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Party Paper:  
Four Proposals for Legislative Amendments  
to the *Emergencies Act*

Prepared by: Ryan Alford

Submitting Party: Canadian Constitution Foundation & Professor  
Ryan Alford

## Note to Reader

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Policy Paper for the Public Order Emergency Commission:  
Four Proposals for Legislative Amendment of the *Emergencies Act*

**Executive Summary:**

The declaration of a public order emergency without an obvious basis for that invocation demonstrates why holding the Government responsible for any misuse of these sweeping, self-delegated powers is essential. Accordingly, the Commission's policy mandate can best be served by proposing amendments to the *Emergencies Act* that ensure that the Government cannot merely insist that Canadians trust their assertions about the propriety of employing what would otherwise be grossly extra-constitutional measures. The best method of preventing any future abuse of emergency powers is to prevent governments from being permitted to rely upon bald and conclusory assertions to the bodies that are explicitly charged with holding them accountable: the Parliamentary Review Committee and the Commission of Inquiry specified in sections 62 and 63 of the *Emergencies Act*, respectively.

For these bodies to hold the Government accountable, they must have sufficient powers to compel the government to justify its assertion that a real threat to national security existed, and that this threat was of a nature and scope that meets the statutory (and constitutional) preconditions for a declaration of an emergency. They must also be specifically charged with focusing on the central question: Whether the government had a reasonable basis for doing what would otherwise be squarely contrary to the rule of law. Four amendments of the *Emergencies Act* are necessary to safeguard their charge and power to hold the Government accountable for the use of its most extraordinary powers:

- The Chair of the Parliamentary Review Committee shall be from the Official Opposition.
- The Commissioner of the public inquiry into the declaration of the emergency shall be appointed on the unanimous recommendation of all the members of the Parliamentary Review Committee.

- The mandate of the Commission shall explicitly include whether the government had a reasonable basis for concluding that the specified threat to national security (or territorial integrity) existed, and that it was of a nature and scope that satisfies all the requirements of the *Emergencies Act*.
- The Commission and its parties shall be explicitly empowered to seek expedited review at the Federal Court of Appeal of any of the Attorney-General's certificates asserting national security confidentiality as a basis for overruling the Commission's rulings requiring disclosure.

### **A Parliamentary Review Committee Must be Chaired in the Manner of an Oversight Committee**

In the Westminster system, the Chairs of parliamentary committees charged with governmental oversight are members of the Official Opposition. The model for this practice is the Public Accounts Committee of the House of Commons of the United Kingdom; in Canada, this convention was adopted when a committee with the same mandate was established in 1958. This was extended to three other standing committees (and one standing joint committee) with oversight responsibilities, namely the Standing Committee on Access to Information, Privacy and Ethics, the Standing Committee on Government Operations and Estimates, the Standing Committee on the Status of Women, and the Standing Joint Committee on the Scrutiny of Regulations. This practice is memorialized in the Standing Orders of the House of Commons.<sup>1</sup>

These special rules pertaining to the chairing of oversight committees are necessary because of the tension between the key responsibilities of committee chairs who are members of the governing party. They are charged with ensuring that committee proceedings are orderly and fair, in the same manner as the Speaker of the House of Commons; however, as C.E.S. Franks noted in his classic treatise *The Parliament of Canada*, these chairs also "had a function of protecting the government's interests when these were under

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<sup>1</sup> Standing Orders of the House of Commons, Consolidated s. 106(2), available online: <https://www.ourcommons.ca/procedure/standing-orders/Chap13-e.html#SO106>

attack".<sup>2</sup> Unlike the Speaker, committee chairs from the governing party are elected on party-line votes, which invariably select "members who enjoy the party leadership's confidence."<sup>3</sup> Another difference between speakers and committee chairs is that while the Speaker abstains from all partisan activity (including participating in debate and attending caucus meetings), committee chairs normally attend national caucus meetings and parliamentary party meetings that have the aim of developing the governing party's strategy for the committee meetings. Accordingly, "given the potential presence of parliamentary secretaries . . . at pre-committee meetings, the blurring of powers, which benefits the executive, is apparent and a problem. The same is true of the impartiality of the office of committee chair."<sup>4</sup>

Conversely, in the oversight committees chaired by members of the Official Opposition, committee chairs typically abstain from attending partisan pre-committee meetings. As Pierre-Luc Dusseault (then a member of the Official Opposition and Chair of the Standing Committee on Access to Information, Privacy, and Ethics) reasoned in 2014: "if a chair assists in implementing a party's strategy, discusses with members of his caucus . . . and is instructed of government instructions for government party chairs, the impartiality of the position, the credibility of the chair among its members may be undermined. Although this kind of dynamic is not very serious in the course of routine proceedings, the situation may be quite different if a tough decision has to be rendered."<sup>5</sup>

It is difficult to imagine a tougher decision than whether to find that the Government abused its ability to invoke emergency powers, or indeed that it manufactured a threat to national security in order to crack down on a protest movement. Accordingly, it is lamentable that a majority of members of the Special Joint Committee on the Declaration of the Emergency excluded the Official Opposition from its proposed chairs. The rejection by the party that forms the Government of the convention for oversight

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2 C.E.S. Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987), 164.

