PUBLIC ORDER EMERGENCY COMMISSION

(ESTABLISHED ON APRIL 25, 2022 PURSUANT TO SECTION 63(1) OF THE *EMERGENCIES ACT*, RSC 1985, c. 22(4TH SUPP.)

CLOSING SUBMISSIONS OF THE GOVERNMENT OF SASKATCHEWAN WITH RESPECT TO BOTH THE FACTUAL PHASE AND THE POLICY PHASE OF THE COMMISSION'S WORK

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I. INTRODUCTION

(a) Mandate of the Commission

1. The Commission was established by Order in Council on April 25, 2022.[1] The Commission's mandate is to examine and report on the circumstances that led up to the declaration of a public order emergency under s. 17(1) of the *Emergencies Act*[2] on February 14, 2022, and to examine and report on the measures taken by the Governor in Council pursuant to the declaration. The Commission has also been directed to examine a number of specific issues including the efforts of police to deal with the protests both before and after the declaration. The Commissioner is to set out his findings and lessons learned in a report which can also include recommendations on any amendments to the *Emergencies Act* that the Commissioner believes may be required.

(b) Reasons for Saskatchewan's Intervention

2. The Government of Saskatchewan intervened in the proceedings for two primary reasons.[3] First, because of concerns about whether the statutory threshold for declaring a public order emergency under section 17(1) of the Act was met in this case. This includes a concern that the requirement for consultations with the provinces set out in section 25 of the Act was not satisfied. Second, the Government is also concerned that the measures taken by the Governor in Council under the Act were overbroad in two senses. They interfered unnecessarily with provincial powers under the *Constitution Act, 1867,*[4] such as the power to regulate insurance. They also unjustifiably infringed on the rights of citizens, in particular their rights under section 8 of the *Canadian Charter of Rights and Freedoms*,[5] by requiring the freezing of financial assets without prior judicial authorization.

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[1] PC No. 2022-0392.
[2] RSC 1985, c 22 (4th Supp).
[3] Saskatchewan's Application to Participate dated June 15, 2022.
[4] RSC 1985, Appendix II, No. 5.
[5] Part 1 of the *Constitution Act, 1982*, RSC 1985, Appendix II, No. 44.

II. FACTUAL PHASE SUBMISSIONS

(a) The Emergency Power and the Constitution

3. The emergency power is the single most powerful tool at the disposal of the federal government under the *Constitution Act, 1867*.

4. The emergency power is not expressly set out in the Act. Rather, it is derived from judicial interpretation of the authority of Parliament to make laws for the "peace, order and good government of Canada" set out in the opening words of section 91 of the *Constitution Act, 1867*. This is commonly referred to as the pogg power.

5. The pogg power has historically been interpreted as having three branches.[6] First, the gap branch, which means that matters not expressly enumerated in sections 91, 92, 92A, 93, 94A or 95 of the Act fall by default under federal jurisdiction.[7] Second, the national concern branch, which the Supreme Court has recently affirmed means that matters which have historically fallen under exclusive provincial jurisdiction can become matters of federal jurisdiction where they have assumed a newfound national significance.[8] Third, the emergency branch, which authorizes the federal government to set aside the division of powers and exercise unrestrained powers in times of emergency.[9]

6. The emergency power has been used very sparingly in Canadian history. It was used during both world wars. It was also used during the FLQ crisis in the fall of 1970. The last time the power was used was in the mid-1970's during a time of double-digit inflation and high rates of unemployment.

7. There has been very little judicial consideration of the emergency power. The leading case is the *Anti-Inflation Act Reference*.[10] In that case, a majority of the Court upheld the use

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[6] Hogg and Wright, *Constitutional Law of Canada* (5th ed, supp), pp 17-1 to 17-5.
[7] *Ibid*, at pp 17-5 to 17-8.
[8] *Ibid*, at pp 17-8 to 17-33; see also *Re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.
[9] Ibid, at pp 17-33 to 17-43.
[10] [1976] 2 SCR 373.

of the emergency power to impose wage and price controls, not only on those sectors of the economy subject to federal jurisdiction, but also on those sectors of the economy that were ordinarily under exclusive provincial jurisdiction. Justice Beetz indicated that "the emergency doctrine operates as a partial and temporary alteration of the distribution of powers between the Parliament and the Provincial Legislatures."[11] The only other power in the Constitution that is analogous is the notwithstanding clause, set out in section 33 of the *Canadian Charter of Rights and Freedoms*, which authorizes governments to legislate on a temporary basis without regard for certain provisions of the *Charter*. In fact, the emergency power can be described as a notwithstanding clause for the division of powers.

8. There are only two limits on the use of the emergency power. First, the federal government must have a rationale basis for believing that an emergency exists. This is a relatively low hurdle to clear and the courts will not lightly second-guess Parliament's decision that an emergency exists.[12] Second, the measures taken must be temporary in nature. The emergency power cannot be relied upon to permanently alter the division of powers. Emergency legislation can only operate for a finite time. However, the length of time that the legislation can operate is something that is inherently uncertain. Emergencies can last a long time.[13] Emergencies legislation upsets the balance of power in the federation. The emergency power must, therefore, be used with great care. It must be reserved for truly extraordinary and unimaginable circumstances that cannot be dealt with effectively by the existing powers in the Constitution or by co-operation between the different levels of government. The emergency power should not be used simply to fill in gaps in the law.

