



**PUBLIC ORDER
EMERGENCY
COMMISSION**

**COMMISSION
SUR L'ÉTAT
D'URGENCE**

Public Hearing

Audience publique

**Commissioner / Commissaire
The Honourable / L'honorable
Paul S. Rouleau**

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Ottawa, Ontario

--- Upon commencing on Friday, December 2, 2022 at 9:30 a.m.

THE REGISTRAR: Order. À l'ordre.

The Public Order Emergency Commission is now in session. La Commission sur l'état d'urgence est maintenant ouverte.

COMMISSIONER ROULEAU: Et bonjour à tous et toutes à la dernière journée des auditions de la Commission et la journée de nos sessions de politiques. Bienvenue à tous. C'est vraiment une journée et un panel mémorables.

So it's a pretty momentous day, the last day of the hearings and the last day of our panel, it's -- of our policy panels. So it's a momentous day and a very interesting panel that we have today. So without further ado, I will ask our moderator, Professor Lazar, to introduce our panellists.

--- ROUNDTABLE DISCUSSION: THRESHOLDS, POWERS AND ACCOUNTABILITY UNDER THE EMERGENCIES ACT:

DR. NOMI CLAIRE LAZAR: Okay. Thank you very much, Commissioner.

Bonjour à toutes et à tous, collègues canadiens et canadiennes.

Nous avons aujourd'hui six experts avec nous couvrant le droit constitutionnel, l'appareil gouvernemental et les pouvoirs d'urgence au Canada et dans une perspective comparative.

Je m'appelle Nomi Claire Lazar, professeure titulaire à l'Université d'Ottawa, membre du Conseil de recherche, et aujourd'hui, modérateur.

1 And joining us are: Mr. Ward Elcock, former
2 Director of CSIS and former Deputy Minister of National Defence;
3 Professor Hoi Kong, who is Rt. Hon. Beverley McLachlin Professor
4 in Constitutional Law at University of British Columbia; Mr.
5 Morris Rosenberg, former Deputy Minister of Justice and Deputy
6 Attorney General of Canada, as well as former Deputy Minister of
7 Health and Foreign Affairs, and Member of the Order of Canada;
8 Professor Victor V. Ramraj, who is Professor of Law at the
9 University of Victoria; and joining us online we have Karin
10 Loevy -- Professor Karin Loevy, who's head of New York
11 University's JSD programme and a researcher in the Institute for
12 International Law and Justice; and Professor Kim Lane Scheppele,
13 who is Laurance S. Rockefeller Professor at Princeton University
14 School of Public and International Affairs, and the University
15 Center for Human Values.

16 Thank you all for your assistance with the
17 Commission's important work.

18 Since laws general rules are designed for the
19 general case, exceptional events will, from time to time, call
20 on governments to act in exceptional ways. Emergency powers to
21 confront such situations are as old as constitutional government
22 and found in every jurisdiction. Codified emergency powers,
23 like those contained in Canada's *Emergencies Act*, bring
24 exceptional measures under the rule of law.

25 Our panel's task is to raise questions around the
26 *Emergencies Act's* threshold, powers, and accountability
27 mechanisms, and as we do so, it's wise to keep in mind the
28 caveat that humility and caution should inform amendment to the

1 Act. Changes to any legislation, especially when reactive, can
2 have unintended consequences, particularly where that
3 legislation specifically applies to inherently unpredictable
4 occurrences.

5 There's no getting emergency powers just right
6 because a threshold flexible enough to deal with some future
7 event may invite abuse in some other future occurrence or
8 circumstance. So any threshold that the Commissioner may
9 propose, and Parliament may debate, may be both too high and to
10 low for what the future holds.

11 This necessary ambiguity makes formal legal
12 checks and balances critical, but we must also bear in mind that
13 courts across the world tend to accord governments wide scope in
14 an emergency, finding that decisions on emergency are political
15 and beyond their scope. This makes is all the more critical
16 that emergency legislation also engineer informal constraints on
17 power which intertwine with legal constraints, advance
18 incentives and disincentives to promote due reflection and
19 responsible action.

20 So the formal constrains under the current Act
21 includes references to the Charter, the International Covenant
22 on Civil and Political Rights, along with the requirement that
23 executive actions taken urgently gain legislative approval after
24 the fact. Informal constraints include the necessity for
25 publicity and for a Commission such as this one.

26 We now have an opportunity to look at ambiguities
27 and the threshold and the accountability mechanisms in the
28 *Emergencies Act* to consider what worked well and what could be

1 improved should this legislation be needed again in the future.

2 Cette conversation est importante, car s'il n'y a
3 pas de solution parfaite, il existe certaines des approches
4 meilleures et pires. Alors que nous entamons notre première
5 heure avec des questions sur la CEA pour déclarer une urgence
6 d'ordre public, j'invite le public à se référer aux articles 3
7 et 16 de la Loi pour référence, au besoin, car la CEA est assez
8 complexe. Un lien est disponible sur le site web de la
9 Commission.

10 So we'll start off with Victor.

11 **--- PRESENTATION BY DR. VICTOR V. RAMRAJ:**

12 **DR. VICTOR V. RAMRAJ:** Merci, Nomi.

13 Bonjour, monsieur le commissaire. Je m'appelle
14 Victor Ramraj et je suis professeur de droit à l'Université de
15 Victoria.

16 At the end of this full week of roundtables and
17 at the end of this Commission, I thought it might be helpful for
18 me to step back a little bit and situate the *Emergencies Act* in
19 its comparative context.

20 I have three points, one on the difference
21 between constitutional and statutory emergency powers; two,
22 briefly, on Article 4 of the International Covenant on Civil and
23 Political Rights, the ICCPR; and third on the question of
24 interjurisdictional coordination, which you would have heard
25 about at length yesterday.

26 On that note, I'm afraid although I did have a
27 chance to review the transcripts of earlier sessions this week,
28 I was on the plane yesterday, so I missed reviewing that

1 transcript. So apologies if there's some overlap.

2 My first point is this; Canada's *Emergency Act* is
3 distinctive in being a statutory rather than a constitutionally
4 entrenched emergency powers regime.

5 In many countries around the world, emergency
6 powers are constitutionally entrenched, and emergencies are
7 declared and governed directly by the constitutional regime.
8 These constitutions, on the French model, typically involve and
9 provide for the derogation from or suspension of constitutional
10 rights and set out limits on that derogation or suspension.

11 In the Canadian context, the *Emergencies Act* is
12 not constitutionally entrenched. It makes no provision for
13 limitation of or derogation from constitutional rights and
14 remains fully subject to the *Charter*.

15 This is a critical feature in Canada's emergency
16 powers regime. It means that the Act remains subject to the
17 *Charter* and its core principles, including the principle of
18 proportionality derived from section 1.

19 Second, the need for emergency powers and the
20 principle of proportionality itself are recognized in
21 international law under such instruments as Article 4 of the
22 International Covenant on Civil and Political Rights.

23 Article 4 recognizes that there will be
24 exceptional circumstances when states require extraordinary
25 powers, but it also sets limits on those powers, particularly on
26 the extent to which states can derogate from rights, if they can
27 at all. Some rights, such as the right to life, the right to be
28 free from torture, a prohibition on slavery and others;

1 including, I should add, a prohibition on cruel, inhuman, and
2 degrading treatment are completely prohibited and they are known
3 as non-derogable rights.

4 Other rights can be derogated from or limited
5 only, in the wording of the ICCPR, "To the extent strictly
6 required by the exigencies of the situation," provided that they
7 are consistent with international law and do not involve
8 discrimination. And the principles set out in international law
9 resonate with the principle of proportionality and minimal
10 impairment that have been elaborated on in *Charter*
11 jurisprudence.

12 My third point concerns the question of
13 interjurisdictional coordination. There are, of course, serious
14 questions as to whether the categories in the *Emergencies Act*
15 needs to be updated to reflect the reality of 21st Century
16 threats, notably cyberattacks and the sorts of threats to
17 critical infrastructure that were highlighted by other experts
18 this week. I won't comment on those issues, nor will I speak on
19 the factual issues before the Commission; however, a key
20 question common to many federal states is whether, in the face
21 of a national emergency, the central or federal government has
22 the tools it needs to coordinate an effective
23 interjurisdictional response.

24 In Canada that response might involve four levels
25 of government; federal, provincial, municipal, and First
26 Nations, as well as, potentially, international governments and
27 agencies.

28 A comparative survey of Westminster-style

1 constitutions shows us, at one extreme, that some central
2 governments have the power in an emergency to suspend the
3 operation of provincial or state governments entirely, and here,
4 with the assistance -- or in discussion with my PhD student,
5 South Asian constitutions speak of constitutional machinery
6 failure, a Colonial-inspired term, and this -- the provisions of
7 these constitutions allow the central or state government to
8 suspend the operations of states within the union. This is, of
9 course a deeply contentious tool and a political tinderbox.

10 On the other hand, when confronted with some
11 national emergencies, for example, widescale political violence,
12 a 9/11-style attack, or a climate disaster, a high degree of
13 coordination may be needed on an urgent basis.

14 In this respect, the *Emergencies Act* is a
15 relatively weak and deferential instrument. It acknowledges the
16 possibility of a national emergency without providing the means
17 to coordinate effectively across multiple levels of government.
18 It does require consultation, but consultation is not
19 coordination.

20 Of course, any centralized response must also be
21 subject to effective accountability mechanisms, which we'll come
22 to later in the session, but a genuine national emergency will
23 require an effective coordinated response, as well as an
24 effective and appropriate accountability mechanism.

25 I'll have more to say on this point later, but
26 let me stop here for now and yield the floor to my colleagues.

27 **DR. NOMI CLAIRE LAZAR:** Thank you very much.

28 Hoi?

1 DR. HOI KONG: Thank you so much.

2 --- PRESENTATION BY DR. HOI KONG:

3 DR. HOI KONG: So Professor -- when Professor
4 Lazar introduced the panel today, she mentioned that it's really
5 difficult to get text right around the emergencies; there's a
6 certain measure of necessary ambiguity.

7 So I would like to present on is -- and to think
8 about, is how to avoid controversy that's unnecessary, yeah?
9 How can we draft the text to avoid interpretations that either
10 give rise to controversy and contradiction, and avoid -- and
11 ensure that the text is tied to the specifics of the emergency
12 context?

13 So let me start with this question of unnecessary
14 contradiction. So the closing phrase of section 3, the
15 definitional clause, is -- states that a national emergency is
16 one, "that cannot be effectively dealt with under any other law
17 of Canada."

18 Now, on its face you might think, okay, so if we
19 had a province and the province could effectively act under its
20 laws but decided not to, we wouldn't have an emergency. Right?
21 I mean that's just sort of a plain reading of the laws of Canada
22 -- the law of Canada; provincial laws are laws of Canada.

23 But if you look at section 3(a), right, section
24 3(a) says that you only have a national emergency, if you have a
25 situation that:

26 "...is of such proportions or nature as to
27 exceed the capacity or authority of a
28 province to deal with it,..."

1 Right? So that clause, section 3(a), rules out
2 the interpretation that you could have a province who had the
3 capacity under its laws but simply decided not to use it.
4 That's an example of avoidable controversy.

5 Now, going forward I would suggest that when --
6 if the Act is amended Parliament avoid using terms of art such
7 as "Law of Canada," so -- and I'm indebted to this for this
8 point to Professor Leah West, right, who notes that law of
9 Canada, in the case -- 1989 case, Supreme Court case of *Robert*
10 *v. Canada*, defined "Law of Canada" and limited it to the laws of
11 Parliament. But as I say, I think it's unwise to use terms of
12 art that give rise to contradictions in interpretation just on a
13 plain reading of the text.

14 Second, on the question of ensuring that language
15 is tied to the specific context of emergencies. So section 16
16 of the *Emergencies Act*, in its definitions of public order
17 emergencies, refers to section 2 of the *Canadian Security*
18 *Intelligence Service Act*, right; it's an incorporation by
19 reference. And so the -- what is understood to be a threat to
20 security of Canada for the purposes of the *Emergencies Act*
21 derives its definition from another statute.

22 Now, incorporation by reference is, of course, a
23 common drafting technique, but I think it gives rise to
24 potential problems in this context. As Professor Lazar noted,
25 emergencies are specific, they're exceptional. So if you use
26 the language from another statutory regime, it is reasonable to
27 think that the language should take its meaning from that
28 context, yeah?

1 Now, if the courts were to review Executive
2 action, as Professor Lazar noted, they will typically defer to
3 the interpretations of the Executive. But I think we can avoid
4 this necessity of recourse to the deference of the judiciary in
5 the interpretation of the statute, and rather house all of the
6 terms within the *Emergencies Act* to ensure that all language is
7 relevant and specific to the context of emergencies, and again,
8 to avoid unnecessary controversy.

9 So as I say, emergencies, *Emergencies Acts*,
10 legislation about emergencies is necessarily controversial.
11 It's -- the language is going to be necessarily ambiguous in
12 certain respects. What I suggest in these brief moments, in
13 this brief presentation, is that there are ways to avoid
14 unnecessary controversy.

15 And I turn the floor over to my colleagues.

16 **DR. NOMI CLAIRE LAZAR:** Thank you, Hoi.

17 Morris?

18 **--- PRESENTATION BY MR. MORRIS ROSENBERG:**

19 **MR. MORRIS ROSENBERG:** Thanks. So this actually,
20 I think, follows quite well.

