

EMERGENCIES ACT

Prepared by:
Peter Niemczak
Philip Rosen, Senior Analyst
Law and Government Division
10 October 2001

TABLE OF CONTENTS

BACKGROUND

SUMMARY OF THE *EMERGENCIES ACT*

A. Preamble

B. Public Welfare Emergency

C. Public Order Emergency

D. International Emergency

E. War Emergency

F. Declaration, Confirmation, Continuation, Amendment and Revocation of Emergencies

G. Compensation

H. Parliamentary Control of Orders and Regulations

COMMENTS

***EMERGENCIES ACT* (1)**

The *Emergencies Act*(2) sets out the procedures by which public welfare emergencies, public order emergencies, international emergencies and war emergencies are proclaimed, continued and revoked. It received Royal Assent on 21 July 1988.

BACKGROUND

Parliament adopted the *War Measures Act* in August 1914, shortly after the beginning of World War I. This legislation, based in part on the *British Defence of the Realm Act*, was adopted to protect national security and to prepare for the conditions of war. The Act, which is no longer in force:

- allowed the Governor in Council to proclaim the existence of war, invasion or insurrection, real or apprehended;
- provided that the issuance of such a proclamation was conclusive evidence that such a state of conditions was actually in existence; and
- permitted the Governor in Council to make whatever orders and regulations were necessary to maintain security, defence, peace, order and welfare in Canada.

The *War Measures Act* was amended in 1960 by the *Canadian Bill of Rights*. The 1960 amendment provided that anything done under the *War Measures Act* was to be deemed not to be an infringement, abrogation or abridgement of any right or freedom recognized in the *Canadian Bill of Rights*. It also provided for the laying of a *War Measures Act* proclamation before Parliament after its issue and for the consideration of its abrogation by both the Senate and the House of Commons.

Canada resorted to the *War Measures Act* during and after three periods of its history – World War I, World War II, and the October 1970 crisis. The Act was in force between 4 August 1914 and 10 January 1920, the date of the end of the war with Germany, as declared by Imperial Order-in-Council. The occasion of the Bolshevik Revolution in Russia in 1917 was the cause of the passage of a number of regulations and orders under which membership in certain organizations was proscribed and individuals were interned. The Act was next in force from 25 August 1939 until 1945, after which the *National Emergency Transitional Powers Act* was in force until 31 March 1947. In 1947, the *Constitution of Transitional Measures Act* was enacted, maintaining certain wartime orders and regulations, and stayed in place until 30 April 1951. Although the *War Measures Act* was not invoked during the Korean War, certain more limited powers were granted to Cabinet under the *Emergency Powers Act* between March 1951 and May 1954.

Finally, the *War Measures Act* was invoked in October 1970 to deal with the domestic FLQ-inspired crisis. It was replaced on 1 December 1970 by the *Public Order (Temporary Measures) Act*, containing many of the same measures adopted earlier under the *War Measures Act*, which expired on 30 April 1971.

In May 1981, the Governor in Council adopted an Emergency Planning Order which assigned responsibilities for planning to meet the exigencies of different types of emergencies to various Ministers, and departments and agencies of government.

The *Emergencies Act* and its companion legislative measure, Bill C-76, the *Emergency Preparedness Act*, were intended to create a new legal framework to deal with emergencies. The *War Measures Act*, criticized for the virtually unlimited powers it conferred on the government, was repealed by Bill C-77, as it would no longer be needed.

SUMMARY OF THE EMERGENCIES ACT

The *Emergencies Act* contains a preamble setting out the broad context within which it is to be applied and interpreted. The Act:

- provides a legislative scheme within which public welfare emergencies, public order emergencies, international emergencies and war emergencies are to be proclaimed, continued, revoked and subjected to parliamentary review;
- sets out a compensation scheme to be available to those who have suffered damages as a result of the Act's application;
- contains a number of consequential and related amendments to the *Energy Supplies Emergency Act, 1979*, the *National Defence Act*, and the *Radio Act*; and
- repealed the *War Measures Act*.

