it by the Constitution.”⁴ Under the statute, an international emergency that “is so serious as to constitute a national emergency in Canada”⁵ can also be grounds for invoking the act.

The statute’s language seems to be carefully and thoughtfully written, setting a high bar for a declaration of a national emergency in very limited circumstances. Does the COVID-19 pandemic rise to that high standard?

COVID-19 – National, Provincial or Local Emergency?

The pandemic is the most consequential crisis Canada has faced since the Second World War. British Prime Minister Boris Johnson has called COVID-19 his country’s “deepest postwar crisis.” It is no less serious for Canada than it is for Britain. This is the only emergency to afflict Canada in peacetime that is truly national in scope and scale. The disease and its spread are having profound health, social and economic effects in every province, city, town and rural community in the country.

The virus originated in China in late 2019 and spread rapidly around the world, producing the worst pandemic since the Spanish flu exactly a century ago. It therefore represents an international crisis that has spilled over into a domestic emergency for Canada and most countries.

Managing the pandemic’s impact has been well beyond the provinces’ capability. Every province is relying on the federal government for pandemic-related support – from the mass procurement and distribution of vaccines and personal protective equipment to the provision of loans, grants, subsidies and other liquidity to businesses hit hard or shut down by the pandemic, to income support for Canadians at levels that are unprecedented and unaffordable for the provinces.⁶ In response to provincial requests, the Canadian Armed Forces (CAF) have been deployed to perform various roles. At the time of writing, this includes assisting with COVID-19 control and treatment in nursing homes in Ontario and Quebec, distributing vaccines to isolated communities in the far

⁴ House of Commons Debates, November 16, 1987, <https://www.cpac.ca/en/programs/house-of-commons/episodes/90001799/>

⁵ House of Commons Debates, November, 16, 1987, <https://www.cpac.ca/en/programs/house-of-commons/episodes/90001799/>

⁶ The federal government’s estimated deficit for FY 2020-21 is around \$400 billion, roughly 20 per cent of GDP, the largest deficit in peacetime, most of which is attributable to emergency COVID-19 income and business supports of various kinds. See Government of Canada, “Fall Economic Statement: Supporting Canadians and Fighting COVID-19,” November 30, 2020, <https://www.budget.gc.ca/fes-eea/2020/report-rapport/toc-tdm-en.html>.



North and working with the Public Health Agency of Canada to distribute vaccines to provinces. There is speculation that the CAF will be deployed along the Canada-U.S. border to assist with pandemic-related border control.

The pandemic has clearly demonstrated that the provinces are overwhelmed, some more than others, and cannot manage the broad effects of this emergency without wide-ranging, extraordinary and ongoing federal support.

The *Emergencies Act* and Pandemics

But is the *Emergencies Act* a well-designed law for pandemic response?

The legislation outlines different situations that could lead to its invocation, one of which is a “public welfare” emergency,⁷ defined 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.⁸

While the word pandemic does not appear in the legislation, the reference to “disease in humans” and its impact on the economy and society seems to encompass the impact a pandemic like COVID-19 can have.

When a public welfare emergency is declared under the act, the Governor in Council can issue orders and regulations in the following areas:

- (a) the regulation or prohibition of travel to, from or within any specified area, where necessary for the protection of the health or safety of individuals;
- (b) the evacuation of persons and the removal of personal property from any specified area and the making of arrangements for the adequate care and protection of the persons and property;

⁷ Any public welfare emergency declaration by the federal cabinet must receive parliamentary approval, through a vote in both the House of Commons and Senate, within seven sitting days of the cabinet’s declaration. The emergency declaration is subject to a 90-day time limit, which the government can extend, subject to confirmation through a further vote in Parliament, for an additional 90 days, and so on. The act requires parliamentary oversight of all regulations made under the act, including the power to revoke the regulations made. See McCarthy Tétrault, “COVID-19: Can They Do That? The *Emergencies Act*,” March 18, 2020. In a minority House of Commons, with an increasingly independent Senate, as is the case today, there are significant practical limits on executive authority under the *Emergencies Act*. The application of the legislation and any regulations under it are also subject to the *Charter of Rights and Freedoms* and judicial review.