9. Parliament has enumerated the circumstances in which the emergency power will be invoked and the preconditions to its exercise in the *Emergencies Act*. The Act properly limits the broad scope of the constitutional power. Saskatchewan does not question the constitutionality of the *Emergencies Act* in any way. Rather, Saskatchewan's concern is

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[11] Ibid, at p. 461.
[12] Hogg and Wade, supra, at pp 17-40 and 17-41.
[13] Hogg and Wade, supra, at pp 17-41 to 17-43.

that the preconditions for its use, as set out in the Act, were not met in this case and that the actions taken pursuant to the Act went farther than necessary to deal with the protests.

(b) The Legal Test under the *Emergencies Act*

10. In order to declare a public order emergency under section 17(1) of the Act, the Governor in Council must believe, on reasonable grounds, that a public order emergency exists and that taking special temporary measures to deal with the emergency is necessary. A "public order emergency" is defined in section 16 of the Act to be an emergency that arises from threats to the security of Canada that are so serious as to constitute a national emergency. This definition includes two distinct components. First, threats to the security of Canada. Second, that those threats are so serious as to constitute a national emergency.

11. Threats to the security of Canada are defined by reference to section 2 of the *Canadian Security Intelligence Service Act*.[14] The definition of threats to the security of Canada in the *CSIS Act* is very specific. It includes only four things – espionage or sabotage; clandestine foreign influenced activities; threats of violence or the use of violence for the purpose of achieving political, religious, or ideological objectives; and covert unlawful acts directed towards undermining the constitutionally established system of government in Canada. The definition is not open-ended. It is confined to these four things. Unless one of these four things are present, there can be no threat to the security of Canada and no public order emergency.

12. In addition to these four things, the threat must also be so serious as to constitute a national emergency. This harkens back to the definition of "national emergency" in section 3 of the *Emergencies Act*. A national emergency only relates to an urgent and critical situation that seriously endangers the lives, health or safety of Canadians or seriously threatens the ability of the Government to preserve the sovereignty, security and territorial integrity of Canada. In the case of endangerment to lives, health and safety, the situation must also

[14] RSC 1985, c. C-23.

exceed the capacity or authority of a province to deal with it. In both cases, the situation must be something that cannot be effectively dealt with under any other law of Canada.

13. The test that must be met to declare a public order emergency is very onerous. The test was crafted with the FLQ crisis of 1970 in mind and clearly requires something akin to war or insurrection before the Act can be triggered. This is completely appropriate given the wide-sweeping powers that fall to the federal government after invocation of the Act and the potential disruption to the federal nature of our state. During the course of their testimony before the Commission, a number of Cabinet ministers and federal civil servants suggested that the definition of a threat to the security of Canada was different under the *Emergencies Act* than it is under the *CSIS Act* and that the Governor in Council was justified in taking into account a wider array of circumstances, including threats to the economic security of Canada, in reaching the decision to invoke the Act. With respect, this interpretation is wrong because it ignores the clear words of the Act and ignores the purpose of the Act which is to set a very high and specific threshold for the use of the emergency power.

(c) It Was Not Necessary to Invoke the *Emergencies Act*

14. Saskatchewan says that it was unnecessary to invoke the *Emergencies Act* and that the test for invoking a public order emergency under section 17(1) of the Act was not met, primarily because the occupation in Ottawa and the protests at the various points of entry across the country, while very serious, were not beyond the capacity or authority of the provinces to deal with and could have been effectively dealt with under existing laws.

15. For example, the following laws could have been used to respond to the protests and occupation:

- Various provisions of the *Criminal Code*,[15] such as the provisions dealing with assaults, uttering threats and committing mischief.

[15] RSC 1985, c C-46.

- Charges could have been laid under section 423(1)(g) of the *Criminal Code* for blocking or obstructing highways.

- Charges could have been laid under section 66 of the *Criminal Code* for participating in an unlawful assembly.

- A proclamation could have been made under section 67 of the *Criminal Code* declaring a riot and commanding the rioters to disperse; if they did not disperse as directed, charges could have been laid under section 68 of the *Criminal Code*.

- Various provincial laws related to the safe operation of motor vehicles.

- Various municipal bylaws dealing with things like parking, excessive idling, excessive noise (from honking) and open fires.

16. In addition to the tools that are ordinarily available to police to deal with protests, in this case, the following additional tools available under existing law were also employed:

- On February 4, GoFundMe agreed to voluntarily halt the fundraising efforts of the protestors on its crowdfunding platform because the monies were being used for illegal purposes.[16]

- On February 6, the City of Ottawa declared a state of emergency.[17]

- On February 7, residents and businesses of downtown Ottawa obtained an injunction to limit the horn honking by the occupiers.[18]

- On February 10, the Attorney General of Ontario obtained an order under s. 490.8 of the *Criminal Code* restraining certain funds including money raised on GiveSendGo.[19]

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[16] GoFundMe Institutional Report, GFM.IR.00000001, at pp 3-4.
[17] OTT.00004231.
[18] Overview Report: Timeline of Certain Key Events, COM.OR.00000004, at p 8.
[19] Ontario Institutional Report, ONT.IR.00000001, at p 12 and ONT.00003776; ONT.00003779.

