The power to react: review and discussion of Canada's emergency measures legislation

John Lindsay

Department of Applied Disaster and Emergency Studies, Brandon University, Brandon, Canada

Published online: 20 Mar 2014.

To cite this article: John Lindsay (2014) The power to react: review and discussion of Canada's emergency measures legislation, The International Journal of Human Rights, 18:2, 159-177, DOI: 10.1080/13642987.2014.889392

To link to this article: http://dx.doi.org/10.1080/13642987.2014.889392
The power to react: review and discussion of Canada’s emergency measures legislation

John Lindsay

Department of Applied Disaster and Emergency Studies, Brandon University, Brandon, Canada

(Received 20 November 2013; accepted 12 December 2013)

Almost a century ago Canada implemented the War Measures Act to give the federal government extraordinary powers to deal with the domestic implications of the First World War. The government further expanded and institutionalised these powers through the Second World War, the Korean crisis and the cold war period. Now these war emergency powers are entrenched in both federal and provincial emergency measures legislation and exercised for peacetime disasters. This paper reviews the historical progression of these powers to better understand the original context for their development and to connect past abuses of civil rights under the War Measures Act to the protections and limits incorporated in the current legislation. Then, based on this understanding of where the powers originated, the paper takes a comprehensive look at the powers available across the Canadian jurisdictions. It identifies common groups of powers and discusses regional variations. It concludes with a short discussion on the imbalance between extraordinary powers for response and the lack of a corresponding emphasis on reducing the risks that may generate the need for them.

Keywords: emergency; powers; legislation; Canada; history

Introduction

Extreme, damaging events, of both natural and technological origins, occur in Canada every year. However, not all are declared to be disaster events under the relevant provincial and federal legislation. In this sense disasters in Canada are rare events. This is an important factor when considering how Canada’s current emergency management legislation is written and why its main focus remains on preparing for response while undervaluing mitigation and recovery.

There has never been a declared National Emergency under the Emergencies Act 1988. There are, by contrast, several State of Emergency declarations every year across the country under the authority of the various provincial acts. While the Canadian Disaster Database, maintained by Public Safety Canada, does not differentiate events that generated a legal declaration from other events, it is safe to assume that many of the 224 natural and technological events registered between 2000 and 2010 would have required, or at least qualified for, a local State of Emergency.

Canada is a geographically large nation with a relatively small population concentrated in urban centres and along the southern portion of the country. This limits the potential for...
large-scale emergencies, as much of the Canadian landscape is too sparsely populated and underdeveloped to generate significant losses of life or property in the event of a natural or technological hazard impact. Of the 224 events between 2000 and 2010 only eight caused 10 or more fatalities and only one event, the 14 July 2000 tornado in Pine Lake Alberta, generated those fatalities in an acute hazard impact, the others being either disease outbreaks or collections of deaths during a particular season, such as the 2003 avalanche season in Western Canada.

One implication of this lack of experience is that disasters do not create a significant political issue in Canada. The way disasters are managed, both in practice and in the legislation that empowers and restricts that practice, is not an immediate concern of the resident or the elected official – or perhaps more importantly of the voter or the candidate. Canada’s federal emergency management legislation is fairly recent, being first passed in 1988. Many provinces can trace their legislation back to the 1950s, but complete revisions are rare. Managing hazards, preparing and responding to impacts and providing for the long-term recovery of communities could not be judged to be a priority of Canadian governments based on the history of the legislation.

Furthermore, the legislative approach to emergency management, especially the powers available under a state of emergency, are rooted in Canada’s wartime experiences. The legislation, and the government agencies that administer that legislation, come to the issue largely from a security perspective. Recovery and mitigation are often overlooked as a result of this reactive, response-oriented and state-centric approach. While some of the legislation has civil liberty protection incorporated, that perspective is not universally considered, and it certainly does not go as far as Geis’s desire for a human right to safety.

This paper will first discuss Canada’s Constitution and five significant historical influences to establish the foundation for an examination of the federal and provincial legislation of relevance to emergencies. Then a review of the legislation will consider the comprehensiveness of the powers and the protection provided for civil rights. This will inform a series of conclusions about Canada’s emergency management law and pose challenges for its future development.

**Historical roots of emergency powers**

Canada’s emergency management law has been shaped by two main forces: the division of powers laid out in the British North America Act of 1867, which was later repatriated to be Canada’s Constitution of 1982, and the experience of emergency powers during past crises. The latter can be further divided into five influential experiences: the domestic events of the First and Second World Wars, the tensions of the cold war period, the unique circumstances of the Front de libération du Québec (FLQ) crisis and the more recent fallout from Y2 K (i.e. the turn of the millennium), the 11 September 2001 terrorist attacks and severe acute respiratory syndrome (SARS). These five have all contributed to the Canada’s legislative framework through the common filter of the Constitution.

**Canada’s Constitution**

There can be no meaningful discussion of Canada’s emergency management legislation without a basic appreciation of the impact of Canada’s Constitution. ‘The validity of federal emergency legislation has always turned on the question whether the legislation was a valid exercise of the federal emergency power or whether it unnecessarily invaded a field reserved to the provinces under s.92 of the [British North America] Act.’
this question of legal validity has been played out in the Supreme Court, usually in the wider context of the often tumultuous federal–provincial relationship, in practice emergency management is handled by the Provinces through the application of their own legislation. However, Canada does have legislation at both levels; these laws are designed, with varying effectiveness, to interact.

