PUBLIC ORDER EMERGENCY COMMISSION

PUBLIC INQUIRY pursuant to s. 63(1) of the Emergencies Act, RSC 1985, c 22 (4th Supp) into the circumstances that led to the declaration of a Public Order Emergency on February 14, 2022 and the measures taken for dealing with the emergency.

Submissions of Fact and Law and Policy Recommendations

See Schedule B for policy recommendations

Of the following Parties who share standing before the Commission:

THE JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS
(counsel: Rob Kittredge and Hatim Kheir)

THE DEMOCRACY FUND
(counsel: Alan Honner)

CITIZENS FOR FREEDOM
(counsel: Antoine d'Ailly)

December 9th, 2022

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Definitions

TERM	DEFINITION
the "Code"	*Criminal Code*, RSC 1985, c. C-46 <https://canlii.ca/t/55n8b>
"Commissioner"	the Honourable Paul S. Rouleau in his capacity as Commissioner of the POEC
"CSIS Act"	*Canadian Security Intelligence Service Act*, RSC 1985, c C-23, <https://canlii.ca/t/5434f>
the "Declaration" or the "Proclamation"	*Proclamation Declaring a Public Order Emergency*, SOR/2022-20
"Emergencies Act" or "EA"	*Emergencies Act*, RSC 1985, c 22 (4th Supp), ss. 3 and 16 <https://canlii.ca/t/55hf0>
"Emergency Measures"	The special emergency powers enacted via *Emergency Measures Regulations*, SOR/2022-21 and *Emergency Economic Measures Order*, SOR/2022-22, collectively
"Financial Measures"	The special emergency financial powers enacted via *Emergency Economic Measures Order*, SOR/2022-22
"Freedom Convoy" or the "Convoy"	Collective term for the protesters in Ottawa. Does not refer to protesters elsewhere in Canada.
"GIC"	Governor In Council
"OIC"	Order in Council constituting the Public Order Emergency Commission: *Order In Council P.C. 2022-0392*
"POEC" or "The Commission"	The Public Order Emergency Commission
"POGG Power"	the Federal Government's authority to legislate for the peace, order, and good government of Canada
"Section 58 Explanation"	COM00000670 - The explanation Cabinet is required to table in Parliament by *Emergencies Act*, RSC 1985, c 22 (4th Supp), s. 58 <https://canlii.ca/t/55hf0>

Brief Factual Overview

1. In late January and early February 2022 the "Freedom Convoy" protests occurred in Ottawa, sparked by Canada's imposition of vaccination and quarantine requirements for cross-border truckers. Truckers began to arrive in downtown Ottawa on January 28th, parking on the roads near Parliament Hill with some declaring an intent to remain there until all vaccine mandates were lifted. The truckers were joined by other Canadians dissatisfied with COVID-related government overreach.

2. Ottawa sees many protests, but most disperse in a matter of hours without significantly interfering with life in the city. The Freedom Convoy – a truck-centered protest movement – had unique characteristics that posed a unique challenge to the city and to police, who failed to appreciate that many of the truckers had driven many days to protest in Ottawa, that they are used to spending long periods of time in their vehicles, which double as living spaces and are difficult to move without specialized heavy towing equipment. Contrary to the expectations of the city and the policy, many truckers did not intend on dispersing after the first weekend of protests.

3. Ottawa police allowed the trucks to become entrenched around Parliament Hill. It soon became apparent that they had no plan to clear the protests, and were failing to enforce bylaws or to take any meaningful steps to incentivize trucks to leave the city. Ultimately, the trucks remained on city streets and the protests continued for weeks.

4. During this period, numerous protests arose independently all across the country and at border crossings, notably in Windsor, ON and Coutts, AB.

5. On February 14, in response to the protests, the federal government invoked the *Emergencies* Act, declaring a public order emergency. The following day, the government made

the *Emergency Measures Regulations* and the *Emergency Economic Measures Order* pursuant to the *Emergencies Act*.

6. From February 18th to February 20th, police cleared the protests in Ottawa. The public order emergency was subsequently rescinded on February 23, 2022.

The Commission's Mandate

> *"The Governor in Council shall, within sixty days after the expiration or revocation of a declaration of emergency, cause an inquiry to be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency."*
>
> *Emergencies Act*, RSC 1985, c 22 (4th Supp), s. 63(1) <https://canlii.ca/t/55hf0>

7. The Public Order Emergency Commission ("**POEC**") was convened pursuant to *Order In Council P.C. 2022-0392*, dated April 25, 2022 (the "**OIC**"). The OIC – issued pursuant to s. 63 of the Emergencies Act - directs the Commission to conduct an inquiry into the circumstances that led to the declaration of emergency, and to set out findings including on the use of the Emergencies Act and the appropriateness and effectiveness of the measures taken under the *Emergency Measures Regulations*, SOR/2022-21 and the *Emergency Economic Measures Order*, SOR/2022-22 (collectively, the "**Emergency Measures**").[1]

8. A meaningful inquiry into the circumstances of the declaration of emergency requires consideration of whether those circumstances justified the declaration, and it would be impossible to determine if orders and regulations made pursuant to the declaration were "appropriate" without first determining whether they were made in accordance with their enabling legislation.

[1] *Order In Council P.C. 2022-0392* at pare. (a)(iii)

9. The POEC must, as part of its inquiry, determine whether the declaration of emergency was justified under the circumstances, and made in accordance with the provisions of the Emergencies Act.

EA invocation assessment framework

10. Part II of the *Emergencies Act* (the "**EA**") deals with public order emergencies, one of four types of national emergencies contemplated by the EA, and the type of emergency declared by the Government on February 14, 2022.

11. Section 17(1) of the EA creates the power to proclaim a public order emergency when the Governor in Council reasonably believes that such an emergency exists.

> *17 (1) When the Governor in Council believes, on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency, the Governor in Council, after such consultation as is required by section 25, may, by proclamation, so declare.*
>
> *Emergencies Act*, RSC 1985, c 22 (4th Supp), s. 17(1) <https://canlii.ca/t/55hf0>

12. The term *"Governor in Council"* refers to the Governor General in her capacity as executor of the will of the Privy Council[2], so in practice s. 17(1) requires Cabinet to *"believe on reasonable grounds that a public order emergency exists"* in order to proclaim a public order emergency.

Definition of a "Public Order Emergency"

13. *"Public Order Emergency"* is defined in s. 16 of the EA as *"an emergency that arises from* ***threats to the security of Canada*** *and that is so serious as to be a* ***national emergency****."*

[2] COM.OR.00000008, *Overview Report: Federal Government Entities Involved in the Decision to Invoke the Emergencies Act, para. 2*

14. Section 16 of the EA defines the term *"Threats to the security of Canada"* as having the meaning assigned in s. 2 of the CSIS Act:

> *2* ***threats to the security of Canada*** *means*
>
> *(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,*
>
> *(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,*
>
> *(c) 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, and*
>
> *(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,*
>
> *but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).*
>
> *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, <https://canlii.ca/t/5434f>

15. In order to meet the definition of a public order emergency, the emergency must "arise" from one of the enumerated s. 2 *CSIS Act* threats.

16. The term *"national emergency"* is defined in s. 3 of the EA:

> *3 ...a* ***national emergency*** *is an urgent and critical situation of a temporary nature that*
>
> *(a) 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, or*
>
> *(b) seriously threatens the ability of the Government of Canada to preserve the*

> *sovereignty, security and territorial integrity of Canada*
>
> *and that cannot be effectively dealt with under any other law of Canada.*
>
> *Emergencies Act*, RSC 1985, c 22 (4th Supp), s. 3 <https://canlii.ca/t/55hf0>

A "national emergency" exceeds provincial authority

17. A *"national emergency"* must exceed the legislative authority of the provinces. Where the provinces have the requisite authority to address the situation at hand, but are not doing so through inaction, whether deliberate or otherwise, the high threshold established by the EA will not be met. This must be so due to the wording of the *Emergencies Act* and the nature of the emergency powers doctrine of the P.O.G.G. power under s. 91 of the *Constitution Act,* 1867.[3]

18. The disjunctive conditions under EA subsections 3(a) and (b) each pertain to a matter that is beyond the powers and duties of the provinces. Subsection (a) explicitly requires that the emergency be beyond the powers of the provinces, and (b) describes a situation that affects the nation p*er se* and so is beyond the duties and powers of the provinces. In either instance, mere provincial inaction would not satisfy the requirements of the EA.

19. The phrase *"cannot be effectively dealt with under any other law of Canada"* provides further confirmation that inability of the provinces to respond must flow from a legal shortcoming, not a failure to act. Parliament signaled this intended meaning by using the word *"cannot"* rather than an alternative wording such as *"is not being"*.

20. The *Emergencies Act* is only valid pursuant to the emergency power branch of the Federal Government's authority to legislate for the peace, order, and good government of Canada (the ***"POGG Power"***). The extraordinary nature of the emergency power is limited to responding to situations which cannot be resolved by the powers vested in the Provinces either individually or

[3] *The Constitution Act, 1867*, 30 & 31 Vict, c 3, s. 91.

through cooperation.[4] The emergency power does not supplant the heads of power granted to the Provinces under s. 92, but rather *"a new aspect of the business of Government is recognised as emerging, an aspect which is not covered or precluded by the general words in which powers are assigned to the legislatures of the Provinces."*[5]

21. Where an emergency can be resolved by provincial laws, the Federal Government cannot declare an emergency and intervene merely because it deems a Province's response to be inadequate. To hold otherwise would be to allow the Federal Government to second-guess decisions properly within provincial authority. The limits on the POGG Power would be violated if the Federal Government could arrogate to itself emergency powers in a matter within the legislative authority of the provinces. The authority granted to the Provinces includes the discretion to decide how to respond to emergencies and what powers to bring to bear on the situation.

