

Containing a Virus and Government Power: Restrictions on the Federal Response to COVID-19

Canada's provinces and territories have all declared states of emergency or public health emergency in response to the COVID-19 pandemic.^[1] Declaring a state of emergency allows the government to secure more powers to deal with the extraordinary circumstances presented. However, there have to be checks and balances on those powers, especially when there is a risk for gross violations of rights and freedoms. So, how are the government's actions in an emergency kept in check?

Canadian courts and government have devised ways to keep emergency powers in check while still providing enough leeway to the government to effectively respond. Although the provinces and territories have individually declared emergencies, at a minimum, it is still necessary for the federal government to coordinate with the provinces and respond on matters that fall under the federal [areas of authority](#).^[2] Specific to the COVID-19 pandemic response, the Constitution gives the federal government lawmaking authority for matters related to international borders and unemployment insurance.^[3] The Prime Minister and his Cabinet (comprising the "executive branch of government") have used these powers to take extraordinary measures since March 2020, such as implementing the Canadian Emergency Response Benefit and closing international borders to foreign non-essential travel.^[4]

So far, the federal and provincial governments have successfully run complementary efforts to control the COVID-19 pandemic. However, some emergencies require more than just coordinated responses from these two levels of government. In these situations, the federal government may need to infringe on provincial authority to implement a uniform response across an affected area. These powers are extraordinary, and therefore, have limits. The Supreme Court of Canada has set boundaries for emergency actions which restrict the federal government's ability to infringe on provincial jurisdiction. Parliament has built these boundaries into some existing emergency laws, including the *Quarantine Act* and the *Emergencies Act*. This article will focus on the restrictions 'built into' those *Acts* and describe how the federal government has chosen to use them during the current pandemic.

The Constitution gives the federal government authority to act in emergencies

Some emergencies require extraordinary government measures that go beyond what is constitutional in ordinary times. During emergencies like the COVID-19 pandemic, the Supreme Court has held that it is constitutional for the federal government to use special,

temporary powers to deal with an emergency, even if they infringe on provincial jurisdiction.[5] The basis for this exception exists in the Constitution itself.[6] Section 91 of the Constitution reads that “it shall be lawful for the Queen... to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.”[7] Emergency situations change the nature of the power being exercised by the government. A threat of “extraordinary peril” to Canada, as a whole, may require the federal government to pass legislation that goes beyond a single province’s exclusive lawmaking ability in an area assigned to it in the Constitution.[8] To determine if the federal government’s response is constitutional, a court will use the “[Peace, Order, and Good Government](#)” (POGG) test. To be constitutional, the emergency cannot exist solely within a provincial border, the legislation must be temporary, and the government must tailor their solution to the emergency.[9]

Current federal emergency acts, such as the *Quarantine Act* and the *Emergencies Act*, are designed to ensure the executive branch follows the conditions of the POGG test. Having instructions built-into existing legislation guides emergency government action and safeguards Canadians against *Charter* rights and other constitutional violations. When an emergency hits, the federal government can choose to use whichever legislation is most appropriate for their pandemic response.

Historically, emergency powers in Canada have sometimes been misused

Enacted during the First World War, the *War Measures Act, 1914* [10] gave the executive branch [11] of the federal government sweeping powers to address states of emergency. It also gave the executive branch the power to by-pass Parliament to pass laws and regulations.[12] This led to serious civil rights violations, such as prohibiting strikes, imposing widespread censorship of individuals and the press, and interning Canadian citizens of Japanese origin during the Second World War. [13] The controversial, third and final use of the *War Measures Act* occurred during peacetime in 1970, and is dubbed the “October Crisis”. [14] This use of the Act gave police sweeping powers to arrest and detain hundreds of individuals associated with a Québec nationalist group.[15] In the years following the October Crisis, Japanese Canadians who had been interned during the Second World War demanded redress for their wartime treatment.[16] This campaign led to the repeal of the *War Measures Act* and its replacement with the *Emergencies Act*. [17]

The *Emergencies Act* provides wide-ranging powers but includes safeguards preventing abuse

In response to concerns about the sweeping nature of powers conferred on the executive branch by the *War Measures Act*, the Act was repealed and replaced by the *Emergencies Act* in 1988. The *Emergencies Act* has measures that keep the executive accountable to Parliament and to the courts.[18] This Act includes safeguards devised by the Supreme Court, which include requirements for time limits, a national dimension, and compliance with the *Charter*. [19] There are two important differences between the *Emergencies Act* and the *War Measures Act*:

1. **Parliamentary oversight:** Parliament must review and approve a declaration of emergency by the Cabinet. The federal Cabinet may only declare an emergency under the *Emergencies Act* once it has determined that its powers under all federal laws are inadequate to the task of responding to the current emergency.[\[20\]](#)
2. **Subject to *Charter* review:** Any temporary laws made under the Act can be reviewed for compliance with the *Charter*. The government must justify any attempts to suspend *Charter*[\[21\]](#) Some rights cannot be limited, even in a national emergency.[\[22\]](#)

