

Modern Finance-Centric Governance: the 2022 Emergency Measures, Property and Financial Powers

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ABSTRACT

A distinctively financial hammer was used to shutter the February 2022 public order emergency. Bank accounts were frozen, donation conduits were squeezed, financial intermediaries were placed under surveillance, and protestors and their financial supporters were met with the risk of severe sanctions. While this tethering of finance and property to end the 2022 Convoy uprising elicits a certain surprise, it is also familiar territory: it sits well within modern crime control policy. The greater surprise is not the type of hammer but the finding of this tool within the box of federal emergency powers that might be leveraged to deal with a public order emergency. This brief note examines the distinct finance and property related measures used in 2022 and their relationship to the federal *Emergencies Act*.¹ It recommends that Parliament engage in careful deliberation over the appropriateness of financial and property measures for responding to a public order emergency, that the permissibility of such measures be clearly specified and constrained by the statutory language of s. 19(1) and that s. 19(1) be further amended to explicitly require review for Charter compliance of all emergency measures prior to any implementation.

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¹ *Emergencies Act*, RSC 1985, c 22 (4th Supp).

INTRODUCTION

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This brief note examines the distinct finance and property related measures used in 2022 and their relationship to the federal *Emergencies Act*.² It recommends that Parliament engage in careful deliberation over the appropriateness of financial and property measures for responding to a public order emergency, that the permissibility of such measures be clearly specified and constrained by the statutory language of s. 19(1) and that s. 19(1) be further amended to explicitly require review for Charter compliance of all emergency measures before their implementation.

I. THE 2022 EMERGENCY MEASURES: A FINANCE-PROPERTY CENTRIC RESPONSE

In the build-up to the invocation of the *Emergencies Act* in February 2022, there was marked cacophony about the financing of the protests. Media spoke repeatedly of financial campaigns, the use of crowdfunding platforms to secure donations, of serious dollars strengthening the resolve and endurance of the protest movement and of the possible involvement of foreign financing in fuelling tensions.³ Prior to the invocation, a series of

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

³ Jon Woodward, "Convoy fundraising leak shows substantial U.S. donations, \$75K from Canadian donor" (last modified 15 February 2022), online: CTV News <www.ctvnews.ca/canada/convoy-fundraising-leak-shows-substantial-u-s-donations-75k-from-canadian-donor-1.5780989> [perma.cc/F4NR-HX7U]; Elizabeth Thompson, "Convoy protest could change the way money is monitored, says watchdog agency" (10 February 2022), online: CBC News <www.cbc.ca/news/politics/truck-convoy-fundraiser-gofundme-1.6346639> [perma.cc/V7VF-MCTW]; Catharine Tunney, "GoFundMe has released \$1M of more than \$6M raised for protest convoy" (27 January 2022), online: CBC News <www.cbc.ca/news/politics/gofundme-money-released-convoy-1.6328029> [perma.cc/9ZTT-2E7E].

legal actions sought to disrupt funding and to freeze property linked to the protestors.⁴ Any social movements, severely disruptive or not, are necessarily undergirded by financial resources – even individual participation in any civil movement requires some funds. In the tense context of February 2022, funding and finance galvanized an inordinate amount of attention.

With the declaration of a public order emergency on February 14, two measures crafted under the authority of federal law sought to restore order. Reflective of the noisy build-up, the dominant combined theme of the Emergency Measures Regulation (EMR) and the Emergency Economic Measures Order (EEMO) was action against property and finance.⁵ The EMR prohibited participation in public assemblies and explicitly enjoined the provision of any financial assistance to any banned activities.⁶ Building on these foundations, the EEMO, almost entirely, centered on property and finance. It defined ‘designated persons’ as individuals associated with the prohibited assemblies and imposed expansive financial restrictions on such persons as well as on any persons providing donations in support of the prohibited acts. The EEMO mandated that financial entities cease to deal with any property, or financial exchanges, related to ‘designated persons,’ required that entities determine, on a continuing basis, whether they were in possession, or control, of property owned, or held by, ‘designated persons’ and compelled entities to disclose any holdings, or transactions, to public authorities. The EEMO placed crowdfunding platforms under the rubric of existent anti-money laundering law, in response to the prominent role crowdsourcing appeared to play in mobilizing funds for the protests.⁷

