



**PUBLIC ORDER
EMERGENCY
COMMISSION**

**COMMISSION
SUR L'ÉTAT
D'URGENCE**

Public Hearing

Audience publique

**Commissioner / Commissaire
The Honourable / L'honorable
Paul S. Rouleau**

VOLUME 32

Held at :

Library and Archives Canada
Bambrick Room
395 Wellington Street
Ottawa, Ontario
K1A 0N4

Monday, November 28, 2022

Tenue à:

Bibliothèque et Archives Canada
Salle Bambrick
395, rue Wellington
Ottawa, Ontario
K1A 0N4

Le lundi 28 novembre 2022

INTERNATIONAL REPORTING INC.

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Ottawa, Ontario

--- Upon commencing on Monday, November 28, 2022 at 9:30 a.m.

THE REGISTRAR: Order. À l'ordre.

The Public Order Emergency Commission is now in session. La Commission sur l'état d'urgence est maintenant ouverte.

COMMISSIONER ROULEAU: Okay. Bonjour. Good morning. Bienvenue and welcome to this new phase of the public hearings.

Over the last six weeks, I've heard from over 75 witnesses who testified about the circumstances that have led to the declaration of a Public Order Emergency, and the use of powers under the *Emergencies Act*.

These witnesses have provided me with many perspectives on those events, including the views of public servants, police forces, protesters, residents, and political officials. That evidence has been critical in allowing me to discharge the fact findings portion of my mandate.

Nous entamons aujourd'hui la deuxième phase des audiences publiques, celle-ci concerne un volet différent de mon mandat. Lorsque j'ai été nommé commissaire, on ne m'a pas seulement demandé de faire la lumière sur ce qui s'est déroulé en janvier et en février 2022, on m'a aussi confié la tâche de formuler des recommandations pour l'avenir. Ces recommandations doivent aborder une éventuelle modernisation de la *Loi sur les mesures d'urgence* ainsi que d'autres enjeux qui méritent d'être étudiés.

On m'a également demandé de tirer des conclusions

1 concernant plusieurs domaines spécialisés – des plateformes de
2 sociofinancement à la mésinformation sur les réseaux sociaux.

3 For the next five days, the Commission will hear
4 from a series of experts and expert roundtables, each one
5 devoted to a different topic that is relevant to the
6 Commission's policy mandate. These discussions will assist me
7 in making the recommendations that will be contained in my final
8 report.

9 The organization of these roundtables was
10 undertaken by the Commission's research counsel, which has
11 provided the Commission with excellent support throughout the
12 process, including the commissioning of papers.

13 And in that regard, I just wish to note that some
14 of the papers contain factual statements or factual assumptions
15 that may not have been borne out in the evidence led at the
16 hearings. Of necessity, of course, these papers were prepared
17 in advance of the fact of the hearings, and those factual
18 assumptions or statements will not be considered as evidence and
19 will not be considered in reaching my conclusions. Obviously, I
20 will reach conclusions based on the facts I have heard in the
21 course of the hearings, and in the documents contained -- that
22 were filed.

23 Now, parties with standing at the Inquiry were
24 consulted, and provided valuable input on the topics to be
25 addressed; the process that the roundtables should follow; and
26 who should be invited to participate. As a result of that
27 process, the research counsel prepared nine roundtables
28 involving approximately 50 expert participants. The experts

1 include both academics and practitioners in such areas as law --
2 such areas of the law as policing, intelligence, and government.

3 For those who have been following our proceedings
4 so far, the policy phase will look somewhat different, both
5 physically and in how it's going to proceed. Rather than
6 examinations by lawyers, the roundtables will start with a
7 facilitated discussion led by a moderator. During this
8 discussion, parties with standing at the policy phase will be
9 submitting additional questions to Commission Counsel, who will
10 then conduct their own questioning of the participants, based on
11 the input received.

12 I, too, may have questions to ask of
13 participants.

14 Le Conseil de recherche, les modérateurs et les
15 participants ont consacré de longues heures à la préparation des
16 tables rondes qui se tiendront cette semaine. Je tiens à les
17 remercier tous et toutes d'avoir fait preuve de générosité en
18 acceptant d'appuyer la Commission dans ses travaux.

19 Sur ceci, je cède la parole au doyen Robert
20 Leckey qui animera notre première séance sur les droits et
21 libertés fondamentaux qui entrent en jeu lors de manifestations
22 et leurs limites.

23 Doyen Leckey, la parole est à vous.

24 **--- ROUNDTABLE DISCUSSION: FUNDAMENTAL RIGHTS AND FREEDOMS AT**
25 **STAKE IN PUBLIC PROTESTS, AND THEIR LIMITS**

26 **DEAN ROBERT LECKEY:** Merci beaucoup, Monsieur le
27 Commissaire.

28 Donc, je suis Robert Leckey, le doyen de la

1 Faculté de droit de l'Université McGill. J'ai le plaisir de vous
2 présenter les panélistes ce matin.

3 Brian Bird, Assistant Professor, Peter A. Allard
4 School of Law, University of British Columbia.

5 Jamie Cameron, Professor Emerita, Osgoode Hall
6 Law School, York University.

7 Jean-François Gaudreault-Desbiens, Professor,
8 Faculté de droit et Vice-recteur de la planification stratégique
9 et des communications de l'Université de Montréal.

10 Vanessa MacDonnell, Associate Professor in the
11 Common-Law section of the Faculty of Law, University of Ottawa.
12 Also co-director of the U Ottawa Public Law Centre.

13 Carissima Mathen, Full Professor in the Common-
14 Law section of the Faculty of Law, University of Ottawa.

15 And Richard Moon, full Professor, Faculty of Law,
16 University of Windsor.

17 This roundtable aims to lay out the foundation
18 and framework for the fundamental freedoms under the *Canadian*
19 *Charter of Rights and Freedoms*; rights to freedom of expression,
20 assembly, and perhaps association.

21 Protesters regularly exercise these democratic
22 rights, and governments seek to justify limits on those rights.
23 I think there will be a consensus on the importance of these
24 rights of democratic participation, and the need for sound
25 justifications for limiting them. Beyond that, Commissioner,
26 it's possible that one takeaway will be that reasonable people
27 disagree on the complex challenges of fleshing out and
28 concretizing these rights in our free and democratic society.

1 We have a lot to address this morning, and I
2 remind participants of the need to keep their answers concise.

3 We're going to kick off with a brief primer on
4 the *Canadian Charter of Rights and Freedoms*, perhaps set against
5 the history of rights protection in this country; rights have
6 not only been protected through entrenched *Bills of Rights*.

7 And so we'll have a little introduction to that,
8 including the notion of substantive rights, and limitations on
9 them, and we begin with Professor MacDonnell.

10 **--- PRESENTATION BY PROF. VANESSA MacDONNELL:**

11 **PROF. VANESSA MacDONNELL:** Thank you, Dean
12 Leckey.

13 So in terms of setting the stage for today's
14 discussion, it actually does make sense to actually go back a
15 little bit further than 1982 when the *Charter* was enacted, and
16 to just touch briefly on Canada's history of rights protection,
17 because we do have a longer history of rights protection in this
18 country.

19 The common law has long protected rights in
20 Canada, and Canada also has a history of statutory protection of
21 rights, most notably at the federal level through the *Canadian*
22 *Bill of Rights*, which is an ordinary statute which, in the
23 1960s, codified a set of rights and freedoms.

24 Now, this pre-1982 history is certainly not an
25 unblemished one. It's part of a broader history that includes
26 notable failures in rights protection, and so that needs to be
27 acknowledged as well in discussing Canada's pre-1982 history.

28 So that brings us to 1982 and to the *Charter*,

1 which formed part of a package of constitutional reforms that
2 included the recognition of Aboriginal and treaty rights and a
3 domestic- amending formula.

4 So the *Charter* creates a catalogue of judicially
5 enforceable rights and freedoms. Some of these rights and
6 freedoms are a part of many constitutions around the world. So
7 you'll hear us speak today about the right to free -- or to
8 freedom of expression, to the right to equality, the right to
9 vote possibly. These are all core guarantees that are found in
10 most bills of rights. There are other aspects of the *Charter*
11 that are unique to Canada, and that would include, for example,
12 the language rights provisions of the *Charter*.

13 As Dean Lucki mentioned, the *Charter* is
14 constitutionally entrenched. That means it's supreme law, and
15 that laws that are enacted that are inconsistent with the
16 *Charter* are of no force or effect. The *Charter* also prohibits
17 state actors from violating rights, and so that means that state
18 actors must conduct themselves in ways that are compliant with
19 the *Charter*.

20 And so that brings us to another important
21 foundational point, which is that the *Charter* binds state
22 actors. And what that means is that the state is bound to
23 respect constitutional rights, but there aren't rights that are
24 held as between private parties.

25 Some of the rights and freedoms that you'll hear
26 us talk about today are -- include the fundamental freedoms, so
27 freedom of expression, freedom of association, freedom of
28 peaceful assembly. These are the core rights that are engaged

1 in the context of a public protest. But there are also rights
2 here that may not be immediately obvious, but which form an
3 important part of the discussion. And so those include section
4 7, which is the right to life, liberty and security of the
5 person, and the right not to be deprived thereof except in
6 accordance with the principles of fundamental justice and
7 section 15, which is the right to equality.

8 To the extent that arrests or detentions were
9 made in connection with the protests, the rights of accused
10 persons found in section 7 through 14 of the *Charter* are also
11 relevant.

12 So what do these rights mean? How have they been
13 interpreted? Well, the meaning of the *Charter* and of individual
14 *Charter* rights has developed over the last 40 years, largely
15 through adjudication in the courts but also through the
16 involvement and interpretations of political actors. And I
17 think it's fair to say that in complex situations like the ones
18 that gave rise to the convoy, there are complex rights issues.
19 And so in discussing how *Charter* rights were implicated as part
20 of the convoy, it's important to surface all relevant rights,
21 the rights that were potentially violated as the result of the
22 state response, but also the rights that were protected by the
23 state response, because I think it's clear that the state in
24 response to public events like the ones that we experienced have
25 an obligation to respond in some way.

26 And so I'm going to turn things over to my
27 colleague, Professor Mathen here in a moment, but perhaps I can
28 sort of set things up a little bit by saying that *Charter* issues

1 when they're adjudicated are adjudicated really in two stages.
2 And so at the first stage, the question is are rights engaged,
3 have rights been limited. And if there's no rights violation,
4 that's more or less the end of the story. If a right has been
5 violated, the second step in a *Charter* analysis is whether any
6 limits on rights have been justified. And so I've really been
7 speaking about that first stage of the analysis and I'll turn
8 things over to Professor Mathen to speak about the second stage.

9 **DEAN ROBERT LECKEY:** Thank you, Professor
10 MacDonnell.

11 Professor Mathen?

12 **--- PRESENTATION BY PROF. CARISSIMA MATHEN:**

13 **PROF. CARISSIMA MATHEN:** Thank you very much.

14 Section 1 of the *Charter* states,

15 "The *Canadian Charter of Rights and*
16 *Freedoms* guarantees the rights and
17 freedoms set out in it subject only to
18 such reasonable limits prescribed by
19 law as can be demonstrably justified in
20 a free and democratic society."

21 Its purpose is to guarantee all the rights and
22 freedoms in the *Charter* and to state that those rights are
23 subject to reasonable limits. Now the fact that rights would be
24 subject to any limits might seem counterintuitive but, in fact,
25 in most constitutions there are very few absolute rights.

26 A concern that might be raised about section 1 in
27 particular is that it appears to undermine the way that we
28 understand something as a right because of its reference to

1 democracy, which might suggest that rights can be reasonably
2 limited if a large enough majority in society wants them to be.
3 Sometimes we refer to this as the tyranny of the majority, the
4 idea that in a democracy, minorities can be vulnerable if they
5 lack political power or are very unpopular.

6 Section 1 does not operate that way. For
7 something to be a reasonable limit, it is not enough that a
8 majority, even a super majority really wants that limit. This
9 is because the reference to democracy is not to majority wishes
10 alone but to a broader conception, what does it mean to be a
11 free and democratic society. Section 1 exists not as an
12 exception to rights based on the wishes of a majority but as a
13 confirmation that rights are essential in a democracy.

14 Like everything in the *Charter*, section 1 is a
15 legal tool, so it has a recognizable and routine framework, in
16 place for almost 40 years, whenever it arises in a legal case.
17 The framework both draws on the actual language of section 1 and
18 how courts have interpreted that language.

19 At the section 1 stage, the burden of proof is on
20 the state, so it is for the government to convince a court that
21 any limit on a *Charter* right is reasonable and demonstrably
22 justified. Section 1 itself says that a reasonable limit is
23 prescribed by law. This ensures that any limits on *Charter*
24 rights are traceable to an actual legal rule. That rule can be
25 found in statute or regulation, or more rarely, at common law.
26 This ensures that limits on *Charter* rights are consistent with
27 the rule of law, which guarantees that all state power is itself
28 authorized by law.

1 Once you start to drill down into whether a limit
2 on a right is reasonable, there are a number of factors that a
3 state will have to address: that the limit on the right is for
4 a pressing and substantial objective, that the limit is
5 rationally connected to achieving that objective, that the limit
6 minimally impairs the *Charter* right in question, and that there
7 is overall proportionality between the positive or salutary
8 effects of the limit and the negative or deleterious effects on
9 the individual whose *Charter* rights have been infringed.

10 While section 1 is a legal tool designed to
11 promote consistency in how the *Charter* applies, it's important
12 to recognize that *Charter* rights are implicated in extremely
13 diverse situations of varying complexity. It's also useful to
14 recognize that the -- there is a sometimes delicate relationship
15 between the courts and the state when assessing whether a
16 section 1 justification has been demonstrated.

17 To that end, the courts have repeatedly stated
18 that the analysis of section 1 is contextual. It will look
19 closely at the circumstances. While the state must prove its
20 case under section 1, courts also recognize that it is not
21 always possible to do so to a particular degree of scientific or
22 forensic certainty. This may be because the particular
23 objective really isn't amenable to scientific proof, or because
24 the state is operating in a situation where information is
25 simply not yet available or is uncertain.

26 While purely speculative arguments are likely to
27 fail, the courts do tend to give the state a certain margin in
28 which to establish justification under section 1, again,

1 depending on the context.

2 The final point I would make here is that it's
3 natural to see the state and individual or citizens in an
4 oppositional, even antagonist relationship. This is
5 particularly true for some context like criminal law where you
6 have the immense power of the state being brought to bear
7 against a single individual. But sometimes the state is in a
8 different position. It may be trying to balance competing
9 *Charter* rights. It may be trying to protect the vulnerable, or
10 it may be trying to safeguard certain things or values that in
11 themselves are essential to a free and democratic society. All
12 of those factors may be important to the ultimate assessment of
13 whether section 1 has been made out.

14 **DEAN ROBERT LECKEY:** Thank you very much,
15 Professor Mathen.

16 Does another panelist wish to anything at this
17 introductory level or sort of *Charter* primer, so to speak?

18 Professor Moon?

19 **--- PRESENTATION BY PROF. RICHARD MOON:**

20 **PROF. RICHARD MOON:** Well maybe I -- is this one?
21 Yes, it sounds like it's on.

22 Just that was, you know, a terrific introduction.

23 I'd just add one thing, because I'm struck that
24 often individuals make claims, "I have a right to something" and
25 make claims at large. And I think it's worth thinking about and
26 noting what's in the *Charter* and what's not in the *Charter*. And
27 the *Charter*, in a sense, performs two functions. One is a
28 symbolic function and is meant to list what we understand to be

1 the fundamental rights of members of the political or national
2 community, but it also has a very practical function in the
3 sense that there is an enforcement mechanism. That is to say,
4 if someone feels their *Charter* right has been breached, they can
5 make a claim for the Courts.

6 And that very much shapes what's in the *Charter*
7 and how particular *Charter* rights are in fact interpreted. The
8 limits of what a Court can do and how a Court can approach or
9 interpret a right. And I just think that's worth noting, given
10 the general language that often operates about, "I have a right"
11 statements made very much at large.

12 **DEAN ROBERT LECKEY:** Thank you, Professor Moon.

13 Okay. Commissioner, we're going to move on. So
14 a few minutes from now, we're going to drill down more
15 specifically on two of the fundamental freedoms: freedom of
16 peaceful assembly in paragraph 2(c) of the *Charter* and freedom
17 of expression in paragraph 2(b).

18 Still at a somewhat introductory mode, we're
19 going to speak a little bit about those rights of democratic
20 participation together, perhaps connecting them to fundamental
21 values of engagement of participatory democracy. And we're
22 going to continue now with Professor Bird.

23 **--- PRESENTATION BY PROF. BRIAN BIRD:**

24 **PROF. BRIAN BIRD:** Thank you very much, Dean
25 Leckey.

26 So the topic of democratic participation, how and
27 when individuals who belong to a democratic society contribute
28 to the democratic governance of that society raises several

1 complicated and nuanced considerations.

2 Participation in a democracy can take many forms:
3 voting, running for office, writing to your elected
4 representative, starting or joining a political advocacy group,
5 and so forth.

6 But for today, our focus is on protest as a form
7 of participation in a liberal democracy, the idea of a right to
8 protest in such a society, and when that right can or should be
9 limited.

10 So in these brief remarks, I'll offer some
11 reflections on the added value of protest in a liberal
12 democracy, leaving the matter of a legally protected right to
13 protest and how that right can be limited, for a later stage of
14 our discussions.

15 So it seems rather uncontroversial to suggest
16 that protest, in the form of rallies, marches, demonstration,
17 sit ins, et cetera, is part and parcel of democratic life.
18 Protest may, at times, test certain commitments that are said to
19 be hallmarks of a liberal democracy, but I think it would be
20 difficult to find widespread support for the notion that
21 peaceful non-violent protest is untethered to democracy or that
22 this activity should be done away with as a form of democratic
23 participation.

24 And in general, I think the occurrence of protest
25 is a marker of a vibrant democracy in which citizens are
26 invested in how they're being governed and how their society
27 ought to change.

28 Even where protests might be a response to a

1 perceived departure from democracy, these protests are still a
2 form of democratic participation, as they aim to perhaps rescue
3 or preserve democracy and democratic institutions.

4 Citizens coming together to publicly manifest
5 their support for or opposition to this or that cause, issue,
6 law, court decision, or some other current issue of public
7 interest, is a normal feature of democratic life. So much so
8 that it would be perhaps unsettling, from the perspective of a
9 society's democratic credentials, if protests were to become an
10 endangered species of democratic participation, and even
11 extinct.

12 And that idea invites us to think more about the
13 added value of protest to our society, to democracy. It's one
14 thing to say that protests are common place and accepted as
15 normal in a democratic society, but how do they enhance the
16 practice or project of democracy?

17 And perhaps history and hindsight might help us
18 here.

19 It wouldn't take too much time to be able to
20 create a list of protests or activities akin to protest that
21 were either instrumental in effecting transformative change for
22 a society, or significant from the perspective of raising within
23 that society, and perhaps in other societies that take notice,
24 of injustice, inequity, or violations of human dignity.

25 So the civil rights movement in the United
26 States, for example, comes quickly to mind.

27 Now, scientific measurement of the effect of
28 protests like these on the societies in which they occurred, as

1 well as on the other societies that may have taken notice of
2 those protests is difficult to provide, but it seems fair to
3 suggest that these and so many other protests over the course of
4 history have accelerated the pace of change in hearts, minds,
5 and laws alike.

6 So the value of protest in the pursuit of a
7 society that is more just, equitable, and protective of human
8 dignity might be easier to perceive through the rear-view
9 mirror, so to speak, but we can choose to apply these lessons of
10 the past to protests we witness during our lifetime. The
11 protests we ourselves witness could be part of a longer arc of
12 positive change that is not entirely perceptible to us at the
13 time the protest is occurring.

14 They may also turn out not to be part of that
15 kind of change, but our inability to definitively know either
16 way when the protest is underway suggests that we should perhaps
17 err on the side of permitting protest.

18 Still, some of us might say that instead of
19 protesting, we should opt for less disruptive and disconcerting
20 forms of democratic participation: voting in elections, writing
21 to your elected representative, publishing an opinion article in
22 the newspaper, launching media campaigns for a cause, and so on.

23 And one response to this proposal would be that
24 protests, owing precisely to its uniquely disruptive and perhaps
25 disconcerting characteristics, may, in certain cases, be far
26 more effective than other methods of democratic participation.
27 It may even be true that in certain cases, protest is the only
28 method that stands any chance of sparking the change that is

1 desired.

2 It's hard to imagine, perhaps, the civil rights
3 movement in the United States having succeeded simply through
4 writing letters to Members of Congress.

5 Protest, in other words, might be the only
6 meaningful way for certain voices and the message they carry to
7 be heard by individuals in the halls of power. Without protest,
8 the desired change might take longer to come about in the order
9 of years, decades, or even longer, or the desired change might
10 never come about.

11 Much more could be said about the added value of
12 protest to democracy, not to mention the value of protest to the
13 human condition and spirit, but for the sake of time, I'll
14 mention only one more now.

15 It could be called the pressure cooker rational,
16 allowing citizens to come together to peacefully express
17 discontent over how their society or other societies are
18 governed allows these citizens, and even those citizens who
19 agree with the protest, but can only watch on television or
20 social media, to let off steam and be heard. Forbidding or
21 unduly expressing this outlet for citizens might, sooner or
22 later, cause the pressure cooker to explode.

23 Just to close, perhaps the greatest obstacle to
24 appreciating the democratic value of protest is our own personal
25 opinions on the aim or cause of a particular protest. When we
26 disagree with the viewpoint animating the protest of the day,
27 our opinion of protest as a form of democratic participation may
28 also diminish. And the reverse also might be true. When we

1 agree with the complaints of the protestors, our affinity for
2 protest itself may increase as well.

3 And this dynamic seems to come to the surface
4 when we opine on how long a given protest should be allowed to
5 last or the degree to which restrictions should be imposed on
6 the time, manner, and place of the protest.

7 I suspect we often afford more or less latitude
8 on these points, depending on how sympathetic we are to the
9 views animating the protest at issue.

10 To close, I would just note that it takes a major
11 dose of even-handedness and tolerance to express support for
12 peaceful protest, even when we vehemently disagree with the
13 reason for this or that protest, or the views that the members
14 of a protest hold.

15 And yet in Canada, this ideal, this even-
16 handedness and tolerance, seems to be our aim in a free and
17 democratic society committed to maintaining a public square that
18 is open to all its citizens and apart from exceptional
19 circumstances, the unhindered expression of their core
20 convictions.

21 So I hope these reflections will aid our
22 conversation today as we explore how protest is and should be
23 protected, as well as limited under Canadian law.

24 Thank you very much.

25 **DEAN ROBERT LECKEY:** Thank you, Professor Bird.

26 I wondered if any panelist wanted to comment on
27 the particular contributions of any particular protest in recent
28 years – qu'il s'agisse du Printemps Érable ou quelque chose

1 d'autre comme cela - at this stage? Does anyone want to jump in
2 on a particular -- I have another -- after that, we'll move to
3 the connection, perhaps, between a couple of the democratic
4 rights of participation.

5 Professor Cameron?

6 **--- PRESENTATION BY PROF. JAMIE CAMERON:**

7 **PROF. JAMIE CAMERON:** Yes, thank you, Dean
8 Leckey.

9 I would just draw attention to the pedigree and
10 lineage of protest movements in history. So not expressly to
11 answer your question, but just to point out if we're looking at
12 the United States, for example, we go back to the time before
13 the Civil War and to the whole Abolitionist movement followed by
14 the Women's movements and then up into the Civil Rights
15 movement, which has been mentioned by Professor Bird, as well as
16 the Vietnam protest and any number of others.

17 In our own country, just in recent years, we have
18 seen Maple Spring, of course; the Occupy movement; Black Lives
19 Matter; Idle No More; Pride movements, and all the Indigenous
20 movements which are too numerous to mention, but just to say
21 that we have a very strong pedigree of protest movements in
22 North America and including in Canada. And they're an important
23 aspect, I agree with Professor Bird, very important aspect of
24 participatory democracy.

25 **--- OPEN DISCUSSION:**

26 **DEAN ROBERT LECKEY:** Thank you, Professor
27 Cameron. That makes it a little more concrete, Professor Bird's
28 reminder that protests may not be simply something to be

1 tolerated, but that they bring a distinctive value.

2 Professor MacDonnell?

3 **PROF. VANESSA MacDONNELL:** I was just going to
4 add that I think that you've both captured very well the sort of
5 value of protest in a democratic society and the importance of
6 nurturing it. You know, my sense is that where the challenge
7 lies is in, you know, first defining the contours of a right to
8 peaceful assembly, but then also sorting out how the state
9 should respond when a protest implicates the rights of others.
10 And so I think there is a wide degree of consensus on the value
11 of protest in a democratic society.

12 What becomes genuinely challenging is how the
13 state responds in circumstances where parts or all of a protest
14 become violent; where a protest interferes, to some degree, or
15 to a substantial degree, with the security and safety of others.
16 And so I think the real challenge for decision-makers, whether
17 that's the state in the first instance, or a court on judicial
18 review, or an inquiry reviewing these matters, is, you know, how
19 do we do what Professor Mathen alluded to in her discussion of
20 section 1, which is; how do we balance the competing rights and
21 interests that are at stake in the context of a public protest?
22 And, you know, to me that's where the difficult work is.

23 **DEAN ROBERT LECKEY:** Thank you, Professor
24 MacDonnell.

25 Professor Moon?

26 **PROF. RICHARD MOON:** Yeah. I mean I think, and I
27 know this comes up in the various presentations. we have to
28 recognize that any kind of protest is invariably disruptive. It

1 will, to some extent, interfere with the ordinary use of spaces,
2 people's ordinary lives. And so, again, I agree the challenge
3 is to determine when, what is the outer limit of that? When
4 does it become too disruptive, either as a matter of how much
5 space is taken up, or how long it's going on, or how
6 confrontational it is?

7 And there is no simple answer to that. I mean, I
8 think that's the real problem. One can think of the Occupy
9 movement, for example, which involved the establishment of
10 encampments that were there for an indefinite period of time, at
11 least that seemed to be the plan. Everybody accepted that it
12 was an important protest and that there was a right to be
13 located there for a period of time. But then the question
14 became, well, how long is too long? And again, there's no
15 simple answer to that question.

16 **DEAN ROBERT LECKEY:** Thank you, Professor Moon.

17 Part of the challenge of construing a Bill of
18 Rights, such as the *Canadian Charter*, is seeking to identify the
19 relationship between the different guarantees, and at times we
20 see from, you know, the claims brought in court, that there is a
21 perception that multiple guarantees may be engaged by a similar
22 set of facts. But nonetheless conceptually it can be helpful to
23 try to distinguish the different guarantees. And in the
24 discussion so far we've been touching, I think, on peaceful
25 assembly and perhaps freedom of expression.

26 Does any panellist want to prepare us for the
27 challenge of articulating or separating those two, before we go
28 into them one by one?

1 Professor Cameron?

2 **PROF. JAMIE CAMERON:** Well, I think as part of
3 what I had been planning to say, I can do it upfront, if that's
4 preferable?

5 So I guess I would say that the fundamental
6 freedoms overlap and complement each other, and that you
7 couldn't have a viable freedom of peaceful assembly without also
8 respecting protections for freedom of expression, and I guess
9 incidentally, freedom of association. So they work together,
10 and they have to all be protected. But I would also say that
11 freedom of peaceful assembly is a distinct and independent
12 guarantee that is not the same as freedom of expression.

13 And so I can go into that in a tiny bit more
14 detail. So freedom of peaceful assembly is a collective
15 entitlement; it's an exercise of solidarity by a group of two or
16 more individuals.

17 The Supreme Court of Canada has acknowledged as
18 much; it hasn't discussed section 2(c) very much, but it has
19 acknowledged it that it is a group activity that is incapable of
20 individual performance. So we tend to think of section 2(b),
21 freedom of expression, as being an individual entitlement. And
22 perhaps section 2(c) is as well, but it's one that is exercised
23 in collective -- in a collective way as an embodiment.

24 I think that also it's important to note about
25 freedom of peaceful assembly that it has an embodiment and a
26 presence that is usually spatial in nature. Usually spatial in
27 nature, not necessarily the case with freedom of expression.

28 And an assembly is also -- I'll use this word,

1 it's performative in nature, in the sense that, what you have
2 with an assembly is more than verbal expression. And whether
3 the assembly is passive, like forms of assembly can be
4 completely passive, that can be the message; an assembly can
5 also be active and, indeed, very active. But what this tells us
6 is the -- that is that the act of assembling itself has a
7 performative nature and a meaning that is not captured by
8 section 2(b)'s freedom of expression, and therefore, it would be
9 a mistake to collapse section 2(c) and the right of peaceful
10 assembly into section 2(b) and only -- and treat assembly events
11 as belonging under section 2(b), rather than having their own
12 independent entitlement.

13 And so from my point of view, anyway, it's very
14 important to separate section 2(c) from section 2(b) and begin
15 the task of giving it definition and interpretation.

16 So I don't know if others have comments on that.

17 **DEAN ROBERT LECKEY:** Thank you. So you're --
18 Professor Cameron, you're laying the groundwork for us to move
19 in a moment to go a little deeper into looking at freedom of
20 peaceful assembly, which as you note has been construed less by
21 our courts than have others; freedom of religion; freedom of
22 expression.

23 At the level of the rights of democratic
24 participation together, is there a final thought from anyone?

25 Okay. So we're going to go back to Professor
26 Cameron, to pursue our reflections on freedom of peaceful
27 assembly.

28 **PROF. JAMIE CAMERON:** Don't worry, Dean Leckey,

1 this is where it gets lively.

2 Okay. So the *Charter's* guarantee of peaceful
3 assembly has been mostly inert for the first 40 years of the
4 *Charter's* interpretation. There's been very little in the
5 jurisprudence, and apart from a mention by the Supreme Court
6 that I noted a moment ago, has had very little interpretation or
7 discussion at the Supreme Court level.

8 And this might seem surprising, given what we've
9 just heard from Professor Bird and others about the importance
10 of public protests and public gatherings. As -- and their value
11 as a form of participatory democracy. And I think it's clear
12 that the *Charter's* fundamental freedoms and peaceful assembly do
13 form a vital background to the Commission's work.

14 So some may know that I did write a Commission
15 paper for the Commission on peaceful assembly; it's on the
16 website. And the purpose of that paper, at least from my point
17 of view, was to bring peaceful assembly into the conversation.
18 And the paper, therefore, does not discuss the convoy, or make
19 any assessment of convoy activities, but its objective instead
20 was to propose an approach to section 2(c).

