

Canada's Fractured Emergency Management System

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ABSTRACT

Canada's emergency legislation, the *Emergencies Act*, was examined as part of the Public Inquiry into the 2022 Public Order Emergency. This Inquiry recommends several amendments to the *Emergencies Act* but does so without examining the wider context of Canada's emergency management system. This paper looks at that context to explain why the only legislative tool available to respond to the 2022 protests was, at best, adequate. The underlying assumption is that Canada has an effective and efficient emergency management system that is only hampered by out-of-date legislation. Examining the historical development shows that the *Emergencies Act* was drafted in the absence of a robust emergency management system that subsequently evolved in ways that make the legislation further out of step. Amendments to the *Emergencies Act* must resolve the current overlap with matters of provincial concern that can currently arise during a national emergency for public welfare and public order. Federal emergency powers should only deal with ways the federal government is likely to get involved within its own jurisdictional powers and in light of current federal legislation.

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I. INTRODUCTION

Canada has a fractured emergency management system. The cracks in the system have resulted from building the system in an *ad hoc* manner on weak, outdated foundations. The special and temporary powers available under a declared state of emergency need to be carefully reconsidered in terms of their impact on citizens and their applicability to different jurisdictions. The decision by the Government of Canada to use the *Emergencies Act* in 2022 for a Public Order Emergency, when the ongoing global COVID-19 pandemic and many prior significant disasters and political protests had not triggered such action, highlights that it is the emergency management system that needs to chart a new course, not just the *Emergencies Act*.¹

As Parliament considers Commissioner Rouleau's recommendations, this commentary recommends that Parliament also consider whether the powers available to the federal government under the four categories of emergency make the best use of the federal government's authority and ability to respond to contemporary emergencies, and undertake a comprehensive review of its emergency management system in support of revisions to the *Emergencies Act* to minimize potential conflicts with provincial responses and be efficient with federal resources.

Such a comprehensive review is needed to address the fractured nature of emergency management in Canada: Responsibilities for emergency management are currently not logically divided between constitutional partners' jurisdictions. Emergency management systems and legislation is inconsistent across the country. There is a lack of critical assessment of the performance of both pre-impact activities and response and recovery actions. Most importantly Canada's emergency management system is not ready for a future of climate instability nor the socioeconomic consequences of the global climate emergency.

II. THE WIDER CONTEXT LEADING TO THE INVOCATION OF THE *EMERGENCIES ACT*

The convoy events of February 2022 are set against the backdrop of another emergency: the COVID-19 pandemic. The pandemic brought

¹ *Emergencies Act*, RSC 1985, c 22 (4th Supp).

about the first time in Canada's history that all the provinces were under a state of emergency at the same time. This triggered the first widespread and public discussion of declaring a national public welfare emergency, one category of emergency under the *Emergencies Act*.² The numerous and often different provincial and federal public health orders led to inconsistency between provinces and created a perception of unfairness. Increasingly divergent views were amplified by both social and corporate media. As noted by the Public Order Emergency Commission, “[s]ocial media also served as an accelerant for misinformation and disinformation, which ... clearly played a role in the protests”.³ This shift in the public's willingness to abide by public health orders in an emergency is a recognized concern⁴ and past research has identified “a compelling need to maintain the confidence and support of the public while decisions are implemented that may curtail health care services”.⁵

The report on the Public Order Emergency details the events leading up to and throughout the trucker convoy and blockades. In doing so it highlights how the growing discontent over the provincial and federal response to the pandemic led to the declaration of a national public order emergency.⁶ What the report does not ask is why a national public welfare emergency⁷ was not declared for the widespread health and economic impacts. Had the Commission's mandate included this question it would have exposed a fundamental tension within the *Emergencies Act*: the special powers available to the federal government in public welfare emergencies

² John Paul Tasker, “The ‘Measure of Last Resort’: What is the Emergencies Act and What Does it Do?”, (24 March 2020), CBC News, online: www.cbc.ca/news/politics/trudeau-emergencies-act-premier-1.5507205

³ Canada, Report of the Public Inquiry into the 2022 Public Order Emergency. vol 1: Overview, by (Ottawa: Public Order Emergency Commission, 2023). (Chair: Hon Paul S. Rouleau) [Rouleau Report] at 142.

