

MEMO / NOTE DE SERVICE



To / Destinataire	Mayor and Members of City Council	File/N° de fichier:
From / Expéditeur	David White City Solicitor	
Subject / Objet	Ongoing Demonstration	Date: February 7, 2022

A number of questions have arisen, and proposals have been made regarding potential legal avenues to address, in whole or in part, the ongoing demonstrations in the City of Ottawa. This memorandum, prepared by Legal Services, is intended to provide an overview of the legal authorities that have been reviewed and to offer details of the various Provincial or Federal statutory schemes and the legal implications of each.

At the outset, it should be noted that none of these legislative schemes provide, in themselves, a resolution to the demonstrations that the City and its residents have experienced. Rather, any one or more of them may be considered as part of an overall operational strategy to be deployed in concert with the law enforcement authorities who are responsible for preserving the peace and maintaining public order, in accordance with the *Police Services Act* and while respecting the constitutional protections enshrined in the *Charter of Rights and Freedoms*. To that end, staff in my office have been working with their colleagues at the Ottawa Police Service to ensure that we are prepared to move quickly to support law enforcement authorities' operational plans, in the most effective manner possible. However, the City's Legal Services Branch does not, and cannot, provide legal advice to the police on the exercise of their enforcement powers.

Furthermore, City Council has no legal authority to direct the police service and the Police Services Board may not direct the Chief in respect of specific operational decisions, pursuant to Subsection 31(4) of the *Police Services Act*.

As a result, the summary below seeks to address your questions and to more thoroughly explain what tools are within the authority of the City of Ottawa and what tools lie with other levels of government.

1. Declaration of a "riot" pursuant to Section 67 of the *Criminal Code of Canada*.

That section provides as follows:

67 A person who is

- (a) a justice, mayor or sheriff, or the lawful deputy of a mayor or sheriff,
- (b) a warden or deputy warden of a prison, or
- (c) the institutional head of a penitentiary, as those expressions are defined in subsection 2(1) of the Corrections and Conditional Release Act, or that person's deputy,

who receives notice that, at any place within the jurisdiction of the person, twelve or more persons are unlawfully and riotously assembled together shall go to that place and, after approaching as near as is safe, if the person is satisfied that a riot is in progress, shall command silence and thereupon make or cause to be made in a loud voice a proclamation in the following words or to the like effect:

Her Majesty the Queen charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business on the pain of being guilty of an offence for which, on conviction, they may be sentenced to imprisonment for life. GOD SAVE THE QUEEN.

This section is known colloquially as "reading the *Riot Act*". Provisions already exist under the *Criminal Code* for the related offences of unlawful assembly and for participating in a riot and may be invoked without the necessity of the above proclamation. As a result, the effect of section 67 would appear to be limited to potentially making available more serious sentences after a conviction, though sentencing is within the authority of the judiciary. There has been no indication from the Ottawa Police Service that making such a proclamation would expand their existing criminal law enforcement powers or be of any additional benefit to their ongoing operations.

2. Requisition for Aid in Support of Civil Authorities pursuant to the *National Defence Act (Canada)*

The Federal *National Defence Act* provides authority in the Attorney General of a Province to request the assistance of the Canadian Armed Forces in order to support the civil authorities (i.e., provincial police) response to a "riot or disturbance". The relevant sections are reproduced below. It must be noted that the requisition of the use of the Canadian Armed Forces is not within the authority of a municipal council.

277 Where a riot or disturbance occurs or is considered as likely to occur, the attorney general of the province in which the place where the riot or disturbance occurs or is considered as likely to occur is situated, on the initiative of the attorney general or on the receipt of notification from a judge of a superior, county or district court having jurisdiction in the place that the services of the Canadian Forces are required in aid of the civil power, may, by requisition in writing addressed to the Chief of the Defence Staff, require the Canadian Forces, or such part thereof as the Chief of the Defence Staff or such officer as the Chief of the Defence Staff may designate considers necessary, to be called out on service in aid of the civil power.

