"Order and Security": The Legitimacy of Emergency Action Under Canada's *Emergencies Act*

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Canada's Emergencies Act was first invoked in February 2022. This paper evaluates the Emergencies Act and investigates the problems of legitimacy resulting from the executive's use of emergency powers. It concludes that, although serious challenges remain, the Emergencies Act regime represents an inevitable compromise between constraints which would foster legitimacy and the rapid, centralized decision-making required during a crisis. However, the legitimacy of emergency action would be strengthened by the imposition of a strict standard of judicial review by the courts or Parliament. First, the paper reviews the literature on emergency powers. Second, the paper discusses the historical background to the Emergencies Act, including martial law and the notorious War Measures Act. Third, the paper provides an overview of the structure and passage of the Emergencies Act. Fourth, the paper summarizes the 2022 Public Order Emergency. Finally, the paper assesses the Emergencies Act and proposes a framework for the judicial review of emergency action, commenting on the decision of the Federal Court of Canada in Canadian Frontline Nurses v Canada (Attorney General).

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Introduction

"[T]here are a lot of bleeding hearts around who just don't like to see people with helmets and guns", Prime Minister Pierre Trudeau told reporters on October 13, 1970, two days before he decided to invoke emergency powers for the first time since the Second World War. "All I can say is, go on and bleed", Trudeau continued, "but it is more important to keep law and order in the society than to be worried about weak-kneed people".[1] Fifty-two years later, Prime Minister Justin Trudeau would make the same choice as protesters blockaded downtown Ottawa. The use of emergency powers, Trudeau said at a news conference, was "about keeping Canadians safe, protecting people's jobs and restoring confidence in our institutions".[2]

These comments reflect the maxim "the safety of the people is the supreme law", which was the first line of the 1987 white paper introducing Canada's *Emergencies Act*.[3] The rationale behind this principle is straightforward: To ensure public safety, the government may need extraordinary powers which would not be justified in normal circumstances. As Thomas Jefferson wrote: "To

1. Peter Bregg, "Trudeau: 'Just watch me'", *The Globe and Mail* (5 October 2010), online: <theglobeandmail.com> [perma.cc/8ZWX-2AQX] (transcript of comments made by Pierre Trudeau to the media on 13 October 1970).

2. Catharine Tunney, "Federal government invokes Emergencies Act for first time ever in response to protests, blockades", *CBC News* (14 February 2022), online: <cbc.ca> [perma.cc/YV7S-4ACJ].

3. Emergency Preparedness Canada, *Bill C-77: An Act to Provide for Safety and Security in Emergencies: Working Paper* (1987) at 1, online (pdf): <publicsafety.gc.ca/lbrr/archives/ke%205460%20b55%201987-eng.pdf> [perma.cc/DKA5-KE5M]; RSC 1985, c 22 (4th Supp) [*Emergencies Act*].

lose our country by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means".[4] The German scholar Karl Loewenstein, responding to the manipulation of democratic institutions by fascists in the 1930s, argued that a robust democracy required emergency powers—"even at the risk and cost of violating fundamental principles"—to resist those who would overthrow democracy itself.[5] Yet, an executive with unchecked emergency powers could unjustifiably curtail civil liberties, abuse human rights, and threaten democracy.

Once a national emergency is proclaimed, the *Emergencies Act* delegates lawmaking powers to the Governor in Council, which legislates through Orders in Council and regulations. Emergency proclamations, orders, and regulations are subject to subsequent review by Parliament and the courts. Justice Rouleau of the Court of Appeal for Ontario, serving as commissioner of a public inquiry into the 2022 Public Order Emergency, held that the invocation of emergency powers was legally justified.[6] In *Canadian Frontline Nurses v Canada (Attorney General)* (*Frontline Nurses*), Mosley J of the Federal Court of Canada came to the opposite conclusion, and also found that some of the government's emergency measures violated the *Charter of Rights and Freedoms* (*Charter*).[7] At the time this paper was finalized for publication, an appeal from Mosley J's decision was before the Federal Court of Appeal.

This paper asks whether the *Emergencies Act* resolves the problems of legitimacy created by emergency action. It concludes that, although serious challenges remain, the *Emergencies Act* represents an inevitable compromise between constraints which would foster legitimacy and the rapid, centralized decision-making required during a crisis. However, the legitimacy of emergency action would be aided by the imposition of a strict standard of review by the courts or Parliament.

First, the paper reviews the scholarship on the legitimacy of emergency powers. Second, it discusses the history of emergency powers in Canadian law, including the common law power of martial law and the infamous *War*

4. Letter from Thomas Jefferson to John B Colvin (20 September 1810) in Paul Leicester Ford, ed, *The Works of Thomas Jefferson*, Federal ed, vol 11 (New York: G.P. Putnam's Sons, 1905), online: <press-pubs.uchicago.edu/founders/documents/a2_3s8.html> [perma.cc/K3KG-2KJP].

5. Karl Loewenstein, "Militant Democracy and Fundamental Rights, I" (1937) 31:3 Am Pol Sci Rev 417 at 432.

6. Public Order Emergency Commission, *Report of the Public Inquiry into the 2022 Public Order Emergency*, vol 1, by Paul S Rouleau (Ottawa: King's Printer, 2023) [Rouleau Report, Vol 1].

7. *Canadian Frontline Nurses v Canada (Attorney General)*, 2024 FC 42 [*Frontline Nurses*]; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

Measures Act.[8] Third, the paper summarizes the statutory framework of the *Emergencies Act*. Fourth, it discusses the 2022 Public Order Emergency and the conclusions reached by Commissioner Rouleau and Mosley J. Finally, the paper evaluates the *Emergencies Act* and proposes a framework for the judicial review of emergency measures, commenting on the approach taken by Mosley J in *Frontline Nurses*.

