

Federalism, Disaster Planning Standards, and Canadian Charter Rights

K. Fredin¹

Introduction

Canada has a problem with emergency management (EM) standards. Canadians utilize a federalist government structure that pushes responsibility for EM planning from the federal government to provinces and territories, who then pass responsibility to municipalities (or regional counties) – who typically have less resources to engage in effective EM than higher levels of government (Raikes & McBean, 2016). In this structure, there are no set standards for levels of risk and disaster protection across the nation. The overall effect of this is the lack of protective measures and planning in place to provide the people living, working or visiting Canada to be as safe as they could be.

For the purposes of this discussion, the definition of a disaster is any hazard that overwhelms a community's ability to respond, where the hazard has an immediate and negative effect on tangible (lives, property and the environment) and intangible (cultural practice, knowledge and psychological well-being) assets (Coppola, 2020; Mysiak et al., 2016). Public Safety Canada (2017) has numerous documents, including ‘An Emergency Framework for Canada: Third Edition,’ that suggests all levels of government and citizens of Canada are responsible to be prepared and help mitigate disasters. Pragmatically, however, not all people have the means, opportunity, or privilege to be prepared (Cox & Kim, 2018). Furthermore, is it the responsibility of private citizens and businesses to be prepared in case of a large-scale natural or human-made disaster for which they have little resources, training, and control compared to

¹ Mr. Fredin is a member of CJEM. This article was reviewed using a specialized review process to prevent conflict of interest.

governments? Federal, provincial and territorial (FPT) governments have the ability and responsibility, both morally and ethically, to institute more concrete disaster risk reduction (DRR) standards across the nation to ensure a higher level of safety for the people in Canada. DRR is described in line with the UN's Sendai Framework for Disaster Risk Reduction 2015–2030 (SFDRR) (2015), where disasters are mitigated through reducing existing and future risk by investing in effective policy, legislation and the recognition of areas of inequality/vulnerability in society that typically lead to an increase of negative disaster outcomes. There is a variety of ways standards could be adopted by FPT governments, such as intergovernmental agreements (IGAs) or coercive or 'strings attached' federal funding (Rolland, 2022). Regardless, to date no standards have been created or adopted. As Raikes and McBean (2016) note, all but one province and territory—Québec, have little or nothing in their EM legislation that attempts to reduce risk through planning and preventative measures. Most provincial/territorial legislation only state that municipalities will develop and practice a plan; there are no or few specific guidelines, rules or frameworks for what should or should not be in EM plans; only that one should exist. This paper proposes greater research into interpreting the Canadian Charter of Rights and Freedoms (CCRF or the Charter) (1982) sections on the rights to *life* and *security* for EM, where insufficient legislation may leave FPT governments open to liability unless specific DRR standards are created and upheld to protect Canadians' rights.

Methodology

This article begins with a short-targeted literature review. It was conducted to survey existing research into federalism and its intersections with emergency management both within and outside of Canada. Research evaluated various legal precedents and academic literature on the subject of creating national standards in federalist nations. The Wilfrid Laurier University Library, Google Scholar and general internet searches were used to collect relevant articles and

sources. Key search terms included: emergency management, disaster risk reduction, disaster, standards, international, federalism, coercive federalism, legislation, liability and Canadian Charter of Rights and Freedoms. These search prompts were used individually and in combination with one another to yield specific results as necessary.

Discussion

Why are Legislative Standards Important?

Legislative standards in EM are important as they outline ways in which FPT and ultimately municipal governments will achieve the goal of reducing their local risk to becoming more disaster-resilient. Llosa and Zodrow (2011) describe how specific and binding legislation is necessary to implement effective DRR strategies. Failure to legislate desired outcomes and relying on suggested goals leads to a lack of implementation due to governments' various budgetary and political goals. Raikes et al. (2021) describe a current underlying separation of economic, social and political policies that limit effective DRR strategies. Llosa and Zodrow's (2011) United Nations research also proposes how effective EM legislation leads to the protection of life, property and the environment. Further, set standards would allow more transparency into what the shared responsibility of EM in Canada truly means for governments, businesses and private citizens. This clarity is important as vague legislation leads to questions regarding who is responsible for different parts of DRR and preparedness. Stacy (2018) notes many government EM plans are not publicly accessible, which "raises questions about the efficacy of these plans in addition to deeper questions about their legal and democratic authority," (p. 868–869). They and the SFDRR (2015) further recommend legislative standards be applied from a vulnerable person's perspective in order to legislate a focus on protecting all people in our nation. In general, standardized DRR legislation could limit the occurrence of future problems. Numerous recent Canadian examples of problematic DRR strategies are

available. For instance, after the 2016 Fort McMurray wildfires and flooding in Alberta, Canada, residents living in known floodplains rebuilt in the same locations despite provincial recommendations (Bosomworth et al., 2017; Stacey, 2018). Moreover, after these events, no efforts were made to amend local or provincial building bylaws or codes to rebuild structures to be more resilient in the future.

