Inquiries as Accountability Mechanisms in Times of Emergency

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ABSTRACT

The *Emergencies Act* provides for a series of accountability mechanisms to compensate for the fact that a declaration of a state of emergency by the executive branch bypasses normal democratic processes, institutions and deliberations. One such accountability mechanism is the requirement in section 63 that an inquiry "be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency." However, as currently drafted, section 63 is a source of considerable ambiguity, making it difficult to achieve the accountability objectives of the *Emergencies Act*. More precisely, it does not indicate that the inquiry must have appropriate powers or that it must be public or independent. The purpose of the inquiry is not clear, nor is it clear whether the government is authorized to further specify its mandate. And it is given a very compressed time frame to complete its work. In what follows, I discuss how these ambiguities open the door to the politicization of the inquiry, and suggest possible amendments to the *Emergencies Act* to strengthen this accountability process that is essential in a democracy governed by the rule of law, particularly in times of emergency.

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INTRODUCTION

When, on April 25, 2022, the Governor in Council appointed Justice Paul Rouleau to conduct the Public Inquiry into the 2022 Public Order Emergency[1], the very decision to establish the inquiry had in fact already been made 35 years ago. In 1988, the federal Parliament passed the *Emergencies Act*[2], which establishes a legal framework for when and how the government can declare a state of emergency and what measures can be taken during its existence. In addition, to compensate for the fact that a declaration of a state of emergency by the executive branch bypasses normal democratic processes, institutions and deliberations, the *Emergencies Act* provides that any such declaration "triggers a series of review, oversight, and accountability mechanisms that serve as a check against governments using the Act when they should not, and as a means to restrain overreach."[3] The establishment of an inquiry is one such accountability mechanism. Thus, in declaring a state of emergency on February 14, 2022, the government was well aware that its decision would be closely scrutinized after the fact.

The Order in Council establishing the Public Order Emergency Commission (POEC) provides that it is created under Part I of the *Inquiries Act*.[4] Interestingly, the government was not obliged to choose this option, since the statutory provision mandating an inquiry is silent on its characteristics:

> 63 (1) The Governor in Council shall, within sixty days after the expiration or revocation of a declaration of emergency, cause an inquiry to be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency.

This provision does not indicate that the inquiry must have the powers of a commission of inquiry under Part I of the Inquiries Act, or that it must be public or independent. The purpose of the inquiry is not clear, nor is it clear whether the government is authorized to further specify its mandate. Furthermore, the law stipulates that the Final Report must be submitted no later than three hundred and sixty days after the expiration or revocation of

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1 Order in Council PC 2022-392.

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

3 Canada, *Report of the Public Inquiry into the 2022 Public Order Emergency* (Ottawa: Public Order Emergency Commission, 2023) (Chair: Hon Paul S. Rouleau) [Rouleau Report], vol 1: Overview, at 247.

4 *Inquiries Act*, RSC 1985, c. I-11.

the declaration of emergency.[5] How would an inquiry be able to carry out its statutory duty on such a compressed timeframe?

In the next few pages, I address these ambiguities and suggest how the *Emergencies Act* could be amended to allow the inquiry to play its full role as an accountability mechanism following a declaration of emergency.

I. A PUBLIC AND INDEPENDENT INQUIRY

As alluded to above, the government chose to establish the POEC under Part I of the *Inquiries Act.* While this choice is not mandated by the *Emergencies Act*, this is entirely appropriate given the role that the inquiry is called upon to play in the context of that statute.

Commissions of inquiries created under the *Inquiries Act* have been part of Canadian governance for decades and an impressive number have been created over the years in a variety of contexts.[6] Under normal circumstances, federal and provincial legislation delegates to governments the authority to create commissions to investigate matters of public importance.[7] These commissions are particularly appropriate in cases where an independent, non-partisan and transparent assessment of a particular situation is required.[8] They can also help to restore or enhance public confidence, and inform and educate the public, thereby contributing to the strengthening of democratic institutions.

