CANADIAN CIVIL LIBERTIES ASSOCIATION

ASSOCIATION CANADIENNE DES LIBERTES CIVILES

# Submissions of the Canadian Civil Liberties Association to the Special Joint Committee on the Declaration of Emergency

January 19, 2023

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The Canadian Civil Liberties Association ("CCLA") welcomes the opportunity to make submissions to this Committee. These submissions are drawn largely from the CCLA's lengthier closing submissions made to the Public Order Emergency Commission, where CCLA participated as a party.[1] For the purposes of the Committee's work, this submission focuses on two areas: whether the legal threshold for declaring an emergency was met and whether the orders declared were lawful and constitutional. In CCLA's view, the answer to both questions is no; the legal threshold was not met, and the emergency orders were unlawful and unconstitutional.

## ***Legal threshold for declaring an emergency***

Any assessment of the federal government's decision to declare a public order emergency must start with a consideration of Parliament's intention in passing the *Emergencies Act* (the "*Act*" or "*EA*") and in establishing the legal thresholds for invocation that it did. The *EA* was intended to prevent the abuses and correct the excesses that occurred under the *War Measures Act*. It therefore incorporated significant safeguards including a requirement for Parliamentary supervision, a standard for invocation ("belief on reasonable grounds") that could be subjected to judicial scrutiny, the establishment of this special committee, and the requirement to conduct an independent inquiry.

In assessing whether the government acted within its legal authority in declaring a public order emergency, the CCLA wishes to focus on two interpretive points. The first relates to the definition of a national emergency under section 3 of the *EA* and in particular the meaning of the phrases "cannot be effectively dealt with under any other law of Canada" (in section 3) and "exceed the capacity or authority of a province to deal with it" (in section 3(a)). The second interpretive issue relates to the meaning of "threats to the security of Canada" as defined in the *EA*, which explicitly incorporates the statutory definition in the *Canadian Security Intelligence Service Act* ("*CSIS Act"*).

### ***Definition of a national emergency***

Although not explicitly set out in the declaration or the section 58 justification put before Parliament, the government of Canada has argued that it was relying on section 3(a) of the *EA*. This section requires an urgent and critical situation of a temporary nature that 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. Further, it requires that the situation cannot be effectively dealt with under any other law of Canada. It is unclear whether the threshold of seriously endangering Canadians' lives, health or safety was met.

The government's initial public justification for using the *EA* did not disclose evidence of widespread acts of serious violence that endangered Canadians' lives, health or safety. The government's section 58 statement describes the level of violence in vague and somewhat tentative terms.[2] The only concrete example of a serious risk of violence is the reference to the RCMP's seizure of a cache of firearms in Coutts, Alberta. Although arrests were made prior to the declaration of a public order emergency, these arrests are said to indicate "that there are elements within the protests that have intentions to engage in violence."[3] The statement also notes that "Violent online rhetoric increased threats against public officials and the physical presence of ideological extremists at protests also indicate that there is a risk of serious violence and the potential for lone actor attackers to conduct terrorism attacks."[4] These statements are all highly speculative, and neither the evidence that was before the POEC, nor the testimony heard by this committee, indicated events or acts that seriously endangered the lives, health or safety of Canadians.

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[1] CCLA's full submissions to the Public Order Emergency Commission can be found here: https://publicorderemergencycommission.ca/files/documents/Closing-Submissions/Canadian-Civil-Liberties-Association-Closing-Submissions.pdf

[2] February 14, 2022 Declaration of Public Order Emergency, Explanation pursuant to subsection 58(1) of the *Emergencies Act* ("Section 58 Explanation"), p. 11.

[3] Section 58 Explanation, p. 12.

[4] Section 58 Explanation, p. 6.

There were concerns about the economic impacts of the border blockades that may, over a long period, have posed a serious threat to health and safety. However, when the emergency was declared, there was no compelling evidence that Canadians were at risk of going without necessities. The economic harms did not amount to circumstances that seriously endangered Canadians' lives, health or safety.

One key question in assessing whether there was a national emergency relates to whether the circumstances exceeded the capacity (operational capacity/resources) or authority (legal authority/legislative tools) of provinces and could not be addressed under any other law of Canada. The CCLA submits that this part of the legal test was not met.

