Thresholds, Powers, and Accountability in the *Emergencies Act*

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ABSTRACT

It can be difficult for a legislature to clearly define an emergency or precisely describe different kinds of emergencies. In the context of emergency legislation some degree of vagueness and ambiguity is therefore to be expected. As a consequence, there will be some unavoidable uncertainty about the scope of the executive's authority when it exercises its emergency powers. Legislatures can, however, avoid *unnecessary* ambiguity and vagueness in statutes, and thereby reduce uncertainty about the scope of emergency powers. Legislatures can also set out consultation mechanisms and impose reason-giving obligations that render the executive politically accountable to those affected by exercises of emergency powers. This paper proposes amendments that aim to eliminate avoidable uncertainty that arises from how the *Emergencies Act* currently defines a national emergency and a public order emergency. Further, the paper proposes amendments to the Act that aim to increase the executive's accountability to those affected by declarations of public order emergencies.

I. INTRODUCTION

In Canadian constitutional law, questions of power and accountability are, generally speaking, intertwined with issues of legislative interpretation. According to the Supreme Court of Canada, the rule of law requires that "the exercise of all public power must find its

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ultimate source in a legal rule."[1] For the Court, this requirement has specific purposes: it ensures "executive accountability to legal authority" and provides "a shield for individuals from arbitrary state action."[2] And in order to ascertain what the law authorizes in a given situation, it can be necessary to engage in statutory interpretation. For example, in *Roncarelli v. Duplessis*,[3] the Supreme Court of Canada held that executive power was exercised in a way that was — according to the Court's interpretation — irrelevant to the statute under which the executive purported to act.

In general, then, when legislation circumscribes the ambit of executive authority and when courts are able to ascertain whether the authority has been exercised within those bounds, the executive can be held legally accountable. Yet it can be difficult for a legislature to clearly define an emergency or precisely describe different kinds of emergencies.[4] In the context of emergency legislation some degree of vagueness and ambiguity is therefore to be expected. As a consequence, there will be some unavoidable uncertainty about the scope of the executive's authority when it exercises its emergency powers.

Legislatures can, however, avoid *unnecessary* ambiguity and vagueness in statutes, and thereby reduce uncertainty about the scope of emergency powers. Legislatures can also set out consultation mechanisms and impose reason-giving obligations that render the executive politically accountable to those affected by exercises of emergency powers. This paper proposes amendments that aim to eliminate avoidable uncertainty that arises from how the *Emergencies Act* (the Act) currently defines a national emergency and a public order emergency. Further, the paper proposes amendments to the Act that aim to increase the executive's accountability to those affected by declarations of public order emergencies.

The amendments propose:

(1) that the phrase "of Canada" be deleted from the final clause of section 3 and replaced by the phrase "of Parliament" so that the clause reads "that cannot be dealt with under any other law *of Parliament*";

(2) that the definition of "threats to the security of Canada" be included in the Act itself, and therefore that section 16's

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[1] Reference re Secession of Quebec, [1998] 2 SCR 217 at para 71 [Secession Reference].

[2] *Ibid*, at para 70.

[3] [1959] SCR 121.

[4] See Oren Gross & Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006) at 45.

incorporation by reference of section 2 of the *Canadian Security Intelligence Service Act*[5] be deleted;

(3) that section 25 include "the council of any affected municipality" as a body to be consulted when the Governor in Council issues, continues or amends a declaration of a public order emergency, and that municipalities may be consulted after the fact, if consultation with a municipality "would unduly jeopardize the effectiveness of the proposed action";

(4) that subsections 17(2)(a) and 58(1) each be amended to include one clause stating that "the Governor in Council shall include a statement that explains how the declaration responds to 'threats to the security of Canada' as that term is defined in this *Act*" and a second clause stating that "the purpose of the statement is to inform members of the Senate and the House of Commons as well as the public."

Part I of this paper identifies how the Act's definitions of national emergency and public order create avoidable uncertainty and explains how the first two amendments proposed above can resolve this problem. Part II defines political accountability, identifies crucial actors that are not included in section 25's consultation requirements and describes a lacuna in the Governor in Council's reason-giving requirements under subsections 17(2)(a) and 58(1) of the Act. Part II also explains how the last two amendments proposed above can respond to these gaps in the Act.

PART I: LEGISLATIVE THRESHOLDS AND INTERPRETIVE UNCERTAINTY

In this Part, I will describe how the Act gives rise to two points of interpretive uncertainty. One source of uncertainty arises from section 3's definition of a "national emergency". Section 3 states:

> For the purposes of this Act, a ***national emergency*** is an urgent and critical situation of a temporary nature that:
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> (a) seriously endangers the lives, health and safety of Canadian and is of such proportions as to exceed the capacity or authority of a province to deal with it, or
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> (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.

