

Emergency Powers and the Emergencies Act

* This article is an edited excerpt of [“Climate Emergency vs Emergency Powers”](#) by Michael Graham originally published on June 27, 2019.

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*, 5th ed (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.

Travel Restrictions in a Pandemic: What are your *Charter* Rights?

The COVID-19 pandemic has modern Canada facing unprecedented challenges. The severity of the crisis has led governments to restrict personal liberties in ways that were unthinkable only a few weeks ago. One of these restrictions is the decision to place limitations on travel. The mobility rights of all Canadians are protected by section 6 of the *Charter of Rights and Freedoms*.^[1] Though it is an infrequently discussed section of the *Charter*, the protections afforded by section 6 figure prominently in this era of government-mandated travel restrictions.

Section 6: A Brief Overview

Sections 6(1) and 6(2) of the *Charter* state:

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
- (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right:
 1. to move to and take up residence in any province; and
 2. to pursue the gaining of a livelihood in any province.

As is clear from the wording, section 6(1) is concerned with international travel whereas section 6(2) is concerned with movement within Canada.

The right to international travel applies only to Canadian citizens.^[2] Section 6(1) grants the right to enter, remain in, and leave Canada.^[3] However, it is important to note that the right to enter, remain in, or leave Canada does not guarantee that this mobility can be achieved in practice. The section “does not grant the right to enter another country or the right to leave another country” since it “is the authorities of that other country who determine their own entry and exit conditions.”^[4] Thus, section 6(1) “does not impose any obligation on the Canadian government to guarantee entry to or exit from another country.”^[5] The section merely limits the Canadian government from hampering this mobility through its own action. Thus, “an adult Canadian citizen cannot be forced to stay in Canada and cannot be ordered to return to Canada” by the Canadian government, unless the government can provide a justification for its actions in a court of law, using [section 1](#) of the *Charter*.^[6]

Section 6(2)’s right to “move and take up residence in any province” implies that Canadian citizens have the right to travel freely throughout the country. Canadians have consistently had the right to inter-provincial travel since the adoption of the *Charter*. Government efforts to stop free travel in Canada are unprecedented and are a clear violation of this section. However, like other sections of the *Charter*, the government would have the ability to justify

its actions to a court, using section 1 of the *Charter*. It would likely argue that such an infringement was a necessary step to fight the spread of the COVID-19.

It is important to note that section 6 is not subject to section 33, the *Charter's* notwithstanding clause. If invoked, the clause allows governments to ignore certain *Charter* rights. However, when the notwithstanding clause was drafted, mobility rights were determined to be of such fundamental importance that the *Charter* drafters decided that governments could not override those rights by invoking the clause. In effect, individual mobility rights were given an additional safeguard from government interference. This decision speaks to the significance of freedom of travel in a liberal democracy like Canada.

COVID-19 Related Restrictions on Mobility

The federal government and other levels of government in Canada have initiated various policies that have limited the freedom to travel since the pandemic was declared in early March. These include practical limits on leaving Canada, limits on returning to Canada, and restricting travel within the country.

Limits on leaving Canada

The Canadian government can only control access to its borders. This power allows Canada to limit the ability of citizens to leave the country. However, once people leave the country, it cannot control if they can enter the borders of another sovereign state. Some practical roadblocks to travel are out of the control of the Canadian government, such as the suspension of some commercial airline operations and the closing of international borders by other countries.

However, recent actions by the federal government are adding to Canadians' inability to leave the country. On March 16, 2020, Canada closed its borders to foreign travelers,[\[7\]](#) exacerbating paralysis of international travel routes to and from Canada. Further, a mutual decision between Canada and the United States to close its border to all but essential travel[\[8\]](#) clearly has the effect of limiting the ability of Canadian citizens to leave the country.

Limits on returning to Canada

There are also practical issues for citizens attempting to return to Canada. Despite Prime Minister Justin Trudeau's plea for Canadians abroad to "come home,"[\[9\]](#) closed borders and suspended flight routes have hampered the ability of Canadian citizens to do so.

At the time of writing (March 2020), despite the escalation of COVID-19 cases in the country and around the world, Canadian citizens can return to the country: while Canada has closed its borders to foreign nationals, they remain open to citizens and permanent residents.[\[10\]](#) Further, the federal government has begun to work with Canadian airlines to charter flights to repatriate Canadians stranded abroad.[\[11\]](#)

However, the Prime Minister has also conceded that the government is “unlikely to be able to bring everyone home.”[\[12\]](#) In closing Canada’s international borders, the Prime Minister also stated that “[anyone] who has [COVID-19] symptoms will not be able to come to Canada.”[\[13\]](#) This policy choice will have the effect of stranding sick Canadians abroad, with no practical way to return to Canada. Thus, in practice, some Canadians will be not be able to exercise their right to exercise their section 6 right to return to the country.