3 Alexis Dubois, House of Commons Committee Chairs: Perspectives of Two Members of Parliament, 2014 37-1 Canadian Parliamentary Review 26, 30.

4 *Ibid.*

5 *Id.* at 31.

committees was troubling, especially as the Government House leader publicly stated that the Official Opposition "should not be involved in the leadership of the committee since several [of its members] expressed support for the protesters." As a result, the election of the committee's leadership was determined by a party-line vote in the House of Commons.<sup>6</sup>

The decision to reject the conventions of oversight committees in favour of so-called neutral chairing was further complicated by the subsequent agreement of confidence and supply between the party forming the Government and the party to which one of the co-chairs of the Parliamentary Review Committee belongs. It should be noted that this agreement was specifically predicated upon the support of that party (now no longer in opposition *de facto*) for the Government's agenda at committees. As it was reported at the time, "They [the New Democratic Party] have also struck a deal to control parliamentary committees to block the Conservatives and Bloc Quebecois from launching inquiries that are uncomfortable for the Trudeau minority government."<sup>7</sup>

This arrangement does not bode well for public confidence in neutral process at this crucial oversight body, especially when the co-chair from the party now supporting the government states his intention to deviate from the statutorily defined mandate of the Parliamentary Review Committee, in order to direct its focus to issues that align with the Government's agenda (such as the need to regulate social media) and away from the fundamental question of whether the government had a reasonable basis to conclude that the statutory thresholds of the *Emergencies Act* were met.<sup>8</sup> Simply put, without the conventions of an oversight committee, a Parliamentary Review Committee will always be at risk of being deterred from fulfilling its statutory function of ensuring that the Government is held accountable.

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6 Aaron Wherry, "The Committee reviewing Trudeau's use of the Emergencies Act faces a daunting task", CBC News, 06 Mar 2022, available at: <<https://www.cbc.ca/news/politics/emergencies-act-trudeau-vaccine-protest-convoy-ottawa-1.6373636>>.

7 Globe & Mail Staff, "What the Liberal-NDP power-sharing deal means for dental care, pharmacare and other key issues" *The Globe and Mail*, 22 Mar 2022, available at: <<https://www.theglobeandmail.com/canada/article-liberals-ndp-deal-agreement-confidence-and-supply/>>

8 Wherry, *supra* n. 6.

**The Commissioner Should not be Appointed by the Government Without the Consent of the PRC**

The Commission of Inquiry required by Section 63 of the *Emergencies Act* is as essential to ensuring that the Government will remain accountable for the momentous decision to enlarge its powers on its own initiative as the Parliamentary Review Committee. Unfortunately, while that section describes the mechanics for establishing an inquiry (namely, by Order-in-Council) it does not establish a procedure for the nomination of the Commissioner. In keeping with the *Inquiries Act*, which governs whenever a public inquiry is not regulated by any special law, the Governor-in-Council (in practice, the Government) may simply appoint persons it deems fit.<sup>9</sup> Accordingly, the *Emergencies Act* should be amended to regulate the inquiry in the manner contemplated by section 2 of the *Inquiries Act*. These amendments should remove the power of nomination from the Government and place it into the hands of the Parliamentary Review Committee.

Allowing the Government to appoint the head of the Commission charged with determining whether it has perpetrated a gross abuse of power violates a key principle of natural justice, which is that no one should be empowered to select the judge of their own cause. While it is unlikely that a Commissioner would favour the Government's interests, when considering the issue of the reasonable apprehension of bias, "not only should justice be done, but should manifestly and undoubtedly be seen to be done."<sup>10</sup> Despite the strong presumption of impartiality that applies to judges (including those that serve as Commissioners), it is inevitable that they will themselves be judged against stringent standards for bias in the court of public opinion.

In the event of a finding by the Commission that the government behaved entirely appropriately when declaring an emergency and in using the emergency powers it assumed, the danger inherent in the Government's power of appointment will manifest. It is this situation that is most likely to catalyze

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<sup>9</sup> *Inquiries Act*, R.S., c. I-13, s. 1.