- On February 11, the Government of Ontario declared a provincial state of emergency pursuant to the *Emergency Management and Civil Protection Act*.[20]

- On February 11, the City of Windsor and the Automotive Parts Manufacturing Association obtained an injunction against blocking of the Ambassador Bridge.[21]

- On February 14, the City of Ottawa obtained an injunction enjoining the violation of its municipal bylaws.[22]

17. It is evident from the above that the police did not lack the tools needed to deal with the protestors. These tools were not always used as promptly as the public and the politicians would have liked. However, as the Commission has heard, operational decisions are within the complete discretion of police. When making the decision to act against protestors, police must always consider a variety of factors including public safety and officer safety. This inevitably leads to delays.

18. Furthermore, no police agencies requested the invocation of the *Emergencies Act* or indicated to the federal government that they needed additional tools to deal with the protests. This was made clear by the witnesses from the OPS[23], the OPP[24] and the RCMP[25]. In particular, when Commissioner Lucki of the RCMP provided briefing materials to Minister Mendicino's chief of staff for the Cabinet meeting on February 13th, she specifically stated:

> "… I am of the view that we have not yet exhausted all available tools that are already available through existing legislation. There are instances where charges could be laid under the existing authorities for various *Criminal Code* offences occurring right now in the context of the protest. The Ontario *Provincial Emergencies Act* just enacted will also help in providing additional deterrent tools to our existing toolbox."[26]

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[20] Ontario Institutional Report, ONT.IR.00000001, at p 3; RSO 1990, c E-9.
[21] Windsor Institutional Report, WIN.IR.00000001, at p 30 and WIN.00000913; WIN.00000918.
[22] OTT.00006725; OTT.00028978.
[23] Testimony of Robert Bernier, Transcript, Vol 10, at pp 30-31.
[24] Testimony of Carson Pardy, Transcript, Vol 7, at pp 254-255.
[25] Testimony of Brenda Lucki, Transcript, Vol 23, at pp 70-71 and 141.
[26] PB.NSC.CAN.00003256.

19. Also, it must be emphasized that the issue is not whether additional tools would be helpful to the police in dealing with the protestors. The issue is whether the situation can be dealt with effectively under existing laws. In this case, there is no question that the protests could have been, and in fact were in many parts of the country, effectively dealt with under existing laws. In Ottawa, in particular, there were delays. But much of the delay was the result of operational decisions taken by police which were essential to resolving the situation with minimal violence. While frustration about these delays by citizens and politicians is completely understandable, the delays are not evidence that existing laws were not up to the task. In fact, the delays indicate that existing laws were operating as they should and that the police were exercising their discretion to proceed in a slow, methodical and safe manner that ultimately proved to be 100% effective.

20. Saskatchewan also relies on the following facts to support its position that invoking the *Emergencies Act* was unnecessary:

- Protests in Saskatchewan both at the Legislature and at the Regway and North Portal border crossings were effectively dealt with by police using existing tools.[27]

- The blockade at the Ambassador Bridge had been dismantled and the bridge was re-opened for traffic before the *Emergencies Act* was invoked and without reliance on any special powers.

- There had been arrests at Coutts in the early morning hours of February 14th, which led to the remainder of the protestors agreeing to voluntarily leave so that the port of entry could be re-opened.

- Protests in both Toronto and Quebec City were handled effectively by police, based on lessons learned from Ottawa (i.e., not letting heavy trucks into the downtown) with existing tools.

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[27] Saskatchewan Institutional Report, SAS.IR.00000001, at pp 1-7.

- The OPS, OPP and RCMP had established a joint command to deal with the occupation in downtown Ottawa and had agreed on an Operational Plan on February 13th which would see the downtown cleared, using existing legal tools.

- The issue in Ottawa was never the lack of legal tools to deal with the occupation. As indicated by former Chief Sloly, the issue was simply manpower or "boots on the ground".

- It was possible for the OPS to get the additional resources that it needed from the OPP, the RCMP and other municipal police forces under existing authorities.

21. The delay in clearing the occupation in downtown Ottawa was also the result of dysfunction within the OPS. There was distrust among the senior officers. There were numerous changes to the Incident Commander. Chief Sloly inserted himself into operational decisions that would usually be left to others. All of this contributed to the lack of an Operational Plan and a reluctance on the part of the OPP and the RCMP to commit additional resources to the OPS to assist in clearing the occupation of downtown Ottawa.