Canada’s first Constitution, drafted as the British North America Act 1867 by the UK Parliament, reflects the issues of the time, including the Civil War in the US. One outcome of this setting was that ‘the provinces were to be allotted exclusive legislative powers over enumerated classes of matters and to the federation should belong the vast residue of undefined legislative power’. These powers dealt with matters that were common at the time and, as emergency management was not then the professional practice it is today, it was not listed as a distinct legislative subject assigned to either the federation or the provinces. However, there is a general residual power, first created in section 91 of Canada’s 1867 Constitution, ‘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’ (known as the POGG powers) that has been the federal government’s ‘foot in the door’ to emergency management in past crises and continues to underlie its involvement today.

**First World War**

The First World War is often seen as Canada’s first real test as a nation. Battles such as Passchendaele and Vimy Ridge saw Canadian soldiers distinguish themselves and helped carve out the country’s international reputation. The impact on the domestic front was no less significant as a country comprised of immigrants from around the world came to terms with what it meant to be Canadian rather than a foreigner.

In August 1914 the Government of Canada passed the War Measures Act to allow it to exert control by decree. It granted the Governor in Council the following carte blanche powers in section 6 to administer the country during the crisis:

The Governor in Council shall have power to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:

(a) censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
(b) arrest, detention, exclusion and deportation;
(c) control of the harbours, ports and territorial waters of Canada and the movements of vessels;
(d) transportation by land, air, or water and the control of the transport of persons and things;
(e) trading, exportation, importation, production and manufacture;
(f) appropriation, control, forfeiture and disposition of property and of the use thereof.

Issuing orders and regulations became the norm for the Canadian government during this wartime period. Starting almost immediately, Orders in Council were made regarding
issues such as the Registration of Alien Enemies,\textsuperscript{9} or Trading with the Enemy.\textsuperscript{10} The intention was to limit opportunities for espionage or for otherwise aiding the enemies of Canada. The Orders in Council had the effect of turning some residents of Canada into prisoners of war on the basis of their original nationality. The language of the day seems especially painful when read now:

Where any alien of enemy nationality interned under the provisions of this order has wife or children living with and dependent on him, such wife and children shall be permitted to accompany him.\textsuperscript{11}

As a result of this Order in Council, over 120,000 people living in Canada, mostly immigrants who had come to settle the prairies, were deemed Alien Enemies and 7762 of them served time in internment camps, often providing labour for government construction projects.\textsuperscript{12} The orders under the War Measures Act ended in 1920.

During the 1930s there were several cases that went to the Judicial Committee of the Privy Council regarding the Federal government’s use of the POGG residual power to interfere in other matters, mostly relating to employment, that were assigned to the Provinces. In their rulings their lordships defined the need for these POGG powers to be used for emergency situations when temporary measures are called for.\textsuperscript{13} The use of these extraordinary powers was to be tested again as the world moved once more to war.

Second World War

Canada’s actions in the Second World War were no less disturbing. The War Measures Act was renewed on 3 September 1939 and a newly drafted set of Regulations for the Defence of Canada was adopted by Order in Council. These 64 Regulations had been prepared in advance and covered a wide range of issues.\textsuperscript{14} Clearly the lessons of the First World War and the advice of other nations (especially the UK, which followed the same course) had been heeded. The Regulations were designed to ensure the safety of the country during the war and took full advantage of the broad scope of power to rule by decree granted by the War Measures Act.

Many of the Regulations were reactions to a change in the nature of warfare. The Spanish Civil War had highlighted the importance of aircraft as an offensive weapon, and the prospect of aerial bombardment of not just the battlefield but of civilian targets far behind the frontlines led to the need for civil defence. The Regulations included air raid precautions and tasked provinces with administering aspects of the resulting programmes. This led to some court challenges and a series of policy adjustments to account for the costs and clarify the authority under which the Regulations would be enforced.\textsuperscript{15} Thus, from the very beginning, the federal–provincial relationship with respect to civil defence – what is now emergency management – has been fraught with jurisdictional uncertainties.

What was not uncertain during the war was the intention of the federal government to control dissent and protect the nation from extreme ideologies from the left and the right. Fascist and Communist organisations and sympathisers were repressed as the Regulations were implemented to ensure a home front devoid of subversion or even criticism of the government. The War Measures Act provided the power to do so, and the Regulations put those powers to work. Among the worst abuses of these powers was the internment of Japanese Canadians in British Columbia. After the attack on Pearl Harbor the Canadian government, under the power of the War Measure Act, ordered the seizure of some 1800 fishing boats
from Japanese Canadians and forced the evacuation of about 22,000 Japanese to labour
camps. The government then seized and sold the property of those unfortunates to pay
for their internment.

