Canada the Good?

Canada is in full emergency mode in its bid to flatten the pandemic curve. But so far the federal government has not declared a federal state of emergency in terms of the *Emergencies Act*[1], although it has discussed publicly the pros and cons of taking this step and has been urged to do so on the basis that such a declaration would enable a nationwide testing program. There are four main reasons for this hesitation to declare a national state of emergency.

First, health is a provincial jurisdiction in Canada's federal system, and the provinces have used their statutory authority to impose province-wide states of emergency, which vary only in small details.

Second, the federal *Quarantine Act****[2]*** gives the government wide emergency powers. On March 25th the Minister of Health announced an Emergency Order under the Act which requires any person entering Canada by air, sea or land to self-isolate for 14 days whether or not they have symptoms of COVID-19.[3] Maximum penalties include a fine of up to $750,000 and/or imprisonment for up to six months. The penalties increase for anyone who wilfully or recklessly causes a risk of imminent death or serious bodily harm to another person in contravention of the Act or regulations made under it.

Third, there are cultural factors that play a role. Canada has a well-functioning system of public health and if anything is considered sacrosanct in our political culture, it is that system. There is a good deal of trust in public health experts, so that even provincial premiers who have flirted in the last couple of years with Trump-style populist politics have taken direction from the start of this crisis from the experts, many of whom are veterans of the Canadian response to the SARS virus. Public health advice has been treated for the most part as prescriptive by Canadians; and now that advice is turning increasingly into prescription, the transition is pretty seamless and the need for draconian measures not as strong. (But I should hasten to add that one must be careful not to paint the picture too rosy. Things will feel very different in my upper-middle class Toronto neighbourhood from the way they feel in deprived parts of my city and country, in particular in impoverished Indigenous communities in which access is severely limited even in ordinary times to basic resources that I and many other Canadians take for granted.)

The final reason is the juridical structure of the *Emergencies Act*, understood in its political and legal context, which must make the federal government hesitate before invoking it. The Preamble of the Act reflects the fact that it was enacted three years after the *Charter of Rights and Freedoms* became part of the Canadian constitutional order:

AND WHEREAS the Governor in Council, in taking such special temporary measures, would be subject to the *Canadian Charter of Rights and Freedoms* … 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 …[4]

Moreover, it was drafted with an eye on the dubious past practice of Canadian governments in invoking its predecessor, the *War Measures Act*, especially its peacetime invocation in 1970 by Pierre Trudeau, the father of our current Prime Minister. He invoked it to respond to the 'October Crisis' occasioned when a violent secessionist group in Quebec kidnapped the Deputy Premier of that province and a British diplomat. Almost 500 individuals were needlessly detained under emergency powers granted under the declaration. This exercise of wartime emergency powers was controversial at the time and became even more controversial shortly afterwards.

The Act is not only subject to Canada's domestic and international rights commitments, but Section 3 provides that a 'national emergency' can be declared only if there is an '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.[5]

If an emergency were declared, it would be a 'Public Health Emergency' which expires at the end of ninety days unless it is continued in accordance with the Act.

Section 8 (3) (a) provides that powers under the Act shall be exercised or performed

(i) in a manner that will not unduly impair the ability of any province to take measures, under an Act of the legislature of the province, for dealing with an emergency in the province, and

(ii) with the view of achieving, to the extent possible, concerted action with each province with respect to which the power, duty or function is exercised or performed.[6]

Section 10 provides that Parliament may revoke a declaration of a public welfare emergency.[7] Section 58 requires that an explanation of the reasons for the declaration, including the consultation with the provinces (mandated by Section 14), must be laid before both Houses of Parliament within seven sitting days of the declaration, while Section 59 permits a small number of the members of either House to bring a motion that the declaration be revoked.[8] Section 62 requires that a joint committee be established to review the 'performance of duties and functions pursuant to a declaration of emergency'. [9]

In sum, the *Emergencies Act* is in principle subject to both judicial and political checks that should allay many of the fears about the rule of law and rights evoked by the history of public declarations of a state of emergency. However, how such checks would operate at a time of social distancing when Parliament and the courts are unable to sit is hardly clear.

To some large extent, Canadians can comfort themselves with the thought that, in contrast to Hungary (to take just an extreme example), Justin Trudeau's government is not intent on

using the current crisis to accrue power which it will continue to use once we return to some kind of normality. But the temptation for governments to embark on this kind of course is omnipresent. Certainly, the opposition parties sensed this temptation when they fought off the federal government's attempt to include in a statute responding to the financial dimension of the crisis a power to spend, borrow and tax without Parliamentary approval until December of 2021.

In addition, the *Quarantine Act* permits the indefinite detention of individuals who are on reasonable grounds suspected of having a communicable disease. Such individuals have a right to review, but only by a review officer, a medical practitioner designated as such by the minister. The statute does not exclude judicial review and is subject to Parliamentary scrutiny. But it contains none of the elaborate checks built into the *Emergencies Act*. It may be the case that in the circumstances of a public health emergency in which measures under the *Quarantine Act* are the main response of the federal government, a fearful public will be less vigilant than they would be about their rights and freedoms than would be the case in a short duration political emergency where the threat came from a human source.

It is high time to start thinking about what kind of legal norms should govern this kind of situation and it may be that a global conversation about how to develop such norms internationally is appropriate.

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[1] *Emergencies Act*, RSC 1985, c 22 (4th Supp).

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

[3] Public Health Agency of Canada, News Release, "New Order Makes Self-Isolation Mandatory for Individuals Entering Canada" (25 March 2020), online: <https://canada.ca/en/public-health/news/2020/03/new-order-makes-self-isolation-mandatory-for-individuals-entering-canada.html>

[4] *Emergencies Act, supra* note 1, Preamble.

[5] *Ibid*, s 3.

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

[7] *Ibid*, s 10.

[8] *Ibid*, ss 14, 58-59.

[9] *Ibid*, s 26.