

Threats to the Security of Canada: Same, Same but Different

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ABSTRACT

This paper examines the Canadian government's interpretation of the *Emergencies Act* (EA) and its threshold for declaring a national emergency in response to protest and dissent. The authors revisit their previous article published in *Criminal Law Quarterly* (CLQ) which raised concerns about the government's novel interpretation of the EA when justifying its use during the Freedom Convoy protests of 2022. Based on evidence presented during a subsequent commission of inquiry and Commissioner Rouleau's final report, the authors analyze the government's legal interpretation of the phrase "threat to the security of Canada" and the inconsistent and ambiguous testimony provided by government officials and Cabinet Ministers. The authors argue that the Commissioner failed to address the most contentious legal arguments offered by the government, particularly the assertion that economic harm can satisfy the requirement for serious damage to property. The paper highlights the ongoing significance of this missed opportunity. The authors offer recommendations for amending the EA to explicitly address economic harm and disruptions to critical infrastructure to ensure that any powers available to address this new type of emergency are sufficiently tailored to meet this very specific threat. Finally, the authors caution against revising the EA or broadening the definition of threats to the security of Canada in the CSIS Act based on the bad facts of the Freedom Convoy protests.

I. INTRODUCTION

When does an act of protest and dissent against the government create a national emergency? What level of economic disruption, civil disobedience, property damage or violence elevates a protest from a protected activity to a threat to state

security? We asked these questions in a previous article published in *Criminal Law Quarterly* (CLQ)¹ following the first ever declaration of a national emergency under Canada's *Emergencies Act* (EA).² In so doing, we also raised serious concerns about what, at the time, we surmised (correctly, with the benefit of hindsight) to be the government's novel, and much wider interpretation of legislation when justifying the invocation of the EA. Those concerns remain unresolved and as pressing as ever.

In the year since the article's publication, a commission of inquiry was struck (as required under the EA) to examine the circumstances that led to the Freedom Convoy's weeks long occupation of Ottawa and the blockade of various border crossings, most notably in Coutts, Alberta and the Ambassador Bridge in Windsor, Ontario. The Commission also gathered evidence about the actions of municipal, provincial, and federal leaders in the wake of these protests, and the decision-making process that led the Governor in Council (GiC) (in effect, the Federal cabinet) to invoke the EA and impose special temporary measures to bring the protests to an end. Ultimately, the Commissioner, Paul Rouleau found that the Freedom Convoy protests met the legal definition of a national emergency set out in the EA. Indeed, in Commissioner Rouleau's view, the declaration of a public order emergency was not only lawful; it was appropriate.³

During the Commission, several government witnesses testified about their understanding and application of the legal threshold for declaring an emergency. This *viva voce* evidence was – to put it kindly – both inconsistent and ambiguous. The Government of Canada also provided written submissions that outlined its legal interpretation of the EA's thresholds, which varied from the testimony provided by those charged with applying them.

Based on the evidence, submissions, and the Commissioner's final report, this paper revisits the concerns we raised in our CLQ article about the novel interpretation of the phrase "threat to the security of Canada" in the context of invoking the EA in February 2022. In Part I, we recall those concerns, namely the assertion that economic harm can satisfy the requirement for serious damage to property under section 2(c) of the

¹ Leah West, Michael Nesbitt & Jake Norris, "Invoking the *Emergencies Act* in Response to the Truckers' 'Freedom Convoy 2022': What the Act Requires, how the Government Justified the Invocation, and Whether it was Lawful" (2022) 70:2 *Crim LQ* 262.

² *Emergencies Act*, RSC 1985, c 22 (4th Supp).

³ Canada, Public Order Emergency Commission, *Report of the Public Inquiry into the 2022 Public Order Emergency*, vol 1: Overview (Ottawa: POEC, 2023) (Chair: Hon Paul S. Rouleau) at 217.

Canadian Security Intelligence Service Act (CSIS Act).⁴ In Part II we set out the various legal interpretations of section 2(c) offered by government officials and Cabinet Ministers and analyze Commissioner Rouleau's assessment of that evidence as well as his corresponding recommendations. We argue that the Commissioner failed to squarely address the most contentious legal arguments offered by the Government of Canada. In doing so, the Commissioner missed an important opportunity to clarify whether economic disruptions amount to serious violence against property thereby justifying the invocation of the EA.

