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Commissioned Paper:
On Necessity Under the *Emergencies Act*

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On Necessity Under the Emergencies Act
Nomi Claire Lazar

The Public Order Emergency Commission is mandated to assess the appropriateness of the use of the Emergencies Act and of the specific measures used under that Act in the February 2022 convoy crisis, to consider lessons learned, and to suggest possible modernizations of the Act. It serves all these aims to investigate the meaning and functions of the concept of necessity, a key element of the threshold for declaring a Public Order Emergency, and a key test of the justification for specific measures the Governor in Council might undertake in an emergency too. Necessity is inherently ambiguous, and governments may hide from accountability under its cloak. By clarifying – where possible – the sources of this ambiguity, and by suggesting – where possible – tools to limit that ambiguity, this note aims to assist the Commission, Parliament, and the public in assessing the justice of the February 2022 Public Order Emergency, and in navigating key clauses of the legislation going forward, in case of any future use of the Act.

In Part One, I situate the concept of necessity in relationship to emergency. Part Two explains key sources of necessity’s inherent ambiguity, and recommends ways of teasing out clarity, so that a government’s argument that belief in necessity was reasonable is clear to see. Part Three reviews some pertinent Canadian and international jurisprudence, to develop heuristics and guidelines for assessing those claims of necessity.¹

With respect to Public Order Emergencies, necessity makes two key appearances in the Emergencies Act, and this note will address both.

To declare a public order emergency:	To issue emergency measures:
Governor in Council must “believe[], on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency” (section 17(1)).	“the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency” (section 19(1))

This note should not be understood to offer a legal standard. That is a task for the courts. Rather, these heuristics serve a broader aim of public accountability in the spirit of a commitment to the rule of law.² Public accountability is an ongoing process, encompassing the tabling of the Commission’s report with Parliament, and continuing through public debate, into the next election cycle, and for posterity.

1.0 Necessity and Emergency

An emergency is an urgent threat to life, limb, property, or a collective way of life. To be emergent, a threat must arise suddenly, or take a sudden turn for the worse. Natural or human forces may bring about emergencies: wildfires, pandemics, and floods, economic collapse, threats of civil violence, political coup, or war. And commonly, natural and human forces

¹ In developing this note, I benefitted from conversations with Professors Alan Brudner, Geneviève Cartier, David Dyzenhaus, John Ip, Jeff King, and Jocelyn Stacey. I bear sole responsibility for the result.

² On emergency and the rule of law, see David Dyzenhaus, “Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?” *Cardozo Law Review*, 27:5 (2006): 2005-2040; David Dyzenhaus, “The Compulsion of Legality,” in *Emergencies And The Limits Of Legality*, ed. Victor Ramraj (Cambridge: Cambridge University Press, 2009); Oren Gross, “Chaos & Rules: Should Responses to Violent Crises Always be Constitutional?” *Yale Law Journal* 112:5, (2003): 1011-1134; Nomi Clare Lazar, *States of Emergency in Liberal Democracies*. (Cambridge: Cambridge University Press, 2009).

combine to intensify the threat. For example, storm damage may lead to disease; a pandemic may lead to civil unrest or economic collapse.

Not all emergencies are *public* emergencies. A fire in the house up the road is a *public* emergency if the fire department has no capacity to stop it spreading. A heart attack reflects a *public* emergency if hospitals are too overrun to provide ordinarily lifesaving treatment. An emergency becomes *public* when it poses a sudden and urgent threat not just to specific individuals, but to the collectivity, to the public good. This characteristic means that a public emergency may result not only from the threat itself, but also from a sudden failure of state capacity to respond. For example, an earthquake may pose a threat, but becomes a public emergency if damage renders roads impassable for ambulances; a riot may pose a threat, but becomes an emergency only if police lack capacity to restore order.

Evidently, then, an emergent threat is a case of *need*: there is a sudden mismatch between what we urgently need and the public resources that normally satisfy it. Perhaps a threat creates a new, higher *level* of need, which outstrips normal public resources, or a threat may damage public resources, such that they can no longer respond to a regular level of need. Impending floods may create a need for additional labour for sandbagging, and may increase demand on public resources for the provision of emergency shelter, etc. In that case, there is a public emergency. But if a city's flood defences – levees etc - are solid, then the flood may present no public emergency at all: existing resources continue to meet *public needs* for safety and security.³ Thus, one way to understand a public emergency is as a state of collective, urgent need, a *state of necessity*.

Now the concept of necessity has a chequered past in relation to law in constitutional regimes. It was common among the Romans, for example, to cite Publilius Syrus' saying that necessity is a law that justifies itself, or that necessity knows no law.⁴ And this saying and its variants have echoed dangerously down the ages, with leaders sometimes seizing upon the ambiguity in necessity to justify criminal acts like invasion or mass execution. Still, such claims have rarely gone unchallenged.⁵

Where claims that necessity is above the law *have* garnered any sympathy, it has been on the grounds that no system of law can be complete. For, laws are general rules that must apply to distinct and particular circumstances. And while law is just when like cases are treated alike, in circumstances of necessity, it may seem that the normal application of the law may result – in that case - in *injustice*.⁶ This is what Abraham Lincoln meant when he justified the suspension of habeas corpus, during the civil war, by asking rhetorically “Are all the laws but one to go unexecuted and the government itself go to pieces lest that one be violated?”⁷

³ Nomi Claire Lazar, “Political Ethics in the State of Emergency,” in *Handbook of Political Ethics*, eds. Edward Hall and Andrew Sabl (Princeton: Princeton University Press, 2022).