21 There's been lots of discussion about whether the
22 government's declaration of an emergency met the threshold of
23 threats to the security of Canada, and I don't intend to go over
24 that ground; it's been ploughed quite a lot.

25 I did, however, want to say a word about the
26 other part of the threshold that has to be met, and that is, the
27 public order -- that the public order emergency is so serious as
28 to be a national emergency; and, in particular, I wanted to

1 focus on the requirement that the matter can't be dealt with
2 effectively under any other law of Canada. And, like Hoi, I am
3 indebted to Leah West also for her explanation of the term,
4 "Laws of Canada," and I agree with her interpretation that it
5 refers to federal statute law or federal common law.

6 So how is this requirement to be interpreted?

7 And I can think of three possible scenarios.

8 First one, most clearly, is that there may, in
9 fact, be no other law of Canada that even, you know, comes close
10 to addressing the emergency situation. Alternatively, it may be
11 that there are laws that exist, but there are reasons for not
12 resorting to them. For example, there may be laws in place, but
13 there are operational barriers to the effective deployment of
14 the law. For example, if there is inadequate enforcement
15 capacity, or if there are procedural requirements, which
16 couldn't be fulfilled in a timely way.

17 It may also be that there are laws in place, that
18 may, in the view of the government, be more harmful to
19 individual rights or to social cohesion than the invocation of a
20 temporary emergency. And in the questions we got, the example
21 that was given was the possibility of resorting to the *National*
22 *Defence Act* use of a civil power, and the government did not do
23 that. In fact, I think there was some testimony, maybe from the
24 National Security Advisor who said something to the effect of,
25 you know, doing that would just inflame the situation.

26 So with respect to that example, there's a
27 question as to whether the concept of effectiveness captures
28 this reason for not resorting to bringing in the military.

1 Maybe some consideration should be given to a different, or
2 additional criterion to be added to section 3 that might take
3 into account the government's judgment on the appropriateness of
4 using a law that it deems excessive in the circumstances. You
5 start to get into proportionality and minimum impairment
6 analysis.

7 And one of the things that was distributed to us
8 was a paper that Professor Lazar did for the Commission setting
9 out some examples of what the government should consider to make
10 the reasonable belief that the emergency measures are necessary.
11 And I'll mention two that are relevant to this discussion. The
12 first is that the measure taken at the practical or technical
13 capacity to bring about the outcome, and the other is that the
14 government will not just aim to resolve the situation, but to do
15 so in a normatively appropriate way. So the government might
16 wish to resolve the situation -- and here I'm using Professor
17 Lazar's words -- either quickly, or safely, or fairly, or
18 cautiously, or efficiently, or decisively, or expeditiously, or
19 cost effectively. But I think the same criteria could be
20 applied to determine whether other laws of Canada are not
21 effective or appropriate. They may be available but would
22 either not have the technical or practical capacity to bring
23 about the outcome, or they could not do it quickly, safely,
24 fairly, et cetera.

25 The government's required to believe on
26 reasonable grounds that a public order emergency exists and
27 necessitates the taking of special temporary measures for
28 dealing with it. That judgment is subject to judicial review by

1 the courts and subject to review by Parliament and by the
2 inquiry that's established after the emergency is over. All
3 three of those accountability mechanisms should require the
4 government to clearly explain whether were other laws that, on
5 their face, could have been used and why they were rejected.
6 And the first opportunity to provide reasons for why other laws
7 of Canada would not have been effective is the explanation, and
8 the explanation for issuing the declaration that the government
9 is required to provide to Parliament under section 58(1). And
10 this provides a basis for further exploration of these issues by
11 Parliament in its supervisory role under part 6 of the Act and
12 would also be able to be scrutinized by media and by civil
13 society actors who may be able to feed into the Parliamentary
14 process. And perhaps most importantly, the government's
15 explanation on the ineffectiveness or inappropriateness of other
16 laws should be scrutinized in depth by the ex-post inquiry
17 established under section 63. I'll stop there. Thank you.

18 **DR. NOMI CLAIRE LAZAR:** Thank you, Morris.

19 We're now going to turn to Kim, who's joining us
20 online.

21 **--- PRESENTATION BY DR. KIM LANE SCHEPPELE:**

22 **DR. KIM LANE SCHEPPELE:** Wonderful. Thank you,
23 and I'm very honoured to be here. Kim Scheppele from Princeton
24 University, and I'm here, I suppose, because I study emergencies
25 in comparative perspective, and also because some years ago I
26 wrote a parallel history of states of emergency in the U.S. and
27 Canada. What's striking when I wrote that history was how
28 similar the U.S. and Canada were up until the point of the

1 October crisis in Canada, after which time, of course, Canada
2 enacted both the *Charters* and the *Emergencies Act* and had not
3 until this year declared an emergency since that time, while the
4 U.S. went off on a different path of regulating emergencies.
5 And in the United States now, there is almost always an
6 emergency somewhere in the country almost every day, so the U.S.
7 has normalized emergencies and Canada has made them very rare.

8 Now when you look at emergencies in comparative
9 perspective, as Victor Ramraj said, many constitutional
10 democracies have taken the route of putting into the
11 Constitution itself constitutional emergency powers and
12 permissible derogations from rights. But many of those
13 constitutional provisions do exactly what the *Emergencies Act*
14 does in Canada, which is to try to define different types of
15 emergencies, primarily to separate the non-political ones, the
16 ones that have to do with natural disasters, and even pandemics
17 and so on, from the much more politically tinged ones like the
18 public emergency -- public order emergency in Canada. They also
19 tend to distinguish the kinds of emergencies where civilians
20 will remain in control and where the response is primarily
21 civilian from war-like measures where the military may be
22 involved. So in this regard, Canada's *Emergencies Act* is very
23 typical.

24 But what we see from looking at how these other
25 *Emergencies Acts* in other countries have been used is that
26 almost always one of those categories turns into the default
27 category when you can't figure out where else to lodge an
28 emergency when it seems to people that something should be done.

1 And I think that's where we are with the public order emergency
2 in Canada where, as has been already mentioned, there's a fairly
3 broad scope to this emergency power, and some of the crucial
4 definitions are not in this Act itself but in other Acts that
5 don't contemplate that they will be used always in the time of
6 an emergency.

7 So let me suggest a couple things that I think we
8 can learn from looking in comparative perspective at emergencies
9 laws. Excuse me. So almost all, again, in Canada and
10 elsewhere, have assumed that it's a good thing to have a
11 starting point and an ending point, that there's a point when an
12 emergency starts and there's a point when an emergency ends.
13 Bracketed in that period are some potentially legitimate
14 exceptions to the normal groups that would otherwise be in
15 operation. And then at the end of this period, there has to be
16 some kind of oversight and control mechanism, and the
17 *Emergencies Act* has all of those things.

18 But when I'm -- I'm sometimes a law professor and
19 sometimes a sociologist. And in my studies of emergencies as a
20 sociologist -- excuse me -- one of the things I've discovered is
21 that emergencies in real life tend not to have the shape of the
22 laws that regulate them. The laws of regulating emergencies are
23 typically designed for situations like, for example, the 9/11
24 attack in the United States where something comes out of the
25 blue, surprises everybody, and requires some kind of instant
26 firm response. And then there's be some moment when that
27 instant firm response ends. That's how the laws are structured.
28 But many things that develop into emergencies, including in fact

1 the one before this Commission of inquiry, have a very different
2 shape. You can see them coming from a long way off. They start
3 small and they grow. They may spread in the course of waiting
4 for an emergency regulation to be declared. And so what this
5 *Emergencies Act* requires is that the emergency get to a certain
6 level of seriousness and a certain level of national impact
7 before it can be used. And in the meantime, there seem to be
8 inadequate powers for dealing with the budding threat.

9 So here's the dilemma. If you have an
10 emergencies regime that requires a starting point and a stopping
11 point, it's almost always the case that these budding
12 emergencies or these bubbling emergencies will have to get
13 pretty bad before the emergency powers can be used. And
14 wouldn't it make sense to head these things off before they
15 required emergency powers? Okay, now, it certainly -- you know,
16 how would that be done? Well, I think in this -- in the
17 *Emergencies Act*, it's done through saying that perhaps other
18 laws of Canada could be invoked instead. But as was just
19 mentioned by my two former colleagues, this is now a term of art
20 that means federal law. And in a country like Canada, you know,
21 as in the U.S., it may be that you have state or provincial
22 level issues that are not handled by federal law until they get
23 to be too big.

24 So in the course of thinking about, you know how
25 the *Emergencies Act* intersects with actually existing
26 emergencies, I'm wondering whether it might make sense at this
27 stage to think about two things. One is whether there might be
28 something that we would think of as sort of a pre-emergency

1 stage, where some steps can be taken to head off an emergency
2 before it gets to the point where it really is very damaging,
3 not through extraordinary measures, but through the use of
4 ordinary measures, and then that suggest, because many of these
5 things and particularly the one before the Commission now,
6 starts where it might be possible for provincial action to
7 ensure that, you know, a protest demonstration stays within
8 constitutional boundaries, and that that might council some kind
9 of framework for the coordination of provincial and federal
10 powers to ensure not just that public order is restored, but
11 also to ensure that *Charter* rights are actually also guaranteed.

12 And this brings me to my last point, which is
13 that the *Emergencies Act* and the *Charter* in some ways walk hand
14 in hand. As Victor Ramraj said, that Canada's unusual in having
15 the *Charter* regulated by statute that is completely under the
16 jurisdiction of the *Charter*, so in some sense, no derogations
17 are permitted. But what's striking to me about the *Emergencies*
18 *Act* is that in the course of deciding whether to trigger an
19 emergency, all that is there as part of the threshold is an
20 assessment of the danger involved and not an assessment of the
21 rights that might be infringed by declaring an emergency

22 The fact that the *Emergencies Act* will ultimately
23 be assessed under the *Charter*, by the courts or otherwise,
24 suggests that perhaps proportionality analysis, and thinking
25 about the impact on riots, should be built back into the *Charter*
26 as an exercise that the Executive should go through before
27 actually deciding whether or not to trigger an emergency.
28 Because, of course, in the end the *Charter* will apply, but the

1 *Charter* does not require overtly on its face that the Executive
2 actually engage in proportionality analysis.

3 What I assume is that because the *Emergencies Act*
4 was enacted around the same time as the *Charter*, it was enacted
5 before the Supreme Court of Canada developed the robust
6 proportionality jurisprudence that it has now, and so it looks
7 to me like the *Emergencies Act* is kind of a victim of the year
8 in which in it was written, which is really before the Supreme
9 Court of Canada had developed such a robust system for assessing
10 impacts to riots.

11 So if one of the purposes of the Commission is to
12 think about how the *Emergencies Act* might be improved, I would
13 suggest two things: One, is to think about what I call this
14 pre-emergency stage, to ensure that *Charter* rights can be
15 realised while at the same time tamping down the possibility
16 that an emergency would have to be declared. And second of all,
17 requiring that to trigger an emergency the Executive not only do
18 but also make public a proportionality analysis that shows that
19 the Executive has taken into account the impact of any emergency
20 declaration on riots.

21 And with that, I'll hand back to the committee,
22 and thank you very much for the opportunity to discuss this with
23 you.

24 **DR. NOMI CLAIRE LAZAR:** Thank you, Kim.

25 Karin?

26 **DR. KARIN LOEVY:** Hi. Thank you. Do you hear
27 me?

28 **DR. NOMI CLAIRE LAZAR:** Yes.

1 DR. KARIN LOEVY: Thanks so much.

2 --- PRESENTATION BY DR. KARIN LOEVY:

3 DR. KARIN LOEVY: So I'm Karin Loevy. I'm
4 talking to you from New York. I manage the Doctoral Program at
5 the Law School NYU, and I do my research with the Institute of
6 International Law and Justice.

7 And I think I'll kind of follow Kim on some of
8 her points, and especially my take will try to take us away from
9 this notion in which we started this roundtable today of a
10 necessary controversial, necessarily exception situation that we
11 deal with in emergencies. So -- and I'm going to take a broad
12 perspective because I'm not a Canadian. Again, I'm going to
13 talk from a theoretical perspective and from a general
14 perspective.

15 So what I want to do in this -- my comments on
16 the issue of threshold is to shed some light on the problem
17 thresholds in emergency powers more generally, which is the
18 problem of defining the concept of an emergency and defining and
19 identifying a particular situation as an emergency. And my
20 claim is that the language that the *Emergencies Act* uses to mark
21 the threshold for an emergency declaration is misleading and
22 unhelpful. It orients the focus of the decision-maker and the
23 public to the unknown, the unmanageable, the borderline
24 condition of incapacity, instead of what we really need in times
25 of crisis, which is to focus on capacity, on the many different
26 resources that a society has to confront threats, especially
27 Canadian society.

28 So the threshold of emergency has always been a

1 point of anxiety for theorists of emergency powers and for
2 petitioners of emergencies. This is because emergency is
3 commonly understood in the literature as that which defies
4 definition. Emergencies are defined by their exceptionality, by
5 the fact that they raise occasions for the use of special
6 exceptional power.

7 Think about Carl Schmitt's famous or infamous
8 definition of emergency as a threshold concept, a borderline
9 concept. Emergencies for him is that which is not codified in
10 the existing order, a situation that cannot be circumscribed
11 factually, a case in which with the preconditions and the
12 content of jurisdictional competence are necessarily unlimited.
13 So ultimately, we know a real emergency is one which the
14 Sovereign decides it is because the Sovereign can act against
15 the law to declare the threat and how it should be solved.

