

# Disaster Planning Risk Assessment and Management: Legal Risks and Solutions

By Lou Milrad

In the last few years, the need to safeguard public health and safety has become a critical national issue. The SARS outbreak and the 9/11 attacks in particular have focused the public's attention on the need to be prepared for many types of unanticipated disasters. There is a pressing need to prepare plans in the event of potential public health emergencies and mass casualty scenarios.

These types of emergency contingency plans would require strategies at many levels including the federal, provincial and municipal governments, to deal with various events. Depending on the kind of emergency and the scope of its effect, different government agencies would have to be involved at different stages of the event. There is no question of the need for a comprehensive strategy to respond to tragedies or disasters. The United States' experience with Hurricanes Rita and Katrina has shown that there are countless complications that may arise when confronted with these events.

This article will highlight some of the legal issues that may be faced by various actors involved in the



Lou Milrad

response to emergencies. These issues cover a wide spectrum and include items such as federal responsibility for stockpiling vaccines, the statutory interpretation of "Public Health Emergency", reciprocal licensing agreements, and privacy rights.

## Volunteers/Conscripts

During an emergency, public officials tend to rely heavily on volunteers and others pressed into service. Most institutions are not prepared to deal with large-scale crisis situations, as there are usually a much larger number of people that require attention during an emergency than in normal, day-to-day operations. Additionally, an institution's regular staff may themselves be affected by the emergency and may not be able to perform their regular duties.

The most pressing issue facing officials is basic knowledge about the identity, contact information and skill set of potential volunteers/conscripts. One possible solution would be to set up a database where people who would be willing to participate in a crisis situation could register their names and particulars. This registry would serve as a way to quickly identify potential participants and provide a breakdown of particular skill sets. It would also allow for the possibility of setting up a system of reciprocal licensing arrangements, permitting medical personnel to work in other jurisdictions.

The use of volunteers/conscripts is fraught with legal dangers for both the government and the volunteers/conscripts. For example, what is the standard of care required in emergencies? Will volunteers/conscripts with outdated training be required to have the same standard of care as those of existing medical personnel? Will businesses in the health care industry have to carry extra insurance for volunteers/conscripts?

Clearly, volunteers/conscripts have a huge potential for liability. Liability issues will be explored further below in the section titled

Liability Issues. We have just highlighted some of these issues as they relate specifically to volunteers/conscripts.

What if conscripts refused to report? What if they refused to follow emergency guidelines such as the wearing of masks or gloves? Is there a possibility of civil or criminal penalties, for example, medical personnel who cross jurisdictional lines? Some US states have “Good Samaritan” laws that protect people from liability while attempting to assist others. Is there a need for similar laws to be enacted in Canada to protect volunteers/conscripts who help out during an emergency? The Red Cross tainted blood scandal makes it unlikely that volunteers would get sweeping immunity, but should they not be protected in some manner?

Volunteers/conscripts face a host of other possible legal problems. For example, many of them would be salaried employees, who could lose their jobs by joining in a relief effort – would the government take steps to protect the job security of these individuals? What about the jobs of spouses/partners of these people – would they be protected as well? Who would cover injuries or infections suffered as a result of volunteering/conscription? Since they would not be acting in their usual job capacity, it is unlikely that Workers’ Compensation would

cover them. In that case, who is responsible for them? Also, would retired personnel lose pension rights by working during an emergency? Businesses that have suffered physical devastation may face the problem of staff shortages as personnel are diverted to rescue efforts and the like. If they find additional staff, will they still be required to pay employees who are assisting in other areas? Will employees have to prove they are involved in “official” rescue efforts to qualify for the time off? Will the government compensate businesses for drafting their employees?

### **Statutory Issues**

There are a number of statutes that address governmental responses to emergencies. In addition, there are a number of governmental agencies responsible for emergency preparedness. For the sake of brevity, this paper will only focus on Federal and Ontario legislation and agencies.

The Emergency Preparedness Act, R.S. 1985, c. 6 (4th Supp.) and the Emergencies Act, R.S. 1985 c.22 (4th Supp.), set out the responsibilities of the federal government to civil emergencies. The Emergency Preparedness Act requires the government to do the following:

- develop civil emergency plans through government institutions;
- implement such plans;

- provide support and financial assistance to such agencies (including provincial agencies in certain circumstances); and
- enhance public awareness and understanding of emergency preparedness matters and the like.

