

COVID-19: FIRST RESPONSE – THE LAW GOVERNING STATES OF EMERGENCY IN CANADA

On March 17, 2020, Ontario's Premier, Doug Ford, declared a state of emergency in the province in relation to the rapid spread of the coronavirus (COVID-19) pandemic. At present, Ontario's Ministry of Health has confirmed 185 cases of COVID-19 in the province, along with the province's first fatality from the virus.¹

A declaration of a state of emergency is an extraordinary step for any level of government to take. Once declared, it provides a government with the ability to impose measures that can impact on nearly every facet of our daily lives. The following is an overview of how a government can declare a state of emergency and what powers accrue to a government from such a declaration.

In Canada, a state of emergency can be triggered in the face of severe disruptions, such as violent protests, war and/or armed conflict, domestic or international terrorism, or natural disasters. Depending on the size, scope and nature of the disruption, a state of emergency can be declared by one or more levels of government (*i.e.* federal, provincial/territorial, municipal).

Provincial/Territorial and Municipal

A state of emergency is more commonly declared at the provincial/territorial or municipal levels.

At the provincial/territorial and municipal levels, a declaration of a state of emergency is usually governed by provincial/territorial legislation that outlines the broad scope of emergency powers for both levels of government. However, most major Canadian municipalities also have in place bylaws that outline their

municipal emergency plans that also allow for emergency declarations. Generally, these plans establish emergency response protocols as well as institutional roles and responsibilities.

In Ontario, a declaration of a state of emergency is governed by the *Emergency Management and Civil Protection Act*² "**EMCPA**" (formerly the *Emergency Plans Act*). The EMCPA requires that each municipality, ministry, agency, board, commission and other branch of government designated by provincial legislatures develop, implement and maintain an emergency management program.³ Upon a declaration of emergency under the EMCPA, these emergency management programs are implemented.

The EMCPA defines an "emergency" broadly to include "a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property..." This can be caused by, among other things, "a disease or other health risk".⁴

Where an emergency has been identified, a state of emergency can only be declared under the EMCPA by one of the following:

- **The head of a council of a municipality.** In such circumstances, the head of the council may declare that an emergency exists in all or part of the municipality. The head of the council can take any action and make any orders that he or she considers necessary and are not contrary to law to implement the municipality's emergency

¹ <https://www.ontario.ca/page/2019-novel-coronavirus#section-0>;
<https://news.ontario.ca/mohltc/en/2020/03/first-death-in-ontario-related-to-covid-19.html> ;

<https://www.cbc.ca/news/canada/toronto/coronavirus-covid-19-ontario-tuesday-1.5500006>

² R.S.O. 1990, c. E.9.

³ See *e.g. ibid*, ss. 2.1, 3, 5.1, 6.

⁴ *Ibid*, s. 1.

plan and to protect the property and the health, safety and welfare of the inhabitants of the emergency area.

- **The Ontario legislature.**
- **The Premier of Ontario (but only in circumstances where, in the Premier's opinion, the urgency of the situation requires that an order be made immediately).** It is important to note that, if declared by the Premier, the declaration will end after 72 hours unless the declaration is confirmed by the Ontario legislature.⁵

A declaration by the Ontario legislature or the Premier of Ontario can only be made where four (4) criteria are met:

1. There is an emergency that "requires immediate action to prevent, reduce or mitigate a danger of major proportions that could result in serious harm to persons or substantial damage to property."
2. The resources normally available to the provincial government, including existing legislation, cannot be relied upon without the risk of serious delay.
3. The resources normally available to the provincial government are insufficiently effective to address the emergency.
4. It is not possible, without the risk of serious delay, to determine whether the resources normally available to the provincial government can be relied upon.⁶

Once a state of emergency is declared under the *EMPCA*, a very broad range of emergency orders can be introduced and implemented, including orders:

- Regulating and/or prohibiting travel;
- Establishing facilities for the care, welfare, safety and shelter of individuals, including emergency shelters and hospitals;
- Closing any place, whether public or private (e.g. businesses, offices, schools, hospitals);
- Fixing prices for necessary goods, services and resources and prohibiting the charging of unconscionable prices in relation to such goods.⁷

