

Constitutional Dimensions of the Consultation and Accountability Systems within Canada's *Emergencies Act*

D W I G H T N E W M A N , K C *

ABSTRACT

This article assesses the consultation and accountability mechanisms within Canada's *Emergencies Act*, focusing on their alignment with federalism and other elements of Canadian constitutionalism. Using the Rouleau Commission's Final Report as a backdrop, the article identifies gaps in these consultation and accountability mechanisms. The article argues that these gaps are of constitutional significance because the *Emergencies Act*'s effect of departing from standard constitutional norms makes it necessary for legality and legitimacy reasons to have sufficiently robust consultation and accountability mechanisms. The article proposes recommendations, including developing provincial consultation guidelines, implementing a non-whipped parliamentary confirmation vote, enhancing information accessibility for Parliamentarians, refining the inquiry process, and addressing the *Emergencies Act*'s non-compliance with case law on the duty to consult. The analysis thus contributes to ongoing discussions on harmonizing Canada's *Emergencies Act* with constitutional principles.

I. INTRODUCTION

The consultation and accountability mechanisms within Canada's *Emergencies Act*¹ need significant improvements in order to show greater respect for several dimensions of Canada's Constitution.

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

The recent experience with the first-ever invocation of the *Emergencies Act* in February 2022 to deal with the Freedom Convoy in Ottawa helps to highlight certain gaps in the operation of these consultation and accountability mechanisms. The Final Report of the Rouleau Commission² appropriately highlights some of these gaps. At the same time, it overlooks and even obscures others that warrant further attention.

An overriding issue concerns the Rouleau Commission's engagement with federalism. On matters like consultation with the provinces, the Rouleau Commission Report appropriately comments in ways oriented to advancing the spirit and principles of federalism within Canada. It is unfortunate, then, that one of the lines from the Report picked up in media coverage has been one suggesting a critique of federalism. The line that the emergency invocation resulted from a "failure of federalism"³ had an appealing alliteration but is ultimately confounding. The line in the Report appears mainly to be referencing the idea that some political actors operating within a federal system failed in aspects of their roles. There is no suggestion in the Report of needing to change the rules of federalism. On the contrary, I will argue that there is a need to reinforce some of the mechanisms under the *Emergencies Act* so as to ensure ongoing constitutional compliance with Canada's federal structure. That rhetorical line should be put aside in future discussions of the Report and of what is at stake. There are identifiable gaps in some elements of how the *Emergencies Act* and its implementation lined up with requirements of legitimacy and constitutional legality, and those need to be addressed to bring the regime into conformity with federalism and other constitutional considerations.

In this brief article, I first set out the dramatic constitutional effects associated with any invocation of the *Emergencies Act*, which involves departures from three significant dimensions of the Constitution as normally applicable: (1) constitutional rights, at least in respect of the potential imposition of additional limitations; (2) the separation of powers; and (3) federalism, with this last dimension being my main focus for much of this article. Second, in light of pertinent federalism case law, I argue that these dramatic constitutional effects mean that the legitimacy and even the legality of using the *Emergencies Act* depends upon the meaningful operation of sufficiently robust consultation and accountability mechanisms. Third, I will briefly turn to show how the Rouleau Commission highlights numerous

² 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) [Rouleau Commission Report]

³ Rouleau Commission Report, *supra* note 2, vol 1 at 248 and vol 3 at 272.

gaps in these mechanisms and their operations, while also suggesting that the Report insufficiently engaged with issues on Indigenous consultation.

My argument leads to several specific recommendations on how to improve the consultation and accountability mechanisms in the *Emergencies Act* regime so as to comply better with the normative structure of Canadian constitutionalism: (1) articulation of some guidelines on consultation with the provinces to be used in advance of an invocation; (2) articulation of expectations of a non-whipped vote on parliamentary confirmation so that it represents something distinct from another executive approval; (3) development of more robust mechanisms of information being before Parliamentarians; (4) better statutory definition of the inquiry process, with possibilities for more time if needed and with mandated faster federal government cooperation in providing information to the inquiry; (5) rapid attention to bringing the *Emergencies Act* into compliance with existing constitutional case law on the duty to consult combined with ongoing work on further Indigenous engagement.