S. 2(c) CSIS Act - "threats to the security of Canada"

22. Canada made it clear[6] that the Declaration was made based solely on Cabinet's belief that CSIS Act s. 2(c) threats to the security of Canada existed. The 2(c) threat is commonly referred to as the *"terrorism threat."*

Criminal Code definition of "terrorist activity" is informative

23. There is substantial overlap between the *Criminal Code* (the "**Code**") definition of *"terrorist activity"*[7] and the s. 2(c) *CSIS Act* definition of *"threats to the security of Canada.*" This overlap suggests that the two acts are meant to capture the same activity.

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[4] *Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co.*, [1923] 3 D.L.R. 629.
[5] *Ibid*.
[6] See, for example, Minister Lametti's testimony: *POEC Transcript*, Vol. 29, p. 138, ll. 22-23
[7] *Criminal Code, RSC 1985*, c C-46, s. 83.01(1)

24. Notably, both the *Code* and the *CSIS Act* contemplate acts of serious violence against persons or property which are committed for the purpose of achieving political, religious or ideological objectives. The *Code* describes these acts of violence in greater detail than the *CSIS Act* does, and includes:

- Causing death or serious bodily harm to a person by violence;[8]
- Endangering a person's life;[9]
- Causing a serious risk to the health or safety of the public or any segment of the public[10]
- Causing substantial property damage that is likely to lead to death, serious bodily harm, endangerment of life, or serious risk to health and safety[11]

25. This similarity between the *CSIS Act* and the *Code* is not merely theoretical. Documents provided to the Commission in fact show that CSIS interprets its mandate, and s. 2(c) in particular, as encompassing terrorism despite the fact that the word terrorism is not used anywhere in the *CSIS Act*.[12]

26. The above suggests that in order to ground the invocation of a public order emergency under the EA, a s. 2(c) threat to the security of Canada must be a threat that is on par with terrorist activity. Related acts or threats of *"serious violence"*, whether against persons or property, must rise a level that implicates death or serious bodily harm, endangerment of human life, or a serious risk to the health or safety of the public. Lesser acts of violence, such as ripping off masks or simple assaults, do not rise to the level of serious violence required by the EA.

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[8] *Criminal Code, supra,* s. 83.01(1)(b)(ii)(A)
[9] *Criminal Code, supra,* s. 83.01(1)(b)(ii)(B)
[10] *Criminal Code, supra,* s. 83.01(1)(b)(ii)(C)
[11] *Criminal Code, supra,* s. 83.01(1)(b)(ii)(D)
[12] For CSIS's interpretation of it's mandate, as described above, see TS.NSC.CAN.001.00000223_REL_0001, first paragraph. Also see TS.NSC.CAN.001.00000197_REL_0001, first paragraph.

Two important differences

27. While the definitions of "terrorist activity" and "threats to the security of Canada" are so substantially similar that logically they must target the same activity, there are two important exceptions to this rule, namely economic security and essential services.

28. The *Criminal Code* refers to economic security as a potential factor in terrorist activity. According to the code, an act or omission, committed for an ideological purpose, with intention to intimidate the public with regard to its security, including its economic security, will be terrorist activity if it intentionally causes death, serious bodily harm, etc. In contrast, the *CSIS Act* makes no reference to "economic security" anywhere in the act, including in its definition of "threats to the security of Canada"

29. The *Criminal Code* likewise refers to interference with or serious disruptions of essential services as a potential factor in terrorist activity. According to the code, an act or omission, committed for an ideological purpose, with intention to intimidate the public with regard to its security, could qualify as terrorist activity if it intentionally interferes with or seriously disrupts essential services. By contrast, the *CSIS Act* does not refer to "essential services" anywhere in the act, including in its definition of "threats to the security of Canada".

30. These two distinctions show that there is a limited difference between terrorist activity and threats to the security of Canada. Under the code, a person who committed a politically motivated act, intending to intimidate a segment of the public with respect to its economic security by intentionally interfering with essential services, would be committing a terrorist act. The same person would not qualify as having committed an act which is a threat to the security of Canada under the *CSIS Act* because the act lacks the essential ingredient of violence. In this limited sense, "threats to the security of Canada" under the *CSIS Act* is a higher threshold than "terrorist activity"

under the *Criminal Code*. This underscores just how high the threshold is for Cabinet to invoke a public order emergency.

Reasonable grounds to believe

31. By legislating the legal standard of *"reasonable grounds to believe"* in section 17(1) of the Emergencies Act, Parliament incorporated a well-known and reviewable legal test. While there is no jurisprudence as to how this standard specifically applies to a Governor in Council invoking a public order emergency, it stands to reason that its application is analogous to that of a peace officer making an arrest without a warrant under section 495 of the *Criminal Code*.[13]

32. This is to say that just as a peace officer must subjectively have reasonable grounds on which to base an arrest, so too must the GIC subjectively believe that there are threats to the security of Canada, as defined by the *CSIS Act*, and that belief must be objectively reasonable as measured against the point of view of a reasonable person in the same position as the governor in council.[14] To meet this standard, the government must clearly identify the specific threats or acts of serious violence that it subjectively believed to exist, and it must then show that this belief is reasonable as determined by a reasonable person.

33. Moreover, just as a peace officer must take into account all of the information available at the time of arrest, including anything that may exonerate the accused, so to must the GIC/Cabinet consider all of the information available when considering a proclamation of a public order emergency. This includes information which militates against invoking the emergency such as the ability of police to use existing powers and resources to resolve the protests, the question of

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[13] *Criminal Code, RSC 1985*, c C-46, <https://canlii.ca/t/55n8b>, s. 495

[14] *R v. Storrey*, [1990] 1. S.C.R. at pp 250-251

whether the acts in question meet the high threshold of the *CSIS Act,* and any factors which suggest that the protests were resolving.[15]

Understanding Cabinet's reasons for invoking the EA

34. In order to assess whether Cabinet had reasonable grounds to believe that a particular state of affairs constituted a public order emergency that could not be managed without taking the extraordinary step of invoking the *Emergencies Act*, we must first understand:

- The scope of that state of affairs;
- Cabinet's reasons for concluding that it amounted to a public order emergency under the EA; and
- The special temporary powers that Cabinet believed were necessary to deal with the emergency.

35. Among other things, understanding Cabinet's frame of mind at the time of the Declaration allows effective consideration of the following questions:

- What were the activities that Canada alleges constitute a s. 2 CSIS Act threat to the security of Canada?
- Why is it that Canada alleges that the emergency could not be dealt with under any other law of Canada, and that special EA powers were necessary?
- Did Cabinet actually believe that a public order emergency as defined in *Emergencies Act* existed, and was that belief based on reasonable grounds?

The Declaration – defining the emergency

36. Section 17(2) of the EA requires that Cabinet's declaration of a public order emergency must *"specify concisely the state of affairs constituting the emergency"*[16] as well as the special temporary measure that it believes may be necessary to deal with the emergency.

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[15] *Chartier v. Quebec (Attorney General)*, [1979] 2 S.C.R. at p. 499

[16] *Emergencies Act*, RSC 1985, c 22 (4th Supp), <https://canlii.ca/t/55hf0> s. 17(2)(a)

37. This allows us to understand the scope of the activities that Cabinet believed met the threshold for a public order emergency under the EA, and which could only be dealt with through special powers which are only available the Emergencies Act

The Section 58 Explanation – reasons for invocation

38. The *Emergencies Act* provides a mechanism to assess the reasons for Cabinet's belief that the state of affairs set out in the Declaration constituted a public order emergency, in the form of the "**Section 58 Explanation**", which Cabinet must present to Parliament within seven sitting days of the declaration.

> *58 (1) ...a motion for confirmation of a declaration of emergency, signed by a minister of the Crown, **together with an explanation of the reasons for issuing the declaration** and a report on any consultation with the lieutenant governors in council of the provinces with respect to the declaration, shall be laid before each House of Parliament within seven sitting days after the declaration is issued.*
>
> *Emergencies Act*, RSC 1985, c 22 (4th Supp), s. 58 <https://canlii.ca/t/55hf0>

39. On its face, s. 58(1) clearly requires that the Section 58 Explanation must contain an explanation of **all** of Cabinet's reasons for issuing the declaration of emergency. Since the relevant time for assessment of the reasonableness of the grounds on which the emergency was declared is the time of the declaration, those grounds must be found in the Section 58 Explanation.

Relevant time for the assessment

40. The Governor in Council must believe that each and every one of the statements above is true at the time the emergency is declared. This is clear from the wording of EA s. 17(1), which authorizes the proclamation of a public order emergency only *"**when** the Governor in Council believes, on reasonable grounds, that a public order emergency exists..."*

41. The EA does not permit the Government to find reasons after the fact to justify the Declaration – the belief must have been based on grounds known to Cabinet on February 14th.

Standard of review

42. The question of whether the facts known to Cabinet at the time of the Declaration amounted to *"reasonable grounds"* to believe that a public order emergency existed is a question of law, and should be reviewed on a standard of correctness.