⁴ Publilius Syrus, *Moral Sayings of Publilius Syrus*, Trans Darius Lyman. (Martino Books (1856 /2014).

⁵ See, for example, the discussion of martial law and its aftermath in 1848 Ceylon in Charles Fairman, *The Law of Martial Rule*, 2nd edition. (Chicago: Callaghan & co, 1943), and the discussion of the German Reichstag debate on the 1914 invasion of Belgium in Michael Walzer, *Just and Unjust Wars*. (London: Penguin, 1977), 240.

⁶ In the *Nicomachean Ethics*, Aristotle implied that the point of the law's application, the moment when a judge rules, was the appropriate moment for necessity to come into play. The implication is that people ought to go ahead and break the law in an emergency, then expect mercy from a judge: “[W]hen the law states a general rule, and a case arises under this that is exceptional, then it is right, where the [law's]... generality ...[does not cover] that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and ...aware of the circumstances.” [1137b20–24].

⁷ Abraham Lincoln, *July 4, 1861 Message to Congress*. <https://millercenter.org/the-presidency/presidential-speeches/july-4-1861-july-4th-message-congress>.

But modern emergency law is designed specifically to bring cases of necessity under the purview of law, and to subject action in the name of necessity to both legal and public forms of accountability. This is reflected in the codification of emergency law from the 19th century forward. And that codification has, over time, become more rigorous. Certainly, the Emergencies Act provides an evidently *legal* framework for necessity.

But while necessity can be framed, and thus governed by, law, it cannot be fully specified by rules (such as legislation) set out in advance. There are two reasons for this: ambiguity in specifying what *ends* are necessary, and ambiguities specifying appropriate means. We can understand the source of the first ambiguity if we begin from Cicero's saying in *On the Laws*, that the public good is the supreme law (3.3.7). It would seem to follow that whatever public good dictates what is necessary or needful: it is *necessary*, from this vantage, to secure the public good in a crisis in order to serve the highest law, and thus to take whatever action is necessary to that end is, precisely, necessary. But here is the ambiguity: won't we sometimes disagree on what the public good is, in a crisis, and hence on whether action is necessary?

In normal times, parliamentary democracies deliberate and debate over what conception of the public good to pursue, and which policy means to employ to that end. That is, our form of government normally renders questions of the public good procedural. By means of contestation in the public sphere, by means of the election and appointment of representatives who debate and vote in parliament, by means of investigation through parliamentary committees, and by means of constitutional checks and balances through legislatures and courts, citizens normally decide together, continuously, sometimes ponderously, and always defeasibly, what will constitute the public good. The good in our system of government is, in that sense, the product of right: of right procedure, of the proper functioning of institutions. Those decisions are then set down in law and in our constitution and its case law.

But how is this procedural decision on the public good- and hence what end it is necessary to achieve - to work in cases of urgency? The functioning of parliamentary institutions is notoriously, and sometimes intentionally slow. Our democracies are *deliberative* because they promote the ponderous process of reflection and debate as the best means to make good law. But that same quality, that same feature of slowness that ideally generates thoughtful law and policy on public good and what is necessary to serve it, is no good in a crisis. Slow deliberations on the public good in a situation of public emergency could be catastrophic. This fact prompted the Weimar legal theorist and sometime Nazi apologist Carl Schmitt to cast scorn on parliamentary democracy. This form of government, Schmitt argued can't defend itself against those who want to subvert it. Schmitt famously quipped, in the 4th chapter of *Political Theology*, that liberal democracies were so paralytically reliant on procedure, on right, and on rights that if they were confronted with the question "Christ or Barabbas?" they would "[propose] to adjourn or appoint a commission of investigation" to discuss the matter.⁸ Because of this deliberative slowness, this refusal to decisively recognize and defend the good, Schmitt thought liberal democracies would buckle in the face of threats to their system of government and political way of life. Some minority might demand that the freely elected government, whose policies that minority rejects, be overthrown. And Schmitt thought that such a government, if true to itself, would be paralyzed by procedure and an absolutist conception of rights, and would sit helpless, then die.⁹ That is: Schmitt thought that deliberation over what is necessary to the public good in a crisis would bring action too late, in a liberal democracy that maintained respect for the rule of law.

⁸ Carl Schmitt, *Political Theology*, trans. George Schwab. (Cambridge: MIT Press, 1985), 62

⁹ Carl Schmitt, *Crisis of Parliamentary Democracy*, trans. Ellen Kennedy. (Cambridge: MIT Press, 1985), 36ff.

