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# Commissioned Paper: Governing Emergencies in an Interjurisdictional Context

Prepared by: Jocelyn Stacey

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# Governing Emergencies in an Interjurisdictional Context

Dr. Jocelyn Stacey, Associate Professor, University of British Columbia

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### I. Introduction

All levels of government in Canada have active roles in managing and governing emergencies. Thus, while the *Emergencies Act* has only recently been invoked for the first time, Canada—as a whole—has ample experience with the use of emergency management legislation in relation to extreme events. Legislation similar to the *Emergencies Act* exists in every province and territory, governing the use of emergency measures at the provincial/territorial and municipal level. Indigenous governments, too, implement emergency measures by exercising their inherent jurisdiction, treaty rights and delegated powers under the *Indian Act*.

In the last five years, there have been 15 provincial and territorial declarations of emergency with the associated use of emergency measures (8 COVID-19, 3 wildfires, 3 flooding and storms,

1 other – see Appendix 1). Thousands more states of emergency have been declared by Indigenous governments and local governments during this same timeframe.

This paper reviews the roles of different governments in governing emergencies and it describes the general structure of emergency management legislation. It examines the range of emergency measures that can be authorized by provincial and territorial legislation, with a particular focus on powers that are potentially relevant to the events of February 2022. Finally, the paper identifies mechanisms for support and coordination between federal and provincial/territorial government for assisting with emergency response.

This paper is descriptive not prescriptive: it describes emergency management legislation and its recent implementation; it does not take a position on when and whether the use of these legislative powers is justified.

This paper is also limited in scope. It focuses only on centralized emergency management legislation—enacted to cover a range of threats, hazards and extreme events—in order to understand how the federal *Emergencies Act* is one piece of a network of emergency management legislation across the country. It is important to note that many areas of law and many different kinds of legislation also govern emergencies in one way or another (e.g. insurance law or the *Quarantine Act*).

## II. Roles & Responsibilities of Governments

Under the *Constitution Act, 1867* legislative powers are divided between the Parliament of Canada and provincial legislatures. In turn, municipal governments (or local governments) exercise powers delegated to them through provincial legislation. Indigenous peoples in Canada exercise inherent jurisdiction according to their own laws and governance.<sup>1</sup> Governing emergencies in Canada is necessarily a multi-jurisdictional endeavour.

### A. Federal

Parliament has constitutional scope to regulate emergencies under its ‘Peace, Order and Good Government’ power in section 91 of the *Constitution Act*, which permits Parliament to enact temporary measures for responding to an emergency.<sup>2</sup> The courts have held that this scope of authority includes subject-matters that are not normally within federal jurisdiction (i.e. would otherwise be the exclusive jurisdiction of the provinces), but that any legislative act must be

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<sup>1</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295*, available online <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>.

<sup>2</sup> *Re: Anti-Inflation Act*, [1976] 2 SCR 373.

temporary. Powers exercised under the *War Measures Act* were upheld by the courts as constitutional under the Peace, Order and Good Government clause.<sup>3</sup>

At present, Canada relies on two primary statutes to govern emergency management: the *Emergencies Act* and the *Emergency Management Act*.<sup>4</sup>

The *Emergencies Act* is the legislation that is the focus of the Public Order Emergency Commission. The Act sets out the specific requirements for declaring a national emergency and for the use of exceptional emergency powers to address the emergency. This legislation is entirely focused on emergency response and, as such, lies dormant if and until a situation arises in which the federal government decides to activate it. The *Emergencies Act* was invoked for the first time since its 1988 enactment in response to the events in February 2022.

As we will see from the discussion below, the *Emergencies Act* is distinctive from provincial and territorial emergency management legislation because of the specificity of its requirements. First, the *Emergencies Act* defines emergency with relative precision: the Act sets out four categories of emergency (each with multiple components that must be met by a given situation) and, whichever category is relevant, it must also meet the definition of a national emergency (s. 3). Moreover, these definitional requirements are buttressed by a legal standard that the decision-maker must have “reasonable grounds” to believe these requirements are met (e.g. s 17). Second, once an emergency is declared, the *Emergencies Act* does not grant the executive open-ended access to emergency powers. Rather, the Act sets out specific categories of emergency measures that can be used specific to each category of emergency. Third, the *Emergencies Act* contemplates a measure of coordination with other jurisdictions, despite the urgent conditions under which the Act is intended to be invoked. The federal government is required to consult with affected provinces prior to declaring an emergency (e.g. s 25) and any emergency measures issued under the Act, must be implemented in a way that does not “unduly impair” provincial measures and with the view of achieving “concerted action” with the provinces (e.g. s 19(3)). Fourth, the *Emergencies Act* embeds mechanisms for accountability: the ability of Parliament to cancel a declaration of emergency (ss 58-59), a Parliamentary review committee (s.62) and an after-the-fact inquiry (s. 63). As we will see below, this level of oversight and these types of constraints on the use of emergency powers are distinctive in Canadian emergency management legislation.

The second centralized emergency management statute at the federal level is the *Emergency Management Act*, which establishes a program for emergency management. This Act sets out a suite of powers and responsibilities for preparing for emergencies, developing emergency plans and for coordinating across different government departments and levels of government. For

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<sup>3</sup> *Fort Frances Pulp and Paper Co. v Manitoba Free Press Co.*, [1923] 3 DLR 629, 1923 CanLII 429 (UKJCPC); *Reference to the Validity of Orders in Council in relation to Persons of Japanese Race*, [1946] SCR 248; *Reference re Wartime Leasehold Regulations*, [1950] SCR 124.

<sup>4</sup> *Emergencies Act*, RSC 1985, c 22 (4th Supp) and *Emergency Management Act*, SC 2007, c 15.

example, under the *Emergency Management Act*, the Minister of Public Safety is responsible for “monitoring potential, imminent and actual emergencies and advising other ministers accordingly” (s 3(1)(d)). It also requires each federal minister to “identify the risks that are within or related to his or her area of responsibility — including those related to critical infrastructure” and to prepare emergency plans, test, maintain and implement those plans, and conduct exercises and training in relation to those plans (s 6). Unlike the *Emergencies Act*, the powers under the *Emergency Management Act* do not need to be activated in special circumstances; rather, those are powers that should be exercised continually to ensure the federal government is learning about and mitigating hazards and preparing for potential emergencies.

While these are currently the two centralized emergency statutes at the federal level, it is important to keep in mind that Parliament has the option of passing separate legislation to deal with specific emergencies, and can do so by moving through the law-making process more quickly in these exceptional cases (see: Standing Orders of the House of Commons, 71; e.g. *COVID-19 Emergency Response Act*; *COVID-19 Emergency Response Act, No. 2*). The federal government’s additional emergency management responsibilities are closely linked to other spheres of federal authority, such as national security, international affairs, and quarantine.

The federal government plays a vital role in providing assistance to provincial and territorial emergency response and recovery. This is discussed in Part IV below.

## B. Provincial/Territorial

Most emergencies are local or regional events and fall primarily within the constitutional authority of the provinces under the constitutional clauses that allocate to the provinces authority over: property and civil rights (s. 92(13)), municipalities (s. 92(8)), generally matters of a local nature (s.92(16)), and management of forest resources (s. 92A) (relevant to wildfire emergencies). Each province and territory of Canada has a central emergency management statute.<sup>5</sup> All of these statutes are similar in purpose and structure. As discussed below, there is considerable experience with the use of provincial/territorial emergency management legislation in response to natural hazards and, now, the COVID-19 pandemic. The use of provincial emergency powers in Ontario and Nova Scotia in response to the convoy and blockades, however, is distinctive.

### i. Purpose and Basic Structure

Provincial and territorial emergency management legislation performs largely the same functions as the federal *Emergencies Act* and *Emergency Management Act* combined; that is: delegating roles and responsibilities for emergency management and setting out the conditions

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<sup>5</sup> See Appendix 2 for an overview of comparative features and the citations to each statute.

and process for declaring a state of emergency and issuing temporary emergency measures. Similarly, provincial and territorial legislation delegates powers to municipalities to manage local emergencies. While these statutes do not typically contain purpose provisions,<sup>6</sup> the purpose of the legislation is implied in the operative provisions: to enable rapid, coordinated government responses that minimize the impacts on people and property of a serious and urgent event. To this end, provincial and territorial emergency typically establishes a lead emergency management department and requires that the province/territory develop and maintain an emergency plan. While there are portions of these statutes that address prevention and mitigation of emergencies, and recovery from these events, this paper focuses on legislated roles and responsibilities specific to emergency response.

Specifically, this part examines how provincial and territorial legislation addresses the following questions:

- What is an emergency?
- Who decides to declare an emergency?
- What procedures must be followed to declare an emergency?
- What mechanisms are in place to hold emergency responses accountable?

These features are discussed in the section below and are summarized in the Comparative Features Table in Appendix 2.

## *ii. Comparative Legislative Features*

What is an emergency – Unlike the federal *Emergencies Act*, provincial and territorial legislation does not parse out specific categories of emergencies with distinct requirements and powers. In no case is there a distinct requirement for ‘public order’ situations under these statutes.

