CANADIAN CONSTITUTION FOUNDATION

Canadian Constitution Foundation
Policy Recommendations—Public Order Emergency Commission
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Following the conclusion of the hearings of the Public Order Emergency Commission, it has become apparent that the *Emergencies Act* has deficiencies which leave it vulnerable to being invoked without justification, create the risk of an appearance of partisan bias, do not provide for enough transparency around the decision to trigger it, and do not check unwarranted intrusion into provincial jurisdiction.

In this closing submission for the policy phase of the Commission's work, the Canadian Constitution Foundation makes **thirteen** practical proposals for reforming the *Emergencies Act* that we believe will help protect against these abuses in the future.

Declaring an emergency

1. Do not broaden the definition of threats to national security.

The definition of "threats to national security" under the *Emergencies Act* should not be broadened. We adopt the views expressed by Professor Leah West on this issue at the Roundtable on National Security and Public Order Emergencies, which examined " the definition of threats to national security, particularly the section 2 (c) definition in the *Canadian Security Services Act* first enacted in 1984 . . . whether that definition should be changed . . . [and] whether the existing or the new definition of threats to national security to Canada should continue to be used as part of the threshold for the declaration of Public Order Emergency."[1]

Professor West observed "that the premise of this panel is seemingly that what occurred in Canada in January and February of this year was a national security threat, at least as we understand them in the law." She then opined: "I'm not certain that this underlying presumption is accurate". West noted that it remained an open question: "were they perhaps labelled a national security threat because that is what is currently required to unlock federal authorities . . .. If there is a chance that it is the latter, I urge restraint in broadening our understanding of national security."[2]

1 Kent Roach, Roundtable Discussion: National Security and Public Order Emergencies, Public Hearing of the Public Order Emergency Commission, vol. 34, at 2.
2 Presentation by Dr. Leah West, Roundtable Discussion: National Security and Public Order Emergencies, Public Hearing of the Public Order Emergency Commission, vol. 34, at 11-12.

As the Commission's *Emergencies Act Primer* noted, "A public order emergency means an emergency 'that arises from threats to the security of Canada and that is so serious as to be a national emergency' (section 16) 'Threats to the security of Canada' has the meaning assigned by section 2 of the Canadian Security Intelligence Services Act, i.e., Espionage or sabotage, Foreign-influence, Terrorism, Violent extremism."[3] It is notable that threats to the economic security of Canada was not included within this definition.

As Professor Leah West observed, "we have never labelled blockades and other non-violent but illegal means of obstructing critical infrastructure as terrorism. This country has a long history of protests along rail corridors and ports. While certainly these activities threaten trade and Canada's economic interests, they do not fall within section 2(c) of the *CSIS Act*, no matter how broadly one interprets it."[4] Additionally, the temptation to relax this legal threshold from an existing threat to the security of Canada to a potential threat to the security of Canada is exceptionally dangerous.

We concur with Professor West. We submit that it is inappropriate for the Commission to use its Report to, in her words, "suggest ways to make it easier for the Executive to invoke the *Emergencies Act*."[5] The Commission's Final Report should not absolve any extralegal or unconstitutional actions by suggesting, implicitly or otherwise, that they were an understandable response to outdated or overly restrictive definition of threats to national security under the *Emergencies Act*. Recommendations to change the definition of threats to the security of Canada would be inappropriate, because they as this might be taken as an implicit suggestion that the declaration of a public order emergency at issue was justified, or at least justifiable.

Such recommendations would ignore the reason that the *Emergencies Act* incorporated the *Canadian Security Intelligence Services* Act definition of threats to national security -- to prevent the abuses that ensued when declarations of apprehended insurrection were issued pursuant to the legislation that it replaced, the *War Measures Act*.

2. Do not broaden the definition of national emergency.

For the same reason, we also reject attempts to broaden the definition of national emergency. Under section 3, a national emergency is an "urgent and critical situation of a temporary nature", which "is of such proportions or nature as to exceed the capacity or authority of a province to deal with it". Some commentators have suggested that the *Emergencies Act* is outdated because this

3 Public Order Emergencies Commission, "Introduction to the *Emergencies Act*", available at: <https://publicorderemergencycommission.ca/files/documents/Presentations/Introduction-to-the-Emergencies-Act-EN.pdf/>.