21 So here I think I'll quickly just make two or
22 three points, and then move the discussion back to colleagues,
23 who I know would like to weigh in on how we look at peaceful
24 assembly.

25 So I've already spoken about peaceful assembly as
26 an independent guarantee of the *Charter*. And I've spoken about
27 the importance of recognizing that entitlement and giving it its
28 own place in the *Charter*. That was point number one in my

1 presentation.

2 So I'll move to the second point. And it -- we
3 heard about the structure of the *Charter* from Professors
4 MacDonnell and Mathen. And I think I'm going to start there
5 because it's very important when we start to take a look at
6 section 2(c), very important to have that structural framework
7 in mind.

8 And as Professor MacDonnell told us, there are
9 two steps in any *Charter* analysis. The first step is to look at
10 the nature of the entitlement and to give that entitlement a
11 definition or interpretation, and then the second task is under
12 section 1, is to determine what limits are reasonable, what
13 limits on that *Charter* entitlement are reasonable.

14 **DEAN ROBERT LECKEY:** Professor Cameron, this is
15 super valuable stuff. If you could slow down just a little bit,
16 ---

17 **PROF. JAMIE CAMERON:** Oh.

18 **DEAN ROBERT LECKEY:** --- it would help the
19 interpreters and the broadest audience you deserve for this.

20 **PROF. JAMIE CAMERON:** My apologies. Should I go
21 back over any of that?

22 **DEAN ROBERT LECKEY:** No, no. Just ---

23 **PROF. JAMIE CAMERON:** Okay.

24 **DEAN ROBERT LECKEY:** --- a tiny bit slower.

25 **PROF. JAMIE CAMERON:** All right. So then looking
26 at that structure reinforces the view that peaceful assembly,
27 like the other fundamental freedoms under section 2 of the
28 *Charter*, should receive a generous interpretation.

1 And so that means that questions about limits on
2 peaceful assembly, for the most part, should be found and
3 imposed under section 1, rather than introduced into the
4 preliminary definition of the entitlement.

5 And in other words, peaceful assembly should be
6 given broad coverage and limits to deal with disruption,
7 disturbance. Those kinds of issues should, for the most part,
8 be reserved for section 1. That's the set up, and the nature,
9 and the concept of the *Charter*.

10 So moving to section 2(c) specifically, the
11 central question under section 2(c), I think it's fair to say,
12 is what is the meaning of peaceful assembly? What does it mean
13 to say that an assembly is peaceful in nature? So what is
14 peaceful under section 2(c) and what is not?

15 And I think there are going to be different views
16 on this. And I'll just tell you a couple that I encountered in
17 preparing the paper.

18 And I'll say first that how you answer that
19 question, how you decide what peaceful means for purposes of
20 section 2(c) will have dramatic consequences for the scope of
21 the entitlement.

22 So it's the critical issue under section 2(c).
23 It's the critical issue for peaceful assembly, for that
24 entitlement.

25 So one approach to the question of what is
26 peaceful equates peaceful assembly with non-violent assembly.
27 And under this view, assemblies are considered peaceful, unless
28 they engage in acts or threats of violence. It doesn't mean

1 that limits can't be imposed under section 1, but it means that
2 an assembly has *prima facie* or preliminary status under the
3 *Charter*, as long as it does not engage in any violent
4 activities. That's one view. It's not the only view.

5 There's a different approach, sees it a different
6 way, and would interpret the meaning of peaceful assembly quite
7 differently.

8 So under that view, a peaceful -- sorry an
9 assembly is not peaceful or non-peaceful when it does any of the
10 following, like cause a disturbance, engage in disruptive
11 activity, engage in objectional conduct, and even violate
12 bylaws. Bylaws and other kinds of legal regulations.

13 So on that view, an assembly would become non-
14 peaceful when it reaches a sufficient threshold on any of these
15 criteria. And under that view, it would mean that the assembly
16 does not have any protection under the *Charter*.

17 The difficulty with that view, in my opinion, is
18 that it creates a risk of prematurely or pre-emptively shutting
19 down public gatherings or demonstrations because they are
20 considered or experienced as being objectionable in nature. And
21 the risk is that the messages of the dissidents and vulnerable
22 will be too quickly cut off.

23 Now, we don't have a lot to go on in Canada. We
24 do not have any section 2(b) jurisprudence to speak of, much
25 less a robust jurisprudence. But the international
26 jurisprudence on these issues is quite striking because under
27 the international guarantees, peaceful assembly is protected, up
28 to the point of violence.

1 And the issues about disturbance, disruption,
2 commission of unlawful conduct, et cetera, are matters of limits
3 under their version of section 1, or proportionality, but not of
4 initial entitlement.

5 I'm going to mention a third approach, and I'm
6 going to give a bit of a shout out to the City of Ottawa, who
7 provided -- the City of Ottawa presented a brief in response to
8 my paper. And it's a thoughtful response.

9 The City of Ottawa, as I understand their
10 response, proposed a harm test for section 2(c). So the idea
11 was that violence is at one end of the spectrum, disruption
12 considered still a form of peaceful assembly is the other, and
13 the City placed harm as a test sort of between the two. And the
14 idea of it is that once a certain threshold of harm is reached
15 in the activities of an assembly, that will forfeit the
16 protection under section 2(c).

17 So that was proposed as an alternative to these
18 other two understandings of peaceful assembly.

19 I guess I would say that it's difficult for me to
20 agree with the City of Ottawa, although I think the proposal is
21 certainly worth discussing. It's difficult for me to agree with
22 that because harm is a very subjective and evidence-based
23 concept, and it's better suited to the kind of analysis that is
24 typically done in section 2 cases under section 1.

25 So I would see a harm analysis under section 2 as
26 being out of keeping with the way section 2 analysis is done
27 generally in section 2 cases.

28 And again, a malleable concept of harm runs the

1 risk of pre-empting assemblies that are engaged in participatory
2 democracy.

3 I'm coming to pretty much my last point about
4 section 2(c), because I know we want to open the discussion up.

5 And this is also a really important point, I
6 think. We need to think about the relationship between the
7 assembly per se and the individuals who are participating in the
8 assembly.

9 So I've mentioned that the assembly is
10 conceptualized as a collective entity, but the collective
11 entity, you know, incorporates various numbers of individuals.

12 The constituent participants in an assembly
13 remain responsible for their actions. So for instance, if
14 members of a public demonstration or protest engage in unlawful
15 conduct and even violate the *Criminal Code*, they are responsible
16 in their individual right for their actions. They're
17 responsible for any unlawful conduct they may commit. But
18 generally speaking -- and it's subject to evidence, of course;
19 generally speaking the acts of individuals do not taint or
20 compromise an assembly, unless those acts become so pronounced
21 or so pervasive that they come to define or characterize the
22 assembly. At that point, they become the assembly and that may
23 change the status of the assembly under section 2(c).

24 I'm just going to -- I think I've given us some
25 things to think about. I'm going to make one final comment, and
26 it is a little bit about this particular demonstration, but just
27 to illustrate. I guess it would be my view that the assembly in
28 this instance began at the point when the convoy set out from

1 British Columbia at the start of the convoy. Trucks were, at
2 that point, integral to the assembly, and it was a moving -- for
3 many days, it was a moving assembly. It was an assembly that
4 moved across the highways in Canada before arriving in Ottawa.

5 When it arrived in Ottawa, it became static and
6 embedded. The trucks may still have been part of the assembly,
7 but maybe their role changed, and maybe their presence in Ottawa
8 changed and even escalated the nature and scale of the assembly.
9 I think it would be fair to say, and I hope I'm not
10 overreaching, Mr. Commissioner, I think it would be fair to say
11 that the trucks compounded and intensified the disruption.

12 But what I would say is that on a principled
13 approach to the structure of the *Charter*, those issues inform
14 the analysis under section 1 rather than the scope of
15 entitlement under section 2(c).

16 And I have things to say about reasonable limits,
17 but I think I've spoken enough, and would love to hear from my
18 colleagues.

19 **DEAN ROBERT LECKEY:** Thank you very much,
20 Professor Cameron.

21 So just to situate your very helpful comments for
22 the audience here; you were really focusing at defining peaceful
23 assembly at the paragraph 2(c) level; basically, bracketing for
24 other discussion the question of reasonable limits on peaceful
25 assembly under section 1. And you are, very helpfully, I think,
26 focusing on the qualifying adjective, "Peaceful" and its -- 2(c)
27 is distinctive in that the other fundamental freedoms don't have
28 a qualifying adjective. So we have the right to freedom of

1 religion with no adjective, freedom of expression, freedom of
2 association without a qualifying adjective. So it's a real
3 limitation to understand what that "Peaceful" is doing there.
4 And you've invited us to think about the three approaches there.

5 I remember from our preliminary discussion with
6 several panellists that there are also questions about even what
7 an assembly is, and to what extent an assembly is focused on
8 natural persons and, you know, appendages immediately within
9 their control versus larger dimensions.

10 But let's open things up. I think Professor
11 Mathen, you had some thoughts to share on this one, too.

12 **PROF. CARISSIMA MATHEN:** I do, thank you.

13 And I really enjoyed the policy paper prepared by
14 Professor Cameron, and I just do have a few observations that
15 build on the paper.

16 So the first point is I entirely agree that we do
17 need to recognize assembly as an important fundamental freedom
18 in its own right, and particularly in the relationship with
19 expression, while they overlap, they do reflect different
20 components of a free and democratic society.

21 To that end, though, when we think about
22 assembly, as Dean Leckey has just noted, it does have this, what
23 we call an internal limit, an internal qualifier, which is the
24 word, "Peaceful," which is not -- we do not see that with the
25 other fundamental freedoms, and so our analysis needs to take
26 some account of that.

27 In terms of looking at the right itself, while it
28 often is associated with meaningful activity, I think we might

1 want to be careful that we don't only see assembly as oriented
2 towards conveying meaning. Because it is a physical activity,
3 it can be addressed toward some other goal that is not closely
4 related to conveying meaning. For example, an assembly could be
5 oriented towards protection of an individual or a place that is
6 really its own goal, separate from any conveyance of meaning to
7 other people.

8 In terms of the word, "Peaceful," I think here as
9 well it is important to recognize something that distinguishes
10 assembly from the other fundamental freedoms, which is that it
11 is commonly manifested in a physical way. So it is the coming
12 together of people, and it is that physicality that
13 historically, of course, has been seen as very important. But
14 that also makes assembly different from the other fundamental
15 freedoms, and so when we think of the limits on peaceful, I
16 think that the borrowing from expression of the freedom of
17 expression of the notion of violence as being an important
18 qualifier is absolutely appropriate.

19 The Supreme Court of Canada has recognized that
20 threats of violence are not protected under freedom of
21 expression. I would certainly, you know, suggest we could think
22 about whether that's appropriate for freedom of expression, for
23 freedom of assembly. But, in addition, how we assess what the
24 threat is, I think, may require a slightly different vantage
25 point which is that I think it is useful to consider using an
26 objective analysis of the threat posed by a particular assembly
27 that may take it out of the protected sphere of being peaceful.

28 So this is not dependent on proving the violent

1 intentions of any one of a number of the members of the protest,
2 which I think, first of all, can be extremely difficult to do,
3 but also does not sufficiently engage with the nature of the
4 protest as a whole. So this is not a numbers game; this is a
5 very fact- and context-sensitive assessment of what the assembly
6 is or is becoming.

7 It might also be interesting to consider just as
8 there is a right against forced expression, is there a right
9 against forced assembly? And, again, because of the physical
10 manifestation of assembly, are there circumstances in which
11 people might be involuntarily brought into the context of the
12 assembly? And this might particularly be the case where the
13 nature of the assembly is such that it actually affects the
14 person in their primary residence, so that in order to escape
15 the effects of the assembly, they must leave their residence.
16 Is there a question about whether you are, in that context,
17 perhaps dealing with involuntary or forced assembly.

18 Dean Leckey noted the very interesting question
19 of what the actual fundamental freedom includes, in terms of
20 whether it is just human bodies or other things, and that, I
21 think, was very much brought out in the current situation that
22 we're considering.

23 And the one point I would make there is that --
24 and this is not, I would think, as to whether the assembly is
25 peaceful, but whether it is actually a protected exercise of
26 assembly. We just want to be careful that we don't overread the
27 right of assembly so that it privileges those that have more
28 resources to effect an assembly that becomes more difficult to

1 control. So I would just perhaps suggest that might be
2 something to think about.

3 And then, finally, when we get to the
4 justification section under section 1, certainly the state
5 should be cautious about simply dispersing an assembly. I
6 believe in international law that is seen as a last resort. But
7 in some context, dealing with the assembly more rapidly may
8 actually create the space for maximum enjoyment of the right of
9 assembly going forward, as opposed to because of this very, I
10 think, appropriate reluctance to interfere with the assembly,
11 what you wind up producing is a situation of an entrenched
12 assembly that then has to be dealt with in a much more intrusive
13 way.

14 So I would stop -- I'll stop there.

15 **DEAN ROBERT LECKEY:** Comments from other
16 panellists at this point?

17 Professor Moon and then Professor Bird.

18 Professor Moon.

19 **PROF. RICHARD MOON:** Okay, thanks.

20 Just a brief comment. Professor Cameron's paper
21 is a terrific paper and really outlines a very strong argument.

22 I want to take just -- well, not exactly issue
23 with it and some of what Professor Mathen has said -- Mathen has
24 said, sorry. Almost got that wrong.

25 And I want to kind of reassert that what I think
26 is a significant overlap between the different rights. It's
27 really important to remember when talking about freedom of
28 religion, for example, it has a collective dimension. It

1 protects religious rituals, manifestations of religious
2 practice, often which occur in collective form. And so it does
3 have a physical dimension to it in that sense. And the same
4 could be said about freedom of expression. Expression occurs in
5 a variety of ways. I'll say more about that in a minute. But
6 it's always physical, even in the most minimal sense of using
7 one's vocal cord, but more often involves much more than that.

8 So I want to re-emphasize that all of these
9 rights have a physical dimension to them. All of them have a
10 collective dimension to them as well.

11 **DEAN ROBERT LECKEY:** Thank you, Professor Moon.
12 Professor Bird?

13 **PROF. BRIAN BIRD:** Just a couple of quick
14 comments.

15 Thank you, Professor Mathen, Professor Cameron
16 for all the comments so far.

17 And in listening to more recent remarks, it does
18 seem to me that this addition of this adjective of peaceful, so
19 far I'm drawn to this notion that perhaps the drafters are
20 trying to point us to, in a way, what it doesn't protect. And
21 in that, just thinking of the kind of natural antonym of
22 peaceful being violent, or violence, so it doesn't protect
23 violent assembly.

24 But I need to think more about this, and the
25 comments are making me think more about that.

26 One thing I would also note, that this approach
27 has been suggested by the City of Ottawa, perhaps using harm as
28 a way to assess whether the assembly is protected or not.

1 It does seem to me that, at least just from a
2 purely -- from an application perspective, that determining
3 what's violent, as opposed to non-violent, seems to be a bit
4 more manageable, or easier to identify, perhaps, than harm
5 versus -- harmful versus not harmful.

6 So even from a kind of just a linguistic text, to
7 maybe pulling us to what -- pointing us to what the protection
8 does not cover, I'm also drawn to the notion that harm is just,
9 indeed, seems to be a very difficult or can be a challenging
10 concept to apply, whereas violent versus non-violent seems to be
11 a bit of a brighter line.

12 I just wanted to mention on the section 1
13 standpoint, this idea of limiting peaceful assembly, just given
14 what has been said so far about the value of assembly and
15 protest to democratic participation, one of the lesser kind of
16 interpreted phrases in section 1 is this idea of a free and
17 democratic society, this notion that all rights and freedoms in
18 the *Charter* can be limited when those limits are prescribed law,
19 when they're reasonable limits, and then finally when they're
20 demonstratively justified in a free and democratic society.

21 Perhaps this discussion also invites us to think
22 more about what that phrase, free and democratic society,
23 especially the democratic part, means in terms of does that
24 somehow animate the threshold or the bar which a statement needs
25 to reach? And even the word "free", as well, given that that
26 word points to, has a particular resonance with freedom in a
27 fundamental freedom.

28 So just maybe thinking a bit down the road of our

1 discussion of section 1, that that phrase of free and democratic
2 society seems to potentially have a lot of -- may have much to
3 say or a lot to say in this context.

4 I'll just pause there.

5 **DEAN ROBERT LECKEY:** Professor MacDonnell is
6 next, and then we'll go to Professor Cameron.

7 Professor MacDonnell?

8 **PROF. VANESSA MacDONNELL:** Just a short point on
9 this question of reasonable limits on freedom of peaceful
10 assembly.

11 I think in thinking about reasonable limits, it
12 will be helpful for us to try to move beyond what I think is a
13 very common binary in our thinking about protests, which is you
14 either allow the protest to continue, or you shut the protest
15 down.

16 And one of the important components of the
17 section 1 analysis is to examine whether a limit on rights is
18 minimally impairing. Whether it impairs no more than is
19 required to meet its objective.

20 And it seems to me that there are, you know,
21 points on the spectrum that our discussion often fails to
22 capture.

23 And so you do see, if you look at the very little
24 bit of case law that there is on freedom of peaceful assembly in
25 Canada that, you know, one option is to allow an assembly to
26 continue to during specified hours or in -- under different
27 conditions than the assembly -- than the conditions that
28 originally surrounded the assembly.

1 And so to me, this sort of moves our discussion
2 away from either full protection of this right, or sort of full
3 violation of this right to a space where we can consider is
4 there a way to still give meaningful affect to freedom of
5 assembly, while also recognizing that, you know, as Professor
6 Moon said, as time goes on, if there are elements that are, you
7 know, potentially violent or, you know, highly disruptive to the
8 safety and security of others, are there options there that
9 still allow for substantial preservation of the right?

10 **DEAN ROBERT LECKEY:** That's very interest,
11 Professor MacDonnell, given Professor Cameron's point that
12 dispersal is the absolute last resort, ---

13 **PROF. VANESSA MacDONNELL:** Right.

14 **DEAN ROBERT LECKEY:** --- but it's not the first
15 mode of intervention.

16 Professor Cameron?

17 **PROF. JAMIE CAMERON:** Yes, just -- thank you,
18 Dean Leckey. Just a couple of follow up points.

19 On the issue of acts or threats of violence, I
20 think that it's helpful to think about the nature and the level
21 of the threats, to ask where they're coming from, who is making
22 those threats, if any, and how pervasive they are, because the
23 threats will typically be made by individuals, rather than the
24 assembly. The entitlement belongs to the assembly. So we just
25 have to be careful not to treat levels of disruption as threats
26 in and of themselves, because to do so risks excluding certain
27 assemblies and gatherings from section 2(c) and not granting
28 them any *Charter* protection at all.

1 So I would always argue that those kinds of
2 limits can be imposed under section 1. So it's evidence based,
3 whether there are threats, whether they're sufficient to
4 compromise assembly.

5 A second point has to do with Dean Leckey's
6 observation, and I guess a discussion we had at dinner last
7 night, which is what exactly is the assembly and what kinds of
8 props that may be used or by an assembly are included in the
9 entitlement. And so we specifically had a question about trucks
10 last night and whether they are part of the assembly.

11 But there are other kinds of examples, of course.
12 So that assemblies choose the way and means that their message
13 can be effective, so they will typically, or they may use
14 different kinds of props. And they can be quite innocuous in
15 nature, the props that are used by assemblies, but they can go
16 all the way down to the use of weapons and so forth.

17 So the question there is to what extent does this
18 -- the right of peaceful assembly include the choice of means
19 and the choice of props instructors, including not just camps
20 and entitlement -- tents and camps and so on, but things like
21 trucks.

22 And a final point just has to do with the
23 relationship between section 2(c) and section 1. I think, you
24 know, we may have reasonable disagreements about whether the
25 work can be done under section 2(c), or whether it should be
26 reserved to section 1.

27 One of the reasons I support the section 1
28 approach is that for the reasons that were just mentioned, that

1 it's not an all or nothing kind of a calculation. There may be
2 ways for an assembly to continue in a proportional way with the
3 imposition of limits that carefully balance the rights of the
4 community.

5 I think I'll stop there. Thank you.

6 **DEAN ROBERT LECKEY:** Thank you.

7 Professor Mathen?

8 **PROF. CARISSIMA MATHEN:** Thank you very much.

9 Just a brief point to -- just to clarify, perhaps, the issue
10 around threats of violence. And I just want to be clear that I
11 am here talking about violence against the person. So the
12 criminal -- the classic criminal understanding of violence
13 against the person. So that is interference with people. Those
14 are the kinds of threats I was talking about, not other forms of
15 disruption.

16 But there can be, on an objective basis, an
17 assessment that the nature of an assembly creates a reasonable
18 generalized threat to people who are within the immediate
19 vicinity of that assembly. It will be very much fact specific.

20 **DEAN ROBERT LECKEY:** Thank you. It's also
21 interesting to grapple with the question at what point do
22 individual members of the assembly start to characterize the
23 thing as a whole, such that we feel the assembly itself is
24 involved in conduct of that nature.

25 One of the questions submitted in advance to us
26 concerns specifically Canada's Indigenous peoples. And so I
27 wondered if panelists had thoughts on whether the fundamental
28 freedoms of Indigenous peoples differ from those of others?

1 Particularly when they involve social movements seeking to
2 promote recognition and respect for traditional territories,
3 lands, and resources? And a more specific form of that
4 question, should the *Charter* protections for assembly and
5 protest interpreted consistent with the rights of Indigenous
6 peoples and is section 25 of the *Charter* any help in this regard
7 so that limits imposed on those fundamental freedoms do not
8 restrict Indigenous peoples from obtaining redress for historic
9 and ongoing violations and denial of their rights?

10 Anyone wanting to take that one on?

11 **PROF. JEAN-FRANÇOIS GAUDREault-DESBIENS:** Well I
12 can just say ---

13 **DEAN ROBERT LECKEY:** Dr. Jean-Francois
14 Gaudreault-Desbiens?

15 **PROF. JEAN-FRANÇOIS GAUDREault-DESBIENS:** --- if
16 we look at the case law of the Supreme Court, for example, on
17 freedom of expression, we realize that when the Court looks at
18 section 1 and at the justifications that are evoked to defend
19 some measures, potentially restricting freedom of expression.
20 It's a context-based analysis, which takes into consideration
21 particular situation.

22 Example, the cases involving the *Charter of*
23 *French language* in Quebec. The analysis that was made by the
24 Supreme Court was responsive to the particular context of the
25 French language in the Province of Quebec.

26 So under section 1, I don't see why cases
27 involving the fundamental freedoms of Aboriginal people should
28 not be treated in the same sensitive way. Canada is a very

1 diverse country, and in many cases, the Supreme Court has
2 clearly taken into consideration differences.

3 Another case involving Quebec, where the
4 particular regime of -- in history, of labour relations in the
5 province was taken into consideration. Would -- or absent this
6 consideration of the particular context of the province, would
7 the decision have been the same? I don't know. But being
8 context sensitive, as the Court has been in its application,
9 it's interpretation of fundamental freedoms and the evaluation
10 of their reasonable limitation is part and parcel of our case
11 law and of our constitutional law. So I don't see any
12 fundamental problem in being context sensitive to the claims of
13 Aboriginal people and their rights.

14 **DEAN ROBERT LECKEY:** Thank you.

15 Commissioner?

16 **COMMISSIONER ROULEAU:** Yeah, I just want to --
17 not on this last point, but go back to a point that Professor
18 Mathen was raising. And that's about peaceful assembly and the
19 question of whether it's a matter of violence or threatening.
20 And I think threatening is very relevant in this case because we
21 heard a lot of evidence about people who felt threatened by the
22 fact that there was all this gas around and they were scared for
23 their life, arguably. There were people who not walk to work
24 because they felt threatened. And there were people who --
25 businesses who closed because of the threat of mask removal and
26 so on.

27 So leaving aside whether those facts are
28 established or not, which is a dispute, and leaving aside,

1 really, whether that's a group or individuals or not that were
2 causing it, I'm quite interested in exploring a little more of
3 that concept, because I -- whether that means it's a section 1
4 or whether it's -- the assembly is peaceful. And I think the
5 peaceful is if you -- if violence is the only thing that makes
6 it non-peaceful, that's one thing, although I don't think that's
7 a big limitation, given that violence is illegal per se and when
8 is the assembly violent would be hard to define in any event.

9 So that would be helpful for me, because I think
10 that's part of the concept that is being developed.

11 **DEAN ROBERT LECKEY:** Thank you, Commissioner.
12 And just before we go back to the panelists, I would just add to
13 that, if I might.

14 I'm wondering if anyone else wishes to take up
15 Professor Mathen's suggestion that at a certain moment, an
16 assembly is actually conscripting other people into
17 participating in it by being, you know, in their neighbourhood
18 all the time or something like that?

19 And so we know in other contexts that one is not
20 allowed to impose one's religion on others, that one has a
21 certain right not to be in an association, and so I'm wondering
22 if anyone else finds it helpful as a distinct question from
23 whether violence has occurred, to say at a certain point, "I
24 have no choice but to be part of this assembly," and is that --
25 does that help us see a limit on the right to peaceful assembly?

26 Now, Professional MacDonnell was already on my
27 list, and I see Professor Cameron will follow her.

28 **PROF. VANESSA MacDONNELL:** I was on the list for

1 a slightly different point, so perhaps I'll just cede my time to
2 Professor Cameron.

3 **DEAN ROBERT LECKEY:** Sure. Professor Cameron?

4 **PROF. JAMIE CAMERON:** Okay. So just a couple of
5 points, if I can read my writing.

6 Thank you, Mr. Moderator.

7 So I think there's a difference between threats
8 of violence being made and the community's experience of feeling
9 threatened by the presence of a gathering or a demonstration.

10 And so, again, in the spirit of not pre-empting a
11 fundamental *Charter* entitlement, I would say that that
12 experience of feeling threatened can definitely be addressed,
13 and there's nothing to say that it doesn't allow limits. But my
14 view would be that that belongs under section 1, rather than
15 section 2.

16 I think also again, with the second point, I'm
17 not sure if this is responsive or not, but it's a messy
18 situation; isn't it? Because you have an assembly that can be
19 sort of inchoate and you don't really know what is the -- who is
20 the assembly? What is the assembly proper and who are the
21 intervenors? And to what extent is the burden on the state and
22 authorities to separate out those who have gone rogue or engaged
23 in their own activities of unlawful conduct? I think that's a
24 difficult question.

25 Again, the concern would be not to pre-empt the
26 entitlement needlessly, unless the evidence permits a conclusion
27 that the assembly has, itself, attained violent dimensions.

28 And then a third point was about being

1 conscripted, but I'm going to pass so that others can speak.

2 **DEAN ROBERT LECKEY:** Professor Bird, then
3 Professor Mathen.

4 **PROF. BRIAN BIRD:** On the conscription point, or
5 imposing one's assembly on another, it does seem to me that
6 built into the protection of the guarantee is this notion of
7 voluntary assembly, of you wanting to be your own free will and
8 not under duress, or not coerced or conscripted, being a member
9 of that.

10 So I think the notion of not imposing one's
11 religion on another in terms of the freedom of religion context,
12 does seem to have a lot of purchase here as well.

13 On the question of threats of violence, strikes
14 me that, you know, if an assembly is occurring and it's public
15 and the authorities are aware, of course can monitor for
16 prospects of violence. Is there a point at which the threats of
17 violence have transformed into where the violence is inevitable,
18 the authorities know that it's going to occur, maybe they have
19 intelligence that they know that it's going to occur on a
20 certain -- start at a certain date and time, or they have very
21 strong evidence or objective grounds for that. You could
22 arguably say at that point that maybe it's now no longer
23 peaceful, such that it's no longer captured by the guarantee.

24 Alternatively, it could be seen as still being
25 peaceful, because the violence hasn't yet started, and any kind
26 of intervention, which might well be justifiable to avoid what
27 is violence that is forecasted to start, would indeed be a limit
28 on a peaceful, still peaceful assembly, but one that would be

1 considered under section 1. So I'll just pause there.

2 **DEAN ROBERT LECKEY:** Thank you.

3 Professor Mathen?

4 **PROF. CARISSIMA MATHEN:** Thank you. I think a
5 really important point about freedom of peaceful assembly is
6 that -- and I take Professor Moon's point that there are aspects
7 that are common to all the fundamental freedoms, but linked to
8 Professor Bird's discussion of democratic participation is a
9 very important component of mutuality among citizens when they
10 are confronting the kinds of issues that arise that would be the
11 subject of some exercises of peaceful assembly.

12 And so it's -- that mutuality I think is very
13 important. And it's in that context as well that it becomes
14 important to assess the overall nature of the assembly, which
15 may be very messy, which may have inchoate or unknown
16 leadership, which may have multiple assemblies, but from the
17 objective point of view that doesn't make it impossible or
18 indeed remove the need to arrive at an assessment of what the
19 assembly is and the potential risk of interference or level of
20 interference with other citizens that again takes it out of that
21 umbrella of being a peaceful assembly, protected by the *Charter*,
22 consistent with the underlying norms and purposes of the *Charter*
23 that warrant this constitutional protection.

24 **DEAN ROBERT LECKEY:** Thank you. Other thoughts
25 from the panelists?

26 **PROF. JAMIE CAMERON:** Just one ---

27 **DEAN ROBERT LECKEY:** Yes, Professor Cameron.

28 **PROF. JAMIE CAMERON:** Just one tiny point, which

1 is what Professor Mathen is speaking to I think is the coercive
2 properties of demonstration in certain circumstances. And I
3 guess I'm just thinking through, and I don't have any further to
4 say at the moment, but there may be a difference between
5 something that is sort of a coercive presence versus a
6 threatening presence, and you know, it's a point to sort out.

7 **DEAN ROBERT LECKEY:** Thank you.

8 Professor MacDonnell?

9 **PROF. VANESSA MacDONNELL:** One small point, just
10 in making this, you know, sort of factual assessment of the
11 nature of an assembly. I think that social media makes this
12 more difficult in some ways because Professor Bird talked about,
13 you know, what police intelligence might be available, is there
14 national security intelligence that's available. You know, I
15 think there's also this question of how the protest is
16 understood in the public, in the media. And on social media,
17 there is the potential for a small number of leaders to really -
18 - to be the face of a protest.

