On Necessity and Accountability in the Emergencies Act

A Brief Respectfully Submitted at the invitation of the Special Joint Committee on the Declaration of Emergency

by
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I want to begin by thanking the Committee for the invitation to share this brief, which I hope will be useful to you in your important work. Please note that the perspectives I present here are my own, reflecting twenty years of scholarly work on emergency powers, and do not in any way represent the views of the Public Order Emergency Commission, on whose Research Council I sat.

Below I raise three interrelated points for your consideration.

- First, I will offer some tools and heuristics which this Committee may find useful in assessing the necessity of emergency measures.
- Second, looking ahead, Parliament may wish to consider clarifying the division of labour among the Emergencies Act's diverse legal and public accountability mechanisms.
- Third, I will suggest it might be prudent for Parliament to anticipate and prepare for the difficulties a changing rhythm of crises may pose for accountable emergency powers in the future.

<u>On Necessity in the Emergencies Act</u>

I would like to begin by offering for the Committee's consideration, some parameters for judging 'necessity'. Necessity is a key element of the threshold for declaring a state of emergency, and for justifying specific measures the Governor in Council might undertake in an emergency too (S. 19). Yet, necessity is a slippery concept. Historically, leaders have used claims of necessity to cloak abuses of power. We are all familiar with the Roman saying "necessity knows no law," and with examples of its abuse. It was cited, for example, by Chancellor von Bethmann Hollweg when Germany invaded Belgium in 1914, and by the defenders of Governor George Torrington after the mass execution of Sinhalese in the 1848 state of martial law.[1] Necessity's slipperiness stems from at least two sources: a) most reasoning in necessity claims is left implicit; b) we are prone to conflate 'necessary' with 'effective.'

To establish it was reasonable to believe emergency power was necessary, Government must lay bear its reasoning, by accounting for two things: first, that the end was necessary: the situation had to be resolved, 'do nothing' was not a plausible option. Second, Government must explain why it was reasonable to believe that an emergency declaration in general, and emergency powers in particular, were the correct means for bringing about that end. Necessity reasoning, once clear, will then take the shape of a chain of conditionals: It was necessary to do X, in order to have Y, which was, in turn, necessary to achieve critical goal Z.

But claims of necessity often leave reasoning implicit: we can vaguely see the connection between means and end, but Government leaves the middle steps opaque. This was arguably the case, for instance, with the Emergency Economic Measures Order in the February 2022 emergency when they first came down. The

[1] Lazar, States of Emergency, 85-86.

order stated the measures were necessary to resolve the emergency, but did not state why. Nor was it obvious what specific purpose they served in ending the emergency: was it 'necessary' to discourage participation, in order to thin the crowd, in order to lower the chance of violence and harm? Or was it 'necessary' to limit funding for leaders, and with what specific end in view? The Government's description of the measures did not make the necessity links clear. The strength of each link must be tested, and that requires we see the links. Might an amendment to S. 61(1) that required a clearer explanation of the necessary connection between measures and ends be worth considering?

Once the links in the chain of necessity are clear, we may find that weak links conflate "'necessary'" with "'effective.'" Effectiveness cannot alone establish necessity. This is because there are always multiple means to an end: just because I can effectively get to Winnipeg from Ottawa by plane doesn't mean it is necessary that I fly, if I need to go to Winnipeg. To establish that a means was necessary demands more specification. For example, if I need to get to Winnipeg quickly then it may indeed be necessary to fly. If I need to get there cost-effectively, the train may be the necessary means. Moving from 'effective' to 'necessary' requires specification with respect to how a situation must be resolved. For this we need to tease out the relevant adverbs. In the February 2022 emergency, Government may have considered it necessary to resolve the situation: Quickly? Safely? Fairly? Cautiously? Efficiently? Decisively? Expeditiously? Cost-effectively? These adverbs guide the process of resolving a crisis, and show why some means had to be preferred over others. Adverbs key necessity claims, and should be made explicit.

Consider this example from the February emergency. One option open to Government to resolve the February 2022 crisis was to call out the army. That power is available under S.275 of the National Defence Act, potentially rendering resort to the Emergencies Act (EA) moot. Technically, the availability of this option might violate the 'any other law of Canada' element of the EA threshold (S. 3). But if it was necessary not just to resolve the crisis, but to do so safely and cautiously, resort to the National Defence Act might be ruled out, potentially contributing to the necessity of resort to the EA.

These adverbs reflect just one example of the interconnected kinds of necessity that animate any chain of conditionals a Government might assert. These include practical, technical, biological, moral, and legal necessity, in addition to logical necessity. If you want to drive a car, it is (practically) necessary to have access to a car. And it is (technically) necessary that the car have fuel. And it is (biologically) necessary that you have control of your limbs. It is (morally) necessary that you are not, by taking the excursion, neglecting a critical duty–not taking a pleasant country drive in lieu of comforting your pre-operative child in hospital, for instance. And it is (legally) necessary that you have a license to drive, and that everyone in the car is buckled

in. To return to the Winnipeg example, if the train to Winnipeg isn't running, and if I have no drivers license, legal and technical necessity may demand I fly to Winnipeg after all, despite prioritizing cost-effectiveness.