⁸ Government of Canada, *Emergencies Act*, July 21, 1988, <https://laws-lois.justice.gc.ca/eng/acts/e-4.5/page-1.html>, Part 1.



- (c) the requisition, use or disposition of property;
- (d) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered;
- (e) the regulation of the distribution and availability of essential goods, services and resources;
- (f) the authorization and making of emergency payments;
- (g) the establishment of emergency shelters and hospitals;
- (h) the assessment of damage to any works or undertakings and the repair, replacement or restoration thereof;
- (i) the assessment of damage to the environment and the elimination or alleviation of the damage; and
- (j) the imposition
 - (i) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or
 - (ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment, for contravention of any order or regulation made under this section.⁹

Several of these provisions are relevant to dealing with a pandemic's effects, particularly those related to travel prohibitions within Canada;¹⁰ the rendering, regulation and distribution of essential goods and services; emergency payments; the establishment of emergency shelters and hospitals and the imposition of fines for violations of various restrictions.

Modernizing the *Emergencies Act*

In its scope, powers and parliamentary oversight, the current legislation seems useful in responding to pandemics. Nevertheless, Ottawa has not invoked it during the worst national emergency in living memory.

⁹ Government of Canada, *Emergencies Act*, July 21, 1988 <https://laws-lois.justice.gc.ca/eng/acts/e-4.5/page-1.html>, Part 1.

¹⁰ Some provinces and territories, notably Quebec, New Brunswick, British Columbia, P.E.I., Nunavut and Yukon, have restricted citizens' interprovincial/territorial movement in an effort to control disease importation from outside their boundaries. It is questionable whether provinces or territories have the legal authority to do this. The Canadian Civil Liberties Association is challenging the constitutionality of these provincial and territorial restrictions in court. Powers to restrict interprovincial mobility seem to be provided for in the *Emergencies Act*, though the constitutionality of that provision has not been tested and could be challenged.



There could be a variety of reasons for this, apart from the government's claim that provincial consensus does not exist. The *Emergencies Act* forces more transparency on the government, and gives Parliament more powers over executive authorities, including regulations and orders,¹¹ than is normally the case. The minority Liberal government might be uncomfortable with this level of transparency and parliamentary oversight over its executive fiat. The Trudeau government is also apparently highly sensitive to any comparison with the Pierre Trudeau government's invocation of the *War Measures Act* 50 years ago and the sensitivities that might arise in Quebec. Some consider this to be the chief consideration behind the government's posture on the *Emergencies Act*.¹²

It might also be the case that the federal government has the legal authority to do everything it is willing to do in responding to COVID-19 without resorting to emergencies legislation. Ottawa seems to see its chief role in the COVID-19 response as providing income support to people and business, procurement and distribution of vaccine, deployment of CAF personnel to assist provinces when requested and the provision of public health advice and information to Canadians, all of which can be done under existing legal authorities without resort to the *Emergencies Act*. In fact, the statute cannot be invoked unless the government intends to act in an area outside existing legislative authority. The Trudeau government may not want to assume any responsibility or accountability for making tough calls on coercive measures that affect individual and business freedoms and behaviour, leaving those decisions to provincial and municipal governments.

But it might also be the case that the *Emergencies Act* is not as tailor-made for pandemics as it could be. When Bill C-77 was conceived 35 years ago, pandemics were not seen as likely or serious threats to public welfare in advanced countries (though the Canadian government developed its first pandemic response plan as early as 1988). That has changed in the intervening period. For two decades, pandemics have been a feature of the international and Canadian landscape, beginning with SARS in 2003, H1N1 in 2009 and Ebola in 2014, all of which affected Canada, though at nowhere near the scale of COVID-19. U.S. national security agencies have warned for several years that pandemics are one of the greatest risks to American national security.¹³ Dr. Mark Ryan, head of the World Health Organization (WHO) emergencies program, has said that future disease pandemics at least as communicable and fatal as COVID-19 are probable, and that COVID-19 should be "a wake-up call".¹⁴

¹¹ See Kathy Brock and Lori Turnbull, "Balancing Accountability and Action during COVID-19: How the *Emergencies Act* Provided a Model for an Empowered Parliament," in *Beyond COVID-19: Five Commentaries on Expert Knowledge, Executive Action, and Accountability in Governance and Public Administration*, CANADIAN PUBLIC ADMINISTRATION / ADMINISTRATION PUBLIQUE DU CANADA, vol. 63, no. 3, (September/septembre 2020): 339–368.