II. THE *EMERGENCIES ACT* AND DEPARTURES FROM THE NORMAL CONSTITUTIONAL ORDER

The *Emergencies Act*, which became law in 1988 as a replacement for the by-then-notorious *War Measures Act*,⁴ is structured around the idea of permitting certain departures from the normal constitutional order so as to respond to specific categories of urgent circumstances, permitting “special temporary measures that may not be appropriate in normal times”.⁵ These departures relate to three dimensions of the Constitution as normally applicable.

First, steps taken under the *Emergencies Act* may involve limitations on constitutional rights grounded in objectives associated with responding to the emergency. While the preamble of the *Emergencies Act* speaks of the Governor-in-Council being subject to the Charter, it also references the potential abridgment of those rights under the *International Covenant on Civil and Political Rights* that are derogable.⁶ In doing so, it contemplates temporary derogations from rights, which can involve more severe limits on rights than are normally permitted under the limitations clause in Canada’s Charter, even while the *Emergencies Act* implicitly then attempts to suggest

⁴ *War Measures Act*, RSC 1985, c W-2 (repealed 1988).

⁵ *Emergencies Act*, *supra* note 1, preamble.

⁶ *Ibid.*

that those limitations would become justifiable because of the special temporary circumstances.⁷

Second, the invocation of the *Emergencies Act* involves significant transfers of power from the legislative branch of the federal government to the executive branch of the federal government, authorizing the executive branch to undertake various forms of regulations and orders to respond to the emergency. In doing so, it temporarily shifts ruling power significantly from the normal legislative process to an executive process of rule by regulations and orders. That is not literally a system of “martial law” as was sometimes rhetorically asserted by critics of the 2022 invocation, but it is a system of executive rule on matters related to responding to the emergency.

Third, the use of the *Emergencies Act* can shift to the federal executive some powers that would normally be in the hands of the provinces. Here, it is important to understand that many of the powers to deal with most kinds of emergencies would normally fall within the legislative powers of the provinces within section 92 of the *Constitution Act, 1867*. Pertinent provincial powers include the wide-ranging sections 92(13) and 92(16) concerning property and civil rights in the province and, more generally, matters of local concern. These powers generally include the maintenance of order within a province—from addressing wildfires to policing emergencies— and would extend to many dimensions of most kinds of emergencies, including even international emergencies.⁸ This is especially the case when these powers are accompanied by powers such as the section 92(14) provincial power over administration of justice in the province.

However, the courts have held that the federal government’s constitutional powers permit it to temporarily take up areas normally within provincial jurisdiction so as to respond to emergency situations. This power is based on the language concerning “peace, order, and good government” or “POGG” within the opening of section 91 of the *Constitution Act, 1867*, as interpreted in the courts to include a POGG emergency power. To constitutionally take into federal jurisdiction powers that would normally be provincial, the federal Parliament must enact legislation that makes a sufficiently explicit declaration of an emergency, must have a sufficient basis for reasonably believing that it is acting in response to an emergency (with

⁷ See e.g. the enumerated list of potential restrictions in *Emergencies Act*, *Ibid.*, s. 19(1) on public order emergencies.

⁸ I am in accord with Rouleau Commission, *supra* note 2, vol 1, at 17. The basic reason is that provinces have jurisdiction over so many matters within the province that they can contribute to the solution to most kinds of emergencies, including even those that have international dimensions if there are aspects that are within the province and its jurisdiction.

this element to be tested against the record), and must be acting in a way that is genuinely temporary.⁹ The *Emergencies Act* is a piece of legislation enacted in advance, lying dormant until there is an emergency, in light of these requirements that relies upon this POGG emergency power for its constitutional validity. On the types of emergencies in the Act, Parliament delegates its role in declaring an emergency to a process set out within the legislation for the invocation of the emergency legislation.

At the same time, it is worth being clear that the *Emergencies Act* does not use the entirety of the federal POGG emergency power or respond to the full range of emergencies that the POGG emergency power would cover.¹⁰ Indeed, there would be different types of emergencies recognized under the POGG emergency power that are not covered by the *Emergencies Act*, such as an emergency response to certain types of economic circumstances. The leading case on the POGG emergency power, the *Anti-Inflation Reference*, concerned emergency legislation in response to an inflation crisis that would not fit within any of the categories of the *Emergencies Act*.¹¹