But the Emergencies Act, is designed to address this challenge. It does not *eliminate* deliberation, debate, and oversight of what is necessary for the public good. The commission of inquiry is called, but *after* the fact, hanging as a warning of future consequences over government in the moment. The Emergencies Act functionally shifts these processes of deliberation forward in time. While deliberation over the public good and what laws, policies and actions might best serve it takes place *in advance* in normal times, the Act allows that sometimes decisions on necessity and the public good must be (defeasibly) made *now*, while remaining subject to deliberation and judgment along the way and after the fact. That is, while the Emergencies Act leaves ambiguous what the public good is, and hence what is necessary to serve that good, it creates a legal framework that allows for a sort of ‘evidence-based working hypothesis’ that gets examined and reexamined over the course of the emergency (by the Parliamentary Review Committee) and afterward (in the Courts, and by the Commission). In this light, any Schmittian claim that the use of emergency power in Canada is dictatorial or reflects sovereign power reflects ignorance of the nature of public accountability, and its place in this legislation. It is for this reason evidently wrong to call the use of the Emergencies Act dictatorial, whether or not, on a given occasion, its use is legal. It is all a question of timing.

In sum, law has always been understood to sometimes require flexibility when its rigid application would be unjust. Urgent necessity is a common ground of calls for flexibility. While some have held necessity *trumps* law, others understand necessity as grounds for distinct legal frameworks, or even legal exceptions, when and only when this would serve the public good. Because the public good is normally worked out through a slow process of deliberation, in our democracies, assessing whether necessity-based flexibility is justified – whether there really is a public good need – in urgent situations poses a problem. Contemporary emergency law, like the Emergencies Act, is designed to optimize flexibility and constraint in such situations, by shifting deliberation around conditions of necessity forward in time. Deliberation on a declaration which may have begun in the public sphere and in Cabinet discussions, resumes in Parliament within hours of a declaration and continues at least through the tabling of the Commission’s report under Emergencies Act Section 63, and more generally, throughout history. This leaves questions of necessity ambiguous, while keeping them legally reviewable. This is how we maintain the rule of law and a commitment to the rule of law project even in a crisis.

So it is the job of this Commission, of Parliament, and of the public at large to weigh the claim of whether the Public Order Emergency and the measures taken were necessary to the public good. This forms part of the legal threshold for the Emergency, but it is a question of political ethics more broadly, too. Even where the use of emergency powers may be, strictly speaking, legal, the question of whether the working hypothesis of the public good was the right one remains live in a democracy. It is thus important that we consider how claims of necessity actually work.

2.0 Necessity’s Ambiguities

What does it mean to claim that an action is *necessary*? At the outset, we should note that there are several, interconnected kinds of necessity. These include practical, technical, biological, moral, and legal necessity, in addition to logical necessity. If you want to drive a car, it is (practically) necessary to have access to a car. And it is (technically) necessary that the car have fuel. And it is (biologically) necessary that you have control of your limbs. It is (morally) necessary that you are not, by taking the excursion, neglecting a critical duty – for example, that you are not taking a pleasant country drive in lieu of providing comfort to your pre-

operative child in hospital. And it is (legally) necessary that you have a license to drive, and that everyone in the car is buckled in.

Each of these claims of necessity expresses not so much a substance as a logical relation. To claim that some fact or action is necessary, is to claim that in its absence, some other thing cannot be, or be achieved. Claims of necessity thus express *conditions*, and necessity claims are conditional claims. Thus necessity itself is not a substantive thing but rather expresses this *relationship of conditionality*. Necessity is a relational concept. This is the source of its inherent ambiguity and why it can be governed by, but cannot be fully specified in, law.

Ultimately, states are entitled both morally and legally, under Article 4 of the *International Covenant on Civil and Political Rights*, to which Canada is a state party - to take measures which temporarily limit or derogate rights and freedoms in a crisis. Indeed, states may perhaps be *obliged* to take such measures because a well-functioning state is a necessary condition for protecting any rights and freedoms at all, along with the security of persons and property. To protect other rights, to protect the nation and its people from threats to territorial integrity (hence self-determination), to protect a way of life, and to protect citizens' well-being en masse, a state and its institutions, when threatened, is entitled and possibly morally obligated to defend itself.¹⁰ Of course, no state can perfectly secure public well-being, but we might say that a state is decent to the extent that it does, and that it is entitled to temporarily derogate rights, when necessitated by an emergency, to the extent that it is decent.

But often, the nested terms of necessity conditionals remain opaque, rendering a government's claims of necessity difficult to assess. A government may declare that "Thing X, taking place, poses a terrible threat to the public good, so these special measures are necessary." But there are several in-between-steps, which such a declaration papers over.

First, a measure's necessity is conditional on the necessity of achieving the end it seeks to assure. That is, measures are only necessary if there *really is* a terrible threat and if it *really* does substantially impact a defensible and accepted conception of the public good. A threat to the state is a threat to the public good if and only if the decent (not perfect) state is a necessary condition for the well-being of people, and if that threat impairs the state's capacity to work to secure the people's well-being. Then, the threat becomes an emergency warranting rights derogations – that is, a declaration of emergency and emergency measures only become *necessary* - if and only if the usual mechanisms (which may include everyday rights *limitations*) are insufficient to confront the threat.