19 And so I think one of the challenges in trying to
20 make this objective determination is, you know, what matters?
21 Is it what's happening on the ground, is it what the, you know,
22 the police information tells us, is it what seems apparent on
23 social?

24 And, you know, in many ways the democratisation
25 of social media has been very positive. I think it can also,
26 though, perhaps, like, skew our assessment one way or the other,
27 frankly, in terms of trying to characterise the assembly as a
28 whole. And given that this plays an important role in

1 determining the scope of constitutional protection, I think that
2 that is something worth reflecting on.

3 **DEAN ROBERT LECKEY:** Professor Bird.

4 **PROF. BRIAN BIRD:** Just building on
5 Professor MacDonnell's point, I think that's very important to
6 the kind of social media face on the media face of a assembly
7 versus the -- through the potentially different institutions on
8 the ground or perhaps the skewing effect that you talked about,
9 it seems a very important factor.

10 And I just wanted just to qualify my remarks a
11 little bit before, when I said if there -- threats of violence
12 are -- have risen to the level that now they're going to be
13 inevitable, the violence is going to occur or is expected to
14 occur, it may not be that it animates the entire assembly, it
15 may be that, you know, out of an assembly of a thousand people
16 there is evidence that five people, whatever the number might
17 be, a very small percentage themselves are going to kind of go
18 low, sort of speak, and enter into violence, while the rest of
19 the assembly has no interest in that whatsoever. So that's
20 another part of the conclusion as well, is you then have a more
21 individual focus in holding those individuals accountable and
22 saying that the assembly still, by definition is still peaceful,
23 or do you say that it's now become, given the grand scheme of
24 things, unpeaceful or non-peaceful assembly across the boards?
25 So that's another consideration to bear in mind.

26 **DEAN ROBERT LECKEY:** Commissioner, have we
27 provided some help on the question you asked?

28 **COMMISSIONER ROULEAU:** Some help, but it's -- it

1 is -- it's still -- I'm still troubled. I mean, the -- to put
2 it more dramatically, or more sort of black and white, at sort
3 of 10 o'clock on the Saturday of this demonstration, certain
4 people have said "it's an occupation", and so my question is
5 really directed at that. And leaving aside whether that's a
6 fair characterisation.

7 But a neighbourhood was occupied. The police, to
8 a large degree, were not pressing any charges, were not pursuing
9 any complaints by the citizens of that area, and arguably, there
10 was no real violence in that -- in those areas that were as
11 reported, let's assume that. So that's really my question, is
12 you have an occupation of a neighbourhood, as opposed to a park,
13 and you have people who legitimately, let's assume, they've
14 testified they felt threatened. You can't point to any
15 violence.

16 Do you have to go to section 1, a reasonable
17 limit, i.e. which is I think what Professor Cameron says, or is
18 there something about peaceful assembly, no you can't -- it's
19 not a peaceful assembly to occupy a neighbourhood and basically
20 -- where police can't enforce because they'll be swarmed.
21 Again, you might say it's a few individuals, which no doubt it
22 is. But that's -- I think that's a factual finding I may have
23 to find, but it's -- when I look at peaceful assembly is that
24 something that is peaceful?

25 And -- but again, I thank you for the comments,
26 but that's -- I wanted to point out, really, what is a critical
27 element in this is, is that occupation, as it's been described,
28 where it's been said it's a lawless neighbourhood in which

1 people live, and no suggestion, let's say, of violence.

2 **DEAN ROBERT LECKEY:** Thank you. The -- and the
3 occupation question is one challenging thing. Last night, in
4 the discussion some of us had, there was also disagreements,
5 indeed, over whether honking at a certain point becomes an
6 assault. And is it -- I mean, it's -- there is a physical
7 dimension, your body can experience noise if it's loud enough
8 and sustained enough, and there are all kinds of norms around
9 construction work, and so on, that recognises the impact on the
10 person. Does that itself become unpeaceful at a certain moment?

11 And it's -- I don't think of it as a political
12 ideology, but whether you were in Ottawa last winter seems to
13 effect a little bit about how you approach some of these issues
14 where conceptualising and facts meet up.

15 Professor MacDonnell?

16 **PROF. VANESSA MacDONNELL:** I was just going to
17 add that one of the things that we have been discussing and will
18 continue discussing in this conversation is the extent to which,
19 you know, because, as Professor Cameron points out, there is so
20 little case law on freedom of peaceful assembly, when we're
21 looking elsewhere for guidance, one of the places we tend to
22 look is at the way that the court has addressed other
23 fundamental freedoms. And here, on this question of violence or
24 threats of violence, the freedom of expression jurisprudence has
25 moved from saying that, you know, it's only physical violence
26 that is sort of excluded from freedom of expression where there
27 is communicative content, to including threats of violence.

28 And so in terms of thinking about what the scope

1 of peaceful assembly would be, you know, my sense is that's a
2 fairly strong authority for treating both threats of violence
3 and actual violence as being not peaceful for the purpose of
4 2(c). My sense is the question that comes out of some of the
5 submissions of the parties and from some of the material that
6 Professor Cameron canvasses in her paper is, is there something
7 more than that beyond threats of violence? Is there something
8 about disruption, inconvenience that also would take a protest
9 outside of the scope of being peaceful?

10 My impression, though, and you know, perhaps this
11 isn't shared by the panel, is that it would be, you know,
12 surprising if a right to peaceful assembly did not take account
13 of threats of violence, and that the standard for rendering a
14 protest not peaceful is actual physical violence. I think that
15 would be out of keeping with the kind of -- the freedom of
16 expression jurisprudence and the direction it's taken for much
17 the same reason, for -- or which, I guess, informed by much the
18 same rationale as one would see in the context of peaceful
19 assembly.

20 **DEAN ROBERT LECKEY:** Colleagues, we're doing this
21 collectively. We've spent longer on this issue than we
22 expected, but I think it's valuable.

23 So Professor Moon, I'm happy to go to you next.
24 We're all cognisant that this is shrinking a little bit freedom
25 of expression, but think this has been very helpful so far.
26 Please ---

27 **PROF. RICHARD MOON:** So I'll say very little.

28 **DEAN ROBERT LECKEY:** Please continue.

1 **PROF. RICHARD MOON:** Yeah, I wanted to kind of
2 work through the notion of occupying a neighbourhood a little
3 more closely because if what we're talking about are public
4 spaces, public properties, the streets, for example, as opposed
5 to private properties, then it strikes me that there is at least
6 initially a right to protest in those spaces. Obviously, the
7 residential character of a particular neighbourhood can
8 certainly and should play a role in determining what's a, you
9 know what's a -- you know, what's a reasonable limit on that?
10 It's one thing to parade down a street in a residential
11 neighbourhood demonstrating, it's another to remain there for an
12 extended period of time, to honk horns and whatever. And it
13 strikes me that that's very much a question of what are the
14 reasonable limits, as opposed to something more basic.

15 **DEAN ROBERT LECKEY:** Okay. So thank you very
16 much for the exploration of freedom of peaceful assembly.

17 We're going to turn now to freedom of expression,
18 paragraph 2(b) of the *Charter*. We've already had the suggestion
19 that there's continuity in the sense of, potentially, a
20 collective and a physical dimension to this guarantee as well.
21 But we're going to continue with Professor Moon.

22 **PROF. RICHARD MOON:** All right. So I now have
23 two minutes, is what you're telling me?

24 **DEAN ROBERT LECKEY:** No, no, you're good.

25 **PROF. RICHARD MOON:** All right. Well, you know,
26 thank you. I'm, you know, very pleased to be included in this.

27 I almost feel like I should begin with an apology
28 to the translators, because I haven't often spoken to

1 Parliamentary committees, but on the few occasions I have, I've
2 invariably been told to slow down. So I will at least try, to
3 begin.

4 All right. So section 2(b) of the *Charter*
5 protects freedom of expression. But more fully, it protects
6 freedom of thought, belief, opinion, and expression, including
7 freedom of the press and other media communication, but I am
8 going to simply speak about freedom of expression.

9 It's generally understood that it matters, it's
10 important, as a fundamental right or freedom, because it's
11 necessary to the -- I know, it's passion -- it's necessary to
12 the operation of a democratic form of government; it contributes
13 significantly to development of truth, of the growth of
14 individual or collective knowledge; and it's important to self-
15 realization.

16 I would add, though, I think it's important to
17 keep in mind freedom of expression doesn't just protect
18 individual liberty, in the sense of individuals' kind of
19 personal, private space. It protects a social activity. It
20 protects the right of an individual to speak to others and to
21 hear what others may say. It's a social activity that
22 invariably involves the use of collective resources, whether
23 that be the park, the streets, or the internet. And I think
24 that's important to keep in mind.

25 All right. The scope of freedom of expression.
26 It protects communication, something along those lines. And
27 what our courts have said, it protects any activity that is
28 intended to convey a meaning or a message to others, and I think

1 it's worth noting that the court illustrates this with the
2 example of parking against the rules.

3 So ordinarily, if you park contrary to whatever
4 the rules may be, presumably you do so because you won't --
5 don't want to pay, you know, whatever might be the cost of doing
6 so, or you can't find a convenient spot. But, says the Court,
7 if you park against the rules in order to protest in some way,
8 then that counts as expression.

9 Now, that suggests a fairly broad understanding
10 of expression. In principle, any act can be an act of
11 expression if performed with the intention of communicating a
12 message. It also means that any law could, in theory, be a
13 restriction on expression if it happens to restrict the way in
14 which someone has chosen to express themselves.

15 Now, the example given by the Court, refers to
16 parking. You know, maybe it's convenient that we're thinking of
17 cars, but we could, of course, think of other vehicles as well
18 when thinking about acts of expression.

19 As Professor MacDonnell earlier referred to, the
20 Court, though, recognizing the potential breadth of the scope of
21 this right, has said that it doesn't include acts of violence;
22 that's what they said initially. And then subsequently said,
23 and it doesn't include threats of violence as well.

24 So if an act involves -- it's not about --
25 doesn't exclude advocacy of violence, and that can be dealt with
26 under section 1, potentially. But from the scope of section
27 2(b), it only excludes acts that have the form of violence, like
28 terrorist acts, some kind of physical violence directed at

1 another, and threats to do so.

2 All right. So the Court has said that picketing,
3 advertising, hate speech, obscenity are -- all fall within the
4 scope of section 2(b), but of course, are subject to reasonable
5 limits under section 1 of the *Charter*.

6 I won't say anything more about section 1 because
7 it's been very well covered already.

8 But maybe one thing worth noting is, the Court
9 said with regard to freedom of expression, when we move on to
10 section 1 in considering limits, though all these different
11 forms of expression are protected, some have more weight, or
12 more value than others when we are considering limits.

13 So for example, political speeches, core-value
14 speeches closely, says the Court, connected to the values that
15 underlie our commitment to freedom of expression, and so it has
16 a high value, it will be harder for the state to justify its
17 restriction. On the other hand, hate speech, obscenity,
18 commercial advertising are less directly connected to these
19 values and, therefore, it may be easier for the state to justify
20 restriction.

21 Okay. I wanted to quickly say -- talk about
22 three issues; free speech issues that might be, you know, worth
23 considering. One of them is hate speech, and in Canada, hate
24 speech is restrictive under certain human rights codes, not all
25 of them; and, at the moment, not under the *Canada Human Rights*
26 *Act*, but that may change at some point. And it's restricted, of
27 course, under the *Criminal Code*, under section 319(2), which
28 prohibits the wilful promotion of hatred against the members of

1 certain identifiable groups.

2 There are two kinds of harms that we can connect
3 to hate. One of them is the harm directly experienced by
4 members of a target group; threats, intimidation, harassment,
5 for example, and most of the US cases are about that kind of
6 harm.

7 The other kind of harm is the spread of hateful
8 views within the larger community. So that some in the
9 community may be persuaded by others to take a particular view
10 about members of the group with the result that those who hear
11 these views may adopt more hateful attitudes or may even take
12 action against the members of targeted groups. And most of the
13 Canadian cases have been concerned with that kind of harm, with
14 hate speech laws directed at that kind of harm. And our courts,
15 in a number of ---

16 **DEAN ROBERT LECKEY:** About two minutes left of --
17 -

18 **PROF. RICHARD MOON:** Okay. I'll get there.

19 So our Courts had been willing to uphold these
20 restrictions on hate speech, focusing primarily on the fact that
21 the laws are very narrow in their scope. Focusing on speeches,
22 extreme -- is understood as vilifying the members of particular
23 groups.

24 Okay. I'll say no more about that, then.

25 Another issue that seems relevant is the question
26 of the right of individuals to access government-owned property
27 in order to communicate. I wrote about this fairly extensively
28 in my background paper, and so I'll just boil it down to this;

1 our courts have said that they're really two kinds of state-
2 owned properties. There are what might be called public arenas
3 or public forums; properties that by tradition or in practice
4 are generally open to the public for communication and
5 individuals have a *prima facie* right to enter onto those
6 properties in order to communicate. Obviously, their expression
7 can be restricted for a variety of reasons, but those reasons
8 are not simply that the state owns the property and can exclude
9 someone from it.

10 And then there are other properties to which
11 individuals don't ordinarily have the right to enter onto and
12 communicate, and they are described as, paradoxically sometimes,
13 private forums or something like that. And the state doesn't
14 have to justify the exclusion of expression from those
15 properties. So we're talking about government offices;
16 broadcast facilities, properties of that kind.

17 And then, I guess, finally, I just wanted to say
18 a little bit about social media, and the changes that it has
19 brought to our thinking about freedom of expression.

20 I think one change is speech that previously was
21 not considered harmful, at least to a degree that might justify
22 its general restriction, we now may be viewing differently. For
23 example, disinformation or deceit of course has been subject to
24 very particular restrictions in the past; false advertising,
25 defamation and so forth. But it is become such a large problem,
26 I think we are having to think increasingly about whether or not
27 there need to be larger restrictions or interventions on this
28 form of speech.

1 And I think the same could be said about speech
2 that is insulting or harassing. It takes on a different
3 character online when so many people can pile on, or it can be
4 persistent, or the insult harassment can be widespread and
5 endure in many ways.

6 And then finally, I just want -- oh, go ahead --
7 yeah, yeah. My final remark is to say of course what social
8 media also means is the traditional legal responses to these
9 harms are increasingly impractical. They're too slow. They're
10 too cumbersome to really address these. And that's why there is
11 much more thought being given to how social media can, itself,
12 be engaged in taking this material down. And that brings a
13 range of different challenges.

14 **DEAN ROBERT LECKEY:** Thank you. Thank you. And
15 social media and disinformation, we'll come back a little bit
16 later this week.

17 Professor Gaudreault-Desbiens?

18 **PROF. JEAN-FRANÇOIS GAUDREULT-DESBIENS:** Yes.
19 Thank you very much. For the sake of time, I will speak
20 directly to on issue that Professor Moon raised, which is that
21 of disinformation, false news.

22 And since I had written my notes in French, I
23 will switch to French.

24 Alors, je veux simplement rappeler que -- and
25 please remind me to speak slowly, this has always been a
26 challenge.

27 Alors, il faut rappeler ici que la notion même de
28 fausse nouvelle est ambiguë, elle recouvre des réalités qui sont

1 extrêmement différentes, ça peut aller de représentations
2 hyperboliques qui sont faites dans un but satirique à des
3 mensonges qui sont énoncés ou des représentations qui sont
4 fabriquées sciemment en vue de tromper.

5 On sait que dans l'arrêt *Zundel* de 1993, la Cour
6 suprême du Canada a invalidé une disposition qui pénalisait les
7 fausses nouvelles et dont les origines remontaient au Moyen-Âge.
8 La Cour a, à ce moment, rappelé que les critères de la liberté
9 d'expression mettent souvent en jeu une opposition entre
10 l'opinion majoritaire au sujet de ce qui est vrai ou correct et
11 une opinion minoritaire impopulaire, et, d'une certaine façon,
12 en mettant en pratique l'esprit... l'éthique relativiste qui
13 inspire le libéralisme, la juge McLachlin – telle qu'elle
14 l'était à l'époque – nous expliquait que la liberté d'expression
15 est une garantie qui sert à protéger le droit de la minorité
16 d'exprimer son opinion, quelle qu'impopulaire qu'elle puisse
17 être, et cetera, et cetera, et cetera. Donc, elle voyait dans la
18 justification de l'invalidité de cette criminalisation des
19 fausses nouvelles un moyen de protéger l'opinion minoritaire.
20 C'est donc le droit.

21 Par ailleurs, il faut voir que le droit canadien
22 n'impose pas en amont d'obligation de vérité à ceux qui
23 s'expriment, et c'est important de le dire dans le contexte
24 d'une discussion juridique. Ce n'est qu'en aval, *ex post facto*,
25 que le droit pourra rendre des personnes qui ne disent pas la
26 vérité, dans des circonstances très bien balisées, des propos
27 faux qu'ils ont tenus, comme, par exemple, en matière d'atteinte
28 à la réputation.

1 Une chose qui me paraît très, très importante de
2 noter, c'est que l'écosystème expressif dans lequel nous
3 évoluons depuis une vingtaine d'années avec l'internet, avec la
4 montée en puissance des médias sociaux, ce n'est plus le même
5 que celui dans lequel nous avons grosso modo vécu pendant
6 150 ans, et *Zundel* a été prononcé dans cet autre monde, dans
7 l'Ancien Monde, avant l'arrivée d'internet et la montée en
8 puissance de ce qu'un grand sociologue français, Pierre
9 Rosanvallon a appelé « l'âge de la défiance » par rapport à
10 « l'âge de la confiance ».

11 Alors, si on doit continuer de prendre au sérieux
12 les préoccupations de la Cour suprême du Canada dans *Zundel* à
13 propos de la complexité des fausses nouvelles, on doit quand
14 même prendre acte du fait, comme le dit le professeur Moon dans
15 son texte, son Policy Paper, que le cadre qui est mis en place
16 paraît un petit peu daté, il pourrait devenir une forme de
17 cheval de Troie qui ferait obstacle à une appréhension
18 véritablement complexe de ce nouvel écosystème normatif.

19 En effet, la capacité de mobilisation et d'action
20 autour de stratégies de désinformation a été décuplée de telle
21 sorte que toute analyse d'une manifestation, comme celle sur
22 laquelle se penche cette Commission, peut difficilement faire
23 l'économie au moment d'émettre des recommandations de ce qui
24 provoque en amont de telles manifestations et de ce qui va en
25 provoquer d'autres.

26 Comme l'a souligné mon collègue de l'Université
27 de Montréal Pierre Trudel, les différentes catégories de fausses
28 nouvelles n'appellent pas toutes les mêmes interventions alors

1 que la capacité de distinguer les propos satiriques relève d'une
2 stratégie de promotion...

3 **DEAN ROBERT LECKEY:** Peut-être un peu plus
4 lentement.

5 **PROF. JEAN-FRANÇOIS GAUDREAU-DESBIENS:** Oui.
6 I'm sorry.

7 ...relève d'une stratégie de promotion de
8 l'amélioration des capacités de lecture des internautes. Lutter
9 contre la falsification volontaire de l'information pourrait
10 passer par des régulations plus fortes et plus conséquentes. Et
11 là-dessus, il faut bien voir comment les réseaux fonctionnent :
12 par des processus algorithmiques qui sont protégés par des
13 secrets... par le secret commercial et qui sont le fondement du
14 modèle d'affaires des réseaux sociaux et, d'une certaine façon,
15 on le sait très bien, on crée des bulles, des bulles
16 informationnelles qui créent non pas un choc d'idées, comme le
17 veut la théorie classique en matière de liberté d'expression,
18 mais plutôt des compartiments étanches entre des univers
19 informationnels différents, et le collègue en question, Trudel,
20 suggère d'imposer à terme aux opérateurs des réseaux sociaux des
21 obligations de transparence.

22 D'un point de vue constitutionnel – évidemment,
23 ce sera à la Cour de le faire en temps et lieu –, je pense qu'il
24 va falloir revisiter le cadre applicable à la saisie des fausses
25 nouvelles. Peut-être via la reconnaissance d'un statut spécial à
26 ce que la professeure Vicki Jackson de Harvard appelle « les
27 institutions du savoir » – « *knowledge institutions* » –, telles
28 que les universités, les musées, les agences statistiques

1 gouvernementales, mais qui transigent à distance du
2 gouvernement, les tribunaux également, donc des acteurs sociaux
3 qui ont comme objectif principal l'analyse ou le développement,
4 selon évidemment leur fonction particulière, d'informations
5 fiables qui sont produites ou qui sont filtrées selon des
6 standards éprouvés et vérifiables. Et même si on peut dire que
7 la distinction entre les faits et les valeurs n'a plus
8 l'étanchéité qu'elle avait dans le passé, on doit réfléchir à
9 ces questions-là.

10 Et, d'une certaine façon, j'ai peur de dire que
11 notre droit constitutionnel en matière de liberté d'expression
12 mérite d'arriver au 21^e siècle, on n'y est peut-être pas encore,
13 le monde a changé, et peut-être de revoir, même s'il se fonde
14 sur des bases très, très solides, de revoir l'espèce d'angélisme
15 relativiste qui l'a inspiré à bien des égards et qui nous
16 faisait croire qu'en bout de ligne la vérité allait triompher ou
17 pouvait triompher.

18 Je vais m'arrêter là pour l'instant parce que,
19 bon, j'avais plein d'autres choses à dire sur la question de la
20 propagande haineuse aussi... ah, je vais le dire 30 secondes.
21 Monsieur le doyen Leckey va me le permettre, j'espère.

22 La criminalisation de la propagande haineuse au
23 Canada se fait en fonction de variables identitaires, autrement
24 dit la stigmatisation de groupes qui sont définis à partir d'une
25 identité quelconque, le genre, l'orientation sexuelle, la race,
26 l'ethnie, et cetera. Dans notre société où la polarisation
27 politique est exacerbée, bien sûr qu'on retrouve beaucoup de
28 cette propagande haineuse traditionnelle, mais il y a aussi une

1 stigmatisation radicale et virulente des personnes qui
2 participent à l'activité gouvernementale, qu'elles soient élues
3 ou qu'elles fassent partie de l'Exécutif. Ces personnes-là sont
4 victimes d'attaques virulentes et parfois haineuses sur les
5 réseaux sociaux en raison de la fonction qu'elles exercent au
6 sein des institutions démocratiques, et, d'une certaine façon,
7 là aussi il va falloir se poser des questions.

8 C'est évidemment pas la Commission qui va régler
9 ces questions, mais les législateurs vont devoir prendre ces
10 choses-là au sérieux, mais c'est tout cet écosystème expressif
11 qui se met en place en amont et qui est très différent de ce
12 qu'on connaissait auparavant qui va favoriser l'émergence de
13 mouvements sociaux parfois violents, pas toujours, mais qui vont
14 mobiliser des personnes et peut-être, parfois, les mener à poser
15 des gestes collectifs qui vont prendre... qui en viennent à
16 subvertir la démocratie et les processus démocratiques.

17 Je m'arrête.

18 **DEAN ROBERT LECKEY:** Merci beaucoup.

19 Il se peut aussi qu'il y ait une dimension
20 intrasexuelle (phon.) à cela aussi puisqu'on a l'impression que
21 ce sont peut-être les personnes féminines qui occupent des
22 fonctions publiques qui sont peut-être victimes le plus souvent...

23 **PROF. JEAN-FRANÇOIS GAUDREAU-DESBIENS:** Bien
24 sûr.

25 **DEAN ROBERT LECKEY:** ...le plus virulemment des
26 attaques.

27 **PROF. JEAN-FRANÇOIS GAUDREAU-DESBIENS:** Bien,
28 absolument. Factuellement, ç'a été démontré...

1 **DEAN ROBERT LECKEY:** C'est démontré très bien.

2 **PROF. JEAN-FRANÇOIS GAUDREULT-DESBIENS:** ...que des
3 personnes issues de mino... de groupes racisés qui occupent des
4 fonctions publiques, que les femmes, la violence à leur égard
5 est encore plus forte.

6 **DEAN ROBERT LECKEY:** C'était le professeur
7 Gaudreault-Desbiens.

8 I'm looking at the time and we have one more
9 topic still, the relationship between the *Emergencies Act* and
10 the *Charter*. So if someone has literally two minutes or less
11 further on freedom of expression, I would be delighted to take
12 it. But we collectively spent longer on peaceful assembly.
13 Freedom of expression, final intervention?

14 **UNIDENTIFIED SPEAKER:** Obviously everything was
15 said that needed to be said, clearly.

16 **DEAN ROBERT LECKEY:** Okay. Thank you very much.
17 Commissioner?

18 **COMMISSIONER ROULEAU:** Je vais juste... une seconde
19 pour dire je pense que les... certainement ce qui a été soulevé
20 par le professeur Bird rejoint beaucoup ce que le professeur
21 Gaudreault-Desbiens dit dans le sens que la tolérance d'un
22 protêt, est-ce qu'on doit tenir compte du message qui est en
23 train d'être véhiculé par ce protêt-là et aussi les conséquences
24 parce qu'on a entendu de la preuve que le message encourageait
25 des menaces beaucoup pour des gens, des femmes et des
26 politiciens.

27 Alors, je pense que ça, c'est une question.
28 Certainement, s'il y a d'autres commentaires, ça m'est utile

1 puis peut-être le faire plus tard, mais est-ce que c'est
2 légitime de tenir compte de ça? Parce que l'expression est « de
3 la « désinformation ».

4 **DEAN ROBERT LECKEY:** Unless there is an answer, a
5 short answer for the Commissioner? Professeur Gaudreault-
6 Desbiens?

7 **PROF. JEAN-FRANÇOIS GAUDREULT-DESBIENS:** Bien,
8 d'abord, comme je l'ai mentionné, dans l'état actuel du droit,
9 la désinformation est permise, et c'est protégé
10 constitutionnellement. C'est *Zundel* qui met en place le cadre
11 juridique. Donc, évidemment, stigmatiser de manière particulière
12 des messages serait en soi une source de contestation
13 constitutionnelle et si, d'aventure, le Parlement décidait
14 d'édicter des lois, par exemple dans ses champs de compétence en
15 matière de télécommunications, pour davantage resserrer les
16 contraintes dans un sens qui favoriserait une hiérarchisation
17 des informations à partir de faits pour que les faits objectifs,
18 les faits avérés démontrés fiablement ressortent davantage que
19 les fausses nouvelles, la désinformation, bien, évidemment, en
20 soi, ce serait probablement contesté.

21 Ma thèse, c'est que, à terme, l'approche
22 traditionnelle de neutr... que les tribunaux ont adoptée un peu
23 partout quant à leur neutralité par rapport au contenu va devoir
24 être remise en cause. On n'en est pas là, mais j'ai l'impression
25 qu'on s'en va un peu vers là. Et les questions de maintien de
26 l'espace démocratique qui sont au fondement de notre ordre
27 constitutionnel doivent aussi être prises en considération.

28 Il y a une citation que j'aime beaucoup qui

1 vient... qui est un classique du droit constitutionnel américain,
2 mais c'est le juge Jackson qui disait en 1949 dans l'arrêt
3 *Terminiello*, une affaire de liberté d'expression, il disait :
4 « The choice is not between order and
5 liberty. It is between liberty and
6 order and anarchy without either. There
7 is a danger that, if the Court does not
8 temper its doctrinaire logic with a
9 little practical wisdom it will convert
10 the constitutional Bill of Rights into
11 a suicidal pact. »

12 Et d'une certaine façon, je pense qu'on doit
13 réfléchir au périmètre des garanties constitutionnelles de la
14 Charte canadienne aussi à la lumière de cette valeur
15 fondamentale qui est la démocratie, qui nourrit, qui irrigue la
16 liberté d'expression notamment, c'est une des valeurs sous-
17 jacentes. Et puis on doit, si on regarde dans une perspective
18 institutionnelle le continuum des droits qui sont garantis dans
19 la Charte, il y a aussi un droit qui s'appelle le droit de vote,
20 des élections au minimum a tous les cinq ans.

21 Et vous posiez la question sur l'occupation tout
22 à l'heure, alors là quel est le type de message que l'on veut
23 envoyer? Si c'est un changement radical de régime, alors, ben,
24 qu'on fasse de la politique.

25 **DEAN ROBERT LECKEY:** La Charte canadienne n'a que
26 40 ans, donc c'est intéressant de constater que déjà la
27 jurisprudence peut paraître un peu périmée sur certains points.

28 **PROF. JEAN-FRANÇOIS GAUDREAU-DESBIENS:** It's a

1 part of life.

2 **DEAN ROBERT LECKEY:** Returning now, we have
3 literally five minutes. So Professor Bird will share perhaps a
4 comment or two on the relationship between the *Emergencies Act*
5 and the *Charter*.

6 Professor Bird?

7 **PROF. BRIAN BIRD:** Thank you, Dean Leckey. So in
8 these comments, I just want to kind of intensify or amplify the
9 radar with respect to how the *Charter* and the *Emergencies Act*
10 converse.

11 And so most of the commentary on the Federal
12 Government's use of the *Emergencies Act* this year has focused on
13 whether the circumstances in Ottawa last February amounted to a
14 public order emergency. In other words, whether the Federal
15 Government was legally entitled to invoke the Act.

16 This is, of course, a very important question for
17 this Commission, but it's also not the end of the story. This
18 Inquiry is tasked with investigating the circumstances that led
19 to the declaration being issued and the measures taken for
20 dealing with the emergencies.

21 So even if the invocation of the Act was lawful,
22 what about the legality of the measures that followed?

23 This question looks beyond the issue of whether
24 the Federal Government, either at this moment or any other
25 moment in history, can lawfully invoke the Act. It certainly
26 engages the downstream issue of whether measures taken after
27 invocation fall within the scope of powers granted by the text
28 of the Act, but the legality of these measures also implicates

1 foundational considerations within the Canadian legal landscape.
2 It invites us to think about how the *Emergencies Act* converses
3 with the Canadian *Constitution*. And in particular, as we've
4 been discussing today, the *Canadian Charter of Rights and*
5 *Freedoms*.

6 And so it could be perhaps tempting to think that
7 the Act, given its substance, and purpose, and the stakes
8 transcends, or somehow transcends the *Charter*. Put differently,
9 if the Federal Government concludes that a given situation
10 satisfies the criteria that permit recourse to the Act, its
11 invocation, some citizens, maybe even the Government itself,
12 might slide into thinking that practically anything goes in
13 responding to the emergency and that the *Charter* need not be
14 consulted.

