

It Can't Happen Here: Canada's Emergency Protest Orders

Dan Bromberg and Brandon V. Stracener | March 3, 2022

Last month Canadian [police dismantled trucker protests](#) that had [gridlocked the country's capital](#) and [blockaded key border crossings](#). Existing provincial laws [may have](#) provided authority to arrest the protesters, who were angry about vaccine mandates, and to [tow their trucks](#) for creating public nuisances. Yet Canadian Prime Minister Justin Trudeau proclaimed a national “public order” emergency for eight days, giving him broad power to end the protests. Trudeau used this emergency power to prohibit public assemblies, suspend insurance coverage for illegally parked trucks, freeze bank accounts, and require registration of crowdfunding platforms used to finance the protests. If similar protests came to California, declaring a Canada-style emergency and exercising similar powers is not an option for California Governor Gavin Newsom.

We may soon confront that issue: [copycat protests](#) about pandemic safety measures have been organized [in the United States](#). During the COVID-19 pandemic California's governor has exercised broad emergency powers, so reaching for those powers to subdue a freight convoy seems obvious. But unlike Canada's Emergencies Act, California's Emergency Services Act does not authorize the governor to declare an emergency based on economic or political threats. Nor should it. Although some aspects of Canada's Emergencies Act are worth considering, the “public order” emergency is not a good fit for California.

California's ESA only authorizes the governor to proclaim two kinds of emergencies: a “state of emergency” and a “state of war emergency.” Under Government Code section 8558, a “state of emergency” requires “conditions of disaster or of extreme peril to the safety of persons and property” beyond the capacity of local governments, and a “state of war emergency” requires an actual, imminent, or probable attack by an enemy of the United States. Neither would apply to a citizen trucker barricade.

That's because the primary ground for proclaiming a non-war state of emergency in California is some natural calamity: an earthquake, fire, flood, storm, drought, or plague of pestilence or insects. The ESA does recognize certain man-made emergencies: a “riot” or a “sudden and severe energy shortage.” Both have economic aspects, and both may also create dangers similar to the listed natural disasters. But riots or energy shortages create an emergency under the ESA only when they involve extreme peril to persons and property. Indeed, the ESA excludes “conditions resulting from a labor controversy” from its state of emergency definition, suggesting that passive blockades that merely impede commerce are not emergencies under the ESA. A nonviolent student sit-in, an occupation to hold a prayer vigil, or a big-rig roadblock that only caused some social and economic disruption probably will not satisfy the ESA's “extreme peril to the safety of persons and property” requirement.

Canada's Emergencies Act is much broader and more political: it was enacted in response to kidnappings by Quebec separatists and expressly applies to political threats. That act provides for public welfare, public order, international, and war emergencies. Prime Minister Trudeau declared a public order emergency, which “arises from threats to the security of Canada” serious enough to be a “national emergency” and includes situations threatening the country's

“sovereignty, security and territorial integrity.” Trudeau claimed that blockades of border crossings and other critical infrastructure constituted “threats to [Canada’s] economic security.” He also declared that the blockades (and threats to forcibly defend them) were being done through acts or threats of “serious violence against persons or property, including critical infrastructure” for political or ideological purposes. That brought the matter into the “threats to the security of Canada” category.

Granting California’s governor authority to exercise emergency power based on similar threats would be unwise because California’s ESA lacks many safety features of the Canadian statute. In Canada a public order emergency cannot be declared without consulting each affected province’s lieutenant governor. Canada’s Parliament must approve any emergency proclamation within a week, and the emergency expires after 30 days unless expressly continued. The prime minister must report on each proclaimed emergency, and Parliament must also issue a report after conducting its own review. These procedural checks help ensure that a public order emergency is a true threat to Canada’s security. By contrast, California’s ESA has just one emergency brake (the legislature can terminate an emergency) and lacks any initial confirmation requirement, automatic expiration date, or post-mortem reporting requirements. The upshot is that California’s ESA probably does not permit declaring an emergency if truckers barricade downtown Sacramento, and there are major political risks associated with pushing the ESA envelope to do so.

Nor does California need more expansive emergency powers to confront public order disruptions. As a California court recognized last year in *Newsom v. Superior Court* (2021) 63 Cal.App.5th 1099, once an emergency is proclaimed the governor can exercise the police power (the state’s primary lawmaking authority) to implement the ESA’s purposes. Despite occasional [local threats to secede](#), California has no analogue to the Quebec separatist movement. And California state and police agencies have long been authorized to break up unlawful public gatherings and keep the peace (see Penal Code sections 69, 171f, 182, 404, 406, 407, 409, 416, 420). This authority, combined with the ESA’s limited safeguards, counsels against adding a new “public order” emergency — and doing so might violate federal and state constitutional rights to assemble.

Besides, many of Canada’s safeguards would be impractical in California, which has 58 counties to Canada’s 10 provinces. Because natural disasters may affect many localities simultaneously, requiring approval from each affected locality is impractical. Similarly, California commonly endures multiple natural disasters each year, so a one-week approval period is unworkable. And because some disasters may last for months and produce harmful effects lasting for years, an automatic thirty-day limit on emergencies is also cumbersome.

Canada does have a few procedures California might consider adopting. A longer limit of three or six months for certain emergencies could work here, especially if the ESA permitted the governor to continue mitigation efforts after an emergency has ended. Formal reporting requirements are also worthwhile — although emergencies require swift, unilateral executive action, contemporaneous legislative oversight and public transparency are equally important. Balancing these concerns is necessary to ensure that emergency powers are part of the democratic process, not an exceptional risk to it.

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