

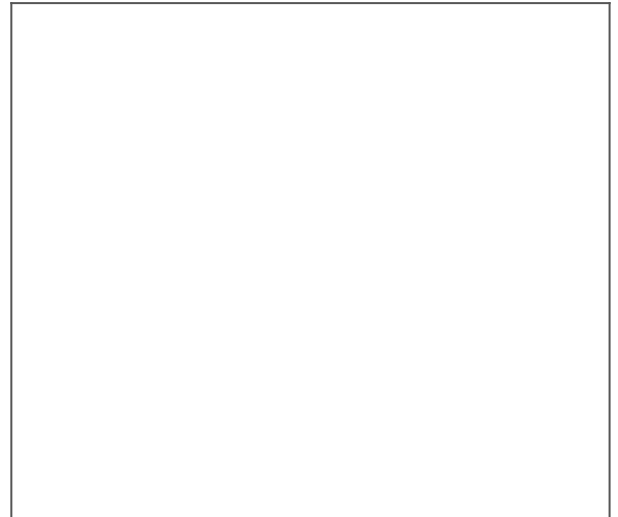
Will the Federal Government Declare a State of Emergency? (March 24)

Authors: Bradley Zander

published 03/24/2020

In response to the COVID-19 pandemic, all Canadian provinces, including Manitoba, have now declared public health emergencies. To date, the federal government has not yet followed suit. While this may surprise some readers given the increasingly rapid spread of COVID-19 throughout the country, there are at least two principal reasons described below why the federal cabinet has not yet declared a state of emergency as permitted by the *Emergencies Act*.

The *Emergencies Act* replaced the *War Measures Act* in 1988 and to date, the *Emergencies Act* has never been invoked. The last time the *War Measures Act* was invoked occurred in October 1970 during the October Crisis in the Province of Quebec by Prime Minister Pierre Elliott Trudeau.



Under what Circumstances will the Federal Government Declare a State of Emergency?

Under section 6(1) of the *Emergencies Act*, a federal public welfare emergency can be declared if, on reasonable grounds, the cabinet believes there exists an emergency that is caused by a real or imminent disease that results or may result in danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.

The first limitation on the federal government's ability to declare a nation-wide state of emergency is that the emergency must be of such proportions or nature as to exceed the capacity or authority of provincial governments to deal with it. Given the breadth of powers available to provincial governments under their own emergency legislation, such as, the authority to: acquire or use any real or personal property considered necessary to combat or alleviate the effects of an emergency; regulate the distribution and availability of essential

goods, services and resources; control, limit or prohibit travel to or from any area or on any road, street or highway; and order evacuations of buildings or areas, it may be unnecessary for the federal government to declare a national state of emergency unless unforeseen circumstances arise. In addition, prior to declaring a federal public welfare emergency, the federal cabinet is required to consult with provincial cabinets in affected provinces. The *Emergencies Act* does not provide specific details as to the scope of this duty to consult.

The second limitation is that the public health emergency must be of such severity that it cannot otherwise be effectively dealt with under any other laws of Canada, including but not limited to the *Quarantine Act* and the *Aeronautics Act*. To date, the minister of transport has already exercised his authority under the *Aeronautics Act* to deny boarding of travelers who display symptoms of COVID-19.

What Powers does the Federal Government have under the Emergencies Act?

While a federal public welfare emergency is in effect, the federal cabinet may make such orders or regulations with respect to the:

1. regulation or prohibition of travel to, from or within any specified area;
2. evacuation of persons from any specified area;
3. requisition, use or disposition of property, including private property;
4. regulation of the distribution and availability of essential goods, services and resources;
5. establishment of emergency shelters and hospitals; and
6. direction to any person, or any person of a class of persons, to provide essential services of a type that the person is competent to provide, such as medical services.

Failure to comply with any such orders may result in a fine of up to \$5,000 and for terms of imprisonment of up to five years, or both.

Legislative Oversight

Under the *Emergencies Act*, the House of Commons and Senate must be allowed to debate and vote on a state of emergency proclamation within 7 sitting days of an emergency declaration by the federal cabinet and if Parliament is adjourned, both houses must be called back into session within 7 days. If the state of emergency is not ratified by the House of Commons and Senate, the state of emergency is immediately revoked. In addition to the authority of Parliament to debate and ratify a federal state of emergency, a declaration by the federal cabinet is subject to judicial review by court challenge on the basis that the federal cabinet has not complied with the legislation as written or that certain actions taken by the Government of Canada under the *Emergencies Act* violate or are inconsistent with the

Constitution.

Summary

To date, none of Canada's provincial governments have publicly called on the federal government to declare a federal public welfare emergency. Rather, provincial governments are relying on their own efforts to limit the spread of COVID-19 within their borders, as provided for under provincial legislation. Assuming these efforts prove sufficient in slowing and reducing the spread of COVID-19, it is not lawful for the federal cabinet to declare a national public welfare emergency. In the event that it is ultimately deemed necessary to declare a federal public welfare emergency, Parliament will be called on to ratify the government's decision. However, once declared, the federal cabinet will have significant discretion to exercise far-reaching authority under the *Emergencies Act*.

DISCLAIMER: *This article is presented for informational purposes only. The content does not constitute legal advice or solicitation and does not create a solicitor client relationship. The views expressed are solely the authors' and should not be attributed to any other party, including Thompson Dorfman Sweatman LLP (TDS), its affiliate companies or its clients. The authors make no guarantees regarding the accuracy or adequacy of the information contained herein or linked to via this article. The authors are not able to provide free legal advice. If you are seeking advice on specific matters, please contact Keith LaBossiere, CEO & Managing Partner at kdl@tdslaw.com, or 204.934.2587. Please be aware that any unsolicited information sent to the author(s) cannot be considered to be solicitor-client privileged.*

While care is taken to ensure the accuracy for the purposes stated, before relying upon these articles, you should seek and be guided by legal advice based on your specific circumstances. We would be pleased to provide you with our assistance on any of the issues raised in these articles.