Brief for the Special Joint Committee on the Declaration of the Emergency:

Fulfilling Parliament's Key Responsibility under the *Emergencies Act*

Executive Summary:

The Special Joint Committee on the Declaration of the Emergency should conclude that there was no lawful basis for the Government's declaration of a public order emergency on February 14, 2022. This conclusion follows from the evidence produced before the Committee and the Inquiry:

- Law enforcement and intelligence officials were unanimous that no national emergency or threat to the security of Canada existed before February 13;
- As the National Security Advisor and the Clerk of the Privy Council disagreed with this conclusion, they sought an alternative analysis of the legal standard;
- The Government reformulated the standards of ss. 3 and 16 of the *Emergencies Act* (the "*Act*") by creating an "evolved" test that included economic harm as a basis for an emergency;
- The Government withheld the evidence the public inquiry required to determine whether the Cabinet lacked a reasonable basis for concluding an emergency existed, by asserting solicitor-client privilege in a manner that frustrated the purpose of that inquiry and s. 63 of the *Act*.

The Parliamentary Review Committee's Central Responsibility

The *Emergencies Act* establishes two independent oversight mechanisms. Section 63 of the *Act* requires an inquiry to be held "into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency." Subsection 62(1) of the *Act* directs a parliamentary review committee to review "the exercise of powers and the performance of duties and functions pursuant to a declaration of emergency." The intersection point of these mandates is an issue that is central for

both bodies, namely whether the Government had a lawful basis to enlarge its own powers, or if this was an affront to the Constitution of Canada. However, it should be noted that the public inquiry must apply deferential standard of review: whether the Government had a reasonable basis to believe a public order emergency existed, while the Special Joint Committee on the Declaration of the Emergency (the parliamentary review committee constituted pursuant to s. 62(1)) can address whether there was, in fact, an emergency as defined by the *Act*. When doing so, it is free to draw negative inferences from the Government's attempts to frustrate the public inquiry. That is appropriate here.

There is no federal jurisdiction under s. 91 of the *Constitution Act, 1867* to address a crisis unless it exceeds the capacities of the provinces to deal with it effectively.[1] Accordingly, the *Act* requires the existence of a 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, and that cannot be effectively dealt with under any other law of Canada.[2] For any declaration of a public order emergency to have a lawful basis, that emergency must also arise from threats to the security of Canada, which in this instance means threats or use "of acts of serious violence against persons or property". This requirement excludes "lawful advocacy, protest or dissent" unless carried on in conjunction with threats or acts of serious violence.[3]

The evidence that demonstrated that the crisis did not satisfy either of these statutory and constitutional thresholds is extensive. That said, owing to the deferential standard the inquiry must apply, it is possible that the Final Report of the Rouleau Commission may conclude that it is impossible to determine with the requisite certainty whether the Government had a reasonable basis to conclude that a public order emergency existed. However, this does not preclude a finding by the Special Joint Committee

1 *Reference re: Anti-Inflation Act*, [1976] 2 S.C.R. 373.
2 *Emergencies Act,* R.S.C., 1985, c 22, s. 3.
3 *Ibid.,* s. 16; *Canadian Security Intelligence Service Act*, R.S.C., 1985, c C-2, s. 2.

that the declaration had no lawful basis, as it is not required to give the Government the benefit of the doubt; doing so would be highly inappropriate given the Government's attempts to frustrate the purpose of the public inquiry. Indeed, as this Committee is not merely a creation of statute but an organ of parliamentary oversight and responsible government, it is essential that a more stringent standard of proof be applied, one which places the onus on the Government to prove that the decision to expand its own powers at the expense of both Parliament and the provinces was lawful and constitutional.

The Special Joint Committee should note that rather than attempting to bear any burden of proof, the Government took every opportunity to thwart the public inquiry's attempts to evaluate the legal basis of the Cabinet's decisions. Numerous witnesses' testimony established that the Cabinet had relied upon a definition of a public order emergency that diverged from the restrictive legal standards established by s. 16 of the *Act,* which incorporates by reference s. 2 of the *Canadian Security and Intelligence Service Act*. This testimony, underlying documents, and the final submissions of the Government demonstrates that the Cabinet relied instead on a novel and excessively broad interpretation when it concluded it had a lawful basis for the Declaration.[4] This redefinition was the product of an untenable interpretation of the *Act* that includes economic harm as an alternative basis for establishing that a public order emergency existed, despite the fact that this is not a lawful basis, even cumulatively, for a public order emergency. The Government's novel arguments that the Cabinet could reinterpret the *Act* in an "evolving manner" to "account for modern events that could not have been anticipated when the statute was passed in the 1980s"[5] are directly contrary to the Supreme Court of Canada's jurisprudence on how statutes must be interpreted.[6]

4 Closing Submission, at para. 560; available online at: <https://publicorderemergencycommission.ca/files/documents/Closing-Submissions/Government-of-Canada-Closing-Submissions.pdf/>.

