CANADIAN CIVIL LIBERTIES ASSOCIATION

ASSOCIATION CANADIENNE DES LIBERTES CIVILES

Final Submissions of the Canadian Civil Liberties Association to the Public Order Emergency Commission

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I. OVERVIEW

1. On February 14, 2022, the federal government declared a public order emergency, using the *Emergencies Act* for the first time in the legislation's history. The decision to declare a federal emergency and make use of extraordinary powers under this law is of significant interest to the Canadian Civil Liberties Association ("CCLA"), an organization that has been dedicated to protecting and promoting the rights and freedoms of people in Canada since its inception in 1964. The organization's work also aims to guard against overreach by state actors and hold those actors accountable for violations of constitutionally protected rights. As a result, the CCLA sought standing to participate in the Public Order Emergency Commission.

2. The CCLA's submissions are focused primarily on the legality of the public order emergency declaration, and the legality and constitutionality of the *Emergency Measures Regulation* and *Emergency Economic Measures Order* that came into effect on February 15, 2022. The CCLA has also made general submissions about the scope of the right to protest, the duties of police in facilitating protest and protecting public safety, the powers available to police to deal with disruptive protests, and the relationship between police, civilian oversight, and elected officials in public order situations. In addition, we have included some limited policy submissions on these and other topics within the Commission's mandate and have flagged some potential areas for reform of the *Emergencies Act* itself.

3. The public order emergency was declared in response to highly disruptive but largely non-violent protests, occupations and blockades that were taking place in several locations across the country. In the CCLA's submission, the legal thresholds established by the *Emergencies Act* were not met and the declaration of a public order emergency was unlawful.

4. The *Act* requires that a national emergency exceed the authority and capacity of a province to deal with it. The evidence the Commission heard demonstrated that provinces had both the legal authority and operational capacity to address the situations in their provinces. In Windsor, Ontario, law enforcement cleared a disruptive border blockade prior to the invocation of the *Emergencies Act* and using their ordinary legal authorities and those granted under provincial emergency orders. In Coutts, Alberta, law enforcement also cleared a border blockade and effected arrests prior to the invocation of the *Act* and without the need for extraordinary powers. The occupation in downtown Ottawa did take place after the *Act* was invoked, but the Commission heard evidence that the struggles in Ottawa were about coordination, communication, and resources, not an absence of legal authority.

5. The *Act* also states that a public order emergency can only be declared if there is a "threat to the security of Canada" as that term is defined in the *Canadian Security Intelligence Service Act.* Once again, the evidence heard by the Commission discloses that there was no such threat to the security of Canada. The government improperly relied on a different and significantly broader interpretation of the legal threshold.

6. The emergency orders that came into force following the declaration were unnecessarily broad and consequently unconstitutional. These orders prohibited a wide range of public assemblies, allowed the government to compel individuals to provide services, and allowed for the freezing of personal assets with no notice and no due process. The orders ultimately relied on law enforcement and financial institutions to use their discretion and engage in selective enforcement to avoid the worst consequences of their overbreadth.

7. The Commission heard a variety of views on the scope of lawful protest and freedom of peaceful assembly. The CCLA submits that freedom of peaceful assembly and the right to protest must be given a large and liberal interpretation, and that the government bears the onus of justifying restrictions on these rights as reasonable and proportional. The role of law enforcement is to facilitate protest while protecting public safety. Police also have considerable legal powers, at statute and common law, to address disruptive or dangerous public order situations.

8. The relationship between police, civilian oversight bodies, and elected officials, has been the subject of many prior public inquiries but remains an area where further clarity seems needed. In the circumstances of the public order emergency, the government had lost confidence in the ability of law enforcement to address the situation but was cognizant of its role in not directing police operations. Ultimately, the federal government invoked the *Emergencies Act* to achieve indirectly what it felt it could not do directly – compel law enforcement to take decisive action.

9. The Commission had a very broad mandate and a short timeframe in which to do its work. The policy phase of the Commission was particularly abbreviated. CCLA's policy submissions are modest and focused on a few core areas.

10. The CCLA is not in favour of changing the legal thresholds in the *Emergencies Act.* In addition, given the evidence of the difficult relationships between oversight bodies, elected officials and law enforcement, the CCLA feels there is room for more clarity on the appropriate processes for communication between these entities, particularly with respect to public order events.

11. We were concerned with the evidence of some in the federal government that suggested a need for greater intelligence authorities and capabilities. We note that the plea for better tools to access "open source" intelligence is actually a plea for tools of mass surveillance that have the potential to dramatically alter Canadians' relationship to the state. This is an area where we urge the Commission to proceed with caution. Another such area relates to misinformation and disinformation on social media. This is a complex policy area in which the federal government is already actively engaged. It may also be a problem that is not easily amenable to a legal solution.

12. Finally, the CCLA proposes some modest changes to the *Emergencies Act* which would extend the time for completion of a public inquiry following revocation of the emergency. We have also proposed that certain transparency requirements for the inquiry be built into the Act to address some of the issues that arose over the course of the Commission's mandate.

II. FACTUAL AND LEGAL SUBMISSIONS

A) The legal threshold for declaring a public order emergency was not met

13. The Commission's assessment of the federal government's decision to declare a public order emergency must start with a consideration of Parliament's intention in passing the *Emergencies Act* (the "*Act*" or "*EA*") and in establishing the legal thresholds for invocation that it did. The *EA* was intended to correct the excesses of, and prevent the abuses that occurred under, the *War Measures Act.* It therefore incorporated significant safeguards including a requirement for Parliamentary supervision, a standard for invocation ("belief on reasonable grounds") that could be subjected to judicial scrutiny, and the requirement to conduct an independent inquiry.

14. In assessing whether the government acted within its legal authority in declaring a public order emergency, the CCLA wishes to focus on two interpretive points. The first relates to the definition of a national emergency under section 3 of the *Emergencies Act* and in particular the meaning of the phrase "cannot be effectively dealt with under any other law of Canada" in section 3 and the meaning of the phrase "exceed the capacity or authority of a province to deal with it" in section 3(a). The second interpretive issue relates to the meaning of "threats to the security of Canada" as defined in the *Emergencies Act*, which explicitly incorporates the statutory definition in the *Canadian Security Intelligence Service Act* ("*CSIS Act"*).

i) There was no national emergency within the meaning of the Emergencies Act

15. Although not explicitly set out in the declaration or the section 58 justification put before Parliament, the government of Canada argued during the Commission's proceedings that it was relying on section 3(a) of the *Emergencies Act.* This section requires an urgent and critical situation of a temporary nature that seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it. Further, it requires that the situation cannot be effectively dealt with under any other law of Canada.

16. The CCLA does not dispute that the situation with the Ottawa occupation and border blockades was urgent and critical. It is less clear whether the threshold of seriously endangering the lives, health or safety of Canadians was met.

17. The blockades were extremely disruptive in the communities where they took place and gave rise to real harms to residents and businesses. Evidence heard by the Commission attested to the harm and fear that residents in Ottawa experienced,[1] and the input that the Commission received from the public also provides insight into the sense of fear and intimidation that many residents felt – although it is significant that there was a wide diversity of views and perspectives on the protests.[2]

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[1] Interview Summary: Councillors Catherine McKenney and Mathieu Fleury, City of Ottawa, (WTS.00000025), p. 2-3; Public Order Emergency Commission (POEC) Transcript, Vol. 2, (Catherine McKenney & Mathieu Fleury), p. 156, lines 20-26.

[2] POEC Public Submissions – Summary of what we heard, p. 6-16.

18. The government's initial public justification for the use of the *Emergencies Act* did not disclose evidence of widespread acts of serious violence that endangered the lives, health or safety of Canadians. The government's section 58 statement describes the level of violence in vague and somewhat tentative terms. For example, it lists among the reasons for declaring an emergency "the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians".[3] The only concrete example of a serious risk of violence is the reference to the RCMP's seizure of a cache of firearms in Coutts, Alberta. Although arrests were made prior to the declaration of a public order emergency, these arrests are said to indicate "that there are elements within the protests that have intentions to engage in violence."[4] The statement also notes that "ideologically motivated violent extremism adherents may feel empowered by the level of disorder resulting from the protests. Violent online rhetoric, increased threats against public officials and the physical presence of ideological extremists at protests also indicate that there is a risk of serious violence and the potential for lone actor attackers to conduct terrorism attacks."[5] These statements are all highly speculative. As discussed further below, the evidence heard by the Commission during its hearings also failed to disclose evidence about events that seriously endangered the lives, health or safety of Canadians.

19. The Commission also heard about the economic impacts of the border blockades. The possibility of further blockades, particularly at the border, would have exacerbated the economic impacts and could have also resulted in supply chain issues that may, over a longer period, have posed a serious threat to health and safety. However, at the time that the emergency was declared, there was no compelling evidence that Canadians were at risk of going without necessities. Indeed, by the time the public order emergency was declared, the border crossing at Coutts and the Ambassador Bridge in Windsor, Ontario had been cleared. The economic harms did not amount to circumstances that seriously endangered the lives, health or safety of Canadians.

20. Without conceding that the serious endangerment aspect of the definition was met, the CCLA submits that the key question in assessing whether there was a national emergency relates to whether the circumstances exceeded the capacity or authority of provinces and could not be addressed under any other law of Canada. The CCLA submits that this part of the test was not met.

