

What's 'Necessary' Under the *Emergencies Act*?

N O M I C L A I R E L A Z A R *

ABSTRACT

In most jurisdictions, any claim to emergency power must be necessary. But necessity is an ambiguous concept which has historically facilitated abuse. Indeed in the Canadian context, though necessity is a key threshold requirement in the *Emergencies Act*, it remains a black box, constituting a worrying gap in that Act's robust framework for accountability and oversight. This paper develops a set of heuristic tools to clarify and rigorously assess claims of necessity, providing a structure for a government's reason-giving around emergency declarations and measures. Because such reason-giving is critical to the rule of law in a state of emergency I conclude by advocating, in the Canadian context, an amendment to section 61 of the Act: When Government tables measures with Parliament or the Parliamentary Review Committee, they should explicitly state why an order or measure is necessary.

I. INTRODUCTION

'Necessity' is central to the *Emergencies Act*, constraining state power by limiting the Act's sphere of use. Necessity is a threshold element for declaring a state of emergency, and for justifying specific measures an emergency declaration might authorize too. Yet, this concept's many ambiguities have historically helped governments cloak abuses of emergency power. While it will rarely be possible to determine necessity with absolute clarity, the clearer a government's statement of why they reasonably believe emergency powers are necessary, the more accountable we can hold them. Since public accountability is critical to the rule of law in a crisis, developing tools that clarify necessity is worthwhile.

After outlining necessity's relationship to emergency, and the sources of necessity's ambiguity, I will propose five tools and principles for rendering necessity claims clearer. A clear statement of necessity should explain: First, what makes a crisis an urgent threat to the public good, and thus precisely why it is necessary to resolve it; Second, how values are ranked and therefore why a certain set of measures is chosen from the range of available approaches. Often, these values will be expressed as adverbs which describe how a situation ought to be resolved (quickly, safely, efficiently); Third, the kind of necessity (technical, moral, legal, or practical) that measure serves; Fourth, where risk and probability are in play with respect to measures' effectiveness, what steps Government took to reduce uncertainty; And Fifth, how Oakes reasoning, used cautiously, can provide heuristics for teasing out these elements of necessity.

Ultimately, to keep emergency power in Canada under the rule of law, and prevent its abuse, the *Emergencies Act* should require Government to explain necessity claims when they employ emergency measures. For that reason, I recommend an amendment to section 61 of the Act to require that, when Government tables measures with Parliament or the Parliamentary Review Committee, they clearly and explicitly explain why an order or measure is necessary. Currently, the Act only requires Government to provide reasons, under section 58(1), for an emergency declaration. There is no requirement that Government provide reasons for the measures themselves.

II. NECESSITY AND EMERGENCY

An emergency is a sudden, or suddenly intensifying, urgent threat to life, limb, property, or way of life. Natural or human forces may bring about emergencies: wildfires, pandemics, and floods, economic collapse, threats of civil violence, coup, or war. Commonly, natural and human forces combine to intensify threats: storm damage may lead to disease; pandemic may lead to civil unrest or economic collapse.

But an emergency only becomes *public* when it poses a sudden and urgent threat not just to individuals, but to the collectivity, to the public good. A public emergency thus derives not just from a threat itself but from a sudden incapacity or failure of state response: An earthquake poses a threat, but becomes a public emergency if damage renders roads impassable for ambulances; a riot may pose a threat, but becomes a public emergency only if police lack capacity to restore order.

Public emergencies are thus situations of urgent public need: there is a sudden mismatch between public need and public resources.¹ This is why, historically, the terms state of emergency and state of necessity have sometimes been used interchangeably.