While there were events taking place in a number of provinces, Ontario was the site of at least two significant protests that are relevant in considering the question of authority and capacity: the occupation in Ottawa and the blockade at the Ambassador Bridge. The Ambassador Bridge was cleared before the federal government declared a public order emergency. As a result, the CCLA submits that Ontario had both the legal authority and the operational capacity to address the situation and did so.

The occupation in downtown Ottawa presented particularly acute policing challenges. The POEC heard that the operational plan that was successfully implemented and cleared the protests was developed relying solely on common law and ordinary statutory authorities. Police did not request the powers provided in the *EA* and multiple witnesses before the POEC conveyed their view that the issue was not legal authority, but coordination, planning, and resource issues within and between police services.

Significantly, the evidence before the POEC made it clear that, at least until the Ambassador Bridge was in play, the government of Ontario was not interested in engaging with other orders of government to try to address the challenges posed by the protests in Ottawa.[5] In fact, the provincial government did not meaningfully respond to the protests until around February 9, two days before it opted to declare a provincial state of emergency pursuant to the provincial *Emergency Management and Civil Protection Act*.

Following Ontario's declaration of an emergency, the measures the province put in place were broad and attached significant consequences to failure to abide by the emergency orders.[6] The CCLA submits that the province of Ontario had all the legal authorities it required to address the situation. It likely would have taken several days for the impacts of the Ontario emergency orders to be seen on the ground, but the federal *EA* was invoked just two days after Ontario's orders were in place.

The question of operational capacity is a separate issue. Despite the government of Ontario's refusal to engage, the Ontario Provincial Police was active at an early stage in providing intelligence reports to law enforcement partners,[7] dialoguing with convoy organizers,[8] and working with municipal police services to provide resources.[9] While Ontario may not have had sufficient policing resources in the province to ultimately address the Ottawa occupation, police in Ontario had pursued the option of contracting with police services within and outside of the province to shore up their capacity.[10] The *EA* declaration and emergency orders were not necessary for these purposes.[11]

The CCLA submits that neither the authority nor the capacity of the provinces was truly exceeded. Moreover, we note that before the Commission and before this Committee, some witnesses testified about the assistance that the

[5] POEC Transcript, Vol. 4, p. 78-81 (Jim Watson); Peter Sloly notes; POEC Transcript, Vol. 13, p. 219-222 (Peter Sloly); POEC Transcript, Vol. 28, (Marco Mendicino), p. 40 line 27 to p. 42 line 17.
[6] See O. Reg. 71/22 *Critical Infrastructure and Highways*.
[7] POEC Interview Summary: Superintendent Pat Morris (OPP), p. 2-4; List of Hendon Teleconferences and reports for Freedom Convoy 2022; POEC Transcript, Vol. 5, p. 189-192 (Supt. Pat Morris).
[8] Interview Summary: Inspector Marcel Beaudin (OPP), p. 2-4; POEC Transcript, Vol. 9, p. 119 line 24 to p. 124 line 1.
[9] POEC Transcript, Vol. 11, (Thomas Carrique), p. 66, lines 18-28; POEC Interview Summary: Commissioner Thomas Carrique, p. 3.
[10] POEC Transcript, Vol. 5, (Diane Deans), p. 20-21, lines 20-13; POEC Interview Summary: Diane Deans, p. 3.
[11] POEC Transcript, Vol. 31, (Justin Trudeau), p. 82-3, lines 1-3.

declaration of emergency and the emergency orders provided in clearing the protests. The CCLA submits that the *EA* requires that a declaration and orders be *necessary*, not merely helpful; this threshold was not met in this case.

***Definition of threats under the Emergencies Act***

According to section 16 of the *EA*, a public order emergency is defined as an emergency that arises from threats to Canada's security and is so serious as to be a national emergency. Section 16 further stipulates that "threats to the security of Canada" has the meaning assigned by section 2 of the *Canadian Security Intelligence Service Act.* The CCLA submits that there was no threat to the security of Canada within the meaning of the *EA*.

The government's justification for declaring a public order emergency focuses on subsection (c) of the *CSIS Act* definition: 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 to achieve a political, religious or ideological objective within Canada or a foreign state. The government's section 58 justification does not indicate reliance on a different or broader definition of threats.