21. During her testimony before the Commission, the Deputy Clerk of the Privy Council Office, Ms. Nathalie Drouin, agreed that authority referred to "legal authority" and "legislative tools" and capacity referred to "operational capacity" or the adequacy of resources.[6]

22. While there were events that were taking place in a number of provinces, Ontario was the site of at least two very significant protests that are relevant in considering the question of authority and capacity: the occupation in Ottawa and the blockade at the Ambassador Bridge. The Ambassador Bridge was cleared before the federal government declared a public order

[3] February 14, 2022 Declaration of Public Order Emergency, Explanation pursuant to subsection 58(1) of the *Emergencies Act* ("Section 58 Explanation"), (COM00000670), p. 11.
[4] Section 58 Explanation, (COM00000670), p. 12.
[5] Section 58 Explanation, (COM00000670), p. 6.
[6] POEC Transcript, Vol. 26, (Janice Charette & Nathalie Drouin), p. 265, lines 16-25.

emergency. As a result, the CCLA submits that it is clear that Ontario had both the legal authority and the operational capacity to address the situation and did so.

23. The occupation in downtown Ottawa clearly presented particularly acute policing challenges. Based on the evidence, however, and as discussed further below, the operational plan that was eventually implemented and successfully cleared the protests was developed relying solely on common law and ordinary statutory authorities. Police did not request the powers provided to the *Emergencies Act* and multiple witnesses conveyed that the issue was not legal authority, but coordination, planning, and resource issues within and between police services. While a wide range of extra policing powers may be "useful" in resolving all types of public order situations, it does not follow that the pre-existing legal authorities are inadequate.

24. Significantly, the evidence heard by the Commission made it clear that, at least until the Ambassador Bridge was in play, the government of Ontario was not interested in engaging with other orders of government to try to address the challenges posed by the protests in Ottawa.[7]

25. The reasons for a refusal to meaningfully engage are less clear, and, unfortunately, the government of Ontario also refused to take an active and helpful role in the Commission's work. At the end of the day, the Commission is left simply with the fact that, while municipalities and police services had been actively engaged, the provincial government did not meaningfully respond to the protests until around February 9, two days before it opted to declare a provincial state of emergency pursuant to the provincial *Emergency Management and Civil Protection Act*.

26. The measures put in place following Ontario's declaration of an emergency were broad and attached significant consequences to failure to abide by the emergency orders.[8] The CCLA submits that the province of Ontario had all the legal authorities it required to address the situation. Some of the federal government witnesses testified that they did not believe the powers that Ontario had enacted pursuant to the *EMCPA* were adequate to address the protests.[9] It likely would have taken several days for the impacts of the Ontario emergency orders to be seen on the ground, but the federal *Emergencies Act* was invoked just two days after Ontario's orders were in place.

27. Further, events in other provinces were also addressed with existing legal authorities and without the need for special emergency measures, including the clearing of the border in Coutts, Alberta and the arrest of individuals associated with that blockade.

28. The question of operational capacity is a separate issue. Despite the government of Ontario's refusal to engage, the Ontario Provincial Police was certainly active at an early stage in providing intelligence reports to law enforcement partners,[10] dialoguing with convoy

[7] POEC Transcript, Vol. 4, p. 78-81 (Jim Watson); Peter Sloly notes, (OPS00014484); POEC Transcript, Vol. 13, p. 219-222 (Peter Sloly); POEC Transcript, Vol. 28, (Marco Mendicino), p. 40 line 27 to p. 42 line 17.
[8] See O. Reg. 71/22 *Critical Infrastructure and Highways* (COM00000910).
[9] See, e.g. POEC Transcript, Vol. 27, p. 318 (William Blair).
[10] POEC Interview Summary: Superintendent Pat Morris (OPP), (WTS.00000035), p. 2-4; List of Hendon Teleconferences and reports for Freedom Convoy 2022, (OPP00004571); POEC Transcript, Vol. 5, p. 189-192 (Supt. Pat Morris).

organizers,[11] and working with municipal police services to provide resources.[12] While Ontario may not have had sufficient policing resources in the province to ultimately address the Ottawa occupation, no additional statutory authorities were necessary to have other police services lend assistance. Police in Ontario had pursued the option of contracting with police services within and outside of the province to shore up their capacity to conduct large-scale public order operations.[13] The *Emergencies Act* and orders were not necessary for these purposes.[14]

29. The CCLA submits that neither the authority nor the capacity of the provinces was truly exceeded.

30. The *Emergencies Act* requires that the situation cannot be dealt with under "any other law of Canada". The CCLA submits that in this context, this phrase refers to federal law (both statutory and common law) since provincial legal authorities are already addressed under section 3(a). As discussed further below in relation to authorities and powers held by police to address public order situations, the CCLA submits that this aspect of the definition of national emergency was also not met in this case.

ii) There was no threat to the security of Canada within the meaning of the Emergencies Act

31. Pursuant to section 16 of the *Emergencies Act*, a public order emergency is defined as an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency. Section 16 further stipulates that "threats to the security of Canada" has the meaning assigned by section 2 of the *Canadian Security Intelligence Service Act.* The CCLA submits that, based on the section 58 justification put before Parliament and the evidence heard by the Commission, there simply was no threat to the security of Canada within the meaning of the *EA.*

32. The government's justification for declaring a public order emergency is focused on subsection (c) of the *CSIS Act* definition: activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state.

33. The Commission heard evidence from many witnesses in law enforcement and intelligence. Notably, CSIS Director David Vigneault confirmed that "at no point did the Service assess that the protests in Ottawa or elsewhere... constituted a threat to the security of Canada as defined by section 2 of the *CSIS Act*."[15] Indeed, in the lead-up to the invocation of the *EA*, Mr. Vigneault "felt an obligation to clearly convey the Service's position that there did not exist a threat to the

[11] Interview Summary: Inspector Marcel Beaudin (OPP), (WTS.00000037), p. 2-4; POEC Transcript, Vol. 9, p. 119 line 24 to p. 124 line 1.
[12] POEC Transcript, Vol. 11, (Thomas Carrique), p. 66, lines 18-28; POEC Interview Summary: Commissioner Thomas Carrique, (WTS00000039), p. 3.
[13] POEC Transcript, Vol. 5, (Diane Deans), p. 20-21, lines 20-13; POEC Interview Summary: Diane Deans, (WTS00000010), p. 3.
[14] POEC Transcript, Vol. 31, (Justin Trudeau), p. 82-3, lines 1-3.
[15] POEC Interview Summary: David Vigneault, Michelle Tessier, Tricia Geddes (CSIS) and Marie-Hélène Chayer (ITAC) ("CSIS Interview Summary"), (WTS.00000060), p. 5.

security of Canada as defined by the Service's legal mandate."[16] Witnesses from the OPP acknowledged that "there was no specific, credible criminal intelligence of an egregious criminal or violent act" and that "most of [the OPP's Provincial Operations Intelligence Bureau]'s assessments say that there was no specific intelligence regarding a specific violent threat."[17]

34. None of these witnesses provided evidence of a threat to the security of Canada within the meaning of the *CSIS Act*. Moreover, none provided evidence of specific and credible threats of acts of serious violence against persons or property.

35. Law enforcement and intelligence witnesses raised the possibility that the protests could serve as cover for a "lone wolf" attack or that violent extremists might use the protests as a means of recruitment.[18] While serious, all these concerns were speculative. The Commission did not hear evidence of any vetted intelligence assessment that considered these as more than mere possibilities.[19] Such possibilities, based on generalized concerns, cannot be sufficient to justify the declaration of a public order emergency.

36. While there were some extremists (including CSIS targets) amongst the protesters,[20] and there were concerns about flare-ups between protesters and counter-protesters,[21] these facts alone do not provide sufficient basis to meet the statutory threshold of "threats to the security of Canada." They also do not constitute "specific threats of acts of serious violence against persons or property."

37. The evidence heard by the Commission strongly suggests that the government felt enormous pressure to act, fueled partly by individual Ministers' own impressions of and experience with

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[16] CSIS Interview Summary, (WTS.00000060), p. 8.
[17] POEC Interview Summary: Superintendent Pat Morris (OPP), (WTS.00000035), pp. 6 and 7. The Hendon Report of February 7, 2022, referred to a potential national security threat. Superintendent Morris explained to the Commission that the decision to employ such language stemmed from concerns about the border blockades and economic integrity. He also confirmed that the OPP "produced no intelligence to indicate that these individuals would be armed." POEC Transcript, Vol. 5, p. 201, lines 1-22, pp. 226-9. Likewise, Commissioner Carrique distinguished between flagging a potential threat in the Hendon Report for intelligence purposes and the threshold established in the *CSIS Act*. He agreed that there were no *credible* threats to national security. POEC Transcript, Vol. 11, (Thomas Carrique), pp. 90-93, 295-296.
[18] POEC Interview Summary: Superintendent Pat Morris (OPP), (WTS.00000035), p. 7; CSIS Interview Summary, (WTS.00000060), p. 6; POEC Transcript, Vol. 27, (David Vigneault, Michelle Tessier & Marie-Helene Chayer), p. 37, lines 10-27, p. 88, lines 1-7, p. 148, lines 4-12, p. 154, lines 19-24, p. 160, lines 21-25; POEC Transcript, Vol. 5, (Patrick Morris), p. 295-297, lines 20-12.
[19] The CCLA notes that it was not privy to the evidence heard by the Commission *in camera* with the CSIS and ITAC witnesses. To the extent this evidence is relied upon by the Government of Canada as a basis for declaring a public order emergency, the CCLA requests that the Commission's report address this evidence as clearly as possible without compromising any of the security concerns that justified the hearing *in camera.* The public summary of the *in camera* CSIS hearing (In Camera Hearing Public Summary - CSIS, WTS.00000079), did not include *any reference* to specific evidence that might be sufficient to meet the legal threshold, strongly suggesting that none exists. For the purposes of achieving the accountability and transparency that is contemplated by the *EA*, the Commission's Report should make clear and explicit statements on the role and relevance of any such evidence in assessing the legality of the emergency declaration.
[20] CSIS Interview Summary, (WTS.00000060), p. 5.
[21] POEC Interview Summary: RCMP Intelligence Panel, (WTS.00000067), p. 3.

