PUBLIC ORDER EMERGENCY COMMISSION

FINAL SUBMISSIONS

Party: Criminal Lawyers' Association (Ontario) & Canadian Council of Criminal Defence Lawyers/Conseil Canadien des Avocats de la Défense

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December 9, 2022

I. OVERVIEW

Criminal Lawyers' Association (Ontario) ("CLA") & Canadian Council of Criminal Defence Lawyers/Conseil Canadien des Avocats de la Défense ("CCCDL/CCAD")

1. The CLA and CCCDL/CCAD are both organizations that represent criminal defence lawyers.

2. The CLA is a non-profit organization founded in 1971 with an aim to educate, promote, and represent its membership on issues relating to criminal and constitutional law. The CLA has over 1,800 members in Ontario and associate members across Canada and in the United States. The CCCDL/CCAD was formed in 1992 to represent criminal defence counsel across the country. The Council consists of senior representatives from across Canada, including the North, and thus is able to offer a national perspective on criminal justice, proposed legislation, *Charter of Rights and Freedoms* issues, and issues pertaining to the public confidence in the administration of justice.

3. The CLA and CCCDL/CCAD sought standing to play a role in closely scrutinizing the government's exercise of its exceptional emergency powers. The daily work of individual members of both organizations involves questioning, challenging, and examining the exercise of state power to protect civil liberties and constitutional rights in Canada. Both organizations value transparency and accountability in the exercise state power—power that should be invoked on the basis of compelling evidence and should be carefully tailored to the circumstances and no broader than necessary to achieve the state's legitimate aims.

Outline of Submissions

4. These final submissions include both factual phase and policy phase submissions on behalf of the CLA/CCCDL/CCAD.

5. In the factual phase submissions, the CLA/CCCDL/CCAD outline some areas for the Commission to consider as it fulfills its mandates to report on the events that took place in January and February, 2022. We offer only brief comments about the evidence and instead focus on four particular areas: the Commission's jurisdiction, the reasonable grounds standard, solicitor-client privilege, and what it means for the *Emergencies Act* to be a measure of last resort.

6. In the policy phase submissions, the CLA/CCCDL/CCAD proposes the following recommendations:

> Recommendation #1: The *Emergencies Act* should be amended to more clearly set out the threshold for declaring a public order emergency, without reference to other legislation.
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> Recommendation #2: The *Emergencies Act* should be amended to require the government to prepare a more complete written record, explaining the information it considered in declaring an emergency, how the declaration is *Charter*-compliant, and why the declaration is a last resort.
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> Recommendation #3: In amending the *Emergencies Act*, the government should consider whether and how to account for economic emergencies.
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> Recommendation #4: The statutory timeline mandated by the *Emergencies Act* should be extended or that section amended to ensure Commissions have the time they need to inquire and report.

II. FACTUAL PHASE SUBMISSIONS

The Commission and its Mandate

7. This Commission is mandated through s. 63(1) of the *Emergencies Act*:[1]

> **Inquiry**
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> **63 (1)** The Governor in Council shall, within sixty days after the expiration or revocation of a declaration of emergency, cause an inquiry to be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency.

8. The Order in Council (dated April 25, 2022) directs the Commission to "examine and report on the circumstances that led to the declaration of a public order emergency being issued…", to "examine issues" and "measures taken" and, in (iii), "to set out findings and lessons learned,

[1] R.S.C. 1985, c. 22 (4th Supp.).

including on the use of the Emergencies Act and the appropriateness and effectiveness of the measures taken…"[2]

9. Section 63(2) of the *Act* mandates that the Commission's report "be laid before each House of Parliament within three hundred and sixty days after the expiration or revocation of the declaration of emergency."

General Remarks and Observations

10. It appeared that the statutory time limits imposed significant pressures upon the Commission and the participants. Many documents were gathered, many witnesses were presented, and many topics were covered. The days were often long and the allocation of time to conduct cross-examination was often constrained. One of the CLA/CCCDL/CCAD's proposed recommendations relates to the timeframe for the Commission to complete its work under s. 63(2) of the *Emergencies Act*.

11. Within this process, the question that quickly emerged is whether the circumstances as presented formed a valid basis in law upon which to invoke emergency powers and justified the particular measures selected.

The Evidence

12. Under s. 13 of the *Inquiries Act*[3], this Commission may make findings of misconduct against persons. The CLA/CCCDL/CCAD are unaware of any s. 13 notices of misconduct being delivered and the delivery of such notices is typically not public.

13. However, if any s. 13 notices of alleged misconduct have been delivered, the CLA/CCCDL/CCAD take the position, in this instance, that these submissions should not sway one way or the other whether the Commission makes a finding of misconduct. For that reason, submissions upon the evidence will be brief and general.