The standard legislative definition of ‘emergency’ is all-encompassing; for example, take the definition in the New Brunswick *Emergency Measures Act*:

*“emergency” means a present or imminent event in respect of which the Minister or municipality, as the case may be, believes prompt coordination of action or regulation of persons or property must be undertaken to protect property, the environment or the health, safety or welfare of the civil population. (section 1)*

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<sup>6</sup> The Quebec *Civil Protection Act*, is an exception. It states “The purpose of this Act is the protection of persons and property against disasters, through prevention measures, emergency response planning, response operations in actual or imminent disaster situations and recovery operations.” (s 1). Ontario has a specific purpose section to preface the use of emergency orders: “7.0.2 (1) The purpose of making orders under this section is to promote the public good by protecting the health, safety and welfare of the people of Ontario in times of declared emergencies in a manner that is subject to the *Canadian Charter of Rights and Freedoms*.”

Here we can see three features:

- a present or imminent event,
- that requires prompt coordination of action,
- to protect the safety and welfare of people and/or prevent or limit damage to property or the environment.

There are some variations on this standard formulation. Ontario and Nunavut have additional qualifying language that there must be the potential for “serious” harm to people or “substantial” damage to property, setting a high threshold for declaring an emergency under these Acts.<sup>7</sup> And Manitoba distinguishes between “routine emergencies” (emergencies that can be addressed by first responder agencies without additional resources, without evacuation orders and without needing a declaration of emergency) and “major emergencies” (emergencies that are not routine emergencies).<sup>8</sup>

Quebec and British Columbia have more specific definitions that depart from the standard formulation above by limiting emergencies to natural hazards and accidents.

*Quebec: “an event caused by a natural phenomenon, a technological failure or an accident, whether or not resulting from human intervention...” (section 2(1))*

*British Columbia: a circumstance that “is caused by accident, fire, explosion, technical failure or the forces of nature...” (section 1)*

Yukon defines a peacetime disaster and a war emergency. The definition for peacetime disaster is similar to the Quebec and BC definitions and it also explicitly excludes “enemy attack, sabotage or other hostile action.” Its definition for war emergency reads:

*Yukon: “‘war emergency’ means the state existing as a result of a proclamation issued by Her Majesty or under authority of the Governor in Council that war, invasion or insurrection, real or apprehended, exists.” (section 1)*

Quebec and BC would not have been able to declare states of emergency under their emergency management legislation in response to blockades or convoy events, since this type of situation is not covered by the definition. Yukon *may* have been able to use emergency powers under its legislation in response to a public order disruption, but only after the federal government acted to declare the situation an emergency due to a real or apprehended insurrection.

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<sup>7</sup> Ontario, Quebec, Nunavut.

<sup>8</sup> *The Emergency Measures Act*, CCSM c E80, s1.



Finally, some statutes also provide a definition of “disaster”,<sup>9</sup> defined as a situation in which major harm and/or damage has occurred or is occurring. Where an “emergency” is defined prospectively (in anticipation of a major event to mobilize a response), a “disaster” is what results from a major event where the emergency response failed to prevent or fully mitigate its harmful impacts.

Canadian history is replete with examples of provincial and territorial states of emergency in response to natural hazards such as wildfires, floods and storms. The COVID-19 pandemic also prompted many provinces and territories to declare emergencies under their legislation (Appendix 1). In principle, some major public order disturbances could meet the threshold requirements for declaring a provincial or territorial state of emergency in many jurisdictions, as noted above. However, this has not been the practice in Canada. Notable public order events (the Oka crisis and the October crisis) prompted provincial Attorneys General to call on the military’s aid to the civil power. But there are no examples that I am aware of (other than Ontario 2022), in which a province or territory has declared a state of emergency under post-War emergency management legislation in response to a public order disturbance. In other circumstances, anticipated protests and demonstrations have been pre-emptively regulated through specific by-laws or regulations (e.g. 2010 Winter Games By-Law No. 9962 (City of Vancouver, 2009)), responded to through separate, stand-alone emergency legislation (e.g. Bill 78, *An Act to enable students to receive instruction from the postsecondary institutions they attend* (Quebec National Assembly 2012)), or by invoking the riot provisions of the *Criminal Code* (e.g. Vancouver Stanley Cup riot 2011). This makes the exercise of powers under Ontario’s *Emergency Management and Civil Protection Act* and Nova Scotia’s *Emergency Management Act* unique.

Canada lacks significant judicial attention to the declaration of emergencies under emergency management legislation. While the question of what is an “emergency” or a “disaster” is the subject of lively and enduring debates in research and commentary<sup>10</sup>, declarations of emergency in Canada have rarely been the subject of legal challenge. In principle, the declaration of an emergency under emergency management legislation is subject to judicial review on ordinary constitutional and administrative law grounds. I am aware of only one successful challenge of the declaration of emergency.

This arose in the context of a successful nuisance claim in which the defendant governments sought to rely on the *Emergency Program Act* as a defence of lawful authority. In response to a sinkhole, the district declared a state of local emergency (with a seven-day sunset clause) and evacuated the neighbourhood, and the Minister then renewed that declaration of local

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<sup>9</sup> Alberta, Manitoba, New Brunswick, PEI, Quebec and Yukon (see in text discussion above).

<sup>10</sup> Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (Cambridge University Press, 2016); E.L. Quarantelli, ed, *What is a Disaster? Perspective on the question* (Routledge, 1998).

emergency on seven-day intervals for over three years. In this case, the Court held that, after three months of renewals, the renewals were no longer a reasonable exercise of power and ceased to be lawful. The Court interpreted the statute to have an implicit temporariness requirement and, in the absence of any steps by the governments to resolve the situation, could not be said to be a situation that required “prompt coordination of action” (*Rosewall v Sechelt (District of)*, 2022 BCSC 20, paras 22-42, 75-85). The case shows that, even in the face of open-ended emergency definitions, courts are (in some circumstances) willing to read in implicit limitations to the definition and will require the government to provide some justification for its use of emergency powers.

Judicial challenges to declarations of emergency in response to the COVID-19 pandemic were filed, but only one has thus far generated detailed judicial reasoning on the merits. In *Bricka v The Attorney General of Quebec*, 2022 QCCA 85, the Quebec Court of Appeal upheld the public health emergency declared under the Quebec *Public Health Act*.<sup>11</sup> The applicant argued that the Act required the National Assembly to approve renewals of the declared emergency beyond 30 days. The Court rejected this argument as not supported by the plain language of the statute (para 28). Another court case challenged Ontario’s use of the *Emergency Management and Civil Protection Act* in response to COVID; however, this was dismissed summarily because the claimant did not raise justiciable claims about the lawfulness of the declaration or associated orders (*Humphries v AG Ontario*, 2020 ONSC 4460). Another case appears to have been dropped when the claimants lost their motion to have cabinet documents released (*Mercer v Commissioner in Executive Council (The)*, 2021 YKSC 24). In both decisions, the Courts’ reasons suggest a deferential approach to declarations of emergency.

These cases help illustrate the difficulties with challenging in court the declaration of emergencies under this type of legislation. One difficulty is the open-ended definition of what constitutes an emergency and the fact that the decision-maker need only ‘believe’ (NB, NS, PEI) or ‘be satisfied’ (AB, BC, NWT, SK) that an emergency exists. Only in Quebec, Ontario and Nunavut do the statutes each require that the decision-maker be satisfied that *specific* statutory criteria are all met.<sup>12</sup> Older caselaw suggests that all the government would need to show, if challenged in court, is that the decision-maker held this belief or was satisfied.<sup>13</sup> (This differs from the federal *Emergencies Act* which requires a reasonable basis for the belief.) However, the current state of administrative law in Canada is intended to foster “a culture of

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<sup>11</sup> The provision of the *Public Health Act* at issue in this case is identical to the provision in the *Civil Protection Act*, which is the legislation that governs disasters.

<sup>12</sup> Note that in Nunavut these specific statutory requirements are threshold criteria for a territorial emergency but not a local emergency.

<sup>13</sup> For example, *David Suzuki Foundation et al v. The AG for BC*, 2004 BCSC 620 (CanLII) at paras 142-146. See also *Humphries*, *supra* para 19.

justification”<sup>14</sup> and it is possible this could lead the courts to require a more fulsome justification by the decision-maker about why the conditions of the statute were believed to have been met. In sum, with such broad enabling language, it can be hard (absent egregious circumstances) to articulate compelling grounds for judicial review.

A second hurdle to judicial review, as demonstrated in *Merger*, is that public interest immunity often protects Cabinet confidentiality. This means that the deliberations about whether to declare an emergency are not accessible to those seeking to challenge the decision as unlawful. This compounds the difficulty of articulating a basis for a legal challenge and supporting that claim through legal argument, because the claimant will not necessarily know the specific information available to decision-makers about conditions on the ground or their reasoning (whether well-founded or misguided) for declaring an emergency. Ontario’s declaration of emergency in February 2022 is illustrative of the amount of detail shared with the public in support of the decision (reproduced in the section on Ontario below). This declaration simply declares that the criteria in the Act have been met without offering reasons supporting this statement.