22. Dysfunction within the OPS, or any other police service in Canada, does not result in a national emergency. Issues such as the ones plaguing the OPS are usually dealt with incrementally over time, perhaps with personnel changes. In times of crisis, people usually put aside their differences and agree to work towards a common cause. However, mechanisms are in place to deal with these situations. For example, if the OPS was unable to provide effective policing in the City of Ottawa, a request could have been made by the OPS Board to have the OPP take over policing in the City.[28]

23. While the additional tools provided by the *Emergency Measures Regulations*[29] and the *Emergency Economic Measures Order*[30] were used by police in Ottawa, they were not

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[28] See OPSB Institutional Report, OPB.IR.00000001, at pp 16-17 and the *Police Services Act*, RSO 1990, c P-15, s 9.
[29] PC No. 2022-107.
[30] PC No. 2022-108.

necessary and the occupation would have been cleared at the same time and in the same manner, whether those tools were available or not.

24. It is also significant that CSIS did not change the level of its threat assessment at any time during the protests and indicated clearly throughout that the threats emanating from the protests did not rise to the level of a threat to the security of Canada within the meaning of the *CSIS Act*.

25. There has been a lot of discussion before the Commission about tow trucks. There is no doubt that both the RCMP and the OPS had difficulty obtaining the heavy tow trucks that they needed to clear blockades because tow truck companies were being threatened and harassed. But ultimately the needed tow trucks were secured. The Ambassador Bridge was cleared without any special power to commandeer tow trucks. Alberta purchased the tow trucks that the RCMP needed at Coutts. The joint command in charge of the operation in Ottawa secured the tow trucks that they needed and it wasn't clear from the testimony of these officers whether the powers under the *Emergencies Act* had a significant impact.

26. Ultimately, two things need to be said about tow trucks. First, invocation of the Act had at most only a minor impact on the ability of police to secure the towing resources that they needed. Second, the inability to secure tow trucks did not justify invoking a national emergency because those trucks could have been, and were, secured by other means.

27. The Prime Minister testified that on February 13th, it was his understanding that the Operational Plan to dismantle the occupation in downtown Ottawa was incomplete and would not be effective. He also testified that he had been told in the past that there was an Operational Plan to remove the protestors from downtown Ottawa and then that had not materialized. However, the evidence establishes that the Prime Minister was not briefed on the February 13th Operational Plan.[31] Notably, in the RCMP's Interview Summary,[32] it is stated: "Commissioner Lucki stated that the Integrated Planning Team promptly

[31] Testimony of Brenda Lucki, Transcript, Vol 23, at p 209 and pp 215-216; see also OPS.00014566.
[32] WTS.00000069, at p 13.

generated a plan, which she characterized as an amazing plan" (emphasis added), and that both she and Commissioner Carrique gave the plan "a green light" on the 13th. If the Prime Minister had been aware of this Plan, as he ought to have been, it would have been clear that the police had the situation in hand, that enforcement action would be occurring imminently and that invoking the *Emergencies Act* was unnecessary.

(d) The Consultation Requirement Was Not Met

28. Section 25(1) of the Act provides that before the Governor in Council issues a declaration of a public order emergency, the provinces must be consulted about the proposed action.

29. In this case, the federal government has taken the position that a single meeting with the Premiers held on the morning of February 14th, only a few hours before the announcement that the Act was being invoked, sufficed to fulfill the consultation requirement.

30. Saskatchewan disagrees and says that the consultations in this case were not adequate to meet the statutory requirement. Saskatchewan's position is based on the following considerations:

- The Report provided to Parliament about the consultations[33] on February 16th refers to a number of Federal-Provincial-Territorial meetings that took place in the days and weeks leading up to the invocation of the *Emergencies Act*, but the witnesses before the Commission universally agreed that the option of invoking the *Emergencies Ac*t was never discussed at these meetings.

- If the *Emergencies Act* was not discussed, these meetings cannot count as consultations about the *Emergencies Act*.

- The only consultation that is relied upon by the federal government is the FMM held on February 14th.

[33] Report to the Houses of Parliament: *Emergencies Act* Consultations, SSM.CAN.00000121.

- This meeting was arranged on short notice. The notification that the Prime Minister was convening a FMM was sent out on Sunday night, less than 12 hours before the meeting was to be held.[34]

- The meeting invitation did not even indicate what the meeting was about.

- The meeting invitation did not include any background information about the *Emergencies Act* or why the federal government considered it necessary to invoke the Act.

- The meeting itself lasted only about an hour.

- A majority of the Premiers indicated that they were opposed to the invocation of the *Emergencies Act*. Some felt that it was unnecessary because the police already had the tools that they needed to deal with the protestors. Others were concerned that invoking the Act would inflame the protestors and make the situation worse.[35]

- After the FMM, there was simply no time for the Prime Minister to seriously consider the positions of the Premiers before the announcement was made to invoke the Act.

31. It is Saskatchewan's position that the federal government could have and should have consulted with the provinces about the possibility of invoking the *Emergencies Act* earlier. The evidence before the Commission establishes that at least some Ministers, such as Minister Lametti, had the *Emergencies Act* in mind from the very beginning of the protests.[36] The evidence also establishes that invoking the *Emergencies Act* was being seriously considered at least from the time of the first Incident Response Group meeting on February 10th.[37] There were opportunities to consult with the provinces at the end of the second week and over the weekend. Consultations could have been done at the front end, not the back end.

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[34] MAN.00000048.
[35] SSM.NSC.CAN.00000625.
[36] WTS.00000077, at p 2.
[37] SSM.NSC.CAN.00000209.