III. NECESSITY'S AMBIGUITIES

Leaders sometimes present necessity claims as substantive and self-justifying: Crisis X demands action Y. For example, then Chancellor von Bethmann Hollweg cited the old adage 'necessity knows no law' as self-evident justification for Germany's invasion of Belgium in 1914. Likewise, after his mass execution of Sinhalese in the 1848 emergency, Governor Torrington's defenders in the United Kingdom Parliament claimed necessity justified the slaughter.² When presented as a simple claim, necessity conceals complex chains of conditional, logical relations and smuggles in hierarchies of moral principles. Unless these are teased out and made explicit, they too easily cloak potential abuse.

The text of the February 2022 Emergency Economic Measures Order provides a good, if tame, example of such ambiguity: while the order stated the measures were necessary to resolve the emergency, it did not state *why*. The public were left to guess the connection between means and ends, what purpose the measures served *specifically* in ending the emergency: was it 'necessary' to discourage participation, in order to thin the crowd, in order to lower the chance of violence and harm? Or was it 'necessary' to limit lucre for leaders, some of whom were benefitting financially from the occupation's continuation?

Even in the best scenario, where an emergency measure is ultimately judged necessary, vagueness can contribute to misunderstandings, miscommunications, and public unrest. Governments should be required to give reasons to mitigate necessity's ambiguities.

There are three key sources of ambiguity in necessity claims. Governments may fail to make clear:

1. **Why the public good depends on the resolution of the crisis.** In the February 2022 emergency, Government did clearly set out a number of

¹ Nomi Claire Lazar, "Political Ethics in the State of Emergency," in *Handbook of Political Ethics*, Edward Hall and Andrew Sabl eds. (Princeton: Princeton University Press, 2022) 213.

² Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge: Cambridge University Press, 2009) 85-86.

reasons why the crisis had to be urgently resolved, pursuant to section 58(1) of the Act.³

2. *Why, among the available means to resolve the crisis, these are best;* that is, why they are the most morally appropriate option from among available options. Just because an end is necessary does not mean the means selected are appropriate.
3. *How, together or on their own, the chosen means will be effective at resolving the crisis.* That is, the measures will be sufficient.

A clear statement of reasons, justifying emergency measures, should address each of these potential ambiguities.

IV. WHY DOES THE PUBLIC GOOD DEPEND ON THE RESOLUTION OF THE CRISIS?

The necessity of an emergency declaration, and by extension the necessity of any emergency measures, is conditional on the necessity of the end the emergency seeks to secure. That is, emergency measures are only necessary if there *really* is a terrible threat to the public good. But since many threats may be serious, but not existential, political judgment is often in play in emergency declarations. This makes reason-giving all the more critical.

Normally judgements about the public good are made – defeasibly – through parliamentary deliberation, an exchange of reasons for and against. Normally, first, debate; then, decide. But the urgency of crisis makes this process challenging, and the *Emergencies Act* addresses this challenge by inverting decision and deliberation. The executive decides on the public good in a crisis, but the justice and plausibility of that decision is near immediately, then near continuously, reassessed during (by Parliament under sections 61 and 62) and after (in the courts, and by public inquiry under section 63) the emergency.

For this process to work, Parliament and the public need to see how means and ends fit together, how the chain of conditionals lead up to the public good claim: what would happen if Government did nothing? *Why* is the public good *conditional* on an emergency declaration? To address this, the *Emergencies Act* currently requires Government, under section 58(1) to provide Parliament with reasons why an emergency *declaration* is necessary. These reasons ought to explicitly provide a clear and logical connection

³ 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).

between means (a declaration) and end (resolving the urgent, critical threat to the public good).

For example, if a state claims it is necessary to restore the free flow of goods across a border, evidently, this is not because the free flow of goods across a border is a good-in-itself. Rather that flow is necessary *so that* supply chains will not be interrupted, and *so that* good trade relations can be maintained with trading partners. And supply chains and good trade relations are necessary *so that* factories and businesses can operate, *so that* people can work and the economy can be robust. These things are important *so that* there is more affluence, with all the good that brings, and less poverty with all poverty's dire consequences, in the service of human well-being. This whole chain of nested conditionals supports the final determination that it is necessary that *something be done* to restore the free flow of goods across the border. The determination of this necessary end is a condition of any emergency measures being necessary, including the declaration of emergency, which is itself a measure. Means are only necessary for ends that are necessary. It is only necessary to act to resolve a crisis if the crisis actually *must* be resolved.