Who decides – Nearly every statute delegates the power to declare a provincial or territorial emergency to either the responsible Minister or Cabinet (Lieutenant Governor in Council). Ontario’s legislation empowers both Cabinet and the Premier to declare a provincial emergency (s 7.0.1).

Procedural Requirements – Generally speaking, provincial and territorial legislation contain basic procedural requirements such as public notice and sunset clauses. With the exception of Newfoundland & Labrador, all provincial/territorial declarations of emergency must be immediately communicated to those affected (with the same requirement for terminating a state of emergency). In nearly all jurisdictions, the declaration of emergency must contain some minimum content: namely, describing the emergency and stating the area which is affected (with the exception of Newfoundland & Labrador and Yukon).<sup>15</sup> Unlike the federal *Emergencies Act*, provincial/territorial legislation does not require the decision-maker to consult with other jurisdictions or affected communities prior to declaring an emergency.<sup>16</sup>

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<sup>14</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para 14; *Bricka*, *supra* para 46.

<sup>15</sup> The exceptions to this ‘minimum content’ requirement are Newfoundland & Labrador (section 12) and Yukon (section 6), which only require notice of the declaration.

<sup>16</sup> The Nova Scotia *Emergency Management Act*, under which the Minister holds the power to declare a state of emergency, states the Minister should consult “where practical” with members of Cabinet (s 12). The Ontario legislation allows the Premier to act unilaterally and

Since emergency measures are, by definition, temporary, emergency legislation generally contains sunset clauses for the automatic expiry of declarations and their associated emergency measures, unless renewed. The timeframe of the sunset period varies from 10 days (Quebec) to 90 days (Yukon, Alberta for pandemics), but is most commonly 14 days. Exceptionally, Newfoundland's legislation does not contain a sunset clause and the emergency declaration continues until terminated by the Lieutenant Governor in Council or by an Act of the legislature (section 12).

Accountability – Provincial and territorial legislation differs significantly from the *Emergencies Act* in the approach to oversight and accountability. Provincial and territorial legislatures do not place a significant oversight role. Only Ontario and Quebec statutes provide that the legislature can cancel a state of emergency (Ontario s. 7.0.9 and Quebec s. 92) and the Newfoundland & Labrador statute recognizes that a state of emergency can be terminated by an Act of the legislature (s. 12). The Alberta legislation provides that only the legislature (and not the executive branch) can renew a provincial state of emergency (section 18(4)). The Ontario and Quebec statutes allow the legislature to renew states of emergency for longer periods of time than executive renewals (s. 7.0.7(3) and s. 89, respectively).

The Ontario and Quebec statutes also require that the Premier (Ontario) or Minister (Quebec) provide a report to the legislature on the use of emergency powers (s. 7.0.10 and s 98, respectively).

Parliamentary review committees and commissions of inquiry – accountability mechanisms that feature in the federal *Emergencies Act* – are not legislative requirements of any provincial or territorial emergency management laws.

In a recent pandemic decision, the Quebec Court of Appeal emphasized the importance of legislative oversight stating:

“In our democratic tradition, it is not for the national assembly to exercise executive power, but it must nevertheless control its exercise. The decision to declare a state of emergency rests with the government and it is responsible to the national assembly. The latter ‘may disallow by a vote the declaration of a health emergency and any renewal’ (s. 122 *PSA*).” (*Bricka, supra* para 31, translated)

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then consult with and (potentially) have the declaration confirmed by Cabinet (section 7.0.1(2)). The honour of the Crown would require that governments consult with Aboriginal peoples whose aboriginal and treaty rights may be adversely affected by the declaration of emergency and exercise of emergency powers (*Haida Nation*).

Finally, the *Ontario Emergency Management and Civil Procedures Act* also requires that the Premier, Minister or delegate shall report to the public regularly during an emergency (s.7.0.6).

In sum, this overview of provincial and territorial legislation has shown that, on the whole, provincial and territorial legislation is much more permissive than the federal *Emergencies Act* when it comes to the declaration of an emergency. While BC, Quebec and possibly Yukon could not have accessed emergency measures under their existing legislation in response to the February 2022 events, all other provinces and territories had this option which would have opened the possibility of using a broad range of emergency powers without the same level of procedural protection or oversight we see in the federal *Emergencies Act*.

### C. Municipal

Provincial and territorial emergency management statutes set out responsibilities of the municipalities for local emergency management, as well as a number of procedures and constraints on the exercise of municipal emergency powers. This section provides some detail on the legislative framework for municipal emergency powers. In short: legislation sets out responsibilities and powers for municipalities that are similar to provinces/territories, but at a smaller scale and with strict oversight from the provincial/territorial government.

First, it's important to note that it is not just municipal governments who have jurisdiction over local emergency management. In some cases, provincial/territorial legislation also recognizes Métis settlement councils (Alberta), Inuit community councils (Newfoundland and Labrador), Indian bands where certain agreements are in place (Alberta, PEI), regional districts (BC, Newfoundland & Labrador), provincial parks (Manitoba) or other areas designated by the Minister.

Municipalities (or other specified local authorities) are responsible for local emergency management, which at a minimum typically requires establishing an emergency management 'group' or 'organization', appointing a lead or coordinator, and developing and maintaining an emergency plan. Often provincial/territorial legislation or regulations specify the required contents of a local emergency plan.

Provincial/territorial legislation provides for the declaration of a state of local emergency (SOLE) and a range of emergency powers that can be exercised by a local authority when it has declared a SOLE. In many instances the process, threshold for triggering a SOLE, and range of emergency powers are the same for local authorities as they are for the province (Alberta, BC, Manitoba, New Brunswick, Nova Scotia, PEI, Quebec and Saskatchewan). Relevant differences between provincial/territorial declarations and SOLEs in these provinces are: the requirement of local authorities to provide notice to the province and that the sunset period for SOLEs is shorter than for a provincial emergency (typically 7 days instead of 14).

In other jurisdictions, the legislation delegates a narrower scope of powers for municipalities than for the provincial/territorial government (Newfoundland & Labrador, Nunavut, Northwest Territories). And in Ontario and Yukon, the delegation of powers to the province/territory and to municipalities is framed in different ways, which complicates making a straightforward narrow vs broader diagnosis.<sup>17</sup>

Municipalities are often said to be ‘creatures of the province’ and, while this is widely critiqued as an oversimplification, it is reflected in the structure of provincial and territorial emergency management legislation.<sup>18</sup> Emergency management legislation is hierarchical and the province/territory wields considerable oversight and power in relation to municipalities. Generally speaking, the province/territory can: order changes to a local emergency plan, direct the municipality to carry out certain planning functions, require the municipality to activate its emergency plan, and cancel a SOLE at any time. In some jurisdictions, the province/territory must approve a renewal or extension of a SOLE.<sup>19</sup>

I did not conduct a survey of the use of SOLEs across Canada for this paper, due to time and space constraints. We do know that Ottawa declared a SOLE in response to the convoy (February 6, 2022). Ontario’s *Emergency Management and Civil Protection Act* provides:

4 (1) The head of council of a municipality may declare that an emergency exists in the municipality or in any part thereof and may take such action and make such orders as he or she considers necessary and are not contrary to law to implement the emergency plan of the municipality and to protect property and the health, safety and welfare of the inhabitants of the emergency area (section 4(1)).

While no specific emergency orders were issued under the SOLE, the city’s news release indicated that the SOLE facilitated government procurement (i.e. the ability to source needed supplies and services using atypical procedures and without issuing a competitive call for bids). It also played an important communicative role to convoy participants and to other levels of government. Ottawa’s state of emergency was in effect until February 24<sup>th</sup>.

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<sup>17</sup> In both instances, the legislation includes open-ended language that the municipality can make all orders necessary to implement their emergency plan (Ontario s 4, Yukon s 9(2)(c)).

<sup>18</sup> Warren Magnusson, “Are Municipalities Creatures of the Provinces?” (2005) 39:2 *Journal of Canadian Studies* 5; Dan Henstra, ed, *Multilevel governance and emergency management in Canadian municipalities* (McGill-Queen’s University Press, 2013); Alexandra Flynn, “Operative Subsidiarity and Municipal Authority: The Case of Toronto’s Ward Boundary Review” (2019) 56:2 *Osgoode Hall Law Journal* 271.

<sup>19</sup> BC s. 12(6), Manitoba s. 11(5), Nova Scotia s. 20, NWT s. 18, PEI s. 16, Saskatchewan s. 22.