In Part III we explain the ongoing significance of this missed opportunity. Namely, that the matter of whether economic harm is sufficient to trigger the EA remains unresolved. This raises serious concerns for civil liberties and advocacy groups who often employ tactics that are intended to create economic discomfort to draw attention to political grievances. We also offer our own observations and recommendations for amending the EA. First, should Parliament wish to give the GiC the power to leverage emergency legislation to limit economic harm or disruptions to critical infrastructure, it should amend the EA to do so explicitly. Moreover, Parliament should ensure that any powers available to address this new type of emergency are sufficiently tailored to meet this very specific threat. Second, the threshold to invoke the EA in response to threats posed by terrorist, saboteurs, spies, foreign actors, and those who seek to covertly subvert the government must remain tied to the definition of threats to the security of Canada in the CSIS Act. Finally, we encourage Parliament to remember the adage that bad facts create bad law. Law makers should resist the temptation of attempting to prevent a second Freedom Convoy protest by revising the EA to make it easier to invoke, or worse, broadening the definition of threats to the security of Canada in the CSIS Act.

II. "THREATS TO THE SECURITY OF CANADA": WHAT WORRIED US THEN

Before revisiting our concerns regarding the GiC's interpretation of threats to the security of Canada, we must set out why it matters to the declaration of a national emergency under the EA. Section 16 of the EA defines a public order emergency as, "an emergency that arises from threats to the security of Canada and that is so serious as to be a national

⁴ *Canadian Security Intelligence Service Act*, RSC 1985, c C-23.

emergency.”⁵ There are two key elements to this definition: (1) national emergency, and (2) threats to the security of Canada.

A national emergency is defined in section 3 of the EA as:
 an urgent and critical situation of a temporary nature that (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada and that cannot be effectively dealt with under any other law of Canada.⁶

The EA does not define the phrase “threat to the security of Canada.” Rather, section 16 stipulates that it “has the meaning assigned” by section 2 of the CSIS Act.⁷ Under that provision we find four such threats: (a) espionage and sabotage, (b) foreign-influenced activities, (c) terrorism, and (d) subversion.⁸ In declaring a public order emergency in response to the Freedom Convoy, the GiC relied on section 2(c) of the CSIS Act which reads:

activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state.⁹

Given the facts included in the GiC’s *Proclamation Declaring a Public Order Emergency* released on 14 February 2022,¹⁰ we warned in the CLQ article that to satisfy this definition, the GiC would need to believe that blockades and economic harm constitute serious violence against persons and property and that the presence of violence to economic interests could satisfy section 2(c) of the CSIS Act.¹¹ Alternatively, the GiC had to find that violent political and ideological rhetoric used openly by Freedom Convoy participants, when paired with unlawful activity, is sufficient to satisfy section 2(c), and that actual destruction of property or physical injury/death

⁵ Emergencies Act, *supra* note 2, s 16.

⁶ *Ibid*, s 3 [emphasis added].

⁷ *Ibid*.

⁸ Craig Forcese & Leah West, *National Security Law*, 2nd ed. (Toronto: Irwin Law, 2021) at 98. See also Emergency Preparedness Canada, *Bill C-77: An Act to Provide for Safety and Security in Emergencies: Working Paper* (Emergency Preparedness: Ottawa, 1987) at 24: “Threats to the security of Canada are defined by the Act to encompass espionage or sabotage, foreign influenced activities detrimental to Canada’s interests, political terrorism and subversion.”

⁹ CSIS Act, *supra* note 4, s 2(c).

¹⁰ *Proclamation Declaring a Public Order Emergency*, SOR/2022-20 (2022) C Gaz II, 156.

¹¹ West, Nesbitt & Norris, *supra* note 1 at 290.

or particularized threats is not required.¹² We cautioned that interpreting the provision – normally understood to mean acts of terrorism or violent extremism – as also including economic disruption or violence to economic interests would constitute a marked departure from convention.

Importantly, from both a rule of law and practical perspective, we argued that the consequences of interpreting the EA threshold in this manner are twofold. First, it lowers the bar for what constitutes a threat under section 2(c) of the CSIS Act from that presupposed by the drafters of the legislation.¹³ Second, invocation on this basis sets a precedent for more easily relying on the EA in response to future protests that impose purely (or primarily) economic costs, so long as “extremists” – once again undefined – are present.¹⁴

Given this, ahead of the inquiry, the key question in our minds was whether the standard for accepting that a threat to the security of Canada exists was lower for Cabinet when invoking the EA than it is for CSIS to conduct its regular investigative activities.