43. Considering "reasonable and probable grounds" in the criminal context, the Supreme Court in *R. v. Shepherd* stated *"While there can be no doubt that the existence of reasonable and probable grounds is grounded in the factual findings of the trial judge, the issue of whether the facts as found by the trial judge amount at law to reasonable and probable grounds is a question of law."*[17]

44. This Commission's mandate to assess the appropriateness of the Declaration and the Emergency Measures is in some ways analogous to judicial review of the exercise of a statutory power. But unlike judicial review, public inquiries hear witness testimony, assess evidence, and by their very nature are required to make findings of fact. Accordingly, even on issues of fact (including the question of what facts were known to Cabinet at the time of the Declaration) the Commission must make its own findings and cannot be bound to the reasonableness standard dictated in *Vavilov.*[18]

45. Similarly, the deference that findings of fact attract in judicial review[19] is not owed to Cabinet in the context of this inquiry.

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[17] see: *R. v. Shepherd*, 2009 SCC 35 (CanLII), [2009] 2 SCR 527, <https://canlii.ca/t/24kx6> at para. 20 -

[18] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653, <https://canlii.ca/t/j46kb>

[19] *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190, <https://canlii.ca/t/1vxsm> at para. 161

46. In any event, the principle in *R. v Shepherd* that whether facts known to a decision maker constitute "reasonable grounds" is a question of law reviewable on a standard of correctness continues to be applied in judicial review post-*Vavilov.* The Ontario Court of Appeal, for example, applied *Shepherd* and found that the question of whether a *Charter* reasonable expectation of privacy existed was a question of law subject to a standard of correctness in a 2022 judicial review.[20]

47. Even if this inquiry was subject to the standards of review set out in *Vavilov* – which is denied - a departure from the reasonableness standard to a standard of correctness would be called for because:

- Statutory language in s. 63(1) the EA requires this fact-finding inquiry into the circumstances that led to the Declaration;[21]
- This inquiry must consider constitutional questions that implicate division of powers and Parliament's authority to expand the scope of its powers;[22] and
- This inquiry must make findings on questions of law of central importance to the legal system as a whole.[23]

Conditions precedent to lawful invocation of EA s. 17(1)

48. In order to lawfully declare a public order emergency based on a s. 2(c) CSIS Act threat, on February 14th 2022, Cabinet must have believed on objectively reasonable grounds that all of the following statements were true:

i. An emergency exists that arose from activities directed toward or in support of the threat or use of serious violence against persons or property to achieve political or ideological objectives;

EA, s. 17(1)
CSIS Act, s. 2(c)

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[20] see: *Elementary Teachers Federation of Ontario v. York Region District School Board,* 2022 ONCA 476 (CanLII), <https://canlii.ca/t/jpw5l> at para. 37
[21] See: Vavilov, Supra. at para. 34
[22] See: Vavilov, Supra. at paras. 55-56
[23] See: Vavilov, Supra. at para. 58

ii. The emergency seriously endangers the lives, health or safety of Canadians AND exceeds the capacity or authority of a province to deal with it;

OR

The emergency seriously threatens the sovereignty, security AND territorial integrity of Canada

EA, s. 3

iii. Special temporary measures are necessary to deal with the emergency, AND the emergency cannot be effectively dealt with under any other law of Canada, and .

EA, ss. 3 and 17(1)

49. In our submission, the Commissioner must make his assessment of whether Cabinet's purported belief was real, and whether it was reasonable based only on the grounds set out in the Declaration and the Section 58 Explanation.

50. In the alternative, if the Commissioner determines that the grounds for that belief can include factors not raised in the Declaration or the Section 58 Explanation, we submit that only those factors known to Cabinet on February 14, 2022 can be considered.

51. Either way, the Commissioner must weigh all of the evidence and make his own findings of fact with regard to what grounds were known to Cabinet at the time of the declaration. This is not a judicial review, and the scope of this inquiry is not limited to a JR-style "record of proceedings." The Commissioner cannot simply accept that allegations in Cabinet testimony or put forward in the Section 58 Explanation are true or were actually known to and reasonably believed by Cabinet at the relevant time – he must make findings of fact on these matters based on all of the available information at the time when Cabinet decided to proclaim a public order emergency.

Our proposed legal test

52. In our submission, the following test should be applied to determine whether a declaration of a public order emergency under the *Emergencies Act* was lawful:

> ***Stage 1*** *– Did the emergency arise from a s. 2 CSIS Act threat?*
>
> ***Stage 2*** *– Was the emergency a s. 3 EA "National Emergency"?*
>
> *2(a) Did it seriously endanger the lives, health or safety of Canadians AND exceed the capacity or authority of a province?*
>
> *OR*
>
> *2(b) Did it seriously threaten the sovereignty, security AND territorial integrity of Canada?*
>
> ***Stage 3*** *– Was there no other way to deal with the emergency?*
>
> *3(a) Were the Emergency Measures necessary?*
>
> *AND*
>
> *3(b) Was it impossible to deal with the emergency under any other law of Canada?*
>
> ***Stage 4*** *– On the date of the Declaration, did Cabinet have objectively reasonable grounds to believe that the first three stages of this test were met?*

53. In order for a proclamation under s. 17(1) of the Emergencies Act to be lawful, we submit that the questions at all four stages of this test must be answerable in the affirmative.

Analysis – The EA invocation was Unlawful

54. Cabinet's February 14, 2022 Declaration of a public order emergency defines the state of affairs constituting the purported emergency as follows:[24]

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[24] *Proclamation Declaring a Public Order Emergency*, SOR/2022-20, <https://canlii.ca/t/55cf3>

> *(a) the continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force, which blockades are being carried on in conjunction with activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada,*
>
> *(b) the adverse effects on the Canadian economy — recovering from the impact of the pandemic known as the coronavirus disease 2019 (COVID-19) — and threats to its economic security resulting from the impacts of blockades of critical infrastructure, including trade corridors and international border crossings,*
>
> *(c) the adverse effects resulting from the impacts of the blockades on Canada's relationship with its trading partners, including the United States, that are detrimental to the interests of Canada,*
>
> *(d) the breakdown in the distribution chain and availability of essential goods, services and resources caused by the existing blockades and the risk that this breakdown will continue as blockades continue and increase in number, and*
>
> *(e) the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians;*
>
> *Proclamation Declaring a Public Order Emergency,* SOR/2022-20, <https://canlii.ca/t/55cf3>

55. The Section 58 Explanation that Cabinet tabled before Parliament on February 16, 2022 expands on these points, but fails to make out grounds for a reasonable belief that the state of affairs set out in the Declaration's description of the emergency met the EA threshold for a public order emergency.

1) Emergency didn't arise from a s. 2(c) CSIS Act threat

56. The first stage of our proposed legal test is an examination of whether the purported public order emergency arose from a *"threat to the security of Canada"* as that term is defined in the *CSIS Act*.

57. During the hearings, Canada made it clear to the Commission that the Declaration was made based solely on Cabinet's belief that CSIS Act s. 2(c) threats to the security of Canada existed.[25] No evidence was heard to suggest that the Declaration relied on any s. 2(a), (b), or (d) threat, and numerous witnesses testified that no such threats existed.

> *2... **threats to the security of Canada** means...*
>
> > *(c) 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...*
>
> *but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).*
>
> *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, <https://canlii.ca/t/5434f>

58. We concede that the *"activities"* that the Government characterized as a s. 2(c) threat took place within Canada, and could be characterized as having a political objective. That, however, is as far as Canada managed to get in proving that any CSIS Act s. 2 threat to the security of Canada existed in connection with the protests.

There was no element of "serious violence"

> *"the lack of violent crime [at the protests] was shocking."*
>
> *"When I read accounts... that the people participating were un-Canadian and*

[25] See, for example, Minister Lametti's testimony: *POEC Transcript*, Vol. 29, p. 138, ll. 22-23

> *that they were not Canadian views and they were extremists; I found it to be problematic, because what I ascertained from my role -- which is not all knowing... but I did not see validation for those assertions."*
>
> *Testimony of OPP Supt. Patrick Morris, POEC Transcript,* Vol. 5, p. 287, ll. 18-25 and 293, ll. 11-20

59. While the wording of s. 2(c) is somewhat convoluted, it is clear that in order for the Declaration to be justified on the grounds of a s. 2(c) threat, Canada must – at an absolute minimum - be able to articulate some element of *"serious violence"* in the state of affairs they claim constitutes a public order emergency. A mere possibility of serious violence would not meet the threshold, but even pointing to a somewhat concrete *"threat of serious violence"* might have been sufficient. After nearly two months of hearings, Canada has utterly failed to do so.

60. Canada cannot credibly argue that while there was no actual or threatened serious violence associated with the protests, they were in substance *"directed toward or in support of"* serious violence. On the contrary, the protests were clearly and overwhelmingly non-violent. Protest organizers and the vast majority of those in attendance loudly and genuinely encouraged peaceful and nonviolent behaviour.[26] Protest organizers took extraordinary steps to prevent violence, and to report any violent incidents or rhetoric to the police.[27]

61. OPP intelligence lead Superintendent Patrick Morris testified that *"the lack of violent crime [at the protests] was shocking."*[28] and the OPP Provincial Operations Intelligence Bureau (POIB) describes the level of criminality at the protests as *"disproportionately lower than what might be expected from a public order event of this size and more difficult to articulate as directly emanating from the protest body and associated actions of the Freedom Convoy 2022."*[29]

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[26] *Testimony of Tamara Lich, POEC Transcript*, Vol. 17, p. 27, ll. 17-19
[27] *Testimony of Daniel Bulford, POEC Transcript*, Vol. 17p. 227-8, ll.15-6
[28] *POEC Transcript*, Vol. 5, p. 287, ll. 18-25
[29] OPP00001783 - *POIB Timeline for Ottawa Occupation and Border Disruptions*, pg. 3

62. Supt. Morris testified that at no point during the convoy protest did he receive any reliable intelligence that would lead him to conclude that there was a risk to national security.[30]

The Declaration's description of the emergency

63. Only the first point raised by Cabinet in the Declaration's description of the emergency has the potential to correspond with a s. 2(c) CSIS Act threat. Points (b), (c), and (d) cannot map to any s. 2 threat because they are not "activities." They simply describe adverse effects that Cabinet baldly alleges to be resulting from the protests. The Declaration's final point (e) contemplates a mere possibility of violence *simpliciter* - the *"potential for an increase in the level of unrest and violence"*[31] – and fails to connect even that alleged potential with the protests or s. 2(c) in any meaningful way.