⁴ Clete DiGiovanni et al “Factors influencing compliance with quarantine in Toronto during the 2003 SARS outbreak.” (2004) 2:4 *Biosecur & Bioterror* 265; Marloes Bults, et al “Perceptions and Behavioral Responses of the General Public During the 2009 Influenza A (H1N1) Pandemic: A Systematic Review. (2015) 9:2 *Disaster Med & Pub Health Prep* 207.

⁵ Frederick M. Burkle, et al “Definition and Functions of Health Unified Command and Emergency Operations Centers for Large-scale Bioevent Disasters Within the Existing ICS” (2007) 1:2 *Disaster Med & Pub Health Prep* 135.

⁶ Rouleau Report, *supra* note 3.

⁷ See Part I, sections 5 to 15 of the *Emergencies Act*.

and some of those under public order emergencies⁸ overlap significantly with the powers available to provincial governments under their provincial legislation. At the same time, however, the *Emergencies Act* also limits the federal government's actions in those two types of national declarations to avoid conflict with the provinces' ability to exercise their own powers.⁹

Understanding the development of the emergency management system in Canada is necessary to contextualize this tension. As contingency legislation, the *Emergencies Act* should not be considered in isolation from other provincial and federal legislation meant to establish and maintain government agencies' abilities to implement temporary special powers. The level of readiness of governments at all levels, as well as that of the private and not-for-profit sectors, to perform these functions is also crucial to identifying potential improvements to the legislation and the emergency management system.

III. *EMERGENCIES ACT* IS A PRODUCT OF ITS TIME

Only a brief history of Canada's emergency management system is needed to identify when the fractures started. This sets the scene for the passing of the *Emergencies Act* and its companion legislation, the *Emergency Preparedness Act*, later replaced by the *Emergency Management Act* in 2007.¹⁰ The more recent record of events influencing legislation and policy explains how Canada found itself not declaring a public welfare national emergency for the worst pandemic in a century but then declaring a national public order emergency for more ambiguous reasons surrounding the convoy events.

The first world war prompted the Government of Canada to pass the *War Measures Act, 1914*.¹¹ This legislation is brief and essentially granted the government the right to rule by order. At the time, women and many ethnic minorities were disenfranchised, the differences between subjectship and citizenship and between imperialism and nationalism were politically active issues and paternalistic policies supported the residential school system.¹²

⁸ Sections 8(1) and 19(1) *Emergencies Act*.

⁹ Sections 8(3) and 19(3) *Emergencies Act*.

¹⁰ *Emergencies Act*; *Emergency Preparedness Act*, RSC 1985, c 6 (4th Supp); *Emergency Management Act*, SC 2007, c 15.

¹¹ *War Measures Act 1914*, SC, 1914, c 2.

¹² Dennis Pilon "Explaining Voting System Reform in Canada, 1874 to 1960" (2004) 40:3

This context made the Orders-in-Council approach more acceptable to the public though the issue of conscription led to protests towards the end of the war.¹³

The period between the two world wars were tumultuous in Canada. Labour unrest, the Great Depression and other events influenced Canadian society. This was the situation in the summer of 1939 when the *Defence of Canada Regulations*¹⁴ were drafted as a consolidation of the *ad hoc* orders issued during the first world war.¹⁵ New warfare technology led to the creation of Civil Defence programs in Canada and other allied nations. The *War Measures Act* was again used to infringe on human rights, most atrociously in the mistreatment of people of selected European and Japanese ethnicity.¹⁶ The Government of Canada continued under a set of post-war legislation through to the end of the Korean 'international emergency.'¹⁷

Both 'War' and 'International Emergency' would become categories of national emergency in the *Emergencies Act*. This is straightforward as international affairs, defence, and other similar matters are clearly federal responsibilities. However, several important events occurred in the 1970s that impacted the drafting of the Public Order and Public Welfare emergency categories. The decade started with the third and final use of the *War Measures Act* to deal with the 'apprehended insurrection' of the Front de libération du Québec (FLQ) during the October Crisis of 1970. This use of the *War Measures Act* in this situation cast a long shadow in Canadian

J Can Studies 135; James Farney & Bohdan S. Kordan "The Predicament of Belonging: The Status of Enemy Aliens in Canada, 1914" (2005) 39:1 J Can studies 1.