III. THE SAME BUT DIFFERENT STANDARDS

During the public hearing and testimony phase of the inquiry, Commission counsel repeatedly questioned government officials about their understanding and application of the legal thresholds set out in the EA. Through this questioning it became clear that Cabinet decision-makers and their advisors, like the Clerk of the Privy Council, the National Security and Intelligence Advisor (NSIA) and the Director of the Canadian Security Intelligence Service (CSIS), relied on a Department of Justice legal opinion when forming their conclusions. The legal opinion is protected by solicitor-client privilege and was never disclosed to the Commission. However, we know from witness testimony that the crux of the opinion was that the definition of threat to the security of Canada, as understood in the context of the CSIS Act, does not bind the GiC when determining whether a public order emergency exists.¹⁵

Counsel for the Commission and counsel representing various parties pressed Cabinet ministers and senior officials to explain how they understood and applied that legal opinion in their individual decision-

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ See e.g., Public Order Emergency Commission, *Public Hearing Volume 25* (17 November 2022) at 288 (Ms. Jody Thomas).

making. Specifically, counsel wanted to know: if the phrase “threat to the security of Canada” means something different under the EA than it does when interpreting the CSIS Act, then what exactly does it mean? This is indeed a critical question. To lawfully invoke the EA, section 16 requires that the GiC have reasonable grounds to believe that a public order emergency exists. Meaning, the GiC must apply the facts they have to the definition of threats to the security of Canada, in this instance 2(c), and reach the conclusion that it is probable that such a threat exists.¹⁶ Moreover, they must reasonably believe that a national emergency arises from precisely this threat to national security. To a witness, the answer to this fundamental question differed.

The National Security and Intelligence Advisor (NSIA) explained that, “a Public Order Emergency is broader than as defined by the CSIS Act.”¹⁷ Unlike CSIS and its “very narrow lens”, the *Emergencies Act* “allows for the Governor-in-Council to make a broad decision about public order emergencies.”¹⁸ The NSIA also indicated that it was her understanding that assigning a different definition under the EA meant that the GiC “can consider more broadly than the intelligence collected by CSIS in determining a national security threat or situation or a public order emergency.”¹⁹

Likewise, the CSIS Director indicated that he was given advice that threat to the security of Canada had a different meaning under the EA than it does in the context of the CSIS Act. He too could not explain what that difference entailed, only that he considered additional information when reaching his conclusion that it was met.²⁰

The Attorney General did not suggest that the phrase had a different meaning under the EA and CSIS Act. He accepted that both acts relied on, “the same standard of the same magnitude”; however, in his opinion “the interpretation of that standard is being done according to a wider set of criteria by a very different set of people with a different goal in mind, and that goal is given by the *Emergencies Act* and not the CSIS Act.”²¹ He

¹⁶ *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 167, 11 DLR (4th) 641.

¹⁷ Ms. Jody Thomas, *supra* note 15 at 288.

¹⁸ *Ibid* at 287, 239.

¹⁹ *Ibid* at 239.

²⁰ Public Order Emergency Commission, *Public Hearing Volume 27* (21 November 2022) at 93 (Mr. David Vigneault).

²¹ Public Order Emergency Commission, *Public Hearing Volume 29* (23 November 2022) at 81 (Minister David Lametti).

reiterated in another exchange that when the decision-maker is the GiC, “there is a wider set of inputs that are more than just CSIS inputs.”²²

The Prime Minister echoed this argument, saying that the difference was what “inputs” the GiC could consider when making its decisions in the context of the EA. He noted that the GiC can consider “inputs” not only from CSIS, but from the RCMP, the departments of Transport and Immigration Canada, the Clerk of the Privy Council, the NSIA, and so on. He stated that the words should not

...be read differently, or broader when they’re used in a public order emergency than they’re used for the CSIS. It’s not the words that are different. The words are exactly the same in both cases. The question is, who is doing the interpretation, what inputs come in, and what is the purpose of it?²³

The Prime Minister also agreed that despite the different inputs, purpose, and decision-makers, “the threshold of the security threat that must be met, cannot be any lower than it is when CSIS is proposing to surveil one person, that the threshold is no different.”²⁴

The positions of the Prime Minister and the Attorney General are supported by the well-worn rules of statutory interpretation and general principles of administrative law. The phrase “threats to the security of Canada” has the same meaning in the EA as it does in the CSIS Act, just as the drafters intended. The words do not take on a new meaning. However, the decision-maker applying the facts to that legal definition becomes the GiC in the case of a (possible) public order emergency, not CSIS which undertakes that interpretation when applied to its own Act. The question before the GiC, then, is whether it is reasonable to believe a public order emergency exists, and it is in that context that they must consider those facts that might go into such a determination. Moreover, the facts that the GiC can consider include all those lawfully and reasonably before them, including their personal experiences. Put simply, the inputs, information available, and information that one might want to consider, naturally change depending on the context.