32. It would have made sense to consult with the provinces earlier. The issue that was being discussed internally by federal officials during this time was whether the police required any additional tools to deal with the protests. The provinces are responsible for policing and have subject matter experts who could have assisted in identifying any gaps in police powers that needed to be filled. Failing to consult more broadly was an opportunity lost.

33. The rationale that the Commission heard for why the federal government did not consult with the provinces earlier was that once discussions about the *Emergencies Act* were undertaken with the provinces, the matter would become public and this in and of itself could inflame the protestors and would require the federal government to make a decision, one way or the other, very quickly.[38] There are two responses to this argument. First, the suggestion that provincial officials would leak information about confidential discussions with their federal counterparts is unsubstantiated and condescending. Second, Minister Blair was already publicly musing about the invocation of the *Emergencies Act* on the morning of February 13th.[39] So, the possible invocation of the Act was already in the public realm by that time and therefore a concern about leaks does not justify the failure to convene a FMM earlier or the lack of information provided in advance of the FMM held on February 14th.

34. Saskatchewan relies on the consultations that occurred in 2020 about the possible invocation of the *Emergencies Act* in response to the COVID-19 pandemic as a precedent for what should have happened in this case. The evidence has established that a very different process was followed in 2020. There were numerous FMM's. There were consultations involving numerous federal departments and their provincial counterparts. The Prime Minister formally initiated the consultations by letter, and the Premiers were given a week to provide a written response.[40] The difference between the two processes could not be more stark.

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[38] Testimony of Nathalie Drouin, Transcript, Vol. 26, at p 300.
[39] Testimony of Minister Blair, Transcript, Vol 27 at pp 297-299 and 303-304.
[40] See POE.SAS.00000001; POE.SAS.00000002; SAS.00000001; SAS.00000002; SAS.00000003; SAS.00000004.

35. The Prime Minister indicated in his testimony that the circumstances were different in 2020 and that what was under consideration was a public welfare emergency, not a public order emergency. It is admitted that the circumstances were different and the type of emergency was different. But the statutory requirement for consultations in both cases is practically identical. The requirement for consultations with respect to a public welfare emergency is set out in section 14(1) of the Act. The requirement for consultations with respect to a public order emergency is set out in section 25(1). The wording of these two sections is, for all intents and purposes, identical. While a consultation process as robust as that followed in 2020 would not likely have been possible in this case, a process involving more than a single FMM was certainly possible.

36. Finally, Saskatchewan submits that an analogy can be drawn between the consultations with the provinces required under the *Emergencies Act* and the consultations required with Indigenous peoples whenever governments propose to take actions that could adversely affect their existing Aboriginal and Treaty rights, which are protected by section 35(1) of the *Constitution Act, 1982*.[41] There has been a great deal of jurisprudence with respect to the duty to consult with Indigenous peoples over the past 20 years. The seminal case is *Haida Nation v. British Columbia (Minister of Forests)*.[42] In that case, the Supreme Court indicated that a good consultation process requires providing adequate notice to the Indigenous group about the proposed action; providing an opportunity for the Indigenous group to consider the information provided and to ask questions about it; listening to the response from the Indigenous group seriously and taking steps to address the concerns of the Indigenous group whenever possible; and finally reporting back to the Indigenous group not only about the decision that has been made, but also about how their inputs were taken into account.[43] In this case, none of these prerequisites for a good consultation were present – the notice was inadequate, both from a timing and an informational basis; there was no opportunity for the Premiers to consider why the federal government believed that

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[41] RSC 1985, Appendix II, No. 44.
[42] 2004 SCC 73.
[43] See the comments of Dr. Dwight Newman at the Roundtable Discussion on Interjurisdictional Responses to Protests and Emergencies, Transcript, December 1st, at pp 148-152.

it was necessary to take this step; and the responses provided by the majority of the Premiers were simply ignored.

37. The words of Binnie J in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*[44] aptly describe what occurred here – "[t]he contemplated process is not simply one of giving the Mikisew [here the Premiers] an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along."

(e) The Decision was Effectively Made Before the Consultations Occurred

38. Saskatchewan says that the consultation with the provinces was inadequate because the decision to invoke the *Emergencies Act* was *de facto* made before the FMM on February 14th.[45] It is Saskatchewan's position that the decision to invoke the *Emergencies Act* was effectively made on February 13th at either the Incident Response Group meeting in the afternoon or at the Cabinet meeting in the evening. This means that the Premiers had no real input into the decision. It also means that the consultation requirement set out in section 25 of the Act was not satisfied because, in the circumstances, the consultations were not *bona fide*.

39. Saskatchewan acknowledges that the Prime Minister and others testified that the decision to invoke the Act was not made until after the FMM. While this may be the case for the formal decision, which was signified by the Prime Minister initialing the Invocation Memo provided to him by the Clerk of the Privy Council sometime around 4:00 PM on Monday afternoon,[46] shortly before the press conference to announce the decision, Saskatchewan says that the evidence establishes that *de facto* the decision had been made the previous day.