16 And this, unfortunately, is the way that many
17 debates in our area express the problem of threshold. Even
18 theorists who are less skeptical than Schmitt about liberal law
19 and about liberal political institutions are influenced by this
20 anxiety. And emergencies again and again are defined as extreme
21 liminal events so that a threshold is placed at the very limit
22 of capacity signifying the very limit of law, yet contained by
23 law.

24 The problem with this framing is that it
25 encourages a politics of emergency governance that is focussed
26 on incapacity and liminality, and that overshadows the real
27 important questions of capacity that defining and identifying
28 emergencies raise, not only questions of what is the threat but

1 about who is capable of identifying threats; who holds the
2 knowledge of the basis of what evidence; what are the processes,
3 methods, standards for identification; what are the levels of
4 consultation, levels of cooperation between agencies and across
5 jurisdictions for determining threats in capacities, et cetera.
6 Such questions that have been raised before the Commission in
7 the last few weeks are sidelined when the emergency is assumed
8 to be completely exceptional in this liminal way.

9 And although Canada's 1985 *Emergencies Act* does
10 not correspond to a Schmittian theory of emergencies, in fact it
11 clearly reject it. Its language reproduces the anxiety of
12 threshold in this way.

13 So what is the emergency that the *Act* envisions?
14 And we heard it before. So, sorry, I'll try to be brief. And
15 again, we're talking about national emergency as defined in
16 section 3, and which applies to all the different types of
17 emergencies that can be declared according to the *Act*.

18 So it is an urgent critical situation, temporary
19 in nature, that seriously endangers lives, health, or safety of
20 Canadians, and exceeds the capacity or authority of a province
21 to deal with it, or threatens the ability of Government of
22 Canada to preserve sovereignty, security, and territorial
23 integrity of Canada, and that it cannot be effectively dealt
24 with under any law of Canada.

25 Now, this language, as others said before,
26 envisions what I call a triple incapacity threshold. Incapacity
27 on a provincial level or incapacity on a federal level, and
28 legal incapacity. By that it seems to create a very high

1 threshold for the declaration of emergencies; right? But a
2 close reading of it shows that it's -- it replicates a
3 Schmittian anxiety about the liminal case. It is oriented to
4 the very extreme case in which competence is lost, and as soon
5 as we accept that we pass this threshold, at the very moment of
6 this extreme incapacity, it births or imagines an all-powerful
7 Executive who can really take charge.

8 This is an absurd framing. It is responsible for
9 the endless arguments that I think the Commissioner heard in the
10 evidence before him about whether there was really no other law
11 or there was really no other capacity anywhere to be found. Of
12 course there is law, of course there is capacity. It is the law
13 and the capacity that we should be interested in if we want to
14 serve the real purpose of emergency government, which should be,
15 as we heard yesterday in the panel of jurisdiction, to avoid the
16 exceptional extraordinary power, to carefully construct and
17 reconstruct regularised, coordinated, multi-faceted, multi-
18 jurisdictional capabilities.

19 So this is my note on the threshold. Thank you.

20 **DR. NOMI CLAIRE LAZAR:** Thank you, Karin.

21 Ward?

22 **--- PRESENTATION BY MR. WARD ELCOCK:**

23 **MR. WARD ELCOCK:** Hello, Mr. Commissioner. I am
24 not -- while I am lawyer, I was a lawyer by education and early
25 career, most of my career has been spent more than as an
26 operator than as a lawyer. So what I would like to do is just
27 make a few comments that perhaps close out some issues came up
28 in the context of the previous remarks.

1 One, the issue of -- I deal with it because it's
2 one that has come up frequently in my career, and one I think is
3 important to put in its proper place, and that is, was there
4 ever an opportunity to use the military as a tool to deal with
5 this?

6 The military had been used in this country. The
7 last time, in point of fact, was the Oka Crisis, when the
8 military were called out, although that was a request by the
9 Province under the doctrine of Aid to the Civil Power. And in
10 that case, the military were successful in dealing with the
11 issue, or at least permitting hiatus within which a solution
12 could be negotiated.

13 The reality is, it seems to me, that absent an
14 armed insurrection, the military has no role in any of these
15 kinds of events, and anybody who starts to talk about the use of
16 the military I think is unwise and it would be highly improper
17 for the military to be involved in anything, even if this
18 particular event did rise to the level -- did meet the test
19 within the definition of the *CSIS Act* that was imported into the
20 *Emergencies Act*.

21 I think I alluded to, in earlier remarks, that in
22 my view there is -- it is open to question whether in fact the
23 events did or did not meet the test that was imported from the
24 *CSIS Act*. I'm not sure that the view of CSIS necessarily closes
25 that issue one way or the other. I think CSIS operates within
26 limitations, which it imposes on the interpretation of that
27 section, which could lead it to a conclusion that the events did
28 not, in their finality, rise to the level of the definition.

1 But it's not clear to me that that means that it did not, in
2 point of fact, on the facts, rise to the level of that
3 definition once you get to the final point when the *Emergency*
4 *Act* is declared and the City of Ottawa was facing considerable
5 difficulties in trying to resolve the convoy protests and there
6 were still threats of potential convoy protests in other places
7 across the country, particularly at border points.

8 The idea of meeting an emergency before it gets
9 to the point of being an emergency is certainly an attractive
10 one, but in some sense, in the context of Canadian history,
11 political history, constitutional roles, division of
12 constitutional roles, it is almost impossible to foresee a
13 situation in which the Federal Government can rely on, or you
14 could create a mechanism which would allow the Federal
15 Government -- the Provinces and the Federal Government to
16 resolve these issues before they get to a really serious point.

17 One would like to hope that they would, but it
18 would not be the first time in this country, and perhaps even in
19 this case, that a Province refuses, in point of fact, to act to
20 resolve an issue at an earlier stage, when in fact it could have
21 been resolved, which ultimately leaves the Federal Government
22 with the only option of actually taking some action.

23 Whether that happened in this case is for you to
24 decide. Not for me. I've not seen all of the testimony and all
25 of the documents. But it does seem to me while it would be
26 attractive to try and deal with emergencies before they happen,
27 that's a role for the provinces and having -- trying to find a
28 mechanism that would allow that to happen on a routine basis

1 strikes me as, given our history and constitutional divisions of
2 powers, seems to me an impractical goal.

3 So ultimately the -- it seems to me the
4 responsibility of dealing with an emergency must fall to the
5 Federal Government, whether or not the definitions in this case
6 and whether or not the legislation is sufficient to deal with
7 the kinds of emergencies that lie ahead of us. My view is that
8 it probably is not and that it requires some additional thought.

9 In particular, in terms of the definition -- the
10 threshold definition, but also in terms of the powers that would
11 be required to deal with emergencies in the future, which were
12 beyond what were envisaged in the *Emergencies Act* when it was
13 done back in the early 90's/late 80's.

14 **--- OPEN DISCUSSION:**

15 **DR. NOMI CLAIRE LAZAR:** Thank you very much.

16 I wondered if any of you might like to address
17 the question of economic emergencies? So this is something
18 which came up in the course of the testimony. And certainly our
19 comparative emergency scholars will know that economic
20 emergencies are certainly conceived of and have been declared
21 and responded to in other jurisdictions. So I wanted to ask
22 whether any of you have any thoughts on this question of
23 economic emergency, whether it fits under the existing framework
24 somewhere, whether it's something that ought to be contemplated
25 in some future version of the *Emergencies Act*? Are there any
26 thoughts or reflections there?

27 Morris?

28 **MR. MORRIS ROSENBERG:** Yeah, I'll start on this.

1 Thank you very much.

2 So I saw a bit of Wednesday's panel and -- that
3 Ward was on. And I know that there were some mixed views in
4 terms of whether the definition of public order emergency should
5 be amended to address economic security threats and also threats
6 to critical infrastructure, which I think are related. And I
7 have a couple of thoughts on policy questions that should be
8 considered before we kind of rush into doing that.

9 And I guess the first order of question for me is
10 whether these are best addressed through emergency legislation
11 or by enacting new legislation. The U.K., for example, now has,
12 in the House of Lords, the -- it's Public Order Bill, I think
13 Leah West mentioned this the other day. That's a law that adds
14 significant new police powers and new offences in relation to
15 obstructing major transport works and interference with key
16 national infrastructure.

17 And there I think are several aspects to this
18 question. It's not clear to me that the *Emergencies Act* is
19 always the worse option. You can ask questions like, "Which
20 would be more effective?" "Which is least disruptive of the
21 rights of citizens?" Legislation, of course, will go through a
22 full deliberative process in Parliament that may provide a more
23 robust opportunity for involvement by civil society actors and
24 media, Parliamentary hearings.

25 We've had some very good examples. For example,
26 the anti-terrorism legislation in Canada, which was, some people
27 would say, rushed, and was introduced into Parliament in October
28 and was law by the end of December, notwithstanding that, there

1 were hearings before the House of Commons Justice Committee over
2 a course of about six weeks, where 80 witnesses were heard, and
3 in the Senate, over the course of about five weeks, where 60
4 witnesses were heard. And those hearings actually resulted in
5 significant changes to that law.

6 So a legislative process can actually be -- and I
7 would say that in that case, a lot of the commentary and a lot
8 of the amendments were to scale down the scope of those powers
9 that were provided and to take better account of civil liberties
10 concerns about who would actually be swept into -- under that
11 law.

12 But that really depends. Kent Roach and Craig
13 Forcese wrote a book on after the Harper Government enacted Bill
14 C-51, this happened after a couple of events which took place in
15 Canada in 2014 in Saint-Jean-sur-Richelieu where somebody was
16 killed right here near Parliament Hill. And their critique of
17 that legislation, in part, was like the *Patriot Act* in the U.S.
18 in 2001, it was just ran through.

19 So there may or may not be an opportunity for
20 meaningful input if you're looking at legislation.

21 You know, what it also means to ask the question
22 whether it's better to amend the regular law of the country to
23 create permanent new government powers, to normalize new powers.

24 If you look, for example, at the law that Alberta
25 passed, which I think is being challenged, the *Alberta Defensive*
26 *Critical Infrastructure Act*, which has been criticized for being
27 overbroad and unclear in its terms, it's not an emergency law,
28 it's part of the regular corpus of law in Alberta. Is that

1 better? Or is it preferable to address these matters through
2 the declaration of an emergency, which is temporary and subject
3 to legal, Parliamentary, and Commission review?

4 And as I was thinking about this, I went back to
5 give Kent a little more credit, he and some of his colleagues at
6 UofT law school were instrumental in 2001, within a couple of
7 weeks after the legislation was tabled, in having put together a
8 conference and then an instant book, which he then drove up and
9 distributed, I think, to every member of Parliament, and I think
10 it had an impact.

11 There's an interesting article in that volume by
12 Professor David Dyzenhaus called, "The Permanence of the
13 Temporary," that deals exactly with this question as to which is
14 worse; using an emergency act or changing the *corpus* of law on a
15 permanent basis.

16 I'll stop there.

17 **DR. NOMI CLAIRE LAZAR:** Thanks very much.

18 Victor?

19 **DR. VICTOR V. RAMRAJ:** Sure. Thanks, Nomi.

20 Maybe like to try to tie together a couple of
21 these points, the question of economic emergencies and Professor
22 Scheppele's idea of pre-emptive mechanisms to deal with
23 emergencies.

24 It seems to me that emergencies aren't easily
25 cabined. I think that Professor Scheppele said that emergencies
26 don't have the shape of the laws regulating them.

27 I think in some ways, different kinds of
28 emergencies often bleed into one another and it's important, I

1 think, for the Commission to acknowledge that this emergency
2 takes place against the backdrop of a global public health
3 emergency. And so sometimes you have other kinds of situations,
4 public health emergency that leads to a public order emergency
5 or an economic crisis that will lead to a public order
6 emergency. So how, then, do we form institutions, create
7 institutions that can pre-empt, in a coordinated way, the
8 emergence of these more serious emergencies?

9 So around the same time that this Commission has
10 been doing its work, or slightly before, of course another
11 commission, the Lancet Commission, which describes itself as an
12 interdisciplinary initiative encompassing the health sciences,
13 business, finance, and public policy. It's a group of experts
14 that were looking at the COVID-19 pandemic and how it emerged.
15 And their conclusion was that -- if I can refer to it, that,
16 "The staggering death toll is both a profound tragedy..." -- I'm
17 quoting, "...and a massive global failure at multiple levels."

18 So I think it's important to acknowledge that had
19 the WHO had the -- worked as it was supposed to; had, for
20 instance, Taiwan been able to signal that there was a virus that
21 was emerging out of China, but because of its exclusion from the
22 WHO there were issues; and had there been international
23 coordination, intergovernmental coordination at that early
24 point, we never would have had this emergency, right? So
25 emergencies are often interconnected.

26 So I'd like Professor Scheppele's idea that we
27 need standing institutions that have the ability to coordinate
28 so that we can prevent the emergence of these kinds of

1 situations in the first place.

2 **DR. NOMI CLAIRE LAZAR:** Thanks very much, Victor.
3 Kim?

4 **DR. KIM LANE SCHEPPELE:** Yes, thank you.

5 So I think the question of economic emergency is
6 quite a vexed one, and the reason is actually the opposite of
7 what I identified as the problem with public order emergencies;
8 and that is that an economic emergency may come on suddenly,
9 which is why people want to use an emergency framework, but it's
10 extremely rare when a sudden intervention into an economy has an
11 immediate effect, you know. So it's not like clearing public
12 protesters where you can do it in a day. You have to make an
13 economic fix, and then it may take months before that economic
14 fix works its way through an economy.