64. Point (a), the phrasing of which is apparently tailored specifically mirror the language in s. 2(c), reads as follows:

> *(a) the continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force, which blockades are being carried on in conjunction with activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada,*
>
> *Proclamation Declaring a Public Order Emergency,* SOR/2022-20, <https://canlii.ca/t/55cf3>

65. The fact that the Declaration simply asserts that the protests are *"activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property"* without evidence or reference to a single specific *"threat or act of serious violence"*, strongly

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[30] *POEC Transcript*, Vol. 5, p. 297, ll. 7-12

[31] *Proclamation Declaring a Public Order Emergency,* SOR/2022-20, <https://canlii.ca/t/55cf3>, s. (e)

suggests that Cabinet was not aware of any threat or use of serious violence at the time of the Declaration.

66. It bears repeating that Cabinet was required to subjectively believe on reasonable grounds that s. 2 CSIS Act *"threats to the security of Canada"* existed on the day of the Declaration, and it was required by the EA to set out those grounds in the Declaration and the Section 58 Explanation. Cabinet failed to do so, and therefore has failed to demonstrate to this Commission that the invocation of the public order emergency was justified.

67. Although the EA does not allow the Declaration to be saved by a post-hoc justification in any event, it is telling that even to this day, Canada cannot clearly articulate reasonable grounds on which it could have formed a belief that the invocation of the public order emergency was justified.

The Section 58 Explanation

68. The reasons set out by Cabinet in the Section 58 Explanation expands on the Declaration's point (a) above, but also fails to set out any reasonable grounds for Cabinet to believe that a s. 2(c) threat existed at the time of the Declaration.

69. The Section 58 Explanation provides the following arguments and examples of purportedly problematic activities in its reasons expanding on the Declaration's point (a), none of which, individually or collectively could reasonably ground a belief the protests as a whole amount to *"activities directed toward or in support of the threat or use of acts of serious violence against persons or property."*:

- Slow roll activity, slowing down traffic and creating traffic jams, in particular near ports of entry; reports of protesters bringing children to protest sites to limit the level and types of law enforcement intervention; trucks and personal vehicles in the National Capital

Region continue to disrupt daily life in Ottawa and have caused retail and other businesses to shutter;[32]

- *None of these activities even approach conduct that could reasonably be described as an act or threat of "serious violence"*

- Convoy supporters formerly employed in law enforcement and the military have appeared alongside organizers and may be providing them with logistical and security advice, which may pose operational challenges for law enforcement should policing techniques and tactics be revealed to convoy participants;[33]

  - *An unspecified future possibility of "operational challenges" arising due to knowledge and experience that unspecified protesters may have gained during their careers in law enforcement or the military does not amount to serious violence. To the contrary, the evidence of Danny Bulford and others showed that many protesters with such knowledge or experience used it to ensure that the protests were nonviolent, to identify and report violent incidents and rhetoric to the police and to try to ensure that relations between law enforcement and the protesters remained peaceful and constructive.*

- The RCMP's recent seizure of a cache of firearms with a large quantity of ammunition in Coutts, Alberta, indicated that there are elements within the protests that have intentions to engage in violence;[34]
  - *This does not "indicate" anything about the protests as a whole. This was an isolated incident, it was resolved without any violence, and was an ordinary policing matter. As Alberta Premier Jason Kenney wrote to the PM on Feb 17, 2022: "Invoking the act was not required to address the situation at the Coutts border crossing. Alberta successfully manage the impacts of the Coutts blockade and other protests through effective police work by the RCMP and supporting law enforcement agencies. <u>This blockade was peacefully resolved, with those involved dispersing on their own accord</u>."*[35]

- Ideologically motivated violent extremism adherents may feel empowered by the level of disorder resulting from the protests;[36]
  - *This is entirely speculative. There was no evidence of an IMVE threat associated with the protests. Supt. Morris of the OPP testified that any event that brings large groups together could create a risk of lone wolf attacks*[37]*, but there would*

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[32] COM00000670 – Section 58 Explanation, pg. 5
[33] COM00000670 – Section 58 Explanation, pg. 5
[34] COM00000670 – Section 58 Explanation, pg. 6
[35] ALB00000521.0001 – Feb 17 Letter from Kenney to Trudeau at pg 1
[36] COM00000670 – Section 58 Explanation, pg. 6
[37] *POEC Transcript*, Vol. 5, pg. 280, lines 13-23

be a risk at any large event not just this protest [38]

- 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[39]
    - *Supt. Morris testified that it is difficult to assess whether an anonymous threat is credible, that such threats are not uncommon in connection with protests, that he was aware of no intelligence that any threats associated with the protests were credible, and that no such threats materialized in connection with the Convoy protests.*[40]

Canada's flawed interpretation of s. 2 in the context of the EA

70. When Parliament drafted the *Emergencies Act*, one of the thresholds it established to limit the use of emergency powers was to incorporate the meaning of *"threat to the security of Canada"* from the *CSIS Act* into the test for a public order emergency. Despite this, the Federal Government's decision to invoke the *Emergencies Act* was premised on erroneous legal advice that the interpretation of the words from the *CSIS Act* have a broader meaning in the context of the *Emergencies Act*.[41] David Vigneault testified that his advice to Cabinet to invoke the *Emergencies Act* was not premised on his own finding that a threat to the security of Canada was present. Rather, it was based on reassurances he had received in the form of legal advice that the *Emergencies Act* had a broader scope.

71. This creative legal re-definition is essential to the Federal Government's attempted justification of the declaration of emergency.

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[38] *POEC Transcript*, Vol. 5, pg. 264, Lines 7-11
[39] COM00000670 – Section 58 Explanation, pg. 6
[40] *POEC Transcript*, Vol. 5, pg. 286-289
[41] *POEC Transcript*, Vol. 29, p. 81, ll. 14-24.

CSIS assessed that there was no s. 2 "threat to security of Canada"

72. CSIS Director David Vigneault clearly testified that, in his view, threats to the security of Canada as defined in the *CSIS Act* were not present.[42] The Prime Minister and Minister Mendicino both confirmed that had received that same advice.[43] No federal officials doubted CSIS's assessment or identified intelligence not available to CSIS. The reasonableness of Cabinet's decision hinges entirely on the accuracy of the legal advice received.

73. The legal re-definition subverts Parliament's intent and the scheme of both the EA and the *CSIS Act*. The modern approach to statutory interpretation requires that the words be *"read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."*[44] Parliament's decision to incorporate a definition by reference reveals an intent to rely on that established meaning. This Commission should rely on Lord Blackburn's dictum in *Portsmouth v. Smith*: *"Where a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it is taken."*[45]

74. Similarly, the *Interpretation Act* states that where an enactment contains an interpretation section, it shall be read and construed as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears"[46] In the case of the *CSIS Act*, the phrase *"threats to the security of Canada"* is contained and defined in the interpretation section. When that same phrase appears in the *Emergencies Act*, there is no contrary intention. In fact, the only intention expressed is the phrase should have the same meaning as it does in the *CSIS Act*.

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[42] *POEC Transcript,* Vol. 27, p. 90, l. 14 - p. 92, l. 1.
[43] *POEC Transcript*, Vol. 28, p. 226, ll. 17-19; Vol. 31, p. 89, l. 26 - p. 90, l. 3.
[44] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21.
[45] *Portsmouth v. Smith (1885)*, 10 App. Cas. 364, at p. 371 cit'd by *MacKenzie, Re*, [1927] 4 D.L.R. 825 at 829 (Ont. S.C. App. Div.).
[46] *Interpretation Act,* RSC 1985, c I-21 at s. 15(2)

75. The *Emergencies Act* is by its nature and intent an exceptional piece of legislation that must have strict limitations on its invocation. In practice, this has been its first and only use. This creates a barrier to judicial oversight by limiting the opportunity for caselaw to build up accepted interpretations of its terms. Parliament addressed this issue, in part, by incorporating the *CSIS Act* definition to rely on an established standard. As explained by Dr. Leah West:

> *"Tying the invocation of an emergency caused from those types of threats to the CSIS Act in my opinion creates some level of objectivity to the legal test. The definition there is one that is routinely applied, understood, and subject to lots of review, as we've heard, and the whole point of including it in the EA was to eliminate questions about what does and does not amount to a national security threat that could trigger the EA, and I'm talking about threats from terrorism, subversion, espionage, et cetera. Using some novel or wider definition that would capture those threats, I think would render essentially a legal threshold meaningless."*
>
> *Policy panelist Leah West*, *POEC Transcript*, Vol. 34, p. 56, ll. 17-28

If anything, the EA calls for a narrower interpretation of s. 2

76. To the extent that the *Emergencies Act* provides a different context for the interpretation of *"threats to the security of Canada"* than the CSIS Act does, that context implies a higher threshold:

- The *Emergencies Act* requires that the *"threats to the security of Canada"* also rise to the level of a national emergency;
- A declaration of a public order emergency requires that Cabinet **believe** on reasonable grounds that a national emergency is present. This, on its face, is a stricter standard than the *CSIS Act*'s **reasonable suspicion** standard for initiating an investigation; and
- the *Emergencies Act* authorizes powers that go far beyond CSIS's powers of investigation. The definitions and thresholds in the *CSIS Act* are designed to limit its use of investigative powers. That rationale applies *a fortiori* to the *Emergencies Act* which allows the Federal executive to wield legislative power and encroach into provincial heads of power

77. To maintain the legislative safeguards put in place by Parliament, this Commission must reject the Federal Government's legal re-definition, rely on the established meaning of the definition of *"threats to the security of Canada"* established in the *CSIS Act,* and find that

a) no CSIS Act s. 2 threat to the security of Canada existed in connection with the protests; and

b) Cabinet did not have reasonable grounds to believe that such a threat existed at the time of the Declaration.

