

Canada's Extraordinary Use of the Emergencies Act Poses Human Rights Concerns



By Myrna El Fakhry Tuttle, J.D., M.A., LL.M. and Linda McKay-Panos, B.Ed, J.D., LL.M.



Overseas, there was recently a prominent and highly charged controversy arising from the measures implemented by the Canadian Government in response to what was called the "Freedom Convoy".

On February 14, 2022, the federal government in Canada invoked, for the first time, the *Emergencies Act* (the Act) by issuing a proclamation of a public order emergency in order to end disruptions, border blockades and the occupation of the Capital City of Ottawa. The proclamation was followed by an Emergency Economic Measures Order (the Order) and by Emergency Measures Regulations (the Regulations).

The Canadian Government argued that the protests and blockades that had been taking place since January 2022 were an emergency that required the invocation of the Act.

The Act became law in 1988. It can be used by the federal government in case there is a "national emergency" which is defined by section 3 of the Act as follows:

[A]n urgent and critical situation of a temporary nature that (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 (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security, and territorial integrity of Canada and that cannot be effectively dealt with under any other law of Canada.

A national emergency must fall within one of the four different emergencies to which the Act applies: a public welfare emergency (Part I), a public order emergency (Part II), an international emergency (Part III), and a war emergency (Part IV).

A public order emergency is defined by section 16 of the Act as "an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency."

Confirmation of the Declaration of Emergency

The declaration of an emergency under the Act was the subject of three full days' debate (February 19, 2022 to February 21, 2022) in the House of Commons before voting to confirm it (185 to 151). The tenor of the debate largely fell on predictable lines, with the New Democratic Party (NDP) supporting the minority Liberal government to achieve passage of the declaration.

There is also a review required under the Act (section 62). Within 60 days of the declaration of emergency being revoked or expiring, the government will have to convene an inquiry (section 63) to study the use of the powers. The report will have to then be presented to Parliament within 360 days.

The declaration of emergency was revoked on February 23, 2022, because the government considered the emergency to be over. There were almost 200 people charged with criminal offences while the blockades were removed. However, that did not mean that the declaration did not face any challenges.

The Charter

When the Act is invoked, and according to its preamble, the *Canadian Charter of Rights and Freedoms* (the Charter) continues to protect



Ottawa Ontario Canada, February 13 2022, Freedom Convoy Trucker Protest
Credit: Franklin McKay - Shutterstock

individual rights as the government takes special temporary measures to protect the safety and well-being of Canadians.

According to Annemieke E. Holthuis:

The preamble to the Emergencies Act, while having no legal force in and of itself, sets out the underlying principles of the legislation. A government's fundamental obligations during a state of emergency are stated to be the following: it must safeguard 'the safety and security of the individual', protect 'the values of the body politic' and preserve 'the sovereignty, security and territorial integrity of the state'. The preamble acknowledges that, in fulfilling these obligations, the Governor in council or in effect, Cabinet, may require temporary emergency powers not normally accorded to it.

Section 2(b) of the Charter protects freedom of expression, section 2(c) protects freedom of peaceful assembly and section 2(d) protects freedom of association. In addition, Charter section 7 protects "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." All of these Charter sections are at issue in this emergency situation.

However, the Charter allows the government to balance the rights of individuals with the interests of society where restrictions on protected rights and freedoms can be justified in a free and democratic society (section 1 of the

Charter). This means that during a public order emergency, the government must only take actions that are reasonable and justifiable to protect Canadian citizens.

Emergency Measures Regulations (the Regulations)

According to the Department of Justice in Canada, the Act was invoked on February, 14, 2022 to grant temporary additional and necessary powers to the federal government to make orders and/or regulations that are believed, on reasonable grounds, necessary to deal with the blockades and public assemblies.

The Regulations prohibited individuals from participating in a public assembly that may reasonably be expected to lead to a breach of the peace through:

1. the serious disruption of the movement of persons or goods or the serious interference with trade;
2. interference with the functioning of critical infrastructure; or
3. support of the threat or use of acts of serious violence against persons or property (section 2(1)).

The Regulations also prohibited individuals from directly or indirectly using, collecting, providing, making available or inviting a person to provide property to facilitate or participate in any assembly or for the purpose of benefiting any person who is facilitating or participating in such an activity (section 5).

Emergency Economic Measures Order (the Order)

The Order required banks to freeze the accounts of these individuals without a court order. It required banks and other financial institutions to stop providing any financial or related services to a designated person that can be any individual or entity that is directly or indirectly in an activity prohibited by the Regulations (Order, section 1).

Deputy Prime Minister and Finance Minister Chrystia Freeland (Minister Freeland) announced that some of the financial measures passed under the Declaration of Emergency will eventually be permanent and will outlast the revocation of the Act. These have been of concern to many.

Registering with FINTRAC

The Order applied to specified financial entities already subject to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA), including banks, credit societies, trust companies, loan companies and securities dealers, as well as entities that may not have been previously subject to the PCMLTFA.

