

# Public Order Emergency Commission

Established by P.C.2022-392

On April 25, 2022

Under section 63(1) of the *Emergencies Act*

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## WRITTEN SUBMISSION of the Government of Manitoba

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### **I. Introduction**

1. The *Emergencies Act* is extraordinary legislation. It entails the authorization of "special temporary measures" during "national emergencies" that "may not be appropriate in normal times". It directly contemplates a marked departure from our legal and democratic norms. Prior to the events of February 2022, it had never been implemented. The use of this extraordinary and powerful legislation requires exacting scrutiny, given the inherent potential for significant state overreach.
2. It is the Government of Manitoba's position that the consultation that occurred prior to the declaration of a public order emergency in February 2022 - as statutorily required by section 25 of the *Emergencies Act* - was inadequate and defective.
3. It is further the Government of Manitoba's position that the high legal threshold for the declaration of a "public order emergency", as set out in section 17(1) the *Emergencies Act*, was not met.

## II. Emergency Measures Legislation Generally

4. Manitoba has enacted legislation designed to address situations of emergency<sup>1</sup>. Most other Canadian provinces and territories have enacted equivalent legislation. This legislation is relied upon and invoked by provincial and territorial governments when they are faced with localized situations of emergency, or province-wide situations of emergency. Most commonly, these are natural disasters, but the COVID-19 pandemic is another example of its possible use.
5. Canada has federal emergency measures legislation as well (historically, the *War Measures Act* which was passed by Parliament in 1914, and more recently, the *Emergencies Act*, R.S.C. 1985, c. 22, which was enacted in 1998 and replaced the *War Measures Act*). This legislation grants federal Cabinet the ability to take extraordinary temporary measures that may not be appropriate in “normal” times.
6. Historically, Canada’s emergency measures legislation has only been invoked on four (4) occasions:
  - a. During World War I, when it was invoked to arrest and detain Canadians of Ukrainian, German and Slavic descent who were considered “enemy aliens”.
  - b. During World War II, when it was invoked to address perceived threats from various groups of “enemy aliens” by permitting the arrest, internment, deportment and seizure of property of Canadians of Japanese, Italian and German descent.
  - c. During the October Crisis in 1970, when it was invoked and led to arrest and detention of more than 450 people in Quebec whom the government believed may have been part of an “armed insurrection”.

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<sup>1</sup> *The Emergency Measures Act*, C.C.S.M. c. E80

d. In February 2022, when it was invoked in response to anti-government protests, blockades and occupations formed in Ottawa and various other locales to object to public health restrictions imposed as a result of the COVID-19 health pandemic (commonly referred to as the “Freedom Convoy”).

7. The Government of Manitoba (“Manitoba”) submits that the Commission should understand the scope of Canada’s *Emergencies Act* in the context of its place within the constitutional division of powers and cooperative federalism. As all provinces and territories have the ability to invoke their own legislation to address situations of emergency within their own territory, Canada should only invoke the *Emergencies Act* exceptionally when, after meaningful consultation, it is clear and apparent that a coordinated provincial/territorial response cannot deal with the emergency, and thus the invocation of the national statute is properly warranted.
8. Notably, apart from instances of war or international emergency, the *Emergencies Act* itself is premised on the existence of a “national emergency”. That is, the Act only applies when an urgent and critical situation poses a serious danger to life, 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 otherwise threatens the sovereignty, security or territorial integrity of Canada<sup>2</sup>. Inherently, the Act respects provincial autonomy to address crises occurring within a province. The *Emergencies Act* is to be invoked only as a last resort.

### III. Circumstances in Manitoba When the *Emergencies Act* was Invoked

9. In January 2022, the Freedom Convoy passed through Winnipeg on its way to Ottawa. At that time, there was speculation that the convoy might situate itself around the Manitoba legislature; however that situation never materialized.

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<sup>2</sup> *Emergencies Act*, R.S.C. 1985, c. 22 (4<sup>th</sup> Supp.), section 3.