¹³ Barry Wright, Eric Tucker & Susan Binnie, "War Measures and the Repression of Radicalism" in Barry Wright, Eric Tucker & Susan Binnie eds, *Canadian State Trials, Volume IV: Security, Dissent, and the Limits of Toleration in War and Peace, 1914-1939*, (Toronto: University of Toronto Press, 2015) 3.

¹⁴ *Defence of Canada Regulations*, 1939.

¹⁵ Patricia Peppin "Emergency Legislation and Rights in Canada: The *War Measures Act* and Civil Liberties" (1993) 18: Queen's LJ 129 at 175.

¹⁶ Rhonda L. Hinker & Jim Mochoruk eds., *Civilian Internment in Canada: Histories and Legacies* (University of Manitoba Press, 2020); Dominique Clément, "The October Crisis of 1970: Human Rights Abuses Under the *War Measures Act*" (2008) 42:2 J Can Studies 160.

¹⁷ John Lindsay "The Power to React: Review and Discussion of Canada's Emergency Measures Legislation" (2014) 18:2 Int'l J Human Rights 159.

politics. This was not, however, the only scenario that influenced the drafting of the *Emergencies Act*'s Public Order component.

Widespread labour protests and other economically driven measures established that the federal government needed powers to deal with public order emergencies that rose to the threshold of a national emergency. The Canadian Labour Congress's National Day of Protest on October 14, 1976 had a million Canadian on strike. This was a situation similar to the 1978-79 labour disputes in the United Kingdom and the 1981 Air Traffic Controllers' Strike in the United States. Furthermore, the 1987 strike of Canadian railway workers was raised in the House of Commons during the debate on the *Emergencies Act*. Nationwide disruptions were reasonably foreseeable as a potential scenario for a Public Order Emergency. This relationship is supported by the fact the Public Welfare component of the *Emergencies Act* was amended during its passage to specifically restrict that set of powers from being used to deal with labour disruptions.

The *Anti-inflation Act*¹⁸, passed in reaction to economic conditions, led to a ruling by the Supreme Court¹⁹ that included discussion of emergency circumstances when Parliament could intrude on matters of provincial nature. It was clear that the idea of the federal government involving itself in provincial matters was open to debate in the absence of appropriate legislation defining national emergencies.

Large civil disasters, such as the 1979 Mississauga train derailment, demonstrated the value of emergency powers to local and provincial governments. The federal government's involvement in these localized events is limited as noted in the 1972 report "The Enhancement of Crisis Handling Capability with the Canadian Federal Structure." This report stated:

Responsibility for managing the great majority of emergencies lies with municipal, provincial and territorial governments, all of which have enabling legislation for appropriate action. Federal participation in dealing with emergencies arise when the provinces request federal assistance, or when it involves matters within federal jurisdiction (for example, matters involving the Departments of Defence and External Affairs) or in both situations. Much of the national capacity existing today has been developed by and responds to provincial direction.²⁰

¹⁸ *Anti-Inflation Act*, SC 1974-75, c 75.

¹⁹ *Re: Anti-Inflation Act*, [1976] 2 SCR 373, 1976 CanLII 16.

²⁰ Canada, *The Enhancement of Crisis Handling Capability Within the Canadian Federal*

The midpoint of the last century, at the beginning of the Cold War, legislation was passed in each of the provinces allowing Lieutenant-Governors in Council to wield emergency powers in support of either a war emergency or civil disasters. At that time provincial legislation made the distinction clear so the federal responsibilities for war were set apart from the provincial role in what is today called emergency management.²¹

Despite the existing provincially legislated powers, and the concern over intruding on provincial matters, the *Emergencies Act* provides special powers to the federal government during such natural and technological disasters that duplicate rather than expand upon the provincial powers.²² In fact these powers had to be tethered by requirements in the Act ensuring federal agencies do not unduly interfere with provincial actions. This may explain why the Government of Canada has never declared a Public Welfare emergency. Such a declaration would add a level of interjurisdictional coordination, and the associated bureaucracy, without adding significant benefit.