A. Preamble

The preamble to the Act:

- sets out the general obligations of government for the safety and security of individuals, the protection of the values of the body politic and the preservation of the sovereignty, security and territorial integrity of the state;
- states that there may be situations where the carrying out of these obligations may be threatened by a national emergency which may imperil the well-being of Canada as a whole or may be beyond the power and capacity of a province to address;
- sets out the general principle that the Governor in Council should be authorized to deal with such situations on a temporary basis, subject to the supervision of Parliament; and
- states that, in taking such temporary measures, the Governor in Council would be subject to the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights*, and must have regard to those rights in the *International Covenant on Civil and Political Rights*, of which Canada is a signatory and by which it is bound, that are not to be limited even in a time of national emergency. Although not set out in the Preamble, these rights are:
 - the right to life;
 - the protection against cruel, inhuman or degrading treatment or punishment;
 - the protection against slavery;
 - the protection against imprisonment for debt;
 - the protection against acts made retroactively into crimes;
 - the right of every individual to be recognized as a person under law;
 - the freedoms of thought, conscience and religion.

B. Public Welfare Emergency

If the Governor in Council believes, on reasonable grounds, that a public welfare emergency exists in Canada and necessitates the taking of special temporary measures, he or she can, after consulting the Lieutenant Governor in Council of the province or provinces where it is found, so declare by proclamation (ss. 6(1) and 14).

If the emergency exists in only one province, such a proclamation can only be issued if the provincial Lieutenant Governor in Council agrees that the emergency is beyond his/her capacity to address (s. 14(2)).

A public welfare emergency is defined as one that is caused by real or imminent:

- natural catastrophe;
- disease in humans, animals or plants;
- accident or pollution;

resulting in danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources so serious as to constitute a national emergency (s. 5).

A declaration of public welfare emergency would have to specify:

- the state of affairs constituting the emergency;
- the special temporary measures the Governor in Council anticipates to be necessary; and
- to which part or parts of Canada the emergency, if it is not a national one, extends (s. 6(2)).

While a declaration of public welfare emergency is in effect, the Governor in Council would be empowered to make orders and regulations concerning:

- 1) the regulation or prohibition of travel where necessary for the protection of the health or safety of individuals;
- 2) the evacuation of persons and the removal of personal property;
- 3) the requisition, use or disposition of personal property;
- 4) the furnishing of essential services and provision of reasonable compensation for such services;
- 5) the making of emergency payments;
- 6) the establishment of hospitals and emergency shelters;
- 7) the distribution of essential goods;
- 8) the assessment, repair and restoration of damages to works or undertakings;
- 9) the assessment and alleviation of environmental damage; and
- 10) the imposition on summary conviction of a fine not exceeding \$500 or imprisonment not exceeding six months or both, or on indictment, of a fine not exceeding \$5,000 or imprisonment not exceeding five years or both for contravention of any order or regulation (s. 8(1)).

C. Public Order Emergency

Where the Governor in Council believes that a public order emergency exists in Canada, he or she could, on reasonable grounds, after consultation with the Lieutenant Governor in Council of the province or provinces in question, issue a proclamation declaring this to be the case. If the public order emergency exists in only one province, such a declaration should issue only if the Lieutenant Governor in Council is in agreement (ss. 17(1) and 25). The declaration would have to contain:

- a statement of the circumstances;
- the special temporary measures the Governor in Council intends to apply; and
- the area of Canada to which the effects of the emergency, if it is not a national one, extends (s. 17(2)).

A public order emergency is defined as an emergency that arises from threats to the security of Canada (as defined in s. 2 of the *Canadian Security Intelligence Service Act*) that are so serious as to constitute a national emergency (s. 14).