15 But this way of thinking would be incorrect. The
16 starting point is that every instance of state action in Canada
17 must comply with the *Constitution*. To the extent that an
18 instance of state action is inconsistent with the *Constitution*,
19 the action is null and void.

20 This principle applies with equal force to the
21 *Emergencies Act*, both in terms of the substance of the Act, its
22 text, and decisions taken by government pursuant to it.

23 The preamble to the Act actually refers to the
24 *Charter*, noting that the Federal Government would be subject to
25 the *Charter* when exercising powers granted by the Act. Now, to
26 be clear, the *Charter* would still govern the use of the Act,
27 even if the preamble did not mention the *Charter*. And as for
28 why Parliament included this reference, perhaps it was intended

1 to help us avoid that headspace described earlier, where the Act
2 is somehow perceived as beyond the reach of the *Charter*.

3 Now it seems fair to say that in general, the
4 substance of the Act does not unjustifiably limit *Charter* rights
5 and freedoms. What I mean by that is that legislation that
6 permits the state to take temporary but severe action to deal
7 with extreme situations, insurrections, terrorism, and so forth,
8 will certainly or almost certainly interfere with various
9 *Charter* guarantees, like the ones we've been describing or
10 discussing today.

11 Even so, most, if not all of us, can agree that
12 those interferences in those extreme situations would often be
13 justifiable under section 1 of the *Charter*. But matters become
14 more complicated once the Federal Government actually invokes
15 the Act and has recourse to the emergency powers at its
16 disposal.

17 Now, assuming for the moment that the
18 circumstances on the ground satisfy the definition of a national
19 emergency in the Act, it would be incorrect to suggest that each
20 and every use of the powers in the Act that follow invocation
21 will inevitably or automatically comply with the *Charter*. Even
22 if an emergency, as contemplated by the Act exists, each
23 emergency is unique in nature. The Federal Government must
24 therefore ensure that its use of emergency powers, depending on
25 the features of the emergency at hand, limit *Charter* rights and
26 freedoms in ways that satisfy section 1.

27 **DEAN ROBERT LECKEY:** Thank you. Thank you very
28 much. So we now have our little pause where we look at some

1 questions, and then we'll come back for a final much shorter
2 session. Thank you very much, panelists.

3 **THE REGISTRAR:** The Commission is in recess for
4 30 minutes. La Commission est levée pour trente minutes.

5 --- Upon recessing at 11:28 a.m.

6 --- Upon resuming at 12:02 a.m.

7 **DEAN ROBERT LECKEY:** We have several questions.
8 We'll begin with the one we wanted to address most importantly I
9 think.

10 There may be a perception by the police this past
11 winter that the *Charter, Canadian Charter of Rights and Freedoms*
12 prevented them from, say, stopping the movement of trucks into
13 parts of the city, and so we're curious if there are thoughts on
14 how the *Charter* -- and this is combining, I think, section 2 and
15 section 1, so the *Charter* as a whole, I mean, would police have
16 been able to stop truckers from driving through zones that were
17 zoned as no trucks? Would the *Charter* have allowed police to
18 stop people parking their trucks? Would the *Charter* have been
19 satisfied if people were told to, you know, park here and we'll
20 bus you over to a different zone where you could gather. We're
21 wondering if you have thoughts on those.

22 First one will start.

23 **PROF. RICHARD MOON:** We'll attempt that. I mean,
24 I guess I have to preface any answer to that question with
25 really what I think came out in our discussion and that is
26 people have the right to protest. Protest invariably involves
27 some disruption of ordinary property use, and the question
28 always is what are the appropriate limits. And it's accepted

1 that municipalities, for example, can put in place different
2 kinds of restrictions, even notice requirements, if you have a
3 large protest to inform the police or municipality in advance
4 that you intend to do that. So I think the short answer is I
5 think they probably could do those things. They could say no
6 trucks parked in this area. No parks -- no trucks can enter
7 into this area. But it has to, notionally at least, be
8 justified as a reasonable restriction on the right to protest.
9 And certainly, it strikes me -- this is easy to say in hindsight
10 that it could easily be understood as reasonable given the
11 amount of space, the pollution, the noise and so forth that a
12 truck could generate.

13 So, again, the real challenge, and I don't envy
14 those who have to make decisions here around any of these
15 questions is that, ultimately, it is a very practical
16 determination to decide how much disruption, how long, so forth,
17 and it would not, to my mind, be unreasonable to say trucks in a
18 space like this is a significant disruption, and the protest can
19 happen but it's legitimate to exclude trucks from it.

20 **DEAN ROBERT LECKEY:** Professor Moon, if I could
21 just follow up, you were talking about reasonable limits and so
22 on, which is evoking the idea of a limit prescribed by law and
23 so on. Do you think, like, existing no truck zone by-laws or
24 whatever form those rules take, would that have been enough as
25 the legal basis for the police to interfere with what they
26 perceived to be the exercise of the democratic rights?

27 **PROF. RICHARD MOON:** Without kind of, you know,
28 having a sense of what the array of existing rules are that

1 could be drawn upon, I think the answer might be yes, but I
2 don't know enough about what the ---

3 **DEAN ROBERT LECKEY:** Sure. So you're ---

4 **PROF. RICHARD MOON:** --- by-laws would be.

5 **DEAN ROBERT LECKEY:** --- you're hedging your bets
6 a little bit.

7 **PROF. RICHARD MOON:** I am absolutely.

8 **DEAN ROBERT LECKEY:** Yeah, thank you. Professor
9 Mathen and then Professor Cameron.

10 **PROF. CARISSIMA MATHEN:** So I think it's also
11 fair to look to past practice and it is true that in the past
12 there were protest and assemblies that did involve trucks, but
13 they did not stay, and that seems to have been part of the
14 landscape in which law enforcement was operating, but there was
15 also information indicating that they intended to stay. And so
16 had they taken that to the real statement of intent that would
17 pose a different kind of enforcement problem, then I think that
18 would be the basis on which you could absolutely seek to prevent
19 that mode of assembly. Again, it's -- it comes down to what
20 does the fundamental freedom actually entail. But certainly,
21 given the scale of the vehicles and the information that was
22 widely circulating about what was the intent for those vehicles,
23 at a minimum, yes, you could in that context reasonably restrict
24 them from proceeding in the way that they wanted to, to the
25 positions where they wanted to place those vehicles.

26 **DEAN ROBERT LECKEY:** I'm wondering if Professor
27 Cameron has a different point of view.

28 **PROF. JAMIE CAMERON:** I'm not sure what my point

1 of view is, but I would just observe that in Toronto, I believe
2 I'm correct in saying that the trucks were stopped from coming
3 into downtown Toronto. And so the same kind of situation never
4 crystallized in Toronto. As for Ottawa, I would say there's a
5 significant difference between a flow-through demonstration, so
6 where the trucks flow through in a day or two days, and the
7 trucks stay. As to whether and when they could be stopped, I'm
8 not really sure. I would worry a little bit about prior
9 restraint kinds of concerns were all trucks to be stopped and
10 never given any opportunity to come into the capital city and
11 make any kind of demonstration, I would worry a little bit about
12 that, but it's an awkward situation, obviously, because once the
13 trucks are there and they come in, the enforcement issue arises
14 very quickly.

15 **DEAN ROBERT LECKEY:** Professor Bird?

16 **PROF. BRIAN BIRD:** Just very quickly, I just --
17 just zooming out a bit, just it strikes me that often other
18 protests, give marches where people are walking the streets,
19 maybe even, you know, stopping in a city square or intersection,
20 oftentimes protests will involve abnormal use of a space. You
21 know, normally people don't walk down major boulevards and
22 that's -- usually you use cars and usually they'd be on the
23 sidewalks instead. Sometimes that -- maybe even some cities, I
24 don't know the array of by-laws, but even walking on streets,
25 marching streets might well also breach by-laws. So just to say
26 that an abnormal use of public space for the purpose of protest
27 is -- seems to be quite common, but I agree with all the
28 comments so far as well. Very important.

1 **DEAN ROBERT LECKEY:** So the factual question of
2 whether there was prior notice of an intention to park might
3 well be very significant as one thinks this through.

4 **COMMISSIONER ROULEAU:** So -- I mean, just to take
5 this point to the next level. So there seems to be consensus
6 that once trucks are parked illegally and are asked to leave,
7 and don't leave, would the assembly then become illegal or is it
8 an assembly that then is in violence and -- of section 1.

9 Here, they were allowed to park, so -- and then
10 they were asked essentially to leave and they didn't leave. So
11 that's, I guess, that's the general view?

12 **PROF. RICHARD MOON:** Well, so much ---

13 **DEAN ROBERT LECKEY:** Professor Moon.

14 **PROF. RICHARD MOON:** --- determines as what the
15 legal authorisation would be to remove, and some believe there
16 would be a variety of rules that would permit that, and then the
17 question is whether that would be justified, and I think the
18 consensus would be, particularly in this circumstance, it would
19 be.

20 **DEAN ROBERT LECKEY:** Professor Cameron?

21 **PROF. JAMIE CAMERON:** Simply to add that on the
22 question of reasonable limits, there is -- there are a number of
23 variables. And as for the assembly itself, the general
24 principle is that the assembly needs to be allowed to have an
25 opportunity to present its message. So whatever that reasonable
26 scope of time is, I'm not sure on the facts of this convoy, but
27 then at a certain point in time it becomes unreasonable for the
28 vehicles to stay. So I think that's a fairly safe assessment.

1 **DEAN ROBERT LECKEY:** Thank you.

2 Professor MacDonnell?

3 **PROF. VANESSA MacDONNELL:** Just to say that I
4 think this comment about the point at the moment in time is
5 quite important, because actually, the requirements of
6 justification under section 1 may well be shifting as the
7 situation evolves; right? And so this is -- my colleagues,
8 Colleen Flood and Brian Thomas, have done some very helpful work
9 on, you know, in an emergency, in a situation like this, you
10 know, what is the court's response or what's the response, you
11 know, of the state, it has to be connected to what's actually
12 happening, what the facts are.

13 And so that includes, you know, like the
14 situation in what's justifiable in the first 24 hours of the
15 protest will be different than what's justifiable in Week 1 and
16 Week 2 when you start layering in significant disruption and
17 concerns about, you know, the health and safety of others, like
18 this shifts, the kind of -- the complexion of the justification
19 analysis. And so actually that element of time is quite crucial
20 and changes sort of what's permissible; right?

21 And that, you know, also changes the state's
22 obligations I think; right? So in the -- at the beginning,
23 there is very little information about a fluid situation, the
24 government has to make a call, they have to act, and they're
25 entitled to act on the best information available to them, and
26 they may not get it perfectly when they're trying to balance the
27 interests of the community. And I think cases like *Irwin Toy*,
28 which Professor Mathen sort of -- you adverted to without naming

1 "A person must not travel to or within
2 an area where [such] an assembly...is
3 taking place."

4 So persons prohibited from entering the area
5 where an assembly might, you know, reasonably be expected to
6 lead to a breach of the peace.

7 Are there views over whether these rules in the
8 Regulations would appear to be, you know, reasonable limits on
9 *Charter* rights?

10 Professor MacDonnell?

11 **PROF. VANESSA MacDONNELL:** I mean, I'd be very
12 curious to hear the thoughts of others, but it strikes me, you
13 know, at first blush that that type of provision might well be -
14 - might be overbroad; right? And so section 7 of the *Charter*
15 provides that individuals have a:

16 "...right to life, liberty and security
17 of the person and [a] right not to be
18 deprived thereof except in accordance
19 with the principles of fundamental
20 justice."

21 Now, to the extent that those provisions prohibit
22 individuals from being in an area at all, they may -- you know,
23 one of the principles of fundamental justice is that laws not be
24 overbroad; right? They shouldn't capture more people than the
25 objectives of the provision are aimed at. And so it may well be
26 that that's the kind of provision that that provision wasn't
27 sort of sufficiently tailored. That's a possibility.

28 **DEAN ROBERT LECKEY:** Thank you. We've got

1 Professor Mathen and then Professor Cameron, then
2 Professor Bird.

3 **PROF. CARISSIMA MATHEN:** So I think in
4 considering this question, which on its face it does look to be
5 overbroad, it is important to consider the very definite time
6 limits in which the *Emergencies Act* operates, which is essential
7 to its core feature, and that will factor into whether in the
8 circumstance that kind of prohibition is in fact overbroad. I
9 would also point out that with respect to the prohibition on
10 travel, I believe it was accompanied by a series of exceptions.

11 **PROF. VANESSA MacDONNELL:** Okay.

12 **PROF. JAMIE CAMERON:** Yeah, exemptions, yes.

13 **PROF. VANESSA MacDONNELL:** And were those
14 criminal ---

15 **PROF. JAMIE CAMERON:** Exemptions.

16 **PROF. VANESSA MacDONNELL:** --- are those -- were
17 those criminal prohibitions?

18 **DEAN ROBERT LECKEY:** Professor Mathen, just a
19 second.

20 **COMMISSIONER ROULEAU:** Exceptions?

21 **DEAN ROBERT LECKEY:** There's exceptions, and
22 we're asking whether there's a criminal -- yeah.

23 **COMMISSIONER ROULEAU:** Yeah, they're offences.

24 **DEAN ROBERT LECKEY:** Yeah, they're offences under
25 section 10 of the Regulation.

26 Professor Mathen, did we cut you off? Did you
27 finish?

28 **PROF. CARISSIMA MATHEN:** No, I just wanted to say

1 that there was some tailoring of the specific travel -- the
2 precise mobility restriction was also accompanied by exceptions.
3 It doesn't ---

4 **DEAN ROBERT LECKEY:** Yeah.

5 **PROF. CARISSIMA MATHEN:** --- obviate the fact
6 that some people would have been prevented from travel, and that
7 was indeed the very intention of the ---

8 **PROF. VANESSA MacDONNELL:** Yes.

9 **PROF. CARISSIMA MATHEN:** --- Regulation.

10 **DEAN ROBERT LECKEY:** Thank you.

11 Professor Cameron.

12 **PROF. JAMIE CAMERON:** Thank you. Just a discrete
13 point, which has to do with the designation of protected places,
14 and the potential over designation of protected places, in
15 particular, section 6(f) that allows any other place to be
16 designated as a protected place by the Minister of Public Safety
17 and Emergency Preparedness. I just have some concerns about
18 that provision and its consequences for public assembly and
19 other *Charter* rights, including freedom of association, those
20 who might wish to associate with a valid, viable assembly.
21 Thank you.

22 **DEAN ROBERT LECKEY:** Thank you.

23 Professor Bird?

24 **PROF. BRIAN BIRD:** I'm just going to say that,
25 thank you, that the constitutionality of those Regulations may
26 also be informed by just the nature of the emergency. They
27 could be overbroad for the reason stated by colleagues, on its
28 face, but given the nature of the particular emergency in which

1 they're being applied it may not be, just depending on the
2 actual application, just what's on the ground. And so it maybe
3 on its face potentially some overbreadth issues, but depending
4 on the nature of the emergency it may end up not being perhaps
5 an overbreadth issue at the end of the day once it's actually
6 applied. Just a thought there.

7 **DEAN ROBERT LECKEY:** Professor Bird, do you want
8 to explain a little more? I mean, if someone were to bring a
9 constitutional challenge to the enactment they'd be challenging
10 the written down rule.

11 **PROF. BRIAN BIRD:** Sure. No -- thank you for
12 that. I think that the -- it may well be that a part of the
13 analysis might be that given the nature of what's at stake in a
14 potential invocation of the *Emergencies Act* what the *Act* is
15 meant to deal with, assuming that there has been a lawful
16 invocation of a Public Order Emergency, Public Welfare
17 Emergency, et cetera, et cetera, that might well inform whether
18 the regulations that have been put to us are overbroad as well.
19 So it just depends whether we're deal with an emergencies
20 legislation, I think it also needs to be brought into the
21 picture as to whether that overbreadth actually pans out.

22 But I do also share the concerns of my colleagues
23 that that needs to be brought into the conversation too.

24 **DEAN ROBERT LECKEY:** Thank you.

25 **PROF. VANESSA MacDONNELL:** You can move on if
26 you'd prefer.

27 **DEAN ROBERT LECKEY:** Professor Moon, were you
28 wanting to jump in?

1 **PROF. RICHARD MOON:** No, I was just -- I really
2 just wanted to first reiterate what Professor Mathen, and that
3 obviously the temporary nature of it makes a difference; and
4 secondly, I imagine a certain degree of deference is going to be
5 given in a situation where rapid action is understood to be
6 necessary, and obviously we'd call it emergency response, then
7 we would understand rapid action to be necessary.

8 So I'm -- it is, obviously, on the face, very
9 broad, and would, just in isolation, be troubling. But I think
10 those factors certainly would have to be taken into account.

11 **DEAN ROBERT LECKEY:** Thank you. Okay. So we're
12 going to move on, is that okay, to the next question?

13 **COMMISSIONER ROULEAU:** Yeah, I guess we can. I
14 guess one of the questions is, maybe that's the overbroad that
15 you commented on, but who makes the determination that it might
16 lead to serious interference, et cetera? Because it's -- that's
17 the -- it's not clear to me. But that may be the answer, as
18 Professor Bird said, that it's by its nature because it's
19 temporary and it has to be broad.

20 **DEAN ROBERT LECKEY:** And there's, I mean, a
21 potential rule of law issue, in the sense that there's a rule
22 you must not participate in a public assembly that may
23 reasonably be expected to lead to breach of peace, how do you
24 know when a particular assembly has met that threshold, such
25 that you're prohibited from going there? There are real
26 questions about that.

27 **COMMISSIONER ROULEAU:** Yeah.

28 **DEAN ROBERT LECKEY:** Professor MacDonnell?

1 **PROF. VANESSA MacDONNELL:** I don't want to drag
2 on the discussion, but there are actually just two very small
3 points that I think are relevant to this overall discussion.

4 One is that violations of section 7 are very
5 rarely saved under section 1 of the *Charter*. So once
6 established, they're very rarely found to be justified.

7 But to the extent that the Courts have suggested
8 that there's an opening for finding section 7 violations to be
9 justified, it's in an emergency situation.

10 And so, you know, one of the things to recognize
11 might be that, you know, we may acknowledge that on the face
12 these laws were overbroad, but this very important context that
13 my colleagues have been speaking about is relevant under section
14 1, in terms of understanding whether, you know, a degree of
15 overbreadth, which would normally not be permissible, might, in
16 a specific context, where a declaration of emergency has been
17 made, in a time limited way, be found to be justified.

18 And so that, I think, is important.

19 Another quick thing though that may be
20 intentioned with this is, as my colleague, Professor Bird,
21 pointed out, the *Emergencies Act* is pretty clear that the
22 *Charter* continues to apply. And so there is a bit of a tension.
23 All *Charter* analysis is contextual, does take its colour from
24 the circumstances, and here the emergency is part of the
25 circumstances. But to my mind, that type of argument also has
26 its limits because the *Emergencies Act* specifically keeps the
27 *Charter* in play, and in fact, the model of emergency control
28 that we have adopted incorporates the *Charter* as an important

1 safeguard.

2 And so to me, that means, you know, I'm glad I'm
3 not the one making the decision, because there is -- there's a
4 tension in there.

5 **COMMISSIONER ROULEAU:** Well, and that's why I
6 raise it, is at the end of the day, much of the concern is that
7 the Act is so broad and powerful, but on the other hand, it is
8 *Charter* compliant by its very nature.

9 So the answer to questions such as this one are
10 important because it arguably affects the initial decision,
11 because the degree of -- or you could argue certainly that the
12 degree of interference with the *Charter* is -- should be taken
13 into account in the initial determination of what the threshold
14 for an emergency is.

15 And I don't think they're detached, but I'm not
16 sure. And that's why I'm curious about the response from you.

17 **DEAN ROBERT LECKEY:** Other thoughts on this one?
18 Professor Mathen?

19 **PROF. CARISSIMA MATHEN:** Just because the
20 question was raised who is the decider, I did just want to point
21 out the interesting separation of powers issues that arises
22 here, because initially you have an executive branch
23 determination, but it is in very short order, subject to
24 legislative oversight and the opportunity, in various ways, to
25 contest that. And so bring -- again referring to what Professor
26 Moon said, the zone for deference here to the decision being
27 made in extremis literally is something that I think could be
28 useful to consider.

1 **DEAN ROBERT LECKEY:** Thank you.

2 So we'll take a crack at another question. And
3 counterprotests are in the question here.

4 So we're wondering, you've got someone
5 protesting, or an assembly is protesting, and then there's
6 prospect of a counter protest that could bring violent
7 confrontation. And so we're wondering, does the kind of
8 realistic prospect of a counterprotest that will perhaps issue
9 in violence, does that make the initial protests violent or, you
10 know, attach a threat of violence to it?

11 Professor Cameron?

12 **PROF. JAMIE CAMERON:** Thank you. In researching
13 the paper, I encountered quite a bit of commentary on just this
14 point in the international jurisprudence and so forth. And
15 basically the position that's taken in that jurisprudence is
16 that the authorities have an obligation and a duty to protect
17 the primary assembly in those circumstances, so that where a
18 counterprotest presents itself, and poses risks to the viability
19 and the safety of the principal assembly is the duty of
20 authorities to deal with the counter protest and protect the
21 assembly, which is an interesting point of view. We don't have
22 much guidance in Canada, but that's what I found when I was
23 researching the paper.

24 **DEAN ROBERT LECKEY:** Thank you very much.

25 Other colleagues on that one? Professor
26 Gaudreault-Desbiens?

27 **DR. JEAN-FRANCOIS GAUDREAU-DESBIENS:** Well I
28 think that this position is quite sensible and reasonable,

1 actually, the duty that is imposed upon the state to protect the
2 first assembly, while not prohibiting counter-protestors to
3 express themselves. So you can imagine a situation where police
4 officers create a kind of corridor between the two, but it's
5 quite -- it's a rather onerous burden. But still, both must
6 have the ability to express their views while taking into
7 consideration this duty to protect the first assembly.

8 **DEAN ROBERT LECKEY:** And perhaps, Professor
9 Cameron, so I hear you saying what you state in the literature,
10 if protest is seriously harming or threatening the livelihood of
11 the potential counterprotests, does that in any way change their
12 position?

13 **PROF. JAMIE CAMERON:** Well if there are -- excuse
14 me, if there are difficulties with, we'll call it the primary
15 assembly, then those can -- if that's what you mean, then those
16 can, of course, be addressed.

17 **DEAN ROBERT LECKEY:** And if the primary assembly
18 is blocking a bridge that is shutting down the workplaces of the
19 potential counterprotests, so, like, they're not just people
20 expressing a different point of view, ---

21 **PROF. JAMIE CAMERON:** Well they ---

22 **DEAN ROBERT LECKEY:** --- does that change it?

23 **PROF. JAMIE CAMERON:** Sorry. They both might be
24 subject to regulations, so we wouldn't rule out the prospect of
25 reasonable limits on the primary assembly, but the
26 counterprotest would still be subject to limits insofar as it is
27 confronting and escalating the situation with the primary
28 assembly. That would be my view.

1 **DEAN ROBERT LECKEY:** Commissioner, anything?

2 **COMMISSIONER ROULEAU:** No, I think to put it a
3 little more directly in context, it's suggested, for example, in
4 Windsor, that the road should be opened up and people's
5 livelihoods was affected by the road being closed, and let's
6 assume that counterprotest wanted to open the road, to put it
7 more concretely. And so they would be -- in that case, the
8 police would be preventing people from carrying out the legal --
9 their legal right to proceed through the road, for example.

10 It gets a little more complicated, I think.

11 **MR. RICHARD MOON:** It's -- yeah, that's not
12 exactly ---

13 **DEAN ROBERT LECKEY:** Professor Moon?

14 **MR. RICHARD MOON:** --- counterprotest, I guess,
15 in the sense that it's an attempt to exercise what are
16 considered to be a right, the right to ---

17 **COMMISSIONER ROULEAU:** Yeah.

18 **MR. RICHARD MOON:** --- move and drive. Certainly
19 the starting point is everybody has the right to protest, to
20 counterprotest, and so forth. And then the challenge always is
21 if it looks like there will be conflict, to what extent can the
22 police manage that? And only exceptional situations, where it's
23 just unmanageable, given their resources, could it be shut down.
24 But the starting point always has to be both sides. But that's
25 an interesting and challenging question about my right to
26 exercise my ordinary mobility that is directly coming in
27 conflict with what the protestors are attempting to do.

28 **DEAN ROBERT LECKEY:** Thank you. We're out of

1 time, so we're going to stop without moving on to the fast-
2 hitting question of separating the acts of individuals from the
3 assembly as a whole, which we might otherwise come back to.

4 Thank you very, very much for your contributions.

5 **COMMISSIONER ROULEAU:** Thank you. It's always
6 fascinating to debate these subjects, and it's very useful for
7 me to listen to the submissions and to hear what the questions
8 of participants are. Thank you.

9 **THE REGISTRAR:** The Commission is in recess for
10 until two o'clock. La Commission est levée jusqu'à 14 heures.

11 --- Upon recessing at 12:29 p.m.

12 --- Upon resuming at 2:04 p.m.

13 **THE REGISTRAR:** The Commission has reconvened.
14 La Commission reprend.

15 **COMMISSIONER ROULEAU:** Alors, vous êtes en charge.

16 **MR. PATRICK LEBLOND:** Merci...

17 **COMMISSIONER ROULEAU:** Avec plaisir.

18 **--- ROUNDTABLE DISCUSSIONS : FINANCIAL GOVERNANCE, POLICING AND**
19 **FINANCIAL INTELLIGENCE**

20 **MR. PATRICK LEBLOND:** ...Monsieur le commissaire.

21 Alors, bonjour à toutes et à tous. Je m'appelle
22 Patrick Leblond. Je suis le modérateur de cette séance. So I'll
23 be moderating this session on Financial Governance, Policing and
24 Intelligence in terms of -- I'm not sure how to best translate,
25 but gouvernance financière, maintien de l'ordre et
26 renseignements financiers.

27 We're very privileged today to have five experts,
28 four in person, one person online.

1 Premièrement, j'aimerais introduire Michelle
2 Cumyn qui est professeure titulaire à la Faculté de droit de
3 l'Université Laval. Next, we have Jessica Davis, who is
4 President and principle consultant at Insight Threat
5 Intelligence. She is also the President of the Canadian
6 Association for Intelligence and Security Studies.

7 Then Michelle Gallant, who is Professor at the
8 Faculty of Law at the University of Manitoba. And then we have
9 Gerard Kennedy, who is an Assistant Professor also at the
10 Faculty of Law at the University of Manitoba. And finally,
11 Christian Leuprecht, who is the Class of 1965 Distinguished
12 Professor at the Royal Military College of Canada. He is also
13 the Director of the Institute of Intergovernmental Relations in
14 the School of Policy Studies at Queen's University, and he joins
15 us online from Germany if I am correct.

16 So, de la façon que ça va fonctionner, les
17 panélistes experts/expertes vont faire des commen... une
18 présentation d'un maximum de 15 minutes, ensuite il va y avoir
19 une discussion que je vais modérer, des questions, et après la
20 pause on va avoir une autre série de questions et de réponses.

21 So I would like to start with, in terms of the
22 order, Christian. Are you ready to go?

23 **PROF. CHRISTIAN LEUPRECHT:** Merci de
24 l'introduction. Vous m'entendez bien?

25 **MR. PATRICK LEBLOND:** Très bien. Merci.

26 **--- PRESENTATION BY PROF. CHRISTIAN LEUPRECHT:**

27 **PROF. CHRISTIAN LEUPRECHT:** Merci. Je vais
28 introduire en anglais, mais je vais prendre vos questions dans

1 les deux langues officielles.

2 So a team that I led supported the Cullen
3 Commission with a submission that figured prominently in the
4 final report released in June 2022. And invoking *EA* is
5 symptomatic of deficiencies and shortcomings reported by the
6 Cullen Commission. I also published a recent book on
7 Intelligence as Democratic Statecraft across the Five Eyes
8 countries that includes substantial information, and financial
9 intelligence; and have a forthcoming book on financial crime in
10 Canada.

11 So let's look at the typology here. This was not
12 money laundering or tax evasion. The phenomena that we have
13 here is probably closest to terrorist financing. There was an
14 immediate use value to funds provided, the purpose for which
15 those funds were provided was ambiguous, it wasn't clear whether
16 they were being withdrawn for legal or illegal purposes. And
17 small donations can have a relatively large impact, and in this
18 case, can also serve as a proxy for the extent of public
19 support.

20 So let's think about this: A G7 country, with
21 the world's 10th largest economy, had to invoke the *EA*, in part
22 to get a handle on some crowdfunding that was in part sustaining
23 some illegal activity. What does this tell us about the
24 adequacy, effectiveness, and efficiency of Canada's financial
25 regime?

26 Within Canada, money laundering is currently
27 governed by 15 different laws and regulatory instruments. At
28 the federal level, Canada currently has 12 agencies tasked with

1 AML enforcement and prosecution, while there are approximately
2 14 within each province. In February, this sizable financial
3 crime policing apparatus was unable to achieve the necessary
4 strategic effect without the EA.

5 That casts a long shadow over the purported
6 efficacy of laws, regulations, and agencies. And although
7 Canada's system appears quite robust, it is actually very weak.
8 So weak, in fact, that Transparency International has ranked
9 Canada at the bottom of G27 countries -- of G20 countries.

10 What are the implications? First, the inadequacy
11 of legislation, regulations, and agencies. Key allies can
12 achieve the same strategic effect without invoking emergency
13 measures because their legislation, regulations, and agencies
14 are actually up to date and properly postured and funded.

15 Second implication: The inadequately [sic] of
16 the posture of Canadian agencies. Expert federal agencies and
17 their financial reporting entities couldn't get it done under
18 existing rule of law powers.

19 Third implication: At least a perception, if not
20 a reality, of the unequal, inequitable, idiosyncratic
21 application of the rule of law; that is, crowdfunding played a
22 role in blockades of critical infrastructure and other
23 environmental protest, for instance, that crossed into -- the
24 line into civil disobedience; illegality, perhaps criminality,
25 including disregard for Court injunctions. But no extraordinary
26 measures were taken to stem financial flows to these groups. So
27 the impression? When the government is sympathetic to
28 protesters and their cause, it goes easy on them. When the

1 government is not, it will go to extraordinary lengths to shut
2 them down. That impression, if not the reality, undermines the
3 very premise of constitutional democracy; that the rule of law
4 applies equally to all citizens, to thwart precisely what we're
5 witnessing here, the tyranny of the majority.