[5] RSC, 1985, c. C-23. I would also recommend that the specific examples of the threats be revisited to ensure that they are relevant to contemporary instances of public order emergencies.

If read in isolation, the phrase "any other law of Canada" is ambiguous: it can refer to provincial and federal laws or it can refer only to federal laws. If the phrase includes provincial laws, then one might interpret the definition to mean that a national emergency exists when a province has the power to address "an urgent and critical situation of a temporary nature" but chooses not to do so. According to this interpretation, "the situation" can be effectively dealt with under the laws of the province in question, but that province has decided not to act. As a result of this interpretation, if the Governor in Council were to exercise its power to address a national emergency in these circumstances, it would not be authorized to do so under the statute, because no national emergency would exist.

Yet if read in context and in light of the meaning that the phrase "the laws of Canada" has been given by courts, this reading is untenable.[6] Section 3(a) modifies the opening words of the section by specifying that a national emergency is a situation that "exceeds the capacity or authority of a province to deal with it." The interpretation set out in the preceding paragraph therefore cannot be correct, as it would create a contradiction: the final clause would envisage an emergency situation (the province in question having the capacity to act, but choosing not to) that section 3(a) expressly precludes.

Moreover, in *Robert v. Canada*[7] the Supreme Court of Canada held that the phrase "the Laws of Canada" in section 101 of the *Constitution Act, 1867*[8] refers to federal statutes or the federal common law. Reading the related phrase "any other law of Canada" in this way avoids a contradiction between the section 3(a) and the final clause of section 3, as it precludes the possibility of interpreting the phrase to include provincial laws. Amending the Act by replacing the phrase "any other law of Canada" with "any other law of Parliament," as proposed in the Introduction to this paper, would avoid the ambiguity and preempt entirely an interpretation that gives rise to the contradiction identified.

A second source of uncertainty arises from the effects of an incorporation by reference in section 16 of the Act. Section 16 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 emergency." The section then states that the phrase "threats to the security of Canada" "has the meaning assigned by section 2 of the *Canadian Security Intelligence*

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[6] I am grateful to Professor Leah West for the following interpretation of section 3, which she communicated to panelists in an email dated November 30, 2022.

[7] [1989] 1 SCR 322.

[8] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

Act". — John Mark Keyes has identified the effect of an incorporation by reference: "when material is incorporated into a legislative text, it has the same binding legal effect as the legislative text and is judicially enforceable."[9] Keyes further notes that "[i]f the incorporated material is subject to particular interpretations in its principal context, these interpretations may be incorporated as well."[10]

In the context of section 16 of the Act, these effects of an incorporation by reference create uncertainty: a reasonable interpreter might read "threats to the security of Canada" in light of how courts and others have interpreted that phrase in the context of the *Canadian Security Intelligence Act*. — Yet emergencies, by definition, are exceptional circumstances. It is therefore incongruous to define and interpret features of an emergency by referring to a specific, non-emergency context. As a consequence, interpreters of section 16 will likely need to extend the phrase "threats to the security of Canada" beyond the meaning it has in the national security context.

Because the judiciary has typically deferred to the executive when it interprets emergency powers,[11] courts would likely defer to executive interpretations of "threats to the security of Canada" that do not align with how that phrase has been understood in the national security context. Yet this kind of deferential interpretation potentially undermines a key benefit of emergency legislation. When emergency powers are set out in (and therefore cabined by) legislation, legislatures reduce the risk that the public will suspect the executive of exercising those powers arbitrarily or without legal constraint.[12] That benefit is attenuated if the public expects that a term that is incorporated by reference in emergency legislation will be interpreted exclusively in light of its non-emergency statutory context. If the term is not so interpreted, the public may suspect that the executive has exceeded its statutorily defined authority and that deferential reviewing courts have failed to provide effective oversight. The Introduction's second proposed amendment aims to remove this suspicion by deleting section 16's incorporation by reference and including in the Act itself a definition of "threats to national security of Canada."

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[9] John Mark Keyes, "Incorporation by Reference in Legislation" (2004) 25:3 Stat L Rev 180 at 182.

[10] *Ibid*.

[11] See the discussion in Kim Lane Scheppele, "North American Emergencies: The Use of Emergency Powers in Canada and the United States" (2006) 4 Int'l J Const L 213.