<sup>10</sup> *R. v. Sussex Judges; ex parte McCarthy* 1924 1 K.B. 256 per Lord Hewart at p.259.

uncharitable criticism, such that the inquiry was a "whitewash". This is an allegation that is now so common that it is entirely predictable. The effect of this rhetoric is likely to be amplified by renewed criticism of earlier decisions that may indeed be wholly correct, but which might acquire a more sinister aspect after the fact. These decisions might include a decision not to grant standing to the political party being tainted by association with the target of those disputed emergency powers, for example.

Unfortunately, in this situation, those of a conspiratorial frame of mind also frequently turn their attention to the identity of the Commissioner. This is the most unhelpful and unproductive focus of discussion imaginable in these circumstances, but it is entirely predictable (on the basis of innumerable other controversies related to judicial and quasi-judicial decision-making) that irresponsible and ill-founded claims will be made about political and financial ties between the decision-maker and the party that allegedly controlled his or her appointment.

Indeed, with respect to the Public Order Emergency Commission, claims of this nature have already been made,<sup>11</sup> and they have been amplified by commentators with considerable reach on social media.<sup>12</sup> Should the Commissioner of the public inquiry called for by s. 63 of the *Act* be appointed on the unanimous recommendation of the members of the Parliamentary Review Committee, it is unlikely that allegations of this nature would obtain any traction. Accordingly, in order to maintain the necessary perception of neutrality and governmental accountability it is advisable to recommend that the effective power to nominate the Commissioner of any future inquiry under the *Emergencies Act* should be transferred

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11 Kean Bexte, "EXCLUSIVE: Trudeau appoints Liberal donor judge to review use of Emergencies Act" *The Countersignal*, 25 Apr. 2022, available at: <<https://thecountersignal.com/trudeau-appoints-liberal-donor-judge-to-review-use-of-emergencies-act/>>.

12 Norman Spector, "No mention of Paul Rouleau's past as a Liberal Government staffer and Party contributor #cdnpoli #justinjournalism", Twitter, 26 Apr. 2022, available at: <<https://twitter.com/nspector4/status/1518925357893758976>>. These narratives can spread quickly to the mainstream press: in the *Toronto Sun*, columnist Brian Lilley labelled the Commissioner a "former top Liberal political staffer . . . [who] must resist the temptation to look the other way for his old political friends, and he must push back when the government attempts to invoke cabinet confidence or claim national security for keeping information secret." Brian Lilley, "Don't use inquiry to sweep Emergencies Act failings under rug", *Toronto Sun*, 25 Apr. 2022, available at: <<https://torontosun.com/opinion/columnists/lilley-trudeaus-inquiry-cant-be-used-to-sweep-emergencies-act-failings-under-the-carpet>>.



from the Government to the Joint Select Committee on the Declaration of Emergency; section 63 should be amended to that end.

### **The Mandate of the Public Inquiry Should be Clarified and Limited by the *Emergencies Act***

The *Emergencies Act* establishes that the inquiry must address "the circumstances into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency." This initially appears both vague and open-ended. However, given the context of the *Act*, and its framers' desire to connect the powers delegated to the Government to a set of carefully defined and limited categories of crises (as opposed to the open-ended and problematic approach embodied in the *War Measures Act*), the Commission was undoubtedly correct to specify its mandate in a manner that served to highlight the primary purpose of holding the Government accountable.

In its *Notice* of June 1, 2022, the Public Order Emergency Commission stated its intention to "examine and *assess* the basis for the Government's decision to declare a public order emergency, the circumstances that led to the declaration, and the appropriateness and effectiveness of the measures selected by the government to deal with the then-existing situation."<sup>13</sup> The emphasis of the Commission's most vital task—the assessment of whether the Government had a reasonable basis to conclude whether the statutory requirements of declaring an emergency had been met—compares favourably to the Government's attempt to redefine the purpose and direction of the inquiry.