6 Fourth implication: In February, the Prime
7 Minister wanted foreign money funding illegal protests in Canada
8 to stop. Minister Mendicino remarks -- remarked about the
9 number of contributions and their sheer size. But CSIS
10 testified before this very Inquiry that it found no foreign
11 actors funding the protest and told the government that back in
12 February. So did the government engage in deliberate
13 misinformation of foreign funding anyway?

14 Implication 5: Compare the Prime Minister's
15 preoccupation with foreign funding of a relatively small but
16 tenacious protest in Ottawa, with this government's inaction on
17 Chinese foreign influence in Canadian elections and democratic
18 institutions; Chinese police stations in Canada; and sanctions
19 on Russia. Words in Canada speak louder than action. In the
20 UK, 19 billion pounds and assets have been frozen; in Belgium,
21 52 billion euros, in Canada, \$122 million Canadian. It would
22 appear that dirty Russian money in Canada is not a priority.
23 But 20 million raised over three weeks, entirely from Canadian
24 sources for protest by Canadians, warrants invoking the EA?

25 There are two ways to read this. The threats to
26 Canadian democracy are as real from within as they are from
27 without, or that it's okay for US, Chinese, and Russian money to
28 interfere with Canada's democratic processes and interests, just

1 not for Canadians with Canadian money, especially there -- if
2 they're opposed to the federal government or its policies.

3 Six implications: Donors came from across
4 Canadian society, including Prairie farmers. They've now seen
5 how the government is prepared to go after people and their
6 assets, should they fund a social movement that is opposed to
7 the current government or its policies. The unintended
8 consequence? They've restructured their assets to put them out
9 of reach for government, and moved support for controversial
10 social movements online onto crypto currency, which makes these
11 financial flows less visible and harder to track. So the yay
12 has had perverse incentives of making work much more difficult
13 for intelligence agencies.

14 The conclusion: Was it really worth to invoke
15 the EA? So how did we get here, and what does it tell us?

16 First, financial intelligence in this country is
17 embarrassingly weak. FINTRAC is an outlier among FIUs. It's an
18 administrative FIU; it does not have investigative capacity, the
19 right to request directly from the reporting entities any
20 additional financial information, and the right to freeze
21 suspicious transactions. FINTRAC is a passive type of FIU
22 because it mostly produces reactive disclosures that are linked
23 to voluntary information records submitted by law enforcement.

24 Canada has an exceptional defensive reporting
25 regime that, at \$6.8 billion a year, is very expensive for
26 banks. Justice Cullen concludes law enforcement bodies in this
27 province cannot count on FINTRAC to produce timely, actionable
28 intelligence.

1 Second; weak criminal intelligence and the
2 inadequate posture of enforcement agencies. There's a paucity
3 of investigative and prosecutory ability.

4 In 2018, for example, the RCMP publicly confessed
5 that it had no expertise to conduct sophisticated financial or
6 corporate investigations. Canadian data show that 86 percent of
7 money laundering charges filed between 2012 and 2017 never made
8 it to trial because they were withdrawn or stayed. There are
9 sensational recent examples in both Toronto and Vancouver to
10 this effect. And in 2020, the RCMP disbanded its Financial
11 Crimes Unit in Ontario altogether because priorities shifted.

12 Third; weak legislation. Just one example, at
13 least since 2002, FATF has recommended that governments pass
14 laws to ensure that lawyers collect, maintain, and disclose
15 information concerning client billings to government regulators.
16 This step is thought to be necessary to guard against the use of
17 lawyers as willing or unwilling dupes who are being paid with
18 crooked dollars. In peer reviews, FATF has highlighted the
19 ongoing non-compliance by two countries that refuse to abide by
20 the disclosure recommendation: Canada and the United States.

21 Fourth; weak penalties. For instance, KPMG, one
22 of the world's big four accounting firms had set up an
23 aggressive tax plan that they marketed to a high-net worth
24 individuals who lived mainly in British Columbia. In March
25 2016, the CBC published reports that indicated the CRA had
26 entered into overly generous settlement agreements with
27 taxpayers. One unhappy taxpayer went to the media with their
28 complaints, but part of the controversy surrounded the fact that

1 no sanctions were ever levied against the tax advisors, the
2 accountants and the lawyers who set up and then marketed the
3 plan in the first place.

4 What does this tell us? That Canadian national
5 security, including financial intelligence, is not fit for
6 purpose for the 21st century.

7 What's the government's response? It announces
8 seemingly ambitious but essentially unquantifiable and vague
9 policy to root out corruption; increase regulatory oversight;
10 tackle the opioid crisis; make housing more affordable for
11 ordinary Canadians.

12 Compare that to the government's determined
13 commitment and response to counterterrorism. By contrast, the
14 EA and Cullen are a measure of the government's inattention to
15 financial crime.

16 How, then, to explain the disconnect between the
17 Canadian state's overt commitments and its failure to deliver on
18 such commitments? Because there is no political or corporate
19 will. The message is, "Don't ask, don't tell." Especially the
20 Panama Papers and the Paradise Papers' findings, as well as the
21 2020 Tax Justice Network figures, suggest that Canada is not
22 unduly worried about the cleanliness of financial flows, whether
23 from immigration or from investment.

24 There's a mix of activities that are illicit, for
25 example, capital flight and business investment; illicit, for
26 example, white collar crime and tax evasion; and on the fringes
27 of legality, for instance, aggressive tax avoidance and trade-
28 related malpractices. Having spent decades building a

1 reputation a haven and global shelter for illicit gains, the
2 government does not have the intent to slaughter its golden
3 goose.

4 Invoking the EA sends a clear message, this is a
5 one-off measure to contain a controversial social movement that
6 is causing the federal government at the time political
7 headaches. Purveyors of dirty foreign money and their enablers
8 need not worry because Canada isn't about to change its regime
9 or its mantra. Canada is still open for dirty money. The
10 Commission confirmed what we all already knew, that the Cullen
11 Canadian financial regime works very well for criminals and the
12 ultra rich to the detriment of the middle class and everyone
13 else.

14 The message in invoking the EA, "If you're a
15 criminal or ultra rich, you need not worry." In short, the
16 justification for invoking the EA that, instead of building a
17 financial regime that's actually fit for purpose for the 21st
18 century, temporarily invoking the EA was far more expedient.
19 Merci.

20 **MR. PATRICK LEBLOND:** Merci beaucoup, Christian.
21 So, actually, you were within time, excellent.

22 Now I would ask Jessica Davis, please -- 15
23 minutes.

24 **--- PRESENTATION BY MS. JESSICA DAVIS:**

25 **MS. JESSICA DAVIS:** I'd like to begin by thanking
26 the Commission for inviting me to be part of this roundtable. I
27 believe that this inquiry has a critical role to play in making
28 Canada safer and more just.

1 Today, I'd like to share four main points with
2 you. I want to first address the issue of foreign funding of
3 the convoy and why that was so contentious for Canadians. I
4 will then discuss the issue regarding regulating crowding
5 platforms and some of the cost and benefits of this approach.
6 Third, I want to raise the issue of unintended consequences of
7 the global anti-money laundering counter-terrorist financing
8 regime and Canada's role in that. And then, finally, I'll
9 discuss the role of asset seizure in response to a protest.
10 I'll conclude with a brief set of recommendations.

11 Before I get too far into this, though, I do want
12 to emphasize one point. During my comments, I'll be talking
13 about money laundering and terrorist financing. This is the
14 context of Canada's anti-money laundering counter-terrorist
15 financing regime and changes to FINTRAC's legislation and
16 regulations. I want to be clear, though, that the convoy
17 protest financing falls outside of definition of both money
18 laundering and terrorist financing, which is part of why some of
19 these amendments were made.

20 So let's talk about foreign funding of the
21 convoy. As we saw from this Commission's work, the majority of
22 the convoy was not foreign funded. There were some foreign
23 donations, particularly to the crowdfunding campaigns, but the
24 majority of the money distributed to the convoy protesters came
25 from Canada, either from the online campaigns, or through email
26 money transfers, or through cash donations.

27 The uproar around potential foreign funding began
28 early, as soon as people began to see other people who self-

1 identified as from outside Canada donating on those public
2 platforms. These donations raised the issue of potential
3 foreign influence, both overt and covert, relating both to the
4 funding of the protests as well as potential artificial
5 amplification of convoy-related messaging on social platforms.

6 Many Canadians expressed surprise that this was
7 permitted under Canadian law. The strong from Canadians about
8 foreign funding of the protests, real or imagined, is an
9 opportunity for Canada. It tells that Canadians are concerned
10 about this and that, for many, the idea of foreign or foreign
11 individuals being able to contribute funds to political causes
12 in Canada is unacceptable.

13 We should take this as an opportunity to scope
14 and legislate limits to foreign funding in Canada, including,
15 potentially, limits on contributions to political causes, limits
16 to donations to politicians, even outside an election cycle, and
17 the creation of a registry of foreign agents. This would go a
18 long way toward dissuading the concerns of Canadians about
19 foreign entities clandestinely, deceptively, or even overtly
20 seeking to influence Canadian politics.

21 I now want to briefly touch on the issue of
22 crowdfunding campaigns and their regulations. The inclusion of
23 crowdfunding platforms as reporting entities under the *Proceeds*
24 *of Crime (Money Laundering) and Terrorist Financing Act* was a
25 somewhat curious response to the convoy. It was curious for a
26 number of reasons. Because one of the platforms had already
27 taken action to remove one of the main campaigns due to
28 potential breaches of service -- terms of service, rather,

1 because many of the funds were already frozen, because much of
2 the funding of the convoy wasn't even happening through those
3 crowdfunding campaigns but rather through those email money
4 transfers and cash donations, as well as payments for expenses
5 like hotel rooms from individuals not present in Ottawa, and
6 finally, because the decision was also made to freeze those
7 individual accounts at the same time, it remains unclear what
8 the regulations were meant to do or how they helped bring about
9 an end to the convoy protest.

10 The regulation of crowdfunding platforms created
11 new reporting entities for FINTRAC, but I question whether it
12 actually created a new source of financial intelligence that
13 could be used to counter the protest or other potential threats
14 to the security of Canada. Prior to the *Emergencies Act*, for
15 example, some of the funds from the crowdfunding platforms would
16 already have been reported to FINTRAC by entities already
17 regulated under the Act, like banks, when those transactions
18 reached reporting thresholds.

19 Aside from those mandatory reporting thresholds,
20 most of which have already been covered prior to the emergency
21 measures, the new regulation of crowdfunding platforms requires
22 these platforms to now file suspicious transaction reports. But
23 in the context of a crowdfunding campaign, I struggle to see how
24 these entities will report suspicious transactions, particularly
25 when that reporting is limited to suspected money laundering or
26 terrorist financing.

27 As an aside, crowdfunding platforms are not
28 widely used for either of these types of financial crimes.

1 Instead, when we see crowdfunding platforms being used for this
2 -- or crowdfunding, rather, it's primarily off-platform
3 campaigns, so basically social media calls that are more widely
4 used, which of course falls outside the scope of the
5 regulations.

6 And back to the issue of creating new reporting
7 entities for FINTRAC. This means that FINTRAC now needs to
8 ensure that they comply. Adding more reporting entities without
9 significantly enhancing FINTRAC's ability to conduct compliance
10 exams, for example, is a missed opportunity. Last year, the
11 centre completed 151 compliance exams, but there are tens of
12 thousands -- I believe 24,000 reporting entities. So this
13 regulation might not have achieved much, further stretched
14 FINTRAC's compliance function, and contributed to over and
15 duplicative reporting to FINTRAC, and there's little point in
16 creating more regulations without simultaneously enhancing
17 FINTRAC's ability to ensure compliance.

18 I'll move on to my third point, which is a little
19 bit more about the unintended consequences and global
20 implications of this.

21 The international regulation of crowdfunding
22 platforms -- so, since the convoy, there have been other calls
23 for global standards to regulate these platforms as part of the
24 global counter-terrorist anti-money laundering efforts. But
25 these, again, are not based on much evidence of use for these
26 platforms for illicit purposes but instead represent more --
27 something like more like low-hanging regulatory fruit.

28 At a recent No Money for Terror Ministerial

1 Conference, the host country, India, called for further
2 regulation of the sector, something that Canada's now leading
3 the way on internationally, for better or for worse. As
4 countries and multi-lateral bodies continue to regulate more and
5 more sectors under these global anti-money laundering counter-
6 terrorist financing rules, it's important to keep in mind that
7 there are plenty of intended consequences of these efforts. For
8 instance, authoritarian regimes often use these laws and
9 regulations adopted to conform to these global norms to crack
10 down on dissidents in their own countries. As my colleagues
11 from the Royal United Services Institute recently noted, these
12 laws are used for a number of things, including politically
13 motivated pre-trial detention, targeted audits, and asset
14 freezes.

15 Canada's now leading the way on regulating
16 crowdfunding platforms, something that can easily be misused by
17 authoritarian states, all under the guise of compliance with
18 international norms, and that regulation has been adopted
19 without consultation, public analysis of cost and benefits, or
20 even an articulation of what it's meant to achieve.

21 I'll move on now to the role of asset freezing,
22 seizures as a response to the protest. This is probably the
23 most contentious element of the emergency measures because it
24 directly targeted Canadians and their financial wellbeing
25 without judicial authorization. The freezing of accounts and
26 financial assets in Canada is usual done with judicial
27 authorization. This is no small measure.

28 **COMMISSIONER ROULEAU:** Slow it down.

1 **MS. JESSICA DAVIS:** When accounts are frozen,
2 there are serious efforts, not only for individuals directly
3 targeted by the asset freezes but their family, employees, and
4 business associates. There are serious implications for
5 individuals who might not be able to pay mortgages, child
6 support, rent, groceries, et cetera.

7 At the same time, when these measures are used in
8 a targeted manner, they can be highly effective at encouraging
9 people to cease and desist illegal activity and can facilitate a
10 peaceful resolution. However, the way these emergency measures
11 were implemented raises a number of issues. The main issue was
12 in the identification of individuals whose account should be
13 frozen. While the RCMP provided a list of influencers to
14 financial institutions, financial institutions were also enabled
15 to use their own internal processes to identify individuals
16 whose accounts should be frozen.

17 When such extraordinary powers are used, there
18 should be a clear list of individuals to whom these measures
19 apply. Deputizing banks to make their own determinations about
20 freezing of accounts created the possibility of mistakes, uneven
21 application of measures between banks, and allowed the spreading
22 of misinformation that further fuelled anti-government
23 sentiment.

24 The emergency financial measures served as a
25 lightning rod for the convoy protestors, enhancing their
26 distrust in government and lacked sufficient guidance,
27 oversight, and transparency. While the measures might have been
28 a justified and proportional response to the Ottawa occupation

1 and border blockades, something for this Commission to consider,
2 their implementation raises serious concerns.

3 Let me now conclude by summarizing the
4 recommendations that have -- I have mentioned in this
5 commentary.

6 So there are a number of issues that I've raised
7 here today that require legislative, regulatory, or other policy
8 responses to make Canada safer and more just.

9 So I recommend that we limit foreign funding of
10 political activities in Canada, both overt and covert, through
11 legislation, including a registry of foreign agents.

12 I further recommend that the Government of Canada
13 undertake consultations on crowdfunding regulations and any
14 future expansion of the proceeds of crime, money laundering,
15 *Terrorist Financing Act*, specifically with an eye towards
16 unintended consequences and setting of international norms.

17 These are powerful tools that are easily misused
18 in the wrong hands.

19 Canada should also enhance its ability to examine
20 the compliance of reporting entities under the regime. Our
21 compliance regime is already stretched, and adding more
22 reporting entities does not improve the situation.

23 And finally, any future use of the *Emergencies*
24 *Act* and financial measures should include provisions to clearly
25 specify the scope of financial targeting, enhancing transparency
26 around that financial targeting and reporting and direct
27 financial institutions in a more concrete way. Such sweeping
28 financial powers should not be left to individual financial

1 institutions' judgement.

2 Thank you very much for your time today, and I'm
3 pleased to answer any questions you have or expand on any of the
4 points I've made.

5 **MR. PATRICK LEBLOND:** Merci beaucoup, Jessica.

6 Alors, on va poursuivre. Maintenant, je
7 demanderais à Michelle Cumyn.

8 S'il vous plait, Michelle.

9 **PROF. MICHELLE CUMYN:** Oui, merci, Professeur
10 Leblond.

11 **--- PRÉSENTATION PAR PROF. MICHELLE CUMYN:**

12 **PROF. MICHELLE CUMYN:** Alors, je m'appelle
13 Michelle Cumyn. Mon expertise porte principalement sur les
14 règles du droit privé applicables au sociofinancement et, de
15 façon plus accessoire, je m'intéresse aussi à la gouvernance des
16 plateformes en ligne qui offrent des services de
17 sociofinancement.

18 Mon intervention portera sur trois éléments, les
19 trois éléments suivants qui sont tirés du rapport d'expert que
20 j'ai préparé à la demande de la Commission sur l'état d'urgence
21 et qui est publié dans son site web. Premièrement, le droit
22 privé applicable au sociofinancement sous forme de dons;
23 deuxièmement, le caractère politique et parfois subversif de
24 certaines campagnes de sociofinancement; et troisièmement, la
25 portée des nouvelles mesures qui visent à assujettir la
26 plateforme de sociofinancement aux dispositifs découlant de la
27 *Loi sur le recyclage des produits de la criminalité et le*
28 *financement des activités terroristes.*

1 Alors, premier élément, le droit privé applicable
2 au sociofinancement sous forme de dons. Le sociofinancement sous
3 forme de dons fait naitre des rapports juridiques entre trois
4 acteurs ou trois catégories d'acteurs. D'abord, le porteur de
5 projet qui lance la campagne de sociofinancement et qui souvent
6 administre les dons; ensuite, les donateurs qui contribuent à la
7 campagne de sociofinancement; et enfin, les bénéficiaires à qui
8 sont destinés les dons.

9 Le porteur de projet peut être une personne
10 physique, une personne morale, ou un groupement informel qui
11 souvent n'a pas même d'existence juridique. Par exemple, je
12 pourrais former un groupe qui s'appelle « Liberté 2022 » et
13 lancer une campagne de sociofinancement en indiquant « Liberté
14 2022 » comme porteur de projet.

15 Quant aux bénéficiaires de la campagne, il peut
16 s'agir de personnes nommément désignées ou il peut s'agir d'un
17 groupe de personnes plus ou moins bien défini, ou enfin, il peut
18 s'agir d'un projet ou d'une cause. Par exemple, le groupe
19 Liberté 2022, porteur de projet, pourrait lancer une campagne
20 qui a pour objet de payer les dépenses de Luc Tremblay arrêté
21 pendant le convoi de camionneurs. Dans ce cas, le bénéficiaire
22 est une personne nommément désignée. Ou alors, le groupe Liberté
23 2022 lance une campagne ayant pour objet de soutenir
24 financièrement tous les camionneurs qui ont participé au convoi.
25 Les bénéficiaires font alors partie d'un groupe plus ou moins
26 bien défini. Et enfin, troisième possibilité, Liberté 2022
27 pourrait lancer une campagne de sociofinancement ayant pour
28 objet de soutenir la création d'un film pour raconter le convoi,

1 auquel cas il s'agit de financer un projet.

2 À ces trois catégories d'acteurs, donc le porteur
3 de projet, les donateurs et les bénéficiaires, il faut ajouter
4 la plateforme en ligne qui offre des services de
5 sociofinancement. Par exemple, GoFundMe ou GiveSendGo, deux
6 plateformes qui ont été impliquées pendant le convoi. Ces
7 plateformes publient les modalités de la campagne de
8 sociofinancement sur une page dédiée de leur site et acheminent
9 les dons des donateurs au porteur de projet ou aux
10 bénéficiaires. Pour prélever les dons et les transférer, les
11 plateformes de sociofinancement ont recours à dans entreprises
12 de services monétaires tels que PayPal, ApplePay, GooglePay, et
13 ainsi de suite.

14 Le cadre juridique applicable au sociofinancement
15 sous forme de dons est mal défini dans le droit privé des
16 différentes provinces et territoires du Canada. Le droit privé
17 doit permettre de déterminer qui est le propriétaire des dons et
18 qui a le contrôle sur les dons et à quel titre. En droit
19 québécois, on se demande qui est donataire. Est-ce que c'est le
20 porteur de projet ou est-ce que ce sont les bénéficiaires? S'il
21 s'agit du porteur de projet, cela implique qu'il en est
22 pleinement propriétaire et qu'il peut en disposer à sa guise.
23 Les donateurs et les bénéficiaires auraient alors peu de recours
24 si les dons n'étaient pas utilisés conformément à l'objet de la
25 campagne. Donc, il serait préférable de considérer que ce sont
26 les bénéficiaires qui sont donataires; après tout, c'est aux
27 bénéficiaires que les dons sont destinés.

28 Cependant, on rencontre alors un problème quant à

1 la validité des donations, toujours selon le droit québécois,
2 parce que, pour que les donations soient valides, il faut
3 l'acceptation du donataire et cette acceptation fait souvent
4 défaut, surtout si la campagne a pour objet de soutenir un
5 groupe de bénéficiaires mal défini, un projet ou une cause.

6 Dans le droit des autres provinces et territoires
7 du Canada, la qualification de fiducie - « *trust* » - serait
8 probablement retenue. Ainsi, le porteur de projet et toute autre
9 personne qui se charge d'administrer et de distribuer les dons
10 seraient considérés comme fiduciaires de ces sommes -
11 « *trustee* ». Cette solution apparaît comme la plus souhaitable
12 parce qu'elle impose des devoirs stricts au porteur de projet et
13 aux autres personnes qui administrent les dons afin qu'elles
14 soient tenues d'utiliser les dons pour l'objet de la campagne de
15 sociofinancement.

16 Cependant, l'application du droit des fiducies
17 soulève des difficultés en droit canadien actuel parce qu'il
18 s'agit souvent de fiducies ayant un objet non caritatif - a *non-*
19 *charitable purpose trust*. Ainsi, la fiducie risque d'échouer en
20 raison de l'indétermination de son objet. Par ailleurs, le droit
21 actuel ne donne pas de solution adéquate lorsque les dons
22 deviennent impossibles à utiliser pour réaliser l'objet de la
23 campagne ou qu'il subsiste un reliquat de ces dons.

24 C'est pourquoi la Conférence pour l'harmonisation
25 des lois au Canada - Uniform Law Commission of Canada - a conçu
26 une *Loi uniforme sur le sociofinancement sous forme de dons* qui
27 permet de résoudre ces difficultés. La *Loi uniforme* reconnaît
28 que le sociofinancement sous forme de dons donne naissance à une

1 fiducie et adapte les règles de la fiducie pour mieux régir les
2 rapports entre les parties. L'adoption de la *Loi uniforme* à
3 l'échelle canadienne apportera une meilleure protection aux
4 donateurs et aux bénéficiaires et clarifiera les rapports
5 juridiques à l'égard des dons, à qui appartiennent ces dons et
6 qui peut exercer un contrôle sur eux.

7 Cette question me semble essentielle puisque les
8 tentatives de régler le sociofinancement, comme celles dont
9 nous discutons aujourd'hui, peuvent dépendre, pour leur mise en
10 œuvre, de la question de savoir qui détient les fonds ou les
11 dons et à quel titre.

12 Par ailleurs, un autre avantage de la *Loi*
13 *uniforme* est qu'elle permettra de baliser les pouvoirs des
14 plateformes de sociofinancement. À l'heure actuelle, les
15 conditions d'utilisation des plateformes leur accordent une très
16 grande discrétion qui leur permet de s'immiscer dans
17 l'administration et la disposition des dons. La *Loi uniforme*
18 prévoit que toute personne agissant de la sorte devient
19 fiduciaire. Ainsi, les devoirs stricts qui incombent aux
20 fiduciaires s'appliqueraient aux plateformes de sociofinancement
21 dès qu'elles interviennent dans l'administration et la
22 disposition des dons.

23 Le deuxième point que je souhaite aborder
24 concerne le caractère politique et subversif de certaines
25 campagnes de sociofinancement sous forme de dons.

26 Certaines campagnes de sociofinancement ont
27 attiré l'attention ces dernières années en raison de leur
28 caractère politique et même subversif. On se rend compte de leur

1 efficacité pour mobiliser et financer des mouvements citoyens et
2 parfois des mouvements de contestation qui ébranlent l'État. On
3 a vu le sociofinancement jouer ce rôle lors du mouvement de
4 protestation de 2019 à Hong Kong. Les manifestants ont su tirer
5 profit des attributs suivants qui caractérisent le
6 sociofinancement : sa simplicité, sa spontanéité, son
7 informalité, son caractère mobilisateur, son caractère
8 international, et sa capacité de déjouer les autorités. On
9 retrouve ici, me semble-t-il, certains parallèles avec
10 l'utilisation du sociofinancement lors du convoi.

11 La campagne *Refund The Wall* est un autre exemple
12 intéressant d'une campagne de sociofinancement au caractère très
13 politique. Cette campagne qui a permis d'amasser plus de
14 25 millions de dollars par l'entremise de la plateforme GoFundMe
15 avait pour objet la construction d'une partie du mur que le
16 président Donald Trump avait promis d'ériger sur la frontière
17 entre les États-Unis et le Mexique. Après le début de la
18 campagne et probablement à la demande de GoFundMe, le porteur de
19 projet a constitué une OBNL, une organisation à but non
20 lucratif, pour recueillir les dons. Cela n'a pas empêché
21 plusieurs individus, dont Steve Bannon, de diverter une partie
22 des dons à leurs profits, et ces personnes font l'objet
23 actuellement d'accusations criminelles pour fraude.

24 Plusieurs campagnes de sociofinancement
25 politiquement chargées ont provoqué des scandales, incitant
26 certaines plateformes à s'en distancier et d'autres à les
27 accueillir. Cela peut conduire à la politisation des plateformes
28 elles-mêmes.

1 Je crois qu'il faut garder à l'œil ces phénomènes
2 et s'assurer que les lois électorales sur le financement des
3 partis politiques permettent un encadrement adéquat à l'égard de
4 ces phénomènes. Cependant, du fait même que le sociofinancement
5 revêt parfois un caractère politique, il faut aussi s'assurer
6 que la liberté d'expression et d'association ne soit pas brimée
7 par les contrôles dont il fait l'objet.

8 Par ailleurs, les quelques campagnes fortement
9 médiatisées qui ont une dimension très politique ne doivent pas
10 nous faire oublier que la vaste majorité des campagnes de
11 sociofinancement sont fondées sur l'entraide et la volonté de
12 mener à bien des projets qui sont bénéfiques pour la
13 collectivité. Ce serait dommage qu'en imposant au
14 sociofinancement un cadre trop rigide ou trop lourd, on
15 décourage ces initiatives dont les retombées sont le plus
16 souvent positives.

17 Et le troisième point que je vais aborder très
18 brièvement concerne la portée des modifications au *Règlement sur*
19 *le recyclage des produits de la criminalité et le financement*
20 *des activités terroristes* adopté le 5 avril 2022 pour assujettir
21 les plateformes de sociofinancement sous forme de dons au
22 *Règlement*, et ici, mon propos va rejoindre dans une grande
23 mesure celui de Jessica Davis avec qui je suis largement en
24 accord.

25 Alors, cette modification peut être vue comme la
26 continuation des mesures financières découlant du *Décret sur les*
27 *mesures économiques d'urgence*. Les plateformes de
28 sociofinancement sont désormais considérées comme des

1 entreprises de services monétaires ou des entreprises de
2 services monétaires étrangères. Par conséquent, elles sont
3 assujetties à de nouvelles obligations auprès de CANAFE, à
4 savoir, notamment :

5 Remplir les exigences relatives aux besoins de
6 bien connaître son client, y compris de vérifier l'identité des
7 personnes et des entités pour certaines activités et opérations;

8 Conserver certains documents, dont ceux
9 concernant les opérations et la vérification de l'identité des
10 clients; et,

11 Déclarer certaines opérations à CANAFE.

12 Comme plusieurs l'ont souligné, il y aurait lieu
13 d'examiner l'utilité de ces mesures puisque les plateformes
14 confient généralement le traitement ou peut-être même... toujours,
15 en fait, dans tous les cas que je connais, elles les confient,
16 le traitement des paiements, à des intermédiaires qui sont déjà
17 visés par le Règlement.

18 Alors, dans ses observations en réponse à mon
19 rapport d'expert, le ministère de la Justice du Canada souligne
20 que la plateforme de sociofinancement possède des informations
21 ou peut mettre en œuvre des mécanismes pour recueillir des
22 informations que ne détiennent pas les entreprises de services
23 monétaires. Je trouverais utile d'en savoir davantage sur la
24 nature de ces informations additionnelles que seules les
25 plateformes de sociofinancement sont susceptibles de détenir et
26 je souhaiterais aussi savoir pourquoi ces informations
27 additionnelles sont nécessaires ou utiles pour la réalisation de
28 l'objet de la Loi.

1 Par ailleurs, je voudrais souligner que plusieurs
2 personnes ou groupes recourent au sociofinancement en créant une
3 page de dons à même leur site web. Ces personnes ou groupes
4 n'utilisent pas les services d'une plateforme de
5 sociofinancement, mais elles utilisent les services d'une
6 entreprise de services monétaires. Alors, selon ma
7 compréhension, de telles campagnes de sociofinancement
8 échapperaient donc aux nouvelles mesures mises en place pour
9 mieux surveiller les activités de sociofinancement. Les porteurs
10 de projet qui désirent éluder les nouveaux mécanismes de
11 cueillette d'informations que devront mettre en œuvre les
12 plateformes de sociofinancement pourraient donc s'y soustraire
13 en créant une page de dons à même leur propre site web.

14 Si le but des modifications introduites le
15 5 avril 2022 est de s'assurer que la plateforme de
16 sociofinancement vérifie l'identité des porteurs de projet ou
17 des donateurs et conserve une trace de leurs activités, cela me
18 préoccupe du point de vue de la protection de la vie privée.
19 Actuellement, les plateformes de sociofinancement recueillent
20 assez peu d'informations de cette nature. Les données que
21 devraient collecter les plateformes à la demande de CANAFE sont
22 aussi des données dont elles pourraient faire un usage
23 préjudiciable aux individus concernés. C'est la préoccupation
24 que je voudrais formuler.

25 En vous remerciant beaucoup de votre attention.

26 **MR. PATRICK LEBLOND:** Merci beaucoup, Michelle.

