Rouleau's Overreach: (Mis)interpreting Section 63 of the *Emergencies Act*

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ABSTRACT

Commissioner Paul Rouleau's conclusion that "the very high threshold for invocation [of the *Emergencies Act*] was met" unsurprisingly dominated coverage of his final report. This paper argues that, in opining on the scope of the government's authority, Commissioner Rouleau exceeded his own. Section 63(1)'s text, context, and legislative history all confirm that the purpose of the mandatory public inquiry is to find facts concerning "the circumstances that led to the declaration" and "the measures taken", not to answer questions of law or of mixed law and fact. With judicial review applications underway in the Federal Court that will determine whether proclaiming a "public order emergency" under section 17(1) was warranted, Commissioner Rouleau's intervention invited a risk of duplication and a multiplicity of proceedings. It also established a problematic precedent for future commissioners who, under the Act, need not be current or former judges, or even lawyers, but who will generally be appointed by the same government that invoked the Act. This paper makes the case for why Commissioner Rouleau ought not to have pronounced on the "threshold," even in the face of widespread expectation from the public and from inquiry participants that he would do so.

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I. INTRODUCTION

By hearing's end, reporters and pundits generally expected Commissioner Rouleau to determine, as one media report put it, "whether the Trudeau government met the threshold required to invoke" the *Emergencies Act*.[1] This "threshold" is set out in section 17(1) of the Act, which authorizes the Cabinet to declare a "public order emergency" — as it did on February 14, 2022[2] — when it "believes, on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures."[3]

Commissioner Rouleau ultimately did as most expected him to do: he opined on whether the Cabinet had the requisite "belie[f], on reasonable grounds", to authorize invoking the Act. He concluded that, "in this case, the very high threshold for invocation was met".[4] This determination dominated media coverage of the report.[5]

It was an error for Commissioner Rouleau to weigh in on this issue. This paper explains why.

The Commissioner is not himself to blame for overstepping. The Order in Council appointing him was drafted in a manner that plausibly invited him to do so: the Order in Council instructed him to "set out findings and lessons learned, including on the use of the *Emergencies Act* and the appropriateness and effectiveness of the measures taken."[6] This, the Commissioner held, authorized him to comment on whether it was

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1 Catharine Tunney, "Memo advising PM to invoke *Emergencies Act* admitted its interpretation was 'vulnerable': docs", *CBC News* (November 18, 2022), online: <www.cbc.ca/news/politics/pco-emergencies-act-1.6656247> [perma.cc/5GMX-3UF4].

2 Canada, Minister of Justice, *Proclamation Declaring a Public Order Emergency*, SOR/2022-20 (Ottawa: MoJ, 14 February, 2022).

3 *Emergencies Act*, RSC 1985, c 22 (4th Supp), s 17(1).

4 Canada, *Report of the Public Inquiry into the 2022 Public Order Emergency*, vol 3: Analysis (Part 2) and Recommendations (Ottawa: POEC, 2023) (Chair: Hon Paul S. Rouleau) at 272 [*Final Report*, vol 3].

5 See e.g. Catharine Tunney, "Memo advising PM to invoke *Emergencies Act* admitted its interpretation was 'vulnerable': docs", *CBC News* (November 18, 2022), online: <www.cbc.ca/news/politics/pco-emergencies-act-1.6656247> [perma.cc/5GMX-3UF4]; Stephanie Taylor & David Fraser, "The Canadian Press, 'Liberals' decision to invoke *Emergencies Act* justified, but 'regrettable' it happened", *Canadian Press* (February 17, 2023), online: <www.thestar.com/business/2023/02/17/liberals-decision-to-invoke-emergencies-act-justified-commission-says.html> [perma.cc/H5GA-8N68].

6 *Order in Council PC 2022-392* (Ottawa: PC, 25 April 2022) at para (a)(iii) [emphasis added] [*Order in Council*].

appropriate for Cabinet to invoke the Act, that is, whether the "threshold for invocation was met".

Predictably, and unfairly, the government was accused of "select[ing] the judge of its own momentous cause" by hand-picking a commissioner who then vindicated the government's invocation of the *Emergencies Act*.[7] This could and should have been avoided — and it would have been, if the Order in Council had hewed more closely to the Act itself.