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[44] 2005 SCC 69, at para 54.
[45] See the Interview Summary of the Saskatchewan Witness Panel, WTS.00000011, at p 4.
[46] SSM.NSC.CAN.00003224.

40. Saskatchewan points to the following evidence to support its position:

- Minister Lametti indicated in a text message on the morning of the 13th that we are "on an inexorable march to the [*Emergencies Act*.]".[47]

- The Prime Minister acknowledged in his testimony that "the consensus" at both the IRG meeting and the Cabinet meeting on the 13th was that the *Emergencies Act* should be invoked.[48]

- Minister Mendicino was cross-examined about text messages exchanged before 1:00 a.m. on February 14th[49] discussing setting up a photo opportunity on the Ambassador Bridge following the invocation of the Act.[50]

- On 8:24 a.m. on February 14th, the Clerk of the Privy Council indicated in an email to senior PMO staffers that she had seen the FMM script with Q's and A's, and that other products "in the train" included "Comms news release and BG; Decision note for PM."[51]

- The Q's and A's for the FMM were drafted as though the decision had already been made, with the first two questions including "Why did you wait so long to act?" and "When will this come into effect?"[52]

- Commissioner Lucki of the RCMP advised Chief Sloly of the OPS and Commissioner Carrique of the OPS at 10:00 AM on Monday morning that the *Emergencies Act* would be invoked later that day.[53]

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[47] SSM.CAN.00007861.
[48] Transcript, November 25th, at pp 57 – 59.
[49] PC.CAN.00001849, at pp 26-27.
[50] Transcript, November 22nd, at pp 89-94.
[51] SSM.CAN.00006920.
[52] SSM.CAN.00002370.
[53] OPS.00014566; Transcript, November 15th, at pp 215-216.

- When asked on the morning of the 13th by Deputy Solicitor General Di Tommaso of Ontario whether the Act would be invoked later that day, Deputy Minister Stewart responded with silence, which indicated to Di Tommaso that the Act was going to be invoked, but that Stewart was not authorized to say so.[54]

- The Prime Minister met with officials to review the speech announcing the invocation of the Act early on Monday afternoon before receiving the Invocation Memo and ostensibly before making the decision to proceed.[55]

- The Invocation Memo did not provide any other options.[56] It simply recommended the invocation of the Act, which suggests that it was a *fait accompli*.

- There was simply no time between the FMM which ended at 11:15 AM and the announcement concerning the Act, which was made at 4:30 PM, to allow for any meaningful consideration of the Premiers' comments.

(f) The Measures were Overbroad and Unnecessary

41. It is Saskatchewan's position that the measures taken by the federal government after the *Emergencies Act* was invoked were overbroad and unnecessary. Saskatchewan says that both the *Emergency Measures Regulations* and the *Emergency Economic Measures Order* unnecessarily encroached on matters within exclusive provincial jurisdiction.

42. For example, under s. 2(1) of the *Emergency Measures Regulations* it was made an offence for anyone to participate in a public assembly that could "reasonably be expected to lead" to a breach of the peace by, for example, interfering with the functioning of critical infrastructure. This section added to the powers set out in sections 63 to 69 of the *Criminal Code* dealing with unlawful assemblies and riots by making it an offence to participate in a public assembly that could "reasonably be expected to lead" to a breach of the peace.

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[54] ONT.00003847; Transcript, November 10th, at p 226.
[55] Transcript, November 24th, at p 296.
[56] SSM.NSC.CAN.00003224.

Under section 2(1), police would not have to wait until a breach of the peace had actually occurred before charges could be laid. They could act prospectively. However, the uncertainty of what might be perceived as "reasonably expected to lead" to a breach of the peace may have unnecessarily dissuaded lawful protest.

43. Further, the breadth of the definition of "critical infrastructure" included many places ordinarily under exclusive provincial jurisdiction. There is no doubt that in the circumstances, a definition of critical infrastructure which included international border crossings would have been appropriate. It would also have been appropriate to include other infrastructure that falls under exclusive federal jurisdiction such as airports, harbours, railway stations, rail lines and interprovincial pipelines. But the definition of critical infrastructure is much wider and includes infrastructure that is ordinarily under exclusive provincial jurisdiction, such as public utilities, power generation and transmission facilities and hospitals. The provinces have the jurisdiction to protect this infrastructure and in many cases have taken steps to do so. The Commission has heard evidence about Alberta's *Critical Infrastructure Defence Act*.[57] In addition, Saskatchewan recently enacted legislation to limit protests that interfere with access to hospitals.[58] The inclusion of these types of infrastructure in the regulations was unnecessary because the provinces are fully capable of providing them with protection. Furthermore, there were no direct threats to public utilities, power generation facilities or hospitals during the protests. These powers were not used, because they were not needed.