14. The CLA/CCCDL/CCAD offers the following observations about the factual backdrop against which the government decided to declare a public order emergency:

[2] Order in Council, PC-2022 392, dated April 25, 2022 (emphasis added).
[3] R.S.C. 1985, c. I-11; the Commission was issued under Part I of the *Inquiries Act*.

a. The convoy protests[4] caused hardship, and in some instances significant hardship, to some people in Ottawa.

b. The protests caused disruption to trade and, through that disruption, had economic impacts.

c. The situation was dynamic and made more complicated by the fact of multiple locations.

d. The police and government were required to act and this was made complicated by the fact that the circumstances engaged different police agencies and governments at the municipal, provincial, and federal levels and engaged different portfolios within the federal government. The events called for cooperation within our federal system.

e. As it was viewed after the fact and through the evidence presented, it was apparent that there were some interpersonal tensions within some police departments, and some tensions between police agencies. When complex and difficult circumstances arise, differences of opinion are to be expected. It is also to be expected, and perhaps ever hoped for, that opinions might be strongly expressed so that they may be fully tested. It is to be expected that frustrations might be experienced and it is in no way surprising that forensic analysis of written communications such as texts will reveal thoughts that are informally expressed. Further, it should not be surprising that, in discussion, ideas will be advanced for consideration which might never be adopted. Overall, the hope is that problem-solving will be based on extensive and open discussion. However, nothing in this sub-paragraph should be taken as condoning poor communications that result in an escalation of circumstances which justify the use of emergency powers, where that escalation was avoidable had there been better or more effective communication.

f. The different protest locations—with different police agencies involved and challenges faced—present the Commission with an opportunity to review different approaches (or similar approaches with different degrees of success). For example, the speed with which integrated command was instituted in Ottawa compared to Windsor could shed light on the importance of this step.

[4] The word “protests” is used neutrally.

g. People who are criminally charged are presumed innocent. However, the fact that there were arrests and charges is information which may be properly considered by the police and governments in deciding whether and how to respond.

15. The evidence demonstrates the complexity of the factual matrix and legal issues and the complexity of the decisions that police agencies and government were required to make. It would be an understatement to characterize the decision process or any decisions themselves as easy or obvious.

The Jurisdiction of the Commission

16. The CLA/CCCDL/CCAD submit that, as a preliminary matter, this Commission is required to interpret its jurisdiction so that, in fulfilling its mandate, it does not act either without or in excess of its jurisdiction.

17. Commissions of inquiry find their jurisdiction in their creating statute and terms of reference.

18. Commissions play an important investigatory and public education function.[5]

19. However, it is well known and accepted that a commission is not a court of law and has no jurisdiction to make findings of criminal or civil liability. The Commission is not resolving a dispute between parties or adjudicating rights or interests. The relationship between a Commissioner and their counsel, which is akin to a team, is fundamentally different from an impartial adjudicator receiving evidence and submissions from adversarial counsel and then rendering a decision. The rules of evidence are relaxed as compared to the rules that govern admissibility in a court and the rules of procedural fairness will often be less rigorous than those in a court.[6]

20. The CLA/CCCDL/CCAD submit that this Commission must interpret its own terms of reference and make a finding as to whether its jurisdiction includes the jurisdiction to determine whether, as a matter of law, the emergency powers were validly invoked.

21. More precisely, whether the word “appropriateness”, as used in the Order in Council, confers upon this Commission the jurisdiction to consider and determine a question of law.

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[5] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at para. 31.
[6] See *ibid* at para. 57.

22. In this regard, the Commission is distinguishable from an administrative tribunal or board that is expressly granted jurisdiction to determine questions of law and where that jurisdiction reflects a clear expression of legislative intent.[7]

23. This Commission might make factual findings that people or governments regarded the laws as difficult to interpret or that there were, in fact, different interpretations. However, those factual findings are distinct from a legal finding as to the correct interpretation of the law and whether, as a matter of law, the emergency powers were validly invoked.

24. If this Commission were to conclude that it has jurisdiction to make such a legal determination, then this Commission must also decide the appropriate standard of review—correctness or reasonableness—that applies to the decision to invoke emergency powers.[8]

25. The CLA/CCCDL/CCAD invite the Commission to carefully consider the complexity of this issue in interpreting its own jurisdiction and what conclusion it will ultimately draw. Here are some questions that the CLA/CCCDL/CCAD submit intersect with this question of jurisdiction:

a. Is economic harm specifically or inferentially captured by the *Emergencies Act*?[9]

b. How does the Canadian Security Intelligence Service's (CSIS's) interpretation of whether there is a "threat to national security" impact whether such a threat exists for the purposes of declaring a public order emergency?

c. Did decision-makers fail to consider relevant information?

d. Do decision-makers retain a discretion with respect to the declaration of an emergency and, if so, was that discretion reasonably or lawfully exercised?

e. Did decision-makers act unreasonably, arbitrarily, or in bad faith in respect of their decision-making process?[10]

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[7] See, e.g., *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 69

[8] See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[9] See *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 63- 64: the Court held that the Minister was entitled to deference in respect of the interpretation of "national emergency" and that the Minister's interpretation of "national interest" to include national security, public safety, and "analogous considerations" was reasonable.