There are at least three reasons why, notwithstanding the ambiguous drafting of the Order in Council, Commissioner Rouleau should not have opined on the "threshold" issue.

First, in doing so, the Commissioner exceeded the scope of section 63(1) of the *Emergencies Act*. It provides for an inquiry "into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency".[8] Section 63 makes no mention of the threshold for declaring a national emergency, or whether that threshold had been met when the Cabinet invoked the Act. Nor, in the scheme of the Act, does section 63 make the threshold an intended subject of an inquiry.

Second, as a commissioner under the *Emergencies Act* and the *Inquiries Act*[9] (under which he received his commission[10]), Commissioner Rouleau did not do his work as a member of the judiciary. Properly construed, his role did not entail pronouncing on disputed questions of law and of mixed law and fact.

Third, the question of whether the government acted lawfully is properly the subject of judicial review and is presently before the Federal Court.[11] Commissioner Rouleau invited the risk of inconsistent findings and conclusions by duplicating the court's task and preempting its determinations.

Commissioner Rouleau should have forborne from answering the question that has preoccupied coverage of the Commission. He should have

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[7] Ryan Alford, "*Emergencies Act* will not be an even bigger threat to free speech", *National Post* (February 21, 2023), online: <nationalpost.com/opinion/ryan-alford-emergencies-act-will-now-be-an-even-bigger-threat-to-free-speech> [perma.cc/AB9G-Z7SJ].

[8] *Emergencies Act*, RSC 1985, c 22 (4th Supp), s 63(1) [emphasis added] [*Emergencies Act*].

[9] *Inquiries Act*, RSC 1985, c I-11.

[10] Order in Council, *supra* note 6 at para (a) [emphasis added].

[11] See Canadian Civil Liberties Association, Press Release, "CCLA Will Fight Invocation of *Emergencies Act* in Court" (17 February 2022), online: <ccla.org/major-cases-reports/ccla-will-fight-invocation-of-emergencies-act-in-court-2/> [perma.cc/BWH2-3W7V]; Canadian Constitution Foundation, Press Release, "CCF announces legal challenge to Trudeau's invocation of federal *Emergencies Act*" (17 February, 2022), online: <theccf.ca/legal-challenge-emergencies-act/> [perma.cc/P6WX-ZWUU].

left it to the Federal Court — and, ultimately, to Parliament — to decide whether the federal Cabinet acted lawfully in declaring a national emergency. That he did not sets an unfortunate precedent for future commissioners.

II. COMMISSIONER ROULEAU'S DECISION TO OPINE ON THE THRESHOLD

In his report, Commissioner Rouleau conceded that "[o]ne of the most difficult questions that I have faced … is what role the Commission should assume in assessing Cabinet's decision to declare a public order emergency";[12] that "[t]here is no clear direction [in section 63 of the Act or the Order in Council appointing him] to decide whether the decision to declare an emergency was justified in law";[13] and that "[t]he Commission does not have the legal authority to adjudicate the 'lawfulness' of the declaration as such".[14]

Commissioner Rouleau took pains to distinguish the question of "whether the invocation [of the *Emergencies Act*] was 'lawful'", which he conceded that he "d[id] not have the legal authority to adjudicate *per se*", from what he asserted was a different question: whether it was "appropriate[]" to invoke the Act.[15] This is not a meaningful distinction. As Commissioner Rouleau's conclusion — that "the very high threshold for invocation was met"[16] — makes clear, it is one without a difference. In opining on the "appropriateness of the invocation",[17] the Commissioner opined on its lawfulness.

Commissioner Rouleau offered two reasons to wade into the issue of legal justification, despite the lack of any "clear direction" to do so.

First, he wrote, "[t]he various oversight mechanisms contained in the *Emergencies Act* speak to a legislative intention to subject the declaration of an emergency to careful scrutiny both during and after the life of an emergency".[18] He did not explain how this legislative intention supports legal scrutiny of the declaration by a commissioner under section 63(1), in addition to the legal scrutiny to which the declaration is subject in the

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[12] Final Report, vol 3, *supra* note 4 at 207.