the protests[22] and a profound lack of faith or confidence in law enforcement.[23] Public officials' views are naturally going to be informed by their own experiences and perceptions. However, Cabinet's exercise of the extraordinary powers under the public order emergency provisions of the *EA* should primarily consider and rely heavily on intelligence assessing risks to national security and public order that has been vetted and analyzed by those with expertise. The evidence heard by the Commission on what Cabinet considered in its deliberations suggest that this type of evidence did not play a considerable role.[24]

38. Rather, both the evidence before the Commission, and the justification laid out in the government's section 58 statement, placed significant emphasis on economic disruption and harms. There were the immediate economic issues that the protests had shuttered some businesses at a time when the economy needed and was expecting a boost. The closure of factories during the blockade of the Ambassador bridge was concerning not only because of its impacts on employment but also on trade with the United States.[25] In addition, government witnesses said they had significant concerns about the long-term economic impacts in the form of a loss of confidence in Canada as a safe country in which to invest.[26] The most immediate manifestation of this concern was the possible loss of a bid for an electric vehicle battery plant that stood to bring a $5 billion investment to Canada.[27]

39. While economic concerns are certainly part of a broad understanding of "national security", the *Emergencies Act*'s reliance on the *CSIS Act* definition of threats to the security of Canada does not contemplate economic disruption alone as a basis for declaring a public order emergency. There is a real danger in allowing the government to make economic considerations a priority over democratic values and fundamental freedoms of assembly and expression.

40. Through a number of witnesses, the Commission heard evidence that the Department of Justice had provided a legal opinion that suggested that "threats to the security of Canada" in the *Emergencies Act* did not have the same meaning as the term has in the *CSIS Act*, despite the CSIS definition's direct incorporation into the EA.[28] The government of Canada has claimed solicitor-client privilege over this opinion. While it appears that the Director of CSIS sought such an opinion from the Department of Justice,[29] it is likely that Cabinet relied on a different (though perhaps similar) legal opinion.[30]

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[22] See e.g. POEC Transcript, Vol. 28, (Marco Mendicino), p. 51, lines 16-28; POEC Transcript, Vol. 29, (David Lametti), pp. 102-5; POEC Transcript, Vol. 27, (William Blair), p. 317, lines 1-11.
[23] POEC Transcript, Vol. 27, (William Blair), p. 262, lines 8-16; POEC Transcript, Vol. 29, (David Lametti), p. 59, lines 26-16.
[24] It is significant that at the IRG meeting on February 13, 2022, Commissioner Lucki was not asked to provide a briefing and did not speak up in order to provide one. POEC Transcript, Vol. 23, (Brenda Lucki), pp. 78-84.
[25] See e.g. POEC Interview Summary: Deputy Prime Minister Chrystia Freeland, (WTS.00000078), pp. 2-4.
[26] POEC, Transcript, Vol. 30, (Chrystia Freeland), p. 38-39, lines 21-17 & p. 100, lines 3-12; POEC Interview Summary: Chrystia Freeland, (WTS00000078), p. 4; POEC, Transcript, Vol. 25 (Michael Sabia, Isabelle Jacques, Rhys Mendes), p. 8-9, lines 23-6; POEC Interview Summary: Department of Finance Panel, (WTS00000059), p.5.
[27] POEC Transcript, Vol. 18, (Drew Dilkens), p. 82 line 17 to p. 84 line 9; POEC Transcript, Vol. 30, (Chrystia Freeland), p. 7-8, lines 11-20.
[28] POEC Transcript, Vol.25, (Jody Thomas), p. 271, lines 15-24; POEC Transcript, Vol. 27, (David Vigneault), p. 94-5, lines 18-8.
[29] POEC Transcript, Vol. 27, (David Vigneault, Michelle Tessier, Marie-Helene Chayer), p. 95, lines 2-9.
[30] POEC Transcript, Vol. 31, (Justin Trudeau), p. 102, lines 6-19.

41. The CCLA acknowledges the fundamental importance of solicitor-client privilege. In this case, however, the government's refusal to waive that privilege significantly hinders the Commission's work. Moreover, to the extent that the government relies on the existence of this legal advice to support the argument that it acted in good faith and on a good faith basis that the threshold for declaring a public order emergency was met, it cannot do so without disclosing the opinion. Simply put, if the Commission is asked to put itself in the shoes of the government and assess all the inputs that Cabinet had before it, the Department of Justice's legal advice is a big missing piece.[31]

42. In any event, the federal Department of Justice does not have the final or determinative word on the interpretation of the EA. The Commission should strongly resist any push to simply take the government's word on its interpretation of the law or accede to the view that this was simply a "political decision" that can't be reviewed. The political consequences of choosing to invoke the EA, whether positive or negative, are ultimately irrelevant to the Commission's mandate. In our submission, a significant part of the Commission's role is to assess the *legality* of the government's decision in order to assist and inform future governments.

43. A core complaint about the protesters involved in the occupation and blockades was that they did not obey the law or had their own understanding of what the law allowed. The government's own creative and privileged interpretation of the law should not be allowed to prevail over what a plain and obvious reading of the statute dictates. The legal threshold for declaring a public order emergency was not met.

B) The emergency orders were unlawful and unconstitutional

i) The prohibitions on public assembly were too broad

44. The emergency orders that came into force on February 15 were set out in the *Emergency Measures Regulation*[32] and the *Emergency Economic Measures Order*.[33] While the question of the government's legal authority to declare a public order emergency is a crucial one, the legality and constitutionality of the emergency measures that were put in place are at least equally significant. The measures are what have an impact on rights and what must be tested for constitutional compliance.

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[31] A legal opinion from the Department of Justice likely includes an assessment of the legal risk associated with a particular interpretation or course of action. It is worth noting that the Minister of Justice, pursuant to section 3 of the *Canadian Bill of Rights* and section 4.1 of the *Department of Justice Act*, is required to "ascertain" or "examine" whether proposed legislation is inconsistent with the *Charter* or *Bill of Rights.* Similarly, pursuant to section 3 of the *Statutory Instruments Act*, the Clerk of the Privy Council (in consultation with the Deputy Minister of Justice) is required to examined proposed regulations to ensure that they are not inconsistent with the purposes and provisions of the *Charter* and *Bill of Rights.* In *Schmidt v Canada (Attorney General)*, 2018 FCA 55, the Federal Court of Appeal upheld a finding that these reporting requirements were only triggered if there was "no credible argument" that could be made that the legislation/regulation met those standards. The CCLA submits that this exceptionally low standard is not appropriate for assessing *Charter* compliance and would be equally inappropriate if applied to the interpretation of the legal threshold in the *Emergencies Act.*

[32] *Emergency Measures Regulations*, SOR/2022-21 (COM00000854).

[33] *Emergency Economic Measures Order*, SOR/2022-22 (SSM.CAN.00001991), p. 10.

45. The Commission heard from many witnesses who noted that several of the measures were helpful in clearing the blockades and occupation. In the CCLA's submission, a focus on the assistance provided by the measures would be misplaced. There are any number of additional legal tools that governments and law enforcement agencies might find helpful in achieving their objectives. The Commission's focus should instead be on the legality and constitutionality of the measures, with particular attention on necessity and proportionality.

46. The government has argued that the emergency measures were carefully tailored and targeted to address the blockades and occupation. The CCLA submits that, even if it is accepted that the federal government was justified in using the *EA* to address the blockades and occupation, the orders were unjustifiably broad. The orders did not target specific protests or geographic areas. They instead depended largely on law enforcement and financial institutions to operationalize and enforce the measures selectively. Overly broad laws are frequently found to be unconstitutional precisely because they download too much discretion to law enforcement. In this case, despite the government's clear loss of confidence in the ability of law enforcement to adequately manage the situation, a proportional and measured approach to enforcement relied largely on the discretion of these institutions.[34]

47. The most significant restriction set out in the *Emergency Measures Regulations* was the prohibition on certain public assemblies that "may reasonably be expected to lead to a breach of the peace".[35]

48. The prohibition on public assemblies, while intended to address the blockades and occupation, was drafted in broader terms and subject to relatively limited exceptions. Although the requirement that the assembly could "reasonably be expected to lead to a breach of the peace" may be intended to narrow the reach of the prohibition, this is a difficult standard to apply and arguably impermissibly vague. More importantly, it is difficult for a layperson to predict how law enforcement may choose to apply it. Given the nature of protests, which are often composed of diverse groups of people with different interests and no prior connection, a large number of assemblies could, at some point, reasonably be expected to lead to a breach of the peace. There is also a reasonable argument that, during a state of emergency where the government has clearly indicated that certain protests are the cause of the emergency, any assembly could reasonably be expected to result in such a breach.