⁴ *Li et al v Barber et al*, 2022 ONSC 1176; Stephanie Taylor, “Ontario court freezes access to donations for truckers’ protest from GiveSendGo” (last modified 11 February 2022), online: CTV News <www.ctvnews.ca/canada/ontario-court-freezes-access-to-donations-for-truckers-protest-from-givesendgo-1.5776674> [perma.cc/JV2V-DPCC]. *Her Majesty the Queen and GIVESENDGO*, Freedom 2022 Human Rights and Freedoms, Chris Garrah, Notion of Application, Ontario Superior Court of Justice, February 10, 2022.

⁵ *Emergency Measures Regulations*, SOR/2022-21; *Emergency Economic Measures Order*, SOR/2022-22.

⁶ The EMR contemplates multiple aspects. It prohibits participation in public assemblies anticipated to result in a breach of the peace; it mandates the rendering of essential goods and services requested in connection with the situation; and it criminalizes the failure to abide by the measures.

⁷ These changes became permanent in April 2022; See Regulations Amending the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations and the Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations, SOR/2022-76.

Forged to stifle the disorder, the tone of the emergency measures was intensely finance and property centric and arguably proved pivotal in ending the protests.

II. THE EMERGENCIES ACT POWERS

A credible case can be made that tools of a financial nature fall afoul of the jurisdiction conferred under federal emergencies law. Under the *Emergencies Act*, the declaration of a public order emergency confers onto the Governor in Council the authority to adopt special temporary measures. Section 19 authorizes the making of orders or regulations in relation to an exhaustive list of matters which the Governor in Council believes on reasonable grounds are necessary to deal with the public order emergency. Although the list is permissive, only measures that fall within the scope of the matters on that list are proper subjects for emergency response.

Section 19 of the *Emergencies Act* speaks to a number of matters: the regulation or prohibition of public assemblies; travel to and from any specified areas; the use of specified property; the designation and securing of protected places; the assumption and control of public utilities and services; the authorization of the rendering of essential services; and the imposition of sanctions for any violations of orders or regulations made under section 19. Notably, the prescriptive list makes no explicit mention of finance or finance-focused powers. To the extent that the word ‘property’ features in section 19, it is captured only by the statutory reference to the regulation or prohibition of ‘the use of specified property.’⁸

In contrast, section 30 of the *Emergencies Act* explicitly refers to financial measures in response to international emergencies, a separate category of emergency. In the instance of an international emergency, the Governor in Council receives the power to act, amongst others, in relation to ‘the appropriation, control, forfeiture, use and disposition of property or services’; and ‘the control or regulation of international aspects of specified financial activities within Canada’.⁹

A straight textual reading discloses the absence of any specific like connotation of financial powers in the context of a public order emergency. In stark contrast stands the express contemplation of financial regulation in the context of an international emergency.

⁸ *Emergencies Act*, *supra* note 2, s 19(1)(a)(iii).

⁹ *Ibid*, ss 30(1)(b) & 30(1)(i).

The recent report of the Rouleau Commission into the use of the *Emergencies Act* found that the EMR and the EEMO measures came within the scope of section 19:

‘There was no suggestion that the measures in question fell outside the scope of the kinds of measures authorized by section 19.’¹⁰

Its examination of this matter is terse, comprising only the above phrase. It might be expected that with the ambitious task of inquiring into the 2022 invocation and delivering its conclusions within a short time-frame, close attention to the precise scope of power under section 19 was eclipsed by the sheer breath of the undertaking.

Still, and with great respect to the Commission, it remains that for public order emergencies, any authority to enact measures connected to finance and property could only rest on the power to regulate ‘the specified use of property.’ It is tough to reconcile the thick financial theme of the EMR and EEMO with the thin language of section 19. Conjuring a weighty finance-centric tool from the text of authorized powers is, at best, an extraordinarily imaginative stretch. Again, a strong argument can be made that the measures adopted to deal with the public order emergency, in relation to finance and property, exceeded the jurisdiction of the *Emergencies Act*.