[12] On the benefits of accommodating emergency powers within a legal framework, generally see *supra* note 4 at 80-81. On the specific features of a "legislative model" of emergency powers, see John Frerejohn and Pasquale Pasquino, "The Law of the Exception: A Typology of Emergency Powers" (2004) 2:2 ICON 210.

PART II: ACCOUNTABILITY MECHANISMS

In the preceding, I have addressed the legal dimension of accountability under the Act. Accountability also has a political dimension, according to which political actors are answerable to those whose interests are affected by political decisions. Accountability, in this sense, can be achieved by including affected parties in decision-making[13] or by requiring that political actors provide reasons that justify their exercises of power.[14] The Act includes mechanisms for these two kinds of accountability and in what follows, I will describe these mechanisms and argue for their reform.

A. *Inclusion in Decision Making*

The Act provides means for including provinces affected by a declaration of public order emergency in the Governor in Council's decision-making process. Section 25(1) provides that the lieutenant governors in council of provinces affected by the declaration of a public order emergency shall be consulted by the Governor in Council. Section 25(2) further provides that where a public order emergency extends to more than one province and the Governor in Council believes that a lieutenant governor in council of an affected province cannot be consulted "without unduly jeopardizing the effectiveness of the proposed action," the Governor in Council may consult after the action is taken. Finally, section 25(3) states that when the effects of a declaration of public order emergency are confined to one province, the Governor in Council may not issue a declaration unless the lieutenant governor in council of the province has indicated "that the emergency exceeds the capacity or authority of the province to deal with it."

These processes of inclusion are important, but underinclusive, means of ensuring that the Governor in Council is accountable to those who are affected by a declaration of public order emergency. They are under-inclusive because they only include the provinces and do not include public actors, including the territories, Indigenous communities[15] and municipalities that may be affected by a declaration Volume three of the

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[13] See Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2002) at 6.

[14] See Henry S Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford: Oxford University Press, 2002) at 27.

[15] Indigenous peoples have a *sui generis* relationship with the Canadian state that is reflected in, for instance, the unique nature of Aboriginal rights and treaties. See John Borrows and Leonard I Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference" (1997) 36:1 Alta L Rev 9.

Report of the Public Inquiry into the 2022 Public Order Emergency partially responds to this problem of under-inclusion by recommending that the Act be "amended to include a requirement to consult with the territories."[16] The Report also recommends that the federal government "engage with Indigenous communities to establish the appropriate parameters for consultations regarding possible recourse to the Act."[17]

Municipalities are notably missing from the Report's recommendations. Yet when an emergency occurs in an urban setting, it is municipal populations and local infrastructure that can be most directly affected.[18] Moreover, a province's political incentives to act (or not act) in response to a given emergency may mean that it will not respond to an affected municipality's immediate needs. And a particular, affected municipal council may have insights into an emergency that the relevant provincial government may lack. Municipal councils interact more regularly with municipal residents than do their provincial counterparts. Therefore, councils may be particularly attuned to the effects of an emergency on, for instance, vulnerable populations within affected municipalities.

For these reasons, the third amendment proposed in the Introduction of this paper requires that affected municipalities be consulted with respect to any declaration of a public order emergency. I recognize that multiplying the number of governments required to be consulted may cause delays. In response to this concern, the proposed amendment further provides that if there is a risk that consulting a municipality will jeopardize the effectiveness of a declaration, the Governor in Council can consult after the declaration has been made and any associated actions have been taken.[19]

B. *Giving Reasons*

Subsection 17(2)(a) of the Act includes a reason-giving requirement. It provides that "[a] declaration of a public order emergency shall specify

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[16] Canada, Public Order Emergency Commission, *Report of the Public Inquiry into the 2022 Public Order Emergency* (Ottawa: Public Order Emergency Commission, 2023) (Chair: Hon Paul S. Rouleau) vol 3: Analysis (Part 2) and Recommendations, at 317-318, online: <publicorderemergencycommission.ca/files/documents/Final-Report/Vol-3-Report-of-the-Public-Inquiry-into-the-2022-Public-Order-Emergency.pdf >. [the Report].

[17] *Ibid* at 318.

[18] The extent of emergencies' impacts on local populations explains the central role that local authorities play in responding to emergencies. See on this point, Jocelyn Stacey, *Commissioned Paper: Governing Emergencies in an Interjurisdictional Context* (Ottawa: Public Order Emergency Commission, 2023) at 25, online: <publicorderemergencycommission.ca/files/documents/Policy-Papers/Governing-Emergencies-in-an-Interjurisdictional-Context-Stacey.pdf>.