[10] See, e.g. *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 32: the majority noted that "because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple reasonable interpretations."

f. If there is evidence that traditional tools of law enforcement would have been effective, does that dictate the result given the emergency declaration must be made as a last resort?

g. If there is only evidence that traditional tools of law enforcement *might* have worked, can that ground a reasonable (or correct) decision to invoke the *Emergencies Act*?

The "reasonable grounds to believe" standard in the *Emergencies Act*

26. The CLA/CCCDL/CCAD will address one particular aspect of s. 17 of the *Emergencies Act*: the "reasonable grounds to believe" test. For convenience, s. 17 states:

> **Declaration of a public order emergency**
>
> **17** (1) When the Governor in Council believes, on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency, the Governor in Council, after such consultation as is required by section 25, may, by proclamation, so declare.
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> **Contents**
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> (2) A declaration of a public order emergency shall specify
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> (a) concisely the state of affairs constituting the emergency;
>
> (b) the special temporary measures that the Governor in Council anticipates may be necessary for dealing with the emergency; and
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> (c) if the effects of the emergency do not extend to the whole of Canada, the area of Canada to which the effects of the emergency extend. [Emphasis added.]

27. The "reasonable grounds" test is a common standard within criminal law[11] and it has been considered by the Supreme Court of Canada in numerous cases. It is a standard designed to offer protection against the arbitrary exercise of power by the state.

28. In the leading case of *R. v. Storrey*[12] the Supreme Court considered the law governing arrest, which relies on the reasonable grounds to believe standard. The Court wrote that without the "important protection" of the reasonable grounds standard, "even the most democratic society

[11] This well-known standard is canvassed in Anne-Marie Boisvert, Commissioned Paper: The Reasonable Grounds to Believe Standard in Canadian Criminal Law. This paper explains that "reasonable grounds to believe" and "reasonable and probable grounds" are two ways of expressing the same standard (see pp. 2-3).
[12] [1990] 1 S.C.R. 241.

could all too easily fall prey to the abuses and excesses of a police state."[13] The Court observed that the "importance of this requirement to citizens of a democracy is self-evident" and the reasonable grounds standard balances the protection of individual rights against the need for society to be able to protect itself against crime.

29. The standard of reasonable grounds has both a subjective and an objective component. In the context of an arrest, the officer must believe that they have reasonable and probable grounds upon which to make an arrest, and the decision to arrest "must be justifiable from an objective point of view."

30. The interpretation of "reasonable grounds" was affirmed in *R. v. Beaver*.[14] In *Beaver*, the Supreme Court once again considered the test for arrest without a warrant which requires the existence of reasonable and probable grounds. In *Beaver*, the majority affirmed that the "reasonable grounds" standard has both an objective and subjective component, that the subjective component must be based on more than a "hunch or intuition", that events might evolve rapidly and there is not always the luxury of "judicial reflection", and that the test is based on common sense and practicality.[15]

31. If this Commission interprets the meaning of "reasonable grounds" as it is used in s. 17(1), the CLA/CCCDL/CCAD submit that the correct interpretation must flow from a recognition that the standard is designed to protect democratic values and *Charter* rights and to guard against arbitrary or excessive use of state power.

32. In that regard, "reasonable grounds" as it is used in s. 17(1) must also contain both a subjective and objective component. In other words, it is not sufficient for the Governor in Council to believe that a public order emergency exists. That belief must be justified on an objective basis (on *reasonable* grounds).

Solicitor-Client Privilege Claims

33. A claim of solicitor-client privilege over communications has the effect, and had the effect in these Commission proceedings, of removing certain information, even if relevant, from the Commission's consideration.

[13] *Ibid* at 249.
[14] 2022 SCC 54 (released December 9, 2022).
[15] *Ibid* at para. 72.

34. The importance of solicitor-client privilege to the lawyer-client relationship and to the administration of justice as a whole has been affirmed by the Supreme Court in numerous judgments.

35. For example, in *R. v. McClure*,[16] the Supreme Court considered the circumstances under which solicitor-client privilege may be set aside in order to enable a person charged with a criminal offence to make full answer to and defence against the prosecution's case. The Court recognized that "[i]nterests compete within our legal system" and that "[t]he policy justifying the existence of solicitor-client privilege might clash with an accused's right under s. 7 of the *Canadian Charter of Rights and Freedoms* to make full answer and defence."[17]

36. A "clash" between interests was felt to some extent within the Commission proceedings.

37. Nonetheless, in *McClure* the Supreme Court acknowledged that recognizing and protecting this privilege is fundamental.

38. The law is a complex web of interests, relationships, and rules. The integrity of the administration of justice depends on the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.[18]

39. It is in no way surprising that governments or police agencies might have sought legal advice to assist in their decision-making processes. A privilege claim necessarily creates a gap in the information available for consideration by this Commission, its participants, and the public.

40. However, it is the position of the CLA/CCCDL/CCAD that it must be presumed that privilege claims made by counsel are made on the basis of good faith and not for an improper purpose. Of course, the government should be expected only to assert solicitor-client privilege in good faith, especially when transparency and accountability are at stake. Perhaps more importantly, while it is the prerogative of a privilege holder to waive the privilege, the failure or unwillingness to waive privilege can never be used as a basis upon which to draw a negative inference against the privilege holder.