278 On receiving a requisition in writing made by an attorney general under section 277, the Chief of the Defence Staff, or such officer as the Chief of the Defence Staff may designate, shall, subject to such directions as the Minister considers appropriate in the circumstances and in consultation with that attorney general and the attorney general of any other province that may be affected, call out such part of the Canadian Forces as the Chief of the Defence Staff or that officer considers necessary for the purpose of suppressing or preventing any actual riot or disturbance or any riot or disturbance that is considered as likely to occur.

Where members of the Canadian Forces are assigned to provide support under this section, they are empowered to act as constables and are peace officers under the law and may be engaged

for purposes such as patrolling specified areas to protect persons and property or to keep peace and to guide traffic. It should be noted, however, that they remain under the authority of the Canadian Forces and are not considered to be in the service of the local police. The scope of any assistance remains within the discretion of the Chief of the Defence staff.

3. Invocation of the Federal *Emergencies Act*

This Federal Statute, enacted in 1988 as the successor to the *War Measures Act*, provides authority in the Governor in Council (i.e., Federal Cabinet) to declare a public order emergency following consultation with the Lieutenant Governor in Council of any Province affected by the emergency. It should be noted that a public order emergency cannot be declared where the effects of the emergency are confined to one province, "unless the lieutenant governor in council of the province has indicated to the Governor in Council that the emergency exceeds the capacity or authority of the province to deal with it." (s.25(3)). The relevant portions are excerpted below:

19 (1) While a declaration of a public order emergency is in effect, the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency:

- (a)** the regulation or prohibition of
 - (i)** any public assembly that may reasonably be expected to lead to a breach of the peace,
 - (ii)** travel to, from or within any specified area, or
 - (iii)** the use of specified property;
- (b)** the designation and securing of protected places;
- (c)** the assumption of the control, and the restoration and maintenance, of public utilities and services;
- (d)** the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered; and
- (e)** the imposition
 - (i)** on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or
 - (ii)** on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment,for contravention of any order or regulation made under this section.

As can be seen in the following section, the powers available to the Governor in Council largely parallel those that can be exercised by the Lieutenant Governor in Council in the case of an emergency declared by the Provincial Premier.

4. Declaration of an emergency under the *Emergency Management and Civil Protection Act (EMCPA)*

Section 4 of the *EMCPA* provides that the Head of Council 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.*" The municipal emergency plan was adopted pursuant to By-law 2018-98, as required by section 3 of the *EMCPA*. It must be noted that this provision does not give to the City any extraordinary powers, such as the imposition of a curfew or the creation of offences. The Ontario Provincial Emergency Operations Centre had confirmed this in 2020 in relation to municipal declarations as follows:

What an Emergency Declaration Does Not Provide

An emergency declaration does not provide a head of council, nor anyone else in a municipality, with any extraordinary authorities that are not otherwise provided for in law. For example, a head of council will not have the authority to order a private business or service to cease operations or to close by virtue of having declared an emergency.

The declaration of an emergency also does not provide access to any funding programs to assist with the extraordinary costs of an emergency. Questions regarding municipal funding should be directed to your local municipal services office.

<https://www.ontario.ca/page/find-your-municipal-services-office>

* * *

What kind of orders can municipalities make?

Municipalities can make orders that fall within the scope of their authority as provided for in the Municipal Act or the City of Toronto Act. The Emergency Management and Civil Protection Act (EMCPA) does not permit any additional orders for municipalities.

The limited authority provided to municipalities can be contrasted with Subsection 7.0.1(1) of the *EMCPA*, which allows the Lieutenant Governor in Council (i.e. Provincial Cabinet) or the Premier to, by order, "declare that an emergency exists throughout Ontario or in any part of Ontario." Such an order may be issued where the following criteria have been met:

(3) An order declaring that an emergency exists throughout Ontario or any part of it may be made under this section if, in the opinion of the Lieutenant Governor in Council or the Premier, as the case may be, the following criteria are satisfied:

1. There is an emergency that requires immediate action to prevent, reduce or mitigate a danger of major proportions that could result in serious harm to persons or substantial damage to property.
2. One of the following circumstances exists:
 - i. The resources normally available to a ministry of the Government of Ontario or an agency, board or commission or other branch of the government, including existing legislation, cannot be relied upon without the risk of serious delay.