The Canadian government has historically committed human rights violations against its citizens in times of emergency - as it did with the internment of Japanese Canadians during WWII. The modern *Emergencies Act* includes safeguards to protect Canadians from unjustifiable infringement of their *Charter* rights. Under this Act, the federal government cannot detain, imprison, or intern Canadian citizens or permanent residents based on their race, national or ethnic origin, color, religion, sex, age, or mental or physical ability.[\[23\]](#)

The *Emergencies Act* includes other safeguards and limitations. Prior to invoking the *Act*, the Prime Minister must consult the provinces.[\[24\]](#) Once an emergency is declared, the executive branch has seven days to provide reasons to both the House and the Senate, who may vote to revoke the proclamation of emergency.[\[25\]](#) In addition, the federal government's actions cannot impair the ability of the provinces to act under their own emergency acts.[\[26\]](#) Finally, a special Parliamentary Review Committee will review the executive branch's actions,[\[27\]](#) allowing for oversight that was missing from the *War Measures Act*. The *Emergencies Act* allows the federal government to take extraordinary measures, including:

- Regulating and prohibiting travel within any area within the country;[\[28\]](#)
- Evacuating people and removing personal property;[\[29\]](#)
- Directing any person to render essential services they are qualified to provide;[\[30\]](#)
- Regulating the distribution of essential goods, services, and resources;[\[31\]](#)
- Making emergency payments and compensating those who experience loss resulting from actions taken under the Act;[\[32\]](#)
- Establishing emergency shelters and hospitals,[\[33\]](#) and
- Imposing fines between \$500 and \$5,000 or jail time between six months and five years, for contravening any order or rule set under the Act.[\[34\]](#)

Section 3 of the *Emergencies Act* states that it can not be used unless the emergency "cannot be effectively dealt with under any other law of Canada."[\[35\]](#) In other words, use of

the *Emergencies Act* should be a measure of last resort.

The *Quarantine Act* has fewer safeguards than the *Emergencies Act* but provides less power

The *Quarantine Act* was enacted in 2005 following the SARS outbreak of 2003.^[36] The *Quarantine Act* has fewer safeguards built into it than the *Emergencies Act*, and it is thus easier for Cabinet to use – there is no need, for example, for a Parliamentary Review Committee. However, unlike the *Emergencies Act*, the *Quarantine Act* also restricts Cabinet's freedom to make laws to issues that relate to the introduction and spread of communicable diseases.^[37]

Specifically, the *Quarantine Act* gives the federal health minister the power to screen travelers entering and exiting Canada who may have a communicable disease, set-up designated quarantine zones, and fine and jail travelers who refuse to comply with the instructions of screening or quarantine officers.^[38] The federal health minister has the power to prohibit any person who has been in a foreign country, or specified part of a foreign country, from entering Canada; or, the minister may subject their entry into Canada to conditions.^[39] The federal Cabinet may make an order prohibiting entry if they believe that:^[40]

1. there is an outbreak of a communicable disease in the foreign country,
2. the introduction or spread of the disease would pose an imminent and severe risk to public health in Canada,
3. the entry of the class of persons into Canada may introduce or contribute to the spread of the communicable disease in Canada, and
4. no reasonable alternatives to prevent the introduction or spread of the disease are available.

The Cabinet may specify the time period in which an order prohibiting entry remains in effect, and Cabinet may renew the order if the same conditions continue to apply.^[41] The *Quarantine Act* lacks many of the oversight requirements found in the *Emergencies Act*, but the federal government's lawmaking power is also much more constrained.

The government has used the *Quarantine Act* to manage COVID-19

The Canadian government has used the *Quarantine Act* to respond to the COVID-19 emergency. As stated above, the *Emergencies Act* is a measure of last resort when there is no other law available to respond to a national emergency. At this time, the provincial governments are containing the virus using their own emergency measures. So, although the COVID-19 pandemic is a national emergency, there is no need for the federal government to expand its authority beyond the powers it is provided in the *Quarantine Act*.

The *Quarantine Act* is the most appropriate legislation for the federal government to use in a health emergency as its provisions are tailored to preventing the spread of infection. The

federal government has issued several orders under the *Quarantine Act*. These orders:

- Prohibit most “foreign nationals” from entering Canada;^[42]
- Require all persons entering Canada to isolate themselves for 14 days;^[43]
- Require all persons entering Canada to provide records or information required by a screening or quarantine officer;^[44] and
- Require all persons entering Canada to wear a non-medical mask or face covering while in transit to isolation.^[45]

Canadian police are enforcing these orders. For example, in June 2020, two American visitors were fined \$1,000 each for not following the mandatory isolation order made under the *Quarantine Act*.^[46]

For now, the federal government has relied on the *Quarantine Act* and has not used the *Emergencies Act* to respond to the COVID-19 pandemic. However, the federal government has not exhausted its emergency options and could impose more significant restrictions under the *Emergencies Act* if it considers that to be necessary.