44. For its part, the *Emergency Economic Measures Order* also dealt with many matters ordinarily falling within provincial jurisdiction. The Order required a large number of financial services providers to determine if any of their customers were participating in prohibited activities and, if so, to cease doing business with them – i.e., to freeze their accounts. The Order included many financial service providers that are ordinarily under exclusive provincial jurisdiction such as credit unions, insurance companies, trust

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[57] SA 2020, c C-32.7.
[58] See *An Act to Amend the Public Health Act, 1994*, SS 2021, c 36, s 7.

companies, loan companies, securities dealers and investment advisors. Failing to cease dealing with their customers participating in prohibited activities (by making funds available to those customers, for example), could constitute an offence on the part of those financial institutions or their employees. Ultimately, financial institutions suffered from a lack of clarity regarding the broad obligations imposed upon them once the Order took effect.

45. The overreach of the Order is easily demonstrated by its requirement for insurers to cancel the insurance of vehicles being used in a prohibited public assembly. The RCMP did not consider having uninsured vehicles in a protest area to be a good idea.[59] And the federal government did not consider the implications of vehicles being left uninsured. For example, in spite of *requiring* insurance of protest-related vehicles to be canceled, the government's own informational material indicated it expected insurers to compensate third parties who may injured by such vehicles.[60]

46. Ultimately, the federal government's position that the measures it enacted were "as practical and targeted as possible"[61] is belied by the mandatory nature of the broad obligations the Order imposed on banks, credit unions, insurers, etc., and the refusal of the police to facilitate enforcement of at least some of those obligations, on account of practical and common-sense considerations.

III. POLICY PHASE SUBMISSIONS

47. Saskatchewan has three suggestions for updating Canada's emergency laws. First, there should be a constitutional amendment to limit the use of statutes reliant on the emergency power, including a requirement for a sunset clause for such statutes. Second, the *Emergencies Act* should be repealed and replaced with two new statutes, a *National Emergencies Act* reliant on the emergency power, and a *Federal Emergencies Act* reliant on other sources of federal authority (e.g., criminal law). Third, the requirement for

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[59] Transcript, November 15th, at p 268.
[60] SSM.CAN.00000278; Transcript, November 17th, at pp 135-137.
[61] Transcript, November 17th, at p 68.

consultations with the provinces in the *National Emergencies Act* should be made more explicit and fulsome.

(a) Proposed Constitutional Amendment

48. As indicated earlier, the emergency power flows out of the pogg clause which is part of section 91 of the *Constitution Act, 1867*. It authorizes the federal government to set aside the division of powers on a temporary basis in times of national crisis. It is similar to the notwithstanding clause in the *Canadian Charter of Rights and Freedoms*, but it does not contain the limits that apply to the use of the notwithstanding clause. Saskatchewan proposes two limits on the use of this power.

49. First, if Parliament intends to use the power, it must be expressly invoked. Legislation that relies on the emergency power should expressly set out this fact. The use of the emergency power should never be a matter of guess work and the emergency power should not be used as an after-the-fact justification for any federal laws.[62] Second, the courts have always indicated that the emergency power can only be used on a temporary basis. But the courts have never defined what is meant by temporary. Presumably, an emergency could last for many years. Saskatchewan suggests that any legislation enacted pursuant to the emergency power should have an end date written into the statute, and that end date must be no more than five years in the future. The wage and price control legislation that was upheld under the emergency power in the *Anti-Inflation Act Reference* case included such a clause.[63] If the emergency continues for more than five years, then, as with the use of the notwithstanding clause, Parliament would have to renew the legislation. The requirement of a five year sunset clause would provide certainty and democratic accountability to any future use of the emergency power.

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[62] The legislation that was upheld under the emergency power in the *Anti-Inflation Act Reference* did not assert the existence of an emergency and the evidence suggested that the federal government and Parliament had relied on the national concern branch of the pogg power, not the emergency branch. See, Hogg and Wright, *supra*, at p 17-40.

[63] The legislation that was upheld under the emergency power in the *Anti-Inflation Act Reference* automatically expired at the end of two years unless extended by Parliament. See Hogg and Wright, *supra*, at p 17-39.

50. Where legislation, like the existing *Emergencies Act*, only comes into effect when invoked by the executive, then the invocation must be confirmed by Parliament within a short time (ie, within 7 sitting days) and must thereafter be confirmed at regular intervals (ie, every six months).

51. Saskatchewan raises one other concern. During the course of the Inquiry, a number of witnesses from the federal government, most notably the Minister of Justice and Attorney General, indicated that the federal government could invoke a public order emergency as a result of provinces not applying existing laws or not using tools available under existing provincial legislation.[64] These statements are deeply troubling on two levels. First, the Commission has heard repeatedly about the independence of the police when it comes to operational decisions. Quite simply, politicians cannot direct the police when it comes to operational decisions. The suggestion that the *Emergencies Act* can be invoked because police are not applying existing laws cannot be interpreted in any other way than politicians second-guessing police about operational decisions. Second, and more fundamentally, the provinces have exclusive power over the matters falling within their exclusive jurisdiction. Under the Constitution, provinces have complete autonomy with respect to the decisions that they make with respect to matters falling under their jurisdiction. The notion that the federal government can second-guess these decisions is offensive to the very federal nature of Canada. How, when or why a province exercises its jurisdiction should never be a basis for using the emergency power.