49. The prohibition on public assemblies included other requirements, in particular that it breach the peace by the serious disruption of the movement of persons or goods or the serious interference with trade; the interference with the functioning of critical infrastructure; or the support of the threat or use of acts of serious violence against persons or property. Again, while these aspects of the prohibition may have been intended to narrow its scope, it remains overly broad. On the plain wording of the provisions, it is likely that labour strikes and other forms of

[34] POEC Transcript, Vol. 27, (William Blair), p. 330, lines 15-28; POEC Transcript, Vol. 28, (Marco Mendicino), p. 49-51, lines 18-15; POEC Transcript, Vol. 29, (David Lametti), p. 70, lines 11-22; POEC Transcript, Vol. 31, (Justin Trudeau), p. 88, lines 2-26.

[35] Section 2(1) of the *EMR* states that a person "must not participate in a public assembly that may reasonably be expected to lead to a breach of the peace by: (a) the serious disruption of the movement of persons or goods or the serious interference with trade; (b) the interference with the functioning of critical infrastructure; or (c) the support of the threat or use of acts of serious violence against persons or property.

typically lawful and safe protest activity were prohibited while the emergency orders were in place.[36]

50. While the Commission heard some evidence about protests that continued in other locations (and without vehicles), these were permitted due to the exercise of discretion by police. The *Emergency Measures Regulation* made no attempt to facilitate the continuation of protest activities that did not involve large vehicles or the blockading of roadways. Regardless of whether a protester was in a truck blocking a major intersection or on the sidewalk holding a sign, all were required to leave under the terms of the *EMR*.

ii) The asset freezing provisions were too broad

51. The *Emergency Economic Measures Order (EEMO)* contained measures to require the freezing of certain financial accounts of "designated persons".[37]

52. The Commission heard evidence that the purpose of the powers to freeze accounts was to disrupt and deter protesters, it was not intended to be punitive nor was it intended to operate on individuals who had not chosen to engage in illegal activity. According to Deputy Prime Minister Freeland, the intention was to create non-violent, non-physical incentives for people to stop taking part in the illegal activity.[38]

53. There were two primary streams that were used to facilitate the freezing of financial accounts. In the first stream, the RCMP served as a channel of communication between the OPS and the OPP, and the financial institutions.[39] Information disclosed by the OPS and OPP consisted of names of individuals, dates of birth, residential addresses, and related police information regarding those who were subjects of investigations due to their involvement in the blockade.

54. In the second stream, the RCMP shared information with financial institutions about individuals associated to vehicles observed by the OPP as being involved in blockade activity in downtown Ottawa.[40] The RCMP corroborated the presence of individuals and vehicles in the illegal protest observed by the OPP and shared identifying features of these individuals and vehicles with financial institutions.

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[36] The Commission did hear some evidence that protests continued in other locations while the emergency declaration was in force, but several witnesses also made clear that none could continue near Parliament.

[37] Section 2(1) of the *EEMO* required a broad range of financial institutions (defined in section 3) to cease dealing in any property that is owned, held or controlled, directly or indirectly, by a designated person or by a person acting on behalf of or at the direction of that designated person. Entities also had to cease facilitating any transactions, making any property available or providing any financial or related services. Section 1 of the *EEMO* defined a designated person as "any individual or entity that is engaged, directly or indirectly, in an activity prohibited by sections 2 to 5 of the *Emergency Measures Regulations.*"

[38] POEC Transcript, Vol. 23, (Michael Duheme & Brenda Lucki), p. 193-4, lines 24-2; POEC Transcript, Vol. 30, (Chrystia Freeland) p. 55, lines 12-19.

[39] POEC Institutional Report - Royal Canadian Mounted Police, (DOJ.IR.00000011), p. 17, para 57; POEC Transcript, Vol. 23, (Michael Duheme & Brenda Lucki), p. 189-190, lines 16-7.

[40] POEC Institutional Report - Royal Canadian Mounted Police, (DOJ.IR.00000011), p. 17, para 58.

55. The RCMP had the responsibility to identify the individuals and transfer the information to the financial institutions. Assistant Deputy Minister Jacques testified that "financial institutions had an obligation to review on an ongoing basis their relationship with their clients to ensure that they were not using property to further the illegal activities that were ongoing… And if they found out that they did have any of these property that they would have to suspend the services they provide and they need to freeze those accounts." On her evidence, the obligation was on the financial institution to determine whether they were going to freeze bank accounts. Pursuant to the *EEMO*, the financial institutions had an obligation to report back to the RCMP or CSIS, although the evidence suggests it was the RCMP that ultimately received this information.

56. Significantly, since it was an offence to make funds available to someone participating in a demonstration considered unlawful by the *EA*, the financial institutions faced potential charges if they did not freeze the accounts of the persons whose names were provided by the RCMP. It was the financial institutions' responsibility to ensure that they were compliant with the order. If the financial institutions decided to exercise their discretion for humanitarian or other purposes, they were taking the legal risk for doing so.[41]

57. The financial institutions expressed concern to the RCMP about the breadth of the orders because there were no instructions on the types of accounts to freeze. As a result, chequing accounts, savings accounts, joint accounts, business accounts, RSP accounts and key lock accounts of any person who was found to be a designated person were frozen.[42] The financial institutions questioned whether the freezing should be applied to joint accounts and whether there should be a threshold to act because when the Order came into effect there was no procedure or policy set in place for freezing accounts that they could follow.[43]

58. The *EEMO* also allowed the RCMP to proactively share basic personal information with entities listed in section 3 (e.g., banks, insurance companies, or crowd funding platforms) where the RCMP was satisfied that sharing would help in the implementation of the *EEMO*.[44] The RCMP exercised its discretion not to provide information to insurance companies due in part to timing, and concerns that if an individual's insurance was cancelled it would be difficult for them to safely leave the blockade.[45]

59. The *EEMO* did not include any process for unfreezing accounts. The Department of Finance discussed this issue with financial institutions and expected that they would, based on their ongoing monitoring of client relationships, unfreeze accounts once it became clear that the individual was no longer involved in the activities deemed unlawful by the *Emergency Measures*

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[41] POEC Transcript, Vol. 25, (Isabelle Jacques, Michael Sabia & Rhys Mendes), p. 106, lines 9-15.
[42] CBA Institutional Report, (CBA.IR.00000001), p. 3-4; Canadian Credit Union Association (CCUA) Institutional Report, (CCU.IR.00000001), p. 2-3.
[43] The *EEMO* created a complex regulatory scheme that had to be implemented on an urgent basis with little clear direction from the government.
[44] The *EEMO* did not provide any privacy-protective measures and did not stipulate how confidential information shared among institutions would be disposed of once the emergency had been revoked.
[45] There was evidence that the government had failed to fully consider the implications of suspending insurance policies. See e.g. POEC Transcript, Vol. 25, (Isabelle Jacques, Michael Sabia & Rhys Mendes), p. 136 and General and Technical Q and As (SSM.CAN.00000278), Q. 13.

Regulation. Ultimately, the government is responsible for developing the *EEMO* which allowed for account freezing.[46]

60. By February 23, 2022, when the declaration of emergency was revoked, the RCMP had disclosed a total of 57 entities to financial institutions, including individuals and owners or drivers of vehicles involved in the blockades, and 170 Bitcoin wallet addresses to virtual asset service providers.[47]

61. Not all financial institutions informed the RCMP of the number of financial products they froze. Based on the information it did receive, the RCMP reported that financial institutions froze 257 financial products, including personal accounts, corporate accounts, and credit cards.[48] At least some accounts were frozen *proactively* by financial institutions, as opposed to *reactively* in response to RCMP disclosures.[49]

62. As a result of accounts being frozen, money that families use to buy groceries, pay their rent, and pay child support was cut off. Notwithstanding the government's intentions, the impact of freezing the accounts spread beyond those participating in the blockades.[50]

C) Existing legal authorities and police powers are sufficient to address even highly disruptive protest activities

i) The right to peaceful assembly and free expression must be interpreted broadly

63. The right to protest is fundamental to a vibrant liberal democracy. No witness that appeared before the Commission seriously disputed the right to and importance of peaceful and lawful protest in Canada.

64. However, there was no clear consensus on the difference between a peaceful protest and a lawful protest, the boundaries of lawful protest, or when an otherwise lawful protest veers into unlawful territory. It is worth noting that while the "Freedom Convoy" protests included prolonged engagement in unlawful behaviour (in the form of illegal parking and blocking of roads, for example), it is not at all uncommon for protests to violate such laws, although usually for a more limited period. Even without the presence of vehicles, large groups of people protesting on foot will often lead to the blocking of roads and may contravene provincial or municipal traffic rules.

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[46] POEC Transcript, Vol. 25, (Isabelle Jacques, Michael Sabia & Rhys Mendes), p. 6, lines 5-13.
[47] POEC Institutional Report — Royal Canadian Mounted Police, (DOJ.IR.00000011), pp. 19-20, para 69; Affidavit of Denis Beaudoin, (JCF00000062) p. 3, para 20-21.
[48] POEC Institutional Report — Royal Canadian Mounted Police, (DOJ.IR.00000011), p. 20, para 70.
[49] An internal RCMP email dated February 20, 2022 (PB.NSC.CAN.00005704) indicates that ten financial products were reported to have been frozen "proactively." Another RCMP email dated February 25, 2022 (PB.NSC.CAN.00007653) cites 23 financial products "proactively" frozen. However, most documents before the Commission do not distinguish between accounts frozen proactively and reactively. As such, it is impossible to confirm exactly how many accounts were frozen by financial institutions on their own initiative, i.e. flagged internally by the institutions themselves.
[50] POEC Transcript, Vol. 25, (Isabelle Jacques, Michael Sabia & Rhys Mendes), p. 75, lines 10-23; POEC Transcript, Vol. 30, (Chrystia Freeland), p. 55, lines 12-27.