For example, if a state claims it is necessary to restore the free flow of goods across the border, evidently, this is not because the free flow of goods across a border is a good-in-itself. Rather that flow is necessary so *that* supply chains will not be interrupted, and so *that* good trade relations can be maintained with trading partners. And supply chains and good trade relations are necessary so *that* factories and businesses can operate, so *that* people can work and the economy can be robust. And these things are important so *that* there is more affluence, with all the good that brings, and less poverty with all poverty's dire consequences, in the service of human well-being. This whole chain of nested conditionals supports the final determination that it is necessary that *something be done* to restore the free flow of goods across the border. Without teasing out each step, it becomes easy to smuggle in a term, in this chain, where the claim of necessity does not hold up. This is especially true where the threat is serious, but not truly existential. There is room between, say, a threat of nuclear annihilation

¹⁰ I work out these arguments in detail in Lazar, *States of Emergency*.

and economic damage. And political judgment will be in play in that space both at the point of decision, and in the aftermath.

Along the teased out chain of conditionals, in an emergency, we would expect to find stronger and weaker links, points at which necessity seemed more or less certain. It would be reasonable to expect a weaker relation of necessity where conditionals depend on:

- assessments of probability and risk,
- relative assessments of appropriate means,
- presence or absence of advance preparation and efforts at prevention, and
- expectations of interjurisdictional cooperation.

With respect to the necessity elements of the emergency, these will be among the points warranting the special attention of the Commission, Parliament, and the public, because each forms a potential weak link in the conditional chain.

2.1 Risk and Probability

Certain aspects of emergency are predictable. For example, we know with something approaching certainty that Manitoba's Red River will periodically flood, and that pandemics will recur periodically too. But most emergencies have dynamic aspects. With any given flood, we must learn on the fly where and how serious the flooding might be, how secure flood infrastructure, like levee systems, remains, etc. With any new pandemic disease, it takes time for scientists to investigate mechanisms of transmission, disease progress, morbidity and mortality, effective mitigation methods and to develop treatments. That is, when we face a threat, we rarely fully understand it initially. That means decision makers are always acting in the face of information gaps, and hence under conditions of uncertainty. Leaders must use judgment, and seek out the best available information, in assessing risk and probability, and any claim to necessity under conditions of uncertainty will thus be itself uncertain.

It may help to consider a parallel, in terms of the uncertainty of necessity claims, with just war theory. The parallel is salient for three reasons: first, the state serves as the moral agent in both scenarios, second, both involve a speech act, (a declaration of war or emergency) that shifts the state's moral position, duties, and obligations. And third, the legitimacy of that shift rests on grounds of a judgment of necessity. As with emergency, both for a war declaration and for specific actions in war, justification rests on criteria that involve probabilistic determinations of necessity. For the purposes of declaring war, just war theorists argue that war must be *the last resort*. That is, war cannot be the *preferred* option, it must be the only and thus *necessary* option to protect the state from threat. But this description conceals many probabilistic determinations. How certain are we of harm, and not just of harm, but of *enough* harm that war is justified? And how certain are we that no other option could work? If there is still a very small chance diplomacy could gain headway, though there are risks to waiting, is a declaration of war justified? We rarely know the future with certainty, and often, urgent decision must be made with inadequate information.

This is why the legal standard in the Emergencies Act requires not necessity itself, but "reasonable grounds for belief" in necessity. And questions around whether those grounds were reasonable will rest on assessments of risk and probability. Hence, pressing on assessments of risk and probability may yield weak links in the chain of conditionals. Conversely, pressing on assessments of risk and probability may yield justifications for conditionals that look weak in the abstract. For example, if there was still a *slight* chance of a negotiated retreat of the convoy, but the information available to the Governor in Council at the time suggested the probability of a successful negotiation within a reasonable timeframe,

given the time elapsed, was thin, the public might still judge that the Governor in Council had reasonable grounds for belief that an emergency declaration was necessary. In a nutshell: most judgments of necessity will be probabilistic, and we need to assess claims of necessity in that light. We must closely interrogate how those assessments were made (what risk assessment tools were used, what information sought out, etc.).

2.2 The Multiple Means Problem

Even if a declaration of emergency is necessary, or could reasonably be believed to be necessary, the Emergencies Act also specifies that the Governor in Council must hold such a reasonable belief about each measure to be undertaken, and must justify the reasonableness of belief in the necessity of those measures before Parliament and the people. Yet commonly, there are multiple ways to accomplish an end, even in situations of public emergency. So what does it mean to say that a specific measure was necessary? Moreover, while it speaks to the appropriateness of measures used to show they were effective, it is not enough to claim measures were effective. In this way, the question Government posed in the Commission's mandate is somewhat misleading. What is effective is not equivalent to what is necessary because to claim that a measure is necessary is to claim that *without it, the end could not have been achieved*. In its absence, the end could not have been brought about. That is, the measure must be a necessary condition of achieving the end. Yet, if there are multiple measures that could bring the end about, any given measure is *not* necessary. The Governor in Council could always have chosen some other means. This may become clearer through an example. Say you want to travel from Ottawa to Winnipeg. The train will get you there (it is *effective* in helping you reach your goal). A car will get you there (also effective). Or perhaps you could fly. These are all effective measures for traveling from Ottawa to Winnipeg. But no single one of these measures is *necessary*, to travel to Winnipeg. If you take the train, *then* you can get to Winnipeg. But it does not follow from this that *if* you want to go to Winnipeg, it is *necessary* to take the train.