### **The Office of Emergency**

Preparedness, Planning and Training is the national body responsible for implementing these requirements. The Emergencies Act determines when the government may declare a public emergency. It replaced the old War Measures Act, which was repealed in 1988. A “public welfare emergency” refers to emergencies generally referred to as those caused by “natural disasters”. A “public order emergency” is defined as an emergency arising from a threat to the security of Canada.

The Emergency Management Act, R.S.O. 1990, c. E.9, is the Ontario statute governing the response to emergencies. Section 4 allows for the declaration of an emergency by the head of a municipality and provides for him/her to “take such action and make such orders as he or she considers necessary and are not contrary to law to implement the emergency plan ... and to protect property and the health, safety and welfare of the inhabitants of the emergency area”. Section 7.1(2) goes even further, authorizing the temporary suspension of statutes

under certain conditions.

The legislation does not provide an outline of what constitutes an emergency. We are faced with the obvious question: At what point does a situation become so disastrous that it becomes an emergency? This is not a question of semantics, as it is only with a declaration of an emergency that the government is entitled and/or required to take certain steps. For example, the National Office of Health Emergency Response Teams (NOHERT) are dispatched in the event of an emergency.

In theory, the decision to declare an emergency may leave the government open to considerable liability. If the government does not call an emergency soon enough, emergency plans may not be implemented. Citizens may claim that the failure to implement those plans caused a loss of life, limb or property. On the other hand, a hasty declaration of emergency may prematurely restrict citizens' rights, creating its own set of legal issues.

Additionally, under the Emergencies Act certain people may be forced to act or provide assistance. While some of the issues surrounding volunteers and conscripts were mentioned above, it is worth noting the statutory considerations. If an emergency is called prematurely, those called upon to volunteer their

help may have a case against the government for lost wages and the like. People treated by these conscripts may have an action against the government for providing substandard care when there was no real need. Businesses may also claim the government caused them financial losses by taking away their employees or requisitioning their equipment.

In light of the above, there is a need to draw up criteria as to what constitutes an emergency. It is obviously difficult to establish a hard and fast rule to deal with situations that are, by their very nature, fluid and ill defined. However, it is critical to establish a guideline for what constitutes an emergency. At the very least, such guidelines or criteria would provide government actors with a degree of comfort when faced with the prospect of declaring an emergency.

A significant statutory concern is that of privacy issues. Privacy laws in the area of healthcare fall under provincial legislation. The Personal Health Information Protection Act, S.O. 2004, c. 3, Sched. A, or "PHIPA", is the Ontario act governing privacy in healthcare institutions. It is very possible that volunteers/conscripts would see some personal health information during an emergency. For example, if makeshift hospitals were set up in a disaster area, people

pressed into service would almost certainly see information about patients/casualties that would normally be restricted from public view. As mentioned above, section 7 of the Emergency Management Act provides for the temporary suspension of statutes. However, this suspension may be effected only if "... victims of an emergency or other persons affected by an emergency need greater services, benefits or compensation than the law of Ontario provides or may be prejudiced by the operation of the law of Ontario". It would appear that the security of personal health information of the victims would have to remain intact, since the suspension is only supposed to act in a way which avoids prejudice of the victim. The disclosure of the personal health information of a victim does not seem to have been contemplated in this Act.

Business and industry may face privacy issues as well. The government may want to get lists of employees and their qualifications. To what degree can a business be forced to comply? Can sanctions be imposed on business owners who unwilling to share this information? A possible solution to some of the privacy concerns mentioned above is to create a statutory "shortcut" for people deemed essential during a state of emergency. For example, legislation could be enacted that

allowed for provincial licenses to be accepted on a national level. This would allow medical personnel from other jurisdictions to have the legal right to help during an emergency. Such a provision might require a minimum national standard that would provide the basis for bypassing provincial requirements during an emergency. As mentioned in the earlier section on volunteers/conscripts, it could allow for the pre-registration of volunteers who would be given the right to do certain things during an emergency. Perhaps they could register with a specific hospital or other health institution and be given health information custodian status (as defined in PHIPA) during an emergency.

Statutory “shortcuts” could be enacted for other necessities as well. For example, it might be important to fast-track the import of certain essentials. This would allow basics such as medicines, surgical equipment, food and clothing to reach affected areas as quickly as possible. Guidelines would have to be established to outline which essentials would be able to bypass general import procedures. Businesses deemed essential would have to have the ability to remain open. That might require statutory intervention to ensure employees report to work.