The Regulations for the Defence of Canada were also used to target individuals and
organisations that were critical of the government. The irony, which has been recognised
as recurring during the current ‘War on Terror’, is that it appears necessary to restrict free-
doms in order to protect those very freedoms. The War Measures Act went further, however,
to the point that freedoms were sacrificed at a cost that may have exceeded the benefits.
Lester Phillips has reviewed the Regulations and concluded: ‘In short, one may raise
some doubt as to whether the Liberal war-time government has lived up to a democratic
standard of keeping war-time restrictions to a minimum consonant with military necessity
and proportionate to the existing danger to the nation’.16

Cold war civil defence and provincial legislation

The end of the Second World War may have seen the end of wartime measures in Canada
but not the end of wartime thinking. Many of the activities initiated under the Regulations
for the Defence of Canada were transformed from temporary reactions to institutionalised
practices. The National Emergency Transitional Powers Act, 1945 was passed for one year
to bridge the gap between the end of the War Measures Act and the completion of demo-
bilisation. It also extended the powers relating to the deportation of Canadians of Japanese
ancestry. These actions were challenged by the Co-operative Committee on Japanese Cana-
dians all the way to the Judicial Committee of the Privy Council, which upheld the Orders in
Council. The Act was later amended and extended by the Continuation of Transitional
Powers Act 1947 so that these powers remained in effect until 1951.

The outbreak of hostilities on the Korean peninsula, and particularly the involvement of
China in that conflict, led the Canadian government under Prime Minister St-Laurent to
bring forward the Emergency Powers Act 1951. When introducing the bill, the prime min-
ister explained that using the existing War Measures Act to deal with the necessary defence
production and cost control issues could further the idea that war was inevitable and place
unnecessary limits on parliamentary involvement. Instead the new legislation was intended
to provide ‘adequate powers to deal with the type of situation that may be expected to arise,
the government ha[ving] endeavoured to avoid taking powers of the grave character which
no democratic government wishes to have, as a government, unless those powers are really
necessary for the safety of the state.’17 The Emergency Powers Act was originally limited to
one year but was continued with Parliament’s consent until May 1954.

While the Korean ‘international emergency’ had generated an alternative approach, the
War Measures Act remained part of Canada’s Statutes throughout the cold war decades. It
was amended in 1960 so that ‘Any act or thing done or authorized or any order or regulation
made under the authority of the Act, shall be deemed not to be in abrogation, abridgement,
or infringement of any right or freedom recognized by the Canadian Bill of Rights’. It
remained available to the government in the event a ‘real or apprehended war, invasion
or insurrection’ should endanger the nation.

FLQ October crisis – need for domestic powers and the Dare report

As the Cold War continued to create international tension, with acute periods such as the Cuban
Missile Crisis in 1962, domestic terrorism also occurred in countries around the world. Canada
had its own experience in the 1960s with the rise of the FLQ in Quebec. Bombings, murder and
other civil unrest culminated in October 1970 with the kidnapping of James Cross, the British Trade Commissioner, and of Quebec Labour Minister Pierre Laporte. These crimes led the federal government to enact the War Measures Act in order to suspend the Canadian Bill of Rights, provide military support and give police special powers to search and arrest without warrant or immediate charges. Prime Minister Trudeau, addressing the country on 16 October 1970, explained the reasons for taking these actions and said:

> These are strong powers and I find them as distasteful as I am sure do you. They are necessary, however, to permit the police to deal with persons who advocate or promote the violent overthrow of our democratic system. In short, I assure you that the Government recognizes its grave responsibilities in interfering in certain cases with civil liberties, and that it remains answerable to the people of Canada for its actions. The Government will revoke this proclamation as soon as possible.\textsuperscript{18}

Prime Minister Trudeau went on to explain that the government was going to implement these powers cautiously and as a last resort. He also recognised the need for legislation that would be more suitable for domestic situations.

Following the October crisis a study group led by General Dare prepared a report calling for a new approach to domestic emergency management and for appropriate legislation.\textsuperscript{19} Such legislation, in the form of the Emergencies Act 1988,\textsuperscript{20} took another 18 years of discussion and debate before passing through Parliament.

\textbf{Y2 K, 9/11: OCIPEP to PSC}

The quarter century since the adoption of the Emergencies Act has been no less tumultuous. While the Emergencies Act 1988 has remained essentially untouched, its accompanying Emergency Preparedness Act 1985,\textsuperscript{21} which set out the Federal government’s emergency management roles and responsibilities, was amended in 1995,\textsuperscript{22} and finally repealed with the passing of the Emergency Management Act in 2007.\textsuperscript{23} The changes in how the federal government plans for emergencies have been driven by the kinds of threats the nation has faced.

The first major change was a renewed concern over critical infrastructure. While the concept of critical infrastructure, in the form of protected and controlled places and areas, goes back at least to the Defence of Canada Regulations 1939, it was the more recent concern for cyber-security that led to changes. This risk was highlighted by the Y2 K problem and various denial of service and other hacker attacks on government computer systems. As a result of this the federal government created the Office of Critical Infrastructure and Emergency Preparedness (OCIPEP) in 2000.

A little over a year later the tragic events of 9/11 set off a chain reaction of legislative changes. The Public Safety Act, 2004 amended various other acts to give government ministers more powers to create interim orders for their areas of responsibility.\textsuperscript{24} These interim powers are crucial to the likelihood that the Governor in Council will ever see a declaration of a state of national emergency as necessary. Section 3 of the Emergencies Act 1988 defines a ‘national emergency’ as:

\begin{itemize}
  \item[(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
\end{itemize}
Therefore granting ministers the power to make interim orders under other laws greatly
increases the range of government’s alternatives to declaring a state of emergency. For
example, the Food and Drugs Act 1985 was amended in section 30.1(1) so that “The Min-
ister may make an interim order that contains any provision that may be contained in a regu-
lation made under this Act if the Minister believes that immediate action is required to deal
with a significant risk, direct or indirect, to health, safety or the environment”.25 This, and
similar additions to other acts, allows a cabinet minister to urgently exercise powers that
would normally need to go through the process of creating or amending a regulation. Of
course, these orders and regulations would be derived from acts that, unless specified,
would have to conform to the Canadian Charter of Rights and Freedoms, thus preserving
the protection of civil rights.