65. While protest activity may contravene a wide variety of laws (including federal *Criminal Code* prohibitions, provincial highway traffic laws and municipal bylaws prohibiting nuisance or restricting noise), the CCLA submits that the mere contravention of such laws does not necessarily render a protest 'unlawful'. Put another way, when applied to the right to protest, some of these laws are not reasonable restrictions on the right to peaceful assembly and freedom of expression enshrined in the *Charter*.[51] In our submission, the extent to which these laws comply with the *Charter* in the circumstances of a particular protest event must be considered.[52]

66. The range of views that the Commission heard on the nature and scope of lawful protest is significant. At one end of the spectrum, some of the protester witnesses clearly did not appreciate that their chosen method of protest included activities that were prohibited by municipal and provincial law, and that in this context prohibitions on these activities could likely be sustained as reasonable restrictions on the right to peaceful assembly. For them, so long as they were not engaging in acts of violence, the protests were lawful and could not be legally restricted.[53] At the other end of the spectrum, some witnesses appeared to suggest that protest activities that are disruptive to residents and businesses are unlawful, or that police have a right to dictate the time, place and manner of protest activity.[54]

67. The CCLA submits both extremes must be rejected. The right to protest (which incorporates both freedom of expression and peaceful assembly) must be given a large and liberal interpretation and that police have a duty to facilitate protest activity while protecting public safety. The law must recognize that, very often, a protest will only be effective if it serves to disrupt communities or upend the status quo. These are features of protest that help protesters draw public attention to their cause and put pressure on decision-makers to take their actions seriously.

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[51] During the policy roundtable on fundamental rights and freedoms at stake in public protests and their limits, POEC Transcript, Vol. 32, pp. 24-28, Prof. Cameron described different approaches to the scope of section 2(c) of the *Charter*. The CCLA's view is that freedom of peaceful assembly should be interpreted broadly and liberally such that the qualifier of "peaceful" assembly, excludes from its ambit acts or threats of violence. As noted by Prof. Cameron, this approach is consistent with the Canadian approach to the other fundamental freedoms in section 2 of the *Charter* and with the way in which freedom of peaceful assembly is interpreted under international human rights instruments. A broad understanding of peaceful assembly also avoids a pre-emptive determination that an assembly deserves no protection and instead puts the onus on the state to justify restrictions.

[52] See e.g. *Garbeau c Ville de Montréal*, 2015 QCCS 5246, in which protesters challenged tickets received under section 500.1 of Quebec's *Highway Safety Code* which made it an offence to intentionally block a highway, with exceptions for pre-authorized parades and events. The Court found the scheme to be an unreasonable restriction on both freedom of expression and peaceful assembly. The exception for those who obtained pre-authorization did not save the scheme because, in practice, no mechanism existed to obtain such pre-authorization and no criteria guided those who might grant exceptions. In *Batty v City of Toronto*, 2011 ONSC 6862, individuals who had been camping in a public park as part of the "Occupy" movement were served with a trespass notice by the City. The Court found that the protester's activities of camping in and "taking over" the park engaged section 2 of the *Charter*, but that the trespass notice's limitation on rights was reasonable and justified.

[53] POEC, Transcript, Vol. 15, (Keith Wilson), p. 109-110, lines 5-10.

[54] POEC, Transcript, Vol. 27, (William Blair), p.180. Minister Blair noted the use of certain designated areas where Toronto police aimed to facilitate lawful, peaceful protests during the Toronto G20 in 2010. His evidence did not make clear that these zones were sites several kilometres away from where G20 leaders were meeting. Protesters were asked to conduct their protests where there would be no opportunity for them to be seen or heard by the intended audience (the world leaders).

68. This is not to say that all activity that occurs in the context of a protest is lawful or can be said to be protected under the broader constitutional rubric of freedom of expression or freedom of peaceful assembly. The Commission heard evidence that some of those affiliated with the Freedom Convoy engaged in harassing and assaultive behaviour, in particular against residents and business owners in downtown Ottawa. It is not difficult to understand why residents and businesses, particularly in Ottawa, felt they had been largely abandoned by their governments and left under-protected by their police services. However, the CCLA submits that the unlawful activities of some individuals must not necessarily or automatically be attributed to an assembly as a whole and render the assembly itself not *prima facie* protected by the *Charter*. The CCLA agrees with the approach to 2(c) adopted by Professor Cameron in her policy paper.[55] The right to peaceful assembly has a broad scope, with narrow exclusions for violence and threats of violence.

ii) Police have a duty to facilitate peaceful protest and to protect public safety

69. The Commission heard evidence that there was a great deal of concern and frustration over the Ottawa Police Service's response (or their perceived lack of response) to the protests in Ottawa.[56] The community's fear and frustration was also echoed in the testimony of some of the civil servants,[57] political staff,[58] and elected officials[59] who testified before the Commission. Unfortunately, during the life of the protests, some government officials made public statements that may not have assisted the public in better understanding the boundaries between lawful protest and illegal activity. For example, Minister of Emergency Preparedness Bill Blair made several statements about the need for police to "do their job".[60]

70. In the CCLA's submission, the Commission should make it clear that when it comes to public order events, the job of police is not confined to enforcement activities such as issuing fines, arresting protesters, or dispersing protests. Police have a role to play in ensuring that protests occur safely, and sometimes that means that facilitating peaceful, constitutionally-protected activities– for example by blocking or rerouting traffic to ensure pedestrian safety and access to key infrastructure – is an important and core law enforcement role. Even when charged with executing a specific court injunction, non-enforcement, at least for a time, will sometimes be the most appropriate police response.[61]

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[55] Reference policy paper. See if this model has a specific label in paper/how to distinguish it from other models id'd.
[56] Residents businesses
[57] POEC Transcript, Vol. 26, (Janice Charette & Nathalie Drouin), p. 267, lines 5-20.
[58] POEC Transcript, Vol. 30, (Katie Telford, Brian Clow & John Brodhead), p. 185-186, lines 21-10.
[59] POEC Transcript, Vol. 29, (David Lametti), p. 61, lines 3-11; POEC Transcript, Vol. 28, (Marco Mendicino), p. 81, lines 3-7; POEC Transcript, Vol. 27 (Bill Blair), p. 340, lines 18-25; POEC Transcript, Vol. 31 (Justin Trudeau), p. 30, lines 5-15.
[60] POEC Transcript, Vol. 27, (William Blair), p. 203-204, lines 3-24 & p. 304, lines 5-12; Text - Zita-Bill Blair, (SSM.NSC.CAN.00003129).
[61] Police routinely exercise their operational independence in deciding whether and when it is safe to enforce injunction orders, for example. See e.g. *Henco Industries Ltd. v Haudenosaunee Six Nations Confederacy Council,* (2006) 82 O.R. (3d) 721 (ONCA) for a situation where police did not pursue enforcement action against Indigenous protesters notwithstanding injunctions.

71. At the same time, there have been concerns raised by some that the police gave the "Freedom Convoy" protesters special treatment and that protesters for causes like Black Lives Matter or Indigenous rights have been treated harshly in comparison. The Commission heard some evidence that highlighted these concerns.[62] Outside of the context of the Commission, the CCLA submits that there is ample evidence of systemic discrimination in our criminal justice system generally and in many Canadian law enforcement institutions. This is an important part of the context the Commission should consider in assessing the actions of law enforcement actors. It should be clear that, regardless of police sympathy with the cause or the protesters, the duty of police to facilitate safe protest activities does not change.

iii) Police have ample powers to address disruptive or unlawful protests

72. Throughout the Commission's fact-finding phase, there were questions posed about the powers that police have or had to exclude the public (and/or vehicles) from certain areas. Some law enforcement witnesses noted that police do have the common law power to create exclusion zones, but that the powers set out in the emergency orders helped to clarify these powers for the public.[63]

73. The powers held by police arise from both statute and from the common law. Common law powers are identified by resorting to the "ancillary powers doctrine,"[64] which acknowledges that police have powers that are ancillary in nature to their duties.

74. The Supreme Court of Canada has held that police actions that interfere with individual liberty are permitted at common law if they are ancillary to the fulfillment of recognized police duties and are reasonably necessary for the fulfillment of the duty.[65] In *MacDonald*, the majority of the Supreme Court set out three factors to be weighed in assessing whether a particular interference with liberty was necessary and reasonable:

    i) the importance of the performance of the duty to the public good;
    ii) the necessity of the interference with individual liberty for the performance of the duty; and
    iii) the extent of the interference with individual liberty.[66]

75. Although determining whether a common law police power exists does not require a direct application of section 1 of the *Charter*, Canadian courts have acknowledged the relationship between the frameworks. In *Fleming*, the Supreme Court noted:

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[62] It is not necessarily inappropriate for the police to consider the routines and habits of particular protest groups, organizations and/or individuals in developing a response to protests and other public order events. Police expectations may vary based on previous experience with particular groups. However, these expectations should be based on facts and evidence, not prejudices or stereotypes.
[63] See e.g. POEC Transcript, Vol. 10, (Robert Bernier), p. 32, lines 3-21.
[64] The *Waterfield* test, from *R. v. Waterfield*, [1963] 3 All E.R. 659, is often used to determine whether police have a particular ancillary power.
[65] *Fleming v Ontario*, 2019 SCC 45, paras 45-7.
[66] *Fleming v Ontario*, 2019 SCC 45, para 47 and *R v MacDonald*, 2014 SCC 3, para 37.