III. THE MODERN APPROACH TO GOVERNANCE AND PROTESTS

The finance-centric theme of the 2022 measures is not surprising. The theme nestles neatly within a modern approach to the control of crime, deploying tools which were not common when the *Emergencies Act* was adopted decades ago.

The near-forty years since the enactment of the *Emergencies Act* have witnessed the evolution of modern finance-centric governance. The inspiration for this manner of governance was the global trade in illegal drugs. Late 1980s concerns with the profitability of this trade triggered the adoption of a strategy focused on seizing drug proceeds and on enabling their interception and detection as these moved through conventional financial channels. Positing that crimes with significant monetary dimensions could not be contained without adequate attention to their financial underpinnings, a fact which previous control efforts tended to

¹⁰ Canada, Public Order Emergency Commission, *Report of the Public Inquiry into the 2022 Public Order Emergency: Analysis (Part 2) and Recommendations*, vol 3 (Ottawa: Privy Council Office, 2022) at 247 [POEC Final Report].

ignore, bred a new governance model. Initially confined to drug crimes, the strategy expanded to other forms of criminality – corruption, organized crime, terrorism, the trade in weapons of mass destruction – and gradually solidified into the standard model.

In the contemporary era, instruments of a finance and property nature are common in the domain of criminal law. Architectural parts include the federal anti-money laundering and terrorist finance apparatus, an expansive edifice that imposes reporting and detection norms on entities involved in financial activities; federal confiscation laws that facilitate the seizure and forfeiture of criminal proceeds; provincial forfeiture laws that permit the taking of criminal proceeds through civil legal mechanisms; and a growing collection of rules aimed at enhancing the visibility of the financial aspects of crime.¹¹

It is notable that a similar theme was not present when the precursor to the *Emergencies Act*, the *War Measures Act*, was invoked to confront the Front de Liberation du Quebec (FLQ): no express attempt was made to ferret out FLQ financing, to intercept property, nor to govern, or detect, possible financial donors. By 2001, however, this theme had become common currency. The September 11, 2001 terrorism incident in the United States provoked the immediate sanctioning of terrorist financing, of financial support for terrorist activities and of terrorist property.¹² By 2022, the strategy was firmly entrenched. Seizing property and following money was orthodox policy.

Of course, this theme was not part of strategic thinking when the *Emergencies Act* was crafted. There is precious little historical record specifically relating to the section 19 powers conferred on the Governor in Council in the event of a public order emergency. Mention was made of the idea that a public order emergency did not confer any additional search and seizure powers which were not part of the *Criminal Code*.¹³ Bits and pieces of the Parliamentary debates acknowledge collisions between civil liberties and property rights but there is no hint of any proposed broad finance and

¹¹ See generally *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17; *Criminal Code*, RSC 1985, c C-46, ss 83.02-83.04 (PART II.1: Financing of Terrorism; see also PART XII.2: Proceeds of Crime); *Civil Forfeiture Act*, SBC 2005, c 29. On developments with respect to transparency, recent changes to corporate governance, federal and provincial laws require the establishment of beneficial ownership registries which aim to reduce the use of corporate vehicles to shield the identity of controlling owners.

¹² Within days of the September 11, 2001 event, the United Nations Security Council sanctioned the targeting of terrorist financing and terrorist assets: see *Security Council Resolution 1373*, SC Res 1373, UNSCOR, 2001, UN Doc S/INF/57 291.

¹³ *House of Commons Debates*, 33-2, vol 9 (27 October 1987) at 10811 (Perrin Beatty).

property centred model of governance. The clear influence of the modern model explains why tools of a financial and property character were deployed. It does not necessarily mean that such tools ought to be used to bridle an unruly protest. Two considerations might compete here in asking whether such tools are appropriate.

On the one hand, it is legitimate to ask whether it is proper, right or just to treat unlawful protestors and their financial supporters in a similar manner as terrorists or other agents of serious criminality. Financial governance evolved to counter serious crime. Ought an unlawful protest movement trigger a response reserved for extremely serious criminal activity? Arguably, it might be preferable to keep the finance-centric model more tightly moored to its central ambitions rather than placed in the service of capturing assets and impeding financial activity associated with a public order disruption.