The most recent changes to the federal system resulted in the assimilation of emergency
management into Canada’s security apparatus. The Department of Public Safety and Emer-
gency Preparedness Act 2005 merged the remnants of OCIPEP with the Solicitor General
into a new department in a way similar to that used by the Department of Homeland Secu-
ritv to swallow up the Federal Emergency Management Agency in the US. However, unlike
in the US example, the Canadian solution did not leave emergency management as a sepa-
rate entity alongside the other agencies of the former Solicitor General (the Royal Cana-
dian Mounted Police, the Canadian Security and Intelligence Service, the Canada Border
Services Agency, the Canadian Firearms Centre and the Correctional Service of Canada).
This absorption of the emergency management function into the general management of
the department, later to be renamed simply Public Safety Canada, was completed with

This brief history sets the context in which the current legislation was drafted. However,
the purpose of this paper is neither to judge these events nor to wade into the broader issues
of what it takes to be, or govern, a sovereign nation. Perhaps the circumstances did justify
the actions of the government, however extreme and unfair they appear in hindsight. Or
maybe the context of the times – for example, Canada did not have universal suffrage
devoid of limits based on gender or ethnicity until aboriginal Canadians were given the
vote in 1960 – can explain the decisions based on ancestry and nationality during the
World Wars. It is reasonable to assume that contemporary world affairs and the acute
experiences of other nations may have amplified the perception of risk for decision-
makers during the FLQ crisis. What is important is the influence these events had on the
drafting and adoption of the Federal Emergencies Act in 1988, the creation of the
various Provincial Acts over the preceding decades and the powers this diverse legislation
grants to limit civil rights in times of disaster.

**Emergencies Act 1988**

In the best light Canada’s experience with the War Measures Act was a series of decisions,
taken in the heat of crises, to impose extraordinary measures deemed unavoidable under the
circumstances. At worst it represented the mistreatment of residents, Canadians and
foreigners living peacefully in Canada, and a disregard for civil rights. These abuses
remained a point of shame that echoed in Parliament with the passing of the Emergencies Act in 1988, when the Minister of National Defence, Perrin Beatty, stated that:

[with] the passage of this Bill from the House of Commons, we will see the abolition of the War Measures Act in Canada. Never again will we have a situation, as was the case in World War II, where Canadian citizens were interned on the basis of their racial ancestry. What we will have is a situation where there will be guarantees. Never again, for example, will there be an ability to use the War Measures Act to knock on the door in the dark of night, to sweep up our citizens, to hold them without charge and without the right of habeas corpus.26

Consequently the Emergencies Act 1988 acknowledges the importance of protecting civil rights in its preamble and, the more importantly, in the body of the Act.

The Preamble of the Emergencies Act 1988 sets out that the intention of the Act is to provide special temporary powers in times of national emergency. It confirms that the need for such powers must be great enough to warrant their use and that Parliament will retain oversight of how the powers are exercised. The Preamble concludes with the following statement:

AND WHEREAS the Governor in Council, in taking such special temporary measures, would be subject to the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights* and must have regard to the *International Covenant on Civil and Political Rights*, particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency.

While these protections have been criticised for being outside the body of the Act,27 it is clear that the government understood that the Act needed to address the concerns arising from the past applications of the War Measures Act. Following the first reading, in response to concerns raised by the National Association of Japanese Canadians, the bill was amended to read:

s4. Nothing in this Act shall be construed or applied so as to confer on the Governor in Council the power to make orders or regulations

(a) altering the provisions of this Act; or
(b) providing for the detention, imprisonment or internment of Canadian citizens or permanent residents within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Emergencies Act sets out powers for four different types of national emergency: public welfare, public order, international and war. Each type of emergency has its own definition of the circumstances that must be occurring and each still requires that the overall threshold of a ‘national emergency’ (as defined above) be met. Each also has slightly differing processes for consultation with the Provinces and for the specifics required in the declaration. There are provisions for parliamentary review, oversight and approval of all national emergency declarations and means for Parliament to revoke declarations or limit the powers being exercised.

Once a national emergency of one of the four types has been declared, the federal government, through the Governor in Council, has the power to make orders and regulations. The scope of these orders varies with the type of emergency. For public welfare emergencies, essentially natural or technological disasters, the powers are limited to those
commonly available to provincial and municipal governments through the various provincial emergency measures legislation to provide for the safety and well-being of the public during the response. Public order emergencies are generated by threats to national security and the powers available to the government reflect a security-oriented response.

International emergencies are harder to imagine, but historical events such as the Korean conflict and the Cuban Missile Crisis were clearly influential in the development of the legal definition. During international emergencies, which by definition affect all of Canada and are therefore clearly and solely within federal jurisdiction, the powers available to the government extend to issues of defence production, immigration and other national matters. Declaring a war emergency gives the government almost unfettered power, within the overarching protections for civil rights, to pursue any actions necessary for the war effort except to enforce conscription into the armed forces.