#### D. Regional

In some jurisdictions, regional entities have specific roles and responsibilities assigned by provincial legislation. For instance, in Quebec, regional districts are required to have emergency plans with mandatory contents (s. 16) and they have considerable responsibility in overseeing the emergency management practices of local governments within their district (e.g. s. 59). In Newfoundland & Labrador, two or more local governments can join together to form a regional emergency management committee, develop a regional emergency management plan and, if needed, declare a regional emergency (s. 8). And in Alberta, the Act provides local governments the ability to delegate some or all of their emergency management powers to a regional services commission, under certain conditions (s. 11.3)

#### E. Indigenous

Indigenous peoples exercise laws and jurisdiction over emergencies as well. How this authority is exercised by Indigenous peoples and received by Canadian institutions is a complicated web of inherent, negotiated and delegated jurisdiction as a result of Canada's colonial history and present. Indigenous peoples developed laws, governance and practices for living in relation with the environment, including hazards such as wildfire and floods, long before the arrival of settler governments.<sup>20</sup> With colonization came disease, and therefore experience with governing during devastating epidemics.<sup>21</sup> These laws and practices flow from the inherent jurisdiction of Indigenous peoples to govern themselves—to freely determine their political status, their representative institutions and to pursue their own goals.<sup>22</sup> Despite the severe disruption to the transmission of knowledge through residential schools and other colonial practices, Indigenous communities continue to draw on this deep experience with emergencies to address current situations such as wildfires and the COVID-19 pandemic.<sup>23</sup> Thus, Indigenous responses to emergencies may look different from the responses of federal, provincial/territorial or local governments (e.g. alternative evacuation measures that seek to avoid replicating conditions associated with residential schools, or stronger travel or border

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<sup>20</sup> Royal Commission on Aboriginal Peoples (Ottawa: Government of Canada, 1996) ch 4; Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus Dubber and Tatjana Hörnle eds, *Oxford Handbook on Criminal Law* (Oxford University Press, 2014).

<sup>21</sup> Crystal Verhaeghe, Emma Feltes and Jocelyn Stacey, *Dada Nentsen Gha Yatastig/ T̄silhqot'in in the Time of COVID* (T̄silhqot'in National Government, 2021) at 7.

<sup>22</sup> UN Declaration on the Rights of Indigenous Peoples, *supra*.

<sup>23</sup> E.g. *Dada Nentsen Gha Yatastig, supra*; Kira M. Hoffman et al, "The right to burn: barriers and opportunities for Indigenous-led fire stewardship in Canada" (2022) 7:1 FACETS 464, online <<https://doi.org/10.1139/facets-2021-0062>>; Waikaremoana Waitoki and Andre McLachlan, "Indigenous Māori responses to COVID-19: He waka eke noa?" (2022) 57:5 *International Journal of Psychology* 567, online: <<https://doi.org/10.1002/ijop.12849>>.

controls). These differences are consistent with rights to self-determination and self-government, rights that are affirmed in federal legislation.<sup>24</sup>

In addition, specific roles and responsibilities over emergency management are often described in modern treaties and self-government agreements, arrangements negotiated between Indigenous peoples and Crown governments. In many instances, these agreements position Modern Treaty Nations/Self-Governing Nations as analogous to local governments. This means that Modern Treaty Nations/Self-Governing Nations have decision-making authority over their people and lands (to, for instance, declare a local emergency), but that provincial and federal law will override these decisions in the face of a conflict (e.g. Maa-Nulth Final Agreement (2011), s. 13.26.0; Sioux Valley Dakota Nation Governance Agreement (2013), ss 16.03; 46.05). Other agreements provide that where impacts of the emergency extend beyond treaty lands, then the provincial or territorial laws apply (e.g. *Yukon First Nations Self Government Act*, s 20). Under these modern treaties and self-governing agreements, Nations may enact and implement their own emergency management laws (e.g. Tsawwassen First Nation, *Emergency Management Act*, 2020).

Band Councils, created and imposed by the federal government under the federal *Indian Act*,<sup>25</sup> exercise powers delegated by the *Indian Act* over reserve lands and members. Parliament has not legislated on the specific matter of emergency management on reserves, leaving this matter to Band Councils to address through the exercise of delegated powers. The *Indian Act* delegates several powers that have particular salience to emergency management, e.g.:

- 81 (1)** The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,
- (a)** to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;
  - (b)** the regulation of traffic;
  - (c)** the observance of law and order ...

Indigenous Services Canada (ISC) encourages Band Councils to devise their own emergency plans, and provides resources to do so.<sup>26</sup> ISC does not provide emergency services support

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<sup>24</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

<sup>25</sup> *Indian Act*, RSC 1985, c I-5.

<sup>26</sup> Indigenous Services Canada, Roles and responsibilities during emergencies, online: <<https://www.sac-isc.gc.ca/eng/1309372584767/1535120244606>>.



directly, but rather has entered into bilateral agreements with the provinces to fund the provinces to provide emergency services on reserves.<sup>27</sup>

The Government of Canada recognizes that relationships with Indigenous peoples regarding emergency management are in a time of transition. On its website, ISC states:

“In recognition of Indigenous peoples’ right to self-determination, ISC is exploring opportunities to transition to new multilateral approaches where First Nations are included in emergency management as full and equal partners.”<sup>28</sup>

Moreover, new tripartite arrangements specific to emergency management are emerging to support Indigenous nations in exercising fulsome leadership in emergency management in their territories and with respect to their people.<sup>29</sup>

Crown relationships with Indigenous peoples underscore the fact that emergency management is already multi-jurisdictional and that roles and responsibilities between governments are being actively redefined.

### III. Scope & Use of Provincial/Territorial Emergency Measures

This part of the paper examines the scope of emergency measures that can be authorized by provincial and territorial legislation. It first provides a general overview of these powers. Then it turns to a closer examination of the scope of powers in Ontario, Nova Scotia and Alberta, and their actual or potential application to a major public order disruption.

#### A. Overview

It is useful to again contrast the features of provincial/territorial emergency management legislation to the federal *Emergencies Act*. Under the *Emergencies Act*, the federal government has discrete categories of emergency measures it can implement that are specific to each of the four categories of national emergency. For instance, the Act allows for orders that allow search and seizure of a person’s house or property in response to an international emergency but not a public welfare emergency (such as a flood).

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<sup>27</sup> Brittany Collier, *Emergency Management on First Nations Reserves*, Publication No. 2015-58-E, online:

<<https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2015-58-e.pdf>>.

<sup>28</sup> Indigenous Services Canada, Roles and responsibilities during emergencies, online: <<https://www.sac-isc.gc.ca/eng/1309372584767/1535120244606>>.

<sup>29</sup> E.g., Collaborative Emergency Management Agreement between the T̓silhqot’in Nation, Canada and British Columbia (2022), online: <[https://www.tsilhqotin.ca/wp-content/uploads/2022/07/2022\\_Collaborative\\_Emergency\\_Management\\_Agreement.pdf](https://www.tsilhqotin.ca/wp-content/uploads/2022/07/2022_Collaborative_Emergency_Management_Agreement.pdf)>.

Most provincial and territorial legislation takes the opposite approach: it authorizes the executive branch to *take all measures necessary* to address the emergency. Alberta, BC, Manitoba, Nova Scotia, Ontario, Newfoundland & Labrador, Nunavut, NWT, PEI, Quebec, Saskatchewan and Yukon all have open-ended language, such as the above, used to delegate emergency powers to the executive.

The order in council issued in British Columbia in response to the 2018 wildfires is illustrative of this broad approach:

IT IS HEREBY ORDERED pursuant to Section 9(1) of the Emergency Program Act (RSBC 1996, Ch.111) that a state of emergency exists in the Province of British Columbia due to the threat of interface fire affecting lives and property;

IT IS FURTHER ORDERED that the Ministry of Public Safety and Solicitor General, Emergency Management BC, the Fire Commissioner and their employees, servants and agents; the RCMP “E” Division, and “local authorities” within the Province of British Columbia as defined in the Emergency Program Act, their employees, servants and agents, are empowered pursuant to Section 10(1) of the Emergency Program Act, *to do all acts and implement all procedures that are considered necessary to prevent, respond to or alleviate the effects of the emergency.* (Ministerial Order No M326, Aug 15 2018; emphasis added)

The open-ended ‘basket clause’ language in provincial/territorial legislation needs to be interpreted in relation to the surrounding text of the statute (as we will see below, with Ontario there are interpretative arguments that it is not as open-ended as it seems). However, in most cases the legislative text is clear that the list of enumerated powers is only illustrative and not exclusive.

All provincial and territorial statutes explicitly delegate powers to:

- Control travel and movement across the jurisdiction,
- Coordinate the provision of essential goods and services.

Almost all provincial and territorial statutes explicitly delegate powers to:

- Implement the emergency plan (all but Yukon),
- Order evacuation (all but Yukon),
- Cause the demolition of structures, trees, crops, etc. (all but Yukon),
- Require qualified persons to provide aid (all but Yukon and Ontario),
  - Ontario’s legislation allows for authorizing “but not requiring” qualified persons to provide services (s 7.0.2(4)12)
- Acquire or use real or personal property (all but Quebec and Yukon),
  - Quebec’s legislation limits this to acquiring supplies for disaster victims (s 93(10))

- Enter into any building or property without a warrant (all but Nunavut, Ontario, and Yukon)
- Fix prices for essential supplies or services, or prohibit price gouging (all but Manitoba, PEI, and Quebec)

It is also common for emergency legislation to permit conscription (Alberta, New Brunswick, NFLD, Nova Scotia, Nunavut, NWT, PEI, and Saskatchewan).