Before the POEC, CSIS Director David Vigneault confirmed that the protests in Ottawa or elsewhere did not threaten Canada's security as defined by section 2 of the *CSIS Act*.[12] Witnesses from the OPP also acknowledged that they found no specific, credible criminal intelligence of an egregious criminal or violent act or threat.[13] Law enforcement and intelligence witnesses raised the possibility that the protests could serve as cover for a "lone wolf" attack or that violent extremists might use the protests as a means of recruitment.[14] While serious, all these concerns were speculative and insufficient to justify a public order emergency declaration.[15]

The evidence strongly suggests that the government felt enormous pressure to act, fueled partly by individual Ministers' own impressions of and experience with the protests[16] and a profound lack of faith or confidence in law enforcement.[17] However, Cabinet's exercise of the extraordinary powers under the public order emergency provisions of the *EA* should primarily consider and rely heavily on intelligence assessing risks to national security and public order that has been vetted and analyzed by those with expertise.

Instead, the evidence and the justification in the government's section 58 statement placed significant emphasis on economic disruption and harm. While economic concerns are certainly part of a broad understanding of "national security", there is a real danger in allowing the government to prioritize economic considerations over democratic values and fundamental freedoms of assembly and expression.

Several witnesses before the Commission stated that the Department of Justice had provided a legal opinion that suggested that "threats to the security of Canada" in the *EA* did not have the same meaning as the term in the *CSIS Act*, despite the CSIS definition's direct incorporation into the *EA*.[18] The government of Canada has claimed solicitor-client privilege over this opinion.

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[12] POEC Interview Summary: David Vigneault, Michelle Tessier, Tricia Geddes (CSIS) and Marie-Hélène Chayer (ITAC) ("CSIS Interview Summary"), p. 5.

[13] POEC Interview Summary: Superintendent Pat Morris (OPP), pp. 6 and 7. The Hendon Report of February 7, 2022, referred to a potential national security threat. Superintendent Morris explained to the Commission that the decision to employ such language stemmed from concerns about the border blockades and economic integrity. He also confirmed that the OPP "produced no intelligence to indicate that these individuals would be armed." POEC Transcript, Vol. 5, p. 201, lines 1-22, pp. 226-9. Likewise, Commissioner Carrique distinguished between flagging a potential threat in the Hendon Report for intelligence purposes and the threshold established in the *CSIS Act.* He agreed that there were no *credible* threats to national security. POEC Transcript, Vol. 11, (Thomas Carrique), pp. 90-93, 295-296.

[14] POEC Interview Summary: Superintendent Pat Morris (OPP), p. 7; CSIS Interview Summary, (WTS.00000060), p. 6; POEC Transcript, Vol. 27, (David Vigneault, Michelle Tessier & Marie-Helene Chayer), p. 37, lines 10-27, p. 88, lines 1-7, p. 148, lines 4-12, p. 154, lines 19-24, p. 160, lines 21-25; POEC Transcript, Vol. 5, (Patrick Morris), p. 295-297, lines 20-12.

[15] The CCLA notes that it was not privy to the evidence heard by the Commission *in camera* with the CSIS and ITAC witnesses. However, the public summary of the *in camera* CSIS hearing (In Camera Hearing Public Summary - CSIS), did not include *any reference* to specific evidence that might be sufficient to meet the legal threshold, strongly suggesting that none exists.

[16] See e.g. POEC Transcript, Vol. 28, (Marco Mendicino), p. 51, lines 16-28; POEC Transcript, Vol. 29, (David Lametti), pp. 102-5; POEC Transcript, Vol. 27, (William Blair), p. 317, lines 1-11.

[17] POEC Transcript, Vol. 27, (William Blair), p. 262, lines 8-16; POEC Transcript, Vol. 29, (David Lametti), p. 59, lines 26-16.

[18] POEC Transcript, Vol.25, (Jody Thomas), p. 271, lines 15-24; POEC Transcript, Vol. 27, (David Vigneault), p. 94-5, lines 18-8.

The CCLA acknowledges the fundamental importance of solicitor-client privilege. However, to the extent that the government relies on this legal advice to support the argument that it acted in good faith and on a good faith basis that the threshold for declaring a public order emergency was met, it can only do so by disclosing the opinion.[19]

In any event, the federal Department of Justice does not have the final or determinative word on the interpretation of the *EA*. The government's own creative and privileged interpretation of the law should not prevail over a plain and obvious reading of the statute. The legal threshold for declaring a public order emergency was not met.