(b) Proposed New Legislation

52. The *Emergencies Act* should be repealed and replaced with two new statutes. One statute would depend on the emergency power and would authorize the federal government, subject to the constitutional limits set out above, to exercise powers that ordinarily fall under exclusive provincial jurisdiction in times of national crisis. This would be a new *National Emergencies Act*. The other statute, a *Federal Emergencies Act*, would not be

[64] See Interview Summary of David Lametti, WTS.00000077, at p 5.

dependent on the emergency power, but rather would rely on various federal powers set out in section 91 of the *Constitution Act, 1867*, such as the power to make criminal laws.[65]

53. The *Federal Emergencies Act* would allow the federal government to declare a federal emergency, much like municipalities and provinces can declare municipal and provincial emergencies. The *Federal Emergencies Act* would authorize the Governor in Council to make regulations and orders to deal with the crisis, but those laws would have to fall within the bounds of ordinary federal jurisdiction. The Act would not permit any encroachment into matters that are ordinarily subject to exclusive provincial jurisdiction.

54. The *Federal Emergencies Act* would be effective to deal with situations like the occupation of downtown Ottawa. It could authorize the creation of new criminal offences. It could also give expanded powers to the federal government to deal with protests in the City of Ottawa. It must be kept in mind that the federal government has jurisdiction over the National Capital Region under the gap branch of the pogg power.[66] While the City of Ottawa is currently largely under municipal and provincial jurisdiction, that does not have to be the case. Parliament has jurisdiction to assume greater control of the National Capital Region on either a permanent or temporary (i.e., in the case of an emergency) basis.

55. The *Federal Emergencies Act* could also give the federal government expanded powers at border crossings. For example, testimony at the Inquiry suggested that the federal government's jurisdiction over the Ambassador Bridge in Windsor ended where the Bridge ended and that the roads leading to the Bridge fell under either municipal or provincial jurisdiction. However, Parliament could pass legislation dealing with the protection of border crossings, or more broadly over trade corridors, based on its jurisdiction over international trade (which is part of the trade and commerce power)[67] or its jurisdiction over "naturalization and aliens".[68] This legislation need not be confined to the physical

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[65] See the comments of Dr. Dwight Newman at the Roundtable Discussion on Interjurisdictional Responses to Protests and Emergencies, Transcript, December 1st, at pp 97-100.
[66] See *Munro v. National Capital Commission* [1966] SCR 663.
[67] Section 91(2) of the *Constitution Act, 1867*.
[68] Section 91(25) of the *Constitution Act, 1867*.

infrastructure that constitutes the Bridge or the actual point of entry, particularly if it only applied in times of an emergency. This type of legislation would allow the federal government to respond to emergencies effectively at border crossings and without unduly encroaching on provincial powers.

(c) Enhanced Consultation Requirements

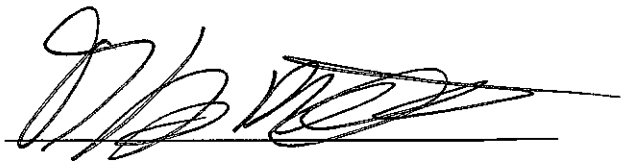
56. The requirement for consultations with the provinces in the new *National Emergencies Act* should be made more explicit and fulsome than what is currently contained in the *Emergencies Act*. The new Act should also explicitly require consultations with the territorial governments. Saskatchewan fully recognizes that in certain exceptional circumstances, with a clear and present danger, such as a suddenly erupting war or a severe terrorist incident, formalized consultations with the provinces may not be possible because they would be too unwieldy, or too slow, in proportion to the severity of the threat. Therefore, Saskatchewan does not propose to make consultations a constitutional requirement. In these cases, after-the-fact consultations, as per section 25(2) of the existing Act will suffice.

57. However, in most circumstances, when events unfold and evolve over days and weeks, as they did in this case, consultations with the provinces and territories should occur earlier in the process, when legislative responses are still being developed and considered. Consultations at early stages will assist in coming up with better legislative plans because the provinces have expertise with respect to matters such as the tools that police have at their disposal, and the new tools that police might need to address unforeseen circumstances.

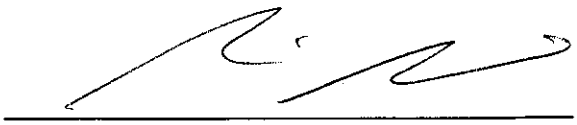
58. Given recent advances in technology, it is possible to have consultations almost instantaneously. These consultations can and should occur at existing FPT tables, such as the FPT Deputy Ministers of Intergovernmental Affairs table and the FPT Crime Prevention and Policing Committee. The federal government should be required to provide written materials to its PT partners that outlines the rationale for using the Act ahead of time.

59. The federal Cabinet should not meet to make a final decision about invoking the Act until after a FMM has been held so that Cabinet can hear about the concerns raised by the Premiers. Also, consultations should be well documented and should include the concerns raised by PT's and the potential adverse impacts in each jurisdiction. The federal government should identify and document how it has addressed the concerns raised by PT's and why other concerns have not been addressed. Finally, greater flexibility should be given so that the Act can be invoked on a narrower geographic basis and only in those PT's that have requested it, or where it is needed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of December, 2022



P. Mitch McAdam K.C.



Michael Morris K.C.