The following sections look at the powers delegated by the legislation in Ontario, Nova Scotia and Alberta specifically in relation to the types of measures that were exercised in relation to the convoy and blockades. These measures included: the prohibition and restriction of travel, movement and gathering in specific areas for specific purposes; removal and detention of property (i.e. trucks); gathering information about participants in specified activities; stopping or slowing the financing and provisioning of specified activities; and securing the flow of essential goods and provision of essential services. We begin with the two jurisdictions that issued emergency measures in response to the convoy/blockades (Ontario and Nova Scotia) and then turn to Alberta's legislation. Finally, it is important to note the limits of provincial jurisdiction under the Canadian constitution: provinces cannot directly regulate banks nor movement across international borders, which are matters of federal jurisdiction, and they cannot regulate activities that are outside of their provincial boundaries (e.g. property in another province).

## B. Ontario

The Premier of Ontario declared a provincial state of emergency on February 11, 2022. Ontario was the only province to declare an emergency in response to the trucker convoy. I am not familiar with any other instance in which a province or territory has declared a state of emergency in response to a public order disturbance such as this. The entirety of the declaration reads:

WHEREAS the interference with transportation infrastructure, including essential trade corridors, and other critical infrastructure that is currently occurring in locations throughout the Province prevents the movement of people and the delivery of essential goods and services and constitutes a danger of major proportions that could result in serious harm to persons and substantial damage to property;

AND WHEREAS the criteria set out in subsection 7.0.1 (3) of the Act have been satisfied;

NOW THEREFORE, an emergency is hereby declared pursuant to section 7.0.1 of the Act in the whole of the Province of Ontario.<sup>30</sup>

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<sup>30</sup> *Declaration of Emergency*, O Reg 69/22.

This declaration was confirmed by the the Lieutenant Governor in Council (LGIC) on February 12<sup>th</sup>.<sup>31</sup> Also on February 12, the province issued the emergency order Ontario Regulation 71/22 (Critical Infrastructure and Highways),<sup>32</sup> which was amended on February 14. The provincial emergency ended on February 23 and the emergency order was revoked on April 15, 2022.

The Critical Infrastructure and Highways emergency regulation temporarily did four things:

1. Defined ‘critical infrastructure’ (a definition which included 400-highways, international and interprovincial border crossings and other types of infrastructure);
2. Prohibited individuals from impeding access to or impeding the ordinary use of *critical infrastructure* (including through the use of motor vehicles) and prohibited knowingly aiding individuals from doing so;
3. Prohibited individuals from impeding access to or impeding the ordinary use of *any highway, walkway or bridge* where it would:
  - (i) prevent delivery of essential services or goods,
  - (ii) seriously disrupt ordinary economic activity, or
  - (iii) cause serious interference with safety, health or well-being of members of the public;
4. Granted enforcement powers:
  - Police can order individuals to cease the impugned activity,
  - Police or the Registrar can order owners/operators to remove impugned vehicles,
  - If owner/operator does not remove vehicle when ordered, police can remove and detain vehicle,
  - Registrar can cancel or suspend the license, plate portion of a motor vehicle permit or the CVOR certificate.

The Critical Infrastructure and Highways regulation appears to fall within the scope of powers set out in Ontario’s *Emergency Management and Civil Protection Act*, specifically the power to regulate or prohibit travel in relation to a specified area. A number of additional powers appear relevant to collecting information and removing trucks from blockades. Below is the scope of powers provision of the Act, with relevant phrases bolded:

Scope of Measures, Ontario

7.0.2 (4) In accordance with subsection (2) and subject to the limitations in subsection (3), the Lieutenant Governor in Council may make orders in respect of the following:

1. Implementing any emergency plans formulated under section 3, 6, 8 or 8.1.
2. **Regulating or prohibiting travel or movement to, from or within any specified area.**

<sup>31</sup> *Confirmation of Declaration of Emergency*, O Reg 70/22.

<sup>32</sup> *Critical Infrastructure and Highways*, O Reg 71/22.

3. Evacuating individuals and animals and **removing personal property from any specified area** and making arrangements for the adequate care and protection of individuals and property.
4. Establishing facilities for the care, welfare, safety and shelter of individuals, including emergency shelters and hospitals.
5. Closing any place, whether public or private, including any business, office, school, hospital or other establishment or institution.
6. To prevent, respond to or alleviate the effects of the emergency, constructing works, restoring necessary facilities and appropriating, using, destroying, removing or disposing of property.
7. Collecting, transporting, storing, processing and disposing of any type of waste.
8. Authorizing facilities, including electrical generating facilities, to operate as is necessary to respond to or alleviate the effects of the emergency.
9. **Using any necessary goods, services and resources within any part of Ontario, distributing, and making available necessary goods, services and resources and establishing centres for their distribution.**
10. **Procuring necessary goods, services and resources.**
11. Fixing prices for necessary goods, services and resources and prohibiting charging unconscionable prices in respect of necessary goods, services and resources.
12. **Authorizing, but not requiring, any person, or any person of a class of persons, to render services of a type that that person, or a person of that class, is reasonably qualified to provide.**
13. **Subject to subsection (7), requiring that any person collect, use or disclose information that in the opinion of the Lieutenant Governor in Council may be necessary in order to prevent, respond to or alleviate the effects of the emergency.**
14. Consistent with the powers authorized in this subsection, **taking such other actions or implementing such other measures** as the Lieutenant Governor in Council considers necessary in order to prevent, respond to or alleviate the effects of the emergency.

When making orders under section 7.0.2(4), the LGIC must attend to further requirements of the Act. Orders must be made in accordance with the purpose provision—to promote the public good in a manner subject to the *Charter* (s. 7.0.2(1)); they must be measures that the LGIC reasonably believes will be effective and are a reasonable alternative to other measures (s. 7.0.2.(2)). And the implementation of emergency measures must be limited in their intrusiveness, and applied in areas of the province where necessary and only for as long as needed (s 7.0.2(3)).

In its report on the use of its emergency legislation, Ontario states that it addressed the financing of the convoy through alternate means (a Court order to freeze the distribution of donations), and that existing regulations under the *Highway Traffic Act* had not been sufficient to address the convoy and blockades.<sup>33</sup> The province further states that the Critical Infrastructure and Highways regulation “provided additional tools for law enforcement to address obstructions.”

No legal challenge was brought to the use of the provincial emergency powers. As bolded above, the legislation clearly empowers measures that regulate movement and travel, permits the removal of personal property from an affected area (e.g. trucks), using or procuring goods (e.g. tow trucks) and authorizing people to provide a service (e.g. operating tow trucks). In addition, enforcement measures such as allowing the cancellation of a driver’s license are rationally connected to the prohibitions under the emergency order and therefore seem to fit comfortably within clause 14.

There are two obvious limitations under the provincial statute to the events at hand: Ontario could not compel tow truck drivers to provide services in the emergency response, and Ontario’s reach only extends to its own provincial boundaries (i.e. it cannot cancel out of province licenses).

### C. Nova Scotia

While Nova Scotia did not declare that convoy and blockades constituted an emergency, it was the first province to exercise emergency powers in response to the convoy. At the time of the convoy, Nova Scotia still had in place a provincial state of emergency declared for the COVID-19 pandemic.

Under this existing state of emergency, on January 28, 2022 the province issued an emergency directive prohibiting protesters from blockading specific areas and prohibiting the financing, organizing aid and encouragement of blockades.

The province’s press release states:

“The Province today, January 28, issued a directive under the Emergency Management Act prohibiting protesters from blockading Highway 104 near the Nova Scotia-New Brunswick border.

The directive also applies to people who stop or gather alongside Highway 104, the Nova Scotia- New Brunswick border, or at the Cobequid Pass toll area in support of the 2022 Freedom Convoy, the Atlantic Hold the Line event, or others

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<sup>33</sup> Report on Ontario’s Declared Provincial Emergency from February 11, 2022 to February 23, 2022 (March 31, 2022), online: <<https://www.ontario.ca/page/report-ontarios-declared-provincial-emergency-february-11-2022-february-23-2022>>.

organized to interfere with traffic. Allowing people to gather in those areas would put themselves and others at risk.

Individuals and corporations could be fined for failing to comply with the directive. Individuals or other entities who finance, organize, aid or encourage blocking the highway could also be fined.”<sup>34</sup>

This prohibition was later extended to cover all roads in Nova Scotia when, on February 4<sup>th</sup>, the province issued a second emergency directive “prohibiting protesters from blockading or disrupting traffic on any road, street or highway in Nova Scotia.”<sup>35</sup>

The Nova Scotia *Emergency Management Act* takes an inclusive approach to authorizing emergency powers, meaning that the scope of measures listed are illustrative and further measures not specified under the Act can be issued. Key phrases are bolded in the box below:

Scope of Measures, Nova Scotia

Section 14 ...

the Minister may, during the state of emergency, in respect of the Province or an area thereof, ... **do everything necessary** for the protection of property and the health or safety of persons therein and, **without restricting the generality of the foregoing**, may

- (a) cause an emergency management plan or any part thereof to be implemented;
- (b) **acquire or utilize or cause the acquisition or utilization of personal property by confiscation or any means considered necessary;**
- (c) **authorize or require a qualified person to render aid of such type as that person may be qualified to provide;**
- (d) **control or prohibit travel to or from an area or on a road, street or highway;**
- (e) **provide for the maintenance and restoration of essential facilities, the distribution of essential supplies and the maintenance and co-ordination of emergency medical, social and other essential services;**
- (f) cause or order the evacuation of persons and the removal of livestock and personal property threatened by an emergency and make arrangements for the adequate care and protection thereof;

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<sup>34</sup> “Highway border blockades banned under new order” (28 January 2022), Emergency Management Office, online: <<https://novascotia.ca/news/release/?id=20220128011>>.