Review of provincial emergency powers

At the end of the Second World War, and influenced by cold war apprehensions, the provinces began implementing their own emergency measures legislation. The Province of Manitoba, for example, passed the Emergency Measures Act in 1951 and then its replacement, the Civil Defence Act, in 1952. This legislation allowed for civil disasters or war emergencies to be declared and for special powers to be granted. The recognition of the differences and similarities between civil disasters, such as floods, and war emergencies was a significant step in the development of emergency legislation. Manitoba’s Civil Defence Act 1952 (and the subsequent Emergency Measures Act 1970) gave wider powers to the government during war emergencies than civil disasters, although later, when the new Manitoba Emergency Measures Act 1987 was passed, the concept of a war emergency was dropped and most of the war emergency powers were consolidated under a more generic declaration of a state of emergency.

Across Canada the provinces were going through similar processes from the 1950s onwards. As a result the emergency management legislative landscape is fairly monotonous, basically the same scenery with a few distinct regional differences, much like Canada’s physical landscape. However, these acts contain the ability to grant significant powers to suspend or otherwise affect civil rights during declared emergencies and should be examined more closely. The easiest way to approach such a review is to consider the roughly two dozen powers most commonly shared by the legislation. These powers can be grouped into:

1. Authorise necessary action;
2. Control location of people;
3. Use property and control resources;
4. Require service;
5. Powers to search, arrest and fine;
6. Miscellaneous.

Appendix 1 contains a table of these powers and indicates the basic section number of the provincial and territorial legislation where they can be found. The intention of the table is to demonstrate the consistency of the emergency powers granted by federal and provincial legislation across the country. The powers in the provincial and territorial legislation are assigned to the relevant government minister or the local authority or both. Each province has a column for the powers available during provincially or minister-declared emergencies and one for local
emergencies declared by mayors or local authorities. In some provinces these powers are identical, but in most the government retains certain powers not available to local officials. The powers are paraphrased in this discussion to indicate the kind of power being granted and a certain amount of judgment was exercised to assign specific powers to a particular category. The six categories indicated above will now be explored further.

**Authorise necessary action**

*Take any action considered necessary*

Almost every piece of legislation begins the section granting emergency powers with a statement allowing the government to take any action considered necessary to ensure the safety of the population and to resolve the emergency situation. This carte blanche approach is usually followed by a reference to specific powers but without attempting to limit the range of actions available to the government. One interesting alternative to this is Ontario’s Emergency Management and Civil Protection Act1990s 4(1):

The head of council of a municipality may declare that an emergency exists in the municipality or in any part thereof and may take such action and make such orders as he or she considers necessary and are not contrary to law to implement the emergency plan of the municipality and to protect property and the health, safety and welfare of the inhabitants of the emergency area.

This formulation does limit the powers available to those that are otherwise legally available to the local authority. This contrasts with other provinces’ legislation, which retains the idea of temporarily exercising extraordinary powers in times of crisis.

**Authorise others’ responsibilities or actions**

Frequently associated with the power to take any action is the power to authorise or require a person or another jurisdiction to take action. This usually means giving the provincial government the power to require a local authority to implement its emergency plan but may also be creating an ability to delegate emergency powers. Related to this is the power to make regulations or bylaws during emergency, which is often restricted to the province.

**Activate or implement emergency plans**

Almost all the provinces give the power to implement emergency plans when a state of emergency is declared. This may seem obvious but since the emergency plans may contain extraordinary measures it is appropriate to include this as an emergency power. It is important to note, however, that in some jurisdictions, such as Manitoba, emergency plans may be implemented without requiring a declaration of emergency.

**Control Location of People**

*Regulation or prohibition of travel/roads*

This is a very common power and one that may appear innocuous. Limiting access to an area during an emergency, including requiring people to obtain travel passes or otherwise control movement, is a useful power. However, Canadians are not accustomed to having to show identification or face any other restriction when traveling (other than at airports) and...
the right to move within the country is protected by the Canadian Charter of Rights and Freedoms. Sections 30(1)(g) and 30(1)(h) of the federal Emergencies Act 1988, under an international emergency, extend this power to include preventing Canadians from travelling outside the country and to permit the deportation of foreigners from Canada. The Emergencies Act also retains the power to designate and secure protected places in order to prevent trespassing or sabotage at key facilities. These powers can easily be traced back to their civil defence roots in the Defence of Canada Regulations 1939.

Evacuation of persons/removal of personal property
The flip-side of the power to prevent people from travelling into an area is the power to require people to leave the area they are already in. Forcing people to evacuate their homes or their whole community, and to remove personal property from an area, is another common response strategy that has serious implications for civil rights. The provincial legislation usually grants these powers together, although Quebec separates them, and most combine them with an obligation to provide for the care of evacuated people or property. In a similar vein Manitoba has a separate power for the control of movement of people and livestock related to containing the spread of disease. Very recently Manitoba also introduced the power to apprehend someone who has not complied with an evacuation order and to use reasonable force, including entry without a warrant, to remove that person to a place of safety.29

Close public or private places/prevent entry
Also connected to the power to control people’s location during an emergency, some provinces (Ontario, Quebec, Prince Edward Island, Newfoundland and Labrador, and Nunavut) create the opportunity for the government to close public or private places during emergencies or to prevent entry into identified buildings. Quebec and Newfoundland also have a related power, under certain circumstances, to order curfews or confinement. The Federal Emergencies Act 1988 also allows the government to regulate public gatherings during a public order national emergency.