To tease out a justification for why certain measures were deemed necessary, rather than others, it may help to seek clarity regarding how Governor in Council wanted to resolve an emergency. That is, those assessing measures may want to **draw out the adverbs** involved. It may be that, if you want to get to Winnipeg from Ottawa *quickly*, then it really is necessary to fly, rather than to drive or take the train.

Claims that some measure is necessary may smuggle in latent considerations in the form of adverbs. That is, a government will not only need to resolve a situation, where it has found that resolution to be necessary. It will want to resolve the situation in a particular way, in a way that has certain characteristics. For example, it might seem important, for various reasons, to resolve an emergency situation:

- Quickly
- Safely
- Fairly
- Cautiously
- Efficiently
- Decisively
- Expeditiously
- Cost-effectively

Such value claims around the outcome will have factored into the perceived necessity (rather than mere desirability) of specific measures. As Professor Jocelyn Stacey has perceptively noted, while the Act technically requires that no other legislation be available for use, before a Government invokes the Emergencies Act, it may be that using other available legislation

would be morally worse. For example, the Government did not need the Emergencies Act to call out the military in the convoy crisis. They could have done this under Section 275 of the National Defence Act, and that might have been effective in ending the crisis. But would that have been preferable?¹¹ Attention to the other values at play, to how Government wanted to resolve the crisis, helps to explain why the use of the Emergencies Act *may* be justified when an alternative is available but, for moral or other reasons, more extreme or morally questionable. If it was necessary to not just resolve the crisis but to do so safely and cautiously, then these value carrying adverbs might rule out the option of National Defence Act. Judgments in the moment will always be prudential, and after the fact, we must bear this in mind. Yet it behooves those holding government to account to press on whether the adverbs themselves are the reasonable and right ones. Government must be held to account for its implicit claims and choices here also.

2.3 Preparation and Prevention.

A third area where the implicit chain of conditionals may conceal weak argument for emergency measures is preparation and prevention. Recall that a public emergency does not just involve a sudden & urgent threat to the public, but a sudden mismatch between public need and government's capacity to address it. This is why every jurisdiction in Canada has extensive procedures and preventive measures in place for anticipating and addressing the most probable emergencies. For example, cities with frequent blizzards, like Ottawa, have plans, communication protocols, and equipment in place so that, in the *event* of a major snowstorm, there will normally be no call for an emergency declaration or emergency measures. Public emergency results from unmet needs, they are states of *necessity* arising from an interaction between an acute event impacting public well-being and the available means of meeting those needs.

This raises the question whether a government could claim an emergency declaration and measures were necessary if, at some earlier juncture, decisions could have been made which may (and here we are back in the realm of probabilities) have averted the emergency. If Ottawa made no contingency plans for snowstorms, could the city reasonably claim that emergency measures – perhaps commandeering snowploughs, were justified, because necessary? On one hand, the measures may in the moment, be necessary, and hence potentially legal. But on the other, might a jurisdiction remain morally or politically culpable because they were negligent in anticipating and preparing for the emergency?

Culpability would vary from case to case because it is not always reasonable to expect a state to be prepared. For one thing, not every emergency is predictable. For another, there are always political, social, and economic trade-offs between the cost of prevention and the cost of response. Prevention responds to, and is evaluated against, counterfactuals, meaning it can be politically difficult to allocate resources to a thing which hasn't happened yet and might not happen. For example, while a purpose-built infectious disease hospital and expandable healthcare capacity might help forestall a health emergency, these are costly and may draw resources away from day-to-day care. Each democratic polity must weigh priorities, costs and relative benefits.

Furthermore, some preventive measures cost rights, not cash. That is, there are circumstances in which a permanent limit on rights and freedoms may prevent an emergent situation, necessitating more severe rights derogations, from arising. For example, the Safe Food for Canadians Act (2012) limits a number of kinds of speech (e.g., in Sections 6, 8, 9, 11), as well as privacy and property rights (Sections 24, 26) in the interests of preventing public harm. For

¹¹ Personal communication. Friday, 30 September 2022.

example, Section 6(1) limits speech and expression by making it an offence to label “or advertise a food commodity in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, quality, value, quantity, composition, merit, safety...” While Section 26 allows inspectors, when they have reasonable grounds, to enter and search private premises and even to restrict owners access to their own property. By placing milder, preventative limit on rights at the outset (e.g. around misleading advertising and factory inspections), we may prevent the need for serious derogations on the other side. Another example concerns the right to peaceful assembly. It may be that placing certain minor limits on the right, for example by delineating a distance that must be maintained between protests and certain premises (legislatures, medical facilities, critical infrastructure), or on the kinds of materials allowed at a protest, freedom of peaceful assembly can be exercised robustly for its intended purposes, without endangering safety and civic life. Sometimes, through minor, preventive but permanent limits, the need for reactive derogations is reduced. But as with fiscally costly prevention and preparation, each polity must weigh priorities and exercise prudence in making such judgments.