<sup>35</sup> “New order bans blockades of provincial highways, roads and streets” (4 February 2022), Emergency Management Office, online: <<https://novascotia.ca/news/release/?id=20220204008>>.

- (g) authorize the entry by a person into any building or upon land without warrant;
- (h) cause or order the demolition or removal of any thing where the demolition or removal is necessary or advisable for the purpose of reaching the scene of an emergency, of attempting to forestall its occurrence or of combating its progress;
- (i) order the assistance of persons needed to carry out the provisions mentioned in this Section;**
- (j) regulate the distribution and availability of essential goods, services and resources;
- (k) authorize and make emergency payments;
- (l) assess damage to any works, property or undertaking and the costs to repair, replace or restore the same;
- (m) assess damage to the environment and the costs and methods to eliminate or alleviate the damage.

The emergency directives prohibiting blockading or disrupting the flow of traffic anywhere in the province would seem to fall squarely within paragraphs (d) and (e) of the Act. Moreover, additional powers could have been accessed, if needed, to require tow truck driver assistance to clear vehicles.

This emergency directive was not challenged in court, leaving questions about its legality unanswered. In particular, the connection between the specific emergency measure introduced (prohibiting highway blockades/interference) and the original declaration of a state of emergency (the COVID-19 pandemic) is arguably tenuous. The two presumably have quite different purposes: the state of emergency is to slow the spread of disease and protect public health whereas the emergency measure was to prevent blockades that interfere with the flow of goods/services through major travel corridors. In addition, the Nova Scotia prohibition appears to be considerably broader than the one issued by the province of Ontario. Ontario's Critical Infrastructure and Highways regulation contained a specific definition of what it meant to unlawfully impede a highway (road, walkway, etc.) and explicitly excluded 'an impediment that is trivial, transient, or minor in nature' (s 3). Such specificity was not contained in the public announcement of the Nova Scotia emergency directive.

#### D. Alberta

The province of Alberta did not declare an emergency in relation to the blockades, though in principle such a major event could have met the legislative definition, allowing access to a wide range of emergency powers:

Definition of emergency: "emergency" means an event that requires prompt co-ordination of action or special regulation of persons or property to protect



the safety, health or welfare of people or to limit damage to property or the environment. (s 1(1)(f))

Premier Kenney stated that it was not necessary to declare a provincial emergency because it would not add to enforcement powers already available under the province's *Critical Infrastructure Defence Act*<sup>36</sup> (though, no charges were laid under this legislation).<sup>37</sup>

It does seem that additional powers would have been available under Alberta's *Emergency Management Act*, which takes an inclusive approach to authorizing the use of emergency powers. Specifically, emergency powers could have been used to obtain tow trucks or other equipment within the province to remove blockading vehicles and the Act clearly allows for the compulsion of delivering essential services (e.g. requiring tow truck drivers to clear trucks). And further enforcement powers, such as the cancellation of drivers' licenses of non-compliant individuals, could have also been authorized through this Act. Key phrases and paragraphs are bolded in the box below:

Scope of Measures, Alberta

**19(1)** On the making of the declaration and for the duration of the state of emergency, **the Minister may do all acts and take all necessary proceedings including** the following:

- (a) put into operation an emergency plan or program;
- (b) authorize or require a local authority to put into effect an emergency plan or program for the municipality;
- (c) **acquire or utilize** any real or personal property considered necessary to prevent, combat or alleviate the effects of an emergency or disaster;
- (d) **authorize or require or make an order to authorize or require any qualified person to render aid of a type the person is qualified to provide;**
- (e) **control or prohibit or make an order to control or prohibit travel to or from any area of Alberta;**
- (f) **provide for or make an order to provide for the restoration of essential facilities and the distribution of essential supplies and provide, maintain and co-ordinate or make an order to**

<sup>36</sup> Sarah Turnbull, "Alberta not following Ontario's lead with state of emergency over protest, blockade: Kenney" (11 Feb 2022) CTV News, online: <<https://www.ctvnews.ca/canada/alberta-not-following-ontario-s-lead-with-state-of-emergency-over-protest-blockade-kenney-1.5778391>>.

<sup>37</sup> Rob Breakenridge, "Coutts blockade proves the sham that is Alberta's infrastructure protection law" (15 Feb 2022), Calgary Herald, online: <<https://calgaryherald.com/opinion/columnists/breakenridge-coutts-blockade-proves-the-sham-that-is-albertas-infrastructure-protection-law>>.

**provide, maintain and co-ordinate emergency medical, welfare and other essential services in any part of Alberta;**

(g) order the evacuation of persons and the removal of livestock and personal property from any area of Alberta that is or may be affected by a disaster and make arrangements for the adequate care and protection of those persons or livestock and of the personal property;

(h) authorize the entry into any building or on any land, without warrant, by any person in the course of implementing an emergency plan or program;

(i) cause the demolition or removal of any trees, structures or crops if the demolition or removal is necessary or appropriate in order to reach the scene of a disaster, or to attempt to forestall its occurrence or to combat its progress;

(j) **procure** or fix prices or make an order to procure or fix prices for food, clothing, **fuel, equipment**, medical supplies, or other essential supplies **and the use of any property, services, resources or equipment within any part of Alberta for the duration of the state of emergency;**

(k) authorize the conscription or make an order for the conscription of persons needed to meet an emergency.

**(1.1) In addition to any other orders the Minister is authorized to make under this Act, the Minister may make any order necessary, in the Minister's opinion, to lessen the impact of the emergency.**

While an emergency was not declared and these powers were not used, it is useful to note another key difference between Alberta's *Emergency Management Act* and the *Critical Infrastructure Defence Act*: emergency measures are intended to be temporary in nature, whereas the prohibitions on movement and assembly in the *Critical Infrastructure Defence Act* are permanent prohibitions.

#### IV. Mechanisms for Inter-Jurisdictional Coordination

Federal, provincial and territorial emergency laws do not operate in separate siloes. Operationally, governments often work together to coordinate on emergency management. Legislation and other formalized arrangements often describe and authorize inter-jurisdictional coordination. Even the *Emergencies Act*, with its narrow temporal focus on immediate response, anticipates some degree of coordination between federal and provincial governments. As noted above, the Act requires the federal government to consult with provincial counterparts prior to declaring a national emergency (e.g. s 25). And it requires that emergency measures are implemented in a coordinated fashion with provincial measures (e.g. s

19). However, the *Emergencies Act* is not the orienting framework for interjurisdictional coordination. This is a primary role of the federal *Emergency Management Act*.<sup>38</sup> Within and beyond the federal *Emergency Management Act*, numerous mechanisms for interjurisdictional coordination exist in Canada. I provide an outline of these mechanisms in this section.

#### A. Background Assumptions About Coordination

In order to understand interjurisdictional coordination, it is important to note the scalar or “pyramidal” approach to emergency management in Canada.<sup>39</sup> The working assumption is that emergencies will be addressed by the most immediate authority – initially the individual or household (hence the recommendation for each household to have a 72-hour emergency kit)<sup>40</sup>—and then the local authority. Regional bodies, provinces, territories and the federal government will only step in once local capacity has been exceeded.<sup>41</sup> Indeed, researchers estimate that 80% of emergencies are handled solely at the local level.<sup>42</sup> An Auditor General of Canada’s report found that emergencies happen more frequently on reserves than elsewhere, in part due to poor socio-economic conditions, lack of capacity, and inadequate funding.<sup>43</sup> Local authorities and Indigenous governing bodies thus play a central role in emergency management: when the focus is on emergency response, they are first responders. When the focus widens to prevention, mitigation and disaster risk reduction, they still play a central role in building resilient communities.<sup>44</sup>

As Juillet and Koji note, this ‘scaling up’ approach to emergency management—whereby other governments step in only when local capacity is exceeded—requires excellent multi-level coordination (at 31-32). Unfortunately, effective coordination has long been a challenge identified in Canadian emergency management, even after significant legislative and policy

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<sup>38</sup> Canada, Parliament, *House of Commons Debates*, 39th Parl, X Sess, Vol 141, No 093 (7 December 2006) at 1719.

<sup>39</sup> Luc Juillet and Junichiro Koji, “Policy Change and Constitutional Order: Municipalities, Intergovernmental Relations, and the Recent Evolution of Canadian Emergency Management Policy” in Dan Henstra ed, *Multilevel governance and emergency management in Canadian municipalities* (McGill-Queen’s University Press, 2013) 25 at 31-2.