2) It wasn't a "National Emergency"

78. This second stage of our analysis examines whether the purported emergency rises to the level of a "national emergency" with reference to the criteria set out in EA subsections 3(a) and 3(b). The remaining requirement that a "national emergency" be one which cannot be effectively dealt with is addressed in the next stage of our analysis.

79. To satisfy this branch of the test, at least one of the following questions must be answered in the affirmative:

> *Did the purported emergency seriously endanger the lives, health or safety of Canadians AND exceed the capacity or authority of a province?*
>
> OR
>
> *Did it seriously threaten the sovereignty, security AND territorial integrity of Canada?*

80. In our submission, the answer to both questions is no.

No serious endangerment of lives, health or safety of Canadians

81. The protests did not pose a serious danger to the lives, health, or safety of Canadians. Point (e) of the Declaration's description of the emergency alleges that it consisted in part of *"the potential for an increase in the level of unrest and violence that would further threaten the safety*

and security of Canadians,"[47] using language consistent with s. 3(a) of the *Emergencies Act*[48], but describing a mere possibility and failing to make out the sort of "serious" endangerment required by EA s. 3(a).

82. This point is expanded upon in the Section 58 Explanation,[49] which alleges that the Freedom Convoy Protest is causing an increase in violent threats. However, the Explanation identifies disparate occurrence with an admitted lack of established connection to the protests. Without a connection, the Explanation amounts to individual threats made in different places in the country which were addressed (appropriately) by local law enforcement.

83. The claim that the Ottawa protest was characterized by violence is contradicted by the OPP's lead intelligence officer, Supt. Morris, who testified that *"the lack of violent crime was shocking."*[50] There is no evidence of anyone being seriously injured in the course of any of the protests.

84. The only circumstances in evidence which could have posed a serious threat are the individuals who were arrested in Coutts, Alberta with a cache of weapons. However, that matter and the Coutts protest more generally was dealt with through ordinary effective policing by the RCMP[51] and those armed individuals were in custody *before* the Declaration was made.[52] They did not commit acts of violence, and any threat they may have imposed was neutralized by their imprisonment. This armed group was not typical of or supported by the broader group of protesters at Coutts, as evidenced by the fact that protesters chose voluntarily to disband rather than be associated with them.[53] The Declaration was made after their arrest, when no serious danger remained at Coutts.

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[47] *Proclamation Declaring a Public Order Emergency,* SOR/2022-20, <https://canlii.ca/t/55cf3>, s. (e)
[48] SSM.CAN.00001949_REL.0001, *Proclamation Declaring a Public Order Emergency*, p. 2, (e).
[49] COM00000740, *Section 58 Explanation*, s. (v), pp. 11-14.
[50] *POEC Transcript*, Vol. 5, p. 287, ll. 15-25.
[51] ALB00000521.0001 – Feb 17 Letter from Kenney to Trudeau at pg 1
[52] *POEC Transcript*, Vol. 23, p. 322, l. 22 – p. 323, l. 6.
[53] *POEC Transcript*, Vol. 23, p. 326, ll. 2-9.

Did not exceed Provincial capacity or authority

85. The protests were within the authority and capacity of the Provinces to resolve. Please see **Schedule A** for a detailed list of laws available to the Provinces that could have been (and often were) used to address the protests and associated problematic behaviour. The capacity of the Provinces is demonstrated by the fact that most protests were resolved or ready to be resolved before the Declaration.

86. As described above, the Coutts protest disbanded in response to the arrests which occurred in the early hours of February 14th. The Windsor protest was cleared by February 13th.[54] With respect to Ottawa, the clearance of the Windsor protest allowed the OPP to redirect personnel to Ottawa to execute the plan which was materializing.[55] Further, Interim Chief Bell stated unequivocally that *"in the absence of the invocation of the Emergencies Act" the police "were going to clear the protest."*[56] Many police witnesses agreed with that statement, and no police force requested invocation of the *Emergencies Act.*. The towing services needed had been procured and tow trucks were in Ottawa and available on February 13th.[57] The evidence collectively shows that all relevant law enforcement agencies had cleared or were on track to clear all of the protests. It was within the normal capacity of law enforcement to clear the protests.

87. The answer to the first question at this stage of the analysis is "no."

No threat to the sovereignty or territorial integrity of Canada

88. The second branch of the test creates three conjunctive elements: there must be threats to the sovereignty, security **AND** the territorial integrity of Canada. None of the elements were met. Indeed, the Federal Government chose not to base the declaration on this branch.[58]

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[54] *POEC Transcript*, Vol. 19, p. 69, ll. 20-23.
[55] *POEC Transcript*, Vol. 11, p. 94, ll. 14-23.
[56] *POEC Transcript*, Vol. 8, p. 251, ll. 26-28.
[57] *POEC Transcript*, Vol. 20, p. 149, ll. 21-26.
[58] SSM.CAN.00001949_REL.0001, *Proclamation Declaring a Public Order Emergency*, p. 2, (e).

89. There was no threat to Canada's sovereignty. Parliament, as the seat of Canada's government, continued to function.[59] Even the Memorandum of Understanding (the "MOU"), as confused as it was, asked (rather than commanded) the Governor General, as representative of the sovereign, to lift COVID-related mandates.

90. Nor was there a threat to Canada's territorial integrity. The concept of territorial integrity is an international law concept pertaining to relationships between states which recognize the defined territory of each other. It is concerned with matters of political unity and independence.[60] The protests in February 2022 did not pose a risk of secession or political independence. There was no risk that another state would cease to recognize Canada's borders. Accordingly s. 3(b) of the *Emergencies Act* was not met.

MOU was misinformed legal nonsense and not a threat

91. The Federal Government's Section 58 Explanation refers to the MOU as forming part of the basis for the declaration of emergency.[61] However the MOU is not a credible document and posed no threat, which would have been at least as obvious to Cabinet as it would be to any reader with even the most limited understanding of the law. First, the MOU misunderstands how the Canadian government works. It is based on a mistaken belief that the Governor General can unilaterally dissolve Parliament. James Bauder believed that the Senate is the "source root of laws."[62] Mr. Bauder had no legal assistance in drafting it.[63]

92. Second, the MOU was premised on obtaining agreement from the Governor General and Senate. It is drafted as an agreement with spaces for the Governor General and the Speaker of the Senate to sign.[64] Mr. Bauder testified "*it means nothing because nobody signed it and nobody*

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[59] *POEC Transcript*, Vol. 27 p. 317, ll. 15-19.
[60] See *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras. 126-130, https://canlii.ca/t/1fqr3.
[61] COM00000740, *Section 58 Explanation*, p. 5.
[62] *POEC Transcript*, Vol. 16, p. 183, ll. 7-14.
[63] *POEC Transcript*, Vol. 16, p. 176, l. 27 – p. 177, l. 1.
[64] COM00000866, *Canada Unity – Memorandum of Understanding*, p. 6.

entered into it, so it's non-binding."[65] Overall, it was a misguided and unsophisticated attempt to enter into a voluntary agreement with the Federal Government. It should be taken no more seriously than "sovereign citizen" litigants. The idea that anyone in Cabinet actually believed it to be a legitimate threat strains credulity.

93. The answer to both questions at this stage of the analysis is "no", and therefore the purported emergency cannot rise to the level of a "national emergency" as that term is defined in the EA.

3) Other legal means were available

94. This stage of the analysis evaluates whether special temporary measures were actually "necessary" as required by s. 17(1) of the EA, and the remaining EA s. 3 requirement that it would have been impossible to deal with the purported emergency "under any other law of Canada." In order to pass this stage of analysis, both of the following questions must be answerable in the affirmative:

> *Were the Emergency Measures necessary?*
>
> AND
>
> *Was it impossible to deal with the emergency under any other law of Canada?*

95. In our submission, they cannot.

Emergency Measures - helpful, perhaps, but not necessary

96. Interim OPS Chief Bell testified that he believed the Emergency Measures were helpful to police in four different ways[66]:

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[65] *POEC Transcript*, Vol. 16, p. 179, ll. 16-19.