The directions to the Commission in the Order-in-Council omit any reference, however oblique, to governmental accountability for the declaration in the event that it had no legal basis. Instead, the Government's directions endeavour to steer the inquiry towards topics that resonate with the most

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<sup>13</sup> Public Order Emergency Commission, "Notice to Interested Parties Regarding the Public Order Emergency Commission", 1 Jun 2022, at 1 (emphasis added), available at: <<https://publicorderemergencycommission.ca/files/documents/Notice-June-1-2022.pdf>>.

contentious elements of its legislative agenda, such as "the impact, role and sources of misinformation and disinformation, including the use of social media."<sup>14</sup>

In order to fulfill its oversight and accountability functions, any Commission convened pursuant to s. 63 of the *Act* will need to cleave to its own understanding of its statutory mandate, and ignore attempts to the government to transform an inquiry into the propriety of the invocation of the *Act* into an inquisition targeting that which it suppressed. While the Commission's public statements to date are cause for optimism, there is no guarantee that governments declaring emergencies in the future might not succeed in blurring the focus on governmental accountability within the the mandate of another public inquiry by means of irrelevant directions in the Order-in-Council. Accordingly, section 63 (1) of the *Act* should be amended so as to cause an inquiry to be held into whether the government had a reasonable basis for concluding that a threat of the specified type existed, such that public inquiries cannot be perverted into yet another chance for governments to vilify those who had been subjected to extraordinary and possibly extraconstitutional measures

#### Challenging Claims of National Security Confidentiality Expeditiously in Federal Court

As the Commission has noted, the very tight timeframe for the completion of the report places a premium on the expeditious production and review of all the evidence related to the Government's decision to invoke the *Act*. The Commission has declared its intention to "review the information the Government possessed and acted on when it decided to declare the emergency."<sup>15</sup> In order to complete this task, "the Government's cooperation will be needed by prioritizing this task and delivering its documentation on a timely basis."<sup>16</sup>

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14 P.C. 2022-392, April 25, 2022.

15 Public Order Emergency Commission, *supra* n. 14, at 8.

16 *Ibid.*, at 9.

The most likely source of delay in the delivery and analysis of the documents that are the most pertinent to the Commission's conclusion about the adequacy of the Government's basis for the *Act's* invocation is the Government's assertion of national security confidentiality ("NSC"). Accordingly, it was prudent for the Commission to state it "expects the Government to take a considered, proportionate and reasonable approach in making assertions of NSC . . . consistent with the public interest in a transparent and thorough review".<sup>17</sup> Unfortunately, the recent history of public inquiries is replete with frustrating and obfuscutory assertions of NSC, a practice which, in the words of Commissioner O'Connor of the *Arar Inquiry*, "promotes public suspicion and cynicism".<sup>18</sup>

Unfortunately, these problematic assertions of NSC are all too common. The leading scholar of Canadian public inquiries has noted that: "The *Arar*, *Iacobucci* and *Air India* Commissions all concluded that the Attorney-General had overclaimed national security confidentiality."<sup>19</sup> Neither the *Emergencies Act* or the Commission's Rules of Practice and Procedure explicitly contemplate what might occur should the Government attempt to trump the Commission's rejection of any unfounded claims of NSC. In particular, the Attorney-General of Canada might respond to such a rejection by issuing a certificate prohibiting the disclosure of evidence.<sup>20</sup>

The text of the *Emergencies Act* is silent on the question of whether a party to the inquiry has the power to seek expedited review of the propriety of such a certificate at the Federal Court of Appeal.<sup>21</sup> However, given the importance of curbing the overclaiming of national security confidentiality, the *Emergencies Act* should be amended to explicitly authorize parties to the inquiry (and, crucially, the

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17 Public Order Emergency Commission, "Rules of Practice and Procedure", 29 Jul 2022, at para. 86.

18 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar: Analysis and Recommendations (2006) at 302 cited in *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 63 (emphasis added).

19 Kent Roach, "'Constitutional Chicken': National Security Confidentiality and Terrorism Prosecutions after R. v. Ahmad", [2011] 54 S.C.L.R. 357, 370 & n. 53.

20 *Canada Evidence Act*, R.S.C., 1985, c. C-5, s. 38.13(1).

21 *Ibid.*, s. 38.131 (1).

Commission itself) to apply for such expedited review of certificates from the Attorney General withholding production or disclosure on this ground.

### **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."<sup>22</sup>

With only four discrete textual amendments to the *Act*, it would become far more likely that governments contemplating the use of emergency powers would know they cannot avoid that standard of accountability. The Parliamentary Review Committee should be chaired by a member of the Official Opposition, as is the case with every other oversight committee; the Commissioner of the public inquiry should be appointed on the unanimous recommendation of the members of that committee; the statutory mandate of the inquiry should be made more explicitly focused on the legal basis of an emergency, such that the Government may not seek to adjust the focus from the propriety of its own conduct to those it subjected to repression; and the Commission and the parties to the inquiry should be explicitly granted the power to seek orders varying any certificates of the Attorney-General overruling the Commission by overclaiming national security confidentiality. The importance of extraordinary governmental accountability for these extraordinary powers demands nothing less.

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<sup>22</sup> 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>>.