15 So you have this opposite problem, right, which
16 is you may have sudden onset but then the effects will have a
17 long tail, so that deciding when to end it may be actually very
18 difficult.

19 So given that economic emergencies have this more
20 systemic quality, it seems to me that those can be regulated
21 more through ordinary government regulatory powers, rather than
22 through an emergency framework, precisely because I think it's
23 extremely hard to know when an economic emergency ends, and then
24 you have this problem of, you know, the bubbling happens after
25 the emergency action is taken.

26 So most emergency laws do not have economic
27 emergency as a category; they have, more or less, the other
28 categories the current Canadian *Emergencies Act* has. So I think

1 most of the things -- if you walk through examples, most of the
2 things that might count as an economic emergency can probably be
3 regulated in other ways.

4 **MR. MORRIS ROSENBERG:** I just ask a question of
5 clarification, sorry.

6 When we talk about economic emergencies, are we
7 talking about things like a global financial crisis, or are we
8 talking about things like a blockade on the Ambassador Bridge
9 that prevents supplies from going back and forth across the
10 border and results in, you know, people losing their jobs,
11 potentially the loss of confidence in the United States on
12 Canada's reliability as a trading partner? Because they're very
13 different.

14 **DR. NOMI CLAIRE LAZAR:** Commissioner, do you want
15 to...?

16 **COMMISSIONER ROULEAU:** I mean, I don't know.
17 It's up to the panel to figure it out.

18 Certainly, on the facts of this case, the
19 economic impact that was testified to resulted from the closure
20 of the Ambassador Bridge and the impact on jobs, both in Canada
21 and the US, that were affected within days of that blockade.

22 So I think on the facts of this case, that's the
23 economic emergency that was discussed, but of course, economic
24 emergencies can be broader.

25 **DR. NOMI CLAIRE LAZAR:** And I guess that's part
26 of the issue with emergency legislation is that, you know, we
27 can't really say in advance; is the next thing going to be this,
28 or going to be that? And so that's our challenge.

1 Kim, did you want to respond?

2 **DR. KIM LANE SCHEPPELE:** Yeah. So I think that
3 actually what the Commissioner just said was very helpful,
4 right, because the problem there is not that -- the problem
5 didn't originate in an economic crisis; the problem originated
6 elsewhere, and the *Emergencies Act* has a system for handling
7 that. If you have something like a global financial crisis
8 where the problem sort of originates in the economy, as it were,
9 then the kinds of measures that must be taken are really much
10 more in the matter of state economic policy, which will need to
11 be longer term than you imagine an emergency should last.

12 So that's precisely why I think economic
13 consequences can be weighed in considering these other kinds of
14 emergencies, but having an emergency just for economic reasons
15 strikes me as being an unnecessary extension of emergency
16 powers.

17 **DR. NOMI CLAIRE LAZAR:** That's a great
18 clarification. That sounds exactly right to me.

19 So as we now move into our second hour, we're
20 going to turn our attention to questions of accountability,
21 which of course are entwined with questions around the
22 threshold.

23 So accountability is a necessary condition for
24 trust in representative government, it thus sits at the very
25 heart of our political system. So in day-to-day governance,
26 there are various layers of accountability; policies undergo
27 public consultation, bills are debated through multiple
28 readings, Parliamentary committees invite diverse perspectives

1 and deliberate, and the press and the public scrutinize the
2 process, courts review, and ultimately we hold elections.

3 But emergencies challenge some of these usual
4 mechanisms. Urgency necessitates speed and decisive action,
5 shifting deliberation to after a decision has been taken, and
6 earlier types of emergency powers had historically sidestepped
7 checks and balances entirely. Often contested claims of secrecy
8 exacerbate these conditions.

9 Some parts of the *Emergencies Act* facilitate
10 legal accountability, including the objective standard that the
11 Governor-in-Council have reasonable grounds to believe emergency
12 measures are necessary, but many provisions of the law,
13 including this Commission, enable public accountability that
14 includes but also goes beyond legality. Legality alone doesn't
15 determine the rightness of state action.

16 Promise of public accountability is important in
17 itself, but it also serves as an informal constraint on
18 government action. Whatever government chooses to do, they know
19 they will be held accountable, and there's evidence that
20 governments behave with greater caution when public scrutiny is
21 inevitable. But how well that works depends in significant part
22 on the good design of accountability mechanisms; they have to
23 work in order to work.

24 Our panellists will now consider how legal and
25 public accountability provisions in the Act might be tightened
26 for the future, mindful, in particular, of the challenges posed
27 by government claims to secrecy. What are the appropriate
28 functions, strengths, and limits of the Act's current

1 accountability mechanisms; what mechanisms might maximize
2 openness with respect to classified information, Cabinet secrecy
3 or solicitor/client privilege, all in the service of public
4 accountability and public trust.

5 So here we're going to begin with Karin.

6 **DR. KARIN LOEVY:** Thank you, Nomi.

7 Thanks, so again, I'm going to be general in my
8 comments. And in terms of accountability, I think that the
9 *Emergencies Act* envisions a very rich environment of
10 accountability mechanisms, institutional conditions for
11 insurability for account giving, for assumption of
12 responsibility encompassing the obligation to report, explain,
13 and be answerable for resulting consequences. And maybe if we
14 used David Eisenhower's terminology, these could also be
15 described as rule of law furniture, or assemblages of
16 institutional structures that make legality possibly real even
17 in emergencies. And I agree with Nomi that it's not only about
18 legality, but it is an important aspect of accountability.

19 But this setup of an expansive and a layered
20 structure of accountability may seem like a moving target for
21 those individuals who were affected. What will they be able to
22 challenge? The declaration? The measures? The oversight
23 process? And where, and in particular, when? How likely is it,
24 for example, that a court will challenge the measures when an
25 emergency declaration is in place? Will a court challenge the
26 declaration of emergency when an inquiry is still taking place?
27 Are each one of these mechanisms independent, or are they
28 reliant on one another? What is the division of labour between

1 them and when does one end and the other begins?

2 Now I can't answer all these questions, of
3 course, and I can't also provide policy recommendations, but I
4 want to provide one general suggestion on how to understand the
5 relationship between these mechanisms. And one way to
6 understand the relation between mechanisms by connecting them to
7 the problem of time in emergencies. So again, a general problem
8 in emergency powers.

9 So often emergencies are characterized by the
10 problematic that we can call the problem of no time. Emergency
11 is a sudden event that needs urgent response and there's no time
12 for regular decision-making processes to take place, so we
13 resort to exceptional behaviour, but only for a limited time.
14 The problem of no time is solved by exceptional behaviour as
15 long as it is limited in time. In the *Emergencies Act*, time is
16 partly framed in this way. From the moment of the declaration,
17 the Act envisions a kind of race towards its termination, and
18 Kim described it before too. So government has seven sitting
19 days to lay the declaration before Parliament. Parliament has
20 to consider the motion on the next sitting day, and if it
21 decides to revoke, the declaration immediately expires, if not,
22 it will continue for up to 30 days unless it is renewed
23 according to the Act. And until the emergency is over, the
24 Parliamentary Review Committee is to report every 60 days at
25 least, or within 3 days of revocation, continuation or
26 expiration of the declaration. And the post-factum inquiry is
27 established within 60 days, and it must conclude within 1 years.
28 This accountability structure is aimed to limit the threat of

1 exceptional urgent behaviour in time. During the emergency, it
2 creates stopwatches for termination, and after the emergency, it
3 limits the time it takes to recover from it.

4 Finally, judicial review is not mentioned in the
5 Act, not excluded, of course, but envisioned as outside the
6 Act's accountability regime. Possibly because it is hard to tie
7 it to the no time frame. But the problem of no time in
8 emergency is quite artificial and formalistic. Most experts in
9 this area know, and it's been repeated here too, that depicting
10 emergencies as exceptional events is unrealistic. Emergency is
11 not a linear process from an urgent crisis nor necessity to its
12 solution. Instead, it moves in a circular and relational time
13 from anticipation, to response, to recovery, which is already
14 anticipating the next event. An obvious example is the mandate
15 of the Commissioner's inquiry to assist the basis for the
16 government's decision in February 2022, but also to review and
17 suggest amendments to the regulatory framework that will be used
18 in future emergencies.

19 Another example is that of consultation. Why
20 should the requirement of consultation with the provincial
21 government in section 25 be limited to the stage of declaration,
22 or continuation, or amendment of the declaration? Isn't
23 consultation ---

24 **DR. NOMI CLAIRE LAZAR:** Karin?

25 **DR. KARIN LOEVY:** Yeah?

26 **DR. NOMI CLAIRE LAZAR:** Karin, could I ask you to
27 just slow down a little bit ---

28 **DR. KARIN LOEVY:** Yeah, sorry.

1 **DR. NOMI CLAIRE LAZAR:** --- for the interpreters?

2 Thank you.

3 **DR. KARIN LOEVY:** So why should we limit
4 consultation to -- with the provincial government in section 25
5 to the stage of declaration, or continuation, or amendment of
6 the declaration? Isn't consultation an ongoing necessity when a
7 province is affected both by an emergency and by federal
8 government intervention? We want our accountability mechanisms
9 to reflect a more fluid and relational timeline. That means
10 that it doesn't make sense or much sense to think of each of the
11 mechanisms as completely restricted to its own place on the
12 timeline. It also means that we may want to think of an
13 overarching, maybe stable, maybe ongoing, maybe permanent
14 mechanism to coordinate between them, or to oversee them all.
15 It doesn't mean that we need to flatten them out. There can
16 still be different roads, different timeframes for each of them,
17 but they should not behave as silos of accountability,
18 especially not silos of the knowledge that is being created in
19 these processes.

20 And we heard yesterday in the round table of
21 interjurisdiction responses why a modern multiagency and
22 multijurisdictional governance structure for emergencies needs
23 to be in place to facilitate ongoing reflexive and transparent
24 coordination between the different relevant actors involved in
25 identifying threats and responding and planning for future
26 events. And I think this idea of an ongoing process of
27 consultation rather than the anxiety of no time should also
28 guide our interpretation of the relationship between different

1 accountability mechanisms in the Act. Thank you.

2 **DR. NOMI CLAIR LAZAR:** Thank you very much. Just
3 a reminder to everyone to try to stick within your five minutes
4 while also slowing down for the interpreters.

5 So, Hoi, take it away.

6 **DR. HOI KONG:** Right. Thank you so much.

7 So I'd like to address what I think of as two
8 kinds of tensions around accountability. So the first, and it's
9 been alluded to, is the kind of tension between consultation,
10 effective consultation with those who are affected and time.
11 The second tension that I'd like to think about, and again it's
12 been alluded to, is about transparency with respect to the legal
13 basis for a declaration of emergency and the interest in -- the
14 interest of the Attorney General in solicitor/client privilege.
15 So let's start with the first one.

16 So as Karin just mentioned, under section 25, the
17 parties that are envisaged to be consulted are the provinces,
18 and of course, that makes all kinds of sense within our
19 constitutional system. But I think that in many circumstances,
20 cities are the places where emergencies happen. Their residents
21 are the people who are the most affected. They may have the
22 most knowledge about what is happening on the ground. They also
23 have the greatest political incentives to be responsive. So I
24 suggest that perhaps cities be brought into the consultation
25 process.

26 Now, of course, this gives rise to questions of
27 time. Section 25(2) already envisages a situation in which the
28 provinces cannot be consulted without unduly jeopardizing the

1 effectiveness of the proposed action. Now I imagine that you
2 could design a regime so that you could have a similar kind of
3 exception for municipalities and for any other party. As my
4 colleagues have said, accountability to the public,
5 accountability to the affected governments is essential. And I
6 think the simple fact that municipalities are not a part of our
7 division of powers and do not have formal constitutional
8 authority is not a good reason to exclude them from
9 consultation.

10 Second, the question of transparency and
11 solicitor/client privilege. So I think one of the challenges of
12 the Acts that we have in front of us is that it states a legal
13 ground for action, or that is, there has to be a reasonable
14 basis. And so -- and also under 17(2)(a) in the declaration,
15 the Governor in Council has to concisely state the affairs
16 constituting the emergency. Yeah? So the question is, how do
17 we convey the legal basis upon which the Governor in Council
18 acted without compromising solicitor/client privilege? I think
19 we have a model of this already. We have *Charter* statements.
20 *Charter* statements are not legal opinions. They are -- they
21 give an understanding of what kinds of reasons would lead the
22 Attorney General to think that there was a legal basis for
23 action, in that case, for legislation.

24 So in this instance, I think a sort of simple
25 response to some of the concerns are bound to transparency and
26 solicitor/client privilege would be to have within the
27 requirements of the concise statement of the affairs
28 constituting the emergency a requirement that a general

1 understanding be conveyed to the public and to other political
2 actors of the legal basis for the declaration of a state of
3 emergency.

4 So two general tensions: One tension between
5 accountability and time. And as I say, I think municipalities
6 are essential partners, and I think that the time issue can be
7 addressed in the way that it has already been addressed under
8 section 17, under section 25(2). Second, the issue of
9 transparency around the legal basis and solicitor/client
10 privilege. And once again, I think we have mechanisms within
11 our existing system to ensure that kind of accountability.

12 And with that, I turn the floor over to my
13 colleagues.

14 **DR. NOMI CLAIRE LAZAR:** Thank you very much, Hoi.
15 Kim?