[66] *Testimony of OPS Chief Bell, POEC Transcript*, Vol. 8, p. 246-7, ll. 22-22

1) *They streamlined the swearing-in of officers from other jurisdictions*

(which he said otherwise might have taken 24 hours[67])

2) *They made it easier to procure towing services*

(although he had no knowledge of whether the power was actually used and said he would not dispute whatever Supt. Bernier testifies, since he had direct knowledge on the tow truck issue.[68] Bernier later testified that *"the federal emergency power to compel tow trucks wasn't necessary"*[69])

3) *The power to freeze financial accounts may have deterred some protestors from coming to Ottawa and/or led some to leave the city*

(although he had no direct knowledge on the issue and was merely speculating that the financial measures may have had this effect[70])

4) *the power to create an exclusion zone was helpful and was actually used by police to clear the protests in Ottawa*

(although he confirmed that non-EA powers were available that could have and would have been used to exclude people from the area while police cleared the protests if the EA was not invoked[71])

97. Numerous police witnesses testified that the Emergency Measures may have been helpful in one or more of the four areas identified by Interim OPS Chief Bell, but no police witness testified that the measures were necessary. See the testimony of OPS Supt. Bernier, for example:

> *"Numerous other OPP and OPS witnesses have testified that the federal emergency powers may have been helpful to police in various ways but they were not necessary; would you agree with that?*
>
> *SUPT. ROBERT BERNIER: Yes."*
>
> *OPS Supt. Bernier, POEC Transcript, Vol. 10, p. 150, ll. 19-22*
>
> *"The plan that I was developing was based on existing authorities, whether it be under the provincial, federal or common law authority to act. This is what takes place on a daily basis on those large type events. We have to leverage the – those*

[67] *Testimony of OPS Chief Bell, POEC Transcript, Vol. 8, p. 247-8, ll. 23-223*
[68] *Testimony of OPS Chief Bell, POEC Transcript, Vol. 8, p. 249-50, ll. 6-12*
[69] *Testimony of OPS Supt. Bernier, POEC Transcript, Vol. 10, p. 149-150, ll. 16-2*
[70] *Testimony of OPS Chief Bell, POEC Transcript, Vol. 8, p. 250-1, ll. 13-3*
[71] *Testimony of OPS Chief Bell, POEC Transcript, Vol. 8, p. 251, ll. 4-22*

> *particular authorities that exist. ...I was satisfied that we were going to have all the authorities we need to take action if the communication and the negotiation piece of our stabilization plan was not successful in having that area cleared and the city returned to a state of normalcy."*
>
> *OPS Supt. Bernier, POEC Transcript, Vol. 10, p. 31, ll. 9-21*

98. Bell himself testified that the invocation of the Act didn't substantially change the plan that was eventually used to clear the protests,[72] that existing law was available and could have been effectively used[73], and stated *"In the absence of the invocation of the Emergencies Act, the OPS, the OPP, the RCMP, as part of a unified command were going to clear the protests."*[74] Bell's statement was put to numerous police witnesses, who all agreed with his assessment.[75] No police witness testified that any of the measures were necessary to clear protests anywhere in Canada.

Swearing in of officers from other jurisdictions

99. The Emergency Measures were employed in Ottawa to obviate the need to swear in RCMP officers, but they could have been sworn in within 24 hours in any event. This power was not necessary.

100. In fact, Deputy RCMP Commissioner Michael Duheme testified that the swearing in process was "essentially a paperwork exercise" that it was "not a significant deterrence or hurdle," He further stated in evidence that it never brought to his attention that the swearing in process was stalling the process, and that he understood that things were "going smoothly" in that regard. The witness statement of RCMP Commissioner Brenda Lucki concurs with this evidence.[76]

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[72] *Testimony of OPS Chief Bell, POEC Transcript, Vol. 8, p. 242, ll. 8-13*
[73] *Testimony of OPS Chief Bell, POEC Transcript, Vol. 8, p. 218, ll. 4-11*
[74] *Testimony of OPS Chief Bell, POEC Transcript, Vol. 8, p. 251, ll. 26-28*
[75] eg: *Testimony of OPS Supt. Bernier, POEC Transcript, Vol. 10, p. 147, ll. 7-10*
[76] *Testimony of RCMP Deputy Chief Michael Duheme and RCMP Commissioner Brenda Lucki,* POEC Transcript, Vol. 23, p. 219-7, ll. 8-19

Tow trucks

101. While there apparently were some initial difficulties in securing heavy towing services, sufficient trucks and willing drivers had been procured prior to the Declaration, and were already staged in Ottawa and ready to provide service by February 13.

> *"MR. ROB KITTREDGE: Right. So would you agree that the federal emergency power to compel towing services may have been helpful to police, and maybe beneficial to police, but it wasn't necessary to enable police to clear the protests, was it?*
>
> *SUPT. ROBERT BERNIER: Yes, however, with a caveat that we were having challenges... prior to the 13 th, I would have said we could have used some help with that but, as things materialized on the 13th, I was satisfied that we were good.*
>
> *MR. ROB KITTREDGE: And you were -- by, you "were satisfied that we were good", you were satisfied that the federal emergency power to compel tow trucks wasn't necessary?*
>
> *SUPT. ROBERT BERNIER: Correct."*
>
> *OPS Supt. Bernier, POEC Transcript, Vol. 10, p. 149-150, ll. 16-2*
>
> *"MR. ROB KITTREDGE: ...you stated earlier that you did have tow trucks lined up and that they were on their way to Ottawa prior to the invocation of the Emergencies Act; isn't that true?*
>
> *ACTING DEPUTY CHIEF PATRICIA FERGUSON: Yes."*
>
> *OPS Acting Deputy Chief Ferguson, POEC Transcript, Vol. 6, p. 186, ll. 16-21*
>
> *"The plan had a contingency that they could execute the plan with as little as two tow trucks, and we also had police personnel lined up to operate heavy tow vehicles should we not be able to get the assistance of professional tow operators."*
>
> *OPP Commissioner Carrique, POEC Transcript, Vol. 11, p. 306, ll. 11-15*

102. Sufficient heavy tow trucks had been engaged by police and were in Ottawa ready and willing to assist with clearing the protests before the Declaration was issued. Most of the police witnesses believed the power to compel tow trucks had never been used. But in the midst of Commissioner Carrique's testimony it emerged for the first time that after the Emergency Measures were passed, police decided to make use of those powers for convenience – not to

compel unwilling tow truck drivers to provide services, but for convenience. For example, to take advantage of the indemnity and anonymity assurances provided under the Emergency Measures, and to streamline payment. Commissioner Carrique explained it as follows:

> *"MR. ERIC BROUSSEAU: ...it appears... that as of the afternoon of the 13th there are tow truck companies lined up, but at some point you have compelled them verbally and followed up with confirmation in writing. What changed for the towing companies between the 13th and the 17th when you sent the letter?*
>
> *COMM. THOMAS CARRIQUE: ...There was concern that tow operators were becoming reluctant. They wanted to have some protections that there would be no retribution or retaliation leveraged against them for participating, and there was still the ongoing concern over indemnification. So yes, they had been lined up, yes, they had been coordinated, but there were still concerns being expressed by some of the tow operators.*
>
> *The plan had a contingency that they could execute the plan with as little as two tow trucks, and we also had police personnel lined up to operate heavy tow vehicles should we not be able to get the assistance of professional tow operators.*
>
> *MR. ERIC BROUSSEAU: Okay. And was the concern across -- sort of unanimous across these 7 companies and 34 trucks, or were there companies, to your knowledge, that would have participated without being compelled?*
>
> *COMM. THOMAS CARRIQUE: I can't say what the proportion of concern would have been, but* ***I was assured that with or without they would've been able to get the job done. It would've taken more time, it would've required potentially our officers having to operate tow trucks, but we still would've moved forward with the execution of the Operational Plan.****"*
>
> *OPP Commissioner Carrique, POEC Transcript, Vol. 11, p. 305-6, ll. 20-25*

103. Despite the fact that in the end it emerged that the power to compel tow trucks was used, it was clearly not necessary. Police could have and would have cleared the protests with or without the power, and heavy towing services had been retained and staged in Ottawa without need for the compulsory power.

Financial Measures

104. A number of witnesses claimed that the Financial Measures may have encouraged some protesters to leave Ottawa, or deterred others from coming to the cite. Those claims were all

speculative, however.[77] There is no clear evidence that the Financial Measures actually had that effect, and in any event, no police witnesses testified that the protests could not have been cleared without the Financial Measures.

Exclusion zones

105. Police witnesses testified that the Emergency Measures power to create exclusion zones was used in Ottawa, and was helpful because the authority to exclude people from the protest area during the police operation was more clear, less subject to legal challenge, and easier to describe than the existing common law and statutory powers that police typically use to exclude the public from areas where police operations are ongoing, but police could have and would have cleared the protests using existing powers in the absence of the invocation of the EA.

> *"MR. ROB KITTREDGE: ...Police have common-law powers to exclude the public from an area in which a police operation is underway; is that correct?*
>
> *SUPT. ROBERT BERNIER: Yes.*
>
> *MR. ROB KITTREDGE: And those powers could have been used in the clearing of the protests in Ottawa, couldn't they?*
>
> *SUPT. ROBERT BERNIER: Yes."*
>
> *OPS Supt. Bernier, POEC Transcript, Vol. 10, p. 146, ll. 18-24*

106. Superintendent Dana Earley, the Critical Incident Commander who was responsible for clearing the protest at the Ambassador Bridge in Windsor prior to the invocation of the EA, testified that she was able to establish an exclusion zone along Huron Church Road, north of Tecmseh to the Ambassador Bridge. To do this, she testified that she relied upon the Criminal Code but could have also relied upon the Emergency Management and Civil Protection Act, if necessary.[78]

107. None of the Emergency Measures were necessary.

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[77] See, for example: the evidence of *OPS Interim Chief Bell POEC Transcript,* Vol. 8, p. 250, ll13 – p. 251, ll 2

[78] WTS00000022 - *Witness Summary of Supt. Dana Early* - Page 98, Line 18 to Page 99, Line 6

Existing powers were not exhausted

> *"You shouldn't need more tools – legal tools - they're barricading the ON economy and doing millions of damage a day and harming people's lives. We'll give you whatever resources you [need]. The police of jurisdiction needs to do their job. If they're saying they can't do it because they don't have enough officers or equipment, we need to remove that excuse as soon as possible"*
>
> *PM Trudeau to Premier Ford, Feb. 9 2022,* SSM.CAN.NSC.00002845_REL.0001
>
> *"I am of the view that we have not yet exhausted all available toold that are already available through the existing legislation."*
>
> *RCMP Commissioner Lucki email, Feb. 14 2022,* NSC.CAN.00003256_REL.0001

108. As acknowledged by Prime Minister Trudeau in his call with Premier Ford, and by RCMP Commissioner Lucki in her February 14 email, more legal tools were not needed.