Not only do most of the EM documents created by the federal government of Canada already suggest strengthening provincial legislation, so does the SFDRR (2015), of which Canada is a signatory nation. Raikes et al.'s (2021) study further shows the importance of governmental roles in pragmatic DRR legislation that addresses the needs and abilities of vulnerable peoples. Governments need to identify areas of need in EM to create stronger legislative backings that are formally tied to existing building, development, planning, occupational health and safety laws (Stacey, 2018). This would extend into the recovery phase of post-disaster rebuilding; potentially mandating the idea of building back better – which happens to be a current slogan of DRR. Legislating more in-depth DRR strategies is possible as the province of Québec already has a well thought out act that identifies strategies and suggests DRR occurs in EM planning (Civil Protection Act, 2001). While legislation cannot account for every eventuality, FPT governments may need to justify a lack of protective laws. This may become more apparent in legal arguments as they could be compared to other provinces/territories who have stronger DRR strategies – especially in cases where a loss of life is present.

Achieving National Standards

Emergency management professionals often need to work with administrators, politicians, businesses and other stakeholders in order to achieve the goals of reducing the risk of hazards becoming disasters. Rolland (2022) considers long-term care facility standards across Canada an analogous jurisdictional topic recently brought to light by the Covid-19 pandemic.

They posit two major routes for Canada, a federalist nation, to create nationwide standards: create an Inter-Governmental Agreement (IGA) or have the federal government engage in coercive funding where they essentially withhold funding to provinces unless the changes or spending habits they wish to see are made. Both of these strategies are routinely used to create national results, but the recent events of the Covid-19 pandemic have shed light on the differences between FPT governments' responses to a national and international health disaster (Rolland, 2022).

Intergovernmental Agreements (IGAs)

IGAs, which hold little legal responsibility, are mutually agreed upon ideas by FPT governments for the betterment of all Canadians (Rolland, 2022). As these are simply agreed upon standards, there is no obligation for governments to comply with the rules. Essentially, FPT governments would need to all agree to reach a set of universal legislative standards and then implement them. To date, FPT governments have adopted the federal Emergency Management Framework in good faith (Public Safety Canada, 2017). This non-binding framework document outlines how all levels of government will utilize a holistic and four pillar approach to EM that aligns with the SFDRR. The framework does not mandate any set of standards, nor have any been agreed upon by any FPT governments. Therein lies the issue with IGAs – they can be remarkable and create strong standards nationwide, but they can also be very contentious and slow to be adopted; especially with varying political views and priorities across the nation.

Coercive Federalism

An alternative to IGAs is a method Rolland (2022) describes as coercive federalism. Schnabel and Dardanelli (2022) describe coercive federalism in Canada as a conditional funding policy that tends to be beneficial for constituents across the nation, promoting healthcare,

educational standards or other policies. However, it is noted these federal strategies are not without controversy. Specifically, it was found coercive funding was viewed as an encroachment on provincial and territorial governments' autonomy. Based on this, it is unsurprising the federal government chooses to limit its use of strings attached funding to what it deems to be most important. Unfortunately, EM has not been seen as one of these priorities. It is also possible it has not been used as currently the federal government lauds the good working relationship it has with provinces and territories, who work in earnest together toward the goals of EM (Public Safety Canada, 2017). While this could change, currently this form of funding has yet to be used to enforce any real set of standards. Viewing this from the other perspective, it may be beneficial for the federal government to avoid potentially relationship damaging jurisdictional issues that could be created through coercive funding. For these reasons, this article suggests one final alternative to promote the creation of standards: proactive prevention of liability.

Motivation for Legislation: Responsibility, Liability and the Charter

Public Safety Canada (2017) describes the duty of emergency management and understanding risk as the responsibility of all Canadian governments, businesses and people. However, this article seeks to encourage further research and discourse into the inadequacies of EM legislation by viewing governments' role as an imperative based on the CCRF. The Charter states every person present in Canada holds the right to life, "...where the law or state action imposes death or an increased risk of death, either directly or indirectly" (Government of Canada, 2022, para. 12). Further, the Charter as interpreted by the Government of Canada (2022) suggests the "security of the person will be engaged where state action has the likely effect of seriously impairing a person's physical or mental health" (para. 19). These criteria could be affected by a governments' lack of preparedness for a disaster. The underlying factor is whether a government holds a legal duty of care to citizens in DRR planning. Governments hold a moral

and ethical duty to protect their people, but does this equate to a legal duty of care for DRR decisions that could be viewed as politically driven?

Many people do not have the means to protect themselves from disasters that could cause irreparable damage to their livelihoods, property or life. Numerous studies show people with lower income, the elderly, racialized people, people living with disability, and others who experience lesser levels of institutional privilege tend to prioritize basic life necessities over disaster preparedness (Cox & Kim, 2018). Notably, Stacey (2018) includes Canada's Indigenous communities in this group, who typically face a higher risk of disaster compared to similar Canadian communities. Bosomworth et al. (2017) note in their study interviewing emergency managers in Australia that individual communities are often left to fend for themselves in government recognized hazardous areas – such as susceptible lands which were approved for development – regardless if they have the means to do so or not. This phenomenon is not specific to Australia. This leaves a gap in our societal level of preparedness and understanding of risks. Further, it creates increased danger for people who are prepared. Responders whose resources are limited may ultimately need to risk their own safety to protect those who are ill-equipped to protect themselves. There is also the increased individual rebuilding and insurance costs associated with the lack of societal preparedness. Failing to account for and actively protect people while knowing their risk could be reduced is a governmental failure. Especially in situations where, as Stacey (2018) notes that governments are aware certain people are at a significantly higher risk in disasters than others.