- ii. The resources referred to in subparagraph i may be insufficiently effective to address the emergency.
- iii. It is not possible, without the risk of serious delay, to ascertain whether the resources referred to in subparagraph i can be relied upon.

A "Provincial" declaration of emergency provides broad authority, subject to certain limitations set out in the *EMCPA*, for the Lieutenant Governor in Council to 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.
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.

The Provincial authority to declare an emergency was most recently invoked in response to the COVID-19 pandemic and formed the basis of the various public health orders issued in an effort to limit transmission of the disease.

As of now, policing authorities have not advised us of any gap in their existing enforcement powers that might be addressed by the use of orders available pursuant to a Provincial emergency declaration. The exercise of the authority available to the Province under the *EMCPA* lies wholly within the discretion of the Lieutenant Governor in Council.

5. Use of Administrative Monetary Penalties (AMPs) – (the City of Kingston example)

In an effort to address large student gatherings and associated nuisance behaviours on the resumption of university classes in 2020, the City of Kingston increased its Administrative Monetary Penalties (AMPs) associated with violations of certain municipal by-laws. The Provincial Government in 2017 amended the *Municipal Act, 2001* to provide municipalities with the authority to impose administrative penalties for by-law violations, in lieu of fines under the *Provincial Offences Act*. The relevant provisions are excerpted below:

- 434.1 (1) Without limiting sections 9, 10 and 11, a municipality may require a person, subject to such conditions as the municipality considers appropriate, to pay an administrative penalty if the municipality is satisfied that the person has failed to comply with a by-law of the municipality passed under this Act.
- (2) The purpose of a system of administrative penalties established by a municipality under this section shall be to assist the municipality in promoting compliance with its by-laws.
- (3) The amount of an administrative penalty established by a municipality,
- (a) shall not be punitive in nature; and
 - (b) shall not exceed the amount reasonably required to promote compliance with a by-law of the municipality.
- (4) If a person is required by a municipality to pay an administrative penalty under subsection (1) in respect of a contravention, the person shall not be charged with an offence in respect of the same contravention.

Authorized under section 434.1 of the *Municipal Act, 2001*, fines under the City of Kingston's Nuisance Party and Noise By-laws are dealt with through AMPs.

It should be noted that such an approach is not available to the City of Ottawa, which continues to operate under the system of fines imposed pursuant to the *Provincial Offences Act (POA)*. As a result, the set fines for offences under the City of Ottawa's by-laws (i.e. those that are used when a ticket is issued) are established by the Chief Judge of the Ontario Court of Justice, and not by Council. A set fine cannot exceed \$1,000. Increased fines may be available where violations are prosecuted either through the use of summonses or the laying of informations, though both of those mechanisms require that the defendant appear before a Justice of the Peace in a lengthier court process. Delays occasioned by such things as COVID-related court closures mean that by-law offences prosecuted through the use of summonses or informations may not be concluded for a significant period of time.

In addition to increased AMPs, the City of Kingston had also taken steps to release the names of individuals 18 years or over who were charged with attending an aggravated nuisance party, as a means of general deterrence. While some questions remain regarding the application of the *Municipal Freedom of Information and Protection of Privacy Act*, the information that an individual has been charged is generally considered to be public information, in keeping with the "open courts" concept. That said, Ontario's Information and Privacy Commissioner has generally been of the view that municipalities should avoid proactively disclosing that information outside the narrow confines of the process before the courts. Whether such a measure would serve as an effective deterrent in the context of the Ottawa demonstrations is unclear.