[13] *Ibid* at 208.

[14] *Ibid*.

[15] *Ibid* at 320 and 321.

[16] *Ibid* at 272.

[17] *Ibid* at 321.

[18] *Ibid*.

Federal Court. As discussed below, the risk of duplication here means that legal scrutiny in multiple forums is neither desirable nor consistent with Parliament's intent.

Second, according to Commissioner Rouleau, "I am faced with a statute that has never been used or judicially interpreted, and questions have been raised by the parties as to whether its conditions have been satisfied", thus "[m]y assessment of the circumstances must ... inevitably involve a consideration of the Act's requirements".[19] In other words, because the *Emergencies Act*'s requirements had not previously been interpreted by a court, Commissioner Rouleau felt that he had to interpret those requirements in order to determine whether they had been met. This is circular: it presupposes that a commissioner under section 63(1) has a mandate to assess whether the Act's requirements had been complied with. A commissioner has no such mandate, as explained below. Just because "questions ha[d] been raised by the parties" did not make it appropriate for him to answer those questions.

III. THE SCOPE OF SECTION 63 OF THE *EMERGENCIES ACT*

As noted above, section 63 of the Act requires an inquiry into "the circumstances that led to the declaration being issued". Such an inquiry arguably entails an investigation of whether the statutory requirements for declaring an emergency were met.[20] Properly interpreted, however, section 63 does not authorize this. This is so for at least two reasons.

First, and most obviously, if Parliament had intended that an inquiry consider whether the declaration of an emergency was lawful, the statute would say so. It does not. In their "grammatical and ordinary sense", [21] the words "the circumstances that led to the declaration being issued" in section 63(1) indicate an investigation into factual issues — what happened and why — rather than into a mixed issue of law and fact — whether a legal threshold was met — let alone a purely legal question: how the applicable threshold ought to be interpreted.

In his report, Commissioner Rouleau conceded that "[i]t would be preferable if the Act explicitly identified the objectives of the inquiry, consistent with the approach taken here".[22] But the Act does explicitly the

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[19] *Ibid*.

[20] *Ibid* at 208.

[21] See *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26, citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

[22] Final Report, vol 3, *supra* note 4 at 320.

identify the inquiry's objectives; the identified objectives are simply more circumscribed than Commissioner Rouleau took them to be.

Second, when Parliament enacted the *Emergencies Act*, it knew that a declaration of an emergency would be subject to judicial review in the Federal Court under the *Federal Courts Act*.[23] The intention of Parliament cannot have been to duplicate in the section 63 inquiry what would be happening in court at the same time on an application for judicial review.

That is why, though the government may — and, in this case, did — appoint a judge to head the inquiry, nothing in the *Emergencies Act* or the *Inquiries Act* required the government to do so. It would have been entirely lawful for the government to appoint a non-judge, or even a non-lawyer, as the Commissioner under section 63. This distinguishes section 63 of the Act from other provisions that require the government to appoint judges to discharge certain responsibilities.[24] Had Parliament intended the section 63 commission to consider legal or mixed questions, it would not have enabled the government to appoint a non-judge, let alone a non-lawyer, as the Commissioner.

A. *Legislative history*

The drafting history of section 63 of the *Emergencies Act* supports the conclusion that the inquiry was not intended to consider whether the legal threshold for declaring a national emergency was met. Legislative history is never a definitive guide to statutory interpretation, but it can be instructive.[25] It is instructive here.

When it was first introduced in the House of Commons, the legislation that became the *Emergencies Act* did not provide for a post-emergency inquiry.[26] What is now section 63 became part of the bill after the requirement of a post-emergency public inquiry was proposed by the Canadian Bar Association during the review of the legislation in committee. It ought to be up to Parliament, as the CBA saw it, to determine whether the government was complying with the law in exercising its powers under the Act, including by (in the CBA's words) "reviewing the declaration of emergency", i.e., determining whether the "threshold" was met.[27]

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[23] *Federal Courts Act*, RSC 1985, c F-7, s 18.1 [*Federal Courts Act*].

[24] See *Emergencies Act*, *supra* note 8 at ss 48(1), 50, 51.