[19] The proposed statutory language draws from section 25(2) of the Act.

concisely the state of affairs constituting the emergency." Moreover, subsection 58(1) requires that "a motion for confirmation of a declaration of emergency … together with an explanation of the reasons for issuing the declaration … shall be laid before each House of Parliament within seven sitting days after the declaration is issued." Neither of these provisions require that the Governor in Council explain why it believed that a declaration met the relevant legal threshold.

The significance of this gap can be seen in the *February 14, 2022 Declaration of Public Order Emergency: Explanation pursuant to subsection 58(1) of the Emergencies Act*. That document implicitly refers to section 2 of the *Canadian Security Intelligence Service Act* when it states that "[t]hreats to the security of Canada include the threat or use of serious violence against persons or property for the purpose of achieving a political or ideological objective."[20] Yet, when the document identifies circumstances that constituted the public order emergency, it does not relate them to the specific examples of threats identified in section 2.[21]

The Report partially responds to the legislative lacuna by recommending that,

> at the time a commission of inquiry into the declaration of a public order emergency is established, the Government deliver to the Commission a comprehensive statement setting out the factual and legal basis for the declaration and measures adopting, including the view of the Minister of Justice of Canada as to whether the decision to proclaim an emergency was consistent with the purposes and provision of the *Emergencies Act* …[22]

This recommendation does not, however, cover the declaration set out in subsection 17(2)(a) — the reasons given to the public — or the motion in subsection 58(1) — the explanation to Parliament. As a consequence, the public and relevant political actors would not be provided with an explanation — at the time when a declaration is made — for why the government believed it had met the relevant legal thresholds in the Act. In the absence of such an explanation, the public may doubt the legality of the Governor in Council's actions and public trust may be eroded.

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[20] Canada, *February 14, 2022 Declaration of Public Order Emergency: Explanation pursuant to subsection 58(1) of the Emergencies Act* (Ottawa: Government of Canada, 2022) at 1 (www.justice.gc.ca/eng/csj-sjc/pdf/Section58_explanation_EN.pdf) accessed 9 March, 2023.

[21] For instance, the document refers to "adverse effects on the Canadian economy" (*Ibid*, at 1) without explaining how those effects are tied specifically to threats set out in section 2 of the *Canadian Security Intelligence Service Act*, including those related to foreign influence, espionage or sabotage, or the threat or use of violence against persons or property.

[22] *Supra* note 15 at 322.

In response to these concerns, the fourth recommendation in the Introduction to this paper proposes that subsections 17(2)(a) and 58(1) be amended to require that the Governor in Council provide an outline of why it believed it had met the applicable legal thresholds for declaring an emergency. It is important to note that this outline would not amount to a legal opinion[23] and would, instead, mirror the form of a Charter statement. Indeed, the language of the proposed amendments mirrors the Department of Justice's explanation of Charter statements.[24]

A recent example of a Charter statement — the *Charter Statement on Bill C-39: An Act to amend An Act to amend the Criminal Code (medical assistance in dying)*[25] — provides a template for the kind of outline I have in mind. The document expressly states that it is not a legal opinion and identifies various Charter considerations raised by the proposed legislation, including those that support the idea that various aspects of the Bill are consistent with sections 7 and 15 of the Charter.[26] The outline that I envision for the emergency context would similarly make clear that it is not a legal opinion. It would further identify considerations that specifically support a Governor in Council's claim that a given declaration is consistent with the definition of a public emergency set out in the Act.

II. CONCLUSION

Declarations of public order emergency will almost inevitably be controversial. They will be issued under conditions of uncertainty and in a politically fraught atmosphere, where some will charge the government with acting without regard for the law or the interests of affected parties. The recommendations I propose aim to blunt controversy. They aim to reduce

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[23] This stipulation is important given that a Minister of Justice may reasonably believe that a legal opinion would be protected by solicitor-client privilege. For an example of when a Minister of Justice may claim solicitor-client privilege, see *Idziak v Canada (Minister of Justice)*, [1992] 3 SCR 631.

[24] Charter statements "are intended to inform parliamentary and public debate on a bill" and "explain considerations that support the constitutionality of a proposed bill." Canada, Department of Justice, *Charter Statements*, online at <www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/index.html#:~:text=Charter%20Statements%20are%20a%20transparency,throughout%20the%20law%2Dmaking%20process> accessed 9 March, 2023.

[25] Canada, Department of Justice, *Charter Statement on Bill C-39: An Act to amend the Criminal Code (medical assistance in dying)* at www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c39.html accessed 9 March 2023.

[26] *Ibid*.

uncertainty, include affected municipalities in decision-making, and increase the opportunities for the Governor in Council to explain its reasoning to those impacted by a decision to declare a public order emergency.