10. Shortly after the Freedom Convoy reached Ottawa on January 29, 2022, Manitoba saw two areas within the Province become focal points for protests: (i) in downtown Winnipeg, near the provincial Legislature; and (ii) at the Emerson border crossing.
11. There was initially some concern that disruption might occur at the Winnipeg Richardson International Airport; however again, that situation never materialized. Both the RCMP (which has jurisdiction over the airport) and the Winnipeg Police Service (which is responsible for the streets surrounding the airport) were aware of the potential for such activity, and were monitoring the area closely.<sup>3</sup>
12. The Institutional Report submitted by Manitoba<sup>4</sup> provides details of the protest activity that was occurring in downtown Winnipeg and at the Emerson border crossing in January and February 2022. In summary:
  - a. The protests which occurred in downtown Winnipeg, near the provincial Legislature, were largely contained to a side street - Memorial Boulevard - which is not a main thoroughfare. The Winnipeg Police Service appeared to have good communication with protestors; they were able to successfully negotiate with protestors to ensure that main thoroughfares remained accessible at all times, and to ensure that protests were kept off the legislative grounds.
  - b. The activity that occurred at the Emerson border crossing was different than what was seen to be occurring at border crossings in other parts of Canada. While the number of vehicles participating in this blockade fluctuated, there were generally only about twenty (20) vehicles participating at any given time, and at its peak, the RCMP estimated that there were approximately 75 vehicles participating<sup>5</sup>. This was in stark contrast to the hundreds of vehicles reported to have been participating in the blockades at the border

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<sup>3</sup> WTS.00000042 (Interview Summary: Manitoba Witness Panel)

<sup>4</sup> MAN.IR.00000001 (Institutional Report of the Government of Manitoba)

<sup>5</sup> MAN00000063 (RCMP Speaking Notes – RCMP Media Scrum, February 16, 2022)

crossings in Windsor, Ontario and Couffts, Alberta. Police in Emerson never raised any concerns about violent elements among the protestors at the Emerson border crossing, and Manitoba government officials received no requests from police in Emerson for more equipment to remove the vehicles.

13. Some industries *did* express concern regarding the blockade at the Emerson border crossing, and were vocal about the need to address it. In particular, some members of the agricultural sector expressed concern that the blockades could impede the safe transportation of livestock across the border, given that severe winter conditions were present in Manitoba at the time. However, these concerns were alleviated locally in various ways. Some agricultural vehicles were permitted to pass through the blockade<sup>6</sup>. In circumstances where vehicles were not permitted to pass through the blockade, police re-routed those vehicles to those other ports of entry situated in close proximity to the Emerson border crossing.<sup>7 8</sup>
14. A minimal degree of violent activity occurred during the protests. On February 5, 2022, a lone male driver who was unconnected to the Freedom Convoy drove his vehicle into three or four protestors near the provincial Legislature. He was subsequently arrested and charged with eleven (11) criminal offences. There was an unconfirmed report of an incident involving a counter-protestor grabbing the sign of a protestor – also at the provincial Legislature. However, on the whole, there was no widespread violence associated with either of the protests in Manitoba. Both the RCMP and the Winnipeg Police Service managed to control each of the two situations effectively by resorting to conventional policing tools, including de-escalation techniques, establishing rapport with protestors, and creating contingency plans.<sup>9</sup>

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<sup>6</sup> MAN0000063, p. 2 (RCMP Speaking Notes – RCMP Media Scrum, February 16, 2022)

<sup>7</sup> WTS.0000042 (Interview Summary; Manitoba Witness Panel)

<sup>8</sup> MAN0000063, p.3 (RCMP Speaking Notes – RCMP Media Scrum, February 16, 2022)

<sup>9</sup> MAN0000042 (Interview Summary; Manitoba Witness Panel)