Conclusion

The *Emergencies Act*, which came into force after the *Charter of Rights and Freedoms* was entrenched in our Constitution, includes safeguards that protect Canadians from unjustifiable infringements of their *Charter* rights during an emergency. It also includes a number of oversight measures that safeguard rights, but that would make it difficult for the executive branch to move quickly in the face of an emergency. Therefore, it is not surprising that, in the face of the COVID-19 crisis, a health emergency, the executive is using the *Quarantine Act* to effect orders that restrict non-essential foreign travel and impose mandatory isolation on travellers.

^[1] See e.g. *Declaration of a State of Emergency Throughout the Province of Saskatchewan to Address the COVID-19 Public Health Emergency (President of the Executive Council)*, OC 102/2020, online: <<https://publications.saskatchewan.ca/#/products/104478>>. See also OIC 148/2020 (2020) M Gaz 149 at no 26, online: <https://gazette.gov.mb.ca/index.html?d=issue&pub_id=1&issue_id=1560&heading_id=540#notice3044>. See also OIC 080/2020, (2020), online: <https://www.qp.alberta.ca/documents/Orders/Orders_in_Council/2020/2020_080.pdf>.

^[2] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

^[3] *Ibid.*

^[4] See e.g. Government of Canada, “Government introduces Canada Emergency Response Benefit to help workers and businesses” (25 March 2020), online:

<<https://www.canada.ca/en/department-finance/news/2020/03/introduces-canada-emergency-response-benefit-to-help-workers-and-businesses.html>>.

[5] *Re: Anti-Inflation Act*, [1976] 2 SCR 373, 1976 CanLII 16 (SCC).

[6] *Toronto Electric Commissioners v Snider*, [1925] 2 DLR, 1925 CanLII 331 (UK JCPC) at 15.

[7] *Constitution*, *supra* note 2, s 91.

[8] *Snider*, *supra* note 6 at 15.

[9] *Ibid* at 419-427.

[10] Government of Canada, “Events in Asian Canadian History”, online: <https://www.canada.ca/en/canadian-heritage/campaigns/asian-heritage-month/important-events.html>

[11] The executive branch of the Canadian government includes the Governor General, Prime Minister, the Cabinet, and the federal departments they manage. The executive branch implements the laws created by Parliament.

[12] Marjun Parcasio, “The Evolution of the War Measures Act”, *LawNow* (3 January 2019), online: <https://www.lawnow.org/the-evolution-of-the-war-measures-act/> [Parcasio].

[13] *Co-operative Committee on Japanese Canadians v Attorney-General for Canada*, [1947] AC 87 at 102.

[14] *Ibid*.

[15] Parcasio, *supra* note 12.

[16] Government of Canada, “Japanese Canadians: Redress Campaign” (25 March 2019), online:

<<https://www.bac-lac.gc.ca/eng/discover/immigration/history-ethnic-cultural/Pages/Japanese-redress-campaign.aspx>>.

[17] *Ibid*.

[18] *Emergencies Act*, RSC 1985, c 22 (4th Supp), Preamble, ss 3-4, 60-63.

[19] *Ibid*, s 3.

[20] *Ibid*, s 60(1).

[21] *Ibid*, s 3.

[22] *Ibid*, Preamble.

[23] *Ibid*, s 4(b).

[24] *Ibid*, s 14.

[25] *Ibid*, s 60.

[26] *Ibid*, s 8(3)(a).

[27] *Ibid*, s 62(1).

[28] *Ibid*, s 8(1)(a).

[29] *Ibid*, s 8(1)(b).

[30] *Ibid*, s 8(1)(d).

[31] *Ibid*, s 8(1)(e).

[32] *Ibid*, s 8(1)(f).

[33] *Ibid*, s 8(1)(g).

[34] *Ibid*, s 8(1)(j).

[35] *Ibid*, s 3.

[36] Michelle McQuigge, "What you need to know about the Quarantine Act as isolation becomes mandatory for returning travellers", *National Post* (25 March, 2020), online: <<https://nationalpost.com/pmnn/news-pmn/canada-news-pmn/what-you-need-to-know-about-the-quarantine-act-as-isolation-becomes-mandatory-for-returning-travellers>>.

[37] *Quarantine Act*, SC 2005, c 20.

[38] *Ibid*, ss 5-27.

[39] *Ibid*, s 58(1).

[40]

Ibid.

[41] *Ibid*, s 58(2).

[42] OIC 2020-0469 (19 June 2020), online: <<https://orders-in-council.canada.ca/attachment.php?attach=39438&lang=en>>; OIC 2020-0523 (29 June 2020), online: <<https://orders-in-council.canada.ca/attachment.php?attach=39483&lang=en>>.

[43] OIC 2020-0175 (24 March 2020), online: <https://orders-in-council.canada.ca/attachment.php?attach=38989&lang=en>.

[44] OIC 2020-0260 (14 April 2020), s 3(1)(a), online: <<https://orders-in>>.

council.canada.ca/attachment.php?attach=39166&lang=en>.

[45] *Ibid.*

[46] The Canadian Press, “Two Americans face fine of \$1,000 for violating Canada’s Quarantine Act”, *The Globe and Mail* (5 July 2020), online: <<https://www.theglobeandmail.com/canada/article-two-people-fined-1000-for-violating-quarantine-act/>>.