[25] See *R v Summers*, 2014 SCC 26 at para 51, citing Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 593-594, and 609.

[26] Bill C-77, *An Act to authorize the taking of special temporary measures to ensure safety and security during national emergencies and to amend other Acts in consequence thereof*, 2nd Sess, 33rd Parl, 1986-1967 (first reading 16 June 1987).

[27] See House of Commons, Legislative Committee on Bill C-77, *Evidence*, 33-2, vol 1, No 2

Once the national emergency was over, the CBA argued, this parliamentary accountability ought to remain paramount. To aid it — but not to replace it — the CBA proposed requiring a post-emergency public inquiry.[28]

The Legislative Committee on Bill C-77 accepted the CBA's proposal. What is now section 63 of the Act was incorporated by amendment.[29] The government of the day embraced it; when the Minister of National Defence, Perrin Beatty, testified before the Senate (convened as a Committee of the Whole) on May 31, 1988, he paid specific tribute to "the contribution made by the Canadian Bar Association".[30] Among the proposed legislation's "exhaustive system of constraints and safeguards", Minister Beatty pointed to the "comprehensive inquiry" that "must be conducted following the termination of an emergency, and reported on within one year".[31]

Section 63 was thus proposed — and ultimately incorporated into the *Emergencies Act* — as an instrument of parliamentary accountability. Its purpose, as the CBA conceived it, would be to "report its findings to Parliament",[32] so that Parliament could hold the government to account. This supports viewing the section 63 commission as one tasked with gathering evidence and finding facts, all so that Parliament, not the Commission, could determine whether the government had acted within its statutory authority.

The government would also be accountable in court. Minister Beatty made this clear in his appearance before the Senate. He did so in the same speech in which he highlighted the "comprehensive inquiry" to be conducted under section 63. Speaking of the power that the legislation would give the Senate to revoke or amend an emergency declaration that it had previously endorsed,[33] the Minister envisioned a scenario in which

> both houses of Parliament have approved the invocation [of the Act] and then, after that, it has been tested in the courts and the courts have found that what was being done by the government was legal and proper and that the government was capable of justifying the fact that an emergency existed and was able to demonstrate that in all cases what it was doing was consistent with what was acceptable in a free

(25 February 1988) at 5 and 15 (Victor Paisley) [*Evidence from CBA*].

[28] *Ibid* at 16 [emphasis added].

[29] See House of Commons, Legislative Committee on Bill C-77, *Evidence*, 33-2, vol 1, No 9 (12 April 1988) at 76-77.

[30] Senate Debates, 33-2, vol 3 (31 May 1988) at 3529 (Hon Perrin Beatty) [*Senate Debates*].

[31] *Ibid* at 3530.

[32] Evidence from CBA, *supra* note 27 at 16 (in law, "findings" generally refers to facts rather than legal conclusions).

[33] See *Emergencies Act*, *supra* note 8 at ss 59, 60.

> and democratic society.... [T]he Senate would [still] be capable of putting down a motion to revoke or amend the declaration or any order or regulation[.][34]

It is clear that the government and Parliamentarians contemplated judicial review of the declaration of an emergency at the time of the Act's enactment. This form of judicial accountability would run parallel to the parliamentary accountability that the Act, including section 63, facilitates. Under section 63, the Commissioner's role is to find the facts that Parliament needs to assess whether the government overstepped by invoking the Act. It is not to take the assessment out of Parliament's hands and assign it to the government's appointed commissioner. It would not make sense to interpret section 63 as duplicating the judicial review process while usurping Parliament's accountability function.

B. *Duplication*

As Minister Beatty acknowledged in his statement to the Senate in May 1988, it was expected that the invocation of the Act would be "tested in the courts", which would determine whether "what was being done by the government was legal and proper" and whether "the government was capable of justifying the fact that an emergency existed".[35] This is happening now: even before Commissioner Rouleau received his commission, civil liberties groups had brought the threshold question before the Federal Court, on applications for judicial review.