¹² Interview with senior government official and former senior official (summer 2020, February 2021 respectively). These two officials were told by two federal ministers that the chief obstacle to invoking the *Emergencies Act* was owing to sensitivities in the government in connection with any comparison to Pierre Trudeau's invocation of the *War Measures Act* in that province in 1970.

¹³ In January 2019, a threat assessment published by the Office of the Director of National Intelligence stated: "We assess that the United States and the world will remain vulnerable to the next flu pandemic or large-scale outbreak of a contagious disease that could lead to massive rates of death and disability, severely affect the world economy, and strain international resources ..." Quoted in Ken Dilanian, "US Intel Agencies Warned of Rising Risk of Outbreak like Coronavirus," NBC News, February 28, 2020.

¹⁴ Kate Dangerfield, "The Big One: WHO Warns Future Pandemics Could Be Worse than Coronavirus," Global News, December 29, 2020.



A case can therefore be made to strengthen and amend the *Emergencies Act*, adding a new section to the legislation with specific powers designed for pandemics. The act could be changed, for example, to confer powers on the federal government to order national mandates in domains that experience with pandemic response suggests are important to battling the spread of diseases nationally (e.g., national mask mandates and a national lockdown mandate, as has been imposed in various other countries). The act could be amended further to give the federal government the authority to determine what services are essential in a national emergency, rather than its current advisory role in this regard, which has led to a patchwork of “essential services” among the provinces. There are no doubt many other lessons from battling COVID-19 that governments and public health authorities can draw upon to fashion legislative powers specific to effective pandemic emergency response, on the assumption that pandemics are a probable risk to Canadians and to our national security in the coming years.

Conclusion

The threshold for declaring a state of national emergency¹⁵ should be high. But it should not be virtually impossible for Ottawa to invoke the *Emergencies Act* to deal with a pandemic and put in place appropriate national-level responses, up to and including coercive measures. For whatever reason(s), the COVID-19 pandemic – the clearest example of a national peacetime emergency in modern Canadian history – has not resulted in such a declaration and response from the federal government. Not invoking the act in this instance creates a precedent, arguably raising the bar for the declaration of a national emergency so high as to make the legislation impracticable in future.

There is some evidence to suggest that the public wants Ottawa to play a stronger role to help deal with the health risks and disruptions to normal life caused by COVID. One public opinion survey conducted in January 2021 indicated that after nearly a year of enduring the pandemic, 70 per cent of Canadians – and 80 per cent of Quebecers – want the federal government to invoke the *Emergencies Act* to deal with a situation that the public, public health officials and some governments increasingly see as out of control.¹⁶ Doing so would at least send a strong and clear message to all Canadians that even though the course of the disease affects provinces and regions differently, we need some basic norms and approaches to battling it that apply to everyone, wherever they live. If the current emergencies legislation somehow impedes the federal government’s ability to act in that way, then the law should be reformed accordingly.

¹⁵ Several advanced democracies, including Italy, Spain, the U.K., the United States, France, New Zealand and Japan have imposed national states of emergency in response to this pandemic.

¹⁶ Frank Graves, “Public Outlook and Vaccine Acceptance: Implications for the Next Ninety Days,” *Rethinking Government*, Ekos Research, January 14, 2021.

► About the Author

Eugene Lang is Adjunct Professor, School of Policy Studies, Queen's University, and Fellow, Canadian Global Affairs Institute. He was chief of staff to two ministers of National Defence in the Chrétien and Martin governments and served as an official in the Department of Finance.

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