4 Presentation by Dr. Leah West, Roundtable Discussion: National Security and Public Order Emergencies, Public Hearing of the Public Order Emergency Commission, vol. 34, at 12.

5 Presentation by Dr. Leah West, Roundtable Discussion: National Security and Public Order Emergencies, Public Hearing of the Public Order Emergency Commission, vol. 34, at 54-55.

definition excludes situations where a local police service, a municipality, or even a province merely fails to deal with the situation in a manner that exacerbates the potential of a threat to the lives, health or safety of Canadians.

We reject this view. Any recommendation for legislative amendment of this definition should be mindful that the existing definition is already at the constitutional boundary of what Parliament may enact. The use of the national emergency power enables Parliament to override provincial laws in potentially every field. It is only the existential nature of the crisis itself—which is, in essence, defined by a provincial inability to resolve it—that creates the constitutional basis under the emergency branch of the peace, order, and good government power.[6]

The Commission should not suggest such an amendment, as it would give back to the Cabinet the powers it possessed under the *War Measures Act*. The power to prevent a potential threat would be equivalent to addressing a state of apprehended insurrection. A recommendation from the Commission for Parliament to turn the clock on Canada's emergency powers back to 1970 would be a loaded gun, one already pointed at the heart of our constitutional order.

3. Require the exhaustion of provincial and territorial authorities.

The requirement in the *Emergencies Act* that provinces be consulted needs to be strengthened. The federal government should be required to formally request provincial and territorial authorities to use existing legal tools — including provincial and territorial emergency legislation — before triggering the *Emergencies Act*.

The *Emergencies Act* is a last resort. The threshold to invoke it is a high one, and section 3 provides a national emergency is something that exceeds the capacity or authority of a province to deal with, and specifically provides a national emergency can only be invoked if it is something that cannot be effectively dealt with under any other law.

This requirement is important to Canada's federal system, and it was ignored in this case. While the federal government has said it used the *Emergencies Act* as a way of giving more tools to police, the reality is they assumed significant provincial powers. The federal government assumed policing powers in matters of provincial jurisdiction. The economic measures also impacted areas of exclusive provincial jurisdiction, including credit unions and insurance. This was an unnecessary intrusion into provincial jurisdiction. The purpose of the *Emergencies Act* is not simply to fill gaps in provincial law. It is only available when the authorities of the provinces have been exceeded.

6 *Re: Anti-Inflation Act,* [1976] 2 SCR 373, 465-66 (Beetz J (de Grandpré J concurring) dissenting).

The federal government knew that the authorities and laws of the provinces had not been exceeded or exhausted because many of the provinces told them so. During the First Ministers call on February 14, 2022, seven provinces advised the federal government that they did not support the use of the *Emergencies Act* in their provinces. They told the federal government that there was no need for these tools, and they had the capacity to deal with the situation under existing laws. Alberta dealt with the blockades in Coutts before the *Emergencies Act* was invoked, using ordinary legislation. Indeed, the Incident Response Group was told the day before the *Emergencies Act* was triggered that the RCMP were taking enforcement measures in Coutts, and the Prime Minister was told at the First Ministers meeting, before the *Emergencies Act* was invoked, that Coutts had been secured.

The federal government appeared to ignore these facts on the ground and ignore the section 3 requirement in the *Emergencies Act* that the situation must exceed the capacity of the province to deal with it. While the federal government has argued that the tools afforded by the *Emergencies Act* created a deterrent effect and were convenient, this must not displace the wording of the Act and the constitutional deference that must be afforded to the provinces.