16 **DR. KIM LANE SCHEPPELE:** Yes, thank you.

17 So I want to put the emphasis on this part of the
18 discussion on backward-looking rather than forward-looking. One
19 of the reasons for having accountability mechanisms is because
20 you want the decision-makers, in the moment when they actually
21 have to make a decision like this, to have like a little bird
22 sitting on their shoulder saying, "one day someone who is not
23 under this time pressure will look at what you've done." In
24 other words, one of the big functions of accountability
25 mechanisms is not just to hold someone accountable after the
26 fact, but to allow the decision-makers to know ahead of time, in
27 some ways, that their decisions will be reviewed in that way.

28 If you have a situation, and emergencies are -- I

1 think they're more predictable than Karin just said, but I think
2 the legal framework assumes that they'll be some pace that could
3 not be anticipated under normal rules, when that happens it's
4 hard to specify in advance precisely how the power should be
5 exercised. So the best you can do is to say, "after you're done
6 with all of this we're going to look at every single thing you
7 did to make sure that what you did was reasonable, rational,
8 accountable, had a legal basis" and so on. So I think as we
9 design or think about the accountability measures, a lot of the
10 purpose of them is to have an effect on the decision-maker in
11 the moment.

12 That leads me to think that there's one other
13 thing, although the Canadian Act is full of accountability
14 measures, there is one kind of accountability measure that's not
15 there that might be worth thinking about. And that is now that
16 Canada has two emergencies, I'm thinking about the October
17 Crisis and then this one, it might be an extremely useful thing
18 to ensure that new governments in Canada are educated about how
19 these emergencies went and what the aftermath looked like before
20 they have to make the next decision. Which is to say if there's
21 some kind of, you know, training program for incoming
22 governments, or for, you know, sort of incoming -- you know, for
23 the decision-makers that are going to eventually be in this
24 position, it would be very helpful for them to know the history
25 before they start to develop a new course.

26 In fact, I think it's kind of a strange -- well,
27 I thought it was actually a beneficial side effect of having
28 your Prime Minister being precisely the one whose father had to

1 deal with the last crisis. That probably made him wait and be
2 more careful when he finally exercised the power, than might
3 have been the case if you had a prime minister who hadn't grown
4 up with the shadow of the October Crisis directly in their
5 family. And that makes me think that perhaps knowing this
6 history is something that may be very important for future prime
7 ministers to have.

8 Finally, let me just say one thing about what
9 could happen during these accountability measures after the
10 fact. The question is why we have them. And we worry about
11 emergencies for two reasons: One is, of course, for their
12 impact on rights, and this raises the question about what's the
13 standard of assessment. And there's, of course, a judicial
14 review mechanism in place for individual problems that arise out
15 of these emergencies, but what I wonder is why, again,
16 proportionality analysis isn't built into the assessments both
17 in the -- at Parliament level and the Commission of Inquiry
18 level. Again, this is going to be standard courts use, it's the
19 standard for thinking how to be compatible with *Charter* rights,
20 and it might be good to make explicit that this is one of the
21 standards to be used.

22 The second one is trickier because the one thing
23 we worry about with emergencies is that they never really go
24 away, which is that emergency powers seized in a crisis will be
25 emergency powers that the Executive retains even when the
26 emergency is over. So I think it's also very crucial to think
27 about how a Commission of Inquiry can look not just in the
28 moment but to look also at the aftermath to ask if emergencies

1 shift the balance of powers over the long run.

2 And with that I'll stop. Thank you much.

3 **DR. NOMI CLAIRE LAZAR:** Thanks, Kim.

4 Victor?

5 **DR. VICTOR V. RAMRAJ:** I think it might be
6 helpful to think of three dimensions of accountability.
7 Accountability for what, to whom, and when? The answers to
8 these questions, I suggest, depend on the nature of the power
9 that's exercised, or not.

10 Consider, for example, the declaration of an
11 emergency. Here, we have at least two institutional forms of
12 accountability, three if you include this Commission. The other
13 two are accountability to Parliament, either through
14 parliamentary debate to confirm or revoke the declaration; and
15 accountability to various parliamentary committees. These forms
16 of accountability are typically synchronise with the emergency
17 itself. We also have accountability for the declaration through
18 the courts, either in the course of an emergency, ideally,
19 possibly on an expedited basis, or after the fact.

20 If, however, our focus is not on the declaration
21 of the emergency, but abuses or rights violations in the course
22 of its implementation, we might look for accountability, either
23 in the courts, or, depending on the source of the alleged abuse,
24 in complaints mechanisms within, say, a police force, or in the
25 case of security, intelligence, through the National Security
26 and Intelligence Review Agency.

27 But let me raise another aspect of accountability
28 in times of crisis. When a crisis materialises, governments

1 might be held accountable after the fact, either for
2 overreacting to the crisis or failing to act to prevent or
3 mitigate it. We can find examples of both kinds of
4 accountability.

5 In terms of overreacting, and I think
6 Professor Kent Roach gave a really good catalogue of Commissions
7 of Inquiry, the Ipperwash and Arar commissions mentioned by him
8 are examples of government overreaction leading to tragic
9 consequences. As for the failure to prevent or mitigate a
10 crisis, the Air India Commission in Canada and the 9/11
11 Commission in the United States are apt examples.

12 I have to say that after following the
13 Commission's work, I'm still not immediately clear on what kind
14 of accountability we're seeking at this Commission. Is it one
15 or the other or both? Is it that the government overreacted by
16 declaring the emergency and enforcing it as it did, or is it
17 that the government did not do enough or did not have the
18 appropriate tools to prevent or mitigate the emergency in the
19 first place?

20 The answer to this question matters because it
21 determines the answer to the question accountability for what?
22 If the government overreacted in declaring the emergency, the
23 appropriate accountability mechanism might be tighter forms of
24 parliamentary or judicial oversight, or tweaks in the way this
25 Commission conducts or subsequent Commissions conduct their
26 affairs. If, however, the problem is that the government to
27 prevent or mitigate a crisis, or, as Professor Leah West
28 suggested on Wednesday, that there was a failure of federalism,

1 it's less clear to me what form accountability should take.

2 Commissions of Inquiry can, of course, urge or
3 recommend legal reforms, and I hope that this Commission might
4 add its voice to those calling for more effective, and perhaps
5 following Kim, pre-emptive interjurisdictional coordination.

6 **DR. NOMI CLAIRE LAZAR:** Thank you, Victor.

7 Ward?

8 **MR. WARD ELCOCK:** On the issue of accountability,
9 Commissioner, my view would be that, frankly, that the
10 accountability structure, as it currently stands, for the most
11 part, makes sense. And I'm not sure that there is some need for
12 a new level of accountability beyond what exists. I'm not so
13 sure that the role of the Parliamentary Committee beyond its
14 initial involvement was sensible, but to suggest to Parliament
15 that Parliamentary Committees are not necessary is probably not
16 something that anybody will pay much attention to on the Hill.

17 So the reality is, that will happen if Parliament
18 wants to do it, almost regardless of what anybody else says.

19 But I think it has worked -- I think in this
20 particular case, the mechanisms have worked reasonably well.
21 Clearly the Government has been, from all of the testimony I
22 have heard, been very careful about how it proceeded in this
23 case. Up to you whether or not it has acted properly or not,
24 but clearly it has exercised a great deal of caution.

25 It has also been very careful about to respond to
26 questions and concerns and to appear before the Commission. No
27 Ministers have refused to appear before the Commission.

28 Clearly there is political -- there has been

1 political accountability throughout this. And the Government,
2 if it acted improperly, will be held to political account, which
3 is, at the end of the day, how our system works.

4 It all seems to me, actually, that it has worked
5 exceptionally well. There may be questions about the time -- in
6 particular about the time available for the Commission to do its
7 work, and that obviously is something well within your purview,
8 and I have no real sense of -- I'm sure that that task is a
9 difficult one. And I have -- but I have no real sense of
10 whether the timeline is too short or insufficient.

11 Having said that, I would also say, having, I
12 think, in my career, worked on some 30 or 40 Royal Commissions,
13 Royal Commissions tend to expand to fill the time available to
14 do the work. So I think it would be important, even if there
15 were to be more time for the Commission to do its work, that it
16 not be open ended.

17 But I think, frankly, what I have seen, the
18 accountability mechanisms are, frankly, about right.

19 As to the issues of solicitor/client privilege
20 and Cabinet confidence, having been a government lawyer for some
21 years, no government is ever going to give up either on -- of
22 either of those issues, for obvious reasons. And so I'm not
23 sure that it is worth a lot of effort to deal with those issues,
24 although Professor Kong's suggestion, I'm not familiar with
25 those statements, frankly. It comes after my time as a lawyer.
26 But if that would work, it might help a little, but the reality
27 is no government -- and I certainly would not advise a
28 government to give up on Cabinet confidences or solicitor/client

1 privilege. Once you've given up once, you're on a slippery
2 slope. And I would -- so I think no government will ever do
3 that.

4 **DR. NOMI CLAIRE LAZAR:** I wonder, Ward, if --
5 before we turn to Morris, I might ask you -- so I know at some
6 point someone had floated the idea of using the NSIRA or the
7 machinery within NSIRA as an overview -- oversight mechanism,
8 pardon me, with respect to solicitor/client privilege. And I
9 wondered whether you might want to just briefly comment on that
10 before we move on?

11 **MR. WARD ELCOCK:** I expressed the view the other
12 day that it makes no sense, in my view, to tie the *Emergencies*
13 *Act* to a definition within the CSIS legislation. I don't think
14 it works. I don't think it's effective. And certainly if there
15 was a decision, you were to come to the conclusion that the
16 definition is insufficient and it should be changed, to try and
17 change that definition within the *CSIS Act* to allow you to
18 broaden the definition for the *Emergencies Act* I think would be
19 a mistake.

20 That -- which I think takes me to the next step,
21 which is if you -- if the *CSIS Act* is not the appropriate place
22 to have, or to draw from a definition of -- that is sufficient
23 for an *Emergencies Act*, then trying to throw back into the
24 national security community, which is focused on a totally
25 different set of issues and concerns, let's try to throw back
26 into that community a decision about emergencies in any respect
27 is probably a mistake as well.

28 So I would not see NSIRA as a place to come to a

1 decision on that issue.

2 And I'm not sure it solves the problem, frankly.

3 **DR. NOMI CLAIRE LAZAR:** Thank you very much.

4 Morris?

5 **MR. MORRIS ROSENBERG:** Thanks. Just a -- or to
6 say what I was going to say, a couple of comments in terms of
7 what's been said so far. I was taking Kim's point on backward
8 looking and need to educate politicians, many of whom have no
9 corporate memory, either of the invocation of the *War Measures*
10 *Act*, and who have little understanding of national security
11 issues, and who also, I think, are driven by the 24 hours news
12 cycle to focus on the here and now and respond to day to day
13 stuff and spend not enough time investing and thinking about how
14 -- or investing in preventive measures, including mechanisms for
15 coordination within the Federal Government itself, but also
16 increasingly important, mechanisms of coordination between the
17 Federal Government, other levels of government in Canada, and
18 international governments, because the reality is, if you just
19 look over the past -- you know, since 2000, the number of really
20 big what I would call crisis emergencies, you know, everything
21 from 9/11 to the global financial crisis in 2008, to five
22 serious public health crises, starting with SARS, Ebola, H1N1,
23 MERS, and of course now the pandemic, really requires a
24 different way of thinking about government, thinking about the
25 structures that we put in place, and puts a high premium on
26 coordination. It's very hard to do.

27 After SARS, there was an amendment -- there were
28 amendments made, we were involved in negotiations on changing

1 the international health regulations, and the idea was that
2 there would be much more early warning going on. Well, that
3 didn't seem to work out so well when it came to the pandemic.

4 So there are cultural issues embedded in this as
5 well.

6 But I think -- these are some really tough
7 issues, but I think that they need to be addressed. I'm not
8 sure it's necessarily the role of your Commission to address
9 them, but I hope they're followed up on.

10 On -- you know, I kind of like your suggestion of
11 *Charter* statements, the finding a way, because I agree with Ward
12 that no government is going to give up on solicitor/client
13 privilege. So if there was some way at getting at that, that
14 would be great.

15 I also think -- I think there is at least still
16 one outstanding legal challenge by the Canadian Constitutional
17 Foundation. I'm not sure about the CCLA, if they've got one
18 going too. But seems to me another way of testing the
19 Government's legal theory is through judicial review.

20 I don't know what's happening with that, I'm not
21 -- I know there were standing issues.

22 But, you know, that's another way of getting at
23 the legal points.

24 So I just wanted to talk a little bit about some
25 of the accountability mechanisms. I'm not going to talk about
26 the legal accountability mechanisms.

27 Nomi, you addressed them in your opening remarks.
28 You talked about what the limitations of them are.

1 But I think they're very important, and they are
2 progress from where we were with respect to the *War Measures*
3 *Act*, and very deliberately, the standard was changed from, in
4 the opinion of the government, to the necessity of reasonable
5 belief.