Use property and control resources
Requisition, use or disposition of property
All jurisdictions in Canada provide some provision during a declared emergency for the government to requisition, use or dispose of property. Such ability to commandeer property varies in the precise wording. This is another set of powers that has been carried forward from the Second World War for use in peacetime emergencies.30 One variation of this power to use property is the ability to order the demolition of property. British Columbia’s provision states that the ministers may ‘cause the demolition or removal of any trees, structures or crops if the demolition or removal is considered by the minister to be necessary or appropriate in order to prevent, respond to or alleviate the effects of an emergency or disaster’.31 This is fairly indicative of the other provinces’ legislation.

Regulate essential resources
The other major power that transferred from the Defence of Canada Regulations 1939 into the provincial legislation for natural disasters is the ability to regulate essential resources
and, under some circumstances in a handful of jurisdictions, to take over the control and care of utilities, services and industries deemed critical to the response. There is often a specific reference, either as a separate power or combined with the more general power to maintain services, to provincial governments’ and municipalities’ ability to establish shelters, hospitals and welfare centres.

Amendments in 2013 to Manitoba’s Emergency Measures Act 1987 introduced the concept of ‘critical service providers’ and the requirement that companies so designated, with telecommunication companies as likely candidates, prepare business continuity plans.\textsuperscript{32} This may signal a change to the approach of giving the government the power to repair or maintain services and place the obligation more squarely on the providers to be prepared.

With the power to control essential resources and services comes the power, in some provinces, to implement price fixing. The wording varies and the power may be linked to the control of essential resources or provided for as a separate power. Ontario allows for ‘fixing prices for necessary goods, services and resources and prohibiting charging unconscionable prices in respect of necessary goods, services and resources.’\textsuperscript{33} In the unique case of an international emergency, declared under the federal Emergencies Act 1988, this power relates to the control and investigation of black-marketeering.

\textbf{Require service}

\textit{Direction to render qualified service}

In parallel to the powers to control and use property or regulate the delivery of services are the powers to engage human resources. All the current legislation across Canada, with the exception of the Yukon,\textsuperscript{34} contains explicit powers for the government to have qualified persons or classes of persons render such services as they are qualified to provide. Ontario only allows for the ‘authorisation’ of such services but stops short of the power many other provinces wield to require such service. Most jurisdictions also have sections in their emergency legislation regarding compensation connected to the requirement to provide service and more generally to losses incurred as the result of the use of property.

More contentious, perhaps, is the power of conscription of persons. This power exists in Alberta, Saskatchewan, Nova Scotia, New Brunswick, Prince Edward Island (PEI), the Northwest Territory and Nunavut. This can be expressed simply, as is the case in Saskatchewan, as ‘conscript persons needed to meet an emergency’,\textsuperscript{35} or with some reference to compensation, such as in PEI, where the minister may ‘order the assistance, with or without remuneration of persons needed to carry out the provisions mentioned in [the section listing emergency powers].’\textsuperscript{36}

Since the intention of emergency legislation is to grant special powers that are not otherwise available to the government, it is important to note that there may be other legislation granting similar powers. For example, while Manitoba’s Emergency Measures Act 1987 does not allow for conscription, its Wildfires Act states: ‘An officer may order any able-bodied adult located in the vicinity of a wildfire to assist in wildfire protection operations when sufficient numbers of firefighters or volunteers are not immediately available.’\textsuperscript{37} Therefore this power to conscript may exist under other circumstances in some jurisdictions.

This ability of a government to require members of the public to provide services, either relating to a qualification or simply through conscription and with or without compensation, presents significant civil rights concerns. The United Nations’ International Covenant on
Civil and Political Rights states: ‘No one shall be required to perform forced or compulsory labour’, although this is qualified later: ‘For the purpose of this paragraph the term “forced or compulsory labour” shall not include: (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community.’ So the power available through the emergency legislation is valid but should still be exercised with caution.

**Powers to search, arrest and fine**

**Entry and search**

The final cohesive set of powers relates to actions the public could normally expect to be exercised by the police. However, under a declared state of emergency, who exercises these powers and the process required to take these actions may be very different. Only Ontario and the Yukon do not have the clear power to enter and search a property during an emergency. The other provinces provide an option to authorise their agents, not necessarily limited to sworn peace or police officers, to enter and search premises without a warrant. In British Columbia this is phrased as ‘authorize the entry into any building or on any land, without warrant, by any person in the course of implementing an emergency plan or program or if otherwise considered by the minister to be necessary to prevent, respond to or alleviate the effects of an emergency or disaster.’

Imposing fines is another aspect of the emergency legislation which could be seen as a police function. Only the Northwest Territories’ Civil Emergency Measures Act 1988 does not contain provisions for what is considered an offence and for assigning imprisonment or fines to those convicted of committing an offence. The fines vary across the country and some legislation differentiates between individuals and corporations.

The power to arrest or detain individuals had been absent from the legislation since the end of the Defence of Canada Regulations but was recently revived in Manitoba. A recent amendment there now allows for a peace officer to arrest someone committing an offence in order to establish their identity, collect evidence or prevent repeating offences under the Act.

**Miscellaneous powers**

The remaining powers found scattered across the country’s emergency legislation cover a range of topics. These may be a reflection of past events when a particular issue was identified and a power then established or they may be left-overs from earlier versions of the legislation. Most provinces provide some authorisation to make emergency payments or otherwise allow government to commit resources during an emergency. Several have powers to construct works or make repairs and Nova Scotia echoes the federal Emergencies Act in allowing the government to assess damage to works or to the environment.