The Governor in Council could by order or regulation:

- 1) regulate or prohibit public assembly that may reasonably be expected to lead to a breach of the peace, travel, or the use of property;
- 2) designate and secure protected places;

- 3) assume the control, restoration and maintenance of public utilities and services;
- 4) authorize or direct the provision of essential services and the provision of reasonable compensation therefor; and
- 5) impose on summary conviction a fine not exceeding \$500 or imprisonment not exceeding six months or both, or on indictment, a fine not exceeding \$5,000 or imprisonment not exceeding five years, or both, for any breach of an order or regulation (s. 19(1)).

D. International Emergency

The Governor in Council can declare that an international emergency exists if he or she believes on reasonable grounds that this is so, and had consulted each Lieutenant Governor in Council (ss. 28(1) and 35). An international emergency is defined as being one involving Canada and one or more other countries, arising from intimidation or coercion, the real or imminent use of force or violence, so serious as to be a national emergency (s. 27). A declaration of international emergency would have to describe the state of affairs constituting the international emergency and the special temporary measures contemplated by the Governor in Council (s. 28(2)).

Once a declaration of international emergency was issued, the Governor in Council might by order or regulation:

- 1) control or regulate specified industries or services;
- 2) appropriate, control, forfeit, use and dispose of property or services;
- 3) authorize the conduct of any inquiries in relation to defence contracts or supplies, or hoarding or black market practices;
- 4) authorize the entry and search of any place or vehicle, or the search of any person found therein for anything that may be evidence in an inquiry referred to in 3);
- 5) authorize or order the rendering of essential services and the provision of reasonable compensation;
- 6) designate and secure protected places;
- 7) regulate and prohibit travel outside of Canada and into Canada;
- 8) remove from Canada persons other than Canadian citizens, persons who are permanent residents as defined by the *Immigration Act*, and those persons who are determined to be Convention refugees who meet certain criteria;(3).
- 9) control or regulate international aspects of financial activities in Canada;
- 10) authorize expenditures in excess of limits established by Act of Parliament;
- 11) authorize specific Ministers to carry out specified duties; and
- 12) impose on summary conviction of a fine not exceeding \$500 or imprisonment not exceeding six months or both, or on indictment, a fine not exceeding \$5,000 or imprisonment not exceeding five years, or both, for breaches of orders and regulations (s. 30(1)).

E. War Emergency

If the Governor in Council believes, on reasonable grounds, that a war emergency exists, he or she can by proclamation so declare after consulting the Lieutenant Governor in Council of each province (ss. 38.1 and 44).

The Governor in Council has to indicate in the proclamation, to the extent possible without jeopardizing any temporary measures to be taken, the state of affairs that had led to the decision (s. 38(2)).

While a declaration of war emergency is in effect, the Governor in Council would be empowered to make whatever orders and regulations were reasonably necessary for dealing with the emergency. The Senate amended s. 40 by adding a provision stating that the orders and regulations made by the Governor in Council pursuant to s. 40(1) may not be exercised for the purposes of requiring persons to serve as members of the Canadian forces. The Governor in Council could make punishable by a fine of not more than \$5,000, imprisonment for five years, or both, any infraction of an order or regulation if tried on indictment, or by a fine not exceeding \$500 or imprisonment not exceeding six months or both, if tried as a summary conviction offence (s. 40).

F. Declaration, Confirmation, Continuation, Amendment and Revocation of Emergencies

An emergency declaration by the Governor in Council would be effective on the day it was issued and, unless earlier revoked or continued, expire at the end of 90 days thereafter (s. 7) for public welfare emergencies, 30 days (s. 18) for public order emergencies, 60 days (s. 29) for international emergencies, or 120 days (s. 39) for war emergencies. A motion for confirmation of an emergency would have to be tabled in Parliament within seven sitting days of its issuance by the Governor in Council. The motion would have to be tabled in each House of Parliament, and contain the reasons for the proclamation and an account of any consultations, if required, with Lieutenant Governors in Council. If, once such a motion is taken up and debated, it is negated by either House of Parliament, the proclamation would be deemed to be revoked on that day (s. 58).