5 *Ibid,* at paras. 548-549.

6 *Perka v. The Queen*, [1984] 2 S.C.R. 232.

Lamentably, the public inquiry witnessed the Minister of Justice asserting solicitor-client privilege over any legal advice given by his department to the Cabinet that provided it with a more pliable and amenable "evolving" definition of a public order emergency than the one established by Parliament in the *Act*. Additionally, the Minister of Justice would not comment on the testimony from the National Security Advisor and the Deputy Clerk of the Privy Council that the statutory standard had been updated or interpreted in an evolved or holistic manner.[7] In particular, he declined to answer questions about whether fresh legal advice that applied a novel standard was the reason why the Director of the Canadian Security Intelligence Service ("CSIS") changed his mind about whether the crisis met the legal standard on the very day that the declaration of the emergency was issued.[8]

Prior to this eleventh-hour redefinition of the *Act*, the opinion of the Director of CSIS that there was no public order emergency had been shared by the Commissioner of the Royal Canadian Mounted Police and the head of the Ontario Provincial Police's Intelligence Bureau. Indeed, Supt. Pat Morris (who coordinated the on-the-ground intelligence work during the protests) testified that at no point during the convoy protest did he receive any reliable intelligence that would lead him to conclude that there was a risk to national security and that his counterparts at the RCMP and CSIS had concurred.[9]

The impasse created by the assertion of solicitor-client privilege by the Government over the central issue of the public inquiry was best summarized by Commissioner Paul Rouleau in his last exchange with the Minister of Justice:

> **Commissioner Paul Rouleau:** I may get into trouble [i.e., by asking questions that impinge on solicitor-client privilege] here, so – but it's – your counsel can weigh in if need be. But I'm just trying to understand, the job that the Commission is to do is to look at the decision by Cabinet, and as was mentioned by Commission Counsel, there's an issue of the

7 Testimony of David Lametti, Public Hearing of the Public Order Emergency Commission, vol. 29, at p. 94.
8 *Ibid.,* 116-17.
9 POEC Transcript, vol. 5, p. 297, ll. 7-12.

> reasonableness of it. And I'm having a little trouble, and I don't know if you can help me, is how we assess reasonableness when we don't know what they were acting on. And do so just presume they were acting in good faith without knowing the basis or structure within which they made that decision? And you know of what I speak . . . . what was the belief of those who made the decision as to what the law was? And I guess the answer is we just assume they acted in good faith in application of whatever they were told. Is that sort of what you're saying?
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> **Minister David Lametti:** I think that's fair.[10]

This dialogue, the pivotal moment of the hearings at the public inquiry, is troubling. It confirms that due to the Government's decision to create a situation where the Commissioner "might get into trouble" owing to solicitor-client privilege, it argues we must "just assume they acted in good faith." Thankfully, the Special Joint Committee is not required to assess the necessarily deferential question of the reasonableness of the declaration, nor must it defer from drawing negative inferences from the Government's decision to frustrate the purpose of another mechanism designed to hold it accountable.

Conclusion

Governmental accountability is the *raison d'être* of both the parliamentary and public inquiries into a declaration of emergency. The Commission has noted that "The starting point for the Commission is to inquire into the reasons why the Government declared a public order emergency. It is the Government that deemed it necessary to invoke the *Emergencies Act;* thus it is the Government that must explain its decision to do so." As the principal author of the *Act* has emphasized, "wherever you have extraordinary powers, there must be extraordinary accountability."[11] The Committee's report should hold the Government accountable for invoking its extraordinary powers in the absence of any legal or constitutional authority to do so, and for disguising this fact to evade responsibility.

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10 *Id.* at pp. 176-77.

11 Perrin Beatty, quoted in Laura Osman, "'Trust us' isn't enough to win confidence in Emergencies Act inquiry: law's author", CTV News, available at: <https://www.ctvnews.ca/politics/trust-us-isn-t-enough-to-win-confidence-in-emergencies-act-inquiry-law-s-author-1.5893810>.