The key is to recognize that a polity’s claim that some action was *necessary* may conceal, at points along the conditional chain, some action it reasonably ought to have undertaken earlier. This may reveal where, all else being equal a state ought to bear a share of responsibility for having created the conditions of ‘necessity’ in the first place. Again, while the condition of necessity may be real in the moment, and hence a legal threshold potentially met, public accountability is broader than legal accountability and this means the question of responsibility remains.

This grows more complex in federal states. It may be that one level of government’s failure to act, whether by refusal for political or other motives, or through incapacity, creates a situation of necessity which might not otherwise have arisen. This may leave one jurisdiction in a position where the other’s decision to act or not act is the thing which makes the declaration of emergency and the measures taken *necessary* at another jurisdictional level. Where the passive jurisdiction failed in its moral but not legal duties, the public can still hold them to account.

In this context it may be worth noting that in the Supreme Court of Canada decision *Perka v. The Queen*, Justices Ritchie, Dickson, Chouinard and Lamer argued that a failure to act reasonably at an earlier juncture to prevent a situation from arising could invalidate a claim to the defence of necessity for a criminal act: “Where it was contemplated or ought to have been contemplated by the accused that his actions would likely give rise to an emergency requiring the breach of the law it may not be open to him to claim his response was involuntary.”¹² This underscores the point that moral and political responsibility may follow from earlier inaction.

I have suggested that, to judge a claim of necessity requires a clear view of the full chain of conditionals it represents. Accountability demands we pay especial attention to, on one hand, whether achieving the end really *is* necessary: does it serve a clear and urgent public good? And on the other hand, it demands we consider issues of risk and probability, the multiple means question, and failures of preparation and prevention that may have contributed to the condition of necessity arising in the first place. A clear view of the chain of conditionals all the way back and all the way forward, makes concealing non-public-good-related motives more challenging, while increasing the ease of assessing whether the conception of the public good which government used in the moment of decision is one that Parliament and the public are willing to accept after the fact.

¹² *Perka v. The Queen*, [1984] 2 S.C.R. 233.

Having considered how claims of necessity work, I now turn to suggesting some tools and heuristics the Commission, Parliament, and the public might employ to press on those claims.

3.0 Necessity's Heuristics

I suggested above that legislation like the Emergencies Act was designed to *make* necessity know law. Specifically, I noted that claims of necessity, to be justified in an emergency context, must be in the service of the public good, the highest law. I also noted that a determination of the public good emerges as a defeasible judgment from procedural engagements such as democratic deliberations of various kinds. That is, through public discourse, elections, parliamentary debate, committee inquiries, etc. we come to an understanding of some always revisable conception of what the public good consists in. Of course, some norms are more foundational than others, particularly norms governing the procedures themselves, such as the rule of law, and norms around fundamental rights, which are entrenched in the Charter of Rights and Freedoms and in the International Covenant on Civil and Political Rights, with both of which, notably, the Emergencies Act must comply.

Now I also suggested above that emergency conditions are such that they tend to pull against the usual procedures, making the process of settling on a (defeasible) conception of what is in the public's interest that much more difficult.

Contemporary emergency laws, like the Emergencies Act, are designed to bring the rule of law to bear in conditions of crisis through novel institutional means. They do so by shifting the temporal horizon around judging necessity. Whereas normally, democratic procedures structure decisions on whether a law or policy furthers the public good *before* these enter into force, in an emergency, governed by a piece of legislation like the Emergencies Act, the time frame shifts so that that democratic discourse take place not just before, but notably in the course of the emergency and after the fact. Shifting the time frame optimizes the balance of flexibility, in meeting the claims of necessity, and accountability, in determining those claims' justification. This is because leaders can act immediately in the face of urgency: they can use a defeasible, evidence-based, working hypothesis of what is necessary for the public good, while remaining accountable from that point on.

Those bodies who bear responsibility for holding government to account – Parliament, the Commission, the Canadian Public, and, ultimately, historians, – can benefit from some explicit heuristics for thinking about necessity in the context of urgency. The Federal Court, too, bears responsibility for accountability, but they will determine their own future standards, drawing on past caselaw. To make use of these heuristics, we need clarity about the chain of conditionals, which is to say, we need clarity about what the Governor in Council claims is necessary and why. But once we have that clarity, these heuristics can assist in assessing those claims of necessity.

To understand the heuristics and why they make sense, it is helpful to look back to cases that arose in international jurisprudence in the legal aftermath of the September 11th terrorist attacks. At that time, some jurisdictions – sometimes under compulsion from courts – were developing novel institutions to keep the rule of law robust even where there were claims of necessity. Perhaps this thoughtful jurisprudence was possible because of the ephemeral or preventive nature of the threats at this time. After 9/11, there was the fear of, but little immediate presence of, chaos and mass death, and perhaps this provided enough distance to sober the courts. Of the cases from that time that touch on or invoke the concept of necessity,

the United Kingdom's *Belmarsh* case is of particular interest and use here, in part because it touches both necessity as a threshold element and necessity as a condition for individual measures, and in part because it points to useful heuristics.