109. Every issue that arose during the Ottawa protest which aggrieved residents or local officials could have been addressed by existing laws. For a comprehensive review of complaints and available laws, please see **Schedule A** attached, which illustrates that each behaviour officials wanted to prevent was prohibited by existing law and could have been addressed through laying of charges and the issuing of tickets.

110. To the extent that tickets and fines would have been insufficient to deter protesters, the City of Ottawa could have obtained an injunction under s. 440 of the *Municipal Act, 2001*, to enjoin protesters against contravening by-laws.[79] This is a powerful legislative tool which had the potential to raise the consequences of civil disobedience to a criminal offence subject to charges, arrest, and potentially the use of release conditions to prevent protesters from returning to the site of the protest.

111. The challenges faced by police forces related to logistical shortcomings, not a lack of legal authorities. As described by former Chief Sloly, the police had the legal authorities necessary but

[79] *Municipal Act, 2001*, SO 2001, c. 25, s. 440

lacked the resources to implement the legal authorities.[80] Nor did police need additional legal power to obtain those resources. As explained above, police ultimately obtained tow trucks. In any event, the *Highway Traffic Act* could have been used to grant the same power to compel tow truck drivers. Under s. 171, the Lieutenant Governor in Council may make regulation prescribing prohibited activities. A regulation could have been passed prohibiting tow truck drivers from refusing prescribed directions to render services. A refusal by tow truck drivers would be a prosecutable offence.[81] This would duplicate the regime under the *Emergency Measures Regulations*.[82]

4) No reasonable grounds to believe emergency existed

112. In our submission, Canada has failed to make out a case for legitimate invocation of the *Emergencies Act* at each and every stage of the analysis above. The EA required Cabinet to articulate reasonable grounds for its purported belief that a public order emergency existed in the Declaration and Section 58 Explanation, but it utterly failed to do so. The idea that Cabinet could have actually held such a belief strains credulity.

113. The Commission must find Cabinet's Declaration of a public order to have been unlawful.

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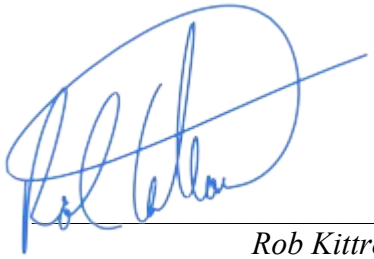
[80] Transcript Vol. 12, p. 193, ll. 11-21.

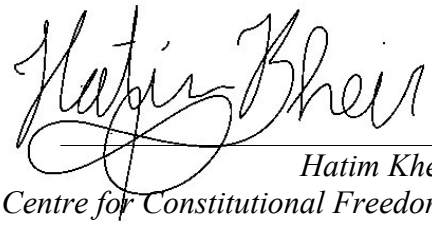
[81] *Highway Traffic Act*, *supra* note X, s. 171; see also *testimony of Ian Freeman, POEC Transcript*, Vol. 20, p. 194, l. 15 – p. 197, l. 25.

[82] *Emergency Measures Regulations*, SOR/2022-21, s. 7, 10; Transcript Vol. 20, pp. 192-97.

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



Rob Kittredge
Justice Centre for Constitutional Freedoms



Hatim Kheir
Justice Centre for Constitutional Freedoms

Alan Honner
The Democracy Fund

Schedule A – Powers available at existing law

The following is a non-exhaustive summary of some of the statutory, regulatory and common law powers that could have been employed to address problematic conduct alleged to have occurred during the protests without resorting to the Emergencies Act.

Trucks parked on city streets: Many of the problems identified stemmed from the prolonged presence of trucks on City streets.[83] City Bylaws make it an offence to park a vehicle on a highway in a manner that obstructs traffic. Police could have ticketed any vehicles doing so. Further, any trucks parked illegally could have been towed and all costs associated with towing and storing can be placed as a lien against the vehicle.[84] Similar power exists under the *Highway Traffic Act* which allows police to remove any vehicle where reasonably necessary to ensure the orderly movement of traffic. Costs for removal and storage become a lien upon the vehicle.[85]

Horn honking: The resident witnesses, Ottawa City Councillors, and Mayor Jim Watson expressed concerns about the horn honking.[86] The excessive use of horns was contrary to Ottawa's Noise By-law and offenders could have been ticketed aggressively to deter the behaviour.[87] Further, an injunction was obtained by Ms. Li which enjoined anyone with notice of the Order to refrain from using air or train horns. Anyone contravening the Order could have been arrested and charged with disobeying a court order.[88]

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[83] *POEC Transcript*Vol. 2, p. 9, ll. 14-20; p. 310, l. 7 – p. 311, l. 18.
[84] COM00000680, *Traffic and Parking By-law* 2017-301, Part VIII, s. 64(3); Part XII, s. 86.
[85] *Highway Traffic Act*, RSO 1990, c. H.8, s. 134.1 [*Highway Traffic Act*].
[86] *POEC Transcript*, Vol. 2, p. 6, ll. 6-9; p. 7, ll. 14-22; Vol. 4, p. 39 - p. 40, l. 10.
[87] *Noise*, By-law No. 2017-255, ss. 2-3, 27.
[88] HRF00000073, 2022-02-07 Interlocutory Injunction Order; *Criminal Code*, RSC, 1985, c. C-46, s. 127 [*Criminal Code*].

Idling and diesel fumes[89]: Idling was prohibited by Ottawa by-laws and offenders were liable to being charged with a provincial offence.[90] In fact, the Ottawa City Council amended the by-law to lower an exemption from temperatures under -5°C to -15°C to ensure enforceability.[91]

Failure to follow truck routes[92]: Ottawa by-laws prescribe set routes heavy trucks are to follow through the city.[93] Violators could have been ticketed.

Fireworks[94]: Ottawa by-laws prohibit setting off fireworks on highways and gathering people to set off fireworks without a permit.[95]

Open fires[96]: Ottawa by-laws prohibit setting or carrying a fire on a highway. Note that highway for the purposes of the "Use and Care of Roads" by-law refers to both the roadway and the sidewalk.[97]

Public defecation and urination[98]: Defecating on roadways and sidewalks is prohibited by Ottawa by-law.[99]

Dumping of chemical toilets in public[100]: The "Use and Care of Roads" by-law prohibits the depositing or spilling of chemicals or substances on roadways and sidewalks.[101]

Hot tubs: Mayor Watson complained of hot tubs a sign of lawlessness on city streets.[102] The hot tubs were "lawless" in that they were not allowed to be on city streets because they obstructed traffic. The individuals responsible for placing the hot tub in the street could have been criminally charged with mischief for wilfully obstructing the lawful use of the roadway.[103]

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[89] *POEC Transcript*, Vol. 2, p. 54, ll. 19-25; p. 185, ll. 3-5; Vol. 4, p. 39 - p. 40, l. 10.
[90] COM00000701, Idling Control By-law No. 2007-266.
[91] COM00000678, By-law No. 2022-44, s. 1.
[92] *POEC Transcript*, Vol. 2, p. 88, l. 26 - p. 89, l. 20.
[93] COM000000853, "Urban_Truck_Routes_2022 v.1.2 EN FINAL-ua.pdf".
[94] *POEC Transcript*, Vol. 2, p. 6, ll. 16-20; p. 188, ll. 2-3; Vol. 4, p. 39 - p. 40, l. 10.
[95] *Fireworks*, By-law No. 2003-237, ss. 5(1), (5), 25.
[96] *POEC Transcript*, Vol. 2, p. 31, ll. 16-23; p. 214, l. 13 - p. 215, l. 17; Vol. 4, p. 39 - p. 40, l. 10.
[97] *Use and Care of Roads*, By-law No. 2003-498, ss. 1, 3(1)(i).
[98] *POEC Transcript*, Vol. 2, p. 10, ll. 18-22; p. 157, ll.8-9.
[99] *Use and Care of Roads*, By-law No. 2003-498, s. 3(1)(n).
[100] *POEC Transcript*, Vol. 2, p. 88, ll. 8-15.
[101] *Use and Care of Roads*, By-law No. 2003-498, ss. 3(1)(a) and (c).
[102] *POEC Transcript*, Vol. 4, p. 19, l. 27 - p. 20, l. 5.
[103] *Criminal Code*, *supra*, s. 430.

Masks not being worn in businesses[104]**:** At the time of the protests up until the invocation of the *Emergencies Act*, everyone on the premises of a business or organization was required to wear a face covering pursuant to regulations under the *Reopening Ontario Act*.[105]

Residents being accosted for wearing masks[106]**:** If protesters, or anyone else, accosted residents wearing masks, those responsible could have been guilty of criminal harassment, assault, or intimidation depending on the specific nature of the behaviour. If the accoster followed the victim from place to place or repeatedly communicated with the victim in such a manner that caused the victim to reasonably fear for his or her safety, the accoster would be guilty of criminal harassment.[107] If anyone tore off another's mask, that would constitute assault.[108] If the accoster used violence, threats, or persistently followed someone else for the purpose of dissuading that person from wearing a mask, the accoster would be guilty of intimidation.[109] In any case, the offending party could be charged and arrested.