But what does not — or at least should not — change under this approach to legislative interpretation is the magnitude of the threat. In other words, the bar to reach a serious threat of violence to persons or property to in turn qualify as a threat to the security of Canada does not rise or fall depending on the decision-maker. Again, the point of including the

²² *Ibid.*

²³ Public Order Emergency Commission, *Public Hearing Volume 31* (25 November 2022) at 50 (Prime Minister Justin Trudeau).

²⁴ *Ibid* at 89–90 (Ms. Ewa Krajewska).

CSIS Act definition in the EA was to ensure a high threshold for invoking the Act.²⁵

However, this was not the legal position advanced by the Government of Canada in its written submissions. First, the government argued that despite its common understanding, “serious violence” and “threats of serious violence” include activities that do not have the potential to cause death.²⁶ The submissions do not specify what conduct short of potentially lethal activities present during the Freedom Convoy protests could otherwise satisfy the criteria for “serious violence”, but makes reference to the existence of an “atmosphere of intimidation, harassment and lawlessness” and compromised supply lines.²⁷

Second, the government submitted that “‘serious violence’ to property should not be restricted to physical damage.”²⁸ Instead, the term should be understood to capture the rendering of critical infrastructure unusable, because “[t]he incapacity of that infrastructure harms Canadians due to the impacts on the economy, directly affected businesses and their employees, and Canada’s international reputation for trade and investment.”²⁹ In both cases, the government argues that a purposive interpretation of the EA supports lowering the bar on what constitutes “serious violence” in this way but does not engage in that purposive exercise to explain the interpretation.

In his report, Commissioner Rouleau accepted the uncontroversial position that the “CSIS Act and the *Emergencies Act* are different regimes that operate independently from each other. They serve different purposes, involve different actors, and implicate different considerations.”³⁰ He also affirmed that “the definition is the same in both statutes.”³¹

Despite that affirmation, the Commissioner then used the criminal law, not the CSIS Act, to help interpret the term serious violence which he

²⁵ House of Commons, Legislative Committee on Bill C-77, An Act to amend the taking of special temporary measures to ensure safety and security during national emergencies and to amend other Acts in consequence thereof, 33-2, No 1 (23 February 1988) at 1:19-20 (Hon Perrin Beatty).

²⁶ Government of Canada, “Closing Submissions of the Government of Canada” (9 December 2022), online: Public Order Emergency Commission <publicorderemergencycommission.ca/files/documents/Closing-Submissions/Government-of-Canada-Closing-Submissions.pdf> at 130.

²⁷ *Ibid* at 136.

²⁸ *Ibid*

²⁹ *Ibid*.

³⁰ Public Order Emergency Commission, *supra* note 3 at 206.

³¹ *Ibid*.

equated to a “serious violence offence.”³² That phrase has been interpreted to mean causing or attempting to cause “serious bodily harm” which was interpreted by the Supreme Court to mean “any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant.”³³ As such, he found it “reasonable to interpret ‘serious violence’” in the EA context “as violence causing, or intended to cause, substantial interference with someone’s physical or psychological integrity, health, or well-being.”³⁴

Yet, the term “serious violent offence,” in the *Youth Criminal Justice Act* relied upon by the SCC to reach that conclusion, was later amended to include only murder, attempted murder, manslaughter and aggravated sexual assault.³⁵ Moreover, the *Criminal Code*’s definition of terrorist activity, which is related to and intentionally narrower than the definition of terrorism in 2(c) in the CSIS Act only captures activities “that intentionally (a) causes death or serious bodily harm to a person by the use of violence, (b) endangers a person’s life or (c) causes a serious risk to the health or safety of the public or any segment of the public”³⁶ It would have been more appropriate for the Commissioner to look here for an understanding of the type of serious violence to persons that is captured by section 2(c).