27 So now we'll move to Gerard Kennedy. Please,
28 Gerald. Fifteen (15) minutes.

1 --- PRESENTATION BY PROF. GERARD KENNEDY:

2 **PROF. GERARD KENNEDY:** Merci beaucoup pour votre
3 invitation. Je m'appelle Gerard Kennedy. Mon expertise en le
4 droit procédural est le droit administratif.

5 And I'm deeply honoured to be speaking on the
6 procedural rights that individuals have regarding their property
7 and how the invocation of the *Emergencies Act* would have
8 affected that.

9 In essence, I'm going to suggest that there were
10 indeed common-law procedural rights that individuals have
11 concerning their property that were clearly affected by the
12 events in February. However, because these are common-law
13 rights, they can be overridden by regulation or legislation. So
14 insofar as the invocation of the Act was lawful, taking away
15 procedural rights that people have before being deprived of
16 property was also lawful. And given that the Canadian
17 Constitution doesn't protect property rights, the Constitution
18 won't change anything in that analysis.

19 The *Canadian Bill of Rights* might more plausibly
20 have something to say, but it's uncertain.

21 From a policy perspective, the legality of
22 sending these procedural rights into abeyance is probably not
23 desirable, and insofar as this Commission has a policy role,
24 I'll make some recommendations. But I don't think that affects
25 the legality of what occurred in February.

26 And insofar as procedural rights cannot be
27 reconciled with the Act's invocation, I would suggest that that
28 is not -- that's a reason to not give the statutory

1 prerequisites that justify invoking the Act a broad
2 interpretation. In other words, an interpretation more
3 consistent with the preservation of common-law rights should be
4 preferred.

5 Starting with a few first principles, individuals
6 have a right to enjoy their property. That's been recognized
7 for centuries. That can be limited in various ways. But
8 generally speaking, that is adjudicated in the Courts, either
9 because there is an action to freeze the property or because
10 Individual A has commenced an action against Individual B
11 asserting that their use of the property somehow impinges upon
12 their rights. And in doing so, the rules of procedural fairness
13 and civil procedure have got to be followed.

14 These can look a little different in exigent
15 circumstances, and I'll return to that, but generally that's the
16 case.

17 Moreover, before the executive branch of
18 government deprives one of one's property, it has to follow the
19 rules of natural justice, or to use the modern Canadian
20 Parliament's procedural fairness, recognized in England for
21 centuries, and certainly applicable in Canada.

22 The content of this procedural fairness will vary
23 according to the circumstances, but generally it's always going
24 to include notice of the proposed seizure or freezing, and some
25 sort of opportunity to respond.

26 I'd like to emphasize, these are procedural
27 rights to property. It doesn't mean that one's rights to
28 property, the property can't be seized, or frozen, or forfeited,

1 or even destroyed. It does mean, however, that certain
2 procedural hoops need to be jumped through before we go down
3 that route. Moreover, the Executive Branch has no substantive
4 power to take property unless authorised by a statute. So a
5 statute needs to authorise the taking.

6 So *prima facie*, without getting into the factual
7 weeds, in early February 2022, the members of the convoy had
8 these protections that processes would be followed before their
9 property rights were taken away. However, the *Emergencies Act*
10 is a statute that clearly authorises takings, and the Emergency
11 Measures Regulations and the Economic Measures Orders make it
12 quite clear that the procedural rights, as well as the
13 substantive rights, were restricted in various ways, as we have
14 already heard from my co-panelists.

15 So to give an obvious example, entities, such as
16 banks, had to cease making available any property for designated
17 persons, among many other things. It made it very clear that no
18 court order was necessary, and the entities were immune from any
19 sort of liability for complying with the Regulations, which
20 probably resulted in erring on the sides of more seizures.

21 Now, I will suggest that that does not fulfill
22 the common law purpose of notice to persuade the decision-maker
23 that you should not be deprived of your property rights because
24 you are not -- you should not be a designated person and there
25 is no centralised authority to making someone a designated
26 person.

27 One could argue that determining individuals to
28 be designated persons is an administrative decision and not a

1 quasi-legislative decision, and that some sort of process should
2 be contemplated there. Possibly, but that doesn't -- that isn't
3 spelled out in the orders, and it's also complicated by the fact
4 that these decisions were generally made by non-state actors,
5 which complicates, somewhat, the applicability of administrative
6 law. I'll come back to this shortly in the policy discussion.

7 Now, we don't live in a country of legislative
8 supremacy entirely. The Constitution constrains government
9 action in various ways, and you heard this morning, and you'll
10 hear later this week about a lot other rights that were
11 potentially impacted by the *Act's* invocation where the *Charter*
12 has a lot to say about matters.

13 But property rights aren't in the Constitution.
14 That was a deliberate choice in 1982, and it would be
15 inappropriate to try to give them constitutional status at this
16 stage. It doesn't mean they don't exist, but they're not
17 constitutionalised, not even procedural protections to them,
18 which again makes Canada a bit of an outlier around the world,
19 but it is still very much the case of the Canadian Constitution.

20 The *Canadian Bill of Rights* on the other hand
21 does guarantee procedural rights regarding property. For
22 instance, section 1(a) guarantees a right to enjoyment of
23 property and the right not to be deprived thereof, except due
24 process of law.

25 This use of due process is fairly rare in
26 Canadian law. It's somewhat of an American import, where we've
27 tended to use natural justice or fundamental justice or
28 procedural fairness. But it has significant overlap, the

1 principles of procedural fairness.

2 Moreover, section 2(e) of the *Bill of Rights*
3 holds that statutes shall not be construed to:

4 "...deprive a person of the right to a
5 fair hearing in accordance with the
6 principles of fundamental justice for
7 the determination of...rights and
8 obligations..."

9 Though I'll note that that doesn't guarantee a
10 particular process, but rather, interference with processes
11 already authorised at law, so there's nothing problematic from a
12 *Bill of Rights* perspective with the mere fact that such a
13 process was not prescribed in the orders.

14 Moreover, the procedural protections for property
15 have been interpreted quite narrowly only to instances where
16 there is discretion to deprive the person of their property. So
17 if legislation takes away the right to property unambiguously,
18 the *Bill of Rights* protections are inapplicable. Moreover, the
19 specific due process rights protected by the *Bill of Rights* must
20 have existed in 1960, as the *Bill of Rights* is a statute to be
21 interpreted the way it would have been after it was passed.

22 So what does this mean about the *Bill of Rights*?
23 Well, the enactment of the Regulations themselves does not pose
24 a *Bill of Rights* problem because the Governor in Council enacted
25 them in a quasi-legislative capacity. Having such a hearing
26 before Cabinet clearly seems to have not been a right pre-1960.
27 More plausibly, individual decisions about the particular
28 individuals whose assets would be frozen could attract *Bill of*

1 *Rights* due process protections because they are administrative
2 rather than legislative acts.

3 At the same time, while that's a plausible
4 reading of the *Bill of Rights*, there is relatively little case
5 law on it, despite it being over 60 years old. It's never been
6 interpreted in circumstances such as this. There probably is a
7 pre-1960 right to have notice or a hearing before property is
8 frozen by the Executive, but does it apply the implementation of
9 Cabinet decisions? Does it matter that this is an emergency, if
10 not statutorily, at least colloquially? Does it matter that
11 private entities actually did the freezing? Does it matter that
12 these are very clear Regulations? These complicating factors
13 make the way in which the *Bill of Rights* could affect things
14 somewhat uncertain.

15 So I'm going to transition to my policy points,
16 and in doing so, though, I will discuss what a hearing that
17 preserves a measure of procedural protection, whether at the
18 *Bill of Rights*, or otherwise, could look like.

19 Procedural law recognises there are exigent
20 circumstances where property has to be frozen soon. So for
21 instance, Anton Piller and Moreva orders in the civil litigation
22 process allows searches of property or seizing of assets without
23 notice if there is reason to believe that responding parties
24 will hide assets or something similar. There has to be judicial
25 authorisation to be sure, but there are opportunities to
26 challenge after the fact, and there will be significant
27 consequences if a party was not forthcoming regarding how it
28 obtained the order.

1 And there are other circumstances, notably in the
2 *Money Laundering and Terrorist Financing Act*, that give
3 individuals post talkability to challenge asset seizure and get
4 a resolution quickly, addressing the concern already identified,
5 that the freezing and lack of access to one's bank accounts can
6 have a really profound affect on one individual's lives, while
7 still recognising there are circumstances where it is absolutely
8 necessary.

9 But that was not -- such a process wasn't
10 apparent in the Regulations, and I don't think that poses a
11 legal problem, given the broad nature of the *Act*, but I do think
12 it may be a good idea to amend the *Emergencies Act* to prescribe
13 a process to review the seizure of property analogous to what is
14 seen in the *Money Laundering or Terrorist Financing Act*,
15 particularly for emergencies that -- or states of emergency that
16 last quite sometime. Because in this case it lasted nine days,
17 but there is nothing inherent that that's necessarily going to
18 be the case.

19 And I'd like to also echo Jessica Davis's view
20 that the designation of individuals should be named, if not by
21 the Governor in Council, by some sort of designated central
22 authority, both in terms of making it easier to determine the
23 applicability of administrative law principles, and to not have
24 this kind of ad hoc situation where what kind of procedure, if
25 any, would be necessary is very uncertain.

26 So, so far I have suggested that there are ways
27 that we could improve the *Emergencies Act* and future Orders in
28 Council to preserve more of a protection for property rights,

1 recognising there are exigent circumstances where property
2 rights have to be suspended and traditional civil procedure is
3 not going to work, but in light of that I would suggest because
4 of the general principle of statutory interpretation to rights
5 limiting legislation strictly, I'd encourage the Commission not
6 to interpret the *Emergencies Act* broadly, given that it can
7 deprive individuals, not just of their substantive rights to
8 property but also any kind of procedural ability to protect it.

9 It's a well-established principle of statutory
10 interpretation that rights restricting legislation, including
11 property rights restricting legislation is to be interpreted
12 strictly. It's also a principle of statutory interpretation
13 that legislation intends to be consistent with the common law to
14 the extent possible.

15 So in this case, if the Commission finds that
16 it's a gray zone, whether the statutory prerequisites for
17 invoking the Act were met, it should bear in mind these common
18 law rights as a reason to not interpret it particularly broadly.
19 That's not determinative. This Commission should consider all
20 canons of statutory interpretation that likely point in
21 different directions.

22 However, insofar as the legislation sends
23 individuals' due process or procedural fairness rights
24 essentially into abeyance, we should be reasonably certain that
25 Parliament intended for it to apply in these circumstances.
26 That's not a condemnation that the government didn't act
27 proportionately here. That will be up for this Commission. I
28 don't see evidence that it didn't, but given that a government

1 is not legally obliged to do so, it should consider the long-
2 term implications of that.

3 Merci beaucoup.

4 **MR. PATRICK LEBLOND:** Merci, Gerard.

5 Maintenant, j'aimerais demander à Michelle
6 Gallant.

7 Michelle, please?

8 **--- PRESENTATION BY PROF. MICHELLE GALLANT:**

9 **PROF. MICHELLE GALLANT:** Thank you. Thank you to
10 the Commissioner, thank you to the moderator, to fellow
11 panelists, everyone present, and those of you attending remotely
12 for this opportunity to share some thoughts.

13 It's a privilege to participate and maybe offer
14 something of value.

15 You know, funding is important to securing any
16 aspirations. It doesn't matter if you're opening a restaurant,
17 if you're starting an industry, if you're going to higher
18 education, or to realize civil society ambitions.

19 You know, funding enables. There aren't a lot of
20 things that are accomplished without some kind of access to
21 finance, to property, and to resources.

22 So in participating today, I would like to simply
23 survey three dimensions of funding and finance; very briefly,
24 funding and the Charter; a little bit on foreign funding and
25 civil society groups; and a little bit about the appropriateness
26 of these particular financial measures.

27 So let me begin by noting that it hasn't been
28 fully canvassed by the courts at all, but in principle, the idea

1 of fundraising to support a cause, right, or a social movement
2 is protected by the Charter freedom guarantees.

3 There was a round table this morning. They did
4 talk about constitutional freedoms, and I'm sort of drawing on
5 some discussions with Professor Jamie Cameron. But suffice to
6 underscore that funding animates those freedoms, so
7 organizations do have the right to fundraise, and you can't
8 impose a limit on what they use those funds for. That would
9 fall within freedom of expression.

10 Donating to organizations, lots of people donate
11 that donate. That donative act can constitute associational
12 freedom; my association is by giving, right, by donating, and
13 then again, the action is captured by the freedom of
14 association.

15 Broad Human Rights law also places the
16 mobilization of resources amongst the activities that freedom of
17 assembly protects.

18 So there is a report. It's May 2022 from the
19 United Nations Human Rights Council, and it specifically -- it's
20 specifically about funding. It's actually specifically about
21 foreign funding. But it specifically states that:

22 "The right of associations to freely
23 access human material and financial
24 resources from domestic, foreign, and
25 international sources is inherent in
26 the right of freedom of association and
27 essential to the existence and
28 effective operations of any

1 associations."

2 So I know there are limits. Some of those were
3 talked about this morning, but simply to underscore that that
4 funding piece is part of those freedoms.

5 And I would also note that the size of a
6 particular funding campaign -- so even if someone has surprising
7 success in mobilizing resources beyond your dreams, that is not
8 ever without more grounds for a state interference. Simply, a
9 successful fundraising campaign galvanizing lots of resources is
10 not, on its own, any kind of a justification for some kind of
11 state-based interference.

12 So let me say a few things about foreign funding
13 restraints and civil society organizations.

14 As my colleague has commented, so democratic and
15 non-democratic orders all resist foreign funding. It's not just
16 the democratic order thing, all orders resist foreign funding.
17 This idea that, you know, foreign influence, that the meddling
18 of the outsider in the internal affairs of another, it's long
19 been controversial.

20 Usually states, particularly sovereign states,
21 democratic states reserve unto themselves that we have the right
22 to arrange our internal matters and will resist and sort of shut
23 off their boundaries to the kind of foreign influence, including
24 foreign funding.

25 That resistance, that sort of who is -- is sort
26 of just based on this feel that look, we're accountable as a
27 state, I'm accountable to particularly through elections, to the
28 domestic populous, and I'm not accountable to an audience

1 somewhere, anywhere else on the globe.

2 It might be said that the entire project of
3 international law is simply devoted to deliberating upon what's
4 the proper place of external influence on domestic affairs of
5 state?

6 I have to underscore this too. Any money flowing
7 across the border is foreign funding. So if I am a Mexican
8 expat and I'm working here and I'm sending money home to fund my
9 family in Mexico, that, to the Mexican state, is foreign
10 funding.

11 If I'm in the UK and I purchase a football team
12 and I'm a Russian billionaire, to the United Kingdom, that is
13 foreign funding.

14 So any funding that crosses a border constitutes
15 some kind of a foreign funding.

16 But what I wanted to note today is that
17 increasingly, there has been this recognition of -- that there's
18 a recognition that states are imposing restraints on foreign
19 funding.

20 This is a new thing. It sort of started maybe in
21 the last 20 years and it's intensified in say the last 10, this
22 idea of we're going to -- individual states are going to
23 restrain access to foreign funding.

24 How do they do that and what are the strategies?
25 Well, one strategy is simply requiring that civil society
26 groups, if you're going to go and harvest foreign resources, you
27 must register. So you have to seek the approval of the state
28 before you can go elsewhere.

1 Another one is simply -- it's a little more
2 covert -- is the adding of different administrative burdens. So
3 you're an organization and you'd like to secure foreign funding?
4 It's the idea that well, if you want to go after foreign
5 funding, you have to disclose that. You have to fire a number
6 of forms. So it impedes. It's harder to secure foreign funding
7 than it is to secure domestic funding.

8 I think one particularly alluded to, maybe by
9 both of my colleagues here was the idea of a state marginalizing
10 or decrying as illegitimate, or in particular, labelling a
11 domestic organization as a foreign agent as a reason to say, "No
12 monies is flowing here." So that's another strategy.

13 And again, the idea too would be calling a civil
14 society group as a political organization.

15 So what do we have?

16 So in Canada -- so those are some of the
17 restraints.

18 In Canada, the -- we do have some restraints on
19 foreign funding, and most of those, I think, as my colleague
20 Jessica Davis has canvassed, most of those connect to elections
21 and the formal political process, basically injunctions against
22 foreign support. So that's the place where we find these
23 restraints on foreign funding.

24 Do we actually see them anywhere else? Well,
25 generally, the idea would be no, we don't generally have
26 specific injunctions prohibit prohibitions on access to foreign
27 funding.

28 However, what we have seen is we have seen, is we

1 have seen some encumbering -- encumbrancing being imposed on
2 say, registered charities.

3 So for example, now -- this is a result of a few
4 years ago -- now, if a registered charity, which is just a
5 charity, it's governed under tax law, but if you are a
6 registered charity, if you're a civil society organization
7 that's organized in that way, you actually now have to disclose
8 the presence of foreign funds.

9 So it used to be charities had to disclose
10 broadly how successfully your fundraising efforts, right, how
11 much money did you raise? But now, these particular ones in
12 Canada now have to disclose the presence of foreign funding.

13 So it's not a specific restraint, but it
14 certainly is an exercise in opening up and disclosing the
15 presence of those resources.

16 So we've seen some of these, and I think what's
17 concerning about this, to me, was when I was really looking at
18 this, I thought, this is going to be your usual suspects where
19 we're going to see there's maybe some states that sometimes, at
20 least in Western society, tend to maybe think they're a little
21 bit troublesome. But none of these foreign restraints are --
22 they're applying in the United States, in Europe, and in Canada.
23 So it's in your reasonably well developed, democratic states
24 that are imposing these restraints.

25 An I would be remiss in not pointing out with
26 respect to foreign funding that in July 2021, it saw the
27 completion of an Alberta report, and the Alberta report deals
28 specifically with foreign funding and the energy campaign and

1 energy campaigns in Alberta. And it was an inquiry that was
2 called in that regard. So that Inquiry, there might be all
3 kinds of other parts of that Inquiry might be uncomfortable
4 with. However, that Inquiry, in its forensic accounting, so it
5 used an accountant, actually did identify an increase in the
6 funding of our donative sector in Canada over the period of 10
7 years of foreign dollars. So I think the number it says is
8 about 1.6 billion, an increase over that period flowing into
9 Canada. It doesn't track where it's from. There's some sense
10 that a lot of it is from the States, but it does track an
11 increase in foreign funding.

12 And I'm noting, since that inquiry specifically
13 about foreign funding, the first recommendation that that
14 Commissioner made was actually that we need to increase the
15 transparency of the financial sector, in particular, in
16 connection with registered charities.

17 So I would just note, just sort of mention in
18 talking about these foreign funding restraints, any time we
19 introduce an element of disclosure, as you know, right, elements
20 of disclosure, they irritate privacy. So when we seek to
21 introduce, even if the restraints are about introducing and
22 enhancing transparency, those transparency norms irritate. And
23 I say that because generally the act of donating, which my
24 colleague talked about donating to any kind of campaign,
25 normally falls within the realm of financial privacy. It's not
26 public. There's no public entitlement to know where I put my
27 donation -- my donative dollars. It's -- privacy shelters that
28 kind of freedom.

1 Now, I just note that sure, if I have no
2 obligation to disclose and yet I freely choose to disclose in
3 some public media or, you know, tell someone what I've done,
4 that's quite different. There I've decided that, look, I'm
5 waiving my financial privacy. But there is always going to be
6 that tension between disclosure and privacy.

7 So let me -- in the few minutes I have left, let
8 me say a few things about the appropriateness, like, turning
9 specifically to the appropriateness or necessity of the
10 particular financial measures that were introduced.

11 I think what I'd like to highlight here, and sort
12 of along the lines of my colleague, when -- my colleague,
13 Professor Kennedy, when you're talking about the appropriateness
14 or necessity of the particular financial measures. And what I'd
15 like to simply comment on is this idea that simply because we
16 have an emergency situation, once that's decided, that doesn't
17 trump or irrigate the complete application of law. So there is
18 space in which we have to determine ad think about were these
19 particular things appropriate or not? Was there particular
20 regimes necessity or not?

21 And in saying that, it's not sufficient to simply
22 say they worked, the situation dissolved, we solved it. it is
23 not sufficient, because that's to equate effectiveness sort of
24 with appropriateness, and it means that appropriateness has no
25 meaning, absolutely no meaning. Anything is appropriate. So,
26 you know, the example would be, you know, the sledgehammer
27 killing the fly, but so would the flyswatter, and that would say
28 that the sledgehammer is -- okay, and I'm not commenting on

1 their appropriateness. I'm just outlining some of the things we
2 have to think about. We have to think about whether those --
3 these particular measures were appropriate or not.

4 So simply in talking about whether the
5 appropriateness of the financial regimes or the necessity of
6 these particular financial regimes, let me simply say that the
7 way in which we might be able to discern that would be to at
8 least think broadly about some kind of a proportionality test.

9 So if you're a lawyer, you know there's an *Oakes*
10 test, and it's kind of -- what it is is it's kind of a matrix of
11 proportionality, and basically what would that mean, that would
12 mean, in a sense, okay, let's look at we have a response, and
13 that response ought to be sort of minimally impacts on
14 individuals; right? So that would be on one side of the
15 equation, while at the same time, be designed to immediately
16 lance a particular public order problem.

17 So you have to think about -- so there's
18 proportionality between the particular measures, right, and
19 their impact on individuals, not as concerned about institution,
20 more concerned about individuals, and the immediate kind of
21 dealing with the public order situation.

22 And I'm going to end just by adding one more
23 thing to that. So what would be -- some pieces that might be
24 relevant to this proportionality analysis? Certainly foreign
25 funding would be -- it would jostle for some primacy. So if
26 there was foreign funding, not concluding that there was, it's
27 been outlined that maybe there wasn't, but the idea of foreign
28 funding would be pretty important in a proportionality analysis.

1 Another thing that would be important, I think,
2 is when people talk about the idea that these measures were
3 temporary, the measures were temporary, but the impact of these
4 financial measures on individuals may not be. And I would
5 simply say this, the Privacy Commissioner has already warned
6 that some information gathered under terrorist finance and
7 suspicious transactions reporting norms, it was wrongful or not
8 clear. Once it went into the final system, there needed to be a
9 way to purge it, to get it out, so that that kind of thing,
10 there was a lingering consequence.

11 So thank you.

12 **--- OPEN DISCUSSION:**

13 **MR. PATRICK LEBLOND:** Merci beaucoup, Michelle.

14 So as the moderator, first I'd like to thank all
15 the experts for their opening remarks presentation. We've
16 covered a lot of ground, but there is more to be covered.

17 Avant de poser des questions, j'aimerais donner
18 la chance aux panelistes peut-être si il ou elle on des
19 questions ou aimerait faire des commentaires par rapport à ce
20 que d'autres panelistes ont dit.

21 So I don't know if you have -- if there are some
22 who have things to say about what the others said?

23 Jessica Davis?

24 **MS. JESSICA DAVIS:** Yes, I just have one quick
25 question, and it's actually for Michelle Gallant, about the not-
26 for-profit corporations and if they have any restrictions or
27 reporting requirements for foreign funding as well. You talked
28 about the charities, but they're different.

1 **PROF. MICHELLE GALLANT:** I'm not aware of any,
2 because generally not-for-profits, the regulation is much
3 lighter, and simply because they don't give tax deductible
4 receipts; right? So I'm not aware of any.

5 And I would also sort of, just in regards of
6 that, I'm not aware of any restrictions. So there's not-for-
7 profits, there's charities, but also sort of ad hoc civil
8 movements. I'm not sure where they would fit in this; right?

9 **MR. PATRICK LEBLOND:** Patrick Leblond, ici.
10 Anyone else would like to ask or say something? Comment?

11 Michelle Gallant?

12 **PROF. MICHELLE GALLANT:** Sure. One question I
13 would have is sort of generally, sometimes when we talk about,
14 you know, fixing the financial system, and then we talk
15 sometimes about -- combine that with this idea of, you know,
16 foreign influence, I guess I wonder myself, I have trouble sort
17 of thinking about well, how are going to discern? So my example
18 would be if we're going to fix -- there's problems with the
19 financial system and we're worried about foreign dollars, and I
20 think of an example like, okay, we're building a church, you
21 know, in Winnipeg, and it's funded by dollars that are coming
22 from the Vatican. That's foreign funding. And it could easily
23 -- so I wonder about how do you think through how do you
24 legitimately identify, you know, what are the gaps that need to
25 be filled and what could be left alone?

26 **MR. PATRICK LEBLOND:** Patrick Leblond. I think
27 that's a very good question. In fact, if I can ask -- and put
28 it in different terms, because I was going to ask the panel to

1 think about that, and in light of what you also said, Michelle
2 Gallant, in your presentation. And that's maybe to -- the
3 question of risk; right?

4 And Michelle Gallant, you talked about, you know,
5 administrative registration, for instance, or disclosure; right?
6 And especially with regards to foreign funding.

7 So would a risk-based approach -- I mean, we see
8 it -- I mean, already the anti-money laundering and terrorism
9 financing is based on this notion of risk. What is the risk, in
10 a way, for the state in terms of national security, which is why
11 we have this? In terms of securities legislation, is the same
12 thing; right? There are restrictions, disclosure requirements
13 when it comes to raising funding for financing companies. So in
14 a way, how is that different than raising funding for building a
15 church or for organizing a group; et cetera?

16 So I'd like to hear the members of the panel, and
17 Christian, please, you know, raise your hand if you want to
18 speak. In terms of what are the risks, ultimately, that we are
19 talking about here; right?

20 I mean, obviously the fact that we are talking
21 about foreign funding means that there is a risk. I mean, in
22 terms of politics, as Jessica Davis mentioned, you know,
23 influence, undue influence over the political process is a risk;
24 right? You don't want foreign states to influence, you know,
25 democratic results in one way or the other. That's why we have
26 rules over funding, et cetera. But what are other risks that
27 are applicable here? So I don't know if anyone wants to go
28 first.

1 Jessica?

2 **MS. JESSICA DAVIS:** It's Jessica Davis. So I
3 think you're right to argue that one of the risks is influence.
4 I think another potential risk is compromise. So, basically,
5 the way that I see it is if an individual or an organization
6 were to accept foreign funding, that is probably intended to buy
7 a certain level of influence with that individual or
8 organization, but there's also the potential for the disclosure
9 of that information to compromise their ability to do their job
10 or that they won't want that information compromised in the
11 future, which in turn can also have another level of influence.
12 But I think it's a good question.

13 And I would also take a moment to talk about the
14 foreign funding issue. I think -- you know, I don't want to be
15 prescriptive here in terms of what should or shouldn't be in any
16 kind of legislation about limits to foreign funding. I think
17 that needs careful study. It's a very sensitive topic, but I
18 think it is reasonable to start thinking about that in terms of
19 limiting political activity. That might also have some limits
20 to religious activity, because it's very difficult to separate
21 these things out. I don't see those -- that as necessarily a
22 problem. I think that there could be a reasonable way of
23 writing that kind of legislation to make that acceptable to
24 Canada and Canadians, but it is a thing that we -- it's
25 something that we need to consider as we talk about that.

26 **MR. PATRICK LEBLOND:** Quelqu'un d'autre?
27 Christian? Ah, oui.

28 **PROF. CHRISTIAN LEUPRECHT:** Christian ---

1 **MR. PATRICK LEBLOND:** Christian, please.

2 **PROF. CHRISTIAN LEUPRECHT:** So it's probably
3 helpful to differentiate between risk and threat; right? So
4 everything's a risk in one way or another. But a threat is
5 capability and intent, and so I think we always need to ask
6 then, if we have actors who are providing funding, what is their
7 capability in terms of actually influencing democratic
8 institutions, whatever it might be, and what is their intent.
9 And if that intent is nefarious, if the intent is to support
10 illegality, criminality, if there's an antidemocratic intent, I
11 think that would be an important sort of element of distinction.
12 And so that seems to be driving, for instance, these foreign
13 agent registries that there's a particular concern that certain
14 state entities have fundamental hostile intent and have the
15 capability to follow through on that intent, and so you have to
16 manage the risk very differently than, for instance, some donor,
17 whoever who's just giving money because he's -- she or he or
18 they sympathize with a particular cause.

19 **MR. PATRICK LEBLOND:** Merci, Christian. Patrick
20 Leblond ici. Maintenant, l'intention est un enjeu majeur, mais
21 je vais poser la question : comment on détermine l'intention?
22 Est-ce qu'on demande tout simplement quelles sont les intentions
23 des gens? Est-ce qu'on détermine soi-même est-ce qu'il y a une
24 agence ou quelqu'un qui dit « ah! vous avez une intention... une
25 bonne intention ou une mauvaise intention »? Comment on peut
26 déterminer à l'avance l'intention si justement on dit « ben,
27 c'est seulement dans le cas où il y a une menace »?

28 So I don't know, how do you decide on intent and

1 who is responsible, because I guess there is a danger that it
2 could be abused. Someone could say, "Oh, no, you have bad
3 intentions, and therefore, you know, we're not letting you get
4 that foreign funding or even do anything."

5 Je vois Michelle Gallant qui peut-être veut
6 répondre.

7 **PROF. MICHELLE GALLANT:** Yeah, it's not really an
8 answer, but I think this came out of some of the comments that
9 Professor Leuprecht made was this -- the part about identifying
10 the foreign funding is one thing, but one reason I think that
11 Canada has some issues on the international stage, even though
12 it hasn't been labelled -- I'm not aware of it being labelled as
13 a money-laundering haven or a terrorist finance haven. I stand
14 to be corrected. But the criteria of both of those is usually
15 financial secrecy is at least one, low tax rates can be one, but
16 also, pronouncedly very strong secrecy rules. So I guess I
17 wonder, like I said, I'm not that sure, I haven't sort of
18 policed or looked into how strong kind of Canadian protection of
19 the secrecy of transactions that cross the border actually how
20 that stands up along, say, you know, different countries which
21 sort of have been labelled sort of I guess as secrecy havens.
22 Some parts in the south, some parts in the very centre of the
23 United States, some places in the middle of Europe, like I said,
24 I wasn't aware that we were, but if we are, simply in terms of
25 detecting that kind of foreign funding, the suggestion would be
26 we actually have to enhance disclosure in some way, shape or
27 form, so to move up the transparency international, you know,
28 index.

1 **MR. PATRICK LEBLOND:** Merci beaucoup, Michelle.
2 Christian, would you -- Patrick Leblond.
3 Christian, would you like to say something about intent and how
4 -- and who could be -- decide this and how it would play in
5 terms of it focussing more on threats than risks?