Presence of hate symbols[110]**:** The public incitement of hared that is likely to lead to a breach of the peace and the wilful promotion of hatred are criminal offences.[111] Admittedly, this is a high threshold that the mere presence of flags would likely not meet. However, anything less is protected by the constitutional right to free speech.[112]

Vandalism of monuments[113]: Vandalism is prohibited by *Criminal Code* provision prohibiting mischief which applies to behaviour which damages, destroys or interferes with the enjoyment of property. There are also provisions which apply greater penalties for mischief to war monuments or cultural property.[114] If anyone was guilty of damaging monuments, such as the cenotaph or the Terry Fox statue, criminal charges could have been laid and offenders could have been arrested.

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[104] *POEC Transcript*, Vol. 2, p. 89, l. 24 - p. 90, l. 24.
[105] O.Reg. 364/20, Schedule 1, s. 3.1; *Reopening Ontario (A Flexible Response to COVID-19) Act*, 2020, SO 2020, c. 17.
[106] *POEC Transcript*, Vol. 2, p. 15, ll. 22-23; Vol. 4, p. 41, ll. 6-12.
[107] *Criminal Code*, *supra*, s. 264.
[108] *Criminal Code*, *supra*, s. 266.
[109] *Criminal Code*, *supra*, s. 423.
[110] *POEC Transcript*, Vol. 2, p. 156, ll. 19-22.
[111] *Criminal Code*, *supra*, ss.319 (1), (2).
[112] See *R v Keegstra*, [1990] 3 SCR 697.
[113] *POEC Transcript*, Vol. 4, p. 11, ll. 17-23.
[114] *Criminal Code*, *supra*, s. 430.

Theft of food from charities: Mayor Watson alleged that food was stolen from the Good Shepherds charity.[115] Anyone stealing food would have been guilty of theft and could have been so charged.[116]

Bear spray and knives: Ms. Carrier testified that she had heard that a store had sold out of bear spray and knives.[117] While the mere possession of these items is legal, if they were intended to be used for a violent or unlawful purpose, possessors could be charged with possession of a weapon for a dangerous purpose.[118] The use of such weapons could be addressed with charges for assault with a weapon.[119]

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[115] *POEC Transcript*, Vol. 4, p. 11, ll. 17-23.
[116] *Criminal Code*, *supra*, s. 322.
[117] *POEC Transcript*, Vol. 2, p. 82, l. 4 - p. 83, l. 3.
[118] *Criminal Code*, *supra*, s. 88.
[119] *Criminal Code*, *supra*, s. 267.

Schedule B – POLICY RECOMMENDATIONS

1) The Commission Should not Recommend that Social Media be Regulated

The Commission's Term's of Reference task it with investigating the role of misinformation and disinformation in the circumstances that led to the declaration of emergency.[120] The Terms of Reference single out social media for a particular focus of the Commission's inquiry. However, social media was not the main source of misinformation which led to the invocation of the *Emergencies Act*. The evidence before the Commission of misinformation or disinformation is limited to non-specific complaints or discrete errors that did not characterize the protest.[121] There is little to no evidence of false claims motivating the protesters.

Indeed, the strongest evidence of the role of misinformation and disinformation in the circumstances leading to the invocation of the *Emergencies Act* came from Supt. Pat Morris. Supt. Morris testified that the press made unsubstantiated claims about the Freedom Convoy which incorrectly described the protest. He stated: *"I did not see information that substantiated what was being said publicly and via the media. And I found that the subjective assertions sensationalized, yes, and exacerbated conflict.*"[122]

The prevalence of misinformation among the press demonstrates the danger which would inhere in any attempt to combat misinformation on social media. Any system to regulate misinformation would require a determination of truth and falsehood. Such determinations would be subject to the same risk of pervasive error which led to all major press outlets repeating similar false claims about the protests. Pervasive error here refers to the potential for a limited group to engage in the same type of error despite operating independently of one another. The "mainstream" press is subject to pervasive error because of the similarities shared between the different outlets; similarities of class, culture, and political leanings.

The only safeguard against pervasive error is a widely decentralized system that allows for independent voices to provide different perspectives. While such a system cannot guarantee the truth will prevail in a

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[120] Order in Council P.C. 2022-392, s. (a)(ii)(C).
[121] E.g. *POEC Transcript,* Vol. 25, p. 232, ll. 8-25; p. 329, ll. 23-28.
[122] *POEC Transcript,* Vol. 5, p. 293, ll. 9-12.

marketplace of ideas, it can guarantee that the truth will be available to be found on the marketplace. A system that privileges certain institutions or perspectives as authoritative can provide no such safeguard. Any attempt to regulate misinformation on social media would necessitate a regulator which either makes determinations of truth and falsehood or relies on other selected institutions for that purpose.[123] The choice is not between truth and falsehood but rather one between a system where truth and falsehood are both accessible or one characterized by a narrow range of perspectives susceptible to pervasive errors.

2) The Emergencies Act Threshold Should not be Broadened or Lowered

The Commission should not recommend that the *Emergencies Act* be amended to broaden or lower the threshold for declaring a public order emergency. As argued above, the test for declaring an emergency was not met in February 2022. This is not an indication of a legislative gap. Rather it is a consequence of an appropriately narrowly drafted legal standard.

The protests did not pose a national security threat either as defined by the *CSIS Act* or in a broader, colloquial sense.[124] As argued by Dr. Leah West, the protests were characterized as a "national security threat" because that is the standard required by the *Emergencies Act* which the Federal Government sought to invoke.[125] The fact that the protests do not fit into the definition set out by the *CSIS Act* is an indictment of the Federal Government, not a shortcoming of the *CSIS Act* or *Emergencies Act*.

Likewise, economic harm should not be included in the definition of "threat to the security of Canada" required to invoke the *Emergencies Act*. Doing so would lead to a massive expansion in the scope of situation in which the Federal Government may use emergency powers. For example, at the policy phase of the hearing, Mr. Rosenberg's question about the inclusion of an economic emergency like the 2008 global financial crisis highlights the potential to the definition to expand to broadly if economic harm is included.[126] Nor is such a definitional expansion necessary. Where economic harms flow from protests or blockades, those demonstrations are the necessary target of government action, not the economy. Demonstrations fall neatly within existing powers as explained in the main body of the submissions. There is no need to broaden the scope of the *Emergencies Act*.

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[123] E.g. see the perspective of Prof. Gaudreault-Desbiens: *POEC Transcript,* Vol. 32, p. 60, l. 22 – p. 61, l. 9.
[124] *POEC Transcript,* Vol. 5, p. 297, ll. 1-12; Vol. 34, p. 11, l. 11 – p. 13, l. 3.
[125] *POEC Transcript,* Vol. 34, p. 12, ll. 22-27.
[126] *POEC Transcript,* Vol. 36, p. 31, ll. 4-13.

3) Waivers of Cabinet Confidentiality Should be Clearly Defined

Uncertainty over the boundary between what element of Cabinet confidence had been waived resulted in confusion during the hearings. It was the subject of motions which require the Commission's resources and interrupted cross-examinations which only had limited time. For example, the Director of CSIS cited a confusion over what was protected by Cabinet confidence as the reason he did not include the fact that he advised the Prime Minister to invoke the *Emergencies Act* in his first interview with commission counsel.[127] This was a key fact which was omitted until the last week of the factual phase of the hearing due to a lack of clarity of what was covered by Cabinet confidence and what had been waived.

As a solution, we recommend that in future inquiries, the government specify in writing what aspects of Cabinet confidence are being waived. A failure to do so creates a variable privilege which can be invoked at opportune times and allows the Government to derive the benefit of a public perception of transparency while retaining the advantage in litigation. A request to clearly articulate the bounds of the waiver of Cabinet confidence in no way prejudices the Government and would save time and resources by avoiding confusion among other parties.

4) The Emergencies Act Should be Amended to Extend the Inquiry's Timeline

The *Emergencies Act* currently sets out a strict and unalterable timeline for the institution of the Commission and the tabling of its report before Parliament.[128] We make two recommendations with respect to changing this timeline. First, the *Emergencies Act* should be amended to extend the time for the Commission's report. While the tight timeline has the advantage of ensuring efficiency, it put pressures on the work of the Commission. Future inquiries would benefit from a modest increase in the time allotted. An increase from the current 360 days to 18 months would likely be appropriate.

Second, the deadline for delivery of the Commission's report should be calculated from the institution of the Commission. Currently, the Commission has 360 days from the revocation of the declaration of emergency.[129] However, the Governor in Council has 60 days from revocation to cause an inquiry to be

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[127] *POEC Transcript,* Vol. 27, p. 97, l. 20 – p. 98, l. 5; see also Vol. 29, p. 82, l. 5-13.
[128] *Emergencies Act*, R.S.C., 1985, c. 22 (4th Supp.), s. 63.
[129] *Ibid* at s. 63(2).

held.[130] Thus, the Commission's timeline can be reduced to as little as 300 days. A deadline calculated from the formation of the Commission would ensure that it always has a set statutorily defined timeline in which to complete its work, and would prevent future governments from taking advantage of the current deadline 60 days after revocation in an attempt to diminish a future Commission's effectiveness and thereby to shield themselves somewhat from effective scrutiny, as the Government of Canada chose to do in the case of this Commission.

[130] *Ibid* at s. 63(1).