In sum, a baseline for assessing necessity is a clear view of why it is critical to resolve a situation in the first place. The claim that it must be resolved will sit in a chain of conditionals, tying the crisis to the public good in one direction, and to the means intended to resolve the crisis in the other. We would expect to find stronger and weaker links in that chain, points at which necessity seemed more or less certain, points at which some other option shy of an emergency declaration might be feasible.

Thus statements of reasons, linking necessary means with clearly established necessary ends, in section 58(1) declaration, should be as explicit as possible. But this only establishes the necessity of a declaration. What about the measures?

V. WHAT MAKES MEANS BEST AND MOST APPROPRIATE?

The second source of ambiguity, in emergency necessity claims stems from the fact that, commonly, there are multiple ways to accomplish an end. Even if we accept that it is necessary to resolve a crisis, why this measure, rather than some other? That some means is necessary doesn't entail that this means is necessary.

Those measures deemed necessary should be the 'best' or most appropriate in the circumstances. And to determine this, we need adverbs. That is, Government will seek a resolution to a crisis that has certain

normative characteristics or criteria, expressed or expressible as adverbs. For example, it might seem important to resolve an emergency:

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

The adverbs help determine which means and measures are best or most appropriate by establishing a hierarchy of normative criteria. To see how this works, consider how, if you must travel to Winnipeg from Ottawa, it is not strictly *necessary* to fly. You could drive or perhaps take the train. But it may become *necessary* to fly if you need to get to Winnipeg *quickly*.

Since adverbs often carry implicit normative criteria, guiding the choice of specific measures, they should be made explicit when Government presents reasons why emergency measures are necessary: not just that it was necessary to resolve the crisis through emergency powers, but how.

Recognizing the importance of ‘how’ to determinations of necessity explains why it may still have been justifiable to use the *Emergencies Act* in February 2022, even though Government had the option, under the *National Defence Act*⁴, to call out the army. That option might have resolved the crisis effectively, in which case, strictly speaking, government would not have met the threshold element for a declaration that requires that there be no other law of Canada capable of getting the job done. But once it is clear that it was necessary not just to resolve the crisis effectively, but to resolve it, firstly, safely and cautiously it becomes clear that the *National Defence Act* was not a live option. The relative hierarchy of these value-carrying adverbs rule the use of that Act out.

It behooves those holding government to account to demand clarity about the criteria guiding the choice of measures: what made specific measures the most appropriate and best, when multiple means are available. Addressing the moral appropriateness of means reduces ambiguity, facilitating accountability for the Governor in Council’s necessity claims.

⁴ RSC 1985, c N-5.

VI. WILL THESE MEANS BE EFFECTIVE?

Beyond measures' moral appropriateness, it must be reasonable to believe necessary measures will get the job done. That is, on their own, or in combination, it must be reasonable to expect the measures will be sufficient. A clear statement of what makes measures necessary should include an account of how each measure will contribute to resolving the crisis. What is the role of this measure in the overall project of resolving the crisis? For further clarity, such a statement might take account of the diverse kinds of necessity that come together to achieve an end: If you want to drive a car, for example, it is (practically) necessary to have car access, (technically) necessary to have fuel, (biologically) necessary to have control of your limbs, (morally) necessary that you not, in driving, neglect a critical duty elsewhere, and (legally) necessary to have a license.

Furthermore, all crisis decisions are taken under pressured conditions of uncertainty, not every link in the chain of conditionals will be clear. Leaders will need to exercise judgement that takes account of risks and probabilities. But the public and Parliament should see where judgments came into play, and what steps leaders took to assess risk, and lower uncertainty about the likely effectiveness of measures.