Consultation with the provinces was inadequate. Consultation is required by the *Emergencies Act*, and it should be, because of the power the *Emergencies Act* gives the federal government to assume provincial authority. Consultation is more than mere notice to the provinces, which can be satisfied by a brief First Ministers call without advance notice of the subject of the call, without sharing an assessment that threats to national security existed, without sharing a legal analysis of why existing legal tools fell short, and after the decision to invoke the *Emergencies Act* had de facto been made. There is evidence before the Commission that the decision to invoke the Act was for all intents and purposes made *before* the First Ministers call, through a consensus on the Incident Response Group and Cabinet the night before, on February 13, 2022.

The federal government already had experience with consultations about the *Emergencies Act*, having considered invoking it in response to the COVID-19 pandemic as a public welfare emergency. That consultation, which took place in 2020, was far more fulsome than the brief call with the provinces on February 14, 2022. Since the *Emergencies A*ct was being contemplated by federal Ministers on February 9, 2022 or even earlier, the provinces could have been engaged far sooner and provided input into how existing provincial law could be used. Recourse to the *Emergencies Act* could have been avoided with appropriate provincial consultation.

For these reasons, we recommended amending the *Emergencies Act* to require that the federal government formally request provincial and territorial authorities to use existing legal tools — including provincial and territorial emergency legislation — before triggering the *Emergencies Act*.

4. A Parliamentary Review Committee to provide real-time oversight.

Rather than proposing amendments that would empower the Executive to declare public order emergencies, the Commission should provide recommendations aimed at increasing accountability for the exercise of the Cabinet's most powerful and exceptional powers. To that end, we submit that the Commission should recommend that the *Emergencies Act* be amended to strengthen its key accountability mechanisms, namely the Public Inquiry mandated by section 63 (discussed further below) and the Parliamentary Review Committee defined in section 62.

The *Emergencies Act* should be amended to require that requires it appoint its Chair from the Official Opposition. An opposition chaired committee will not face the same partisan pressures to accede to the governmental position as a member of the governing party and would be above any suspicion that it is biased towards absolving any Government that commands the support of a majority of the House of Commons.

An opposition chair would align the Parliamentary Review Committee with the existing standards for chairing oversight committees. In the Westminster system, the chairs of parliamentary committees charged with governmental oversight are members of the Official Opposition. The model for this practice is the Public Accounts Committee of the House of Commons of the United Kingdom; in Canada, this convention was adopted when a committee with the same mandate was established in 1958. This was extended to three other standing committees (and one standing joint committee) with oversight responsibilities.[7] This practice is memorialized in the Standing Orders of the House of Commons.[8]

The powers of the Parliamentary Review Committee should be expanded to provide oversight for any declaration of emergency, while the emergency is underway. To this end, the Committee would have security clearance to receive confidential briefings from, and question, CSIS, the RCMP and other security sector agencies, daily.

In addition, as explained below, the Parliamentary Review Committee should have the power to appoint the Commissioner, which would insulate the Commission from charges any apprehension of bias, whether reasonable or unreasonable.

Justifying an emergency

5. Explaining why existing legal tools fell short.

7 Namely, the Standing Committee on Access to Information, Privacy and Ethics, the Standing Committee on Government Operations and Estimates, the Standing Committee on the Status of Women, and the Standing Joint Committee on the Scrutiny of Regulations.

8 Standing Orders of the House of Commons, Consolidated s. 106(2), available at: <https://www.ourcommons.ca/procedure/standing-orders/Chap13-e.html#SO106/>.

Section 58(1) of the *Emergencies Act* already requires that the federal government table an Explanation of the reasons for the declaration of emergency in Parliament. The Explanation for the February public emergency provides a one sentence explanation for why existing legal tools allegedly fell short. The Act should be amended to require the Attorney General to release a legal opinion that provides a detailed analysis of existing legal tools and makes the case for why they fell short.

It became manifestly clear over the course of the Commission's hearings from the evidence of police witnesses at every level that existing ordinary criminal laws, not to speak of provincial emergency laws, would have been sufficient to end the ongoing protests in Ottawa. Thus far, witnesses have only said that the emergency was "extremely helpful", but not absolutely necessary. The Act's requirement that it be a tool of last resort needs to be given teeth and the government seeking to invoke it must complete the exercise of comprehensively reviewing all legal tools available to it to deal with the emergency as well as explain why these tools are insufficient.