## ***The emergency orders***

### *Prohibitions on public assembly*

The emergency orders that came into force on February 15 were set out in the *Emergency Measures Regulation* (*EMR*)[20] and the *Emergency Economic Measures Order* (*EEMO*).[21] While the question of the government's legal authority to declare a public order emergency is crucial, the legality and constitutionality of the emergency measures put in place are equally significant. The measures impact rights and must be tested for constitutional compliance with particular attention on necessity and proportionality.

The government has argued that the emergency measures were carefully tailored and targeted to address the blockades and occupation. The CCLA submits that the orders were unjustifiably broad. The orders did not target specific protests or geographic areas. They instead depended largely on law enforcement and financial institutions to operationalize and enforce the measures selectively.[22]

The most significant restriction set out in the *EMR* was the prohibition on certain public assemblies that "may reasonably be expected to lead to a breach of the peace".[23] The prohibition on public assemblies was drafted in broad terms and subject to relatively limited exceptions. Given the nature of protests, many assemblies could lead or be expected to result in a breach of the peace.

Protests that continued in other locations (and without vehicles) were permitted due to the exercise of discretion by police.[24] The *EMR* did not attempt to facilitate the continuation of protest activities that did not involve large vehicles or blockading roadways. Regardless of whether a protester was in a truck blocking a major intersection or on the sidewalk holding a sign, all were required to leave under the terms of the *EMR.* It is likely that the breadth of the orders had a chilling effect on individuals' willingness to exercise their constitutionally-protected right to peacefully assemble.

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[19] A legal opinion from the Department of Justice likely includes an assessment of the legal risk associated with a particular interpretation or course of action. It is worth noting that the Minister of Justice, pursuant to section 3 of the *Canadian Bill of Rights* and section 4.1 of the *Department of Justice Act*, is required to "ascertain" or "examine" whether proposed legislation is inconsistent with the *Charter* or *Bill of Rights.* Similarly, pursuant to section 3 of the *Statutory Instruments Act*, the Clerk of the Privy Council (in consultation with the Deputy Minister of Justice) is required to examined proposed regulations to ensure that they are not inconsistent with the purposes and provisions of the *Charter* and *Bill of Rights.* In *Schmidt v Canada (Attorney General)*, 2018 FCA 55, the Federal Court of Appeal upheld a finding that these reporting requirements were only triggered if there was "no credible argument" that could be made that the legislation/regulation met those standards. The CCLA submits that this exceptionally low standard is not appropriate for assessing *Charter* compliance and would be equally inappropriate if applied to the interpretation of the legal threshold in the *Emergencies Act.*

[20] *Emergency Measures Regulations*, SOR/2022-21.

[21] *Emergency Economic Measures Order*, SOR/2022-22, p. 10.

[22] POEC Transcript, Vol. 27, (William Blair), p. 330, lines 15-28; POEC Transcript, Vol. 28, (Marco Mendicino), p. 49-51, lines 18-15; POEC Transcript, Vol. 29, (David Lametti), p. 70, lines 11-22; POEC Transcript, Vol. 31, (Justin Trudeau), p. 88, lines 2-26.

[23] Section 2(1) of the *EMR* states that a person "must not participate in a public assembly that may reasonably be expected to lead to a breach of the peace by: (a) the serious disruption of the movement of persons or goods or the serious interference with trade; (b) the interference with the functioning of critical infrastructure; or (c) the support of the threat or use of acts of serious violence against persons or property.

[24] The POEC did hear some evidence that protests continued in other locations while the emergency declaration was in force, but several witnesses also made clear that none could continue near Parliament.