The inquiry provided for in section 63 of the *Emergencies Act* is one of a series of measures designed to hold the government to account. This accountability can only be achieved if the inquiry is conducted publicly, independently and with the powers necessary to obtain the information it needs and the answers the public can legitimately demand. By establishing a commission of inquiry under the *Inquiries Act*, the government has empowered the inquiry to fulfill its role. I believe it is essential to remove any ambiguity about the public and independent nature of the inquiry following a declaration of emergency, and I support the Commission's

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[5] *Emergencies Act*, *supra* note 2, s. 63 (2).

[6] See notably Simon Ruel, *The Law of Public Inquiries in Canada* (Toronto: Carswell, 2010) and Ronda Bessner & Susan Lightstone, *Public Inquiries in Canada: Law and Practice* (Toronto: Thomson Reuters, 2017).

[7] For instance, s. 2 of the *Inquiries Act*, RSC 1985, c. I-11, authorizes the federal government to create commissions to inquire into "any matter connected with the good government of Canada or the conduct of any part of the public business thereof", while under s. 3(1) of the *Public Inquiries Act, 2009*, SO 2009, c 33, Sch 6, the government of Ontario can do so in relation to "a matter [considered] to be in the public interest."

[8] Ruel, *supra* note 6 at 2-3.

recommendation 37 to that effect: "Section 63 of the *Emergencies Act* should be amended to require that the inquiry be called pursuant to Part I of the *Inquiries Act*."[9]

II. AN INQUIRY INSULATED AGAINST POLITICIZATION

Amending the law to impose a requirement to establish the inquiry under the *Inquiries Act* and to make it a public commission of inquiry does not, however, resolve all of the ambiguities noted above. Specifically, the provisions of the *Emergencies Act* relating to the Commission's mandate do not entirely eliminate the risks of politicization and weakening of the Commission's independence.

In a number of important respects, the POEC is very similar to public commissions of inquiry that can be established under federal and provincial legislation. It is also unique in that the decision to establish it is not left to the government of the day: the *Emergencies Act* requires that an inquiry be held as soon as a state of emergency is revoked or has expired. Such legislation is highly unusual. The decision to set up a commission of inquiry is generally the result of the exercise of a discretionary power delegated by statute. For example, the federal *Inquiries Act* delegates to the government the power to establish an inquiry if it "deems it expedient"[10], and the Ontario *Inquiries Act* provides that a commission may be established to inquire into matters that the government "consider[s] to be in the public interest". [11] Such provisions give governments considerable leeway to decide whether or not to conduct a public inquiry, and deciding whether a set of circumstances is of public importance or worthy of attention is not made in the abstract, but rather in light of concrete facts and a particular context.

The *Emergencies Act* takes a radically different approach in this regard. By making the creation of an inquiry a legal requirement, it indicates that whatever the particulars of the situation that led to the declaration of a state of emergency, such a declaration is, in and of itself, a matter of public importance, given the profound implications it has for any democracy governed by the principle of the rule of law.[12] Moreover, imposing a legal obligation to create an inquiry prevents the government from using this mechanism for partisan purposes. In the past, governments have been accused of exercising its discretion to set up commissions of inquiry to

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[9] Rouleau Report, *supra* note 3, vol 1 at 263.

[10] *Inquiries Act*, *supra* note 7.

[11] *Ibid.*

[12] Nomi Claire Lazar and Jocelyn Stacey, "Introduction" (2023) 46:1 Man LJ, 10.

deflect criticism or delay action, or to unjustifiably refuse to set them up. By depoliticizing the decision to create an inquiry, Parliament ensures that partisan considerations will not undermine the accountability processes set out in the legislation.

But while the *Emergencies Act* depoliticizes the decision to conduct an inquiry, it seems to leave open the possibility for the government to re-insert its political or partisan agenda through the articulation of its terms of reference. As it happens, the very mandate of the POEC suggests that this is not merely hypothetical.