Confirming an emergency

6. Super-majority requirements to confirm a declaration of emergency.

At present, a declaration of emergency expires if it is not confirmed by a simple (50% plus one) majority in each of the House of Commons and Senate. Because of the extraordinary power vested in the federal cabinet under the *Emergencies Act*, a majority government should not be able to unilaterally proclaim an emergency. A 60% threshold should be required, which would necessitate the agreement of opposition parties. This will help to protect the rightfully high threshold for invoking the Act, as well as insulate the government's decision to invoke the act from accusations of partisan concerns.

7. Provincial confirmation of a declaration of emergency.

The *Emergencies Act* authorizes the federal cabinet to enact regulations in core areas of provincial jurisdiction. Yet there is no formal provincial role in the confirmation of a declaration of emergency. Provincial confirmation should be required for the two kinds of emergencies that are predominantly domestic in character – public welfare and public order emergencies – in where the emergency applies across Canada, like the February emergency did. The requisite consent should consist of at least seven provinces, representing at least 50 % of the population, which is the same as the general amending formula for constitutional amendments.

Judicial review of an emergency

8. Supreme Court of Canada review with special advocates

A declaration of emergency can be challenged in the courts. Challenges to the legality of the invocation of the *Emergencies Act* must commence in the Federal Court. However, a definitive judicial ruling on the legality of an emergency declaration, even at first instance, may not take be issued until long after the emergency is over. Proceeding up the appellate chain to the Supreme Court will take even longer – many months, if not a few years after the emergency has passed. Indeed, since emergencies should be time-limited events in a constitutional democracy, subjecting declarations of emergency to the ordinary judicial process all but guarantees that courts will often pronounce upon emergency cases that are moot.

The *Emergencies Act* litigation currently underway before the Federal Court illustrates these points. The Notices of Application in the four challenges to the February public order emergency were issued in February 2022. At the time of writing, the hearing on the merits is scheduled for late January 2023, or February 2023 – nearly a year after the public order emergency came to an end, on February 23, 2022. Any appeals to the Federal Court of Appeal and to the Supreme Court of Canada will drag on well into 2023, and potentially 2024.

A major source of delay in the Federal Court proceedings have been disputes over access to evidence. The proceeding is an application for judicial review, where the record includes the materials that were before the decision-maker – the Governor in Council, or the federal Cabinet. The Attorney General of Canada has asserted a variety of privileges over this material, chiefly pursuant to sections 38 and 39 of the *Canada Evidence Act*. Section 38 creates a privilege in relation to international relations, national defence and national security. Section 39 creates a privilege over cabinet confidences. The Canadian Constitution Foundation brought a motion to seek counsel-only access to cabinet confidences, which was unsuccessful. Section 38 proceedings are currently underway, and it is hoped they will conclude by early January 2023, so that the current hearing schedule will be maintained.

The Attorney General of Canada has also asserted solicitor-client privilege over key materials, including the legal opinion provided by the Attorney General to the federal Cabinet on why the definition of national security for the purposes of the *Emergencies Act* is different than under the *Canadian Security Intelligence Act*. Solicitor-client privilege is vital to the operation of the justice system. However, solicitor-client privilege must not become overbroad in scope. It may be asserted in a litigation context where the conversation in question is not actually between counsel and client, and is thus invalid. Overbroad solicitor-client privilege risks impeding effective judicial review. At the Commission hearings, Commission counsel pointed out that the government's refusal to disclose its understanding of the legal basis for invoking the Act created an extraordinary lack of transparency and a "black box". The same holds true for judicial review.

The legislative debates over the *Emergencies Act* reveal two things: first, that the "reasonable grounds" test found throughout the Act was designed to ensure effective judicial review, but at the same time, that no thought was given to *how* judicial review would be effective. In particular, the potential impact of assertions of privilege was not mentioned even once.

We make three proposals to ensure effective judicial review, and to diminish the potential for assertions of privilege to impede the work of the Commission.