15. On February 11, 2022, given the protest activity that was occurring in downtown Winnipeg and at the Emerson border crossing, Premier Stefanson sent a letter to Prime Minister Trudeau, asking for *"immediate and effective federal action regarding the blockade activity now unfolding at the Canada-US border crossing at Emerson, Manitoba..."*.<sup>10</sup> Premier Stefanson was not requesting assistance from the Federal Government in regard to law enforcement in Manitoba - the Winnipeg Police Service and the RCMP had the situations in Manitoba well under control. What Premier Stefanson was in fact requesting from the Federal Government was (i) assistance in relaxing federal pandemic measures which were affecting the border and Canada's trade relationship with the United States; and (ii) dialogue with the protestors regarding a timeline for the relaxation of public health restrictions related to the COVID-19 pandemic.<sup>11</sup>
16. Around the same time this letter was sent, Manitoba's Deputy Cabinet Secretary for Strategic Operations and Deputy Minister of Intergovernmental Affairs, Michael Richards ("DM Richards") spoke to Michael Vandergrift, Deputy Minister of Intergovernmental Affairs and Deputy Secretary to the Cabinet (Plans) at the Privy Council Office ("DM Vandergrift"), and reinforced the view expressed in Premier Stefanson's letter that the Federal Government should relax pandemic border measures.<sup>12</sup>
17. The protests associated with the Freedom Convoy occurring in Manitoba in February 2022 were being adequately managed at the provincial level. The Federal Government's decision to invoke the *Emergencies Act*, at least as it related to the situation that was occurring in Manitoba at that time, was unwanted, in that it negatively affected the then-ongoing police operations. It was also unwarranted, in that it was an unnecessary encroachment on provincial powers,

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<sup>10</sup> MAN00000040 (Letter from Premier Stefanson to Prime Minister Trudeau, February 11, 2022)

<sup>11</sup> MAN00000042 (Interview Summary: Manitoba Witness Panel)

<sup>12</sup> MAN00000042 (Interview Summary: Manitoba Witness Panel)

which were entirely sufficient to manage the two localized situations that were occurring in Manitoba.

#### **IV. The Duty to Consult under Section 25 of the *Emergencies Act***

18. The *Emergencies Act* contains stringent safeguards to ensure democratic oversight and accountability with respect to the way the Federal Government exercises its power under the *Act*. Among other things, this includes the requirement that the lieutenant governor in council for each province and territory in which the effects of the emergency occur be consulted before any declaration of a public order emergency is issued. Section 25 of the *Emergencies Act* clearly states:

##### **Consultation**

**25 (1)** Subject to subsections (2) and (3), before the Governor in Council issues, continues or amends a declaration of a public order emergency, the lieutenant governor in council of each province in which the effects of the emergency occur shall be consulted with respect to the proposed action.

##### **Idem**

**(2)** Where the effects of a public order emergency extend to more than one province and the Governor in Council is of the opinion that the lieutenant governor in council of a province in which the effects of the emergency occur cannot, before the issue or amendment of a declaration of a public order emergency, be adequately consulted without unduly jeopardizing the effectiveness of the proposed action, the lieutenant governor in council of that province may be consulted with respect to the action after the declaration is issued or amended and before the motion for confirmation of the declaration or amendment is laid before either House of Parliament.

##### **Indication**

**(3)** The Governor in Council may not issue a declaration of a public order emergency where the effects of the emergency are confined to one province, unless the lieutenant governor in council of the province has indicated to the Governor in Council that the emergency exceeds the capacity or authority of the province to deal with it.



19. There is nothing permissive or discretionary about the requirement for consultation with the lieutenant governor in council of each affected province, prior to a declaration being made. The language expressed in section 25(1) is of a mandatory nature.
20. Section 25(2) addresses dispensing with the otherwise operative consultation requirement in highly limited circumstances, where this would unduly jeopardize the effectiveness of the action being taken. The specific language is “cannot ... be *adequately consulted*”. Section 25(3) addresses a declaration where its effects are confined to one province. In that scenario, a declaration “may not” be made “unless” the province indicates that the emergency exceeds its capacity or authority to deal with it (reflecting part of the legal threshold set out in section 3 (a) of the Act). Adequate consultation must yield provincial acknowledgment of – and concurrence with – this essential condition.
21. The consultation must be legally meaningful and adequate. By way of example, in April 2020, when the Federal Government was considering whether to invoke the *Emergencies Act* in response to the COVID-19 pandemic, its consultation with provincial and territorial governments was extensive. It lasted for several weeks. And ultimately, following this consultation process, the Federal Government made the decision *not* to invoke the *Emergencies Act* - in part because the Premiers had advised at the time that it was not necessary.<sup>13</sup>

#### V. Consultation and Invocation of the *Emergencies Act* in February 2022

22. Late on the evening of Sunday, February 13, 2022, DM Richards received an invitation for Premier Stefanson to participate in a virtual First Ministers’ Meeting (“FMM”) being called by Prime Minister Justin Trudeau the following morning. No

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<sup>13</sup> MAN00000053 (Government of Manitoba Notes of February 14, 2022 First Ministers’ Meeting)

agenda was provided, nor was any indication given of the intended subject matter.<sup>14</sup> There was no indication given that the *Emergencies Act* was under consideration.