Indeed, the *Emergencies Act* indicates that "an inquiry [is] to be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency."[13] Yet the order in council, after more or less repeating these words, directs the inquiry as follows:

> (ii) [...] the Commissioner [must examine] issues, to the extent relevant to the circumstances of the declaration and measures taken, with respect to
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> (A) the evolution and goals of the convoy and blockades, their leadership, organization and participants,
>
> (B) the impact of domestic and foreign funding, including crowdsourcing platforms,
>
> (C) the impact, role and sources of misinformation and disinformation, including the use of social media,
>
> (D) the impact of the blockades, including their economic impact, and
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> (E) the efforts of police and other responders prior to and after the declaration [...].[14]

With the benefit of hindsight, it is difficult to dispute that, in the specific case of the inquiry into the events of February 2022, each of these elements was relevant to an assessment of the circumstances that led to the declaration of emergency and the justifications that were produced to support it. To some extent, such a list even allowed the POEC to quickly focus its efforts on compelling leads. However, the development of such a list could potentially thwart the objectives of the *Emergencies Act*, as it could allow the government to subtly guide the work of the Commission by inviting it to focus on certain issues rather than others. In the context of limited time, this may deprive a commission of the space to pursue its own lines of inquiry, including those that are likely to embarrass the government. The risks of manipulation, instrumentalization or repoliticization should not be underestimated.

Sub-paragraph (iii) of the order in council raises similar concerns by requiring the POEC to:

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[13] *Emergencies Act*, *supra* note 2, s. 63(1).

[14] Order in Council PC 2022-392.

> (iii) [...] set out findings and lessons learned, including on the use of the Emergencies Act and the appropriateness and effectiveness of the measures taken under the Emergency Measures Regulations and the Emergency Economic Measures Order, and to make recommendations, as pertains to the matters examined in the Public Inquiry, on the use or any necessary modernization of that Act, as well as on areas for further study or review [...].[15]

Given the objectives of the *Emergencies Act*, a commission's mandate should be limited to the essentials: did the government have good reasons for declaring a state of emergency and did it take the appropriate action in the circumstances? Since a commission's investigative work allows it to develop a unique experience and understanding of the issues involved, it may be tempting to take advantage of this by asking it to make recommendations on the issues that were the subject of its work. Thus, as the *Emergencies Act* was first invoked, it may not have been unreasonable to ask the POEC to set out the "lessons learned ... on the use of the *Emergencies Act* ... and to make recommendations ... on the use or any necessary modernization of that Act." But it would also have been possible, and preferable, to have another entity examine these issues, after the report was filed. Asking for more work than is essential diminishes the amount of time the Commission can devote to the core of its mandate, while opening the door to instrumentalization of the Commission for partisan purposes.

I would therefore suggest that the Act be amended to require the government to "cause an *investigative* inquiry to be held", rather than a policy inquiry, and that its mandate be specified in the Act as limited to inquiring "into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency".

III. AN INQUIRY WITH ENOUGH TIME TO DO THE WORK

The *Emergencies Act* provides that the report of the public inquiry held under its terms must "be laid before each House of Parliament within three hundred and sixty days after the expiration or revocation of the declaration of emergency."[16] Considering that the government has up to sixty days after the emergency formally terminates to set up an inquiry and appoint the Commissioner, this leaves three hundred days for the Commission to do its work. In its final report, the POEC suggests that the logistical issues that precede and follow what can be considered the core of

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[15] *Ibid.*

[16] *Emergencies Act*, *supra* note 5, s. 63(2).

the Commission's work mean that the Act actually imposes a shorter time frame than that imposed on any other commission of inquiry.[17]

These strict time constraints are intended to ensure that political actors who have declared a state of emergency under the *Emergencies Act* are held to account as soon as possible and preferably during their term of office. Imposing a short deadline is therefore not arbitrary or wholly undesirable. But while there is a case for not letting the work of the Commission drag on, the Commission must be given a reasonable amount of time to complete the work that is required of it.