The four types of emergencies were designed in reaction to the above-mentioned historic events. Two issues were central to the parliamentary debate when passing the *Emergencies Act*: the threshold for the declaration of a national emergency, and the use of Public Order powers to address threats to national security.²³ The Public Order Emergency Commission's findings demonstrate that the *Emergencies Act* was drafted in the absence of a clear national emergency management system and now appears disconnected from the current system.

Structure (Ottawa: 1972) (Chair: M.R. Dare).

²¹ See e.g. *The Civil Defence Act*, RSC 1953, c 247, preamble and s.2.

²² Canada, Parliament, House of Commons Debates, 33rd Parl, 2nd Sess, Vol 9 (2 Nov 1987) at 10646 (Mr. Brant Blackburn) "We have had disasters such as the Mississauga train derailment that required mass evacuation, but that was carried out without resorting to the *War Measures Act*. Why does the Government need such powers now?"

²³ *Ibid* at 10647: "Most intelligence gathering agencies and most counter-intelligence gathering agencies, whether it be the FBI in the United States, MI-5 in Britain, or CSIS in Canada, find it extremely difficult to delineate the difference between legitimate dissent in a democracy, which should be welcomed, and subversive activity which is clearly illegal."

IV. FRACTURING CANADA'S EMERGENCY MANAGEMENT SYSTEM

The *Emergencies Act* is only one component of Canada's emergency management system. Its inadequacies were created by, and exacerbated, fractures that have been undermining the stability of that system for decades. The federal government's emergency management function has been restructured or moved between Government's portfolios over a dozen times since the Second World War.

This trend continued in the early 2000s when the Office of Critical Infrastructure and Emergency Preparedness (previously known as Emergency Preparedness Canada) disappeared as a distinct government agency and was subsumed into Public Safety Canada by the *Department of Public Safety and Emergency Preparedness Act*.²⁴ The creation of Public Safety Canada merged emergency management with the former security oriented responsibilities of the Solicitor General²⁵ but did not keep emergency management as a separate entity the way homeland security legislation in the United States included their Federal Emergency Management Agency alongside its partner agencies.²⁶

The *Emergency Management Act* in 2007 again revised the federal government's approach to how the responsibilities were distributed within the government. It created a more balanced approach with responsibilities for emergency planning sitting with every government minister while the Minister responsible for the Act sets the standard, provides coordination across ministries and ensures an appropriate level of preparedness. According to this legislative framework, each government agency should be ready to meet the demands of all four types of emergencies.

The Commission's investigation focused on security and policing. This law enforcement perspective effectively distanced the issue from the larger

²⁴ *Department of Public Safety and Emergency Preparedness Act*, SC 2005, c 10.

²⁵ *Ibid*, at s.5 "The Minister shall coordinate the activities of the entities for which the Minister is responsible, including the Royal Canadian Mounted Police, the Canadian Security Intelligence Service, the Canada Border Services Agency, the Canadian Firearms Centre, the Correctional Service of Canada and the Parole Board of Canada, and establish strategic priorities for those entities relating to public safety and emergency preparedness." Also see s.7 on Transitional Provisions.

²⁶ *Homeland Security Act of 2002*, Pub L No 107-296, 116 Stat 2135 (2002).

emergency management system. Deputy Minister of Public Safety, Robert Stewart, testified to the Commission:

...in general, we did not treat the protests as an emergency management issue, and that the framework that we have designed and agreed with the provinces and territories to deploy does not typically apply to issues of public security ... in defence of law enforcement. It deals with natural disasters and the like.²⁷

This is a surprising distinction that does not track the laws and policies discussed above. For example, Section 6(2)(d)(i to iv) of the *Emergency Management Act* requires each Minister to include measures to support the Canadian Forces in the case of war, demonstrating how emergency management practices should be inclusive of all kinds of threats including domestic and international security issues. The Commission's findings raise the question of what categories of national emergencies the *Emergency Management Act* is meant to address, if not all of them.