If 10 or more members of the Senate, or 20 or more members of the House of Commons sign a motion for the revocation of a declaration of emergency, that motion would have to be taken up and debated within six days of its being filed. If such a motion for revocation is debated and concurred in by both Houses of Parliament, the declaration of an emergency would be deemed to be revoked on the day of the vote of concurrence (s. 59). If the Governor in Council is satisfied that the conditions giving rise to an emergency had passed, a declaration of emergency would be revoked by order-in-council (ss. 11, 22, 33 and 42).

A proclamation of amendment or continuation for a period of time equal to the last proclamation of a declaration of emergency by the Governor in Council is to be laid before each House of Parliament within seven days of its issuance. If a motion for confirmation of such a proclamation is negated by either House, it would be deemed to have been revoked on that day (s. 60). There is no provision for the amendment of declarations of international emergency or war emergency.

G. Compensation

Under the *Emergencies Act*, no action in damages would lie against the Minister or any servant or agent of the Crown, including any person providing services as required by regulation, for any act during the existence of an emergency (s. 47). Instead, the Minister is required to award reasonable compensation to any person who has suffered injury or damages as a result of the Act's application provided that person has signed a release. In this case, the Crown would be subrogated to the rights of the person compensated (s. 48(1), (2) and (3)). Under the Act, a person not satisfied with the Minister's decision on compensation could appeal such a decision by the Minister to an Assessor appointed from among the judges of the Federal Court of Canada by the Governor in Council (ss. 50 and 51).

On hearing the appeal, the Assessor would be able to:

- confirm the Minister's decision;
- without exceeding the maximum amount of compensation established by regulation, vary the Minister's decision; or

- refer the matter back to the Minister for such further action as the Assessor might direct, including payment of compensation exceeding the specified maximum (s. 52).(4).

The Governor in Council is empowered to make regulations to:

- 1) prescribe the manner in which compensation is to be sought;
- 2) prescribe the period within which an application for compensation is to be made;
- 3) prescribe the criteria by which eligibility for compensation is to be determined;
- 4) prescribe the maximum amount of compensation that is to be awarded;
- 5) prescribe the manner in which compensation is to be paid;
- 6) exclude a class of persons or injury from compensation; and
- 7) prescribe the type of notice to be given to those claiming benefit for compensation (s. 49).

H. Parliamentary Control of Orders and Regulations

All orders and regulations made under the Act would have to be laid before each House within two sitting days of being made (s. 61(1)). If the Governor in Council believes any such orders or regulations would be exempt from publication in the *Canada Gazette* under the *Statutory Instruments Act*, they would have to be referred to the Parliamentary Review Committee within two days of being made (s. 61(2)). The Parliamentary Review Committee (which may be joint or established by either House of Parliament) would consider, in private, the orders and regulations referred to it under s. 61(1). If within 30 days of an order or regulation being referred to the Committee, a motion amending or revoking that statutory instrument is adopted, such order or regulation would be deemed to be amended or revoked on the day specified in the motion (not to be earlier than the date adopted) (s. 62). The Senate amended then clause 62 to require the Parliamentary Review Committee to be composed of one member from each of the recognized parties in the House of Commons and at least one senator from each party in the Senate that is represented on the committee by a member of the House of Commons.

If not less than 10 members of the Senate or 20 members of the House of Commons move that an order or regulation brought before Parliament be revoked, such a motion must be taken up and debated. If both Houses of Parliament concur in such a motion, the order or regulation would be deemed revoked on the day specified in the motion, not to be earlier than the day of the vote of concurrence (s. 61(3)-(8)).

COMMENTS

Almost since its adoption by Parliament in 1914, the *War Measures Act* was the subject of controversy. For many years, it was promised that the *War Measures Act* – which dealt only with emergencies in time of war, invasion or insurrection, real or apprehended – would be repealed and replaced. The Act was criticized for granting too much power to the government invoking it while providing minimal parliamentary control, excluding judicial review, and establishing an inadequate compensation scheme. The *Emergencies Act* attempts to overcome these shortcomings of the *War Measures Act* by:

- establishing procedures for parliamentary oversight;
- enacting a Preamble incorporating the *Charter of Rights*, the *Canadian Bill of Rights* and the *International Covenant on Civil and Political Rights*; and
- providing procedures for compensation.