Another statutory consideration is

that of quarantine. A traditional response to outbreaks of acute illnesses, viruses and the like has been to quarantine those affected. The Office of Emergency Response Services (OERS) is tasked with administering the Quarantine Act. However, a quarantine is a severe imposition on a citizen’s Charter rights. It may also affect the ability of a health institution to provide proper care, if, for example, an emergency room is quarantined. Difficulties may arise if the individual or institution wants to appeal. Is there an appeal process in place? Can the individual or institution carry on as normal during the appeal or will they be forced to obey the quarantine until the matter is resolved? If an individual is forced to remain under quarantine and it is later found that there were insufficient reasons for ordering the quarantine, can he or she sue for lost wages and the like?

During an emergency, it may be difficult or even impossible to get to the courts. Therefore, it is important to create a system that will allow access to judges and key court staff during an emergency. As set out above, a citizen may want to appeal his or her quarantine. Judges must be available to respond to these concerns. It may be necessary to set up a system that allows for tele-motions, much like the tele-warrants that are issued

in the criminal sphere. In any event, a plan must be prepared that will ensure that the integrity of the judicial system is preserved and that individuals’ rights are protected.

Another important consideration in the context of emergency is pricing. Many businesses seize the opportunity in times of need to increase prices. However, people in affected areas would need access to essentials, such as bread and milk. Can businesses be required to remain open? To what degree can the government enforce prices?

### **Liability Issues**

There are significant liabilities that may attach to both government and private actors during an emergency. Emergencies, by their very definition are unpredictable events that require rapid decision-making and swift action. They tend to be fluid situations, which require quick thinking based on very little information. Mistakes are bound to occur and decisions will always be second-guessed using all-powerful hindsight. As a result, many people are going to claim that certain actions harmed them and will claim compensation.

The statutory shortcuts discussed above would likely be a great source of litigation as people will attack the government and/or private persons

who provided assistance during the time of crisis. There may be accusations of negligence, sub-standard care and other supposed failings of personnel working outside their usual boundaries. The question that remains is who will be responsible to respond to these charges and to whom such claims should be addressed. If it is the government being sued, what level of government should be named as a defendant?

Section 11 of the Emergency Management Act attempts to shield government employees from liability. However, would volunteers/conscripts be considered “employees” for the purposes of this Act? If that is a possibility, would they have to actually be hired or at least recognized by the government or would their participation in an official relief effort be enough to provide them with immunity? What kind of evidence would be required to prove their participation? Would the government bear any responsibility for drafting people with out-of-date training?

The federal government is responsible for stockpiling vaccines in case of a pandemic. It does this through OERS, which manages the National Emergency Stockpile System (NESS). The government really has to balance the need of keeping reserves of these vaccines

with the cost of storage. It is almost certain that there will be claims that the government should have stored more of the vaccine. There will also be questions as to where the vaccines were stored and whether transportation time played a role in the loss of life. What if the vaccines are outdated? Is there a requirement to get the newest vaccine available or is there a standard of how effective the vaccine must be to be considered sufficient (even if there are newer vaccines on the market)?

Can businesses in Canada be forced to provide required medicines or other medical necessities? If the answer is yes, what kind of liability attaches to a business that refuses to provide these necessities? Would businesses face liability for failing to follow through on contracts that they signed before the emergency? What liability might attach to businesses who fail to have proper plans for emergencies? For example, in the event of certain emergencies, gas and water valves should be shut off. Industries working with hazardous materials would have even greater concerns. Would liability attach to businesses for not having a plan in place to deal with these issues? What happens if critical operations are not shut down? Are proper evacuation plans in place?

The Canadian Pandemic Influenza

Plan calls for certain priorities in administering the vaccines. Is there a legal basis for these priorities? Will the government be held liable for failing to administer a vaccine to someone not deemed to be a priority? Will any liability attach to the person in the field making the determination of where someone fits into the priority scheme?

As discussed in the section on Statutory Issues, the declaration of an Emergency can have considerable consequences. Once an emergency has been declared certain plans are put into action and the approach to a crisis is managed differently. What liability can attach to various levels of government for declaring an emergency prematurely or too late (and there is a claim of damage to person or property that may have been prevented had an emergency been declared)?