### *Asset freezing provisions*

The *EEMO* contained measures to require the freezing of certain financial accounts of "designated persons".[25] The purpose of the powers to freeze accounts was to disrupt and deter protesters; it was not intended to be punitive, nor was it intended to operate on individuals who had not chosen to engage in illegal activity. The intention was to create non-violent, non-physical incentives for people to stop participating in the illegal activity.[26]

Two primary streams were used to facilitate the freezing of financial accounts. In the first stream, the RCMP served as a communication channel between the OPS, the OPP, and the financial institutions and shared the identities of individuals involved in the blockade.[27] In the second stream, the RCMP shared information with financial institutions about individuals with vehicles observed by the OPP as involved in blockade activity.[28]

The obligation was on the financial institution to determine whether they were going to freeze bank accounts. Significantly, since it was an offence to make funds available to someone participating in the unlawful demonstration, according to the *EA*, the financial institutions faced potential charges if they did not freeze the accounts of the persons whose names were provided by the RCMP. If the financial institutions decided to exercise their discretion for humanitarian or other purposes, they were taking a legal risk.[29] The financial institutions expressed concern to the RCMP about the breadth of the orders, the types of accounts to freeze, and whether there was a threshold to act.[30]

The *EEMO* did not include any process for unfreezing accounts. The Department of Finance expected financial institutions to unfreeze accounts once it was clear that the individual was no longer involved in the unlawful activities but provided institutions with minimal guidance.

By February 23, 2022, when the declaration of emergency was revoked, the RCMP had disclosed 57 entities to financial institutions, including individuals and owners or drivers of vehicles involved in the blockades, and 170 Bitcoin wallet addresses to virtual asset service providers.[31] The RCMP reported that financial institutions froze 257 financial products, including personal accounts, corporate accounts, and credit cards.[32] At least some accounts were frozen *proactively* by financial institutions, as opposed to *reactively* in response to RCMP disclosures.[33]

As a result of accounts being frozen, families' money to buy groceries, pay their rent, and pay child support was cut off. Notwithstanding the government's intentions, the impact of freezing the accounts spread beyond those participating in the blockades.[34]

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[25] Section 2(1) of the *EEMO* required a broad range of financial institutions (defined in section 3) to cease dealing in any property that is owned, held or controlled, directly or indirectly, by a designated person or by a person acting on behalf of or at the direction of that designated person. Entities also had to cease facilitating any transactions, making any property available or providing any financial or related services. Section 1 of the *EEMO* defined a designated person as "any individual or entity that is engaged, directly or indirectly, in an activity prohibited by sections 2 to 5 of the *Emergency Measures Regulations*."

[26] POEC Transcript, Vol. 23, (Michael Duheme & Brenda Lucki), p. 193-4, lines 24-2; POEC Transcript, Vol. 30, (Chrystia Freeland) p. 55, lines 12-19.

[27] POEC Institutional Report - Royal Canadian Mounted Police, p. 17, para 57; POEC Transcript, Vol. 23, (Michael Duheme & Brenda Lucki), p. 189-190, lines 16-7.

[28] POEC Institutional Report - Royal Canadian Mounted Police, p. 17, para 58.

[29] POEC Transcript, Vol. 25, (Isabelle Jacques, Michael Sabia & Rhys Mendes), p. 106, lines 9-15.

[30] The *EEMO* created a complex regulatory scheme that had to be implemented on an urgent basis with little clear direction from the government.

[31] POEC Institutional Report — Royal Canadian Mounted Police, pp. 19-20, para 69; Affidavit of Denis Beaudoin, p. 3, para 20-21.

[32] POEC Institutional Report — Royal Canadian Mounted Police, p. 20, para 70.

[33] An internal RCMP email dated February 20, 2022 indicates that ten financial products were reported to have been frozen "proactively." Another RCMP email dated February 25, 2022 cites 23 financial products "proactively" frozen. However, most documents before the Commission do not distinguish between accounts frozen proactively and reactively. As such, it is impossible to confirm exactly how many accounts were frozen by financial institutions on their own initiative, i.e. flagged internally by the institutions themselves.

[34] POEC Transcript, Vol. 25, (Isabelle Jacques, Michael Sabia & Rhys Mendes), p. 75, lines 10-23; POEC Transcript, Vol. 30, (Chrystia Freeland), p. 55, lines 12-27.

***About the Canadian Civil Liberties Association***

The Canadian Civil Liberties Association is an independent, non-governmental, non-partisan, non-profit, national civil liberties organisation. Founded in 1964, CCLA and its members promote respect for and recognition of fundamental human rights and civil liberties. For over fifty years, CCLA has litigated public interest cases before appellate courts, assisted Canadian governments with developing legislation, and published expert commentary on the state of Canadian law.