> Certain concepts which play a significant role in the *Charter* justification context – such as minimal impairment and proportionality – have clear parallels in the ancillary powers doctrine analysis. For example, the three factors from *MacDonald* require a proportionality assessment. Moreover, the concept of reasonable necessity requires that other, less intrusive measures not be valid options in the circumstances. If police can fulfill their duty by an action that interferes less with liberty, the purported power is clearly not reasonably necessary.[67]

76. The prominence of a section 1 analysis may be greater in some cases based on the rights at issue. Writing for the Court of Appeal in *Figueiras,* Rouleau J.A. noted:

> The potential interplay between *Waterfield* [test for ancillary powers] and *Oakes* is particularly important given the liberties at stake in this case. The existing *Waterfield* jurisprudence deals predominantly, if not exclusively, with rights under ss. 8, 9 and 10 of the *Charter,* which have internal limits built into the rights they guarantee…
>
> By contrast, s. 2(b) guarantees an unqualified right to freedom of expression, without internal limits, the infringement of which falls to be justified under s. 1. Thus, to the extent that the police conduct in this case infringed Mr. Figueiras' expressive rights, it is not immediately apparent that that conduct should be analyzed under *Waterfield* rather than under s. 1 (and, in particular, under the "prescribed by law" branch of the *Oakes* test).[68]

77. In the *Figueiras* case, the Court proceeded on the basis of the *Waterfield* analysis, finding that nothing turned on the approach taken. While this may have been true in that case, the CCLA submits that when assessing police powers that will have the effect of limiting freedom of expression and freedom of peaceful assembly, a *Charter* analysis should be directly applied.[69]

78. Ultimately, no common law police power can be used if Canada if it does not withstand *Charter* scrutiny. It is worth noting, however, that the authority to create exclusion zones in certain circumstances has been recognized as a common law power in cases dating back to *Knowlton.*[70] Whether the use of this power can be justified in a particular case depends on the totality of the circumstances. In addition, there is a difference between excluding individuals from an area and

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[67] *Fleming v Ontario,* 2019 SCC 45, para 54, citations omitted.
[68] *Figueiras v Toronto (Police Services Board),* 2015 ONCA 208, paras 52-3.
[69] This is consistent with the dissenting opinion of Justices Binnie, LeBel and Fish in *R. v. Clayton*, 2007 SCC 32, who concluded at para 59 that the "growing elasticity of the concept of the common law police powers must …be subjected to explicit *Charter* analysis."
[70] *Knowlton v R,* [1974] S.C.R. 443.

excluding vehicular traffic from an area. The latter constitutes a lesser intrusion and will be easier to justify.[71]

79. For example, given the events that occurred in Ottawa, the Toronto Police Service relied on their common law police powers to limit where Freedom Convoy protests could take place in the city and, in particular, where vehicles would not be permitted. Whether or not refusing to allow trucks anywhere in downtown Ottawa would have been justified depends on an assessment of the intelligence that police had about protester plans, informed by their experience with the protesters to that point.[72]

80. The Commission heard clear evidence from the Ottawa Police Service that the plan that was developed and ultimately used to clear downtown Ottawa relied on existing police powers.[73] The powers granted to the police by the emergency orders were not necessary to clear the downtown core.

iv) Dysfunctional police-government relations should be addressed

81. Throughout the Commission, witnesses and counsel discussed the appropriate relationship between law enforcement, elected officials, and civilian governance bodies such as the Ottawa Police Services Board.[74] Witnesses and counsel drew a perhaps unhelpful analogy to the separation of "church and state," suggesting a bright-line division of roles and responsibilities. At times, witnesses suggested that government officials are entitled to make policy, but should not provide instructions to law enforcement regarding specific operations.[75] Some witnesses suggested it would be helpful to develop written guidance to clarify the relationship between politicians and the RCMP.[76]

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[71] In his policy paper for the Commission, "The Policing of Large-Scale Protests in Canada: Why Canada Needs a Public Order Police Act", Prof. Robert Diab argues that police do not have clear authority at common law to create an exclusion zone of a significant size. The CCLA does not disagree that there is no common law authority to proactively, in the absence of any credible threat of unlawful activity, exclude the public from large areas of public space. In our view, such a power would be problematic from a *Charter* perspective, even if codified in legislation as Prof. Diab suggests. However, there are important distinctions between excluding individuals and excluding vehicles, and between proactive exclusion and the removal of individuals when an assembly poses a hazard to public safety. Nevertheless, the CCLA submits that the suggestion of adopting public order policing legislation is worthy of further exploration. Such legislation would have to be carefully crafted to respect *Charter* rights to peaceful assembly, association and expression, and would have to ensure that it did not allow for the exclusion of protesters from key venues where their messages have a chance to be heard by the intended audience.

[72] Although the *Charter* protects people and not vehicles, it is worth noting that the form a protest takes may be closely linked to the issue(s) animating the protest. For example, in the Occupy protests, the tents and encampments were a fundamental part of the message being conveyed. See e.g. *Batty v City of Toronto*, 2011 ONSC 6862, paras 70-75.

[73] POEC Transcript, Vol. 10, (Robert Bernier), p. 30-31, lines 19-21.

[74] The democratic governance of law enforcement can take different forms. Municipal police forces such as the Ottawa Police Service are accountable to police services boards. By contrast, for the OPP and the RCMP, which lack civilian boards, democratic accountability flows through the responsible minister.

[75] See e.g. POEC Transcript, Vol. 23, (Michael Duheme & Commissioner Brenda Lucki), p. 50-55; POEC Transcript, Vol. 27, (Minister William Blair), p. 199, lines 6-13; POEC Transcript, Vol. 28, (Minister Marco Mendicino), p. 52, lines 3-28.

[76] POEC Transcript, Vol. 22, (Robert Stewart & Dominic Rochon), p. 88, lines 6-17; POEC Transcript, Vol. 23, (Michael Duheme & Commissioner Brenda Lucki), p. 54-55, lines 7-7.

82. The Commission *did not* hear evidence that elected officials or civilian bodies overstepped their role in attempting to respond to the protests and blockades in January and February 2022.[77] Rather, the opposite seems to be true – at the provincial level in Ontario, the major issue was government *shirking* rather than impermissible meddling.

83. The CCLA submits that the evidence before the Commission reveals persistent misconceptions about police independence and outdated notions of a clear policy/operational divide. Yet, as the Commission heard from experts during the policy roundtables, the policy/operational distinction is largely illusory. Previous reports and commissions of inquiry have highlighted the need for active, engaged democratic oversight of law enforcement.[78]

84. The Commission heard that elected officials were frustrated by what they perceived as an inadequate policing response to the situation in Ottawa, yet felt unable to direct the Ottawa Police Service, the OPP, and the RCMP to adopt different strategies or to engage in frank discussions about strategic goals. The evidence also suggests that leaders in law enforcement failed to communicate clearly and directly with civilian oversight bodies, Deputy Ministers and Ministers. This fed the government's already flagging confidence in the police. Ultimately, the orders passed under the *EA* sought to compel law enforcement to dismantle the occupation in downtown Ottawa. In essence, the federal government used the *EA* to achieve indirectly what it felt it could not do directly – compel law enforcement to take decisive action.

85. The CCLA recognizes the need for safeguards to maintain clarity and transparency, and to avoid the politicization of law enforcement agencies. Government instructions to the police should be conveyed in writing and be presumptively public.[79] Moreover, the relationship between the government and law enforcement – like other aspects of policing that affect our rights and freedoms – should be subject to regular, proactive auditing by an independent oversight body.

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[77] When asked whether any ministers put improper pressure on her, Commissioner Lucki responded: "Absolutely not." POEC Transcript, Vol. 23, (Michael Duheme & Commissioner Brenda Lucki), p. 49, line 24. Michael Duheme suggested that "lines were crossed" when officials from the Privy Council Office and Public Safety reached in directly to law enforcement. However, his concerns were largely about lines of communication being blurred – not a true infringement of police independence. POEC Transcript, Vol. 23, (Michael Duheme & Commissioner Brenda Lucki), pp. 195-6.

[78] Honourable Sidney B. Linden, *Report of the Ipperwash Inquiry* (Toronto: Ministry of the Attorney General, 2007), Vol. 2 at p. 344, online: https://perma.cc/75QG-WVDR; Honourable John W. Morden, *Independent Civilian Review into Matters Relating to the G20 Summit* (Toronto: Toronto Police Services Board, 2012) at p. 6; Honourable Gloria J. Epstein, *Missing and Missed: Report of the Independent Civilian Review into Missing Person Investigations* (Toronto: Toronto Police Services Board, 2021), Vol. IV at pp. 722-727.

[79] For instance, at the Ipperwash Inquiry, Justice Linden emphasized that it is "absolutely crucial" that any ministerial intervention "be in the form of a written ministerial directive which, perhaps with restrictions necessary to protect ongoing investigations and confidential information, will be made public." Honourable Sidney B. Linden, *Report of the Ipperwash Inquiry* (Toronto: Ministry of the Attorney General, 2007), Vol. 2 at p. 344, online: https://perma.cc/75QG-WVDR.

III. POLICY SUBMISSIONS

A) Existing legal thresholds under the Emergencies Act are appropriate

86. There are a number of policy issues that arose in relation to the legal authority for invoking the Emergencies Act that the Commission may wish to consider in making recommendations. The CCLA wishes to comment on two such issues, namely:
    i. whether there is a need for a new or different definition of a public order emergency and whether such definition should be "decoupled" from the meaning of "threats to the security of Canada" under the *CSIS Act;* and
    ii. whether economic harm or disruption should be incorporated as a basis for declaring a public order emergency.