6 So I want to focus on Parliament and on the
7 Commission.

8 So in terms of the Parliament -- and with the
9 Parliamentary oversight process, I'll just go back to something
10 I said earlier. I would start with the requirement of the
11 government, the obligation set out in section 58(1) to provide
12 Parliament with an explanation of the reasons for issuing the
13 declaration and a report of any consultation with the provinces.
14 And that's very general language. I'm just going back to a
15 point you were making right at the beginning, and it may be
16 useful to circumscribe and provide more guidance to the
17 government as to what is expected of it in that explanation.
18 And I think, and this has come up today several times, we should
19 consider, because it's an explanation of the declaration, it
20 should also be an explanation of the measures that are being
21 proposed that Parliament needs to ratify. And particularly, it
22 should provide an explanation, going back to the Oakes test, of
23 why the measures taken are minimally impairing, why they are the
24 most appropriate measures but impair rights no more than they
25 need to.

26 So when you get to Parliament, the first thing I
27 would note is -- and I hadn't realized this until I read the
28 legislation, that a declaration by the government can be revoked

1 unless it's ratified by both the House and the Senate. So if
2 the House approves it and the House is much more under the
3 control of the government, and the Senate doesn't approve it, as
4 I read it, it's revoked and it doesn't go back to the House. So
5 this appears to be an area where the Senate, as we used to call
6 the body of sober second thought, has a significant degree of
7 power, and it's less partisan than the House. It's always been
8 less partisan than the House, but it's even more -- even less
9 partisan now because of the institution of independent senators.
10 And that makes the check that was put into this legislation in
11 1985 an even stronger check on government action than when the
12 Act was passed.

13 Now, it's hard to do a serious assessment of
14 Parliamentary accountability because this thing lasted for nine
15 days. We never got past the ratification of the declaration by
16 the House of Commons. I don't think the Senate even got to
17 ratify it. And the committee that was set up, this joint
18 bicameral committee had -- did not actually play their role,
19 which was supposed to be an oversight role, a supervisory role
20 on how the emergency was being managed by the government. So
21 they instead morphed themselves into a after-the-fact review
22 committee, did it I think in a rather partisan way, as I -- this
23 is hearsay, but I understand that that may be the case. You
24 know, if we had had an emergency that went on for 30 days, or
25 that was extended, you would then have an opportunity to see how
26 this worked, and I would hope that it would provide an
27 opportunity in a longer emergency for the committee to actually
28 hold hearings and call witnesses. Because I think it's

1 important that there be more than just parliamentarians talking
2 to each other and to the government, but also to get input from
3 citizens and civil society actors as to how they are perceiving
4 the management of the emergency.

5 As I said, the role of this parliamentary review
6 committee isn't clear. The statute suggests that its role is to
7 review the exercise of powers and the performance of duties
8 pursuant to the declaration. And instead, it's taken on this
9 post hoc role of review, a function that's been assigned to the
10 Commission. And so I agree -- Nomi, you had an article where
11 you suggested that the Act be amended to clarify that the role
12 of the committee is one of supervision of the emergency while it
13 continues in force. And I agree with Ward, that you can't stop
14 Parliament from doing what it, you know, what it wants to do,
15 but this isn't an ordinary Parliamentary committee. It's been
16 created for a special purpose.

17 And finally, just I agree with something that
18 Wesley Wark said the other day, that consideration should be
19 given to assigning the role of ongoing supervision to the
20 National Security and Intelligence Committee of parliamentarians
21 for the reasons that he mentioned in Wednesday's panel, which
22 were that NSICOP has adopted a non-partisan tone, which is
23 precious these days, that it has access to classified
24 information, and unlike other parliamentary committees, it has a
25 dedicated secretariate and research staff. Capacity of
26 parliamentary committees in Canada to actually do their work is
27 a real issue. And the quality of inquiries that you get from
28 parliamentary committees compared to the quality of inquiry that

1 you get from a commission of inquiry are like night and day. If
2 you can have a parliamentary committee that acts in a more
3 serious way, that is properly supported, you might actually get
4 more out of it, especially with an oversight role because
5 parliamentary committees don't generally -- well, they may
6 oversee things in a general way, but they don't normally kind of
7 oversee a particular event, so it's quite a different role.

8 But as was pointed out at that meeting, NSICOP
9 lacks the ability to compel evidence because it's a committee of
10 parliamentarians and not a real parliamentary committee. So in
11 order for this to work, for them to play that supervisory role
12 effectively, they'd have to be converted into an official
13 parliamentary committee.

14 The one accountability mechanism that we have had
15 an opportunity to observe is this inquiry established under
16 section 63. So just three quick observations about this.
17 First, the government set up this inquiry under the *Inquiries*
18 *Act*. The Act -- the *Emergencies Act* doesn't provide that it
19 necessarily has to be under the *Inquiries Act*. The *Inquiries*
20 *Act* has a lot of benefits in terms of the legitimacy of the
21 inquiry because it gives you compulsory powers, and I think that
22 is a absolute essential. So I think the *Emergencies Act* should
23 be amended to provide that the section 33 inquiry would be done
24 under the *Inquiries Act*.

25 Second, I think the timeframe is too short. I
26 agree that it shouldn't be endless. I think this has been just
27 a huge undertaking for the Commission and for the Commission
28 staff, the very, very broad mandate. And I think that something

1 like at least an additional six months for the inquiry to do its
2 work would be reasonable.

3 I also think -- there's one other element of
4 accountability, and I think accountability can be improved if
5 there was a requirement or serious follow-up to the Commission's
6 findings and recommendations, because I think it's probably
7 common knowledge that there are far too many instances of
8 governments, and not just the federal government, calling
9 commissions of inquiry, gets politicians out of hot water for a
10 while, and they can always say, "Well, there's a commission of
11 inquiry that's examining this matter." They spend millions of
12 dollars. They have voluminous sets of findings. They make
13 recommendations. The government says, "Well, thank you very
14 much and, you know, we certainly are going to study these, and
15 we even accept them all in principle," and then they die.
16 Meanwhile, you're functus. Once this report is issued, the
17 commission no longer exists. So what happens to these
18 recommendations and, you know, the findings, and whether they're
19 recommendations about changes to the law, or changes to
20 practice, or training, or whatever. And I think consideration
21 should be given to follow-up mechanisms.

22 And a good example is -- and I'm just looking for
23 it because I have it here somewhere. Louise Arbour, former
24 Justice Arbour did -- was asked to do an inquiry on sexual
25 misconduct in the Canadian Forces and the Department of National
26 Defence. And she had about a year to do her inquiry, and she
27 had a large set of -- a large report and about 47
28 recommendations. The last two recommendations I would commend

1 you to look at. One is that her recommendations be put to a
2 parliamentary committee, that the department would show up
3 before a parliamentary committee and explain if they were not
4 going to adopt some of the recommendations, why they were not
5 going to adopt them. And then she recommended something like a
6 group, a special group that would follow the implementation of
7 her report and have, I think, periodic reports to do that. I
8 would go further and actually put it into the *Emergencies Act*
9 that, you know, for example, requiring the government to appear
10 before a parliamentary committee within six months to explain
11 which recommendations it intends to implement and how it intends
12 to implement them. And if it disagrees with some of the
13 recommendations, it should provide reasons. And that should be
14 followed up by a further report say within two years, because
15 these things don't get done overnight. Maybe by the Auditor
16 General if that's within their remit because the Auditor General
17 is an independent officer of Parliament and has credibility. A
18 report on the government's implementation of the recommendation,
19 and that report should be examined by a parliamentary committee,
20 either NSICOP or the Public Accounts Committee.

21 **DR. NOMI CLAIR LAZAR:** Thank you very much,
22 Morris.

23 So I would just invite any of the panelists who
24 might want to respond to the comments made by your co-panelists
25 at this juncture. Ward?

26 **MR. WARD ELCOCK:** Just a small point, and I
27 disagreed with Professor Wark when he suggested NSICOP the other
28 day, to be a little bit more precise about why I don't think

1 NSICOP would be a good idea. I understand that it is a more
2 non-political body, non-partisan body than some others, but I
3 think there is a problem within NSICOP, and that is it is an
4 attempt for the first time to create a parliamentary body that
5 can review the actions of the service and other parts of the
6 intelligence community. It is a very fragile attempt, and if it
7 fails, as I think there is a better than even chance that it
8 will still fail, there will then be a real difficulty in terms
9 of how Parliament reaches out to review the intelligence
10 community broadly writ.

11 I think to introduce into NSICOP's
12 responsibility, not that we have emergencies every day, but they
13 do happen, and it could happen in the future, could make the
14 non-partisan, it could threaten the non-partisan nature of
15 NSICOP and endanger the experiment, which NSICOP is. So I would
16 urge very strongly that NSICOP not be the body which reviews in
17 any way an emergency because I think it potentially would create
18 a very unfortunate situation in terms of review of the
19 intelligence community by Parliament.

20 Just a view.

21 **DR. NOMI CLAIRE LAZAR:** Karin?

22 **DR. KARIN LOEVY:** Thank you. I just wanted to
23 stress in front -- because of what was said before, and I think
24 just to stress this thing that we are -- we want to focus on
25 capacity. We want to focus on capacity for the long-run, that
26 it is also developing in time to confront emergencies in very,
27 very broad levels. And I think it came up in this discussion
28 too, how many different actors, some of them are on the local

1 level, some on the provincial level and the federal level,
2 internationally are there?

3 So I really think that if we stay focussed on
4 capacity and on the ideals of inclusive, coordination,
5 cooperation, transparency in the process of managing
6 emergencies, which I think is what we should be doing, then
7 thinking about an institution that is, yes, pre-emptive, but
8 also looking forward, that follows up on recommendations, that -
9 - and that includes different actors from this community of
10 emergency responders, which is varied and diverse and -- but
11 still has very specific roles in it, of course, too, is
12 important to recommend.

13 So, yeah, thank you.

14 **DR. NOMI CLAIRE LAZAR:** Thank you.

15 Anyone else?

16 **MR. MORRIS ROSENBERG:** Yeah, I just -- I wanted
17 to -- a question I have is how much -- what is the instrument
18 that you used to do some of these things? I think everybody
19 would -- I would certainly agree that with the point that you
20 made about more consultation, and consultation between
21 municipalities.

22 In fact, as I understand it in this situation,
23 there was a fair degree of consultation with the Mayor of
24 Ottawa, the Mayor of Windsor, personally with the Prime
25 Minister, other Ministers, I think. And there's always a
26 question to me, you can put things into legislation, and not
27 every emergency is going to involve municipal governments. The
28 key for me is that you develop norms of behaviour and a culture

1 of consultation.

2 I think we actually have that, and it, to some
3 extent it's personality dependent. And a lot of this, and there
4 are a lot of intangibles in this too, a lot of this is about the
5 kind of leadership you have and the relationships that were
6 developed before the emergency actually happened that you can
7 then pick up the phone and call on. A lot of this stuff is
8 going to happen informally, and if that instinct, that reflex
9 isn't there, putting something into legislation isn't going
10 necessarily going to make it so.

11 So I think there's a deeper issue of governance
12 that needs to be addressed, and I wouldn't want someone to say,
13 "well, we've put it into the law, so it's all okay", because if
14 that's all you've done you probably haven't solved the problem.

15 **DR. NOMI CLAIRE LAZAR:** Thank you.

16 I actually -- I think I'm just going to -- I'm
17 going to -- before I go any further, are there questions that
18 you still have, Commissioner, that we haven't addressed yet?

19 **COMMISSIONER ROULEAU:** No, I think you're getting
20 at the issues that I have to deal with, and very helpfully so I
21 can ask.

22 **DR. NOMI CLAIRE LAZAR:** All right. So I'm going
23 to throw one thing out there, which came -- I can't remember, it
24 came up in the course of a conversation at some point.

25 So what would happen -- so we -- you know, we've
26 discussed how this Commission of Inquiry does its -- or fulfills
27 its function in part by sitting like a threat over the head of
28 anyone who is going to use the *Emergencies Act*. So they know if

1 they're going to use this legal instrument that everything
2 they've done is going to be carefully scrutinised thereafter.

3 But we saw that the Premier of Ontario, for
4 example, opted to make use of parliamentary privilege and to
5 refuse to give evidence before the Commission. And so I
6 wondered if we might want to contemplate what might happen if in
7 some future scenario the government who made use the *Act* made
8 use of parliamentary privilege and refused to give evidence
9 before the Commission?

10 Ward?

11 **MR. WARD ELCOCK:** I'm not sure that there is
12 anything that one can do to freeze that in the -- or ensure that
13 in the legislation that that never happens, but it seems to me
14 to be relatively unlikely as long as we remain a democracy that
15 a Federal Government that had declared an emergency would then
16 refuse to appear before the bodies that were created to review
17 that mechanism.

18 I am not sure you can -- putting -- I'm not sure
19 legislation solves everything, and I am not sure there is any
20 point in trying to legislate everything. It's a bit like, I
21 suppose, they always say about generals that they're always
22 fighting the last war. In some sense whenever we lawyers pass
23 new legislation we're fighting the last war as well. I'm not
24 sure you want to try and fight all the wars in legislation, it's
25 a never-ending struggle.

26 I think the -- I hope I haven't lost my train of
27 thought here. The other issue that I think is -- no, I've lost
28 my train of thought here. So I'll let you...

1 **DR. NOMI CLAIRE LAZAR:** I think what you've said
2 is, so far, is very wise.

3 Kim?

4 **DR. KIM LANE SCHEPPELE:** Yes. So, you know, I am
5 in the United States, where we currently have a congregational
6 inquiry underway in which members of the prior government are
7 refusing to testify. So this is not entirely a hypothetical
8 thing for those of us sitting in the United States.