41. There is a developed body of law for determining when privilege has been waived and there is a body of law for determining applications for setting aside solicitor-client privilege. It is

[16] 2001 SCC 14.
[17] *Ibid* at para. 3.
[18] *Ibid* at para. 2.

the position of the CLA/CCCDL/CCAD that in the face of a claim of solicitor-client privilege over communications, the perceived importance of an inquiry, hearing, or trial alone can never be the basis upon which to set aside that claim of privilege or to draw a negative inference against the privilege claimant. A negative inference can never be drawn against a person for doing that which the law permits.

The *Emergencies Act* as a Measure of Last Resort

42. Section 3 of the *Emergencies Act* requires a "national emergency" be "of such proportions or nature as to exceed the capacity or authority of a province to deal with it" and that it "cannot be effectively dealt with under any other law of Canada".

43. To the extent that it is within the Commission's mandate and jurisdiction to define this phrase, the position of the CLA/CCCDL/CCAD is that these conditions indicate a legislative intent that the definition of "national emergency" and the powers that flow from the declaration of a national emergency are extraordinary and a matter of last resort. A national emergency will exist only in specified circumstances which are outside the authority and capacity of provinces and which cannot be effectively dealt with under any other law of Canada. The Supreme Court has interpreted this latter phrase—"any other law of Canada"—as including only *federal* legislation and federal common law,[19] an interpretation that avoids redundancy and was widely supported by experts testifying during the policy phase.[20]

44. The CLA/CCCDL/CCAD submits that the law governing the use of wiretaps in the *Criminal Code*[21] might help the Commission to interpret the requirement that the invocation of the *Act* be a measure of last resort.

45. In *R. v. Araujo*[22] the Supreme Court considered s. 186 of the *Criminal Code*, which sets out the test for the authorization of a wiretap:

> **186.** (1) An authorization under this section may be given if the judge to whom the application is made is satisfied
>
> (*a*) that it would be in the best interests of the administration of justice to do so; and

[19] *R. v. Roberts*, [1989] 1 S.C.R. 322.
[20] Transcript – November 30, 2022, pp. 63-64 (Dr. Leah West), p. 68 (Mr. Ward Elcock), Transcript – December 2, 2022, pp. 8-9 (Dr. Hoi Kong), pp. 10-11 (Mr. Morris Rosenberg).
[21] R.S.C. 1985 c. C-46.
[22] 2000 SCC 65.

> (*b*) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures. [Emphasis added]

46. Section 186(1)(b) limits wiretaps to circumstances where: (i) other investigative procedures have tried and failed; (ii) other investigative procedures are unlikely to succeed; or (iii) there is urgency such that it would be impractical to use only other investigative powers.

47. In *Araujo*, the Court held that the last resort test was important for setting an appropriate balance between individual rights and interests and the challenges that law enforcement may face:

> An appropriate balance must be found between the need to safeguard privacy interests and the realities and difficulties of law enforcement. The investigative necessity requirement found in s. 186(1)(*b*) has proved to be a critical but delicate component of the legal framework set up to regulate wiretapping in order to strike this appropriate but often elusive balance between the interests of the State and those of its citizens.[23]

48. The Court concluded as follows:

> In the final analysis, the potentially competing values in this area must be acknowledged. The words of the *Code* must be read with some common sense having regard both to the nature and purpose of the particular investigation which the police wish to undertake. A pure last resort test would turn the process of authorization into a formalistic exercise that would take no account of the difficulties of police investigations targeting sophisticated crime. But the authorizing judge must look with attention at the affidavit material, with an awareness that constitutional rights are at stake and carefully consider whether the police have met the standard. All this must be performed within a procedural framework where certain actions are authorized on an *ex parte* basis. Thus, the authorizing judge stands as the guardian of the law and of the constitutional principles protecting privacy interests. The judge should not view himself or herself as a mere rubber stamp, but should take a close look at the material submitted by the applicant. He or she should not be reluctant to ask questions from the applicant, to discuss or to require more information or to narrow down the authorization requested if it seems too wide or too vague. The authorizing judge should grant the authorization only as far as need is demonstrated by the material submitted by the applicant. The judge should remember that the citizens of his country must be protected against unwanted fishing expeditions by the state and its law enforcement agencies. Parliament and the courts have indeed recognized that the interception of private communications is a serious matter, to be considered only for the investigation of serious offences, in the presence of probable grounds, and with a serious testing of the need for electronic interception in the context of the particular investigation and its objects… There must be, practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry. [Emphasis in original, citations omitted.][24]

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[23] *Ibid* at para. 22.
[24] *Ibid* at para. 29.

49. There is an important difference between an application for a wiretap and resort to emergency powers. An application for a wiretap authorization is based upon an affidavit, setting out the information available to the police and reasons for the wiretap request, and the application is decided by an independent judicial officer. The CLA/CCCDL/CCAD makes a recommendation below proposing that the government produce a written record that lays out the information before the government and includes what other measures it considered before invoking the emergency powers.