Most observers have limited knowledge of the kind of work involved in an investigative commission – which, as I suggested above, is the kind of commission that the *Emergencies Act* should envisage. Investigative commissions are understood to be about establishing "what happened", mainly through documentation and witness testimony, and writing a report about it. This is indeed a very large part of what needs to be done, and it is a daunting task. Few people can even imagine the work involved in preparing a single witness, let alone dozens of them, and anyone who has ever tried to string together a coherent and readable paragraph or two reconciling multiple accounts of a complex situation can appreciate the immense challenge of writing a report of the magnitude of that filed by the POEC. But while most people know little about each of these tasks, they generally know nothing about the role that research plays in all of this. I want to highlight this part of the work of an investigative commission, so that it can be considered in assessing how much time an investigative commission should have to fulfill its mandate.

An investigative commission cannot establish "what happened" without knowing what it needs to find: how does one know which facts are relevant? How can one make sense of the facts that have been found? To what extent is it possible to know in advance what is and what is not relevant to the Commission's mandate? Substantial research and expertise are required to answer these questions:

> [W]hat we call facts, how we decide what facts to present, and how we choose to describe what we are looking for and what we see, are not data given immediately to our senses. They are largely determined by the social, economic, and political judgements we make.[18]

Thus, in the case of the POEC, a number of research papers were quickly commissioned to help guide the fact-finding. These papers covered

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[17] See, for example, Rouleau Report, *supra* note 3, vol 4: Process and Appendices, at 38ff.

[18] Roderick A. Macdonald, "Interrogating Inquiries" in Allan Manson & David Mullan, eds, *Commissions of Inquiry – Praise or Reappraise?* (Toronto: Irwin Law, 2003) 473 at 479.

a wide range of topics directly related to the Commission's mandate – legal aspects of crowdfunding, challenges posed by cryptocurrency, essentials of freedom of expression and freedom of peaceful assembly, issues surrounding mis-, dis-, and mal-information and social media, issues around police powers, policing and public order, studies on various social cleavages, the role of intelligence in emergency contexts, the functioning of and normative justification for the *Emergencies Act*, and so on.[19] These documents were gradually made public during the first months of the proceedings. One of the purposes of these studies was to facilitate the preparation of witnesses by highlighting important aspects of some of the issues raised by the events that led to the declaration of emergency. As the hearings progressed, new facts came to light. Usually, the new information would have been shared and discussed with the research council for them to conduct additional research if needed. But the prosecutors did not have time to do this because they were so busy keeping up with the pace of the hearings. This necessary back-and-forth between research and the work of counsel was nearly impossible to accomplish in the time available.

A number of expert roundtables were held following the hearings. The purpose was both to save time – commissioning additional written studies would not have provided the results in a timely manner – and to allow a larger number of people from different backgrounds and opinions to debate live on questions suggested by the research team and then reviewed and approved by the POEC team. This was a useful exercise, but an additional two or three weeks between the end of the hearings and the beginning of the roundtables would have allowed the POEC to take stock of the facts established in the hearings and to clarify questions about how to interpret those facts. The experts would have been able to answer more precise questions and contribute even more meaningfully to the deliberations, and the POEC would have benefited even more from the richness and variety of the expertise gathered.

I therefore agree with the POEC's assessment that the current time frame set out in the Act is inadequate. And while a reasonable amount of time is not easy to determine in the abstract, I join with those who support the following recommendation:

> Recommendation 50. The *Emergencies Act* should be amended such that:
> a. The 360 days within which an inquiry must complete its work should start to run on the day that the Order in Council creating the Commission is made.
> b. That "the Commissioner heading a public order emergency inquiry should have

[19] The papers are reproduced in Rouleau Report, *supra* note 3, vol 5: Policy Papers.

> the power to extend the time within which the Commission's report must be produced by up to six months.[20]

IV. Conclusion

As currently drafted, section 63 of the *Emergencies Act* is a source of considerable ambiguity, making it difficult to achieve the accountability objectives of the legislation. The experience of the POEC is instructive: the decision to establish the inquiry under the *Inquiries Act* was a sound one, but the breadth of the mandate given to the Commission, combined with the short time it was given to complete its work, point clearly to the need to revise the *Emergencies Act* to strengthen the accountability process that is essential in a democracy governed by the rule of law, particularly in times of emergency.

[20] Rouleau Report, *supra* note 3 at 264.