Judicial review is the primary means of challenging the lawfulness of state action in court. Under the *Federal Courts Act*, the Federal Court has exclusive jurisdiction (subject to certain exceptions) to hear applications for judicial review "against any federal board, commission or other tribunal".[36] When the federal Cabinet exercises a power of decision conferred on it by legislation, it is considered to be a "federal board, commission or other tribunal" under the *Federal Courts Act*.[37] The Federal Court therefore has exclusive jurisdiction to hear an application for judicial review of a decision to proclaim a "national emergency" under the *Emergencies Act*.

The exclusive jurisdiction of the Federal Court, conferred on it by Parliament, is another clear signal that the inquiry to be conducted under section 63 of the *Emergencies Act* is not intended to address the issue of

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[34] Senate Debates, *supra* note 30 at 3530 [emphasis added].

[35] *Ibid*.

[36] *Federal Courts Act*, *supra* note 23 at s 18(1).

[37] See *Saskatchewan Wheat Pool v Canada (Attorney-General)*, [1993] FCJ No 902 at para 6, 107 DLR (4th) 190, per Rothstein J. See also *Etches v Canada (Indian and Northern Affairs)*, 2009 ONCA 182 at para 21, per Rouleau J.A.

legality, that is, the threshold issue.[38] That issue is squarely within the exclusive jurisdiction of the Federal Court on an application for judicial review. Parliament surely did not intend to give the government the power to preempt judicial accountability in the Federal Court by tasking a hand-picked commissioner with determining the lawfulness of the emergency declaration — even if without binding effect[39] — in an inquiry under section 63 of the *Emergencies Act*.

The civil liberties groups that are challenging the emergency declaration seek a formal judicial order that the government acted unlawfully in declaring a national emergency. In deciding whether to grant such an order, the Federal Court must determine whether the government met the requirements of section 17(1) of the *Emergencies Act*. In offering his opinion on this question, Commissioner Rouleau has at best duplicated, if not also complicated, the court's task.

As the Supreme Court of Canada held in the *Krever* case, and as Commissioner Rouleau acknowledged,[40] "[t]he findings of a commissioner... are simply findings of fact and statements of opinion reached by the Commissioner at the end of the inquiry.... They are not enforceable and do not bind courts considering the same subject matter".[41] Even if the Federal Court considers Commissioner Rouleau's opinion to be persuasive, and even if it reaches the same conclusion as he did, it cannot simply give Commissioner Rouleau's findings binding effect. Instead, the court must itself analyze the evidence and the law and reach its own conclusion as to whether the government acted lawfully.

For this reason, the Commissioner's determinations can only be duplicative. They are also themselves subject to judicial review under the *Federal Courts Act*.[42] This raises the spectre of a multiplicity of proceedings: the Federal Court could find itself seized not only of judicial review

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[38] See *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at para 47 ("Although the Acts have different aims, their subject matters will clearly overlap in places. As Parliament is presumed to intend harmony, coherence, and consistency between statutes dealing with the same subject matter, two provisions applying to the same facts will be given effect in accordance with their terms so long as they do not conflict" (quotation marks and citation omitted).).

[39] See Final Report, vol 3, *supra* note 4 at 208.

[40] *Ibid*.

[41] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440 at para 34,151 DLR (4th) 1.

[42] See *Morneault v Canada (Attorney General)*, [2001] 1 FC 30 at paras 42-43, 189 DLR (4th) 96. See also *Chrétien v Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802; *Beno v Canada (Attorney General)*, 2002 FCT 142.

applications challenging the government's declaration of an emergency, but also of judicial review applications challenging the findings of the Commissioner.

Even if the Commissioner was entitled to offer his opinion on whether the government acted lawfully, the prospect of duplication meant that he should have refrained from doing so. Moreover, the duplication confirms that Parliament did not intend for the Commissioner to address this issue; it was — and still is — the Federal Court's task to do so.

IV. THE ORDER IN COUNCIL AND THE PARTIES' EXPECTATIONS

Commissioner Rouleau looked beyond the Act, to the "the Terms of Reference of my mandate",[43] and to "questions ... raised by the parties",[44] to justify opining on whether the government acted lawfully when it declared an emergency. Neither the terms of reference set out in the Order of Council that created the Commission, nor the parties' questions and expectations, justified the Commissioner's decision to expand his own mandate beyond what Parliament intended in section 63(1) of the *Emergencies Act*.