III. THE NEED FOR THE MEANINGFUL OPERATION OF ROBUST CONSULTATION AND ACCOUNTABILITY MECHANISMS

The consultation and accountability mechanisms in the *Emergencies Act* are vital. While the *Anti-Inflation Reference* envisioned Parliament declaring an emergency, the delegation in the *Emergencies Act* envisions the invocation of the normally dormant Act in response to an emergency through a series of steps in the Act. These steps substitute for the specific requirements for the use of the POGG emergency power set out in the *Anti-Inflation Reference*. As stated before, that case envisioned that Parliament needed to make an explicit declaration of an emergency and needed to be acting based on a sufficient basis for a reasonable belief that it was responding to an

⁹ Re: *Anti-Inflation Act Reference*, [1976] 2 SCR 373 at 463-65 (Beetz J., in dissent but not on these factors, searching for these elements), 422 and 425-26 (Laskin C.J.C. considering these same factors).

¹⁰ The legislative history behind the *Emergencies Act* included claims that it provided for “an appropriately safeguarded statute to deal with a full range of possible emergencies” (*Bill C-77: An Act to Provide for Safety and Security in Emergencies: Working Paper* (Emergency Preparedness Canada, 1987) at 50 [*Working Paper*]). This claim is not completely correct if one is thinking of the definition of “emergency” involved in the POGG emergency branch.

¹¹ *Anti-Inflation Reference*, *supra* note 8.

emergency.¹² There is a constitutional significance to Parliament itself making the explicit declaration of the emergency and Parliament itself having the sufficient basis for a reasonable belief. For the *Emergencies Act* not to deviate from the constitutional standard set for the use of the POGG emergency power as an exceptional departure from the constitutional division of powers, it needed to contain sufficient safeguards on the use of the *Emergencies Act*, which ultimately included a number of consultation and accountability mechanisms. Given the departure of the *Emergencies Act* from the strict terms of the *Anti-Inflation Reference*, it follows that these mechanisms need to be sufficiently robust and to function sufficiently robustly if the *Emergencies Act* is to continue to meet the constitutional standards for the use of the *Emergencies Act*. In other words, underlying considerations of federalism case law implicitly hold the consultation and accountability mechanisms in the *Emergencies Act*, as well as their implementation, to constitutional standards.

As the Rouleau Commission states a number of times, in the circumstances of emergencies, the *Emergencies Act* allows for rapid decisions with fuller deliberation later.¹³ That is an appropriate approach within the context of emergency circumstances, subject to the presence of sufficient safeguards on the rapid decisions. The need for sufficient safeguards is both a general normative requirement for the acceptability of rapid decisions with deliberation later and a legal requirement for the constitutional acceptability of such a process. In other words, both the legitimacy and the legality of the use of the *Emergencies Act* hinge upon the presence and robust use of sufficient safeguards within the Act. These safeguards include legal thresholds for the existence of an emergency, but they also contain a set of consultation and accountability safeguards.

Thus, in advance of the invocation of the *Emergencies Act*, there are various legal requirements, and these include a requirement of consultation with the provinces (and, in certain contexts, requirements of provincial consent).¹⁴ The legislative history behind the *Emergencies Act* shows that this particular element was meant to “provide an opportunity for negotiations and compromise consistent with the spirit of federalism”.¹⁵ That legislative history also shows that the drafters of the *Emergencies Act* contemplated a full sense of “consultation”:

¹² *Ibid.*

¹³ See e.g. Rouleau Commission Report, *supra* note 2, vol 1, at 186-87.

¹⁴ *Emergencies Act*, *supra* note 1, ss. 14, 25, 35, 44.

¹⁵ *Working Paper*, *supra* note 9, at 45.

The *Emergencies Act* therefore includes appropriate procedures in respect of provincial consultation. ‘Consultation’ in this context is to be interpreted in its fullest dictionary sense of not only exchanging information but also seeking the advice and taking into consideration the interests and views of the provincial governments which may be affected.¹⁶

Much jurisprudential consideration of consultation has taken place over the last two decades in the context of the section 35 duty to consult Indigenous peoples,¹⁷ and I would suggest that the full sense of consultation envisioned by the drafters is along the lines of the concept of “meaningful consultation” in that jurisprudence. It is meant as a robust requirement in advance of the declaration of an emergency.