6. Civil Remedies and Injunctive Relief

Injunctive relief is a type of remedy that can be requested of the Superior Court in a civil proceeding. What is commonly referred to as an injunction is an order of the Court that states a person is required to take some sort of action or to cease doing something. Typically, the relief is granted as a time-limited interim order. The City has no independent legal authority to issue an injunction as it is a remedy that is in the discretion of the Court.

An order for injunctive relief can be sought by way of motion by a party in a civil action. The City may commence a civil action seeking damages against protestors and organizers grounded upon various common law causes of action, including but not limited to civil conspiracy, public nuisance, and trespass. There are also statutory causes of action that could be plead in such a claim. For example, section 12 of the *EMCPA* provides a right of action against any person who caused the emergency for the recovery of money expended by a municipality in the implementation of an emergency plan or in connection with the emergency. The City has additional standing under section 440 of the *Municipal Act, 2001* to seek an order in the nature of injunctive relief restraining acts in contravention of its by-laws. A motion for an injunction could be brought in the context of this underlying civil action. Because an injunction is a Court order, the process to obtain the order is not within the control of the City. The Court is in control of its own processes and may take steps such as granting adjournments, raising additional issues, requiring notice to other parties, or granting intervenor status. Any decision by the Court of first instance to grant an order for injunctive relief or to deny the motion for injunctive relief, could be appealed to higher levels of Court.

Unlawful acts in the context of civil disobedience have been the subject of injunction orders granted in civil proceedings, including civil proceedings brought by municipalities, notwithstanding that the acts were being carried out as part of a protest. The prospect of success on such a motion in this case would depend on the particulars of the order sought, particularly if the proposed injunction engaged the *Charter of Rights and Freedoms*. It should be noted that pursuing an injunction is not without risk. One risk is that in the event the injunction is not ordered or the scope of the requested injunction is reduced by the Court, it may be misunderstood or misrepresented as judicial condonement of the unlawful conduct in question.

Where an injunction is in place, civil and/or criminal contempt proceedings can be instituted against a party who fails to comply with the order. If the contempt is proven in a further court hearing, the person found to be in contempt can be subject to penalties, such as fines and/or imprisonment by order of the Court. Civil contempt proceedings would have to be brought by the

City as a separate civil process. Criminal contempt proceedings would be at the discretion of the Crown.

Like any Court order, the terms of an order for injunctive relief can be enforced by the police at their discretion. The order does not require police to take active enforcement steps.

In the context of the unlawful behaviour that has been exhibited by protestors, the Ottawa Police Service currently has legal authority to take enforcement action pursuant to its existing authority, as derived from such things as the *Criminal Code*, the *Highway Traffic Act* and City by-laws.

The City's Legal Services Branch has been in continued dialogue with the Ottawa Police Service as to whether there are any gaps in their legal enforcement authority that could be remedied should the City be granted an order for injunctive relief by the Court. To date, no gaps have been identified. That said, the City is prepared to move quickly to seek an injunction if it is determined that such an order would further support the operational plan of the police service.

7. Fuel handling

The storage and handling of fuel is regulated by both the Province of Ontario under the *Technical Standards and Safety Act, 2000*, including those regulations, codes and standards that remain in force under its predecessor legislation, the *Gasoline Handling Act* as well as under federal regulations and standards under the *Transportation of Dangerous Goods Act, 1992*. These are not enforced by the City of Ottawa. The City's Use and Care of Roads By-law 2003-498 prohibits oils, chemicals, or substances to be deposited or spilled on a highway, and is enforceable either by police or City By-law Enforcement Officers. However, Legal Services is currently unaware of any instances of violations in this regard.

8. Auto insurance

Auto insurance is a highly regulated industry, the requirements of which vary from province to province and as between Canada and the United States. The City is not in possession of any particulars of the insurance carried by the vehicles involved in this event and Legal Services is not able to comment on any coverage issues that may arise between the owners and/or operators of the vehicles and their insurers.

I trust the above overview is helpful and serves to address the issues that have been raised, to date.

David White