To judge necessity, we need a clear view of such keying considerations. But we must also bear in mind that people can only make decisions with the information they have in the moment. Not all options may be visible, and after the fact, we ought not to let counterfactuals sway our judgment of necessity. This is one reason the Act requires 'reasonable grounds to believe' in necessity, not necessity itself.

One other tool may be of use to the Committee in thinking about necessity: while the Committee is not a court, and while there is no jurisprudence, as yet, on the pertinence of the Oakes Test to the EA specifically, Part 2 of the Oakes test makes a handy heuristic for assessing the necessity of specific emergency measures. As in Oakes, Government might be asked to explain how emergency measures aimed at resolving the crisis, are "reasonable and. . .justified." Second, how these measures are a) "fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective." And, b) how the measures limit (or derogate) rights "as little as possible" to achieve the end. And c), "there must be proportionality between the effects of the . . .measure and the objective." That means that the more serious the consequences of limiting (or derogating) a right through emergency measures, "the more important the objective must be."[2] I hope the Committee may find these tools useful as you consider necessity in the EA context.

On Accountability in the Emergencies Act

I now turn to the relationship of diverse accountability mechanisms under the Act. Accountability is critical to trust in representative government. Emergencies make accountability both more important – because of the broad scope of available power – and more challenging, since urgency, and sometimes secrecy, may limit parliamentary, press, and public oversight of executive action. Conscious of this, the EA's drafters took steps to encourage two types of accountability – legal and public - appropriate to emergency circumstances.

The EA enables legal accountability in at least two ways: First, through explicitly including reference to the Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights, to which Canada is a state party, in the preamble. Second, by including the phrase 'believes on reasonable grounds' among the EA's threshold elements. This partly objective standard makes emergency decisions reviewable in Court. Review can rest on administrative grounds, if the Governor in Council oversteps authority under the Act, or on constitutional grounds if there are Charter or jurisdictional considerations.

[2] R v. Oakes, [1986] 1 S.C.R. 103

Yet, it has never been wise to leave accountability, in emergencies, solely or even primarily to courts. In other jurisdictions, courts have often declined to review emergency declarations, noting their political character.[3] And though courts have been more assertive in reviewing the legality of specific emergency measures, even then, legal accountability is slow and uneven. Formal, legal constraints on emergency power do remain important: they make legal accountability possible even when slow or unlikely, and they play the extra-legal role of setting public standards. But at least as far back as the Roman Republic, constitutional regimes have compensated for the shortcomings of formal, legal constraints on emergency power by making judicious use of informal constraints[4]: leaders, even when not held legally accountable, must face the public, and well-designed emergency laws maximise visibility and reputational cost for anyone who abuses those powers. Importantly, public accountability sets the bar higher: citizens expect more of government than actions which are simply "legal." We expect government to act prudently, effectively, and with integrity.

The EA engineers public accountability through a range of formal &informal constraint mechanisms, outlined in S. 58-63 and elsewhere. I will assume the Committee is familiar with these and not review them here. This proliferation of mechanisms makes abusing emergency power more difficult. But, the February 2022 emergency demonstrated these mechanisms can also cause public confusion. These confusions seem to center around two loci. First, there is a widespread expectation that public accountability mechanisms, like this Committee and the Rouleau Commission, will make findings of legality, but as Adam Goldenberg argues, we should consider whether this is strictly the job of the Federal Court.[5] Second – and my focus here - even experts have been confused by the parallel inquiries of this Committee and the Rouleau Commission.

Evidently, complementarity, and not duplication was envisioned by the EA's framers. Duplication likely resulted from the novelty of the Act's use, and the brevity of the February Emergency. As this Committee heard from the Honourable Perrin Beatty (DEDC-3, 29-3-2022), as is suggested by the text of the Act, and in the records in Hansard at the time the legislation was drafted, this Committee was to be "charged specifically with the task of assessing the continuing validity of government action" (Hansard 25-2-1988 1610 2:15). That is, a S. 62 committee was originally conceived as an oversight mechanism with especial responsibility for secret measures and secret matters. This is why S. 62(3) and S.62(4) refer to in camera meetings and oaths of secrecy. But since emergency measures cease when an emergency ceases to continue in force, this would seem to entail that the responsibilities of a S. 62 Committee would cease with the emergency also. S. 62 provides scrutiny of executive power, during the emergency, while a S. 63 Commission of Inquiry is tasked with gathering and synthesizing facts, and presenting Parliament with recommendations after the fact. These provisions were intended to work in tandem to promise scrutiny, encouraging the executive to self-police, and

[3] Notable here is the landmark UK case A and others v. UK [2004] known as the Belmarsh Case.