Also notable, in his analysis the Commissioner considered only the most serious threats of violence and found that they were sufficient to satisfy the definition in this case. He pointed specifically to the arrests of four men for conspiracy to commit murder and weapons seizures in Coutts, Alberta, and the concern that similar individuals or groups were present at other protest sites. In particular, “[t]he discovery of the Diagonon insignia among the material seized at Coutts, coupled with the presence of Diagonon leader Jeremy Mackenzie in Ottawa, heightened this concern.”³⁷ The Commissioner also pointed to “the threats to assassinate public officials because of the government’s public health policies” as evidence of threats

³² Canada, Public Order Emergency Commission, Report of the Public Inquiry into the 2022 Public Order Emergency, vol 3: Analysis (Part 2) and Recommendations (Ottawa: POEC, 2023) (Chair: Hon Paul S. Rouleau)) at 227.

³³ *Ibid.*, citing *R v CDK*, [2005] 3 SCR 668 at para 20; *R v McCraw*, [1991] 3 SCR 72 at 81.

³⁴ *Ibid.*

³⁵ Youth Criminal Justice Act, SC 2002, c 1, s 2; amended by Safe Streets and Communities Act

SC 2012, c 1, s 167.

³⁶ *Criminal Code*, RSC 1985, c C-46, s. 83.01(1). See also West, Nesbitt & Norris, *supra* note 1 at 278.

³⁷ Public Order Emergency Commission, *supra* note 3 at 209.

of serious violence satisfying section 2(c) of the CSIS Act.³⁸ He made no reference to economic disruptions or the impact on critical infrastructure, nor whether these kinds of activities could alone amount to a threat to the security of Canada.

Commissioner Rouleau's failure to address this point is regrettable both because it remains central to the government's justification and because it is a novel interpretation that could significantly lower the bar of declaring a public order emergency in the future. The closest the Commissioner got to addressing this issue was to say that the EA "does not, and was not intended to, capture purely economic crises." He then noted that economic disruption was relevant to the consideration of "whether the situation constitutes a *national emergency*."³⁹ Recall that national emergency is a separate criterion for finding a public order emergency exists.

It is probably safe to assume that the Department of Justice opinion relied upon by Cabinet to justify the invocation of the EA against the Freedom Convoy offers the same reasoning as the government's legal submissions: rendering critical infrastructure unusable through nonviolent means constitutes a threat to the security of Canada. While it was arguably unnecessary for Commissioner Rouleau to draw conclusions on this point to determine whether the threshold for of the EA's invocation was met, the concerns raised by the parties behoved him to squarely address the issue.⁴⁰ There is deep concern amongst civil liberties and activist groups that the application of the government's expansive interpretation of 2(c) in this instance could create a precedent that would justify the future invocation of the EA against Indigenous and environmental protestors who have traditionally blockaded pipelines, nuclear plants, railways, and so on.⁴¹ By failing to address this very real concern, the legality and political prudence

³⁸ *Ibid.*

³⁹ Public Order Emergency Commission, *supra* note 32 at 222.

⁴⁰ Canadian Civil Liberties Association, "Final Submissions of the Canadian Civil Liberties Association to the Public Order Emergency Commission" (9 December 2022), online: *Public Order Emergency Commission* <publicorderemergencycommission.ca/files/documents/Closing-Submissions/Canadian-Civil-Liberties-Association-Closing-Submissions.pdf> at 9–11.

⁴¹ See e.g., Brett Forester, "Emergencies Act committee can't ignore Indigenous concerns about precedent, police bias say Parliamentarians" (3 March 2022), online: *APT News* <www.aptnnews.ca/national-news/emergencies-act-committee-indigenous-concerns-parliament/>. See also BC Civil Liberties Association, "[the invocation] sets a dangerous precedent. If our elected officials become comfortable with using excessive powers to target dissent in Canada, it becomes easier to use again to stifle important movements such as Black Lives Matter and Indigenous land and water defenders", *Twitter* (February 17, 2022 at 17:12), online: *Twitter* <twitter.com/bccla/status/1494434520300339211>.

will continue to cast a serious shadow over the government's invocation of the EA.

IV. CONCLUSIONS AND RECOMMENDATIONS

The testimony of the Attorney General and Prime Minister before the Public Order Commission made the clear and logical case that the definition of and standard (what we have called “bar”) associated with meeting the threshold of threats to the security of Canada was and is the same under the EA and the CSIS Act.⁴² What differed, the story went, was the inputs – the facts and circumstances one might want to consider when determining whether the threshold is met. These inputs are logically and necessarily broader under the EA than the CSIS Act, with different and a greater number of individuals implicated in the analysis. So far as it goes, this is how the EA was always intended to be interpreted and how we described it in our CLQ article before the Commission began its work.⁴³

However, the legal position advanced by the Government of Canada in its written submissions to the Commission told a very different story. This story, presumably based on the unreleased legal opinion that founded the government's position, morphs and stretches the definition of “threat to the security of Canada” to an unknown degree. It does so by expanding the understanding of “serious violence” beyond the risk of death, while also expanding the definition of “serious violence to property” beyond physical damage.