Importantly, once declared, a state of emergency can remain in place for an indeterminate period of time under the *EMPCA*. In the case of a state of emergency declared at the municipal level, the *EMPCA* does not appear to restrict how long an emergency can last. By contrast, the *EMPCA* states that a state of emergency at the provincial/territorial level will last for fourteen (14) days. However, the state of emergency can be extended by the Ontario legislature.⁸

In accordance with these legislative requirements, the Ontario legislature is apparently being recalled to sit on Thursday, March 19, 2020 with the aim of passing emergency measures related to COVID-19 (e.g. new legislation to address jobs affected by quarantine and self-isolation requirements).⁹

Federal Legislation

In addition to provincial/territorial and municipal declarations of emergency, a national state of emergency can be declared by the Parliament of Canada under the federal *Emergencies Act*¹⁰ (formerly the *War Measures Act*). Under this act, a national emergency is defined as an "urgent or critical situation of a temporary nature" that meets one, or both, of the following criteria:

- seriously endangers the lives, health or safety of Canadians and is of such proportions or nature

⁵ *Ibid*, ss. 4 and 7.01.

⁶ *Ibid*, s. 7.0.1(3).

⁷ *Ibid*, s. 7.0.2(4).

⁸ *Ibid*, s. 7.07.

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<https://www.nationalobserver.com/2020/03/17/news/doug-ford-declares-state-emergency-ontario-records-first-covid-19-death>

¹⁰ R.S.C. 1985, c. 22 (4th Supp.).

as to exceed the capacity or authority of a province to deal with it, or

- seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada.¹¹

The *Emergencies Act* allows the federal government to implement “special temporary measures to ensure safety and security during national emergencies and to amend other Acts in consequence thereof”.¹² This act identifies four (4) types of emergencies that meet this threshold:

1. **Public welfare emergencies** (see section 5) – this typically refers to large-scale “danger to life or property, social disruption or...breakdown in the flow of essential goods, services or resources” caused by natural disasters/phenomena, disease in human beings, animals or plants, or accidents or pollution.
2. **Public order emergencies** (see section 16) – this broadly refers to emergencies caused by threats to national security (e.g. espionage, sabotage, activities within or relating to Canada that are aimed at supporting the threat or use of serious violence within or outside Canada).
3. **International emergencies** (see section 27) – this refers to circumstances “involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence”.
4. **War emergencies** (see section 37) – this refers to circumstances of “war or other armed conflict, real or imminent, involving Canada or any of its allies”.

Historically, federal state of emergency legislation has been invoked in circumstances of war or domestic armed conflict. For example, the former *War Measures Act* was

¹¹ *Ibid*, s. 3.

¹² *Ibid*, long title.

¹³ <https://www.theglobeandmail.com/politics/article-parliament-to-be-recalled-to-pass-covid-19-emergency-measures-trudeau-2/>

invoked during the 1970 October Crisis and during the First and Second World Wars. However, it appears the federal government may be following Ontario’s lead and is considering invoking the *Emergencies Act* in relation to COVID-19 – in fact, Prime Minister Justin Trudeau announced on March 17, 2020 that Parliament would be recalled to discuss the federal government’s role in introducing emergency measures for Canadians and business affected by COVID-19.¹³

Accordingly, if Parliament invokes the *Emergencies Act* in these circumstances, its decision will likely be based on the classification of COVID-19 as a public welfare emergency. In cases of public welfare emergencies, the federal government can introduce even broader orders than provinces/territories and municipalities in relation to the affected areas, e.g.:

- Regulating the distribution and availability of essential goods, services and resources;
- Authorizing and making emergency payments;
- Imposing summary conviction punishments (i.e. fines up to \$500 and/or imprisonment of up to 6 months);
- Imposing indictments (i.e. fines up to \$5000 and/or imprisonment of up to 5 years).¹⁴

However, declarations of a public welfare emergency, and related orders, under the *Emergencies Act* are not intended to interfere with the scope of matters and issues under the control of provincial/territorial and municipal police forces.¹⁵

In addition to the *Emergencies Act*, the federal government can invoke the *Emergency Management Act*,¹⁶ which requires the federal Minister of Public Safety and Emergency Preparedness to develop, maintain and mobilize national emergency management plans in the event of a declared state of emergency.

¹⁴ *Ibid*, s. 8(1).

¹⁵ *Ibid*, s. 9(1).

¹⁶ S.C. 2007, c. 15.