6 **PROF. CHRISTIAN LEUPRECHT:** I'll try to be brief.
7 Look, intelligence is our first line of defence, and so this is
8 why intelligence agencies are subject to different threshold,
9 evidentiary threshold regime, for instance, than criminal
10 intelligence. Now let's look at how well we're actually doing
11 when it comes to, for instance, figuring out intent in terms of
12 financial intelligence. So 2019 and 2020, FINTRAC had 31-and-a-
13 half million individuals reports submitted to it. Now the
14 entire United States had 21-and-a-half million. The United
15 Kingdom had 500,000. So that's 12-and-a-half times more reports
16 in Canada as compared to the others. That's 96 percent -- 96
17 times more reports compared to the UK. So that's an exceptional
18 defensive regime that provides very high volume, very low-
19 quality outputs. In fact, in 2019/2020, FINTRAC made only 2,057
20 unique disclosures to law enforcement, and most of those
21 disclosures were not particularly useful because they didn't,
22 for instance, draw a broader network in terms of threats and so
23 forth.

24 So we need to actually have a much more robust
25 posture for intelligence agencies to actually be able on the one
26 hand collect the information that they need to discern intent,
27 and then to be able to action that type of intelligence. And
28 when it comes to FINTRAC, for instance, if you read the chapter

1 on FINTRAC, in the Cullen Commission report, it is very clear
2 that FINTRAC does not perform. Why does it not perform?
3 Because it is a complete outlier in terms of financial
4 intelligence agencies among western democratic allies.

5 So this just sort of as an example that we can
6 have all the conversations about legal particularities that we
7 like. If we have agencies that cannot perform for the purpose
8 of the security, prosperity and democracy of Canada, then all
9 this is probably nugatory.

10 **MR. PATRICK LELOND:** Thank you very much,
11 Christian.

12 Jessica?

13 **MS. JESSICA DAVIS:** Yes, I just want to come in a
14 bit on the Cullen Commission information that Christian
15 Leuprecht is presenting. So in my reading of the Cullen
16 Commission, I found a number of factual errors and a number of
17 errors of interpretation, so I think we should be cautious in
18 citing that too closely and being too -- using that information
19 too carefully here, because, you know, when we talk about 2,057
20 unique disclosures, that doesn't actually tell us anything,
21 because there can be hundreds, if not thousands of individual
22 transaction reports in each one of those disclosures. We don't
23 know how many of the 30 million reports were actually disclosed
24 to law enforcement or intelligence services in those reports.
25 So there's some issues of interpretation around that.

26 And I would also take issue with the idea that
27 all of this FINTRAC intelligence is not useful. Law enforcement
28 and security services have repeatedly told FINTRAC the opposite.

1 In their annual report they share that information. I worked at
2 FINTRAC. I worked in the Canadian Security Intelligence
3 Service. I reviewed a number of FINTRAC disclosures, so they
4 vary in terms of their usefulness, but they are not universally
5 not useful.

6 And I just want to come in on financial
7 intelligence and the issue of intent. The problem is, when
8 we're talking about financial intelligence, we're talking about
9 financial transactions. They don't tell us anything about
10 intent. It's literally just an information, a record of who's
11 sending money to whom. You need an all-source intelligence
12 picture to get that intent. But I also think that when we're
13 looking at foreign donations, there is an implied intent behind
14 that. It's to support the organization, political activity or
15 individual there. So it kind of makes a whole argument about
16 whether it's threat or risk moot.

17 **MR. PATRICK LEBLOND:** Patrick Leblond. Thank you
18 ---

19 **PROF. CHRISTIAN LEUPRECHT:** I just do have to --
20 if I may reply ---

21 **MR. PATRICK LEBLOND:** Christian, yes.

22 **PROF. CHRISTIAN LEUPRECHT:** --- to that very,
23 very briefly, that what Ms. Davis outlines here is precisely the
24 problem when it comes to effectiveness of government agencies;
25 that there is insufficient transparency for outsiders to measure
26 whether these agencies are actually effective, and what
27 governments do with their own agencies, they will always say
28 about each other that they're all effective. I've yet to find

1 an RCMP report, for instance, that has ever said about any RCMP
2 aspect that the RCMP is not effective at something that it does.

3 So what this means is the state controls the
4 narrative on how effective its own institutions actually are,
5 and that's why inquiries such as this one are so important
6 because they're some of the very few opportunities to actually
7 shed light and provide some transparency on what actually
8 happens. And I think it is -- while there may be some factual
9 issues with the Cullen Commission's report, I think it very
10 dangerous to call into question the overall conclusions that the
11 Cullen Commission draws because it is the only measure of
12 objective independent sort of assessment of the entire regime in
13 Canada, and to what extent it actually or does not serve the
14 public purpose, and I think the Cullen Commission's conclusions
15 on that are irrefutable.

16 **MR. PATRICK LEBLOND:** Merci, Christian.

17 If anyone else would like to take on this issue
18 of intent or not?

19 Okay, Jessica.

20 **MS. JESSICA DAVIS:** I will come back on the issue
21 of effectiveness and usefulness, because Professor Leuprecht did
22 move the bar on that.

23 So we were initially talking about usefulness of
24 the FINTRAC disclosures, and then you talked about the
25 usefulness of the -- or the effectiveness of the regime.

26 I would agree that the regime has plenty of room
27 for improvement. The regime, as a whole, is largely
28 ineffective, in terms of the measurements we would normally

1 associate with that, things like prosecutions of money
2 laundering and terrorist financing offences. But that doesn't
3 mean that FINTRAC disclosures are not useful.

4 **MR. PATRICK LEBLOND:** Okay, thank you very much,
5 Jessica.

6 Patrick Leblond.

7 Let's bring it back to foreign funding, which in
8 a way is what I would like us to focus for now, and there are
9 other issues. But in terms of the risks and the intent, and
10 therefore the question of whether, you know, there should be
11 disclosures, registration, as mentioned by Michelle Gallant, and
12 I guess putting it in terms of -- that she presented it in terms
13 of appropriateness; and is it necessary and when is it
14 necessary?

15 And, you know, I'm going to use other examples.
16 We know, for instance, when it comes to foreign dark investment;
17 you know, there's the *Investment Canada Act* and that has been
18 changed over time; the notion of national security was
19 incorporated, and a lot of the focus has been on state-owned
20 enterprises, for instance, that do invest.

21 So I'm going to try to draw this parallel in
22 terms of, I think, you know, Jessica Davis mentioned, well,
23 foreign funding says something about intent. But it only says
24 about that you support something; it doesn't say in what way,
25 for what purpose; you just support it.

26 Should -- would it make sense -- and this is
27 obviously open to all the panellists -- to draw categories? Say
28 that state funding, for instance, from any state, is illegal, or

1 at least -- you know, and then, obviously, there is the issue of
2 well -- the state could say, "Well, we're going to fund some
3 private organization that is then going to fund something." So
4 like we would then have to go back to the financial chain.

5 Is there a way or is there a logic to kind of
6 having categories and saying, "Well, if it's individuals, it's
7 okay; if it's corporations, well, then that goes in another
8 category; if it's states, it goes, you know, like, no, no
9 states," for instance?

10 In terms of maybe requiring the kinds of
11 disclosures -- and then who discloses? Is it the party that
12 seeks funding or is it the party that brings in the funding?
13 Where does this disclosure take?

14 Donc, je ne sais pas si quelqu'un aimerait peut-
15 être discuter de cet enjeu de comment on peut justement
16 approcher cette question de transparence ultimement.

17 Michelle Gallant?

18 **PROF. MICHELLE GALLANT:** Sure. I would say that
19 generally that there's certainly been a lot of work here in
20 Canada, and sort of it comes -- it's this global regime, both in
21 a sort of a criminal context and a terrorist funding intent, but
22 also in a tax context; two separate global regimes but they're
23 both about increasing transparency. And it's simply -- it's not
24 simply about but it's largely about crossing borders.

25 So the tax evasion or avoidance to which my
26 colleague referred, a lot of that activity is because it's
27 enabled by a border, so even the CRA can go as far as the
28 border, but they can't look beyond; then they've got to start

1 asking questions.

2 But there's been a lot of work, I think, and it
3 has a long way to go in terms of transparency. So one example
4 would be it's been -- I don't know how many years they've been
5 asking us to create a corporate registry of beneficial
6 ownership, and it's simply a place that, you know, you find a
7 corporation and you know who actually benefits from it, right?
8 It's been forever, and we're finally -- BC's moving, so a lot of
9 places. So that general work, I think, is happening but as I
10 said, it's been very slow.

11 But related to that, and maybe -- I think
12 somebody else can probably answer this because the transparency
13 piece is from the top down. I usually sort of work from the
14 bottom up. So if I were looking at -- I would start with
15 proliferation. So I would know that, say, there was a nuclear
16 facility and money was destined for proliferation, then I would
17 look up from there to the regimes that governed that allowed the
18 transparency, or why didn't we see this.

19 But one question I have in terms of that, is I
20 can't get my head around; what is it about this particular --
21 what was going on in Ottawa in January and February that would
22 have triggered a financial response? So, you know, when I think
23 of financial reporting, I think of suspicious transactions
24 reporting, so you know, \$12,000 deposit from somebody who has
25 you know, no resources; it might trigger a suspicious
26 transaction report.

27 But I guess I wonder generally, so in terms of --
28 if we had transparency, what is it about what was happening, as

1 I said, in January and February and sort of in Ottawa but also
2 across the country that would have triggered some financial
3 knowledge? Like I say, that's ---

4 **MR. PATRICK LEBLOND:** Merci, Michelle.

5 Patrick Leblond.

6 So if I can maybe go further, Michelle? Sorry;
7 does it make sense to say -- well, if I understand, like, even
8 if we had had information on -- I guess we -- whether -- on
9 these transactions, would it have changed anything, right? In
10 the sense, I guess -- and then this, as it was raised, right, by
11 if those crowdfunding platforms had, you know, been registered
12 and they had collected information, would it have changed
13 anything?

14 So Jessica?

15 **MS. JESSICA DAVIS:** Yeah, I just want to say that
16 FINTRAC was in a position to collect a lot of that information.
17 When those transactions hit the Canadian side of the
18 transaction, anything over 10 -- \$10,000 or more would have been
19 reported to FINTRAC.

20 The gap is in the suspicious transaction reports,
21 although institutions can absolutely file that as well. And I
22 -- you know, looking at this whole convoy finance issue, I think
23 I've made no secret that I'm not a particular fan of how things
24 went in Ottawa, being a resident here, but I see -- I don't see
25 any way that enhancing these regulations in this way would have
26 provided the government, or FINTRAC or law enforcement or
27 security agencies, with any additional information that would
28 have been particularly useful to countering the protest.

1 **MR. PATRICK LEBLOND:** Thank you, Jessica.

2 Patrick Leblond.

3 Anyone else who would like to add? Because just

4 ---

5 **PROF. MICHELLE GALLANT:** Just, yeah, I think it's
6 the point ---

7 **MR. PATRICK LEBLOND:** Michelle Gallant.

8 **PROF. MICHELLE GALLANT:** Sorry. I think it's the
9 point that Professor Cumyn -- Michelle Cumyn made about that
10 even if you regulate the crowdfunding platforms is one thing,
11 but as I understand it, there may -- if you have -- if I put a
12 sign on the internet that says, "Send me money," and it's got my
13 bank accounts, that that -- it's regulated by the financial
14 institution; it's an exercise in crowdfunding, but it doesn't
15 touch any kind of crowdfunding. I think that's the point?

16 **PROF. MICHELLE CUMYN:** Yes, and I think you made
17 that point as well.

18 **MR. PATRICK LEBLOND:** Michelle Cumyn, yes?

19 **PROF. MICHELLE CUMYN:** Oh, sorry. Michelle
20 Cumyn, yes, that's right.

21 It is possible to have -- to launch a
22 crowdfunding campaign without using a crowdfunding platform.
23 All you need to do is create a page on your website for people
24 to give donations, and in that case, while you're using a money
25 services provider -- is that what they're called in English; a
26 money services provider, and therefore that would therefore be
27 reported to FINTRAC. Is that correct?

28 **PROF. MICHELLE GALLANT:** Yes.

1 **PROF. MICHELLE CUMYN:** So I don't understand what
2 the added value is of also getting reporting from the
3 crowdfunding platforms themselves.

4 **MR. PATRICK LEBLOND:** Merci, Michelle Cumyn.
5 Patrick Leblond here.

6 Is it fair to say, at least from my perspective,
7 going back to the -- what happened in Ottawa last winter, that
8 in a way the money issue kind of came in because the occupation,
9 if we want to call it that, or the convoy lasted for much longer
10 than, you know, I guess everyone expected or hoped, and then it
11 was seen as a way to put pressure on those who, you know, in a
12 way overstayed their welcome.

13 So originally, it seems, and many of you have
14 talked about this, right, and I think Michelle Gallant and
15 Michelle Cumyn made it quite clear, that while, you know,
16 funding itself, funding is good for a democracy in a way; right?
17 Something, a protest, is something that we should allow and
18 potentially even encourage, right, that people have a right to
19 demonstrate, they have a right to get together and say what they
20 like and don't like. It seems that while it's one kind of this
21 turn, then the money parts was seen as a way, "Well, if we cut
22 the funding then they won't be able to do what they want."

23 I don't know if -- like it seems that we're
24 talking about two things here, and when is it that, you know, we
25 slip into the other parts, and where -- and would the
26 registration, the disclosures, the transparency change anything
27 to that? Like ultimately, was it just to say, "Okay. Now, this
28 is no longer just a protest", right, "it's an occupation. We

1 need to get -- we've used", let's say, "whatever means we
2 couldn't do it, and we think that if we cut the funding to these
3 people and it's going to prevent new people from coming because
4 we're going to threaten them", I have a question about that
5 later, but would any of these disclosures, transparencies change
6 that?

7 I don't know if I'm making myself clear, but it
8 seems that there are two things. One is kind of what happens
9 before the money kind of gets there; right? Like in a way when
10 we're talking about terrorism financing, we don't want them to
11 get the money even before, we want the money to -- we want to be
12 able to track it so that we can prevent some attack. But in
13 this case, would it have changed anything?

14 Jessica, you're nodding. Maybe...

15 **MS. JESSICA DAVIS:** Yeah, so I'm trying to sort
16 of pick out the pieces of your question there.

17 **MR. PATRICK LEBLOND:** Yeah.

18 **MS. JESSICA DAVIS:** So I think that there is two
19 things, and I'll use a framework for this. So I see the way
20 that the government sought to counter the financing of the
21 protests and the occupation in two different ways. One was
22 organisational. So by targeting the crowdfunding campaigns,
23 which were drawing in those large sums of money, the foreign
24 funding piece largely came from those crowdfunding campaigns,
25 they were seeking to address that organisational piece because
26 it was -- the movement piece I think is a better way to frame
27 that. And the concern for Canadians really came from that
28 movement level funding that was happening, from people who were

1 identifying as being outside of Canada.

2 And I use that term -- that language very
3 specifically because there was no identity verification being
4 done on who was actually donating and where they were located,
5 it was just what they were saying, so I think we need to be
6 quite careful about that. So that was the first piece.

7 The operational funding is what I would consider
8 to be on-the-ground funding, and that's where we get into
9 questions about the -- sort of the effectiveness of the
10 measures. To my mind, telling people that you're going to
11 freeze their bank accounts unless you leave Ottawa could
12 facilitate a peaceful conclusion to a situation, and it
13 indicates a level of seriousness on the part of the government.
14 I'm leaving aside all questions about proportionality and
15 whatnot there. And I think that that's quite a useful way to
16 think about it.

17 The thing that bothers me, though, about what
18 I've heard from the Commission so far is the Government's
19 assertions about its effectiveness with no evidence. I've heard
20 repeatedly from Government officials saying that, you know, in
21 public statements and at this Commission that these measures
22 were effective, but we haven't seen any evidence about whether
23 or not, you know, why were they effective. Whose money was
24 frozen that really spurred people to leave Ottawa? The process
25 tracing of that activity. And I think that's what concerns me.

26 **PROF. MICHELLE CUMYN:** Je voudrais peut-être...

27 **MR. PATRICK LEBLOND:** Oui, Michelle Cumyn.

28 **PROF. MICHELLE CUMYN:** Michelle Cumyn. Je voudrais

1 peut-être juste ajouter quelque chose aussi.

2 Pour moi, le moment où tout ça est devenu
3 vraiment illégitime, c'est lorsqu'il y a des actes criminels qui
4 ont commencé à être commis par les manifestants, et une des
5 mesures qui a été prise, je ne sais pas si elle a été efficace,
6 mais je le soulève quand même, je le souligne, c'est
7 l'ordonnance de blocage sur le fondement de l'article 490.8 du
8 *Code criminel* qui permet, donc, de bloquer ou de geler des fonds
9 si on croit que ces fonds vont être employés pour commettre une
10 infraction criminelle grave. Il me semble que ça, c'est un
11 exemple d'une mesure qui semble tout de même efficace, mais, en
12 tout cas, c'est pour moi le moment où toute cette histoire est
13 devenue vraiment illégitime du point de vue sociofinancement,
14 c'est lorsqu'on a vu que ces fonds-là allaient être utilisés
15 pour commettre des actes criminels.

16 Voilà. Merci.

17 **MR. PATRICK LEBLOND:** Merci beaucoup, Michelle.

18 Gerard, would you -- I have a question. Patrick
19 Leblond.

20 I have a question for Gerard, and this -- you
21 talked about notice in the, you know, procedural fairness. You
22 know, that normally before someone's assets get seized or frozen
23 they should receive notice. And it was mentioned by the others
24 that, and this is what happened, that in a way it's like, okay,
25 once the *Emergencies Act* was invoked, the Regulations came in,
26 and it was like "Okay. Now, if you don't leave Ottawa, or if
27 you come to Ottawa, you risk having your financial assets, your
28 bank account frozen and all that."

1 Would that be considered as notice in terms of
2 procedural fairness? Like in a way, you are warned. I just
3 wonder what your opinion on that.

4 **PROF. GERARD KENNEDY:** Yeah. No, that's really
5 interesting, and you could definitely make an argument that for
6 everyone who is coming, it is notice. For people who are there,
7 it kind of is all right, it's a dispersal order that's not a
8 dispersal order, so to speak. So it's kind of stretching the
9 definition, I think, of notice.

10 And it still doesn't really get around to
11 determine whose assets get frozen. That remains a little bit of
12 an uncertainty. And so that is where I think from a procedural
13 fairness perspective it gets a little more complicated, unless
14 you just view this as a quasi-legislative action and then that's
15 notice enough.

16 **MR. PATRICK LEBLOND:** Patrick Leblond. Oh,
17 Christian.

18 **PROF. CHRISTIAN LEUPRECHT:** Christian Lepreucht.

19 **MR. PATRICK LEBLOND:** Please.

20 **PROF. CHRISTIAN LEUPRECHT:** So I think this
21 really gets at the heart of sort of the challenge, that moving
22 beyond the invocation of the Act as simply a means to an end and
23 it somehow had the effect, the strategic effect that the public
24 or the Government was looking for. And I think -- so these
25 measures of notice then get us to, I think, four other sort of
26 thresholds, which is was it proportional, was it necessary, was
27 it reasonable, and was it sort of a -- and the efficacy, so
28 efficacious, efficient? And so what does the sequencing look

1 like in order to be able to then have on your matrix being able
2 to check these off?

3 And so I think the financial piece really came as
4 a way to substitute for the relatively ineffectiveness of the
5 initial law enforcement response also on the financial side
6 because these financial investigations are some of the most
7 complex investigations that you can possibly lead on a criminal
8 enforcement, criminal intelligence side and were simply not
9 postured with the people that can actually do these
10 investigations.

11 So we're having I think the conversation that
12 we're having today as a way that the Government substituted for
13 the fact that we simply on the enforcement side didn't have the
14 appropriate capacities and competencies if we had been able to
15 leverage these the way other countries, Australia, the United
16 States, France, Germany leveraged these in protests effectively
17 then we don't have to resort to these extraordinary measures.

18 And so I think they're trying to understand, you
19 know, where -- how do we get ourselves to some benchmark
20 measures as to under what circumstances it might be appropriate
21 to then use the second order effects, such as the financial
22 measures that we're talking about and when these effects are
23 proportional or necessary, reasonable and efficacious, that's I
24 think the heart of the matter.

25 **MR. PATRICK LEBLOND:** Patrick Leblond. Merci,
26 Christian.

27 I guess this -- ça soulève une question pour moi
28 justement cette notion de modifications. Est-ce que, bon,

1 Gerard, vous avez dit que, bon, pour les gens qui étaient à
2 l'extérieur qui peut-être voulaient revenir passer le weekend à
3 Ottawa pour s'amuser et manifester, OK, ça aurait été suffisant
4 de leur dire, « ben, écoutez, si vous venez, on risque de peut-
5 être geler votre compte bancaire, vos cartes, et cetera »; pour
6 les gens qui étaient déjà là, peut-être pas. Mais est-ce que...
7 parce que, bon, là, après ça, c'est comment on fait pour les
8 identifier et qui on identifie exactement, mais est-ce que, si
9 on avait dit, « bon ben, écoutez... », quelqu'un passe et demande
10 le nom des gens qui sont tous présents dans un périmètre et on
11 dit, « bon ben, voici la liste de toutes ces personnes qui à
12 telle date étaient présentes et si elles sont encore présentes
13 dans 48 heures, on va donner l'ordre aux institutions
14 financières de bloquer, est-ce que ça, ça serait acceptable,
15 disons?

16 (LAUGHTER)

17 **PROF. GERARD KENNEDY:** Je vais reprendre en
18 anglais parce que je veux être le plus précis que possible.

19 **MR. PATRICK LEBLOND:** Yes.

20 **PROF. GERARD KENNEDY:** Well, is it -- okay, let's
21 -- in times of crisis, traditional rules of procedural fairness
22 can be modified. We have to accept that not -- we can't always
23 have gold-plated process going on here. So in that sense, to
24 some extent, a hammer is -- I'm not completely opposed to it.

25 Where I think it becomes more problematic is, how
26 did the banks know who's accounts to freeze? And if they felt
27 they made a mistake -- like, what sort of disincentive is there
28 on the bank to not do it. How do they know the person didn't

1 leave? The fact that there wasn't a centralized authority is a
2 little bit of a problem as well here. And the fact that there
3 was no challenge after the fact is a bit of a problem as well.

4 Like, going only for efficaciousness, this may
5 very well have efficacious and therefore, in some cases, I don't
6 have an -- I'm not going to argue that it wasn't efficacious, or
7 that it wasn't even justified in particular situations. I think
8 the problem arises, as you know -- as you've noted -- it was
9 implicit in your question -- that we don't how the banks made
10 this decision. We don't know if the banks did it with someone
11 who actually got the message and left, and that's where the lack
12 of any individual protection is a bit problematic.

13 And look, in an emergency, some of this is going
14 -- someone's going to fall through the cracks, but the lack of
15 any kind of ability to challenge, the lack of any kind of way to
16 say, "No, I left. I got the message," and the bank had no
17 incentive to accept it -- like, the person could go into their
18 bank account in Toronto and say, "Look, I'm back," but the bank
19 wasn't obliged or had no incentive to take it off, per se,
20 that's where I think it becomes slightly more problematic from a
21 procedural perspective.

22 **MR. PATRICK LEBLOND:** Merci, Gerard. Michelle
23 Gallant?

24 **PROF. MICHELLE GALLANT:** I can just add, just in
25 terms of the notice piece, the idea of affecting, sort of,
26 rights -- and I think this has been mentioned before, would be
27 yeah, the financial measures touched the stuff of designated
28 people, but the stuff of designated people, like most of us, a

1 lot of that stuff is jointly owned or owned in common, so in
2 thinking about the -- just in thinking about whether it was
3 proportionate, sure, you jointly own a house -- or you jointly
4 own a bank account and one of those people has nothing to do
5 with -- or maybe they're even estranged and they still have an
6 account sitting there. So just -- I'm just adding that to sort
7 of the discourse on the lack of any kind of sense of -- not only
8 of notice but of any -- anything.

9 **MR. PATRICK LEBLOND:** Thank you, Michelle.
10 Jessica?

11 **MS. JESSICA DAVIS:** Yes, I just want to come in
12 on this question about how banks, if they're not told who the
13 designated people are, very specifically how they identify them,
14 and it comes through social media and media monitoring, so
15 identifying people through that means, and then also through
16 accounts, so if they're conducting transactions in Ottawa and
17 they're not normally residents here, withdrawals, purchases, et
18 cetera.

19 So there's a couple of different ways that that
20 happens, which I think raises some issues in terms of whether or
21 not, outside the context of money laundering and terrorist
22 financing because we are talking outside of that context --
23 whether that kind of surveillance of the population should be
24 taking place.

25 And then my next issue for us to consider, of
26 course, is, then what happens with that information? When banks
27 have this information that individuals were designated people,
28 or they determined that they were designated people under the

1 measures, they don't forget that. They remember, and that
2 becomes part of their de-risking process. And banks are risk-
3 averse institutions, so does this continue to impact the ability
4 of these designated people to obtain financial services and
5 financial products? I don't think that we've explored that in
6 any real way. I don't think that there's been a lot of
7 information about that, but I think that there's a real risk and
8 very probable implications for the individuals who were
9 designated.

10 **MR. PATRICK LEBLOND:** Thank you, Jessica.
11 Gerard.

12 **PROF. GERARD KENNEDY:** Yeah, Gerard Kennedy.
13 Just to add a little bit on that, I realize we're outside of the
14 terrorist financing context here, but many of the principles, I
15 think, are analogous in terms of there are situations where you
16 will want to freeze the account because it's really urgent. But
17 as Professor Gallant noted, there are circumstance where there -
18 - it could be a joint account between someone who's genuinely
19 engaged in terrorist financing and a completely innocent party,
20 which is why there's a process to challenge that, which is why I
21 think -- and maybe it couldn't be exact analogous -- some sort
22 of ability to challenge property seized under the Emergencies
23 Act analogous to under the *Terrorist Financing Act* -- *Money*
24 *Laundering and Terrorist Financing Act* is probably a good idea.

25 And to Jessica's point, that banks have the duty,
26 ultimately, to do this, banks are not experienced in
27 administrative law in the way that many aspects of the -- agents
28 of the government are, which is why I suggest that the

1 designation should probably be done by a centralized authority.
2 I don't that affects the legality of what went on in February,
3 or even whether it was necessary, reasonable, and proportionate.
4 It may have been all that thing, but I think it would be better
5 policy to have it done by an entity that's learned in admin law
6 principles. And yes, there might be some sort of brief period
7 where someone's bank account is frozen unnecessarily, but I
8 think it would mitigate it, and the incentive for the bank to do
9 nothing is not quite the same as if there's an emergency
10 regulator that has precisely this purpose.

11 **MR. PATRICK LEBLOND:** Merci Gerard. Jessica, if
12 I can go back to what you said, because I think this is an
13 important point in terms of surveillance and what happens after,
14 right, once you're been designated, either officially by some
15 authority or unofficially by a bank within the context of the
16 regulation or something else, right, and you said that there's
17 always the potential that banks don't forget, that they will use
18 this in their risk assessment of customers, either existing ones
19 or potential ones.

20 And I don't know -- and again, in -- and this is
21 open to everyone, but should there be some kind of process,
22 whether -- you know, obviously, it's in a crisis situation like
23 the one that we experienced last winter or, if there's
24 something, in a way, more systematic put in place where people
25 should have some kind of appeal mechanism or transparency where
26 they could look at their risk profile or some -- and I'm not
27 even sure if it's possible, but because I'm wondering, for
28 instance, what if someone, you know, and we know participates in

1 a protest, and they do so, you know, in -- with good intentions,
2 to go back to intent that Christian was talking about.

3 They take part in a protest. Maybe things get
4 out of hand. They leave. They might get designated just
5 because they were there. And then, all of a sudden, they have,
6 you know, a sort of black mark on -- associated with their
7 names. Do we know if that black mark stays forever? Do it
8 disappear? Does it have an impact? Is there any way of finding
9 out?

10 Is there -- I'm just wondering because you raised
11 an important issue and obviously, then, there can be
12 associations. It's like, "Oh, well, these kinds of people
13 participate in those kinds of activities that -- which
14 potentially could be nefarious for -- to the state or the
15 economy," or something like that. And so I'm just wondering, is
16 there a danger? And then what remedies or safeguards could --
17 should -- could we -- should we put in place even if -- to deal
18 with the situation, but then what happens afterwards?

19 You know, I'm thinking people who -- young people
20 who demonstrate and might be arrested and then they have, you
21 know, some kind of record that affects the rest of their lives
22 even though, you know, they might have changed their lives. So
23 in this context, is there something similar and what safeguards
24 could we put in place to prevent abuse or discrimination in
25 terms of the surveillance, and even doing business? So I mean I
26 asked to Jessica but, obviously, this is open to the others as
27 well.

28 **MS. JESSICA DAVIS:** Okay, if I may, I'll start,

1 and then hopefully there's plenty of room for others to come in
2 on this. My understanding of bank process is that it's
3 individual banks that are making those determinations about how
4 much information they're keeping on their clients for any given
5 time.

6 The remedy is actually on the critiques of our
7 system, which is that banks -- there's strict privacy
8 regulations around what banks can share with each other. So if
9 an individual were to be banked by one bank, that information
10 could not be shared with another bank, so the individual in
11 question could, you know, in this example, go to another bank
12 and that bank wouldn't have the information about them having
13 been designated, et cetera. So the remedy is actually in one of
14 the critiques of the system.

15 **MR. PATRICK LEBLOND:** Can I just maybe, then, go
16 back to -- okay, that's a very good point, but what if there is
17 a list of designated individuals which is shared across the
18 financial system. So then you lose that privacy, right? Now,
19 you're on a list. You're blacklisted in a way for a particular
20 situation. But is there a risk that then that particular
21 situation then associates you as a risk individual for financial
22 purposes, going forward?

23 **MS. JESSICA DAVIS:** Jessica Davis here. So I
24 think that that's a question for the banks about how they handle
25 that internal information and whether or not they'll be
26 considering that going forward in their client decisions.

27 **MR. PATRICK LEBLOND:** Thank you.

28 Quelqu'un d'autre veut... Patric Leblond. Quelqu'un

1 d'autre veut ajouter quelque chose? Personne?

