Emergency Powers and the Emergencies Act

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Emergency Branch: Peace, Order, and Good Government ("POGG")

The Constitution includes a section called Peace, Order and Good Government that allows Parliament to uphold laws that would ordinarily be unconstitutional because they are outside of Parliament's listed areas of authority (a.k.a. the provincial areas of authority). Those federal areas of authority, or 'powers' are all listed in section 91 of the Constitution and, among others, the list includes powers like currency, navigation, copyrights, the postal service, regulation of trade and commerce, and the military.[1] The ability to make laws under POGG was originally included in the Constitution as a catch all. The intention was that any area of law that was not originally divided between the provinces and Parliament would become Parliament's responsibility.[2] POGG powers have since been narrowed to three branches of power:

1. Emergency: "the temporary and extraordinary need for national regulation of a particular subject matter";

2. Residual: "the power to make laws on matters that are not enumerated" in the Constitution;

3. National Concern: "the power to make laws in relation to matters that go beyond local or provincial concerns or interests, and are, due to their inherent nature, concerns of the Dominion of Canada as a whole."[3]

When the government declares it must act because of an emergency and the appropriate response is outside of its authority, then Parliament can use the emergency branch of POGG to uphold the passing of an ordinarily unconstitutional law.

Use of the emergency branch has been few and far between in Canada's history. It was first used in 1882 to uphold a Parliamentary foray into prohibition. The Court found that Parliament had the ability to enact prohibition laws with the aim of achieving public order.[4] The word emergency was not actually used until 1923 when matters related to war were determined to almost automatically fall under the jurisdiction of POGG.[5] What are considered emergencies was not summarized until 1946 when the Judicial Committee of the Privy Council listed war, pestilence, drink or drug traffic, and the carrying of arms as examples.[6] But without a specific definition, what might be considered an emergency, and therefore, what powers Parliament has under POGG's emergency branch remains uncertain.

As it currently stands, there are two requirements for the use of Parliament's emergency

powers to make laws. First, there must be a rational basis for the legislation and second, the legislation must be of a temporary nature.[7] These requirements mean that there has to be a genuine and reasonable belief that an emergency exists, and that the solution presented has a time limit associated with it. The Supreme Court of Canada listed these requirements when deciding whether a law passed by Parliament to combat inflation in the 1970s (that clearly encroached on provincial authority) using the emergency branch, was constitutional.[8] It did not want Parliament to be able to arbitrarily, or indefinitely encroach on the provinces' powers.

The most notorious use of the emergency powers of POGG is easily identifiable in Parliament's invocation of the *War Measures Act* ("WMA"). Parliament first passed the WMA in response to the onset of World War I.[9] The act granted the Governor in Council the ability to proclaim apprehension or existence of war, stated that such a proclamation was proof of the existence of such conditions, and allowed the Governor in Council to make any orders or regulations they saw fit to maintain the "security, defence, peace, order and welfare in Canada."[10] The term Governor in Council is used when the Governor General acts on the advice of just the Prime Minister and the Cabinet, as opposed to Parliament as a whole (the Senate and the House of Commons).[11] The WMA also explicitly granted the Governor in Council authority over such matters as censorship of publications, arrest, detention, deportation, and appropriation of property.[12] One of the abuses that resulted from use of the WMA was the internment of individuals who were members of organizations inspired by the Bolshevik Revolution.[13]

The WMA was invoked two more times to deal with WWII and the October Crisis in 1970.[14] All three uses of the WMA have led to claims of human rights violations, notably the internment of Canadians.[15] The WMA was criticized for the sweeping powers that it provided the government, and Parliament sought to remedy this by replacing the WMA with the *Emergencies Act* ("EA").[16]

Emergencies Act

In an attempt to remedy the controversies surrounding the WMA and to codify (but not definitively list) its emergency powers, Parliament replaced the WMA with the EA. Both of these acts were possible under the emergency powers of POGG. However, Parliament's emergency powers cannot be entirely defined or contained within one act of legislation.[17] This means that if there was an emergency or a response that fell outside of the scope of the EA, Parliament would still have the constitutional authority to make laws to handle the emergency. The EA seeks to limit the sweeping powers that the WMA granted, and to quell fears that the government could trample over people's rights. The EA does this by:

- requiring Parliamentary oversight (both houses of Parliament passing a motion confirming the declaration of an emergency);

- requiring compliance by the Governor in Council with the *Charter*, the *Canadian Bill of Rights* and consideration of the *International Covenant on Civil and Political Rights*; and

- implementing compensation provisions.[18]

The EA permits the Governor in Council to take "special temporary measures" in times of national emergency.[19] A national emergency is a situation that is temporary, urgent and critical, and that endangers the health and safety of Canadians to a point where provinces are unable to deal with it, or that threatens Parliament's regular ability to ensure the security, sovereignty, and territorial integrity of Canada.[20]

National emergencies are then grouped into four categories:

1. Public Welfare Emergencies: deals with emergencies such as natural disasters, diseases, and pollution;[21]

2. Public Order Emergencies: deals with emergencies because of threats to the security of Canada;[22]

3. International Emergencies: deals with emergencies where the use of force or violence has been threatened or is imminent and involves Canada and one or more other countries;[23]

4. War Emergencies: deals with war or armed conflict for Canada or its allies.[24]

Although Parliament has passed the EA, it has never been used.[25] It appears that either the provinces have been able to handle any emergencies on their own, or that existing laws have been sufficient and the government has not needed to use the powers provided by the EA.

[1] *Constitution Act, 1867*(UK), 30 & 31 Vict, c 3, s 91.

[2] Patrick J. Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law,* 5th ed (Toronto, ON: Irwin Law, 2017) at 263. See generally *Constitution Act*, *supra* note 1 at ss 91-95 (these sections contain the constitutional distribution of legislative powers).

[3] Legal and Legislative Affairs Division & Parliamentary Information and Research Service, *Bill S-7: An Act to deter terrorism and to amend the State Immunity Act*, by Jennifer Bird & Julia Nicol, (Legislative Summary), Publication No. 40-3-S7-E (Ottawa: Library of Parliament, 26 April 2010) at 19, n 31.

[4] *Russel v The Queen*, [1882] 7 AC 829.

[5] *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 407, 68 DLR (3d) 452 (Chief Justice Laskin made note of this when referring to the *Fort Frances* case).

[6] *Ontario (Attorney General) v Canada Temperance Federation*, [1946] 2 DLR 1 at 5-6, [1946] AC 193; The Constitutional Law Group, *Canadian Constitutional Law*, 5thed (Toronto: Emond Montgomery Publications Limited, 2017) at 177 (the Judicial Committee of the Privy Council in England was the highest court of appeal in Canada until 1949).

[7] *Anti-Inflation*, *supra* note 5 at 423, 427.

[8] *Ibid* at 380, 392.

[9] Law and Government Division, *Emergencies Act*, by Peter Niemczak & Peter Rosen, PRB 01-14E (Ottawa: Library of Parliament, 10 October 2001) at 1.

[10] *Ibid*.

[11] House of Commons, *Compendium of Procedure*, (online collection of articles), at Parliamentary Framework.

[12] *War Measures Act*, 5 George V 1914, c 2, s 6.

[13] Law and Government Division, *supra* note 9 at 2.

[14] *Ibid*.

[15] Marjun Parcasio, "The Evolution of the *War Measures Act*", *LawNow relating law to life in Canada* 43:3 (3 January 2019), online: .

[16] Law and Government Division*, supra* note 9 at 2.

[17] Monahan, *supra* note 2 at 267.

[18] *Ibid* at 9; *Emergencies Act*, RSC 1985, c 22 (4thSupp), s 58.

[19] *Emergencies Act*, *supra* note 18 at preamble.

[20] *Ibid*, s 3.

[21] *Ibid*, s 5.

[22] *Ibid*, s 16.

[23] *Ibid*, s 27.

[24] *Ibid*, s 37.

[25] Legal and Social Affairs Division & Parliamentary Information and Research Service, *Parliamentary Committee Review of Regulations*, by Peter Bernhardt & Michael Dewing, (Background Paper), Publication No. 2005-63-E (Ottawa: Library of Parliament, 18 December 2008, revised 4 May 2015) at 5.