The sufficiency of measures raises the issue of preparation in its relationship to accountability. Recall that a public emergency involves not just a sudden and urgent public threat, but a sudden mismatch between public need and government capacity. Often, multiple factors must come together to address urgent need: in an earthquake, assisting the injured requires not just passable roads for ambulances, but incident management plans and hospital resources, backup electricity generators, and supplies of clean water. Only *together* might these individually necessary means be sufficient.

Because so many factors come together, governments must be as prepared as possible – in advance – so that the fewest possible emergency measures are needed to address crises as they arise. If a blizzard-prone city like Ottawa made no contingency plans for snowstorms, could the city reasonably claim that emergency measures – perhaps commandeering snowploughs, were justified, because necessary? On one hand, the measures may in the moment, be necessary, and hence strictly legal. But on the other, it may be that jurisdictions remain morally or politically culpable because of negligence anticipating and preparing for the emergency. Notably federalism complicates responsibility with respect to necessity. One jurisdiction's failure, incapacity, or refusal to act, may create a situation of necessity for another jurisdiction. Yet, not every emergency is predictable,

and there are political, social, and economic trade-offs between the cost of prevention, in money or freedom, and the cost of response. Each polity must weigh priorities.

VII. THE ROLE OF *OAKES*

In sum, necessity claims in an emergency context should make clear the chain of conditionals linking means to ends, and ends to the public good. I want now to suggest that, once that chain of conditionals is clear, a proportionality framework, such as the *Oakes* test, can help Parliament and the public assess government's rationale for the use of emergency powers.

Many measures taken under a state of emergency may involve rights limitations, and lawyers might point out that *Oakes* – a legal test Canadian courts use to determine when rights limitations are justified, under section 1 of the Charter – already provides the tools we need to assess their necessity. *Oakes* indeed provides useful heuristics, but these must be cautiously employed. Assessing necessity in an emergency is saliently different from assessing rights limitations in normal times for at least three reasons. First, *Oakes* is a legal test and historically courts have been hesitant to adjudicate political decisions around necessity. Second, accountability for government use of emergency power is (primarily) public and political. And finally, emergency requires distinct thresholds from everyday rights limitations. Nonetheless, *Oakes* inspired reasoning provides heuristics governments can use to present clearer necessity claims before the public, in a manner that helps address the three elements of ambiguity set out above.

The first reason we cannot just use *Oakes* to establish necessity is that *Oakes* is a *legal* test. While emergency decisions are reviewable in court, judges have historically been hesitant to adjudicate emergency declarations. In the United Kingdom's *Belmarsh* case, Lord Bingham concisely expressed why. That case concerned the indefinite detention of nine non-nationals, whom the principle of non-refoulement secured from deportation. To legally hold these men, the UK claimed a derogation from Article 5 of the European Convention on Human Rights on the grounds that the post 9/11 situation justified derogations allowed under Article 15, which reads: "in time of ... public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation..."

The men appealed, arguing their indefinite detention violated their rights and that Government's Article 15 derogation was unlawful.

With respect to the derogation, Lord Bingham reasoned the Court should not intervene. Regarding whether an emergency exists, he held that Government is:

“called on to exercise a pre-eminently political judgment. ... Any prediction about the future behaviour of human beings ... is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety...”⁵

Lord Bingham went on: “It is the function of political and not judicial bodies to resolve political questions.”⁶

But the Law Lords in *Belmarsh* were less reticent in ruling the UK government’s *measures* were unnecessary: employing *Oakes* inspired reasoning, they found that the indefinite detention of foreign nationals suspected of terrorist involvement was: disproportionate, not strictly required, not rationally connected to the security threat, and constituted discrimination on the grounds of nationality. That is, their detention was not *necessary*.