50. Even despite this difference in procedure, elected officials should be guided in their decision whether to invoke emergency powers by the Court's reference to a "serious testing" of the need for electronic interception and its directions that the judge receiving the application "should not be reluctant to ask questions" and that the application be considered with care and with full recognition of the constitutional rights which are at play.

III. POLICY PHASE SUBMISSIONS

Recommendation #1: The *Emergencies Act* should be amended to clearly set out the threshold for declaring a public order emergency, without reference to other legislation.

51. As currently drafted, to understand the threshold to declare a public order emergency, you have to look at ss. 3, 16, and 17 of the *Emergencies Act* and s. 2 of the *Canadian Security Intelligence Service Act* (the *CSIS Act*).[25] This drafting approach unhelpfully leaves the reader to piece together these different elements into one whole.

52. The starting point is s. 17 of the *Emergencies Act*:

> **17 (1)** When the Governor in Council believes, on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency, the Governor in Council, after such consultation as is required by section 25, may, by proclamation, so declare. [Emphasis added]

The Governor in Council must believe, on reasonable grounds, that a public order emergency exists. To understand what constitutes a "public order emergency", you have to look to the definitions in the preceding section:

> **16** In this Part,
>
> …

[25] R.S.C. 1985, c. C-23.

> ***public order emergency*** means an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency; (*état d'urgence*) [emphasis added]

Embedded in this definition are two further defined phrases. The first, "threats to the security of Canada" is also set out in s. 16:

> ***threats to the security of Canada*** has the meaning assigned by section 2 of the *Canadian Security Intelligence Service Act*. (*menaces envers la sécurité du Canada*) [Emphasis added.]

This definition incorporates by reference the definition of "threats to the security of Canada" set out in s. 2 of the *CSIS Act*:

> ***threats to the security of Canada*** means
>
> > **(a)** espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,
> >
> > **(b)** foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,
> >
> > **(c)** activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and
> >
> > **(d)** activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,
>
> but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d). (*menaces envers la sécurité du Canada*)

The second definition embedded within the definition of a public order emergency, a "national emergency", is set out in the *Emergency Act*'s main definitions section as this definition applies to more than one type of emergency:

> **National emergency**
>
> **3** For the purposes of this Act, a ***national emergency*** is an urgent and critical situation of a temporary nature that
>
> > **(a)** seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
> >
> > **(b)** seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada
>
> and that cannot be effectively dealt with under any other law of Canada.

These various provisions act like a set of nesting dolls, with each provision requiring the reader to seek out another definition and then another and another.

53. The CLA/CCCDL/CCAD take the position that this nesting dolls structure is an ill-suited approach to setting out a threshold test. Ambiguity in statutory drafting is antithetical to the rule of law. While all statutes must strive for clarity, the exceptional nature of the *Emergencies Act* makes ambiguity in the governing test particularly troubling. Because the *Emergencies Act* will be only infrequently invoked, courts will have little opportunity to consider and interpret this legislation.

54. The incorporation by reference of a definition from a separate statute presents a particular challenge for politicians, civil servants, and the public alike trying to understand (and in some cases apply) the threshold.[26] This challenge was clear in the evidence heard by the Commission. Mr. David Vigneault, the Director of CSIS, testified that CSIS itself did not think that s. 2 of the *CSIS Act* was met and did not start any investigations into individual protestors under the authority of that *Act*.[27] To explain why the government invoked the *Emergencies Act* despite CSIS's own assessment under s. 2, Ms. Janice Charette explained that there is a different decision-maker under the *Emergency Act*—it is the Governor in Council, not CSIS, that is looking at threats to national security for the purposes of determining whether the threshold for a public order emergency is met.[28] The Prime Minister explained that the context and purpose of the s. 2 definition of "threats to national security" is different under the two statutes. The decision-makers are different. And the inputs are different: the Governor in Council is not only considering input from CSIS but also from "the RCMP, Transport, Immigration, from the whole of government, from the Clerk, from the National Security Intelligence Advisor." [29]

55. Several roundtable panelists, including former directors of CSIS, supported 'decoupling' the CSIS definition for "threats to national security" and the threshold under the *Emergencies Act*.[30] Dr. Leah West did not support a complete decoupling—however, it was her opinion that the *CSIS Act* definition was relevant only to a narrower subset of emergencies: those involving

[26] See Transcript – December 2, 2022, p. 9 (Dr. Hoi Kong).
[27] Transcript – November 21, 2022, pp. 51-55; Interview Summary: David Vigneault, Michelle Tessier, Tricia Geddes (Canadian Security Intelligence Service) and Marie-Hélène Chayer (Integrated Terrorism Assessment Center) (WTS.00000060), p. 8; see also Public Summary: Canadian Security Intelligence Service (CSIS) *in camera*, *ex parte* Hearing (WTS.00000079), pp. 6-7.
[28] See Transcript – November 18, 2022, pp. 191-194.
[29] Transcript – November 25, 2022, pp. 47-50 (quotation at pp. 49-50).
[30] Transcript – November 30, 2022, p. 52 (Mr. Richard Fadden), pp. 58-59 (Mr. Ward Elcock), p. 60 (Dr. Wesley Wark).