Minister Freeland noted that Canada's anti-money laundering and terrorist financing rules now cover crowdfunding platforms and the payment service providers they use. These changes cover all forms of transactions, including digital assets such as cryptocurrencies.

Under the Order, platform fundraisers and payment processors must register with the

After their occupation was declared illegal, the occupiers moved to GiveSendGo, a crowdfunding platform more friendly to right-wing causes. Another \$10 million rolled in. A litany of smaller crowdfunding operations followed, including a Bitcoin fund, the creation of a novel cryptocurrency, a series of e-transfers, and cash donations. It all amounted to a small war chest designed to keep the occupation going.

Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) if they are in possession or control of property that is owned, held or controlled by or on behalf of a designated person (Order, subsection 4(1)). They also must report to FINTRAC the transactions and information according to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* (Order, subsections 4(2)(3); must report large and suspicious transactions).

Minister Freeland explained:

This will help mitigate the risk that these platforms receive illicit funds; increase

the quality and quantity of intelligence received by FINTRAC; and make more information available to support investigations by law enforcement into these illegal blockades.

We are making these changes because we know that these platforms are being used to support illegal blockades and illegal activity, which is damaging the Canadian economy.

The government will also bring forward legislation to provide these authorities to FINTRAC on a permanent basis.

Freezing Accounts

The government also authorized Canadian financial institutions to temporarily cease providing financial services where the institution suspects that an account is being used to further the illegal blockades and occupations. This Order covers both personal and corporate accounts. This was effective as of February 15, 2022; a bank or other financial service provider will be able to immediately freeze or suspend the account of an individual or business affiliated with these illegal blockades without a court order.

Reporting to RCMP and CSIS

In addition, financial services providers described in the Order must disclose without delay to the Commissioner of the Royal Canadian Mounted Police (RCMP) or to the Director of the Canadian Security Intelligence Service (CSIS):

(a) the existence of property in their possession or control that they have reason to believe is owned, held or controlled by or on behalf of a designated person; and

(b) any information about a transaction or proposed transaction in respect of property referred to in paragraph (a) (Order, section 5).

Finally, the Order protected these financial institutions against lawsuits (Order, section 7). It also required the suspension of insurance policies for any vehicle being used in a public assembly (Order, section 2).

Concerns

Two measures that were of particular concern may be summarized:

1. Any bank or credit agency was to immediately cease "making available any property, including funds or virtual currency" to those blocking critical infrastructure and borders. The government also ordered the banks to stop "providing any financial or related services" to those occupiers. The order stipulated that any institution that complied with these orders would be immune from liability.
2. Crowdfunding services were to register with the Financial Transactions and Reports Analysis Centre (FINTRAC) and report any transactions over a certain threshold, or deemed suspicious.

One worry was that these measures (freezing accounts and refusing services) could be undertaken without judicial oversight.

Canadian law firm Stikeman Elliott stated:

The immediate challenge for financial service providers will be to assess what steps they must take to identify

persons who are engaged directly or indirectly in a Prohibited Activity. The Order provides that Canadian federal, provincial and territorial institutions may disclose information to financial services providers described in the Order, if the disclosing institution is satisfied that the disclosure will contribute to the application of the Order. Presumably this disclosure will involve names of persons allegedly involved in Prohibited Activities. Financial services providers will, on receipt of such disclosure, have to decide whether to act on the basis of the information it contains – a decision that may present some serious challenges given that non-compliance with the Order is subject to prosecution.

The Canadian Bar Association (CBA) believes that the emergency financial measures will likely have ramifications for years to come. They note that the occupiers' initial GoFundMe campaign raised \$10 million before they even arrived in Ottawa, but the crowdfunding website shut it down. All in all, only \$1 million was released.

The CBA notes:

After their occupation was declared illegal, the occupiers moved to GiveSendGo, a crowdfunding platform

more friendly to right-wing causes. Another \$10 million rolled in. A litany of smaller crowdfunding operations followed, including a Bitcoin fund, the creation of a novel cryptocurrency, a series of e-transfers, and cash donations. It all amounted to a small war chest designed to keep the occupation going. As the federal government devised plans to dislodge the occupation, that pool of cash became a prime target.

Fasken notes that financial entities face significant new responsibilities. First:

[I]t is not clear how Financial Entities will be able to determine with certainty and in the time available whether it is dealing in property that is owned, held or controlled, directly or indirectly not only by a designated person but also by a person acting on behalf of or at the direction of the designated person or whether they are facilitating any such transaction.

Second, it is difficult to ascertain the exact meaning of: "cease providing any financial or related services to or for the benefit of". For example, are banks and credit unions required to freeze **all** the accounts that a designated person has with that bank or credit union? Would this include mortgages?