23. By early morning, and prior to the commencement of the FMM, national media reports were circulating, citing government sources, and suggesting that the *Emergencies Act* could be invoked.<sup>15</sup>
24. Premier Stefanson attended the FMM, along with DM Richards. It was during that meeting that Prime Minister Trudeau advised the Premiers formally, for the first time, that the Federal Government was considering invoking the *Emergencies Act*.
25. For Manitoba's representatives, it was clear at this meeting that the Federal Government's deliberation regarding the invocation of the *Emergencies Act* were being driven by the situation that was occurring in downtown Ottawa. By that time, the blockade at the Windsor, Ontario border crossing was well on its way to being resolved, as were blockades in other provinces, including Manitoba.
26. A number of Premiers indicated that they had appropriate tools in place to respond to the situations in their jurisdictions, and that they did not believe the *Emergencies Act* should be applied in their provinces. Several Premiers expressed concern that its invocation could potentially inflame the situation, and encouraged a narrow application of the *Emergencies Act*, to be confined to those provinces and/or territories that wanted it to apply.
27. Manitoba's Premier Stefanson stated unequivocally that the use of the *Emergencies Act* was not required – and should not occur – with respect to Manitoba. Premier Stefanson noted that Manitoba had appropriate tools in place to respond to the protest activity that was occurring within Manitoba, and once

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<sup>14</sup> MAN00000048 (Email from M. Vandergrift, PCO February 13, 2022 at 9:46 p.m.)

<sup>15</sup> MAN00000042 (Interview Summary: Manitoba Witness Panel)

again called upon the Federal Government to lay out a plan to reduce public health restrictions associated with the COVID-19 pandemic.<sup>16</sup>

28. Following the First Ministers' Meeting on the morning of February 14, 2022, Premier Stefanson issued a public statement opposing the implementation of the *Emergencies Act*.<sup>17</sup> Concurrently, DM Richards sent an email to DM Vandergrift noting that there was reasonable confidence that a negotiated resolution of the situation at Emerson was imminent, that the encampment at the Emerson border crossing was in the process of being cleared out that day, and that the federal musings about the possible invocation of the *Emergencies Act* had negatively impacted this momentum, at least initially. DM Richards further noted that the invocation of the *Emergencies Act* would not provide additional tools to local RCMP at the Emerson border crossing; rather, to the contrary, he stated that "*they are a hindrance; are not welcomed by them, and make all of their operational work and planning more difficult.*" DM Richards reiterated Manitoba's position that the *Emergencies Act*, if invoked, should not apply to Manitoba.<sup>18</sup>
29. Following Premier Stefanson's public statement opposing the invocation of the *Emergencies Act*, Prime Minister Justin Trudeau confirmed, during a press conference later that afternoon, that the *Emergencies Act* was in fact being invoked across the country. The Governor in Council subsequently made its proclamation declaring a Public Order Emergency (SOR/2022-20) under Part II of the *Emergencies Act*.

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<sup>16</sup> MAN00000053 (Government of Manitoba Notes of February 14, 2022 First Ministers' Meeting)

<sup>17</sup> MAN00000006 (Statement from Premier Stefanson on Potential Use of the Federal *Emergencies Act*, February 14, 2022)

<sup>18</sup> MAN00000052 (Email from M. Richards to M. Vandergrift, PCO, February 14, 2022 at 3:18 p.m.)