espionage, sabotage, foreign interference, and subversion.[31] For public order emergencies caused by unlawful protests and blockades, the entire section needs to be rewritten, in her view.[32]

56. Another reason to decouple the *CSIS Act* definition from the *Emergencies Act* arises out of the different standards that apply as part of reacting to national security threats under these two statutes. Under the *CSIS Act*, CSIS needs 'reasonable grounds to suspect' before starting to investigate;[33] the Governor in Council needs 'reasonable grounds to believe' that a public order emergency exists (which in turn must arise from threats to the national security of Canada).[34] There is a danger that where CSIS has reasonable grounds to suspect, this conclusion could in turn be imported into the government's decision to invoke the *Emergencies Act*—which requires reasonable grounds to believe, a higher standard.

57. The CLA/CCCDL/CCAD submit that the Commission should recommend that Parliament redraft the *Emergencies Act* to include a clearer—and, ideally, simpler—threshold for a public order emergency. The threshold should be contained in a single section of the *Act* and should not incorporate a series of multi-part definitions from other parts of the *Act* or other statutes. While the threshold should be clearer it should be no less demanding.

Recommendation #2: The *Emergencies Act* should be amended to require the government to prepare a more complete written record, explaining the information it considered in declaring an emergency, how the declaration is *Charter*-compliant, and why the declaration is a last resort.

58. At the core of the threshold for invoking a public order emergency is the requirement that the Governor in Council *believe, on reasonable grounds* that such an emergency exists, with all that entails. As outlined above, this basis for action—believing on reasonable grounds—is well-known in criminal law.[35] This standard has both subjective and objective components: the belief must be subjectively held and objectively reasonable, based on circumstances known at the time and taking an officer's experience into account.[36]

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[31] Transcript – November 30, 2022, pp. 55-56 (incorporating s. 2 of the *CSIS Act* adds a level of objectivity to the legal test).
[32] Transcript – November 30, 2022, p. 55 (Dr. Leah West).
[33] *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, ss. 12(1), 12.1(1) ("reasonable grounds to believe" are needed to engage in more intrusive actions); see also Transcript – November 21, 2022, pp. 11, 17-19 (Ms. Michelle Tessier).
[34] *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), s. 17(1).
[35] See e.g., Anne-Marie Boisvert, Commissioned Paper: The Reasonable Grounds to Believe Standard in Canadian Criminal Law.
[36] *Ibid*, pp. 6-9.

59. The *Emergencies Act* as drafted requires the government to produce the following explanatory documents:

a. Under s. 17, a declaration of the public order emergency, specifying the matters set out in s. 17(2): (a) the state of affairs constituting the emergency; (b) the special temporary measures that may be necessary; and (c) the area of Canada to which the effects of the emergency extend (if not the whole of Canada).

b. Under s. 58, a motion for confirmation of the declaration, together with an explanation of the reasons for issuing the declaration and a report on any consultation with the lieutenant governors in council of the provinces with respect to the declaration.[37]

This is the only information the *Emergencies Act* requires the government to provide at the time of the public order emergency. Little direction is given in these sections for the content the government should include.

60. By contrast, to obtain a search warrant, a police officer must present a justice of the peace with an affidavit that sets out that officer's reasonable grounds to believe that there will be evidence in the particular place named in the warrant.[38] This affidavit can include both non-confidential information (for example, the results of a police officer's surveillance) and highly confidential information (for example, a tip provided by a confidential informant). Later, at trial, the defendant can challenge the basis for the search by challenging the validity of the warrant issued as a result of the officer's affidavit. The reviewing court is able to closely scrutinize whether the police had reasonable and probable grounds to conduct the search based on what was included in the affidavit. Officers have a duty to be full, frank, and fair in their description of the evidentiary foundation on which their reasonable grounds to believe was based.[39]

61. The CLA/CCCDL/CCAD proposes a recommendation that the *Emergencies Act* be amended to require a more complete written record of the government's decision to invoke the *Emergencies Act* at the time that decision is made. This more complete written record should include at least the following three components (in addition to what is already required): (1) a review of the information on which the decision was based; (2) an explanation for why the measures taken minimally impair *Charter* rights; and (3) an explanation for why the government

[37] See February 14, 2022 Declaration of Public Order Emergency, Explanation pursuant to subsection 58(1) of the *Emergencies Act* (SSM.CAN.00000105_REL.0001). A similar collection of information is required to continue or amend the declaration of emergency under s. 60 of the *Emergencies Act*.
[38] *Criminal Code*, R.S.C. 1985, c. C-46, s. 487.
[39] See, e.g., *R. v. Araujo*, 2000 SCC 65 at paras. 46-47.

has concluded that other orders of government or federal laws are insufficient to solve the problem (i.e. why this tool of last resort is necessary).