First, the *Emergencies Act* should be amended to confer on the Supreme Court of Canada original jurisdiction over challenges to the legality and constitutionality of a declaration of emergency, and any measures taken pursuant to such a declaration. There would be no need to proceed up the appellate chain. While the Supreme Court of Canada has appellate jurisdiction, it has original jurisdiction to answer reference questions sent to it by the federal Cabinet. There is no legal barrier to vesting the Supreme Court with original jurisdiction to hear a live dispute. Moreover, the Court's size – nine judges, supported by a large number of clerks and permanent legal staff – give it far greater resources than a single Federal Court justice. The Supreme Court should hold a hearing on an expedited schedule. In addition, should the Supreme Court uphold the lawfulness of an emergency, it should nonetheless remain seized of the matter so that it can adjudicate upon ongoing legality of the emergency should circumstances change.

Second, the *Emergencies Act* should be amended to confer on the Supreme Court the power to appoint Special Advocates, with full security clearance who would have full and immediate access to any evidence which the federal government seeks to keep secret on the grounds of national security privilege, and cabinet privilege, and solicitor-client privilege. The role of the Special Advocate would be to challenge the lawfulness and constitutionality of an emergency and emergency measures. The model is the Special Advocates regime under the *Immigration and Refugee Protection Act*.

Third, the Supreme Court should have the power to review, on an expedited basis, the government's claims to keep evidence secret pursuant to sections 38 and 39 of the *Canada Evidence Act*, as well as any other to ensure that as much evidence is filed in open court as quickly as possible. Kent Roach, Canada's leading expert on public inquiries, concluded that the government was permitted to over-assert national security privilege in the Air India, Arar, and Iacobucci Commissions. We fear this has happened again.

Inquiry following the declaration of an emergency

9. The Act must spell out that the inquiry has investigative powers.

The *Emergencies Act* only calls for the creation of an inquiry into the circumstances which led to the declaration of emergency. It does not spell out the powers of the inquiry. Fortunately, the federal Cabinet appointed Commissioner Rouleau pursuant to the *Inquiries Act*, which gives him investigative powers, including the power to summon witnesses. The ability of the Commission to summon witnesses is important, and germane to the Commission fact-finding function. *Viva voce* evidence, tested through cross-examination is necessary for a fulsome factual picture.

The Commission has an important fact-finding function, and future governments should not be able to curtail the transparency and thoroughness of this exercise. The Act should be amended to provide that the inquiry occurs under the *Inquiries Act*.

10. The inquiry should be given 18 months to do its work.

The *Emergencies Act* currently mandates that the inquiry into a declaration of emergency must deliver its report within one year of the termination of the emergency. While some time pressure is a good thing, this Commission has been forced to review an ocean of evidence consisting of thousands of documents in an unreasonably tight timeframe. The period for delivering the final Commission report should be extended to 18 months from the end of the emergency.

11. The head of the inquiry should be appointed by an impartial party.

Currently, the federal cabinet has the sole discretion to appoint the head of the inquiry, which violates the principle of natural justice of *nemo debet esse judex in propria sua causa*, i.e., that no one should be able to choose their own judge. This lack of procedural safeguarding may create the perception of bias, which could undermine public faith in the important process of the Act.

Commissioner Rouleau has discharged his role presiding over the Commission with rigour and fairness. Nevertheless, section 63 of the *Emergencies Act* should be amended to place the power of appointing the head of the inquiry into the hands of a Parliamentary Review Committee chaired by a member of the Official Opposition.

Vesting the power to appoint the Commissioner in the Parliamentary Review Committee can enhance the Inquiry's perceived independence, esteem, freedom of action. Should the Commissioner of the public inquiry called for by section 63 of the Act be appointed by the Parliamentary Review Committee, it is unlikely than allegations of this nature would obtain any traction. Accordingly, to maintain the necessary perception of neutrality and governmental accountability it is advisable to recommend that the effective power to nominate the Commissioner of any future inquiry under the Emergencies Act should be transferred from the Government to the Joint Select Committee on the Declaration of Emergency; section 63 should be amended to that end.