On the other lies perhaps a more practical aspect. The tactic of disrupting finance and temporarily obstructing access to property is less prone to induce the violence of more confrontational policing action. Measures that target finance and property reduce the risk of direct physical harm. This latter appears to have carried some sway with the Rouleau Commission. The report notes that the tethering of assets, property, encouraged the ending of the protests while avoiding resort to physical violence.¹⁴ In this, finance-centric tools are not exactly a soft option. Their impact is serious and concerning, however gentler they may be than the alternative of outright brute force.

IV. AMENDING THE FEDERAL INSTRUMENT

The ascendancy of the modern finance-centered model of control makes it likely that policy makers will accept that this model ought to be available in the context of the governance of public order emergencies. The drift from serious crime to public order disturbances is troubling. The ‘softer option’ reasoning, together with the familiarity of this strategy, is apt to carry the day.

For the purposes of reforming federal emergency law, law-makers must be mindful of three considerations for the use of financial emergency measures.

First is the legal structure of the *Emergencies Act*. Since a declaration that a public order emergency exists confers access to section 19 powers, be they financial or otherwise, the statutory conditions governing a declaration are

¹⁴ POEC Final Report, *supra* note 10 at 264.

of prior paramountcy. Indeed, the bulk of debates around the 2022 use of the *Emergencies Act* centers on the legitimacy of the declaration rather than the measures themselves. Importantly, though, it is the measures that deliver the impact, that affect particular individuals.

Second, and relatively obviously, the list of matters upon which the Governor in Council might choose to regulate contained in section 19 ought to clearly connote the regulation of finance, of the interdiction of financial activities and of restraints on property. As noted above, it is not clear that lawmakers anticipated the use of financial measures when the Act was first enacted. Given the stakes outlined above, it is imperative that Parliament deliberate on the appropriateness of such measures for public order emergencies and properly constrain or enable their use in a public order emergency. Accurate signalling of which legal tools may be used is the bedrock of proper legal ordering, whether in an emergency context or any other.

Moreover, the Rouleau Commission recommends comprehensive changes to the definition of public order emergency.¹⁵ Any such change to the definition should be made in concert with a review of section 19. A broader definition might warrant a stricter approach to the list of powers to be used in response.

Finally, and perhaps only cosmetic, some instruction might be drawn from Ontario's emergency instrument.¹⁶ A national emergency does not neuter constitutional governance. Debates about the constitutional conformity of the 2022 exercise are presently percolating through the courts. While redundant, the federal instrument locates a reminder of the rule of law in the preamble through a direct reference to the Bill of Rights and the constitution. The Ontario instrument locates the emphasis on constitutional congruence in proximity to the very powers which risk impacting on constitutional rights and freedoms. Subsection 7.0.2 of the *Ontario Act* lists the emergency powers and the first section reads:

The purpose of making orders under this section is to promote the public good by protecting the health, safety and welfare of the people of Ontario in time of declared emergencies in a manner that is subject to the Canadian Charter of Rights and Freedoms.¹⁷

Rather than placed in the preamble, Ontario emergencies law locates the explicit reference to constitutional governance, to rights and freedoms, in immediate proximity to the list of possible emergencies powers. A similar

¹⁵ *Ibid*, at 314.

¹⁶ *Emergency Management and Civil Protection Act*, RSO 1990, c E.9.

¹⁷ *Ibid*, s 7.0.2(1) (See also the emergency powers listed in s 7.0.2(4)).

acknowledgement might feature in the *Emergencies Act* as a new subsection s. 19(4) and might also reference the Bill of Rights.

V. CONCLUSION

In light of the 2022 experience with the *Emergencies Act*, lawmakers must decide the critical question of whether an approach forged to deal with serious crime—financing and property restrictions — is appropriate for a public order emergency. A familiar tool may not be an appropriate one. If it is appropriate, then it ought to be clearly delineated as part of the section 19 toolbox. Emergency measures must be strongly constrained through precise statutory language and must be Charter compliant. The section 19 toolbox needs to be seriously examined and amended.