62. First, the government should outline the factual foundation underlying its 'reasonable grounds to believe' a public order emergency exists. A parallel can be drawn with the full, frank, and fair disclosure a police officer must provide to explain how the reasonable grounds to believe threshold is met to obtain a warrant. The Supreme Court's decision in *Araujo* offers some helpful guidance: the explanation does not need to be lengthy and outline every minute detail. Instead, it should be clear and concise. It must set out the facts fully and frankly—for the authorizing judicial authority in *Araujo* and, by analogy, for future reviewing bodies (and the public) in the context of a declaration under the *Emergencies Act*.[40]

63. Much like in the criminal law context, this process could account for confidentiality and privilege concerns. Where an officer's affidavit contains confidential information, defence counsel receives a redacted version of the affidavit and there is a process to disclose some of the redacted information in a summary way only.[41] A process could be created in the *Emergencies Act* context to balance the need to protect privilege with the importance of preserving a record of information known to the decision-maker at the time of the decision.

64. Second, the government should explain why the measures chosen impact *Charter* rights only insofar as is necessary and in a way that is proportionate to the emergency. A similar requirement was supported in different forms by several experts in the Thresholds, Power, and Accountability under the *Emergencies Act* roundtable. Dr. Morris Rosenberg suggested that the government's explanation of the declaration also include an explanation of why the measures taken are minimally impairing, borrowing language from the test in *R. v. Oakes*.[42] Dr. Kim Lane Scheppele suggested that the government do (and make public) a "proportionality analysis".[43] Dr. Hoi Kong suggested that the Commission look to the *Charter* Statements the federal government already releases alongside new legislation as a model for how the *legal* basis for invocation might be explained to the public without compromising solicitor-client privilege.[44] Though the test the panelists propose and the form they thought this exercise should take may be different, these

[40] See *R. v. Araujo*, 2000 SCC 65 at para. 46.
[41] See *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1461.
[42] [1986] 1 S.C.R. 103; Transcript – December 2, 2022, p. 50.
[43] Transcript – December 2, 2022, pp. 17-18.
[44] Transcript – December 2, 2022, pp. 39-40.

suggestions share a common theme: the government should be turning its mind to the impact its decision will have on *Charter* rights and ensuring this impact is minimized.

65. Third, the government should explain the other potential tools it canvassed and why these tools could not be used—to ensure the invocation was truly necessary as a measure of last resort. As set out above, there are two aspects to the requirement that the *Emergencies Act* be invoked as a last resort, as currently drafted: to constitute a "national emergency", the event must be of "such proportions or nature as to exceed the capacity or authority of a province to deal with it" and such that it "cannot be effectively dealt with under any other law of Canada".[45]

66. Here again there is ambiguity in the meanings attributable to these two components making the *Emergencies Act* a tool of last resort. Mr. Morris Rosenberg explained the different possible interpretations that flow from the requirement that the situation "cannot be effectively dealt with under any other law of Canada" in particular. First, there may in fact be *no* other law that could address the problem. Second, there may be a law but it is unavailable, due to enforcement capacity constraints or insurmountable procedural hurdles, for example. Finally, there may be a law that exists and is available but which is, in the government's eyes, *more harmful* than the *Emergencies Act*.[46] Similarly, the requirement that the situation be outside the *capacity* or *authority* of the province likely excludes a case where there is *capacity* and *authority* but not the *political will* to act (perhaps based on a conflicting view of the situation's seriousness). Whether or not these ambiguities are resolved, requiring the government to explain why its invocation of the *Emergencies Act* was *necessary* as a last resort would ensure the government turns its mind to this issue and explains its reasoning process. This too was suggested by Mr. Morris Rosenberg.[47]

67. Requiring the government to set out these aspects of their decision in writing will both ensure the Governor in Council is turning its mind to these three parts of the statutory scheme while also creating a clearer record for review and inquiry after the fact. Dr. Scheppele explained that accountability mechanisms exert their influence both during the decision-making process and after the fact:

> One of the reasons for having accountability mechanisms is because you want the decision-makers, in the moment when they actually have to make a decision like this, to have like a little bird sitting on their shoulder saying, "one day someone who is not under this time pressure will look at what you've done." In other words, one of the big functions

[45] *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), s. 3.
[46] Transcript – December 2, 2022, p. 11.
[47] Transcript – December 2, 2022, pp. 12-13 (Mr. Morris Rosenberg).

> of accountability mechanisms is not just to hold someone accountable after the fact, but to allow the decision-makers to know ahead of time, in some ways, that their decisions will be reviewed in that way.[48]

68. The CLA/CCCDL/CCAD proposes a recommendation that the *Emergencies Act* be amended to require the government to set out in more detail particular elements of their decision. This written record could form part of the proclamation under s. 17, part of the report to Parliament under s. 58, or could be a separate document entirely.

Recommendation #3: In amending the *Emergencies Act*, the government should consider whether and how to account for economic emergencies.

69. The *Emergencies Act* in general and the provisions dealing with public order emergencies in particular do not specifically address emergencies with an *economic* component. The threshold for invoking a public order emergency as currently drafted includes concerns about the threat or use of acts of serious violence against persons or property (under s. 2 of the *CSIS Act*) and situations that seriously endanger the lives, health or safety of Canadians (under the definition of "national emergency") but does not refer explicitly to urgent economic concerns.