Parliamentary oversight is a further legal requirement, although the parliamentary confirmation (and forms of ongoing oversight if an emergency continues) follows upon the initial decision to invoke the Act. The *Emergencies Act* maintains the requirement for the formal declaration of an emergency. That declaration is now by an executive act. But the acceptability of that hinges upon a parliamentary confirmation within a short time period, based on a sufficient record. Indeed, the legislative history suggests that this was to be a “full justification” before Parliament if to be an appropriate safeguard.¹⁸ That makes sense, given that the *Anti-Inflation Reference* actually contemplated Parliament making the determination of whether there was an emergency in advance of making a formal declaration of an emergency¹⁹—a robust assessment in Parliament is essential to the constitutional legality of the application of the *Emergencies Act*.

It is worth noting that the *Emergencies Act* was adopted in a historic period when free votes were not uncommon and, indeed, were often used on matters of potential moral disagreement, where this process sought to respect Parliament as a parliamentary representative body within the deepest traditions of Parliaments. Tighter party discipline has made free votes less common.²⁰ This historical change has arguably undermined an

¹⁶ *Ibid.* at 55.

¹⁷ See generally Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich, 2014); Dwight Newman, “The Section 35 Duty to Consult”, in Peter Oliver, Patrick Macklem & Nathalie des Rosiers, eds., *Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017).

¹⁸ Working Paper, *supra* note 9, at 52.

¹⁹ *Anti-Inflation Reference*, *supra* note 8.

²⁰ On trends on free votes, the free votes on major moral issues through the second half of the twentieth century, and the mid-1980s efforts to encourage more free votes, which would then have been within the assumptions of drafters, see Lucie Lecomte, *Party Discipline and Free Votes*, Library of Parliament Publication No. 2018-26-E (28 June

underlying assumption that was present in the minds of those adopting the *Emergencies Act* that Parliament, as a parliamentary representative body, would carry out scrutiny of the full justification. A whipped vote, by contrast, amounts to little more than another executive stamp of approval. There is arguably need to consider whether aspects of the *Emergencies Act* safeguards continue to have sufficiently robust standards within the statute itself.

Ongoing steps to review the extraordinary step of invoking the *Emergencies Act* are effectively also part of the safeguards structure that makes the substitution for parliamentary action potentially permissible. Obviously, even while it is part of what they protect, these safeguards are not just about federalism. The statutory requirement for an inquiry that lays its report back before Parliament²¹ is related to informing Parliament on the effects of the pre-delegation mechanism of the *Emergencies Act* in the context of potential impacts on rights, on separation of powers, and on federalism, making it also part of the architecture that bears on maintaining the legitimacy and constitutional legality of the process. It is vital that the inquiry be able to carry out a full examination so that it can also function as a strong safeguard.

IV. GAPS HIGHLIGHTED BY THE ROULEAU COMMISSION AND FURTHER GAPS

While I have, in one sense, already set out my main claims that concern some requirements for the legitimacy and legality of invoking the *Emergencies Act*, discussing matters today without referring to the Rouleau Commission itself would be to approach matters in an unnecessarily detached way when its report can actually further ground and render tangible some aspects. Anyone, whether in media or academia, who attempts to boil the Rouleau Commission down to one line dramatically oversimplifies a rich report. While the report indicates an acceptance of the invocation of the *Emergencies Act*, it also highlights some real gaps in compliance with pertinent standards.²² In relation to the key dimensions of

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²¹ *Emergencies Act*, *supra* note 1, s. 63.

²² Just to offer an example to illustrate the point that the Report did indicate some real gaps generally, in terms of elements over the line, the Report identifies some specific aspects of the financial freeze measures put in place, notably measures suspending vehicle insurance, as “inappropriate in principle”: *Rouleau Commission Report*, *supra* note 2, vol 1, at 245. And, while it somewhat defers to exigencies on the point, it also suggests that the lack of review mechanisms on the broader financial freeze mechanisms was also a failing within the framework adopted: vol 1, at 244.

consultation and accountability mechanisms, it effectively suggests that aspects of federal action were dancing on the line of acceptability. At the same time, even within a rich report, there is a troubling gap within the Report on Indigenous consultation which also warrants attention.