<sup>40</sup> *Your Emergency Preparedness Guide* (Ottawa: Public Safety Canada, 2012), online: <<https://www.getprepared.gc.ca/cnt/rsrscs/pblctns/yprprdnssgd/yprprdnssgd-eng.pdf>>.

<sup>41</sup> *An Emergency Management Framework for Canada*, 3d ed (Ottawa: Public Safety Canada, 2017), online <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2017-mrgnc-mngmnt-frmwrk/2017-mrgnc-mngmnt-frmwrk-en.pdf>> at 4.

<sup>42</sup> Juillet and Koji, *supra* at 31.

<sup>43</sup> Office of the Auditor General of Canada, Chapter 6 – Emergency Management on Reserves (Fall, 2013), online: <[https://publications.gc.ca/collections/collection\\_2013/bvg-oag/FA1-2013-2-6-eng.pdf](https://publications.gc.ca/collections/collection_2013/bvg-oag/FA1-2013-2-6-eng.pdf)>; Brittany Collier, *Emergency Management on First Nations Reserves*, Publication No. 2015-58-E.

<sup>44</sup> Juillet and Koji, *supra* at p 33-4.

reforms were undertaken post-9/11, including the enactment of Canada's *Emergency Management Act*.<sup>45</sup>

Much federal-provincial-territorial coordination work takes place through policy frameworks and working groups. Since 2007, Canada has relied on a policy document named, *An Emergency Management Framework for Canada* (last updated in 2017), with associated strategies and action plans.<sup>46</sup> These documents set out strategic priorities, such as building a public safety broadband network to facilitate effective communication amongst emergency responders across the country. Researchers point out that, while these policy frameworks have improved coordination across federal-provincial-territorial governments, coordination on the ground is in fact hampered by the absence of municipalities and Indigenous governing bodies in these arrangements.<sup>47</sup>

This scalar approach to emergency management is noticeably hierarchical, both in terms of responsibility but also in terms of control. This is especially true when it comes to municipal-provincial coordination. As we saw above, most provincial emergency management legislation gives the province significant control over local emergency management, including the ability to direct a local authority to declare an emergency and to cancel a local emergency and take over emergency response when an event exceeds the capacity of the local authority. These hierarchical arrangements are expanded further in instances where regional entities play a formalized role: local governments are overseen (and potentially directed by) regional entities, and the regional entities are overseen (and potentially directed by) the province.

Interestingly, the *Emergency Services Act* of Newfoundland & Labrador replicates this hierarchical arrangement with respect to provincial-federal relations. It has a unique legislated requirement to respond to a request by Canada. Section 13 of this statute reads:

13. Where the Governor in Council has declared an emergency under the Emergencies Act (Canada), the Lieutenant-Governor in Council shall, where requested by the Governor in Council, order that the provisions of this Act with

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<sup>45</sup> Juillet and Koji, *supra* at p 26; Standing Senate Committee on National Security and Defence, *National Emergencies: Canada's Fragile Front Lines* (March 2004), online: <<https://sencanada.ca/en/content/sen/committee/373/defe/rep/rep03vol1-e>>; Chief Maureen Chapman and George Abbott, *Addressing the New Normal: 21<sup>st</sup> Century Disaster Management in British Columbia* (2018), recommendations 18-28, online: <<https://www2.gov.bc.ca/assets/gov/public-safety-and-emergency-services/emergency-preparedness-response-recovery/embc/bc-flood-and-wildfire-review-addressing-the-new-normal-21st-century-disaster-management-in-bc-web.pdf>>.

<sup>46</sup> Emergency Management Strategy for Canada: Toward a Resilient 2030 (2019); Federal, Provincial, and Territorial Emergency Management Strategy Interim Action Plan 2021-22.

<sup>47</sup> Juillet and Koji, *supra*.

respect to emergency response be activated to the extent that is appropriate and practicable.

It is possible to imagine different—more horizontal arrangements—for emergency management, whereby emergencies trigger all governments to come to the table and work collaboratively in an emergency response. While these arrangements have been proposed and advocated for in the law reform process, the hierarchical and formal authority model baked into Canadian federalism is what continues to be reflected in legislative definitions of roles and responsibilities.<sup>48</sup>

#### B. Federal Aid

In practice, emergency managers see the federal government’s role as primarily financial.<sup>49</sup> The federal government frequently provides financial aid and resources (often military resources) to assist with emergency response and recovery. Sections 4 and 7 of the federal *Emergency Management Act* empower the federal Minister to provide assistance—financial and otherwise—if the province has requested it. Through Disaster Financial Assistance Arrangements (a program run by Public Safety Canada),<sup>50</sup> the federal government and the provinces/territories have a set formula for sharing the cost of disaster financial assistance.

Resources are also often provided through the Canadian Armed Forces under the “public service” provision of the *National Defence Act*.<sup>51</sup> The Canadian Forces have a standing disaster assistance program, Operation LENTUS, which deploys personnel and equipment when needed in disaster response.<sup>52</sup> There were seven deployments in 2021 to disasters across the country.

The *National Defence Act* also creates the ability for provincial attorneys general to call “service in aid of the civil power”. The Canadian Armed Forces must respond to such a request, which can be made by a province if a riot or disturbance of the peace exceeds their capacity to respond. The aid of the civil power was used by the province of Quebec during the FLQ crisis in 1970 and again during the Oka crisis in 1990, but to my knowledge has not been invoked since.

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<sup>48</sup> Juillet and Koji, *supra*.

<sup>49</sup> Malcolm Grieve and Lori Turnbull, “Emergency Planning in Nova Scotia” in Dan Henstra ed, *Multilevel governance and emergency management in Canadian municipalities* (McGill-Queen’s University Press, 2013) 62 at 66.

<sup>50</sup> Public Safety Canada, “Disaster Financial Assistance Arrangements (DFAA)”, online: <<https://www.publicsafety.gc.ca/cnt/mrgnc-mngmnt/rcvr-dsstrs/dsstr-fnncl-sstnc-rrngmnts/index-en.aspx>>.

<sup>51</sup> *National Defence Act*, RSC 1985, c N-5, s.273.6.

<sup>52</sup> Government of Canada, Operation LENTUS, online: <<https://www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/operation-lentus.html>>

### C. Agreements & Mutual Aid

In contrast to aid that is called in in the midst of emergency response, emergency management legislation also authorizes a proactive approach, enabling responsible ministers to enter into agreements with other jurisdictions for the purposes of emergency management. These agreements are often mutual aid agreements, which commit to reciprocal obligations in the event that one or the other jurisdiction experiences an emergency. They are formalized agreements for sharing equipment and supplies, providing personnel, information and other assistance. For instance, Canada's current agreement with the United States on emergency management was entered into in 2009 and includes arrangements for mutual aid (enabled by section 5, *Emergency Management Act*).

Most provincial and territorial legislation also enables municipalities to enter into mutual aid agreements with each other or with regional entities. Saskatchewan's *Emergency Planning Act* allows the Minister to designate "mutual aid areas", the purpose of which is described as:

(3) The purpose of establishing a mutual aid area is to pool the resources of local authorities, regional park authorities and the Crown in order to improve their emergency response capabilities with respect to regional parks, provincial parks designated pursuant to The Parks Act and municipalities located within the mutual aid area. (section 11)

Researchers have observed the historic and ongoing importance of mutual aid arrangements, which predate their formalized incorporation into emergency management.<sup>53</sup> Others have observed that intergovernmental collaboration is often the strongest between local governments and more developed than vertical collaboration between different levels of government.<sup>54</sup> Tripartite emergency management collaboration between the federal government, provincial governments and Indigenous governing bodies are also now emerging and are in their early stages of implementation.<sup>55</sup>

These interjurisdictional agreements thus go hand-in-hand with emergency plans, an essential feature of emergency management. Both require government officials to plan and prepare in advance for emergencies. This means that important details about interjurisdictional coordination are not found in the legislation or regulations, but are rather in the individualized and context-specific arrangements between governments.

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<sup>53</sup> Miriam Belblidia and Chenier Kliebert, "Mutual Aid: A Grassroots Model for Justice and Equity in Emergency Management" (2022) *Community, Environment and Disaster Risk Management*, 25, 11–30.

<sup>54</sup> Grieve and Turnbull, *supra* at 70-71.

<sup>55</sup> Collaborative Emergency Management Agreement, *supra*.

## Conclusion

This paper has provided an overview of the inter-jurisdictional landscape of emergency management in Canada. The federal *Emergencies Act* is an important piece of legislation and its use needs to be carefully scrutinized. But the *Emergencies Act* and its use cannot be understood in isolation. The federal role in emergency management is multi-faceted and declarations of emergency under the *Emergencies Act* are unique.

Through the above review of provincial and territorial emergency management legislation, we can see that the *Emergencies Act* is distinctive in how it delegates emergency powers to the executive in a much more constrained fashion than exists at the provincial and territorial level. Accordingly, if one is concerned about the exceptional powers enabled by the *Emergencies Act*, then one should be at least as concerned about exceptional powers enabled at the provincial/territorial level which are broader, have fewer formalized mechanisms for accountability and oversight and are exercised with greater regularity.