87. The Commission heard evidence from witnesses and commentary from expert participants in the policy roundtables that argued for a need to re-define a public order emergency or alter the definition of threats to the security of Canada in the Emergencies Act so that it no longer hinges on the definition in the CSIS Act.

88. These opinions are premised in part on a belief that the use of the Act and emergency measures in this case were justified. In short, if the emergency was not legally authorized, the Act should be modified so that similar circumstances would clearly and explicitly fall within its ambit. The CCLA does not accept this premise. As noted above, there were existing federal, provincial and municipal legal authorities that could be (and were) used to address the blockades. Making effective use of these legal tools required effective coordination of resources. While doing so was undoubtedly challenging, these are ultimately operational – not legal – issues. This in and of itself is not a reason to give extraordinary law-making powers to the executive branch.

89. Moreover, while some witnesses talked about the need to "modernize" the legislation, it is likely that any such modernization would in fact broaden the definition of a threat to the security of Canada, rendering it easier for the government to justify resort to the Act.

90. The Emergencies Act sets an intentionally high threshold for the government to declare an emergency. Indeed, it is worth noting that at the time of its adoption, many felt the definition of "threats to the security of Canada" under the CSIS Act was too broad and vague to serve as a useful reference.[80]

91. It is also worth noting that the EA provides for different thresholds for different types of emergencies because the powers that can be authorized pursuant to the Act depend on the type of emergency that is declared. While all of the four types of emergencies that are identified in the Act may result in restrictions on the rights of individuals in Canada, the regulation or

[80] When the *Emergencies Act* was being considered before Parliament, the CCLA had argued for a different threshold, namely that a public order emergency should only be declared "at the point where it could reasonably anticipate the outbreak of illegal violence, so intense, so widespread, and so continuous that the government itself would be overthrown or it would be powerless to govern."

prohibition of certain public assemblies is only explicitly contemplated under the public order emergency part of the EA.[81]

92. Another issue that arose throughout the Commission's hearings was the role that economic harm and disruption might play in a government's decision to declare a public order emergency. As noted above, the CCLA rejects the proposition that economic harm is sufficient to constitute a public order emergency, unless such harm flows directly from one of the activities described in the *CSIS Act* definition of threats to the security of Canada.

93. While the CCLA appreciates that Canada's economic well-being is a part of a broad understanding of "national security", there are real dangers associated with allowing economic disruption or harm to justify the use of emergency powers – particularly those powers authorized by the public order emergency provisions of the Act.

94. Economic pressure is a common form of protest and one that the state frequently employs to achieve policy goals in the spheres of foreign affairs and international trade. At a domestic level, individuals have tools at their disposal to exert economic pressure to effect change. The classic example is a labour strike, where labour is withdrawn to pressure employers to improve working conditions or employment terms. This form of protest has a long history in Canada and should be jealously guarded. Significantly, where the government considers the withdrawal of labour truly urgent and harmful, Parliament has passed legislation that requires workers to return to work, and such legislation is frequently passed in record time.[82]

B) There is room for greater clarity on police-government relations and police powers during public order events

95. As the Commission heard, debates about the relationship between law enforcement and the government have a long history in Canada. Indeed, previous reports and commissions of inquiry have explored the tension between two seemingly contradictory imperatives. Canadian law recognizes the principle of police independence – which holds that police forces must maintain their autonomy to act according to the law, insulated from undue political meddling. At the same

[81] The orders permitted under the war emergency section of the *EA* are exceptionally broad and not defined in the legislation, so it is possible that these could also authorize restrictions on peaceful assembly. When the *Emergencies Act* was being considered before Parliament, CCLA argued that the power to regulate/prohibit public assemblies is particularly dangerous power "In so many ways, the right of peaceable assembly serves as a prerequisite to the existence of other freedoms. It represents one of the most potent ways that citizens can challenge excesses of government power. Indeed, one of our concerns is that this power might be used to prevent legitimate critics from effectively calling into question the very declaration of a public order emergency. Under the normal law, the police have very wide powers to control and regulate assemblies that might be turning violent. They may arrest without warrant anyone who they have reasonable grounds to believe is about to commit an indictable offence and they may detain any person who commits or is about to join in or to renew a breach of the peace. They may also direct the flow of pedestrian and vehicular traffic. And they may interpose themselves between potential assailants and their victims. Moreover, to the extent that an assembly does become unruly, there are special powers to deal with it (unlawful assembly) and perhaps there could even be a "reading of the Riot Act". In view of the substantial powers under the normal law, it is hard to justify the power to prohibit assemblies that is being sought in this Bill.

[82] See Federal Back to Work Legislation, ParlInfo, for a list of back-to-work legislation which includes the time from introduction to Royal Assent.

time, experts have recognized the importance of accountability and democratic control to ensure that police forces do not become "a law unto themselves."

96. Based on the findings of previous commissions and the evidence before this Commission, the CCLA would emphasize four key points that should guide the Commission's findings and recommendations.

97. First, the Commission should highlight the need for active, engaged and transparent democratic oversight of law enforcement – particularly in the context of public order policing. The CCLA submits that civilian boards and elected officials *can and should* take an active role in overseeing police decisions that affect the exercise of fundamental rights. Civilian and government oversight are crucial to ensure that policing reflects the needs and priorities of the community. Justice Morden emphasized this point in his report examining the oversight role played by the Toronto Police Services Board (TPSB) during the G20 protests in 2010. He explained: "Civilian oversight of the police is essential. It acts as a check and balance against the legal powers society has given the police to enforce the law. Effective oversight of the police is the way that the public and police remain partners in the preservation of public safety."[83]

98. Second, the traditional distinction between policy and operations has outlived its usefulness. Most experts, including the academics who provided input to this Commission, agree that the distinction is neither tenable nor helpful.[84] Moreover, in the past, the bright-line prohibition against meddling in "operational" matters, coupled with a lack of fulsome information sharing, have prevented oversight bodies from fulfilling their role in a meaningful way.[85]

99. Rather than treating "policy" and "operations" as watertight compartments, Justices Linden and Morden put the emphasis on *process*. Justice Linden agreed with the conclusions of the McDonald Commission that the responsible minister *must retain* the option of intervening in the way that the police discharge their operational responsibilities. He recognized that "the precise ambit and content" of police and government responsibilities would "evolve over time." Still, he concluded:

> I am persuaded that the best way to approach the difficulties of distinguishing policy from operations is not through attempts at a static or legalistic definition, but rather by providing a process to resolve difficulties in defining policy and operations which will promote transparency and accountability and will be consistent with ministerial responsibility.[86]

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[83] Honourable John W. Morden, *Independent Civilian Review into Matters Relating to the G20 Summit* (Toronto: Toronto Police Services Board, 2012) at p. 6.
[84] See e.g. Lorne Sossin, "The Oversight of Executive Police Relations in Canada: The Constitution, the Courts, Administrative Processes and Democratic Governance," Ipperwash Inquiry (2004) at 5, online: https://perma.cc/E6VN-PG6Y; POEC Transcript, Vol. 35, (Roundtable on Police-Government Relations), p. 9, 27, 30-31.
[85] Honourable John W. Morden, *Independent Civilian Review into Matters Relating to the G20 Summit* (Toronto: Toronto Police Services Board, 2012) at p. 6, 18-19; Honourable Gloria J. Epstein, *Missing and Missed: Report of the Independent Civilian Review into Missing Person Investigations* (Toronto: Toronto Police Services Board, 2021), Vol. IV at p. 722.
[86] Honourable Sidney B. Linden, *Report of the Ipperwash Inquiry* (Toronto: Ministry of the Attorney General, 2007), Vol. 2 at p. 344, online: https://perma.cc/75QG-WVDR.

100. Similarly, Justice Morden proposed a consultation protocol to structure the relationship between the Toronto Police Services Board and the chief of police.[87] His protocol emphasized the candid, unfettered exchange of information between the board and the chief on *all matters of policy and operations*. The board should play a decision-making role with respect to all "critical points" in municipal policing – major operations, events and issues that require approval at the highest levels. This should involve determining appropriate objectives, priorities, and policies, but not micro-managing the finer points of operational plans.

101. Third, our understanding of police independence must be nuanced to take into account the distinct nature of public order policing. The CCLA recognizes the need to maintain police independence over "core" law enforcement functions. Police services boards must not intervene with respect to specific investigations, arrests, and prosecutions in individual cases. Political interference by elected officials in these matters is even more problematic, so the same principles should govern the relationship between the responsible minister and the OPP or RCMP.

102. However, there is a clear difference between "core" responsibilities and the deployment of police officers during public order events. The policing of protest typically requires difficult decisions about how best to facilitate the freedom of expression of protestors while protecting the rights and safety of others. Moreover, protests typically involve hot-button political questions, from Indigenous sovereignty to labour rights. In such cases, democratic accountability is *particularly* important. Government must bear the responsibility for any decisions to curtail protestors' rights, while respecting the expertise of law enforcement in determining the feasibility and safety of carrying out particular public order operations.

103. Fourth and finally, the CCLA recognizes the need for safeguards to avoid the politicization of the police and to maintain transparency. As noted above, we agree with the recommendation that government instructions to the police should be written and presumptively public. Moreover, the relationship between government and police – like other aspects of policing – should be subject to regular, proactive auditing by an independent oversight body.