A. *The Order in Council*

As noted at the outset, the Commission from Cabinet that empowered Commissioner Rouleau to conduct the inquiry also directed him, among other things, to "set out findings and lessons learned, including on the use of the *Emergencies Act* and the appropriateness and effectiveness of the measures taken".[45]

"[F]indings ... on the use of the *Emergencies Act*" and "recommendations ... on the use ... of that Act" could plausibly be construed as authority for (or even a direction to) the Commissioner to address whether it was lawful to "use" the *Emergencies Act*. This interpretation is strained. Had the Cabinet intended the Commissioner to determine whether it lawfully invoked the Act, it would have framed that direction in clear terms. It would not have used the words "findings" and "recommendations"; these suggest determinations of factual and policy matters rather than the determination of a legal issue, which is what the threshold issue ultimately is.

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[43] Final Report, vol 3, *supra* note 4 at 209.

[44] *Ibid* at 208.

[45] Order in Council, *supra* note 6 at para (a)(iii) [emphasis added].

As for "the appropriateness … of the measures taken", this too does not suggest an inquiry into whether the measures were lawful. Commissioner Rouleau evidently took "appropriateness" to mean appropriateness with respect to the *Emergencies Act*'s statutory requirements. As argued above, this interpretation of "appropriateness" makes it indistinguishable from lawfulness. The better reading of the Order in Council is that it authorizes an assessment of whether "the measures taken" were appropriate with respect to (in the words of section 63(1) of the Act) "the circumstances that led to the declaration". The question is not whether the government complied with the statute; as discussed above, and as Commissioner Rouleau himself acknowledged, that question is reserved to the Federal Court. Rather, the question is whether the measures imposed under the Act met the moment.

Context also matters. The Order in Council quoted above was made under — and specifically invokes — section 63 of the *Emergencies Act*.[46] As discussed above, section 63, properly interpreted, does not envision a commission of inquiry that would determine whether the statutory requirements for declaring a "national emergency" had been met.

B. *Parties' expectations*

That, at the Commission's hearings, "questions [were] raised by the parties as to whether [the *Emergencies Act*'s] conditions [were] satisfied"[47] is weak justification for extending the scope of the Commission's mandate. So is the existence of "broad consensus among the parties, including the Federal Government, that one of the objectives of this Inquiry was to assess whether Cabinet acted appropriately when it declared a Public Order Emergency".[48] Either the Commissioner had the authority to determine whether the government acted lawfully, or he did not.

Just as parties cannot confer jurisdiction on a court by agreement,[49] so the parties to the Commission's proceedings could not confer authority on the Commissioner that neither the *Emergencies Act* nor the Order in Council afforded to him. Since, as discussed above, neither the Act nor his terms of reference authorized him to opine on whether the government acted lawfully, he should not have done so, even at the risk of disappointing some of the parties — and, for that matter, the public.

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[46] *Ibid*, Preamble.

[47] Final Report, vol 3, *supra* note 4 at 208.

[48] *Ibid* at 320.

[49] See e.g. *2650971 Ontario Inc v Shameti*, 2022 ONCA 62 at para 20; *744185 Ontario Inc v Canada*, 2020 FCA 1 at para 53.

V. CONCLUSION

It had widely been assumed that Commissioner Rouleau would answer the legal question of whether the government broke the law by invoking the *Emergencies Act*. He did. He should not have.

Neither section 63 of the Act nor the Order in Council authorized the Commissioner to provide the opinion that he did. Nor could the parties' expectations validly augment his authority. Rather than court duplication and a multiplicity of proceedings, the Commissioner should have forborne from offering non-binding commentary on questions to which, in pending judicial review proceedings, the Federal Court must provide its own answers.

Commissioner Rouleau's qualifications, objectivity and impartiality cannot be disputed, but the next commissioner may not be a judge, or even a lawyer. The government's hand-picked decision maker should not purport to adjudicate the lawfulness of the Cabinet's declaration of an emergency. Instead, a commissioner under section 63 of the *Emergencies Act* should respect the limits of their statutory authority — and leave it to others to determine whether the government did the same.