Q&A with Professor Nomi Claire Lazar: Alberta's Emergency Management Act

In this Q&A session, CCS Summer Student Juliana Quan talked to Professor Nomi Claire Lazar (University of Ottawa, Graduate School of Public and International Affairs) about Alberta's *Emergency Management Act*, which was recently used to help the government deal with rampant wildfires across the province. Professor Lazar makes the case that this *Act* should be revised to better balance the values of flexibility and governmental constraint during public emergencies.

Q: What specific elements of Alberta's *Emergency Management Act* (*EMA*) concern you the most in terms of their potential for abuse, and why?

A: Emergency powers are a dangerous but necessary tool to protect people, property, and modes of life when jurisdictions face urgent threats. Necessary, because addressing those threats may require powers and rights limits we wouldn't want available to government day to day. Dangerous, because we can't know in advance what powers will be needed, or which novel situation may constitute an emergency.

Over the years, trial and error — a lot of error — in diverse jurisdictions has yielded institutional innovations that safeguard citizens from emergency powers' abuse, while minimally limiting the necessary flexibility to safeguard citizens from the emergency itself. And here's where the issue arises: Alberta's emergency legislation, like that of most Canadian jurisdictions, has not kept up. The *EMA* contains few safeguards:

- Section 18(4)'s sunset clause enables legislative oversight of the emergency declaration after 28 days, 90 in a pandemic. But that's a long runway for executive abuse;
- Section 18(3) requires publicity, which is important, because secret abuses are hard to contest;
- And section 18(5.1) refers to Alberta human rights law, which is promising, but the relevant provincial rights acts have limited pertinent scope.

These are very minor constraints on what is effectively vast power. How vast? Well, section 18(1) grants government power to declare an emergency whenever they hold the subjective

opinion — no reasons or justification required — that a situation even might be emergent.

Once an emergency is declared, section 19(1) allows government to carry out any actions or take any measures which in their opinion — again no reasons or justification required — are necessary. Such measures can include conscription of labour, seizure or destruction of property, restrictions on movement, forced evacuation, etc. These are normal types of emergency powers, but here they are unlimited by any objective standard with no requirement to give account. Penalties for refusing to comply include jail time. Not only is there no prescribed recourse, but the *Act* actually indemnifies, in Part 3, anyone taking or enforcing emergency measures so long as they acted in good faith.

Why should Alberta's EMA still grant *War Measures Act* type powers when there are sensible institutional alternatives at hand?

Q: In public commentary, you have mentioned historical examples where emergency powers have been used to justify grave abuses. Can you share the lessons learned from these instances of abuse and how this can guide reform to Alberta's *EMA*?

A: There are distinct types of emergency powers abuse, historically, which share the same remedies: reason giving, objective standards, oversight, and accountability.

Here are some examples of abuse. Temporary emergency power has been used to permanently consolidate power, by wiggling around constitutional safeguards while the emergency is in force. Leaders like Julius Caesar used this technique. More recently, Hungary's Victor Orban has done the same.

In addition, emergency powers can, even in a real emergency, be used to excess or for additional nefarious purposes. We know about the internment of Japanese Canadians under the old *War Measures Act*. Then there is the case of Indira Gandhi's 1975-77 India emergency during which her son Sanjay seized the moment of concentrated power and little oversight to institute a program of mass forced sterilization with millions of victims.

Emergency powers have also been used to circumvent legislative gridlock in crisis cascades. Interestingly, scholars and activists have recently called for emergency powers to be used this way to address the climate situation. But history suggests caution. In the Weimar period, Germany's President repeatedly used Article 48 emergency powers this way to address the economic and political chaos of the 1920's and 30's. This ultimately undermined respect for the democratic process, and paved the way to authoritarian rule: in 1933, when parliament was dissolved and power concentrated in Hitler's hands, overuse of Article 48 as a workaround meant such actions had come to seem normal.

Most of these abuses took place through emergency institutions that, like the *EMA*, lacked

institutional safeguards. Safeguards can include objective, reviewable standards, such as a requirement that an emergency declaration be "reasonable." Correlatively, government can be required to publicly give reasons why the declaration and any measures taken are necessary, with options in place in the event secrecy is required. In the Canadian context, reason giving around the necessity of specific measures may fruitfully employ an *Oakes*-informed framework. And with these elements of objectivity and account-giving in place, emergency law can facilitate or even require a combination of judicial and legislative oversight and accountability, as well as public accountability in the court of opinion.

Some might argue, and with good reason, that in some of these cases emergency abuse was just the death rattle of political systems already corrupted. And that is surely true. But sound emergency institutions can help preserve democratic political systems, and in the event that our democracy some day faces such threats, why leave the tools of their demise on the table?

Some might also argue that there is no need for such safeguards, because there is no historical track record of provincial premiers abuse of emergency power. Even were this true, though, why wait until it's too late, should some future leader take up the invitation? Put the safeguards in place now.

Q: You argue for the *EMA* to be subject to the objective standard of reasonableness. How would this change the current operation of the *Act* and the consequences it might have?