Evidently, legal accountability with the assistance of *Oakes* reasoning, matters. But it often comes too late. At the time of writing, we are more than a year out from the February 2022 emergency, the Commission of Inquiry under section 63 has concluded, and yet we still await the Federal Court’s decisions on cases arising from use of the *Emergencies Act*. So while some version of *Oakes* may yet inform a new legal test both for Charter compliance of emergency measures, and also, importantly, for interpreting the concept of necessity in the legislation, the slowness and uncertainty of adjudication means public accountability comes first.

But even in public accountability contexts, *Oakes* reasoning effectively draws out key aspects of the chain of conditionals implicit in necessity reasoning: whether and in what ways emergency powers might be appropriate and sufficient to ends, and how those ends are related to the public good. For example, *Oakes* reasoning demands an account of how limiting a right is “reasonable and...justified” in circumstances which are “pressing and substantial”. Notably, the *Oakes* concept of “pressing and substantial” must be used cautiously in emergency contexts. First, not all pressing and substantial societal concerns are public emergencies: for emergency necessity, the threshold must be *higher* than the threshold for

⁵ *A and others v Secretary of State for the Home Department*, [2004] UKHL 56, s. 29, online: BAILII OpenLaw <<https://www.bailii.org/uk/cases/UKHL/2004/56.html>>.

⁶ *Ibid.* s. 96, It is worth noting Lord Hoffman argued that it was not credible to suggest that the life of nation was under threat “there is no doubt that we shall survive Al-Qaeda,”

everyday rights limitations. But conversely, Section 1 Charter limitations are permanent, while emergency powers are temporary, which should also give us pause. Hence, Part 1 of the *Oakes* test would require some adaptation for use in the emergencies context.

More helpfully, *Oakes* reasoning demands an explanation for how each measure is “fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective.”⁷ A government that sought to provide an explanation on each of these points would, in the process, be forced to go some substantial way toward demonstrating the appropriateness and sufficiency of measures, and providing requisite clarity around the conditional connections between necessary means and necessary ends. That *Oakes* also requires rights be limited “as little as possible,” and its demand for proportionality “between the effects of the limiting measure and the objective”⁸ means *Oakes* reasoning will assist in clearer explanation regarding what makes certain measures morally most appropriate too.

Clarity around necessity only serves accountability if clarity is *available*. For this reason, I suggest Parliament consider an amendment to sections 61(1) and (2) of the *Emergencies Act* to require a clear explanation of necessary connections between measures and ends. Section 61(1) currently reads “every order or regulation made by the Governor in Council pursuant to this Act shall be laid before each House of Parliament within two sitting days after it is made.” While currently section 58(1) requires that Parliament give reasons for the declaration, no such reasons are required for specific measures. Were section 61 amended to require that such orders include explicit reasoning around necessity of means and ends, citizens and Parliament could more effectively hold government to account when the *Emergencies Act* is used. Where such measures are secret, and laid instead before the Parliamentary Review Committee under section 61(2), necessity reasoning could be presented to that Committee, rather than to Parliament as a whole. Such an amendment would work in tandem with Recommendation 40 of the report of the Public Order Emergency Commission, which would require such a statement be provided to a section 63 Commission. It would also work in tandem with the Hoi Kong’s recommendations, in “Thresholds, Powers, and Accountability in the *Emergencies Act*,” found elsewhere in this volume.

While ultimately, states are entitled both morally and legally, under Article 4 of the *International Covenant on Civil and Political Rights*, to which Canada is a state party – to take measures which temporarily limit or

⁷ *R. v Oakes*, [1986] 1 SCR 103, headnote.

⁸ *Ibid.*

derogate rights in a crisis, such limitations and derogations should only be undertaken in concert with the rule of law project. Accountability is central to that project, and clarity is central to accountability. During the February 2022 emergency, the reasons for measures the government took were sometimes opaque. This will only become worse as emergencies gain complexity in the wake of climate change. Clarity can only become more important in that context. Natural disasters will have economic impacts, economic impacts will have political impacts, and onward in a likely crisis cascade. Canadian law must be prepared.