On February 25, 2022, a spokesperson for Minister Freeland said that roughly

Ottawa, Ontario, Canada - January 29 2022. Protesters on a truck in Ottawa Convoy for Freedom 2022 protesting in the streets. Credit: Benoit Daoust - Shutterstock



Emergency Powers in Australia

Emergency powers are special prerogatives that a government can resort to in extraordinary situations such as war, insurgency, terrorist attacks, or other severe threats to the state, environmental calamities, serious industrial accidents, pandemics or similar situations that threaten a great number of lives. It is commonly accepted that these powers should only be used in such extraordinary circumstances, and even then only to the extent that the situation requires.¹

In Australia, there is no single 'emergency' law giving one government all the power to formulate and implement a national response to such extraordinary emergencies, though the Federal Government has powers and functions under Federal laws that might be exercised during States of Emergency to assist the States and Territories in their responses.

For example, on 18 March 2020, at the onset of the COVID-19 pandemic, the Federal government declared a nationwide human biosecurity emergency under the *Biosecurity Act 2015 (Cth)*. (Health Minister Greg Hunt confirmed in late March 2022 that, from 17 April 2022 and for the first time in 2 years, there will be no extension to the human biosecurity emergency period)

In Western Australia, a state of emergency can be declared under the *Emergency Management Act 2005 (WA)*, and a public health state of emergency under the *Public Health Act 2016 (WA)*.

Both these states of emergency have been in effect in WA since 15 March 2020. The state of emergency legislation is due to expire in July, however Premier Mark McGowan has recently confirmed that it is likely to be continued beyond July (there being no express limits on how many times it can be extended.)

Australian Human Rights Commissioner Lorraine Finlay has expressed concerns about the long-term use of state of emergency laws saying: "The state of emergency declaration transfers an enormous amount of power to the executive, and therefore to public servants and bureaucrats, and reduces parliamentary oversight and scrutiny."

As emergency powers are characterised by extraordinary concentrated powers of the executive, there is a real risk of human rights rule of law violations. Last year, the Australian Human Rights Commission, in a submission to a Senate inquiry examining the *National Emergency Declaration Act 2020*, called for greater accountability to be embedded in laws that extend the Commonwealth's power in the event of national emergencies. It stated that the laws, which empower the Australian Government to act quickly and unilaterally during national emergencies, must include appropriate checks and balances.² (read their statement here).

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200 occupiers had their accounts frozen, thanks to names referred by the RCMP. The spokesperson also noted: "The account freezes will remain in force no longer than the declaration of public order emergency lasts," they stressed. Thus, after the Act was revoked, the freezes lapsed. However, the [CBA points out](#) that these measures "marked a significant new expansion of federal power into the financial sector."

Court Challenges

Legal actions to the Federal Court for judicial review of the decision to invoke the Act have been initiated and continued by the [Canadian Civil Liberties Association](#) (CCLA), the [Canadian Constitution Foundation](#) (CCF), and [Alberta Premier Jason Kenney](#). [Saskatchewan Premier Scott Moe](#) said that his province was also considering a court challenge.

The CCLA believes that the high standard for invoking the "massive powers" of the Act has not been met. In their view,

"many ordinary laws and police powers allow governments to respond to difficult and complex law enforcement situations." The federal emergency powers were not needed to manage border blockades and protests in cities across the country. They state (CCLA, March Edition: *Your Gifts at Work*):

After invoking the Act, the federal Cabinet has the power to create laws (emergency orders) without the usual checks and balances of a democratic system such as transparency, accountability, and public participation.

The CCLA expressed concerns about Cabinet passing:

[T]wo emergency orders that limited peaceful protest from coast to coast, allowed for the freezing of bank accounts and financial assets without a court order, required the sharing of personal financial information with Canada's security agencies, and handed enormous enforcement powers to police

services across the country (CCLA, March Edition: Your Gifts at Work).

The CCLA is also concerned that current and future governments will be comfortable taking extraordinary measures that suspend Canada's ordinary democratic processes.

Moreover, [CCF Litigation Director](#) stated:

Emergency legislation should not be normalized. The threshold for using the Emergencies Act is extremely high and has not been met. The decision to invoke the Emergencies Act, which has never been used or interpreted by the courts, is unprecedented. If Parliament authorizes the proclamation of the public order emergency, the courts will be the last defence for the rule of law.

However, in spite of these concerns, it has been [reported](#) that a majority of Canadians supported the invocation of the Act.

Conclusion

The Act gives the Federal government extraordinary powers to deal with a national emergency.

Courts have an obligation to oversee how the government exercises its emergency powers and whether these powers have been abused. Therefore, the Federal Court may set aside or quash an emergency proclamation, order or regulation for inconsistency with the Act in accordance with section 18.1(3)(b) of the [Federal Courts Act](#).

It will be interesting to see how the Federal Court is going to interpret the government's actions in this situation, and whether these events will embolden future governments to declare an emergency.

End Notes

1. Anna Chakee, *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe*, Policy Paper – No 30, Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2009, 5.
2. Australian Human Rights Commission Media Statement: <https://humanrights.gov.au/about/news/media-releases/greater-scrutiny-emergency-powers-needed> (downloaded on 7 April 2022)



Ottawa, Ontario, Canada - February 12, 2022. Trucks parked in the street during Freedom Convoy Protest in Ottawa. Credit: Benoit Daoust - Shutterstock