A: Oversight and accountability are difficult without an element of objectivity. If the standard for declaring an emergency or issuing orders and measures is the Governor in Council's subjective opinion, as it is in the *EMA*, what can be done about abuses of power? Including a reference to reasonable grounds to believe in necessity is a simple way to make emergency decisions — both declarations and measures taken — reviewable in court. This is not just for the courts, it is also much easier for the public to hold leaders to political account if government is required to present clear justifications, the reasonableness of which citizens can debate for themselves. Moreover, because leaders know their decisions will be reviewable, evidence suggests they self-police in advance, and take more care that their reasons for acting are good ones. In this sense, the threat of accountability is nearly as important as the accountability itself.

Some might argue that reviewability would make leaders hesitate. After all, it may be extremely difficult for people to inhabit, after the fact, the leader's epistemic position at the time the decision is taken. Usually, we learn a lot in the meantime that, if known at the outset of an emergency, might have changed a leader's calculus. It's important for oversight bodies to avoid letting that *post facto* knowledge impact their judgment of whether the action was reasonable at the time. But in a real crisis, a leader will act in part because

citizens will demand it. And given what's at stake, the risk that we may later unfairly judge a leader seems less worrisome than the risk of allowing the Lt-Governor in Council to take vast unaccountable power whenever, in their opinion, they think they should.

Q: You have suggested that the *Act* should require near-immediate multi-party oversight of emergency measures. What are some possible ways to implement this?

A: In normal times, all parties in the legislature debate first. Then they decide, and the executive executes. But emergencies mean decisions are made rapidly, by the executive, not the legislature. For that reason, historically, emergency powers often eschewed debate. But the legislature can play an active role in emergency governance without impacting urgency. For example, emergency powers can invert decision and debate. The executive can act rapidly, but legislation can require their decisions to come up almost as rapidly for legislative debate, with the possibility that those decisions may be revoked. Knowing this oversight is coming means that leaders may make decisions more responsibly in the first place.

The federal *Emergencies Act* provides a good model here. Part IV of the *Emergencies Act* describes all the ways the legislative branch (Parliament) can revoke a declaration or measure. Emergency declarations and measures must be tabled with Parliament on the first sitting day, and debated the next day, and Parliament must sit within seven days if the House is adjourned or prorogued. The legislative branch can continually scrutinize and even revoke emergency measures and may at any time force a vote on a continued state of emergency. Furthermore, opposition parties are given an outsized role in this scrutiny to reduce the chances that the legislative checks function as a rubber stamp.

By inverting decision and debate — first decision, followed by near immediately debate — emergency powers can remain flexible and fast, while also ensuring continuous oversight.

Some might worry this will tie emergency action up or make it partisan when, for example, emergency measures are necessary for straightforward matters, like forest fires. But in such a case, a vote could be called quickly with the consent of the opposition, whereas in more complex situations, the oversight is there if it's needed.

The problem is that right now, Alberta's *EMA* provides no robust role for the legislative branch, no real check on the executive, no substantive form of oversight at all.

Q: Given the potential severity of future crises due to climate change and other factors, how do you see the role of the *EMA* evolving, and what

additional reforms might be necessary to keep pace with these changes?

A: This is a tough question, because I don't think we really know — yet — what we're up against, how quickly things will change, and in which ways. Will the past be a guide to the future? Probably not in every respect. One thing we know for sure is that the provinces will be the locus of most climate disaster reaction. This is because most of the immediate impact of climate change — more frequent, more intense fires, floods, storms, tornadoes, heat waves, outages etc. — will fall under provincial jurisdiction. Alberta's *EMA*, like every province and territory's emergency laws, will almost certainly see a lot more use.

The other challenges that climate change might bring are more probabilistic at this point. But they may include:

- Increasingly complex emergencies: We might expect the boundaries between different kinds of emergencies to be less clear. For example, a storm emergency may cascade into an outage emergency, which may — if severe and prolonged — cause public health, economic, and social consequences, which could spark a political reaction to any emergency action the province might take.
- Temporal compression of emergencies: If there are that many more fires, floods, storms, tornadoes, and outages, there will be less time for accountability in between.
- Increasing calls for authoritarian control from both the right and the left: Where events become chaotic, this is not unusual. We already see such calls spanning the political spectrum from eco-fascists, through populists, through those advocating for something like climate policy. Such calls can create a spiral that undermines trust in the rule of law and democracy.

To address these and other possibilities, we may need to get creative — and fast! Now is the time to turn our minds to how to safeguard the rule of law and democracy in challenging emergency circumstances like these. Here I mean every jurisdiction, provinces and territories and the federal government too. But in the meantime there is no excuse for leaving the dangerously sloppy *Emergency Management Act* unamended. It would require just a few tweaks to incorporate the best remedies we currently have — a standard of reasonableness, a requirement for reason giving, then multiple lines of accountability and oversight — so that the courts, the legislature (ensuring a real voice for the opposition), and the public can assess the government's reasons.