9 What our experience I think shows in the
10 January 6th Inquiry are two things: One is that it's a
11 congregational inquiry, congressional, and Congress has a power
12 of subpoena. Somewhat difficult to enforce, but there is still
13 a kind of a legal compulsion that Congress can exercise. And I
14 wonder if anyone's thought about this with respect to
15 Commissions of Inquiry. But I think the other thing, because I
16 agree with what Ward just said, which is that these are
17 situations in which I think it's hard to legislate the
18 parameters of.

19 What's been so fascinating about watching the
20 January 6th Committee in the United States, is how much they've
21 been able to learn from other witnesses. So even if they don't
22 have the primary players testifying before them, there is such a
23 trail that most decision-making now reads, either through text
24 messages that are in the hands of people who actually will
25 testify or other forms of, you know, sort of written
26 documentation.

27 And so I think that creativity in asking -- in
28 you know, seeking information for such a Commission can often

1 overcome some of these refusals to testify. But I do think
2 that, you know, again, the question is whether the Commissions
3 are backed with some kind of a subpoena power or other power to
4 compel witnesses to at least show up and refuse to testify, even
5 if they can't be compelled to testify against themselves.

6 Thank you.

7 **DR. NOMI CLAIRE LAZAR:** So I do think, and
8 correct me if I'm wrong, that this Commission does have the
9 power to subpoena, but while legislature is in session there is
10 a Parliamentary privilege that allows people to refuse to turn
11 up.

12 Did I get that right, Commissioner?

13 **COMMISSIONER ROULEAU:** Yes, it's -- that's the
14 Parliamentary privilege.

15 **DR. NOMI CLAIRE LAZAR:** All right.

16 So we have about 10 minutes left, so I will just
17 ask if any of the panellists want to take two minutes for some
18 final thought or what you consider to be the key takeaway.

19 Does anyone have any final thoughts? Victor?

20 **DR. VICTOR V. RAMRAJ:** This is more to reiterate
21 a question that I think you were alluding to, and let me put the
22 point hypothetically. So going back to Wednesday's session and
23 Professor Leah West's suggestion that this is might be a
24 federalism failure, the question that I have, and I don't have
25 the answer to, is what form of accountability can there be for
26 inadequate interjurisdictional coordination?

27 I think that's what we're getting at, in fact,
28 when we're talking about these subpoena powers because if the

1 problem is a failure of interjurisdictional coordination it's
2 not clear to me how you match an institutional form of
3 accountability, and we saw that with the Lancet Commission. So
4 that, to me, is the essence of the problem.

5 **DR. NOMI CLAIRE LAZAR:** Kim?

6 **DR. KIM LANE SCHEPPELE:** Yes, and actually just
7 following on that because I do think that this goes to my pre-
8 emergencies issue, which is if something starts off as a problem
9 in one province that doesn't adequately handle it, it may become
10 a national emergency by virtue of not being headed off, with
11 lawful powers that take into account *Charter* rights, you know,
12 at some earlier stage.

13 So one of the things that this may suggest is
14 creating structures that can better handle these forms of
15 coordination outside the context of the *Emergencies Act*; which
16 is to say, to think about -- I mean, many countries did this,
17 you know, after 9/11, where they tried to look at some of these
18 jurisdictional gaps, and to figure out ways to coordinate the
19 responses of provincial authorities, national authorities;
20 tribal authorities we haven't discussed in this particular
21 session.

22 But, you know, in a complex form of government
23 there are going to be all of these different powers that could
24 be brought to bear to address this kind of crisis, and it might
25 be worth thinking about how to put some coordinating mechanism
26 in place so that the different levels are accustomed to
27 communicating with each other before you actually need them to
28 take some kind of action. So that suggests, in thinking about

1 my sort of pre-emergency framework, that that would be one way
2 to handle these situations.

3 Thank you.

4 **DR. NOMI CLAIRE LAZAR:** Thanks.

5 Morris?

6 **MR. MORRIS ROSENBERG:** Yeah, thanks.

7 Just on the same point, I think history has shown
8 that after every one of these crises, mechanisms do get put in
9 place. So after the SARS crisis there was a -- I think a
10 reinforcement of coordination mechanisms between the federal
11 government's Public Health Agency, which was created as a
12 response to SARS, in fact, and provincial public health
13 agencies; post-9/11 I think there was more -- there was a sort
14 of a greater level of collaboration.

15 And, you know, the use of either existing
16 mechanisms or intergovernmental cooperation, or in some cases
17 the creation of new committees, there is no shortage -- there's
18 a very thick infrastructure of committees of intergovernmental
19 coordination in Canada. The question I think that has to be
20 asked before we start creating new mechanisms is how are these
21 mechanisms working, and where there have been failures why are
22 they failing, and how do we fix them?

23 So I agree completely with Kim that you need
24 this; in fact, we have a lot of it, but it isn't necessarily
25 working on all cylinders, and there should be a review -- or
26 several reviews, because it's not just a question of national
27 security; Public Health is a good example of how people are
28 working together in these areas.

1 **DR. NOMI CLAIRE LAZAR:** Thank you.

2 Anyone else?

3 Hoi?

4 **DR. HOI KONG:** Yes, so Morris, I really liked you
5 thought about norms of behaviour and how informal norms are kind
6 of essential in this area. And I think that there's a really
7 important question, and this might be something the Commissioner
8 might want to think about, is how you structure those norms of
9 behaviour in a way that has a degree of permanence but enough
10 flexibility, because I think that we've talked about
11 accountability in terms of public accountability, legal
12 accountability, but I think the internal accountability of
13 political actors, political parties, and departments is equally
14 important. So I think that -- I think, for me, that's something
15 that is an absolutely essential point.

16 **DR. NOMI CLAIRE LAZAR:** All right.

17 Well, on that note, perhaps we'll take our break
18 and -- oh. Oh, sorry. Karin, go ahead, I missed your hand.

19 **DR. KARIN LOEVY:** Okay. So I will say just I
20 think that was said again. And, again, this issue of having a
21 framework for an ongoing place in which these norms and
22 behaviours are going to be generated, but -- and that it cannot
23 be legislated, or at least that it has to be beyond or under
24 legislation, there's something else that's going on the level of
25 administration and on the level of the society itself.

26 But I wanted to say one thing maybe to connect to
27 the beginning to the question of threshold, to the question of
28 liminality, that I think we should be careful of, and this -- so

1 Canada does have a very robust set of mechanisms, and it's
2 admirable and I've been, like, looking at this from the
3 perspective of outside of Canada in the last week or so, and
4 it's really interesting.

5 But there's something we should not forget, which
6 is that this -- what happened in Canada this year is, in a way,
7 a part of a global trend which took place in COVID and after
8 COVID, of using emergency -- exceptional emergency mechanisms to
9 deal with different kinds of crisis situations, and this
10 happened -- this was a wave post-9/11; this is another wave.

11 And so I think if Canada would find a way to
12 both, you know, pay attention to this, limit this tendency
13 within its own governance, but also to learn from this and more
14 -- something more substantive about the way management -- the
15 management of emergencies and crises should be taken into the
16 future, it would be a great thing.

17 So, yeah, thank you very much.

18 **DR. NOMI CLAIRE LAZAR:** Thanks very much, Karin.

19 So we'll take our break now and then turn to
20 questions from the parties.

21 **COMMISSIONER ROULEAU:** Okay, so they will rise
22 for a half hour and come back at ---

23 **DR. NOMI CLAIRE LAZAR:** Noon.

24 **COMMISSIONER ROULEAU:** --- noon.

25 **DR. NOMI CLAIRE LAZAR:** High noon.

26 **COMMISSIONER ROULEAU:** Thank you. Yes, okay.

27 Thank you.

28 **THE REGISTRAR:** The Commission is in recess for

1 30 minutes. La Commission est levée pour 30 minutes.

2 --- Upon recessing at 11:28 p.m.

3 --- Upon resuming at 12:02 p.m.

4 **THE REGISTRAR:** The Commission is reconvened. La
5 commission reprend.

6 **COMMISSIONER ROULEAU:** Okay, so we're back. Nous
7 voilà de retour. La dernière portion.

8 Allez-y, Madame la professeure Lazar.

9 **DR. NOMI CLAIRE LAZAR:** Thank you very much,
10 Commissioner.

11 So we'll now turn to some questions from the
12 parties.

13 So the first question is; how would you respond
14 to the suggestion that redacted information before the
15 Commission limits the power of the Commission to exercise its
16 accountability function, particularly with respect to sections
17 37 and 38 of the *Canada Evidence Act* that refer to public
18 interest immunity and national security.

19 Would anyone like to address that? And also in
20 relevance -- that's relevant.

21 Ward, I feel like you have a thought.

22 **MR. WARD ELCOCK:** A thought. It would be hard to
23 say that it does not affect the ability of the Commission to
24 reach a conclusion. Having said that, there are issues of
25 national security; there are Cabinet issues; there are Cabinet
26 documents -- Cabinet issues; there are solicitor/client
27 privilege issues, and I -- that rise beyond -- that are simply
28 issues that you -- the government is unable to make public. And

1 so every -- there are always going to be cases where commissions
2 and/or courts will struggle to deal with issues or have problems
3 in dealing with issues. I guess it then comes back to the
4 question of, for the Commission to decide whether those issues
5 rise to the level that it wishes to make a comment about its
6 inability to conclude on an issue.

7 And that would only be, in my view, if in fact it
8 did, in the Commission's view, impede their ability to come to
9 conclusion.

10 But I can think of information of a variety of
11 sorts that governments will never turn over or make available to
12 anybody outside government. It's just simply a reality of the
13 system.

14 **DR. NOMI CLAIRE LAZAR:** Weighing and balancing
15 priorities and norms, I suppose.

16 I see Kim has her hand up.

17 **DR. KIM LANE SCHEPPELE:** Yeah. So this is an
18 issue when it comes to Executive Branch accountability all over
19 the world. And I would suggest that there may be steps that can
20 be taken between disclosing everything and disclosing nothing.

21 And in fact, Canada's already done this with
22 regard, for example, to terrorism trials, where there are
23 specially cleared counsel with security clearances who can see
24 this information so that a proper defence is permissible. And
25 also, the concept of gist, right? Of at least summarizing
26 what's there in a way that doesn't disclose, for example,
27 sources and methods.

28 So I guess I would urge you to think about some

1 intermediate steps, if in fact it is the withholding of
2 classified information interferes.

3 And I think this is an especially sensitive case;
4 right? Because especially with regard to something like a
5 public order emergency, which has a very high likelihood of
6 relying on security sensitive information, it will essentially
7 make it impossible for anyone to tell whether the government was
8 reasonable at the moment that it launched an emergency if the
9 information available to the Government at the time it made that
10 calculation isn't something that the Commission of Inquiry could
11 see.

12 So again, I think there may be ways to redact
13 some information that would -- like, for example, sources and
14 methods, which may be less crucial than the content of the
15 information caused the Government to be alarmed, but there has
16 to be, it seems to me, some way to get classified information
17 into this process so that the Commission of Inquiry can make a
18 responsible judgement.

19 **DR. NOMI CLAIRE LAZAR:** Thanks.

20 Morris?

21 **MR. MORRIS ROSENBERG:** Yeah, I just wanted to get
22 in on this a little bit.

23 There are always going to be some categories of
24 information that are absolute no-gos, and Kim just mentioned two
25 sources and methods. But I think it's important, and Mel Cappe
26 wrote a piece in policy options a few months ago about this,
27 that it shouldn't simply be up to the government, that there
28 should be an independent ability to adjudicate through a court

1 to look at the balance of interests, the government's interest,
2 in maintaining the confidentiality of the information as against
3 the importance of the information to the proceedings of the
4 Commission.

5 And there is -- I know there's been some
6 confidential -- some Cabinet confidence information that's been
7 provided to this Commission. I think this has happened at least
8 three times before. I know it happened, for example, with
9 respect to the McDonald Royal Commission on the RCMP back in the
10 1980s.

11 And then, as Kim said, there are a variety of
12 methods to provide information while still providing protection.
13 It can be -- you can require people to sign confidentiality
14 agreements. You can appoint a special counsel so that even if
15 the parties themselves can't see it, an independent counsel
16 could look at the information. Court could redact part of the
17 information and choose to make other parts of it public.

18 But I think it's important, you know, that the
19 Executives shouldn't be the sole decider of this. There should
20 be some opportunity for an independent adjudication of these
21 issues.

22 **DR. NOMI CLAIRE LAZAR:** Thank you.

23 On a related question, so the Government did give
24 this Commission access to inputs before Cabinet, including a
25 partial disclosure of information subject to Cabinet confidence,
26 and of course they waived Parliamentary privilege. So are there
27 ways, are there mechanisms that you panelists can think of to
28 make this sort of thing a precedent for future commissions?

1 Apparently not.

2 **MR. WARD ELCOCK:** In some sense, the mere fact
3 that it happens even up to a certain point means that in future,
4 there is a precedent for doing something similar, which is part
5 of, in a sense, the slippery slop argument. You do anything,
6 you do create a precedent for the future.

7 I think ultimately the reality is here, on all
8 these issues, is the Government pays a price if it doesn't
9 provide some information. If it provides none and the
10 Commission says something, or a Commission says something about
11 failure to provide information, the Government pays a price.

12 So the Government is -- again, this is a
13 political system, it is the government -- the price the
14 government will ultimately pay is a political price, and that's
15 the way the system works.

16 **DR. NOMI CLAIRE LAZAR:** Right. So this is an
17 example of public accountability, even in those areas where full
18 legal accountability might not be possible.