**Conclusion**

Canada has rightly enacted laws at the federal and provincial level to allow the government to take extraordinary measures in times of emergencies. In doing so the provisions of Article 4 (1) of the International Covenant on Civil and Political Rights are met, specifically:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the
exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Canada has created the required legal framework to derogate from the Covenant and permit certain limitations on civil rights when and where necessary and only for the time needed. This is clear in the preamble of the federal Emergencies Act.

Provincially, Ontario’s legislation is unique in its explicit protection of the civil rights during an emergency:

7.0.2 (1) The purpose of making orders under this [Emergency Powers and Orders] section is to promote the public good by protecting the health, safety and welfare of the people of Ontario in times of declared emergencies in a manner that is subject to the Canadian Charter of Rights and Freedoms.

No other province makes this point as clearly. In this way the Ontario legislation, derived from its own unique set of experiences, is more in line with the federal government’s commitment to only using special temporary powers in times of urgent need and in the absence of alternatives. The lack of language in the other provincial legislation to guarantee protection of civil rights is worrisome.

The history of civil rights abuses in Canada during the two World Wars and the FLQ crisis under the War Measures Act may seem increasingly irrelevant as time fades the memories. However, the quarter century since the introduction of the Emergencies Act 1988 does not necessarily demonstrate its success, given the complete lack of any application of that Act. Furthermore, the powers that are regularly exercised across Canada are authorised by the provincial legislation and the majority of these powers originate from a civil defence approach to war emergencies, even though they are now used for peacetime disasters.

Thus, the legislation in Canada is heavily weighted towards providing extraordinary powers for disaster response but does not have a balanced emphasis on hazard mitigation. Donald Geis argues that living in what he coined a ‘disaster resistant community’ – ‘the safest possible community that we have the knowledge to design and build in a natural hazard context’ is a basic human right. If this proposition is accepted, if it can be agreed that citizens should expect their governments to ensure their safety as a fundamental factor in community decision-making, then citizens should further question the need for all these legislative powers to suspend civil rights in order to overcome events that often could have been avoided or mitigated in the first place. At a minimum, citizens should be protected before an emergency by an equally potent legislative approach to risk reduction. Then, at least, the application of powers to suspend civil rights during an emergency could be seen as a true last resort, rather than as a convenience, and the powers could be further restricted to guarantee rights and liberties.

Notes


8. 5 George V Ch 2 1914.


19. McConnell, *Plan for Tomorrow...TODAY!*


22. Bill C-65 (an act to reorganise and dissolve certain federal agencies) received Royal Assent on 13 July 1995 and resulted in Emergency Preparedness Canada being returned to the Department of National Defence.


34. Civil Emergency Measures Act RSY 2002 c 34.


37. Wildfires Act CCSM c W128 s 7(12).

38. United Nations’ International Covenant on Civil and Political Rights, Article 8 s 3(a).

39. Ibid., Article 8 s 3(c).


41. This power, created in s17(2) of the Emergency Measures Amendment Act 2013 CCSM c12, is aimed at preventing people from interfering with emergency measures, such as the operation of flood control works.


There is some support from the European Court of Human Rights: López Ostra v. Spain, App no 16798/90, Series A no. 303-C (1994); McCann v UK, App. no.18984/91, Ser A vol.324 (1995); Budayeva and Others v. Russia, App nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008; Murillo Saldias and Others v. Spain, App no. 76973/01, 28 November 2006; and Kolyadenko and others v. Russia, App nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012.

Notes on contributor

John Lindsay is Associate Professor in the Department of Applied Disaster and Emergency Studies at Brandon University and a candidate for the PhD in Emergency Management at Massey University’s Joint Centre for Disaster Research in New Zealand. He integrates 20 years of experience as an emergency management professional into his research focus on urban planning, hazard mitigation and emergency management policy.
## Appendix 1  Emergency Powers in Canadian Legislation