Restricting Travel Within the Country

The ability for unfettered travel within the country has also been restricted. For example, Nova Scotia began restricting its border on March 23, 2020, where “anyone entering the province will be stopped, questioned and told to self-isolate for 14 days.”[\[14\]](#) The Northwest Territories has closed its borders with only limited exceptions.[\[15\]](#) On March 28, the federal government barred anyone showing symptoms of COVID-19 from boarding domestic flights or intercity passenger trains.[\[16\]](#) Additionally, there has also been speculation that the federal government could invoke the *Emergencies Act*[\[17\]](#) to impose further inter-provincial travel restrictions throughout the country.[\[18\]](#)

Can the government justify its breach of *Charter* mobility rights? The Importance of Section 1

The restrictions on mobility rights by a government in Canada are unprecedented. All these government sanctioned efforts to restrict travel are likely clear breaches of section 6.[\[19\]](#) However, the government can attempt to justify its actions to a court using section 1 of the *Charter*. In order to justify its actions, any government travel restriction must be reasonable and demonstrably justified in a free and democratic society. If a court decides that the government has made its case for justifying its actions, the breaches will be deemed constitutional. If they do not, then the government would need to stop its travel restrictions because they would be unconstitutional. For this reason, Section 1’s limitation clause is of great importance in ensuring that the government does not overstep when it breaches the section 6 rights of Canadian citizens, but also, allows the government to provide a rationale for a breach in specific circumstances.

In the context of a worldwide public health crisis, there are several arguments that Canadian governments can make to justify a section 6 breach. For example, since unfettered travel is a significant transmission source of COVID-19, the government could justify its breach as a necessary response to cut rates of transmission. This in turn could preserve valuable health care resources and limit the rates of fatality caused by COVID-19. Since the Canadian Constitution allows for the balancing of rights, some “liberties must [occasionally] make way in the pursuit of other legitimate societal objectives, like public health.”[\[20\]](#) Therefore, restrictions on travel freedoms can look insignificant when balanced against a potentially substantial loss of life if they were not enacted. This current crisis speaks to the importance of section 1 of the *Charter* – in situations where the health and safety of Canadians is at stake, there may be a greater public good that requires the breaching of some individual rights.

Justifying a breach of Canadian's *Charter* rights is not an easy job for the government. Government action must be pressing, substantial, and have proportionate effects. If the *Charter* breach is more detrimental than the goals of the policy being enacted, then it will not be upheld. A draconian government action would not be upheld under section 1 if there was insignificant evidence that it helped to alleviate a pressing issue. For example, an indefinite quarantine order that is backed by no evidence showing that it would be beneficial to health and safety would likely be struck down by a court as unconstitutional.

University of Ottawa law professor Martha Jackman believes that the government's current approach to restricting travel is justified under section 1, since it is based on the best public health evidence available. She believes that if the restrictions arise because of public health concerns then it would be "quite likely [that they would] be found reasonable by the courts" and upheld.^[21] The uncertainty and seriousness of the situation would likely give the government "significant leeway if any of [the travel restrictions] were challenged" in court.^[22]

Conclusion

The restrictions on mobility that have been enacted or pondered by governments in Canada are unprecedented. It appears that, on their face, the restrictions breach the *Charter's* right to free mobility guaranteed by section 6. Should the government's actions be challenged in court, section 1 of the *Charter* would be used to determine whether the breaches can be justified. However, given the extraordinary situation and the continually evolving public health risk posed by COVID-19, it is likely that governments would be given substantial leeway by the courts in restricting mobility rights to attempt to fight the virus, even if Canadians lose their travel related liberties in the short term.

^[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

^[2] *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711.

^[3] *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 18.

^[4] *Kamel v Canada (Attorney General)*, 2009 FCA 21 at para 17.

^[5] *Ibid.*

^[6] *Droit de la famille - 13328*, 2013 QCCA 277 at para 40.

^[7] Hannah Jackson and Emerald Bensadoun, "Trudeau closes Canadian borders to most foreign travellers amid coronavirus outbreak," *Global News* (16 March 2020), online: <globalnews.ca/news/6682040/coronavirus-trudeau-address-nation/> [Jackson and Bensadoun].

^[8] Eric Stober, "Canada-US land border closes to all non-essential travel," *Global News* (20 March 2020), online: <globalnews.ca/news/6711194/canada-us-border-closes/>.