70. The economic consequences of the protest featured prominently in the government's stated rationale for declaring a public order emergency. The *Proclamation Declaring a Public Order Emergency* included the following as three of the five elements the public order emergency was constituted of:

> …
> (ii) the adverse effects on the Canadian economy – recovering from the impact of the pandemic known as the coronavirus disease 2019 (COVID-19) – and threats to its economic security resulting from the impacts of blockades of critical infrastructure, including trade corridors and international border crossings,
>
> (iii) the adverse effects resulting from the impacts of the blockades on Canada's relationship with its trading partners, including the United States (U.S.), that are detrimental to the interests of Canada,
>
> (iv) the breakdown in the distribution chain and availability of essential goods, services and resources caused by the existing blockades and the risk that this breakdown will continue as blockades continue and increase in number, and[49]
> …

[48] Transcript – December 2, 2022, p. 40 (Dr. Kim Lane Scheppele).
[49] February 14, 2022 Declaration of Public Order Emergency, Explanation pursuant to subsection 58(1) of the *Emergencies* Act, (SSM.CAN.00000120_REL.0001), pp. 1-3.

71. Deputy Prime Minister Chrystia Freeland's explanation for why economic concerns were so prominent here demonstrates the challenges of addressing economic concern-driven emergencies within the current definition of a public order emergency. The Deputy Prime Minister sought to draw a link between economic security and national security. She offered two connections: first, Canada's general security is built on its economic security—so, any threat to economic security is a threat to national security more broadly. Second, the Deputy Prime Minister was concerned about individual security being undermined by the protests and blockades, including about someone getting hurt.[50] These views of "national security" appear far removed from the specific definition of "threats to national security" in s. 2 of the *CSIS Act*, as incorporated into the *Emergencies Act*.

72. Experts testifying during the policy phase offered different considerations and possible solutions, including using other legislation outside the emergencies context to address threats to critical infrastructure specifically.[51] However, no clear picture emerged of a desirable approach to this "vexed"[52] question.

73. The CLA/CCCDL/CCAD proposes a recommendation that the government consider whether and how economic emergencies—or other emergencies that might not have been foreseeable when the *Act* was drafted in 1985—should be incorporated into the *Act*'s framework or be addressed in other legislation. What powers the government should have at its disposal to address economic-related emergencies should be debated and any proposed legislation rigorously scrutinized as part of the public Parliamentary process.

Recommendation #4: The statutory timeline mandated by the *Emergencies Act* should be extended or amended to ensure Commissions have the time they need to inquire and report.

74. Section 63(1) of the *Emergencies Act* set outs that the Governor in Council has 60 days from the expiration or revocation of a declaration of emergency to cause an inquiry to be held. Under s. 63(2), the inquiry must be complete its report within 360 days of the expiration or revocation of a declaration of emergency.

75. Here, the Public Order Emergency Commission was announced on April 25, 2022—a full 60 days after the declaration of emergency was revoked. Because the deadline for the

[50] Transcript – November 24, 2022, pp. 72-73.
[51] Transcript – December 2, 2022, pp. 26-28 (Mr. Morris Rosenberg).
[52] Transcript – December 2, 2022, p. 46 (Dr. Kim Lane Scheppelle).

Commission's report is also tied to the date of revocation, the government's taking 60 days to announce the Commission means the Commission has only approximately ten months to complete its inquiry into the broad array of subjects set out in the Order in Council.

76. This time pressure has clearly impacted the Commission's operations. In his remarks at the close of the factual phase of the Commission, Commissioner Rouleau acknowledged the constraints under which everyone is operating:

> I should note that there's no question that the Commission's timeframe did present challenges. There was a staggering number of documents produced by the parties in response to the Commission's request including by the federal government.
>
> …
>
> [T]he needs of the Commission to review these documents and the right of the parties to redact on various legal grounds necessarily created time constraints and challenges for all concerned.[53]

77. Several panelists participating in the final roundtable (Thresholds, Powers, and Accountability under the *Emergencies Act*) also commented on the short timeline within which the Commission must complete its work.[54] Mr. Morris Rosenberg suggested that perhaps an additional six months would be appropriate.

78. The CLA/CCCDL/CCAD submits that there are two possible recommendations that could be made. The first is a recommendation to extend the deadline for the inquiry's report in s. 63(2) from 360 days to 18 months. The second recommendation would be to begin the 360-day clock for the inquiry's report on the day the inquiry is created by the government. This would ensure that the time (up to 60 days) the government takes to cause the inquiry to be held is not subtracted from the inquiry's timeframe.

CONCLUSION

79. The CLA/CCCDL/CCAD thanks the Commission for the opportunity to participate in its work and offer these submissions for its consideration.

[53] Transcript – November 25, 2022, pp. 256-257 (Commissioner Rouleau).
[54] Transcript – December 2, 2022, pp. 46 (Mr. Ward Elcock), pp. 53-54 (Mr. Morris Rosenberg).