19 Karin, I see you have your hand up.

20 **COMMISSIONER ROULEAU:** You're on mute.

21 **DR. NOMI CLAIRE LAZAR:** You're set ---

22 **DR. KARIN LOEVY:** Sorry. Thank you. I agree
23 with Ward that it's going to happen because of the tendency to
24 normalize.

25 But I wouldn't agree that it's definitely
26 something you could call a slippery slope, because -- or you
27 could define within a slippery slope, because the problem is not
28 the normalization. The question is what is being normalized?

1 Normalization will happen anyway whenever emergencies are being
2 managed because of the tendency of the management processes to
3 become better, you know, at doing something, managing something.

4 So I think we should understand that the flow of
5 information is a critical feature of every emergency, and the
6 question is what is the structure for it and what are the
7 mechanisms that enable it, restrict it, or create communication
8 and coordination around it?

9 Kind of obvious, of course, but it's important to
10 -- and I think it was also, again, stressed yesterday in the
11 jurisdiction, interjurisdiction response roundtable, when the
12 structure of this multi-jurisdictional framework was portrayed,
13 one of the first features of it was this ability to exchange
14 information on a -- in a clear way, in a way that flows, that is
15 not only stuck in one place.

16 Thanks.

17 **DR. NOMI CLAIRE LAZAR:** Thank you.

18 All right. The next question. Does it make
19 sense to have the same accountability mechanisms regardless of
20 the kind of emergency? So we have certain emergencies that are
21 politically tinged, and other ones which are -- I don't want to
22 say apolitical, because I don't think there's ever an apolitical
23 emergency, but we could say less centrally political. Does it
24 make sense that the Act has the same accountability mechanisms
25 for all these kinds of emergency?

26 **MR. WARD ELCOCK:** I think the simple answer is
27 yes. I don't think you can write a piece of legislation that --
28 I think it's hard to systematize kind of all of multiple choice.

1 I think you have to -- you pick your mechanisms of
2 accountability, and those are the mechanisms of accountability.
3 Some may work less well in some cases than others, but I don't
4 think you can do a kind of multiple-choice accountability.

5 **DR. NOMI CLAIRE LAZAR:** I suppose that's one
6 advantage of having different kinds of accountability.

7 Morris?

8 **MR. MORRIS ROSENBERG:** Yeah, I would agree with
9 that. I think it's hard to anticipate exactly how these things
10 are going to roll out. So I can imagine, for example, a public
11 welfare emergency, if one were to be declared, that started to
12 impose draconian measures on people that were limiting of
13 rights, perhaps -- and, you know, there's room there for a
14 proportionality or minimal impairment analysis. So there would
15 be a role for judicial review in a case like that.

16 I can think of other examples of, you know,
17 public welfare emergencies, you know, natural disasters, where
18 judicial review really wouldn't be a particularly relevant
19 factor.

20 I do think -- and I think that the kind of review
21 that you'd have in Parliament in a public welfare emergency, it
22 might be a lighter hand of review, you might see, you know --
23 you know, and if you were dealing with a natural disaster, then
24 you would in something like a public order emergency that is
25 more directly impinging on rights. But I agree that I think
26 keep them all. There's a menu of things and they can be applied
27 as needed, depending on the circumstances.

28 **DR. NOMI CLAIRE LAZAR:** Kim?

1 **DR. KIM LANE SCHEPPELE:** Yes, so I think
2 emergencies are like water. They seek the lowest point. And if
3 you have a kind of, you know, lesser emergency that has fewer
4 oversight mechanisms, you could imagine more serious emergency -
5 - or more political, shall we say, emergencies being disguised
6 as the less political ones. So I think it's actually important
7 to have all the mechanisms in place, because one of the
8 questions, as it has been in this inquiry, is is this the right
9 category of emergency. And if you have different accountability
10 mechanisms for different emergencies, you make that a much
11 harder thing to ask. So all the accountability mechanisms I
12 think should remain.

13 **DR. NOMI CLAIR LAZAR:** Thank you very much.

14 Okay. The next question is a bit of a rephrasing
15 or a regrouping around a topic we briefly touched on earlier.
16 So one way of understanding the -- so we were talking earlier
17 about economic emergencies that begin as economic and economic
18 emergencies that arise from, for example, public order
19 circumstances. So we might think of this as an economic
20 emergency versus a question of economic security. So the
21 question is, should the impact on the economy be considered in
22 declaring a public order emergency. So is the impact on the
23 economy an aspect of a threat to national security?

24 Victor?

25 **DR. VICTOR RAMAJ:** Again, I think emergencies
26 tend to bleed into one another. And so the economic factors,
27 you can imagine a very serious economic emergency where millions
28 of people are losing jobs, or losing their livelihoods, that

1 kind of emergency can transform into a public order emergency.
2 So I think in that sense it needs to be taken into account. But
3 again, I think it's hard to say that emergencies don't morph
4 into other kinds of crises, and I think this public health
5 emergency that's transformed into a public order emergency is a
6 perfect example.

7 **DR. NOMI CLAIR LAZAR:** Hoi?

8 **DR. HOI KONG:** Yeah, I think the way the threats
9 to the security of Canada is framed, there's kind of a
10 connection between conduct and outcomes. And so if you were to
11 think about economics, economic impact as an overarching goal, I
12 guess just the question I would have is do you think it's within
13 the same sort of structure as the rest of the threats to the
14 security of Canadians.

15 More generally, I think, if we think back to the
16 anti-inflation reference, the parliament can enact legislation.
17 So I think you can ask the question without putting it within
18 the structure of emergency legislation.

19 **DR. NOMI CLAIR LAZAR:** Thanks.

20 Kim?

21 **DR. KIM LANE SCHEPPELE:** Yes. I was just going
22 to say the same, which is that I think there are other
23 mechanisms for handling economic crises, even shock economic
24 crises, but it does seem to me that there may be an economic
25 component. Again, proportionality analysis is the guide here.
26 You know, some economic impacts actually affect fundamental
27 rights. And so if that is true, then it may be the case that,
28 you know, taking into account the hit to rights is requiring

1 something like government action to preserve the rights in
2 question may actually be something that would figure into the
3 emergency declaration. But that's where I keep coming back to
4 this point that proportionality analysis is not required
5 anywhere in the *Emergencies Act* on the part of the executive,
6 and yet I think that would just solve a lot of these kinds of
7 problems because everything would go into the proportionality
8 analysis calculation.

9 **DR. NOMI CLAIR LAZAR:** I think that's a very
10 interesting and wise way of approaching this.

11 So the next question -- oh, I'm sorry. Karin, go
12 ahead.

13 **DR. KARIN LOEVY:** Sorry. No, just to support Kim
14 on this issue of proportionality. You know, putting in the --
15 this standard into not only the place where it will come up
16 naturally in assessing the measures taken, but also in the
17 declaration itself. I think that's very important.

18 **DR. NOMI CLAIR LAZAR:** Thank you.

19 Okay. So now we turn to a fifth question. So
20 what about suggestions -- so we've been talking a lot about how
21 we might be able to tweak the *Emergencies Act* potentially to
22 strengthen accountability, but what about the turning our
23 attention to the *Inquiries Act*, for example. So if we want to
24 strengthen the commission or any future commission's ability to
25 do its work and to hold some future government to account, might
26 it make sense for us to look at -- or to encourage a look at the
27 federal *Inquiries Act*, which has a lower -- or which has fewer
28 powers than, for example, provincial inquiries legislation. So

1 do we have thoughts there in terms of potentially strengthening
2 the *Inquiries Act* at the federal level?

3 **MR. MORRIS ROSENBERG:** I don't really have a
4 whole lot to say on this because, I mean, the question I would
5 have is, obviously, there are some people here who think that
6 the *Inquiries Act*, which is actually being used here, has
7 deficiencies. I mean, I think -- I mean, it has some strengths
8 relative to informal inquiries obviously. So it'd be
9 interesting to know -- to do a comparison of, like, what are
10 best practices with respect to *Inquiries Act*? What are the
11 gaps, the alleged gaps that are being -- that are of concern to
12 some of the participants here? And then you can do an analysis
13 as to whether there should be changes to the *Inquiries Act* to
14 make it more appropriate. I mean, because it should be
15 presumably the vehicle that's used for future section 63
16 inquiries. If it can be bolstered, let's do it. I mean, a
17 recommendation that could come out of this Commission is that
18 the government should do a review of the *Inquiries Act* to see if
19 it's actually up to the standard of best practices in inquiries
20 legislation, but I'd have to know what the specific deficiencies
21 are to answer.

22 **DR. NOMI CLAIR LAZAR:** Kim? Your mic's off.

23 **DR. KIM LANE SCHEPPELE:** Yeah, sorry. So it
24 seems to me that actually, here too, I think there's some
25 general principles we can think about. So one is if there are
26 more protections for the inquiry in the *Inquiry Act* than there
27 are in the *Emergencies Act*, then it seems to me that the
28 *Emergencies Act* should be at least as robust as the *Inquiries*

1 Act. That said, there may be some special reasons for
2 strengthening the powers in the case of these emergency
3 inquiries, precisely for some of the reasons we just discussed,
4 which is something like a public order emergency is very likely
5 to have information that will raise classification issues. And
6 you may want stronger powers for the emergency commissions than
7 for ordinary inquiry commissions; right? So it seems to me that
8 what this suggests is that the two Acts be looked at together,
9 and to think about the different context in which they would be
10 used, to make sure there isn't a way to evade powers by just
11 going to the lowest common denominator and making sure that an
12 inquiry into something like these states of emergencies,
13 particularly where they involve security related information,
14 have robust powers that may be exceptional compared to other
15 inquiries.

16 **DR. NOMI CLAIR LAZAR:** Thank you very much.

17 Any other thoughts? All right. Then on that
18 note, I'll turn things back over to M. le commissaire.

19 **COMMISSIONER ROULEAU:** And M. le commissaire est
20 tres heureux. I'm very pleased with the -- I guess all of the
21 submissions, comments, recommendations that have been made by
22 this group. I'm -- I want to thank you all for your thoughtful
23 participation. Obviously, you've put a lot of time in preparing
24 and taken the time to participate, so thank you very much to all
25 the participants, the panelists. Merci beaucoup à tous. And a
26 special thanks to Professor Lazar who's put a lot of work to
27 make sure this would be as productive as it has been. So thank
28 you in particular to her for her ability as chair of this

1 committee or this panel.

2 Now this panel, in fact, concludes the
3 Commission's policy phase. And I just -- if you -- you can
4 actually get up and leave if you like. This is just going to be
5 a brief closing statement that is -- because this is, in fact,
6 the last public segment of the Commission's work. And over the
7 last week, I've heard the views and perspectives of nearly 50
8 experts from a wide range of disciplines and perspectives the
9 discussions have taken place during these roundtables, and they
10 have been of great assistance to me as I consider the
11 recommendations that I might make in a final report.

12 So I'd like to take this opportunity to once
13 again thank all of the participants in the hearings, I won't
14 repeat them all, but in particular, the participants of the
15 roundtables. Each of them devoted a great deal of effort and
16 time to prepare for the hearings this week, and they took time
17 out of their busy schedules, as did you all here, to join us in
18 person or online. I appreciate the willingness of all who have
19 volunteered their time and energy to assist me in discharging my
20 mandate.

21 I want to also thank the Commission's Research
22 Council for their efforts to organise and coordinate these
23 policy hearings. Without their hard work, this week would not
24 have been possible. In particular, I wanted to thank Senior
25 Counsel -- Commission Counsel Dan Sheppard, who put a great deal
26 of effort in coordinating this, and also, the Chair of the
27 Committee, Geneviève Cartier, who came in and took over this
28 task and did an admiral job.

1 So this concludes the Commission's public
2 hearings. I'm told that since we started on October 13th, it
3 seems like a long time ago, we've held over 300 hours of
4 hearings, and entered more than 9,000 exhibits into evidence.

5 J'entamerai maintenant ma réflexion sur les
6 informations que j'ai reçues au cours de ces 36 derniers jours
7 et j'attends avec intérêt de recevoir les observations des
8 parties sur les aspects factuels et politiques de mon mandat,
9 ils sont dus dans à peu près une semaine. Une fois ces
10 observations reçues, je me concentrerai sur la préparation de
11 mon rapport final qui sera déposé au début de la nouvelle année.
12 J'espère que ce rapport aidera le public à comprendre les
13 événements de janvier et février 2022 et en particulier à
14 comprendre ce que le gouvernement fédéral a fait, pourquoi il
15 l'a fait, et si ces actions étaient justifiées.

16 Je tiens encore à remercier tous ceux et celles
17 qui ont participé à ce processus.

18 Thank you to everyone who participated in this
19 process. I want to thank you all. Je vous remercie tous.

20 We'll adjourn for the day and until the report is
21 filed I guess. Thank you, all. Merci.

22 **THE REGISTRAR:** The Public Order Emergency
23 Commission is adjourned. La Commission sur l'état d'urgence est
24 ajournée.

25 --- Upon adjourning at 12:26 p.m.

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C E R T I F I C A T I O N

I, Mitchell Kersys, a certified court reporter, hereby certify the foregoing pages to be an accurate transcription of my notes/records to the best of my skill and ability, and I so swear.

Je, Mitchell Kersys, un sténographe officiel, certifie que les pages ci-hautes sont une transcription conforme de mes notes/enregistrements au meilleur de mes capacités, et je le jure.



Mitchell Kersys