[4] N.C. Lazar, States of Emergency in Liberal Democracies. (Cambridge University Press, 2013), Ch.5.

[5] A Goldenberg, "Commissioner Rouleau Should not Cross the Threshold," Unpublished manuscript on file with the author.

thus informally constraining abuses of power. Responsibility for public accountability could then rapidly return to Parliament when the S.63 Commission tabled its report within one year.

Your Committee was struck in unusual circumstances and with an unusual mandate, given the novelty of the emergency and its short duration. But looking ahead to future emergencies, it may serve the public to clarify these distinct roles. For, overlapping investigations result in public confusion, exhaustion, expense, and the risk of divergent conclusions and recommendations. The current process risks generating a public perception of politicization of the fact-finding process. And these factors together may undermine public trust in the mechanisms of accountability, in turn undermining their effectiveness.

I know these views were not shared by the Honourable Perrin Beatty, who testified before this Committee on March 29th (at 2050) that he was not concerned about accountability duplication. The implication was, that if accountability is good, then more accountability is better.

With due respect to the Honourable Mr. Beatty, I would invite this Committee to consider arguments against this implication. More of a good thing is not always better, because there are competing aims and values in complex political processes. This becomes evident by analogy: regular elections are good, but this doesn't mean the more elections the merrier. Too frequent elections would mean campaign-distracted politicians, rendering good policy making difficult or impossible. Voters would likely become fatigued and ultimately disengaged. Similarly, multiple readings of a bill are good, but if Parliament moved from three to five or seven or ten readings of each bill, would this be better? The current number balances care and reflection on one hand, and efficiency on the other. More of a good thing is not always better, because we must balance countervailing aims and values. I would invite this Committee to consider whether there are parallels in the current case of tandem investigations.

Given the level of public confusion, and the risk of undermining public faith in accountability, perhaps this Committee might consider whether, in future emergencies, a sequential course of post-facto accountability might be preferable: In the wake of an emergency, first, the fact finding, by a single body whose neutrality the public widely accepts. Then, the facts, their best synthesis, and the best available advice are laid before Parliament for robust partisan and public debate. In this way the work of public accountability might proceed with maximum clarity and public faith, best serving the interests of Canadians.

<u>The changing face of emergency</u>

The final point I would like to bring to this Committee's attention as Parliament and public look ahead in the wake of the first use of the EA and its possible amendment, concerns the changing rhythm of crisis.

Our political system is designed around stability and continuity. It is flexible enough to withstand occasional shocks, or even clusters of shocks, and sturdy enough to scaffold repairs to public trust in the wake of a crisis. Mechanisms of accountability in the EA are designed against this background: They assume times will return to a sufficient level of normalcy in the aftermath of a crisis that a year-long public process of reflection and accountability can take place before any new crisis arises.

But we face a future of cascading crises: Climate change causes more frequent and severe natural disasters. These events may mean more frequent – perhaps very frequent - resort to emergency powers. While many will fall under provincial jurisdiction, their consequences are interjurisdictional, particularly when emergencies are frequent or constant. And, most provincial emergency powers lack the safeguards and accountability mechanisms of the federal EA. Furthermore, emergencies rarely stay in their lane. What starts as a natural disaster or pandemic may lead to economic, and political emergencies, all of which, historically, tend to intertwine. Independently, climate change may drive economic insecurity and is already driving political extremism and apocalyptic politics across the spectrum. As this braid of crisis grows thicker, there may be little time between emergencies for the system to right itself, and for critical processes of accountability to take place. And we know from historical experience – such as the experience of Weimar Germany leading up to 1933[6] - that a pattern of frequent, unaccountable states of emergency, particularly where they are ineffective, risks calling democratic governance into disrepute, potentially further fuelling political crisis.

Furthermore, accountability mechanisms rely on a shared commitment to democracy and to what David Dyzenhaus calls the rule of law project. Without this commitment, no amount of legal constraint will matter and informal constraints will become impotent. But increased polarization, and the mainstreaming of apocalyptic political narratives may undermine this.

Going forward, we must face this multi-pronged threat to democratic governance. While we can't yet predict how these shifts will play out, now is the time to think ahead and consider safeguards for the unpredictable, which is anyway the central purpose of emergency powers. One reason the EA, though by no means perfect, is such a comparatively fine and careful piece of legislation is that it was drafted at a time when cool heads prevailed, and cooperation was possible. Let us not wait until we are shoulder deep in the crisis cascade to address the issue of accountability amid more frequent crisis. We must anticipate and prepare for these changes in the rhythm of crisis. Forethought will best ensure our institutions, founded on democracy and the rule of law, are able to stand firm against the literal and figurative storms to come.

[6] C. Rossiter, Constitutional Dictatorship. (Transaction Publishers, 2002).