104. The CCLA agrees with the many experts and observers who have highlighted the need for easier and smoother integration of police services for large events, including unanticipated ones. How best to facilitate such integration lies outside of the CCLA's institutional expertise. However, we would note that the Ontario *Police Services Act* allows the Solicitor General to make agreements with other governments for the provision of police services in an emergency.[88]

C) The state's desire for greater intelligence capabilities must be approached with caution

105. One concerning theme that emerged from the evidence heard by the Commission was a desire for various law enforcement and government agencies to have greater access to intelligence and improved intelligence capabilities. While legitimate questions about the sufficiency of intelligence often arise when an unanticipated violent act occurs, the narrative about the need

[87] Honourable John W. Morden, *Independent Civilian Review into Matters Relating to the G20 Summit* (Toronto: Toronto Police Services Board, 2012) at p. 84-92.
[88] RSO 1990, c. P.15 at section 55(1).

for greater surveillance arising out of a highly disruptive but largely non-violent protest movement is worthy of note.

106. Several witnesses addressed this issue. For example, Jody Thomas, the National Security and Intelligence Advisor (NSIA) to the Prime Minister, identified certain intelligence gaps she felt impacted the government's ability to respond to the convoy events.[89] One area that was highlighted was the need for better tools to address "open source intelligence". The NSIA's evidence was that she received intelligence from several agencies and departments.[90] Nevertheless, there was a thirst for more.

107. Staff from the Prime Minister's Office also expressed concerns about the intelligence to which they had access. Although they acknowledged that the government was receiving briefings from law enforcement and intelligence services, when asked about deficiencies, they agreed that there was not a lack of intelligence, but not as much as they wanted.[91]

108. The evidence provided by Superintendent Pat Morris of the OPP is also instructive. He highlighted concerns he had about queries he was receiving related to individuals where there was no evidence of any criminal activity taking place.[92]

109. Although some witnesses referred to the need to find ways to effectively monitor "open source intelligence" the CCLA submits that this is a more palatable way of describing what is in reality a system of mass surveillance. Open source monitoring means surveilling the day-to-day communications of the nation, including all of the banal, funny, silly, tragic, intimate and ultimately personal messages we post online for the purposes of our social connection with others.[93]

110. Further, although the "open source" label may be intended to suggest that the information is essentially public, the Privacy Commissioner of Canada recently investigated the RCMP's use of a particular "open source" took, Clearview AI's facial recognition technology. The Privacy Commissioner found that "[t]he use of FRT by the RCMP to search through massive repositories of Canadians who are innocent of any suspicion of crime presents a serious violation of privacy."[94]

111. The routine and indiscriminate monitoring of the communications of people in Canada fundamentally alters the nature of the relationship of individuals to the state in a democracy. We

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[89] POEC Interview Summary: National Security and Intelligence Advisor Panel, (WTS.00000071), p. 6-8; POEC Transcript, Vol. 25 (Jody Thomas), pp. 220, 272-3.
[90] POEC Interview Summary: National Security and Intelligence Advisor Panel, (WTS.00000071), p. 6-8; POEC Transcript, Vol. 25 (Jody Thomas), pp. 220, 272-3.
[91] POEC Transcript, Vol. 30, (Katie Telford, Brian Clow, John Brodhead), pp. 252-3.
[92] Email from P. Morris to C. Cox (Feb 2, 2022), (OPP00000850); POEC Transcript, Vol. 5, pp. 297-300 (Supt. Pat Morris).
[93] Not necessarily confined to "open source" note concern re telegram and similar apps where encryption is used.
[94] Office of the Privacy Commissioner of Canada, News release: RCMP's use of Clearview AI's facial recognition technology violated *Privacy Act*, investigation concludes. See also *PIPEDA Findings #2021-001*. The Commissioner further found that the "indiscriminate scraping of of publicly accessible websites" by Clearview AI was an unreasonable manner of collection, for an improper purpose, likely to "create the risk of significant harm to those individuals". In the CCLA's submission, whether it is images or, by extension, text, Canadians do not give up all reasonable expectations of privacy while engaging in the world via technologically-mediated tools.

typically assume that we are presumed innocent and can participate in society (which is increasingly not just possible to do online but often necessary) without ubiquitous state surveillance. The kind of mass surveillance proposed by some witnesses changes things dramatically and can have a chilling effect on individuals and their willingness to engage with others in online spaces.

112. The NSIA suggested that the tools and capabilities she had in mind would be looking for trends and would be anonymized so as to avoid targeting or identifying individuals. While de-identifying or anonymizing the information may mitigate some harms, the chill of surveillance remains. There is also a concern that policies designed to habituate people to the state collection of anonymized open source intelligence opens the door to further erosions of privacy.[95]

113. Ultimately, a system of mass surveillance undermines privacy, dignity, agency and autonomy, as well as the exercise of other key rights (freedom of expression, for example). The *Charter's* protection of the right to be free from unreasonable search and seizure is grounded in large part on Canadians' reasonable expectations of privacy. Moving to a society where mass surveillance by the state is normalized shifts our expectations and risks significant erosion of our privacy rights.

114. A consideration of how such a system would impact on equality rights is of particular importance, since the surveillant gaze of law enforcement and other state actors is often disproportionately directed at already marginalized minority groups (Indigenous and racialized persons, for example).

115. Finally, while monitoring general trends on social media may help to understand what content Canadians are exposed to and engaging with online, it is also easy to be led astray by such content. As discussed further below, misinformation and disinformation are often allowed to thrive and proliferate through online platforms. Relying on this information to predict future behaviour and threats is risky and challenging.

116. The CCLA submits that the Commission should be wary of weighing in on issues related to the alleged need for greater surveillance and intelligence tools and authorities. The question of whether or how the kind of mass surveillance contemplated by some of the witnesses could be done in a rights-respecting manner is fraught. Many of Canada's privacy laws need updating and some are currently in the process of being reviewed and amended. Given the breadth and depth of the Commission's mandate and its very short timeline, the CCLA suggests that any recommendations in this area should be modest, perhaps encouraging further study and highlighting the human rights dimensions of any such endeavours.

[95] There are difficult questions associated with deciding How anonymization would work, who would do it, difficult issues. Starts with collection but no access; then collection and access but no use; then all of the above (DNA databank examples?)

D) The problem of misinformation and disinformation online is not easily amenable to a legal solution

117. Somewhat related to the issue of intelligence gaps is the role of social media, misinformation and disinformation which was amongst the topics the Order-in-Council establishing the Commission mandated it to consider. Although the topic of misinformation came up on several occasions during witness testimony, it is not an area that the parties had an opportunity to explore in much detail.

118. The policy roundtable on the topic of misinformation and disinformation demonstrated the nuances and challenges in tackling this issue. Social media has helped to democratize expression but the business models that underlie many social media platforms can be counter-productive to this trend. In many instances, extremist content or unreliable content is amplified while trust-worthy content is drowned out by a deluge of information. Individuals tend to reside in online echo chambers, leading to polarization and distrust.

119. It is worth noting that although misinformation and disinformation may have played a significant role in motivating some protesters, the government's own use of social media to quickly disseminate information or to amplify its narrative can similarly result in the spreading of mis- and disinformation.

120. Any attempt to address the problems of mis- and disinformation in online spaces comes up against concerns about robust protection for free expression and difficult questions about whether or when state actors can or should be the arbiters of truth. The federal government has been engaged in policy discussions and consultations on the issue of "online harms" and "online safety" for over a year. While not specifically targeting misinformation and disinformation, the government's interest in regulating online platforms to address the harms they may cause is clear and its work ongoing.

121. With respect, given the breadth and depth of its mandate, and its very short timeline, the CCLA submits that the Commission is not well placed to make substantive recommendations related to this complex policy area.

E) The Emergencies Act would benefit from targeted amendments to improve transparency and accountability

122. The CCLA recognizes the extremely challenging task the Commission faced given the statutory deadline to render a final report. While there are good reasons to ensure that an inquiry into the use of the *Emergencies Act* does not continue indefinitely, the one-year timeline in the *Act* was simply not sufficient to address the myriad issues included in the Governor-in-Council's appointment of the Commission. Moreover, the *EA* became law before electronic communication and documents became widely used. A new timeline should reflect the greater volume of documents that exist in the digital era.

123. The CCLA recommends that the time for delivering a final report be extended to eighteen months and that it run from the time the Commission is appointed. Currently, time runs from

the date of revocation of the emergency. However, the government has sixty days after revocation to initiate an inquiry. In the case of this Commission, the government waited the full sixty days before making an appointment and, as a result, the Commission missed out on an additional sixty days during which it could have been doing its work.

124. In addition to the time pressures the Commission faced, issues of government transparency arose during the course of the Commission's work. The CCLA appreciates the time pressure that all parties were under and the large volume of documents the government had to review and produce. However, redactions were over-zealous in some instances. Further, in many cases relevant government documents were made available to the parties after witnesses had completed their testimony. This diminished the quality of the evidence that the parties were able to elicit and from which the Commission could benefit.

125. The CCLA appreciates that the federal government partially waived Cabinet confidentiality to allow the Commission and parties access to all of the "inputs" that Cabinet had in making its decision to declare a public order emergency. This was an important transparency measure, but it was not required by the Act. Further, as noted above, the government maintained solicitor-client privilege over the legal opinion on which Cabinet may have relied in choosing to declare a public order emergency. It would be beneficial if the *EA* itself explicitly addressed some of the government's transparency obligations vis-à-vis the Commission.