## VI. The Consultation was Wholly Inadequate

30. The FMM that occurred on February 14, 2022 was the one and only “consultation” with Manitoba prior to the Prime Minister’s announcement that the *Emergencies Act* was being invoked. This consultation was neither meaningful nor adequate.
31. The very short notice of the FMM, the absence of an agenda, and the duration and superficiality of the consultation are beyond dispute. In sharp contrast to the federal processes detailed in the record – which revealed that potential use of the *Emergencies Act* arose as an option early on, as the protests developed – Premiers were provided with no opportunity for advance consideration or briefing. The record further reflects that, *prior to the FMM*, invocation of the *Emergencies Act* had already been considered and endorsed by the federal Cabinet, the government caucus had already been briefed on its use, and national media reports were circulating about pending invocation.
32. Manitoba recognizes that the nature of a particular crisis and true public order emergency could conceivably be such that consultation might be compressed. But that was manifestly not the case here, especially in Manitoba. This “consultation” with Premiers was legally meaningless; a mere formality.
33. Manitoba urges the Commission to make a determination that the brief virtual FMM that occurred on the morning of February 14, 2022, just hours before the *Emergencies Act* was invoked, did not meet the requirement under Section 25 of the *Emergencies Act* for legally meaningful and adequate consultation.

## VII. The Factual Circumstances Present in Manitoba in February 2022 Did Not Meet the Legal Threshold for the Declaration of a Public Order Emergency.

34. The necessarily high legal threshold for the declaration of a “public order emergency” reflects the intertwined definition of a “public order emergency” set out in section 16 of the *Act*: a “threat to the security of Canada” so serious as to meet

the stringent definition of a “national emergency”, as set out in section 3. For further clarity, the *Act* confirms that a “threat to the security of Canada” has the meaning set out in the *Canadian Security Intelligence Service Act*. The language in Part II of the *Emergencies Act* is clear and unambiguous. It admits no reasonable room for (undisclosed), expanded statutory interpretation.

35. Distilled, then, a “threat to the security of Canada” must involve (i) espionage or sabotage against Canada or its interests; (ii) foreign influenced activities detrimental to the interests of Canada and that are clandestine or deceptive; (iii) activities directed toward the threat or use of serious acts of violence to achieve a political or ideological objective; or (iv) activities directed toward undermining by covert unlawful acts, intended to lead to the destruction or overthrow by violence, the constitutionally established system of government in Canada.
36. Again, these things must also be so serious as to meet the definition of a “national emergency”. So they must both “seriously” threaten the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada, *and* be such that they cannot be dealt with under any other law of Canada.
37. None of the relatively isolated protest and blockade activities occurring within Manitoba in February 2022 fell within this exceedingly high legal threshold. Based on the advice of the Manitoba RCMP – which operates under contract as a provincial police force but nonetheless liaises and works with the RCMP’s national headquarters – Manitoba was not aware of any “threats to the security of Canada” in Manitoba. Both the Manitoba RCMP and the Winnipeg Police Service, at all times, advised Manitoba Justice officials that they had all of the law enforcement tools – under existing laws – that they required in order to effectively deal with these situations. The demonstrations that were occurring did not even require the engagement of joint police operations, much less any rational consideration of extraordinary emergency powers.

38. The considered and consistent views of these Manitoba law enforcement agencies were of course fully borne out as they effectively and peacefully resolved all protest and blockade activities within Manitoba, using existing federal and provincial laws and their standard tactical approaches. There was thus never any question of the province's capacity or authority to address the situations that were emerging.

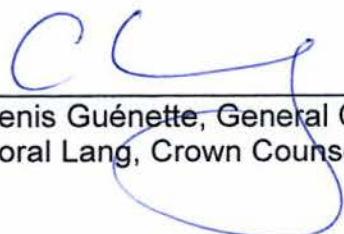
#### VIII. Conclusion

39. It would be difficult to characterize the circumstances occurring in Manitoba in February 2022 as an emergency, let alone a national emergency beyond the capacity of Manitoba to address. The necessarily high legal threshold for the declaration of a national "public order emergency" – with application across the entire country – was simply not met. There were no reasonable grounds for believing that a Public Order Emergency existed in Manitoba that necessitated a declaration – over the express objections of Manitoba – under section 17(1) of the *Emergencies Act*.

40. Had Manitoba felt it necessary to implement emergency measures to address the February 2022 circumstances in downtown Winnipeg, or at the Emerson border crossing, it certainly could have done so, relying upon its own emergency measures legislation. It did not do so. The fact that both protests were wound down with the standard de-escalation techniques that were deployed only reinforces the conclusion that the factual basis for an invocation of the *Emergencies Act* with application to Manitoba was completely lacking.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 9, 2022

  
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