Indeed, the Commission's investigation revealed a response that contradicts Canada's much-repeated emergency management policy to take an 'all-hazards' approach. The all-hazards principle of the *Emergency Management Framework for Canada* is about "addressing vulnerabilities exposed by both natural and human-induced hazards and disasters".²⁸ In addition to the range of natural and technological hazards, the all-hazard approach includes "Human-induced disasters that concern emergency management include intentional events that encompass part of the spectrum of human conflict" ... and ... "disruptions to a critical infrastructure sector".²⁹ This is the programmatic work, including assessing hazards and preparing needed responses,³⁰ that should logically support each type of national emergency with associated policies and procedures that fall into different government portfolios.

Decades of intervening legal and policy reform have further fractured Canada's emergency management system.³¹ For instance, the *Public Safety*

²⁷ Public Order Emergency Commission Hearing Transcript, vol 22: 14 Nov 2022, at 190-191. Cross examination of Robert Stewart, Deputy Minister of Public Safety at the time of the Convoy.

²⁸ Public Safety Canada, *An Emergency Management Framework for Canada*, 3rd ed (Ottawa, 2017) at 4, 11.

²⁹ *Ibid*, at 11.

³⁰ *Emergency Management Act*, RSA 2000, c E-6.8 s.6.

³¹ See Canada, Parliament, Senate, Standing Committee on National Security and Defence, *Report of the Standing Senate Committee on National Security and Defence: Emergency*

Act amended various federal acts after September 11, 2001 and subsequent terrorist attacks.³² These amendments inserted emergency directive powers for Ministers into number of federal acts³³ to allow for urgent action for the purpose of public safety. These emergency directives, added to the federal toolbox fifteen years after the *Emergencies Act* was passed, could resolve many potential situations without recourse to declaring a National Emergency. Any reconsideration of the *Emergencies Act* must account for how amendments align with the broader suite of emergency management policies.

V. CONCLUSION

In his book *Dan la fosse aux lions*³⁴ (In the Lion's Den) Jean Chrétien refers to Prime Minister Pierre Trudeau's use of the *War Measures Act* during the FLQ Crisis of October 1970 as using a moving van when all the government had to do was move a bicycle. Perhaps in hindsight Prime Minister Justin Trudeau's use of the *Emergencies Act* in 2022 will be seen as using a tow truck to move a bicycle. In both cases the analogy focuses on the appropriateness of the vehicle to handle the task rather than on the driver or the destination. In Canada the drivers of provincial and federal emergency legislation are elected officials. Their navigators, setting the destination and preparing the directions, are the civil servants of the emergency management system. Over the past century Canada has seen several different configurations of drivers and vehicles but has undervalued the importance of a navigator with an accurate map.

The revisions to the *Emergencies Act* recommended by the Public Order Emergency Commission are needed but will only be yet another set of *ad hoc* improvements if the underlying issues of overlapping emergency powers are not addressed. The wider problem of how Canada's system is structured needs a complete review that recognizes current federal and provincial

preparedness in Canada : how the fine arts of bafflegab and procrastination hobble the people who will be trying to save you when things get really bad, 39th Parl, 2nd Sess, [13th report] (Chair: Sen. Colin Kenny) (Ottawa: 2008); Canada, Office of the Auditor General, 2009 Report of the Auditor General of Canada to the House of Commons, Chapter 7, "Emergency Management - Public Safety Canada," (Ottawa, 2009).

³² *Public Safety Act*, 2002, SC 2004, c 15.

³³ See e.g. sections 4.76 and 6.41 of the *Aeronautics Act*, RSC 1985, c A-2.

³⁴ (Montréal: Éditions de l'Homme, 1985).

emergency powers are only one part of comprehensive emergency management. In fact, resorting to emergency powers is too often the focus of current planning. Canada's emergency management system must be redesigned so the goal is to *not* need special temporary powers.³⁵ This can be achieved through a coordinated, interjurisdictional approach that prioritizes risk reduction, identifies disaster related demands in terms of capabilities and capacities, integrates emergency management into normal government procedures, including other provincial and federal legislation, and acknowledges the importance of the emergency management profession.

³⁵ In keeping with Canada's commitment under the Sendai Framework: United Nations Office for Disaster Risk Reduction, "*The Sendai Framework for Disaster Risk Reduction 2015-2030*" (Sendai: UNISDR, 2015), online: www.undrr.org/quick/11409.