Unfortunately, Commissioner Rouleau made no note of the contradiction in legal position put forth by the government. Instead, the Final Report included a contradiction of its own. Arguably Commissioner Rouleau overcame the contradiction by failing to address (or completely ignoring) the government's logic and necessary legal justification, while simultaneously relying on a narrower set of facts that differed from those that the government relied upon. It was a solution that one supposes technically resolves a contradiction. But it creates a host of other questions. Yet, the result is that Canadians are left with a good sense that the threshold for threat to the security of Canada was met, but no sense of what the threshold was in the first place.

Nevertheless, Commissioner Rouleau ultimately recommended the removal of the “incorporation by reference into the *Emergencies Act* of the

⁴² See e.g., Prime Minister Justin Trudeau, *supra* note 23 at 90.

⁴³ West, Nesbitt & Norris, *supra* note 1 at 278–83.

definition of ‘threats to the security of Canada’ from the CSIS Act.”⁴⁴ He also recommended that there be an in-depth review of the definition of a public order emergency to ensure it captures modern threats while “ensuring that the threshold remains high, the invocation of the Act remains exceptional, and all appropriate safeguards are put in place to maintain Parliament’s ultimate and effective control over the steps taken by the government in response to a public order emergency.”⁴⁵

To that end we offer our own observations and recommendations:

First, evidence of Cabinet Ministers made clear that major concerns of the GiC when invoking the EA had to do with the impact of the protests on critical infrastructure, namely ports of entry, and the second order effects on the economy and public safety. These concerns are certainly valid, and Parliament may wish to give the GiC the power to use the EA to ensure the proper functioning of critical infrastructure without the need to find that protestors amount to terrorists or violent extremists. In doing so, however, Parliament should ensure that any powers available to address threats to critical infrastructure are sufficiently tailored to meet this very specific threat.

Second, there conceivably remains a need for the GiC to be able to respond to national emergencies arising from terrorist, saboteurs, spies, foreign actors, and those who seek to covertly subvert the government. These threats are difficult for the public to assess let alone identify. Canadians can see the effects of a flood, a pandemic, a blockade, and a war. Images and stories of the impact fly across the country in real time. But espionage? Covert efforts to overthrow the government or influence our democratic processes? Terrorist plots? Often the only ones with knowledge of these threats will be Canada’s intelligence or law enforcement agencies. Moreover, the target of these threats is in most cases going to be the government itself. This creates the potential for an unseen threat, targeted at those with the power to invoke emergency powers. When coupled with the fact that decisions to invoke the EA will always be given significant deference, and the intelligence that forms the basis for that decision can be withheld on cabinet and national security privilege grounds, there is potential for abuse.

For this reason, we believe that tying the invocation of an emergency resulting from these threats to the CSIS Act remains absolutely necessary. The CSIS Act definition, as we currently understand it (not as advocated by the Government of Canada) preserves a level of objectivity in the legal test.

⁴⁴ Public Order Emergency Commission, *supra* note 3 at 261.

⁴⁵ *Ibid.*

The definition is one that is routinely applied, understood, and subject to review by national security review bodies and the Federal Court. The original intent behind including the already broad term “threat to the security of Canada” from the CSIS Act in the EA was to limit uncertainty about what does and does not amount to a national security threat that could trigger the EA. We believe that crafting a novel or broader definition that would capture threats of terrorism, espionage, subversion, etc, would render it meaningless as a legal threshold.

In any event, we wholeheartedly agree that any revision of the EA must maintain a high legal threshold for invocation and that the invocation of the Act remains exceptional. Parliament should not simply remove the reference to threat to the security of Canada so that it is easier to deal with a second Freedom Convoy type protest. The Freedom Convoy resulted from a series of errors including, as Rouleau stated, a “failure of federalism”, and not from an *inability* to respond under existing non-emergency legislation.⁴⁶ We strongly urge Parliament to remember the adage that bad facts create bad law and resist the temptation of trying to prevent another such protest by revising the EA, or worse still, the definition of threats to the security of Canada in the CSIS Act.

⁴⁶ *Ibid* at 248.