- [9] “‘If you’re abroad, it’s time for you to come home’: Trudeau,” *CBC News* (16 March 2020), online: [cbc.ca/player/play/1711921731695](https://www.cbc.ca/player/play/1711921731695)>.
- [10] Jackson and Bensadoun *supra* note 7.
- [11] Prime Minister’s Office, “Prime Minister announces efforts to bring Canadians home from abroad” *Justin Trudeau, Prime Minister of Canada* (21 March 2020), online: pm.gc.ca/en/news/news-releases/2020/03/21/prime-minister-announces-efforts-bring-canadians-home-abroad>.
- [12] Kathleen Harris, “Trudeau says government will do all it can to help stranded Canadians, but concedes some will remain trapped,” *CBC News* (21 March 2020), online: [cbc.ca/news/politics/trudeau-canadians-stranded-covid19-coronavirus-1.5505582](https://www.cbc.ca/news/politics/trudeau-canadians-stranded-covid19-coronavirus-1.5505582)>.
- [13] Ryan Tumilty, “Canada to close borders to most non-citizens, stop ill travellers from boarding inbound flights, PM announces,” *National Post* (16 March 2020), online: nationalpost.com/news/canada/trudeau-travel-restrictions-ban-coronavirus-covid19-canada>.
- [14] “Nova Scotia border restricted as of 6am Monday,” *The Chronicle Herald* (22 March 2020), online: thechronicleherald.ca/news/provincial/nova-scotia-border-restricted-as-of-6-am-monday-428043/>.
- [15] Katie Toth, “NWT to close borders to all inbound travel by air, land and port – with limited exceptions,” *CBC News* (20 March 2020), online: [cbc.ca/news/canada/north/nwt-travel-ban-covid19-1.5505505](https://www.cbc.ca/news/canada/north/nwt-travel-ban-covid19-1.5505505)>.
- [16] Hannah Jackson and David Lao, “Coronavirus: Canada to ban sick travellers from domestic flights, intercity trains,” *Global News* (28 March 2020), online: globalnews.ca/news/6745733/trudeau-coronavirus-update-march-28/>.
- [17] RSC 1985, c 22 (4th Supp).
- [18] Collen Flood and Bryan Thomas, “In the face of COVID-19, we must understand Canada’s lockdown powers,” *The Globe and Mail* (16 March 2020), online: theglobeandmail.com/opinion/article-in-the-face-of-covid-19-we-must-understand-canadas-lockdown-powers/>.
- [19] Brian Hill, “Coronavirus: Could Canada impose strict travel bans? Experts say yes,” *Global News* (13 March 2020), online: globalnews.ca/news/6673743/coronavirus-travel-restrictions-canada/> [Hill]. Law Professor Martha Jackman believes that travel restrictions “absolutely raise mobility rights concerns.”
- [20] Joseph Arvey and David Wu, “As civil liberties erode, Canada must not allow COVID-19

outbreak to infect the rule of law,” *CBC News* (26 March 2020), online: <[cbc.ca/news/opinion/opinion-charter-rights-freedoms-covid-1.5508222?fbclid=IwAR2eADCfm_z9OFMIoSt9zBendyJa9W02i8DbqSMvKn7fyUcmAGVA5ybtQpw](https://www.cbc.ca/news/opinion/opinion-charter-rights-freedoms-covid-1.5508222?fbclid=IwAR2eADCfm_z9OFMIoSt9zBendyJa9W02i8DbqSMvKn7fyUcmAGVA5ybtQpw)>.

[21] Hill *supra* note 19.

[22] *Ibid.*

A Law to Stop Politicians From Lying

With an upcoming federal election, Canadians are preparing to decide who deserves their vote. A 2019 poll conducted for The Globe and Mail found that the biggest issue for voters is ethics in government. This concern is not uniquely Canadian either.

The Feds and a Conversion Therapy Ban: Mixed Messages and Constitutional Challenges

In 2019, the federal government has been inconsistent about a potential ban on conversion therapy even though the practice is harmful and professionally disregarded. This article will pose and attempt to answer a series of questions: What is the ‘therapy’

Jewish Holidays, Federal Elections, and Court Decisions! Oh My!

Chani Aryeh-Bain, Conservative Party candidate in the upcoming federal election in the Toronto riding of Eglinton-Lawrence, and Ira Walfish, political activist, both adhere to an Orthodox Jewish faith and strictly follow religious holidays. The date of the upcoming federal election,

The Military Exception: SCC affirms no right to a trial by jury for military members

Introduction The Supreme Court of Canada (“SCC”) ruled that members of the Canadian military charged with ordinary civilian crimes do not have the Charter right to a trial by jury if their charge is covered by section 130(1)(a) of the

A penny for your thoughts, if we like them: Freedom of Expression on Campus Part 1

The Progressive Conservative Government of Ontario has altered their provincial funding scheme for post-secondary institutions: 60% of funding is now tied to measurements that include the employment and pay rates of graduates. It appears the United Conservative Government of Alberta (“UCP”)

We like our speech deep dish: Freedom of Expression on Post- Secondary Campuses Part 2

Last summer the Progressive Conservative government of Ontario ordered all provincially funded post-secondary institutions to implement free speech policies similar to the Chicago Principles. Failure to do so could have ended in the withholding of funding. The United Conservative government of Alberta

Comparing Federal Government and Indigenous Perspectives on Self-Government Agreements

Introduction: Agreements for Self-Government Indigenous peoples have lived in what is now Canada for thousands of years, governing themselves and developing unique legal orders. The Canadian state, with its colonial roots, has been slow to recognize this reality. However, there

Solitary, Segregation or a

Structured Intervention Unit - An Unconstitutional Way to Do Time?

Introduction The Government of Canada has stated they are ending the practice of segregating inmates and leaving them in cells alone for extended periods of time. While Canada does not use the term solitary confinement, the term is used internationally