Belmarsh concerned the rights of nine men – all British non-nationals. Because of their alleged ties to terrorist groups, these men were detained indefinitely and without trial under the Anti-terrorism, Crime, and Security Act 2001. The UK government had claimed a derogation from Article 5 of the European Convention on Human Rights that provides for the “right to liberty and security of person.” Because of that derogation, the United Kingdom Home Secretary was able, under Section 21 of that Act to certify individuals as constituting a threat to national security, and then under Section 23 of the Act, to detain them indefinitely unless they chose to be deported. Because of their alleged connection to terrorist groups, the men faced the risk of torture or death in their home countries, were they to be deported, meaning that to deport them forcibly would violate the principle of non-refoulement under international law. The men appealed to the Appellate Committee of the House of Lords, arguing that their indefinite detention violated their Article 5 rights under the European Convention and that the derogation the Government had made under the emergency provisions of the Convention (Article 15) was unlawful.

On one hand, for the derogation to be lawful, it had to meet Article 15's criterion of necessity. That article reads: “in time of ... public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation...” That is to say, the situation must be so urgent and important as to *necessitate* derogations, and the derogations must, each and severally, be strictly necessary to resolve the situation: the threshold question and the measures question.

On the threshold question, i.e., whether the post-9/11 situation warranted the use of derogations, Lord Bingham argued that it was not the place of the Court to say. “I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what ... people ... might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety...”¹³

Lord Bingham went on: “The more purely political ... a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions.”¹⁴ This is sometimes thought to be in line with jurisprudence globally, but at least in the US context, courts have, in the midst of serious crisis, taken divergent approaches to policing rights in a crisis.¹⁵

¹³ *A and others v Secretary of State for the Home Department*, [2004] UKHL 56. S. 29.

¹⁴ The dissent of Lord Hoffman is worth noting: he argued that it was not credible to suggest that the life of nation was under threat “there is no doubt that we shall survive Al-Qaeda,” he wrote. S. 96

¹⁵ See, for example, the rich discussion of wartime jurisprudence in Lee Epstein et al. “The Supreme Court during Crisis: How War Affects only Non-War Cases,” *New York University Law Review* 80,1 (2005): 1-116.

As with the ECHR Section 5 derogation, under the Emergencies Act, a judgment of necessity must be made first at the point of declaration. Lord Bingham argued that the necessity of the derogation - equivalent in our case to determining the necessity of a declaration, was a matter for political, not judicial judgment. While courts have historically been reticent to weigh in on matters of political judgment, accountability takes many forms in democracies, and there is more than one check on executive power written into and implied by the Emergencies Act. Though opinions here may diverge, courts may properly choose to evade political questions which Commissions of Public Inquiry, Parliament and the public can properly take up. Even where courts may be reticent to hold the executive branch to account for its political decisions, it is fully appropriate for citizens to do so.

But, regarding judging the necessity of *measures* undertaken in a crisis, the Law Lords were much less reticent. They found that the indefinite detention of foreign nationals suspected of terrorist involvement was, as a measure, disproportionate, not strictly required, not rationally connected to the security threat, and constituted discrimination on the grounds of nationality. On these grounds, the Law Lords found that the Home Secretary's detention of the men was unnecessary, and hence unlawful.

To make this determination, the Lords borrowed reasoning from the Canadian Supreme Court case *R v. Oakes*. The Lords cited *Oakes* in part because the appellants had referred to a UK case, *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, which itself drew its reasoning from that Canadian case.

While the reasoning in *Oakes* may not be directly appropriate to interpret the specific statutory requirements of the Emergencies Act, particularly with respect to the declaration of emergency, it may serve as a helpful heuristic for clarifying the necessity of measures. *Oakes* pertains to Section 1 of Canada's Charter of Rights and Freedoms, which states that rights in Canada can be "subject only to such reasonable limits... as can be demonstrably justified in a free and democratic society."¹⁶ Many rights in the Charter contain limits in the text itself, but Section 1 allows that there may be occasions when further limits may be justifiable. The Supreme Court of Canada developed the *Oakes* Test to help assess the justifiability of a rights limit.

The first part of the test requires that government only limit a right or freedom by law if the aim is important. The Court found a rights limitation must "relate to societal concerns which are pressing and substantial."¹⁷ For our purposes, i.e, as an heuristic for assessing the use of the Emergencies Act, this part of the test may serve as a reminder that emergency powers are subservient to the public good, as the highest law. Yet the threshold for an emergency declaration is clearly *higher* than the threshold for passing part one of the *Oakes* test. Pressing and substantial are not enough for an emergency declaration to be *necessary*, in part because measures short of emergency may be sufficient.