Case law seems to indicate that the government may be protected from these types of claims. In *Mitchell (Estate) v. Ontario*, it was alleged that funding cuts created the conditions which led to an infant’s death. The plaintiffs sued Ontario for the vicarious liability of a former Premier and others. The claim included allegations of negligence, misfeasance in public office and breach of fiduciary duty. It was found that there was no close connection between Ontario and the plaintiffs, as there was no

supervisory authority set out in the Ministry of Health and Long-Term Care Act given to the Premier or Ministry of Health officials. Although policy decisions may have led to conditions that contributed to the infant's death, government officials are not liable in negligence for those decisions. There was no finding of bad faith or dishonesty which would be required to support a claim of misfeasance. Finally, the court held that there was no fiduciary duty in Crown actions. The court in *Laroza v. Ontario* (a SARS-related case) reached essentially the same conclusions.

Therefore, it would seem that governments may be protected from liability for many of the decisions they make. However, this does not mean that such protection is extended to the private actors who either volunteer their services or are drafted by the governments. It is clear that they too must be protected to a certain degree.

### **Digital Mapping Issues**

Digital mapping is the use of digital maps to make sense of items such as Global Positioning Systems coordinates. Global Positioning Systems only provide raw data; e.g. they can tell you where your car is located on a two-dimensional grid. Digital mapping systems transform this data into a specific point on a city street by replacing the grid with

an actual map of a given area.

This mapping data is crucial to emergency response teams. Take an emergency call about a fire at 101 Crisis Street in the township of Calm. The driver of the fire truck may not know exactly where this address is located. Instead of calling in for directions, he or she plugs the address into a portable GPS and is quickly en-route. In most cases, the decision to use such a system will have saved the emergency response team some time. However, what happens if the system directs the user to use a longer, circuitous route or, even worse, to the wrong address?

These maps may be created and/or owned by the government or by private-sector companies. Most maps come with standard disclaimers, in an attempt to immunize the sellers and/or creators from some or all liability. Will these disclaimers shield government agencies from liability if other government actors use the systems? How about systems bought from private-sector companies – will standard disclaimers immunize them if reliance on their system is proven to have led to loss of life?

There is little case law on this subject, but a comparison can be made to other cases. The argument against the sellers/creators of

the system will be that the system was bought to help cut down the response time to emergencies. Failure to provide good directions means that the system is not working properly. One should not be able to contract out of the very essence of the agreement and it would not be fair and reasonable to use a liability clause to immunize the creators/owners.

However, in *Fraser Jewelers*, a case decided by the Ontario Court of Appeal, a limit of liability was allowed to shield an alarm company despite a robbery of a jewelry store ostensibly guarded by the alarm company. A jewelry store had used ADT Security as its security provider for a number of years. Two years before the hold-up which precipitated this case, the store owner upgraded the security system to include monitoring by ADT. During the hold-up, both the owner and an employee managed to push the hidden button connected to the ADT monitoring centre. However, the ADT employee on duty failed to call the police for about 10 minutes after receiving the alarm. The jewelry store sued ADT on the basis that it failed to fulfill its contract. ADT relied on a limited liability clause to protect itself from the full costs of the robbery.

On the issue of the liability clause, the Court of Appeal held that the

services provided by ADT were of an ongoing nature. The fact that the alarm company failed to respond to the alarm was considered to be a onetime event in a relationship that lasted a number of years. It was also telling that Fraser Jewelers did not switch alarm companies right away. Based on these reasons, the court did not find the late response to be a fundamental breach of the contract and the limited liability clause was considered to be fair and reasonable.

One could say that the failure of a Digital Mapping system to provide optimal directions is analogous to the alarm company not responding properly. If the system had been used in the past and if emergency services continued to use it, then it would likely be found by courts to be a one-off event. As such, it would not be a fundamental breach of contract and the limit on liability would be considered fair and reasonable.

The other issue to consider is the propriety a creator/owner would have on these systems. Could he or she be compelled to provide emergency response teams with the information they desire or could he/she claim intellectual property rights in the creation? If government agencies could require creators/owners to provide them with information, are there any parameters to the information they

can request? Would they have to get the information on a case-by-case basis or could they take any information they may require? Could the government actors be forced to pay for usage if they seize the information?