Some argue that the inclusion of preambular references to the *Charter of Rights* and the *Bill of Rights* ensures that any resort to the *Emergencies Act* by a government will be reviewable by the courts. Others argue that

judicial review of the Act's invocation would be strengthened by having the references to these two human rights documents within one of the substantive provisions of the Act itself, as is done in the *Access to Information Act* and the *Young Offenders Act*. Preambular statements are merely guideposts to the purpose of the Act, while inclusion of purposive statements in the Act itself would have binding effects on court interpretations.

The First Reading version of the Act defined "national emergency" by a preambular reference to "an urgent and critical situation of a temporary nature that imperils the well-being of Canada." This was said to constitute a definition of the term "emergency" that is applicable to all four types of emergency dealt with in this Act. In response to criticisms of this positioning of the definition and for purposes of clarity, the Minister proposed that the term be defined in section 3 of the Bill. The Legislative Committee accepted this amendment.

In response to criticism, some of the broad regulation-making power granted to the Governor in Council was limited by amendments to the Act. Search and seizure powers would apply only to inquiries in relation to black market practices (s. 30(1)(c) and (d)). Public assemblies could now be controlled only if they might reasonably be expected to lead to a breach of the peace (s. 19(1)(a)). An amendment to the regulation-making power under s. 8 (public welfare emergencies) specifies that such regulations are not to be used to terminate strikes and lockouts. International emergency powers must not be used for the purpose of censorship (s. 30(2)(b)).

In the First Reading text, many powers were to be exercised on the basis of the opinion of the Governor in Council. These provisions now require that "on reasonable grounds, the Governor in Council believes that" a certain situation exists. The Minister suggested that this would permit testing by the courts.

Another series of amendments clarified provincial powers and required that federal action be exercised in concert with the provinces (ss. 6, 17, 28 and 38).

Other provisions that had been subject to criticism remain in the Act. In relation to the war emergency, there is no enumeration of the matters in relation to which regulations may be adopted by the Governor in Council. Those disagreeing with these criticisms pointed out the provision in the Bill for parliamentary oversight of such regulations and for the possibility of judicial review which would control them.

Critics of the definition of "public order emergency" say that its incorporation of s. 2 of the *Canadian Security Intelligence Service Act's* definition of "threats to the security of Canada" in the Act brings along with it the uncertainty in that definition in dealing with "foreign-influenced activities" and "subversion." Those opposed to this criticism say that the definition must be read in conjunction with the definition of emergency discussed above – thus the uncertainty may not be a problem in the context of this Act.

Some commentators on this Act have pointed out that one of its strengths is the provision for parliamentary control of its invocation. It is argued that this is much more extensive than that contained in the now-repealed *War Measures Act*. Others argue that this protection is illusory because a government that has a majority will almost always ensure that any declaration of emergency is carried forth for as long as it wants.

Some observers have viewed the compensation provisions as being more complete than those set out in the now-repealed *War Measures Act* in that they establish ground rules and a mechanism for the determination of awards. Others say that the compensation provisions are flawed in that they give extensive regulation-making powers to the Governor in Council.

(1) This paper is based on *Bill C-77: Emergencies Act (As amended in the House of Commons)*, a Legislative Summary (LS-16E) previously prepared by Philip Rosen, Parliamentary Research Branch, Library of Parliament, 1 December 1987, reviewed 31 May 1988.

(2) S.C. 1988, C. 29.

(3) This section was amended by An Act to amend the *Immigration Act*, S.C. 1992, c. 49, s. 125.

(4) Minor rewording of this section was included in the *Miscellaneous Statute Law Amendment Act, 1993*, S.C.1993, c. 34, s. 61.