In its commentary on the implementation of consultation and accountability mechanisms, the Report highlights elements where the federal government's actions seem to have been right on the line of acceptability. For example, the Report tends to suggest that the consultation with the provinces was of questionable sufficiency.²³ While tending ultimately to accept it in light of some imprecisely described general engagement between government officials, the Report suggests that the meeting of First Ministers considered on its own could well have been insufficient.²⁴ By the time it occurred, that meeting saw the Prime Minister enter with a plan to invoke the *Emergencies Act* which he was going to change only if he heard an immediate alternative solution,²⁵ and it did not thus reflect a full engagement with interests and views of provinces as inherent in the consultation requirement.²⁶ The Rouleau Commission Report fairly notes that it is difficult to set precise statutory rules on consultation with provinces in the range of kinds of emergencies that could occur and thus declines to offer a specific recommendation on the point.²⁷ But there must be ongoing attention to this issue which bears upon a departure from meeting the constitutionally necessary safeguards for invoking the *Emergencies Act*.

It is also notable that the Rouleau Commission highlights needs for adaptations to the inquiry process itself to enable sufficient accountability on invocations of the *Emergencies Act*. Courageously doing so at the possible risk of some drawing adverse inferences on its own process, the Commission is ready to say that future inquiries need better, faster supply of information about the invocation from the federal government and also need the possibility of a time period going beyond one year to fully study all aspects of an invocation.²⁸ Serious engagement with these recommendations must be recognized as an imperative with constitutional implications.

On one more problematic note, the Rouleau Commission speaks of needing discussions on developing appropriate parameters for consultation

²³ *Ibid.*, vol 1, at 216.

²⁴ *Ibid.*

²⁵ *Ibid.*, vol 1 at 117 and vol. 3 at 101.

²⁶ *Ibid.*, vol 3 at 240.

²⁷ *Ibid.*, vol 3 at 317.

²⁸ *Ibid.*, vol 3 at 321.

with Indigenous peoples on uses of the *Emergencies Act*.²⁹ While there may not have been sufficient material before the Commission for it to say more, this recommendation falls short on the federal government's consultation obligations to Indigenous peoples. The judicial articulation of the duty to consult doctrine since 2004 has set up a definitive legal requirement for proactive consultation with rights-bearing Indigenous communities in advance of a government decision that risks adversely impacting upon their section 35 Aboriginal or treaty rights.³⁰ The *Emergencies Act*, enacted before 2004, has had no amendments to take account of this duty. While the matter is not without complexities since some lower court case law has suggested exceptions to the duty to consult in emergency decision-making,³¹ there is scholarship that highlights appropriate distinctions in phases of emergencies such that it is clear that the duty to consult would logically apply to some decisions being taken in the context of emergencies.³² Even if there are to be larger discussions about engagement with Indigenous peoples on the *Emergencies Act* in the context of developing alignment with the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* as required in federal statute,³³ complying with the duty to consult as it exists in presently existing domestic Canadian law is not an optional matter for discussion but something that must be addressed.

V. CONCLUSIONS AND RECOMMENDATIONS

The legitimacy and constitutional legality of the use of the *Emergencies Act* depends upon the Act containing robust safeguards and these safeguards being implemented in robust ways. To the extent that either fails, serious constitutional problems arise.

That point leads to several key recommendations. First, work on the elements concerning consultation with the provinces needs to go farther than what the Rouleau Commission suggests. While the Report is right that situations could be sufficiently variable as to make statutory amendments

²⁹ *Ibid.*, vol 3 at 318.

³⁰ *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511. See generally Newman, *Revisiting the Duty to Consult*, *supra* note 15.

³¹ See e.g. *R. v. Lefthand*, 2007 ABCA 206 at para. 45; Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009) at 34.

³² See generally Courtney E. Kirk, *The Sound of Silence: First Nations and British Columbia Emergency Land Management* (LL.M. thesis, University of Saskatchewan, 2015).

³³ *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc. A/RES/61/295 (13 September 2007); *United Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s 5.

on this point too challenging, the articulation of guidelines would be a real improvement. Second, there needs to be attention to the altered context of how Parliament's confirmation votes operates, the expectation of a non-whipped vote should be articulated. Third, there should be more robust mechanisms of information being before Parliamentarians. Fourth, the inquiry process needs to be better defined in the statute, and there needs to be better, faster cooperation with it from the federal government than took place if it is to completely fulfill its part of the safeguards architecture. This last point may seem technical, but it concerns the lack of availability of information to the Commission in the early going, which affected the overall process unfavourably—the federal government needs to have its documents in order so the inquiry can do its necessary work. Finally, there needs to be rapid attention to bringing the *Emergencies Act* into compliance with existing constitutional case law on the duty to consult, even while there should be ongoing conversations with Indigenous partners more generally. Constitutional standards like those of federalism need to help shape a better *Emergencies Act* for the future.