Emergency Management Statute Law Amendment Act, 2006 (Bill 56)

Many of the questions raised above remain unanswered under the common law. However, a new statute called the Emergency Management Statute Law Amendment Act, 2006 (EMSLA), provides for a sweeping overhaul of the Emergency Management Act. In fact, the statute creates a new approach to emergencies in the 21st century. This approach is further developed in the proposed definition of emergency. An emergency is defined as:

“a situation or 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”

This new definition includes references to disease and health risks; a clear response to the panic caused by the SARS outbreak and the risk of a flu pandemic.

It is interesting to note that the

purpose of orders made under the Act would be to protect “the health, safety and welfare of the people of Ontario”. As stated by Ernie MacGillivray, the Director of the New Brunswick Emergency Measures Organization and Chair of the Canadian Council of Emergency Management Organizations:

“Emergency management and public health [have been] redefined as key components of national security. [There is an] increasing interaction and collaboration between emergency management, health and security actors.”

The EMSLA provides many of the answers to the questions posed above. It sets out strict criteria for determining whether or not an emergency should be declared and the length of time emergency measures may be in effect. In addition, the Premier must file a report in the Legislature within 125 days of the declaration being lifted. The EMSLA gives the Premier and/or Cabinet the power to:

- Establish facilities, construct works and to procure goods during an emergency.
- Order the evacuation of an area, control travel into an area and requisition property.
- Stop price gouging.
- Authorize those who would not otherwise be eligible to do so, to perform certain duties. For

example, allowing doctors from other jurisdictions to work in Ontario for the duration of the declared provincial emergency.

- Close certain private or public places, such as beaches, if necessary.
- Authorize facilities, such as electrical generating facilities, to operate as necessary to address the emergency.

This EMSLA provides tremendous new powers to the government of Ontario. It will also eliminate some of the confusion and hesitancy that may have been raised by the issues mentioned earlier. For example, there would no longer be an issue with the security of personal information since that information would be able to be used when responding to an emergency. In case that provision was not clear enough, there is a provision that provides that orders which are in conflict with statutes or regulations prevail.

It was suggested earlier that a statutory shortcut should be put in place to enable people who have the ability to provide services, but for the technical requirement of a license, to be allowed to provide those services in an emergency. The EMSLA seems to have considered this possibility. Although not as far-reaching as the suggestions offered earlier, the statute states that as long as one is “reasonably

qualified”, that person could act under an order given by the Lieutenant Governor. On the other hand, the language used, especially in regard to “the procurement of necessary ... services” has caused many in the medical profession a great deal of concern. They are worried they may be conscripted and forced to work, possibly in less than ideal conditions. This fear is heightened by a potential \$100,000 fine and one year in jail for persons who do not comply with orders.

We earlier raised the issue of employees facing the loss of their jobs if they participated in relief efforts. The EMSLA addresses that concern. It amends the Employment Standards Act and provides employees with the right to an unpaid leave of absence under certain circumstances. These include responding to an order or caring for a close family member. In terms of liability, the EMSLA prohibits the filing of a suit against individuals acting in accordance with an order under the Act. This would appear to include good faith providers of assistance during an emergency. However, the Crown and municipalities are specifically not shielded from liability. This may be because of historical reasons. The War Measures Act was repealed due to Prime Minister Trudeau’s use of the Act in quelling Quebec unrest. In hindsight, Trudeau’s actions were

seen by many as overzealous and an abuse of the powers. By specifically leaving the Crown open to liability, the EMSLA provides a recourse for persons affected by the use of powers under the Act.

## Conclusion

All of these issues must be reviewed by the government and its legal counsel. A comprehensive strategy to deal with emergencies is more important than ever. However, it is insufficient to plan responses to the various emergencies, if these plans will create crises of their own. If an emergency is declared, it is certainly more important to deal with it and prevent pain and suffering than it is to worry about apportioning risk and liability. Nevertheless, an effective plan to deal with future events must consider the ramifications of various responses and create solutions before the problems arise. Hopefully, the new EMSLA will be able to deal with many of these issues.

### **About the Author**

*Lou Milrad, a former URISA Ontario President and its Legal Counsel, is a partner at the Toronto law firm of Gardiner Roberts LLP where he heads up the firm’s Technology and Intellectual Property Law Practice as well as its Health Informatics Law Practice and may be contacted by email at [lmilrad@gardiner-roberts.com](mailto:lmilrad@gardiner-roberts.com) and telephone at (416) 865-6650.*