Most FPT governments include provisions in their EM legislation that absolves any minister or appointed actor for the government from liability for their actions, except in cases where they appear to be acting in bad faith. Raikes and McBean (2016) suggest EM legislation falls into the realm of policy, which makes it immune from liability. However, based on

objective evidence from numerous sources including Public Safety Canada's (2022) Emergency Management Strategy for Canada: Toward a Resilient 2030, we know the risk of disasters can be significantly decreased or mitigated through active DRR efforts. In this situation, legal duty of care may provide an opening for a government, based on the 2021 Canadian Supreme Court decision, *Nelson v. Marchi*, to be held liable for a lack of actions taken in EM (Rankin & Williams, 2021). Essentially, if the risk of disasters is evident and the risk to the public increases when insufficient DRR legislation exists, governments could be held liable for their inaction and lack of legislation. Rankin and Williams (2021), suggest this interpretation of a municipal government's level of liability needs to meet certain criteria, most notably, the extent to which the decision (or in this case indecision or omission) is based on objective knowledge. It is clear that we know active DRR strategies reduce the risk of disasters, which inherently reduce the risk of negative outcomes for a person's life and personal security as set out by the CCRF (1982).

Recommendations

Canadian governments at all levels need to decide which DRR strategies they will employ. This article suggests governments could be held liable in certain situations where a lack of legislated EM strategies leads to negative outcomes. While the goal of this article is to offer discussion and a possible motivating factor to mitigate disaster risk, a short section on recommendations follows.

All levels of government in Canada should act together to proactively include legislative standards as a vital part of DRR policies. Ideally, this would include nationally agreed upon standards, especially as disasters do not typically see intra-national borders. The goal is to provide lower disaster risk for all Canadians. It is strongly recommended that legislative frameworks include minimum standards for EM while allowing a level of flexibility to account for the specific risks each jurisdiction is exposed to (Raikes et al., 2021). Provinces and

territories should work with the federal government to create these standards in good faith.

Creating a minimum level of protections will still allow each government to add areas of specific concern to their own legislation to account for specific areas in need of additional attention.

Legislation should be holistic and include an approach for future proofing. Modern frameworks or policies should include transparency and openness to allow for critical discourse and oversight (Stacey, 2018). Further, authorities could incorporate discretionary areas that could be expanded on through future technologies. In cases where full legislative overhaul is not feasible, stronger DRR legal frameworks should be incorporated into existing legislation where possible. Further, existing related laws such as climate change initiatives or building codes can be adapted and added upon with EM in mind (Llosa & Zodrow, 2011). This adds to the holistic nature of EM, where disasters can affect numerous areas of policy not typically dealt with by emergency management professionals.

Limitations and Conclusion

In a perfect world, all citizens of a nation would be prepared and would have participated in learning and exercising in DRR. Pragmatically however, significant evidence exists to show many people face challenges and barriers to engage in the learning and exercising activities required to be prepared. National legislative DRR standards can be used to promote transparency, understanding and safety for all people in Canada. As a nation we must ask ourselves: Are we really willing to sacrifice more people, property and the environment to hazards that could be effectively mitigated? Further, why are the same disasters occurring in the same areas over and over?

Federalist governments across the world have struggled to overcome jurisdictional issues and promote continuity for their citizens, regardless of their location within the nation. While IGAs may work for DRR standards, FPT governments would need to work together to promote

legislation – something that has yet to happen. In terms of coercive federalism, we do not have to look far to find multiple jurisdictional controversies in Canada, whether they be language rights in Québec or the more recent carbon tax in Alberta.

The idea of governments adapting legislation to avoid liability is not novel. Moreover, encouraging FPT governments to create a standard set of DRR legislation by risking liability through disasters is a hurdle that would likely need to be tested in court. Unfortunately, that means some disaster would need to occur for which enough people were motivated to launch a legal suit against a government. All of this could also be contingent on a province/territory's right to use the notwithstanding clause to deny adherence to any such nationally created standard. Hopefully this would not be the case as each individual province may see their own potential liability from the position presented above.

This article does not address the issue of funding that may be created by endorsing more strict standards. It is possible through current structures that additional financial burden would end up on small communities who may not always be in a position to absorb the increased costs. Further, there may be additional legal repercussions by engaging with the CCRF (1982) where legal precedent could be applied to other unintended areas of governance. It must be noted that this argument is written from the emergency management perspective and is not given by a legal professional. The purpose of the article is to promote critical thought into the various jurisdictional intersections of EM in practice, policy and legislation.

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