<table>
<thead>
<tr>
<th>Power</th>
<th>Canada</th>
<th>DC</th>
<th>AB</th>
<th>SK</th>
<th>MB</th>
<th>ON</th>
<th>QC</th>
<th>NS</th>
<th>ND</th>
<th>PE</th>
<th>NL</th>
<th>NWT</th>
<th>Yukon</th>
<th>NU</th>
</tr>
</thead>
<tbody>
<tr>
<td>take any action considered necessary</td>
<td>40</td>
<td>10</td>
<td>13</td>
<td>19</td>
<td>24</td>
<td>18</td>
<td>21</td>
<td>12</td>
<td>12</td>
<td>7.6.2</td>
<td>4</td>
<td>14</td>
<td>14</td>
<td>12</td>
</tr>
<tr>
<td>authorize others’ responsibilities or actions</td>
<td>30</td>
<td>10</td>
<td>13</td>
<td>19</td>
<td>24</td>
<td>18</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>activate or implement emergency plan</td>
<td>10</td>
<td>13</td>
<td>19</td>
<td>24</td>
<td>18</td>
<td>21</td>
<td>12</td>
<td>12</td>
<td>7.6.2</td>
<td>93</td>
<td>47</td>
<td>14</td>
<td>14</td>
<td>12</td>
</tr>
<tr>
<td>make regulations bylaws during emergency</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>regulation or prohibition of travel/roads</td>
<td>20</td>
<td>8</td>
<td>19</td>
<td>30</td>
<td>10</td>
<td>13</td>
<td>19</td>
<td>24</td>
<td>18</td>
<td>21</td>
<td>12</td>
<td>12</td>
<td>7.6.2</td>
<td>93</td>
</tr>
<tr>
<td>deportation</td>
<td>30</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>catch public or private place, prevent entry</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>evacuation of persons</td>
<td>32</td>
<td>8</td>
<td>10</td>
<td>13</td>
<td>19</td>
<td>24</td>
<td>18</td>
<td>2</td>
<td>12</td>
<td>12</td>
<td>7.6.2</td>
<td>93</td>
<td>47</td>
<td>14</td>
</tr>
<tr>
<td>removal of personal property</td>
<td>8</td>
<td>10</td>
<td>13</td>
<td>19</td>
<td>24</td>
<td>18</td>
<td>2</td>
<td>12</td>
<td>12</td>
<td>7.6.2</td>
<td>93</td>
<td>47</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>care of evacuated people or property</td>
<td>8</td>
<td>10</td>
<td>13</td>
<td>19</td>
<td>24</td>
<td>18</td>
<td>21</td>
<td>12</td>
<td>12</td>
<td>7.6.2</td>
<td>93</td>
<td>47</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>control movement of people/stock with disease</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>entry and search of any dwelling, premises, conveyance or place</td>
<td>58, 59</td>
<td>30</td>
<td>10</td>
<td>13</td>
<td>19</td>
<td>24</td>
<td>18</td>
<td>21</td>
<td>12</td>
<td>12</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>requisition, use or disposition of property</td>
<td>48</td>
<td>8</td>
<td>19</td>
<td>30</td>
<td>10</td>
<td>13</td>
<td>19</td>
<td>24</td>
<td>18</td>
<td>21</td>
<td>12</td>
<td>12</td>
<td>7.6.2</td>
<td></td>
</tr>
<tr>
<td>Power</td>
<td>Canada</td>
<td>BC</td>
<td>AB</td>
<td>SK</td>
<td>MB</td>
<td>ON</td>
<td>QC</td>
<td>NS</td>
<td>NB</td>
<td>PE</td>
<td>NL</td>
<td>NWT</td>
<td>Yukon</td>
<td>NU</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>--------</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-------</td>
<td>-----</td>
</tr>
<tr>
<td>demolition of structures, trees, crops</td>
<td></td>
<td>10</td>
<td>13</td>
<td>19</td>
<td>24</td>
<td>18</td>
<td>21</td>
<td>12</td>
<td>12</td>
<td>7.0</td>
<td>2</td>
<td>93</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>designation and securing of protected places</td>
<td>3</td>
<td>19</td>
<td>30</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>directions to render qualified service</td>
<td>8</td>
<td>19</td>
<td>30</td>
<td>10</td>
<td>13</td>
<td>19</td>
<td>24</td>
<td>18</td>
<td>12</td>
<td>12</td>
<td>7.0</td>
<td>2</td>
<td>93</td>
<td>47</td>
</tr>
<tr>
<td>concurrency of persons needed</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>14</td>
</tr>
<tr>
<td>compensate for service/damage</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>19</td>
<td>24</td>
<td>18</td>
<td>21</td>
<td>12</td>
<td>12</td>
<td>7.0</td>
<td>2</td>
<td>93</td>
</tr>
<tr>
<td>regulate essential resources</td>
<td>8</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>control and care of utilities/services/industry</td>
<td>13</td>
<td>19</td>
<td>30</td>
<td>10</td>
<td>13</td>
<td>19</td>
<td>24</td>
<td>18</td>
<td>12</td>
<td>12</td>
<td>7.0</td>
<td>2</td>
<td>93</td>
<td>47</td>
</tr>
<tr>
<td>implement price fixing</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>14</td>
</tr>
<tr>
<td>authorize emergency payments</td>
<td>8</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>16</td>
<td>13</td>
<td>24</td>
<td>18</td>
<td>12</td>
<td>12</td>
<td>7.0</td>
<td>2</td>
<td>16</td>
</tr>
<tr>
<td>establish shelter, hospital, welfare</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>assess damage to works</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>assess damage to environment</td>
<td>8</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>construct works or make repairs</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>impose fines</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>permit censorship</td>
<td>13, 14</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>arrest or detain</td>
<td>24,</td>
<td>30</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>order cautlevs/ confinement</td>
<td>36</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>manage waste</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>manage information</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>assist in law enforcement</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Power</td>
<td>Canada</td>
<td>BC</td>
<td>AB</td>
<td>SK</td>
<td>MB</td>
<td>ON</td>
<td>QC</td>
<td>NS</td>
<td>NB</td>
<td>PE</td>
<td>NL</td>
<td>NWT</td>
<td>Yukon</td>
<td>NU</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>--------</td>
<td>--------</td>
<td>--------</td>
<td>--------</td>
<td>--------</td>
<td>--------</td>
<td>--------</td>
<td>--------</td>
<td>--------</td>
<td>--------</td>
<td>--------</td>
<td>--------</td>
<td>--------</td>
<td>--------</td>
</tr>
<tr>
<td>assist in fire fighting</td>
<td>9</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ensure health and welfare</td>
<td></td>
<td>9</td>
<td>9</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>regulate public gatherings</td>
<td>19</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>405</td>
</tr>
<tr>
<td>regulation of international financial activities</td>
<td>30</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>