2 **MR. CHRISTIAN LEUPRECHT:** Yeah, I just want to
3 introduced the Australian example here, right? So if you look
4 at the fines that were levelled against Westpac and CommBank,
5 for instance, I mean, these are huge fines, and what that
6 suggests is that the banks aren't actually terribly concerned
7 about the risk that any one individual that's making hundreds or
8 thousands of potentially quite dubious transactions poses.

9 So the banking culture in Canada may be
10 different, but the Australian example suggests that while I
11 think this is an important point that you raise that affects --
12 clearly affects -- has potential serious impact on individuals,
13 the Australian example suggests that we should be concerned
14 about quite the opposite on the part of banks.

15 **MR. PATRICK LEBLOND:** Merci, Christian. I see
16 one hand, so Gerard, please?

17 **PROF. GERARD KENNEDY:** Okay. I actually have a
18 question that I'd like to ask my colleagues who are more
19 substantive subject matter experts in this area for the earlier
20 question of whether we have any questions.

21 Many of the individuals financing the people in
22 February may not have been here, and yet I don't think they fall
23 within the definition of designated persons whose assets were
24 frozen.

25 So -- and they may have been the people who
26 actually may have been most efficacious to freeze the bank
27 accounts up. And does that affect your opinion about what
28 policy should be, going forward, how proportional things were of

1 that nature?

2 **MR. PATRICK LEBLOND:** Jessica?

3 **MS. JESSICA DAVIS:** Thank you for that.

4 **MR. PATRICK LEBLOND:** You can also respond to
5 Christian. I ---

6 **MS. JESSICA DAVIS:** Yeah, so just on that, I
7 think I'd have to go back to the regulations because I think
8 that there was an interesting provision about financing other
9 protests, but I can't answer that without looking at those
10 again.

11 And then just on the example that Christian
12 Leuprecht brought up, I just want to bring up the idea of profit
13 motive for banks though as well. So you know, Westpac and some
14 of these big organizations that have been fined these huge
15 amounts, there's a significant profit motive for the banks in
16 continuing that financial relationship that does not exist for
17 individuals.

18 So I think that the risk for individuals is far
19 far greater than for those kinds of large entities.

20 **MR. PATRICK LEBLOND:** Thank you.

21 Michelle Gallant?

22 **PROF. MICHELLE GALLANT:** I would just say as it's
23 always difficult, given jurisdiction, to attach something.

24 So it's the same reason again in the opening
25 presentation, he talked about taxation. The reason you put your
26 assets outside of Canada is a jurisdiction concern, right? It's
27 more difficult to tax them. I'm not saying it's a crime, but
28 it's more difficult when anything is offshore. It doesn't

1 matter what it is, an asset, relation to tax, or anything else.
2 It's much more difficult for the Canadian state to do anything
3 against that, particularly if you're not a Canadian.

4 So if you had somebody -- yeah, so anything, sort
5 of any resource, the only place you can catch is you can catch
6 it at the border, but if it involves sort of a donator in
7 Australia or in you know, Nigeria, or United States, the reach
8 of Canadian laws obviously doesn't cross that border.

9 Now, I would say, there are relationships amongst
10 banks, so Canada has never done this, but the U.S. has certainly
11 seized -- this little thing, it's just called a correspondent
12 accounts, but basically what they have done is, if you don't
13 follow what we want you to do, we will seize anything that's
14 remotely related to your bank here, so say the Bank of Canada
15 has what's called a correspondent account in New York.

16 But as far as I know, we've never done that, but
17 that whole question about jurisdiction is a difficult one. It's
18 an absolutely difficult one.

19 **MR. PATRICK LEBLOND:** Merci, Michelle, Michelle
20 Cumyn. We're going to take a -- on va faire la pause, alors je
21 ne sais pas si, Michelle, vous vouliez ajouter quelque chose?

22 **PROF. MICHELLE CUMYN:** Non, c'est très bien.
23 Merci.

24 **MR. PATRICK LEBLOND:** Ça va?

25 **PROF. MICHELLE CUMYN:** Oui.

26 **MR. PATRICK LEBLOND:** OK.

27 Alors, je crois qu'on va faire la pause
28 maintenant d'une demi-heure et puis on reprend à 16 h 30.

1 So ---

2 **THE REGISTRAR:** Thirty (30) minutes. La
3 Commission est ajour... est levée pour 30...

4 --- Upon recessing at 4:02 p.m.

5 --- Upon resuming at 4:28 p.m.

6 **THE REGISTRAR:** The Commission has reconvened.
7 La Commission reprend.

8 **MR. PATRICK LEBLOND:** Alors, nous sommes de
9 retour. Patrick Leblond.

10 Voilà, Christian, il est là.

11 Donc, nous avons quelques petites questions et
12 ensuite une question... en fait, deux questions d'ordre plus
13 d'importance. La première, et c'est peut-être une... je pense
14 c'est une question probablement pour Jessica Davis. Dans un
15 contexte de crise lorsque justement... une des questions qui était
16 posée, c'est les délais, par exemple entre le moment, par
17 exemple, où peut-être une transaction est identifiée et ensuite
18 l'information est remise ou transmise à CANAFE et ensuite elle
19 était analysée, est-ce que y'a... ces délais-là sont importants ou
20 ça se fait rapidement?

21 Jessica, do you know?

22 **MS. JESSICA DAVIS:** Oui. Généralement, pendant une
23 crise, je dirais que les opérations financières sont soumises à
24 CANAFE rapidement, alors, généralement, je dirais que ça se rend
25 dans les opérations douteuses, en général, 24 heures ou moins.

26 **MR. PATRICK LEBLOND:** Et pour l'analyse ensuite,
27 avant de peut-être dire, OK, c'est...

28 **MS. JESSICA DAVIS:** Oui, c'est...

1 **MR. PATRICK LEBLOND:** ...is that fashionable?

2 **MS. JESSICA DAVIS:** Oui, c'est...

3 **MR. PATRICK LEBLOND:** Excuse-moi, le terme en...

4 **MS. JESSICA DAVIS:** Même chose. Certainement,
5 avec... s'il n'y a pas beaucoup d'opérations financières, cela ne
6 prend pas beaucoup de temps pour faire l'analyse et déterminer
7 si ça peut être donné à... si c'est sous autre agence. Alors, je
8 dirais que oui, c'est rapide encore à CANAFE, ça peut prendre
9 quelques heures, quelques jours dépendant des circonstances.

10 **MR. PATRICK LEBLOND:** Merci beaucoup.

11 **MS. JESSICA DAVIS:** Dans une situation urgente,
12 mais...

13 **MR. PATRICK LEBLOND:** Oui, oui.

14 **MS. JESSICA DAVIS:** ...c'est aussi une question à
15 poser à CANAFE.

16 **MR. PATRICK LEBLOND:** Oui. Bien sûr, mais on se
17 demandait. OK. Donc, effectivement, des délais très courts.
18 Merci, Jessica.

19 In terms of the second point that we had some
20 discussions, one thing that was mentioned -- and you know, we
21 talked about a lot of the potential longer-term unintended
22 consequences for people who might be designated -- one thing
23 that was mentioned is the -- not only in terms of the banks, but
24 what would happen, let's say, if someone's bank accounts or
25 money, assets, were seized or frozen and then they missed
26 payments on their mortgage or on the couch that they bought or
27 something, and then obviously, their credit score was affected?

28 Again, when we think about proportionality, is --

1 you know, should these things be taken into account the longer-
2 term effect because then is there any regrets? For instance,
3 say, "Hey, yeah, I missed my payment because I didn't have
4 access to my bank account because someone froze it because I,
5 you know, went to a protest, or I gave money to people who went
6 to a protest." So I'm curious to hear whether, you know,
7 whether such unintended consequences, potential unintended
8 consequences should be considered in the kind of proportionality
9 tests when actually implementing or putting in place these kinds
10 of measures. So I'm putting it open to everyone. So Michelle
11 Gallant?

12 **PROF. MICHELLE GALLANT:** Sure. I'm not sure I
13 would use the language of "unintended." But in certainly in
14 thinking about the -- ruminating on proportionality, it would
15 have been known -- so when I referred to the privacy -- or at
16 least when I referred to the Privacy Commissioner has a report,
17 it simply talks about sort of stagnant financial information, so
18 information -- she's talking in the context of terrorist
19 finances, suspicious transactions, so there's a little cloud on
20 someone, and it's been investigated and dismissed. But the
21 point she makes is you need to -- there needs to be a mechanism
22 for clearly purging that. So in the same, we don't have
23 mechanisms. You know, somebody else wrote about it, it's
24 something called the right to be forgotten, right, the right to
25 have information actually purged and destroyed.

26 But just in response to what you said, I don't
27 think by any stretch anyone -- it was -- I'm not sure what
28 intention means, but it would have been known because it's

1 always been, like, it's a piece of -- it's known that once
2 something descends, right, as I said in her context talking
3 about once privacy and some information, yeah, it's there;
4 right? So it would have been known that that information was
5 there. So this idea about was it temporary or not, at the time,
6 that piece, that something might potentially linger would have
7 been a piece that ought to, I think, have gone into, as you say,
8 the analysis of whether this is proportionate or not. It's not
9 temporary if you're, you know, for some whose relationships or
10 financial matters would have been disrupted. Maybe not
11 permanently, but as you say, even -- I mean, the severity would
12 be even something like, you know, our bank account just closed
13 and we live on the margins, and, you know, we've -- you know,
14 the consequences there. But in this case, yeah, if you have one
15 bank account and it goes beyond, then you're really in
16 difficulty so.

17 **MR. PATRICK LEBLOND:** Jessica?

18 **MS. JESSICA DAVIS:** Yes, I think that you're
19 right to consider those things and some of the consequences of
20 the asset freezing. The issue of there being a lack of redress
21 I think is also well worth considering. I mean, you know, how
22 do you go to a credit agency and fix that? The only thing that
23 I will say that -- on this is that the measures were in place
24 for a short period of time. So I think that reduces some of
25 those potential consequences because five days is -- in some
26 cases might make a difference for some people, but it's -- you
27 know, it's not a full pay cycle. It's not a full month. So I
28 think that there's some considerations there as well.

1 **MR. PATRICK LEBLOND:** Gerard?

2 **PROF. GERARD KENNEDY:** And just to build on that,
3 I think that may be an argument that the measures were
4 proportionate on the facts of what occurred in February, while
5 also recognizing that insofar as this Commission has a policy
6 rule and is recommending how to make sure that these more
7 profound consequences are mitigated in the future, depending on
8 whether or not it believes the threshold for invoking the Act
9 was met, there are recommendations that could be made to
10 mitigate those concerns.

11 **MR. PATRICK LEBLOND:** Merci. Patrick Leblond.
12 J'aimerais retourner a l'enjeu du financement étranger, mais
13 dans un contexte de -- so now -- well, during the protest and
14 then afterwards, crowdfunding platforms have to be registered or
15 have to register with FINTRAC. Before that, also, you know,
16 crypto exchanges, wallets operating in Canada have to do so.
17 But I guess one of the questions, and I'd like to hear the
18 panelists, is the -- and Jessica mentioned, you know, obviously,
19 the compliance burden that it puts on an entity like FINTRAC,
20 but even beyond that, how does -- or how can -- I'm not sure,
21 but if you have foreign entities, you know, and, you know, I
22 assume if there is a crowdfunding platform somewhere in the
23 world, or a crypto exchange, or a crypto wallet service,
24 whatever they call themselves, you don't necessarily know or
25 even care who's your clients; right? Especially if where you're
26 physically located, at least legally, there is no requirement
27 for, you know, know your client's information. You may not know
28 that, oh, this person's from Canada. You may not even know that

1 you have technically now that you have someone who has put money
2 on your platform or donated money to your platform or that are
3 receive money from your platform, that you should be registered.

4 So, first of all, it's very difficult for an
5 entity like FINTRAC to actually scour the world to find out,
6 okay, who's doing business in Canada, who's not? So that's the
7 first thing. The second thing is, even if that were possible,
8 say, "Hey, you're not registered, so now you have to register."
9 And then, you know, after I guess a certain time, you find out
10 that the platform, crowdfunding, crypto, is not registered, then
11 what? What happens? Does FINTRAC say, "Oh, you're not
12 registered. You're not complying. We're going to shut you
13 down." That's not going to happen especially if that platform
14 is not in Canada. They can't really do that. Then can you
15 block a website, like, an actual IP address from this platform
16 and say, "Now Canadians now no longer have access to that"? Is
17 that, you know -- and is that possible, or what is the process
18 for doing that? And then even if you could do that, then what -
19 - isn't there -- in this platform I just say, "Okay, well, now
20 we're blocked here. We'll just create another IP address where
21 people can go and do the same business they were doing before,"
22 and then you have to go through this whole process and this kind
23 of cat and mouse. So the big question is, even if want to have
24 this level of registration, disclosure, transparency,
25 compliance, is it even possible, feasible? So I see Michelle
26 who wants to say a lot of things. Michelle Gallant.

27 **PROF. MICHELLE GALLANT:** Sorry, yeah, I don't
28 think it's possible and I don't think it would be a good idea.

1 So it's possible under a new technologically-driven model, which
2 my colleague referred to earlier. You could have some sort of
3 centralized system wherein Canadians were only allowed by law to
4 use an electronic currency. You could have that. I think
5 that's a very, very bad idea. It means that everything is
6 capable of surveillance, regardless of what -- we put -- placed
7 all the information in a central place, so I think that's bad,
8 not a good idea. I think facilitating exchanges is fine, but
9 that particular model, which has come up recently, is not a
10 great idea at all. And nor would I be -- it's very, very
11 delicate when the state starts blocking websites. So if we put
12 this in the context of China, and you talk about sort of, well,
13 I -- when I'm there, I can't access these websites, what's going
14 on, which to me are quite normal, that's a very, very delicate
15 and a dangerous area. We -- so just -- so whether it's to shut
16 off funding or to shut off, you know, access to information, I
17 mean, there are limits on the things maybe that we should have
18 access to, but distaste or, you know, short of certain real
19 extremes, you know, the state's ability to sort of shut off, to
20 sort of shut off -- and I say that because we've seen that.
21 We've seen that right now in the context of Russia. We've seen
22 websites shut down, which reasonable people, I think, would
23 completely disagree onto whether those websites should have --
24 they would say that was my source of information and now it's
25 shifted. So I'm just sort of responding to that. I'm really
26 concerned -- I would be very, very concerned about giving the
27 state that kind of authority. Sorry.

28 **MR. PATRICK LEBLOND:** Merci, Michelle.

1 Jessica?

2 **MS. JESSICA DAVIS:** Yeah, so it's a very
3 complicated scenario that you've painted for us, but I think
4 that this points to one of my recommendations, which was that
5 the government and FINTRAC and Department of Finance, as policy
6 centres, should be conducting public consultations on these
7 kinds of things because this is the kind of scenario they should
8 be test driving. You know, how are we reasonably going to
9 enforce these regulations? And then, you know, just a little
10 bit on the client issue, there is increasingly -- crypto
11 exchanges are increasingly regulated and there are know your
12 customer requirements. Not all crypto exchanges are as good at
13 that as others. And there's still, of course, the wallet-to-
14 wallet issue that, you know, unhosted wallets can conduct these
15 transactions across borders and attributing those wallets to any
16 individual is exceptionally difficult unless you have quite good
17 access to the individual's devices or other sources of
18 intelligence. So I think that there's a lot of holes in this
19 regulation, but not a lot of benefits necessarily.

20 **PROF. MICHELLE GALLANT:** But can I ---

21 **MR. PATRICK LEBLOND:** Michelle Gallant? Yes.

22 **PROF. MICHELLE GALLANT:** Sorry, Michelle Gallant,
23 yeah. I just -- Jessica, I think in something you wrote you
24 mentioned at some point in time you talked about these things
25 that are called I think Hawala Networks, or Informal Value
26 Transfer networks.

27 So I'm simply asking you whether your idea is
28 that actually whether you see any value in this in the fact that

1 the state actually, so for these Informal Value Transfer
2 networks are outside of the formal banking system, and a lot of
3 people have issues with them, but I wonder if you see any
4 benefits with that kind of a -- because you mentioned
5 cryptocurrency, so the idea of a decentralised system, you know,
6 the lack of state surveillance? The same -- and I'm just trying
7 to parallel between the Hawala might have been an older version
8 of a deregulator, or the Mexico peso network might have been
9 another.

10 So I'm just wondering if you see any value in
11 those kind of networks that aren't subject to intense
12 regulation?

13 **MR. PATRICK LEBLOND:** Jessica?

14 **PROF. MICHELLE GALLANT:** Yes.

15 **MS. JESSICA DAVIS:** Most Hawalas are actually
16 meant to be regulated under anti-money laundering legislation in
17 different countries, they're meant to be money service
18 businesses. A lot of them are not regulated because they don't
19 register or they just operate outside of those regulated
20 channels. The International Anti-Money Laundering
21 Counterterrorism Financing regime has been trying to address
22 this issue for many years.

23 Hawala is an Informal Value Transfer System
24 that's been -- you know, there's a lot of myths around it I
25 think, but it's basically just a way to send money. It's less
26 expensive, it's faster, it has greater access anywhere in the
27 world than most -- banks would aspire to that. The issue, of
28 course, comes in terms of the reluctance to report. Has the

1 tremendous value in terms of moving remittances from the
2 developed world to the developing world. The issue, of course,
3 becomes when illicit actors take advantage of those same
4 benefits to move funds, and that's sort of where the issue is.

5 But you know, in Canada, I'll just conclude by
6 saying Hawalas, they exist. They should almost exclusively be
7 registered as money service businesses, but that's also part of
8 FINTRAC's remit is to figure out who is not registering and get
9 them to register or fine them or refer for criminal compliance.

10 **MR. PATRICK LEBLOND:** Thank you, Jessica.
11 Patrick Leblond.

12 And I guess it goes back to this question of to
13 what extent is it feasible, you know, once there is a
14 registration requirement for whatever funding or financial
15 entity for FINTRAC, who is ultimately responsible for ensuring
16 its compliance to actually do so. Because I guess it's very
17 hard to identify something that, you know, you don't really know
18 exists, and no one is kind of out there and say, "Hey, I'm
19 here", and even more so if it's outside of Canada's borders
20 somewhere on the ethernet, or even on the Dark Web for that
21 matter.

22 So -- but I think it's -- it raises an issue in
23 terms of, you know, does it mean that ultimately you need more
24 resources, or even the fact even if you had all the resources in
25 the world it would not even be possible to actually do so.

26 So I guess I just wanted to bring that up because
27 to me it seems an important issue to think about when, you know,
28 if the -- if some -- some people think that the answer is just,

1 "Oh, well, just require them to register and if they don't
2 comply then we're done." It seems that it's as you mentioned,
3 it raises a number of issues, obviously, whether it's privacy,
4 whether it's freedom, access to, you know, to information, or
5 even in terms of efficacy.

6 Oh, Christian, please.

7 **PROF. CHRISTIAN LEUPRECHT:** It's a really
8 pertinent conversation because if you want to prepare to solve
9 the problems of tomorrow rather than the problems of today, then
10 of course we need to prepare for a world where the banks of
11 today are no longer going to be the central financial
12 institutions that we have today. So we're not going to
13 necessarily have a future next time this happens where we can
14 just go to six banks and ask them to identify sort of the key --
15 the keys of nefarious -- designate nefarious individuals.

16 But what we can do is, and we live in a world
17 where I think we now have about 20,000 cryptocurrencies, that
18 these have very different standards, and once you get into to
19 Altcoin, for instance, and you have significantly less --
20 intentionally much less transparency and ability to trace and so
21 forth. So what we can do is set standards with regards to what
22 sort of transparency, for instance, is required for the sort of
23 digital currencies that crowdfunding platforms do -- are subject
24 to sort of under regulation. And to some extent that's already
25 happening in the marketplace because the marketplace is sorting
26 out already cryptocurrencies based on some certain benchmarks
27 and transparency and so forth.

28 **MR. PATRICK LEBLOND:** Merci, Christian. Patrick

1 Leblond.

2 I guess, and this I think will be the last
3 element that we'll talk about. And I -- you know, in a way, as
4 Christian just mentioned, you know, we have to think about this,
5 and I think a lot of discussion has been about, you know, going
6 forward.

7 And one of the questions, and it was already kind
8 of discussed, I think it was Christian in his original
9 presentation. The question of in a way seizing assets or the
10 risk, or the threat of seizing, freezing assets, financial
11 assets, and to what extent it represents -- I think there are
12 two things. One is to what extent it represents a risk to the
13 overall financial system in terms of people's trust in the
14 system, right, and going to also what Michelle Gallant said
15 about in a way the fundamental right of, you know, getting money
16 for causes if we want, right, or to organise protests, you know,
17 in a democracy.

18 And is there a risk that people, as a result of
19 what happened and what could happen in the past, will now --
20 could feel or will now feel that, A, if I put my money in a, you
21 know, a regular bank account could it be frozen? If I give
22 money to a cause and all of a sudden that cause somehow doesn't
23 quite turn out how we thought it would be because some
24 individuals, not all of them, or some of them, decided to use
25 the money for in a way not things that we had planned for, and
26 all of a sudden, you know, because I gave my bank account is
27 frozen or I have this cloud that, as Michelle mentioned, over my
28 head, so therefore, either I'm not going to give any more money,

1 so that obviously has an impact, that people's ability to
2 collect funding, or I'm going to try to avoid the traditional
3 financial systems? And I think it was Christian who said,
4 "Well, are they going to move in a way to less regulate it
5 darker corners of the financial system?", which obviously have
6 their own consequences in terms of, you know, potentially as
7 consumers losing their money, losing the value of their
8 financial assets and all that.

9 So I'd like -- you know, we have about -- we have
10 ten minutes, or actually, nine minutes. I don't know if we
11 could -- what are your thoughts. In a way in kind of the grand
12 scheme of things is there -- you know, and again, going back to
13 this proportionately element that Michelle Gallant raised, you
14 know, is -- the freezing of assets or the seizing of assets is
15 there a greater -- a risk to the system itself and the trust
16 that people have in the financial system?

17 I don't know who wants -- qui aimerait commencer
18 pour conclure sur le niveau très macro.

19 Michelle Gallant?

20 **PROF. MICHELLE GALLANT:** Sure. I'm not generally
21 in favour of more law, right, more regulation. I mean prudence,
22 yeah, maybe prudent, targeted regulation, yes. And actually, I
23 would simply just go in terms of like watching and concerning
24 financial activity, there is a balance between the amount of
25 information that any state ought to know, right, and then what
26 to be private, even if that privacy might offend someone.

27 So we usually use the language of "crime" to
28 discern that, and really that's what terrorism financing and

1 those laws do, but it seems to me we're sort of -- to go beyond
2 that to me is quite frightening. And the reason when I
3 mentioned -- that I mentioned sort of in the future our state
4 and many states having the capacity to regulate everything, that
5 is -- there are templates you can see of this ability happening,
6 right, so this ability to actually watch every single financial
7 transaction.

8 Now, we talk about those as though "Oh, the state
9 won't", whatever, but I would be concerned. I would be
10 seriously concerned about moving to a system where everything
11 was in one place that it could be, right, because once it could
12 be, then the next time it we'd be, "Oh, well, maybe we don't
13 like this thing, let's check"; right? "We said we wouldn't
14 unlock the door, but now we have good reason to so we'll break
15 the lock and see what's in there." So seriously concerned about
16 that.

17 And you know, my final comment would be, you
18 know, I have this -- you know, when we think about these things,
19 sort of thinking about the Inquiry and the need to be consistent
20 what keeps resonating with me, is this might not have been, you
21 know, your particular social movement, your particular protest,
22 but the next one might be.

23 **MR. PATRICK LEBLOND:** Merci, Michelle.

24 Gerard?

25 **PROF. GERARD KENNEDY:** I just think that goes
26 back to a point I made earlier, that insofar as individuals'
27 property rights were limited in this situation. The
28 prerequisites to do so should not be interpreted broadly when

1 there's genuine ambiguity about that. And I just think this
2 underscores that, because of the reasons is that limiting
3 individual's rights, even when we understand it's for a problem
4 that's really got to be resolved, is going to have unintended
5 negative consequences, and we don't want to have those
6 unintended negative consequences unless we're sure they were
7 quasi-intended negative consequences.

8 And I also think this underscores what I said
9 earlier, that it may be best that the bank is not making the
10 decision on whose assets to freeze, because then individuals
11 stop trusting the bank as a bank, and banks may not be the most
12 sympathetic entities in our society, but they play a very key
13 role, and they're very risk adverse. Like, whenever I teach
14 certain discovery rules, it's always the bank that has to be
15 told exactly what it's going to do. It wants a court order,
16 because it's going to avoid liability at all costs.

17 So having the bank not make the decision is
18 probably, in this exceptional circumstance, where the bank is --
19 has to freeze your assets, because occasionally we'll have to, I
20 think it shouldn't be the entity that's applying its discretion
21 as to whether or not to do that, because it's going to avoid
22 liability at all costs.

23 **MR. PATRICK LEBLOND:** Thank you, Gerard.

24 Jessica?

25 **MS. JESSICA DAVIS:** Yeah. So I think to address
26 your broader question about whether this could force or
27 encourage people to move away from our formal financial system,
28 I think that the benefits of decentralized finance, including

1 cryptocurrency, are overblown at the moment. There are not
2 sufficient offramps for cryptocurrencies and other forms of
3 decentralized finance to make them viable for operating in a
4 modern economy. That can change, but I'm more of a 30 to 50
5 years kind of person, not five years kind of person.

6 But that will happen for some people. I think
7 seeing these emergency measures was a bit of an education for
8 Canadians. I don't think that a lot of Canadians realized that
9 even with judicial authorization, that your account could be
10 frozen or you could have your assets seized. I think that was
11 new information for a lot of people.

12 And that will certainly undermine some people's
13 trust in the system, probably people who are already distrustful
14 of the situation, which we should be wary of further pushing
15 people to the margins on that. I think that that's a serious
16 concern.

17 But I definitely agree with Gerard Kennedy on
18 this, that, you know, the measures might have been
19 proportionate, they might have been effective. Those questions
20 are not necessarily for us to determine here. But the problem
21 was really in the application of those measures and deputizing
22 the banks to make those decisions was probably the biggest
23 problem I saw with them.

24 **MR. PATRICK LEBLOND:** Thank you.

25 Michelle Cumyn?

26 **PROF. MICHELLE CUMYN:** Oui. Bien, je suis vraiment
27 d'accord avec tout ce que mes collègues viennent de dire. Je
28 pense que l'anonymat, c'est une manière importante de protéger

1 sa vie privée, et puis si on pense aux origines du
2 sociofinancement, bien, on passait le chapeau puis les gens
3 déposaient quelques pièces dans le chapeau. C'est...
4 malheureusement, on est maintenant dans une situation où toutes
5 les transactions laissent des traces et je pense que, comme les
6 collègues l'ont très bien dit, il y a vraiment un danger à
7 profiter de ça pour essayer de surveiller toutes ces
8 transactions-là parce que les gens vont vouloir trouver d'autres
9 façons justement de rester dans l'anonymat.

10 Alors, je pense que c'est vraiment... c'est ça, je
11 pense que ça, ce point-là, il est important aussi, mais je suis
12 aussi d'accord avec tout ce que les autres ont dit.

13 Merci.

14 **MR. PATRICK LEBLOND:** Merci, Michelle.

15 Christian, do you have a comment?

16 **PROF. CHRISTIAN LEUPRECHT:** So, you know,
17 democracy is fragile. And so we need to make sure that we
18 defend democracy. And we've seen the increasing use of
19 emergency powers by democratic governments across the world.

20 And so I think on the one hand, we need to make
21 sure we set disincentives for governments to resort to emergency
22 measures simply because they didn't have the political incentive
23 or motive to update, to ensure that legislation, regulations, or
24 current agencies are probably postured. And then when we do
25 invoke them, we need to build in sort of enough thresholds to
26 make sure that when governments do have to compensate for
27 shortcomings in regular law and posture in the 21st century, that
28 appropriate, I think, thresholds are forced onto government,

1 even under those circumstances.

2 And I think particularly the comments about that
3 this -- the Act can only apply very specifically and with more
4 safeguards I think is critically important, because I think we
5 saw here elements that most Canadians, whether they --
6 regardless of where they fell with regards to the protestors,
7 were probably not thrilled to see government feeling that it had
8 to resort to extraordinary measures to re-establish the rule of
9 law in this country and what can we do to avoid that, because if
10 we can avoid that, then we don't need to have conversations
11 about worries about trust in the financial system under
12 emergency measures and so forth.

13 **MR. PATRICK LEBLOND:** Thank you very much,
14 Christian.

15 Alors, c'est... je pense que c'est tout pour
16 aujourd'hui en ce qui nous concerne, cette discussion qui a été
17 très riche, beaucoup d'informations, et j'aimerais remercier nos
18 panélistes : Christian Leuprecht, en ligne de l'Allemagne où il
19 est en ce moment, Michelle Gallant, Michelle Cumyn, Jessica
20 Davis, Gerard Kennedy, merci beaucoup à vous toutes et tous
21 d'avoir été avec nous et de nous avoir fait part, en fait, de
22 vos expériences, vos expertises, vos connaissances. Je pense que
23 c'est... en tout cas, pour moi, ç'a été très utile, j'espère que
24 ça l'est aussi pour le Commissaire et la Commission. Et donc,
25 voilà, merci à vous toutes et tous.

26 **COMMISSIONER ROULEAU:** Oui, et j'aimerais ajouter
27 mes remerciements aux pénalistes, c'était, pour répondre à ta
28 question, très utile, un domaine où je dois pédaler très vite et

1 vous m'avez donné un peu un élan. Alors, un grand merci.

2 Et un très grand merci aussi à toi, Patrick
3 Leblond, pour ta contribution et d'avoir bien animé notre
4 discussion.

5 Alors, un grand merci à tous et on va remettre à
6 demain les séances de la Commission.

7 À demain à 9 heures et demie.

8 **THE REGISTRAR:** The Commission is adjourned. La
9 Commission est adjournée.

10 --- Upon recessing at 4:59 p.m.

11

12

C E R T I F I C A T I O N

13

14 I, Sandrine Martineau-Lupien, a certified court reporter, hereby
15 certify the foregoing pages to be an accurate transcription of
16 my notes/records to the best of my skill and ability, and I so
17 swear.

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19 Je, Sandrine Martineau-Lupien, une sténographe officiel,
20 certifie que les pages ci-hauts sont une transcription conforme
21 de mes notes/enregistrements au meilleur de mes capacités, et je
22 le jure.

23

24



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