At the same time, it is important to recognize that governments interact in a variety of ways outside of ‘scalar’ declarations of emergency. Emergency plans and intergovernmental agreements *should* specify how governments will coordinate and support one another when faced with a range of foreseeable threats. Moreover, the federal government plays a unique supporting role – as articulated in its *Emergency Management Act* and *National Defence Act* – of providing resources upon request to the provinces and territories. This supporting role does not require the federal government to declare a state of emergency or exercise its emergency powers.

Emergency management in Canada is a decidedly interjurisdictional endeavour with effective and seamless coordination across governments remaining both an enduring goal and persistent challenge. This challenge is reiterated after every major emergency, emergencies which occur with regularity across Canada. Thus, lessons learned from the heightened scrutiny of the *Emergencies Act* should be carried forward to emergency management at all levels of government.

## Appendix 1: Provincial and Territorial States of Emergency 2017-2022

<b>Province/Territory</b>	<b>Declaration of Emergency</b>
British Columbia	Pacific Northwest Floods – November 2021 Wildfires – July 2021 COVID-19 – March 2020 Wildfires – July 2018 Wildfires – July 2017
Alberta	--
Saskatchewan	COVID-19 – March 2020
Manitoba	COVID-19 – March 2020 Snowstorm – October 2019
Ontario	Convoy & Blockades – February 2022 COVID-19 – March 2020
Quebec	--
New Brunswick	COVID-19 – March 2020
Nova Scotia	COVID-19 – March 2020 Hurricane Dorian – September 2019 (province declared a local emergency)
Prince Edward Island	--
Newfoundland & Labrador	--
Yukon	COVID-19 – March 2020
Northwest Territories	COVID-19 – March 2020
Nunavut	--



## Appendix 2. Comparative Features of Provincial and Territorial Emergency Powers\*

\*Adapted and updated from online supplement to Craig Forcese and Leah West, *National Security Law*, 2d ed (Irwin Law, 2020).

Province	Definition of emergency	Statutory Decision-Maker	Maximum Duration	Power of Renewal	Accountability/Oversight of emergency powers
Alberta <sup>56</sup>	“[A]n event that requires prompt co-ordination of action or special regulation of persons or property to protect the safety, health or welfare of people or to limit damage to property or the environment”	Lieutenant Governor in Council (LGiC)	28 days (90 days for a pandemic)	May be continued by legislative resolution	None specified
British Columbia <sup>57</sup>	“[A] present or imminent event or circumstance that (a) is caused by accident, fire, explosion, technical failure or the forces of nature, and (b) requires prompt coordination of action or special regulation of persons or property to protect the health, safety or welfare of a person or to limit damage to property”	LGiC or Minister	14 days	Renewal by LGiC for additional periods of up to 14 days	None specified
Manitoba <sup>58</sup>	The minister may declare a state of emergency “[i]n the event of a major emergency or disaster”. A major emergency is defined as “an emergency that is not a routine emergency”.  An emergency is “a present or imminent situation or condition that requires prompt action to prevent or limit (a) the loss of life, or (b) harm or	Minister	30 days	Renewal by LGiC for additional periods of up to 30 days	None specified

<sup>56</sup> *Emergency Management Act*, RSA 2000, c E-6.8.

<sup>57</sup> *Emergency Program Act*, RSBC 1996, c 111.

<sup>58</sup> *The Emergency Measures Act*, CCSM c E80.

	<p>damage to the safety, health or welfare of people, or (c) damage to property or the environment.”</p> <p>A disaster is “a calamity, however caused, which has resulted in or may result in (a) the loss of life, or (b) serious harm or damage to the safety, health or welfare of people, or (c) wide-spread damage to property or the environment”.</p>				
New Brunswick <sup>59</sup>	“[A] present or imminent event in respect of which the Minister or municipality, as the case may be, believes prompt coordination of action or regulation of persons or property must be undertaken to protect property, the environment or the health, safety or welfare of the civil population”	Minister	14 days	Renewal by the minister, with approval of the LGiC, for additional periods of 14 days	None specified
Newfoundland & Labrador <sup>60</sup>	“[A] real or anticipated event or an unforeseen combination of circumstances which necessitates the immediate action or prompt co-ordination of action as declared or renewed by the lieutenant governor in council, the minister, a regional emergency management committee or a council.”	LGiC	Until terminated	N/A	Minister must report to Cabinet on actions taken (while the emergency is ongoing)
Nova Scotia <sup>61</sup>	“[A] present or imminent event in respect of which the Minister or a municipality, as the case may be, believes prompt co-ordination of action or regulation of persons or property must be undertaken to protect property or the health, safety or welfare of people in the Province”	Minister	14 days	Renewal by the minister, with approval of the LGiC, for additional periods of 14 days	None specified

<sup>59</sup> *Emergency Measures Act*, RSNB 2011, c 147.

<sup>60</sup> *Emergency Services Act*, SNL 2008, c E-9.1.

<sup>61</sup> *Emergency Management Act*, SNS 1990, c 8

Nunavut <sup>62</sup>	“[A] present or imminent situation or event that is seriously affecting or could seriously affect the health, safety or welfare of persons or is substantially damaging or could substantially damage property”	Minister	14 days	Renewal by the minister for periods of up to 14 days	None specified
Northwest Territories <sup>63</sup>	“[A] current or imminent event that requires prompt coordination of action of special regulation of persons or property in order to protect the safety, health or welfare of people or to limit or prevent damage to property or the environment”	Minister	14 days	Renewal by the minister	None specified
Ontario <sup>64</sup>	“[A] situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise.”	LGiC or Premier (in urgent circumstance)	Declaration by the LGiC = in 14 days  Declaration by Premier = 72 hours to be confirmed by the LGiC	Renewal by the LGiC for one additional period of 14 days. On the Premier’s recommendation, the Legislature can extend the emergency by periods of up to 28 days.	Legislature can terminate a declaration of emergency at any time.  Premier must table a report in the Legislature within 120 days after the declaration of emergency has been terminated.
Prince Edward Island <sup>65</sup>	“[A] present or imminent event in respect of which the Minister or municipality believes prompt co-ordination of action or special regulation of persons or property must be undertaken to protect	Minister	14 days	Renewal by the minister, with approval of the LGiC	None specified

<sup>62</sup> *Emergency Measures Act*, SNU 2007, c.10.

<sup>63</sup> *Emergency Management Act*, SNWT 2018, c 17.

<sup>64</sup> *Emergency Management and Civil Protection Act*, RSO 1990, c E.9.

<sup>65</sup> *Emergency Measures Act*, RSEI 1988, c E-6.1.

	the health, safety or welfare of people or to limit damage to property”				
Quebec <sup>66</sup>	‘Major disaster’: “[A]n event caused by a natural phenomenon, a technological failure or an accident, whether or not resulting from human intervention, that causes serious harm to persons or substantial damage to property and requires unusual action on the part of the affected community, such as a flood, earthquake, ground movement, explosion, toxic emission or pandemic”	Government (where government cannot meet, minister may declare emergency for a maximum of 48 hours)	10 days	Renewal by the government for additional periods of up to 10 days, or with the consent of the legislature, for maximum periods of up to 30 days	National Assembly can terminate declaration at any time.  Provincial (‘national’) emergency: Minister must provide the National Assembly with a report within 3 months after the emergency has ended.
Saskatchewan <sup>67</sup>	“(i) a calamity caused by (A) accident; (B) act of war or insurrection; (C) terrorist activity as defined in the <i>Criminal Code</i> ; (D) forces of nature; or (ii) a present or imminent situation or condition, including a threat of terrorist activity as defined in the <i>Criminal Code</i> , that requires prompt action to prevent or limit: (A) the loss of life; (B) harm or damage to the safety, health or welfare of people; or (C) damage to property or the environment”	LGiC	14 days	May be renewed by the LGiC for additional periods of 14 days	None specified
Yukon <sup>68</sup>	An emergency is a “a peacetime disaster or a war emergency”.	Commissioner of Yukon in	90 days	Commissioner in Executive Council	None specified

<sup>66</sup> *Civil Protection Act*, CQLR c S-2.3.

<sup>67</sup> *The Emergency Planning Act*, SS 1989-90, c E-8.1.

<sup>68</sup> *Civil Emergency Measures Act*, RSY 2002, c 34.

	<p>A peacetime disaster is: “a disaster, real or apprehended, resulting from fire, explosion, flood, earthquake, landslide, weather, epidemic, shipping accident, mine accident, transportation accident, electrical power failure, nuclear accident or any other disaster not attributable to enemy attack, sabotage or other hostile action whereby injury or loss is or may be caused to persons or property in the Yukon”.</p> <p>A war emergency is “the state existing as a result of a proclamation issued by Her Majesty or under authority of the Governor in Council that war, invasion or insurrection, real or apprehended, exists”.</p>	Executive Council		may extend emergency (*does not say for how long)	
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