The second part of the test has three subsections which, once an emergency declaration is found to be necessary, provide clear guidance to assess the necessity of specific emergency measures. First, Government must show that limiting (in our case, derogating) the right in order to achieve the important aim is "reasonable and...justified." Second, the limit (or derogation) must be a) "fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective." And, b) the right should only be limited (or derogated) "as little as possible" to achieve the end. And c), "there must be proportionality between the

¹⁶ *R. v. Oakes*, [1986] 1 S.C.R. 103

¹⁷ *Ibid.*

effects of the limiting measure and the objective.” That means that the more serious the consequences of limiting the right, “the more important the objective must be.”¹⁸

An interesting consequence of drawing on Oakes reasoning is that it lends support to David Dyzenhaus’ conjecture that different standards of necessity may be appropriate for judging the necessity of the *declaration* and judging the necessity of the measures.¹⁹ One could elaborate this insight in light of Oakes like this: the necessity standard may be lower for the declaration because the declaration does not itself impact rights. It may be, for instance, that the necessity heuristic for a declaration would evolve from Parts 1 & 2a of the Oakes test only. For example, we might propose that, for a declaration to meet the necessity heuristic, the Governor in Council must believe on reasonable grounds that the such a declaration is pressing and *critical* (with critical understood in light of the Act’s definitions), and that such a declaration would be “fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective.”²⁰ This heuristic can work effectively together with the technique of drawing out the chain of conditionals, because it is through that chain that the connections between means and ends and the justifications for ends is more fully revealed.

The necessity heuristic for a declaration might look something like this: if, once fully articulated with the best available information and assessments of risk, a threat critically impairs the state’s capacity to work to secure the people’s well-being, and, if and only if the usual mechanisms (which may include everyday rights *limitations*, as most government measures do) are insufficient to confront the threat, and, the use of emergency legislation, under existing circumstances, is fair and not arbitrary, and may reasonably be expected to achieve the objective in question, then the necessity condition of the declaration threshold is met.

Notably, this approach draws attention to the political and communicative aspects of an emergency declaration. While an emergency declaration makes it possible to undertake emergency measures, even should it turn out that the *measures* were not strictly necessary, this would not, in and of itself, entail that the *declaration* was unnecessary. This is in part because a declaration may also serve a communicative function. For example, a declaration might serve to warn those who threaten violence or pose an imminent menace to democratic institutions that they cannot act with impunity, while also communicating to citizens that government remains functional and committed to peace and order. This communicative function, when intended, does not of itself put any rights at risk, but might aid in resolving a situation. Indeed, in some ideal case, a declaration might be effective enough to render any specific rights derogations unnecessary. The declaration does work in the service of the end, independent of the measures that may or may not come next.

With respect to the necessity of specific emergency measures, Part 2 of the Oakes Test provides a fine tool to both excavate and assess the soundness of chain of conditionals here too. The necessity heuristic for measures might look something like this: if an emergency has been declared, then measures to resolve the emergency may be deemed necessary if and only if a) those measures are “fair and not arbitrary, carefully designed to achieve the objective in question” where that objective is fully specified (i.e., not just that the situation be resolved, but that it be resolved *quickly* or *fully* or whichever adverbs are justified in the given scenario) and where the measures are “rationally connected to that objective;” and b) any right derogated is impacted “as little as possible;” and c) the derogation is proportional to the objective.

¹⁸ Ibid.

¹⁹ Personal communication, August 8, 2022.

²⁰ R. v. Oakes, [1986] 1 S.C.R. 103.

In this way, the Oakes Test, together with a full elaboration of the chain of conditionals, can help guide thinking about necessity in the service of public accountability.

4.0 Conclusion

Because it is essentially relational, necessity is a permanently ambiguous concept. This note has aimed to unpack that concept, as it applies in the context of emergency, to the extent possible. The aim has been to provide greater clarity for the Commission, Parliament, and the public in weighing the necessity of the Public Order Emergency declaration and the emergency measures undertaken. The note has advocated for a full teasing out of the chain of conditionals that describe the necessity in a situation of threat, and has underlined pressure points, such as risk assessments and the multiple means problem, that may warrant extra scrutiny. And finally, the note shows how the Oakes Test, whether or not it comes to serve as the legal standard, can work effectively as an heuristic for assessing claims of necessity for purposes of broader public accountability.

It is important to note that, as of this writing, Canada's courts have not yet ruled on any matter related to the Emergencies Act or the measures undertaken under its authority. Hence, we do not know what legal test the Federal Court will use. But we do know that measures taken under the Emergencies Act must, by law, conform with the Charter and with Canada's obligations under the International Covenant on Civil and Political Rights, and that any such measures must be temporary, strictly necessary, and reviewable in Parliament and the courts. Where a Government's emergency measures meet these criteria, it is possible that emergency limits on rights and freedoms can be consistent with the rule of law and with Canada's constitution.

To uphold the rule of law in these circumstances requires that we keep in mind the holistic character of the Emergencies Act, the intention of which is to allow for emergency action but under the rule of law. It aims to achieve this by incorporating a range of forms of democratic deliberation, but with the temporality of deliberation shifted later, in relation to executive action. These concurrent or after the fact forms of deliberation and accountability include legal accountability, since the Federal Court may review actions taken under the Act. But other forms of deliberation and accountability under the Act are more broadly public and political. And it is right that the public assess whether the use of the Act was appropriate on grounds that incorporate, but go beyond legality. Upholding the rule of law means we must also press on and consider the articulation of the public good which drove the emergency declaration and each of the measures. In this way, the procedures through which we articulate, assess, and reassess our shared conception of the public good, a shared practice that forms the heart of our system of government and public way of life, can continue even under conditions of emergency.