I. The Problem of Emergency Powers

By their very nature, emergencies render the normal means by which government action is legitimated difficult, if not impossible. Parliamentary authority is delegated to the executive, which legislates by decree. Courts may no longer enforce some civil rights, instead deferring to government action.[9]

One influential view on the nature of emergency powers was provided by the American scholar Clinton Rossiter, who argued that the executive branches of liberal democracies could justifiably resort to dictatorial powers when it was "necessary or even indispensable to the preservation of the state and its constitutional order".[10] The fascist scholar Carl Schmitt (whose writing predated Rossiter's) argued that this mode of reasoning demonstrated the fallibility of the liberal state: during times of emergency, or "exception", the state had to rely on powers which were outside the constitution.[11]

As David Dyzenhaus argues, both of these conceptions are problematic because the exercise of emergency power would be unconstrained: freed from the Constitution, a dictator has no limits except those he imposes on himself.[12] The first step is to recognize that emergency measures must be constrained by the rule of law, a "fundamental postulate" of even the unwritten common law constitution.[13] In a 2005 decision of the House of Lords, Lord Hope of Craighead went so far as to call the rule of law "the ultimate controlling factor" of the unwritten constitution, protecting "the individual from arbitrary government" and requiring courts to "disregard as unauthorised and void" any

8. SC 1914 (5 George V), ch 2.

9. "Civil rights" is being used in the general sense; *Charter* rights, for example, would be a subset of civil rights.

10. Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Liberal Democracies* (New York: Harbinger, 1963) at 298.

11. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Cambridge, MA: MIT Press, 1988) at 5–6, online: <archive.org> [perma.cc/TQG3-9AUE].

12. David Dyzenhaus, "Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?" (2006) 27:5 Cardozo L Rev 2005 at 2006–14.

13. *Roncarelli v Duplessis*, [1959] SCR 121 at 142, 1959 CanLII 50 (SCC); see also *Reference re Secession of Quebec*, 1998 CanLII 793 at paras 70–78 (SCC) [*Quebec Secession Reference*].

executive or legislative act which exceeds the powers of its originating organ.[14] This modern interpretation of the constitution is arguably inconsistent with the Judicial Committee of the Privy Council's description of a state of emergency as "no law at all",[15] and supports Dyzenhaus' argument that the rule of law must contain a substantive aspect disallowing the unjustified exercise of emergency powers.[16]

In his report on the 2022 Public Order Emergency, Commissioner Rouleau referred to the views of Nomi Claire Lazar, who prefers to erase the distinction between emergencies and regular order.[17] In her opinion, the same criteria which justify government action in normal circumstances also apply during an emergency.[18] It is easy to see why Commissioner Rouleau would be sympathetic to this view. For one thing, as a matter of judicial policy, it is attractive to imagine that in an emergency "leaders may be held to the same standards of . . . accountability to which they are always held in executing their duties", as Lazar says.[19] Moreover, in the modern Canadian constitution, the *Charter* continues to operate in an emergency, even as many of the rights it protects can be overridden using the notwithstanding clause or limited under section 1 in normal times.[20] From a constitutional perspective, at least, it is probably true that "[e]mergency powers are justified—when they are justified—because they embody principles that already function under normal circumstances", as Lazar argues.[21]

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14. *R (on the application of Jackson and others) v Attorney General*, [2005] UKHL 56 at para 107. These comments were *obiter dicta* and were only expressly supported by two of the eight other law lords, although none voiced direct opposition: see Tom Mullen, "Reflections on Jackson v Attorney General: Questioning Sovereignty" (2007) 27:1 Legal Stud 1 at 13–15. It should be noted that the Supreme Court of Canada has held that unwritten constitutional principles like the rule of law cannot be used to strike down legislation: *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 54; cf Abella J, dissenting, at paras 165–66 & note 4.

15. *Tilonko v AG Natal*, [1907] AC 93 at 94, 95 LT 853 (UKJCPC) [*Tilonko*].

16. Dyzenhaus, "Schmitt v. Dicey", *supra* note 12 at 2037; see also David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (New York: Cambridge University Press, 2006) at 4–5.

17. Rouleau Report, Vol 1, *supra* note 6 at 185. See also Lazar's submissions to the Public Order Emergency Commission: Nomi Claire Lazar, "On Necessity Under the *Emergencies Act*", in Public Order Emergency Commission, *Report of the Public Inquiry into the 2022 Public Order Emergency*, vol 5, by Paul S Rouleau (Ottawa: King's Printer, 2023), 9–1 [Rouleau Report, Vol 5].

18. Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (New York: Cambridge University Press, 2009) at 5.

19. *Ibid*.

20. *Charter*, *supra* note 7, ss 1 & 33.

21. Lazar, *States of Emergency*, *supra* note 18 at 5.

As Grégoire Webber writes, emergencies are "fluid situations" which require a concentration of power in the executive to "settle patterns of coordination"—economic, governmental, social, and otherwise—to respond to the crisis.[22] The challenge is to strike a middle ground between freeing the executive from supervision, as Rossiter and Schmitt would have it, and imposing the constraints that apply under regular order, which would defeat the purpose behind emergency powers. One way to find that middle ground is to ask if the legal framework regulating emergency powers legitimates their use.

The problem of legitimacy which faces the use of emergency powers has two sides. On the one hand, sociological legitimacy deriving from popular participation in government action—especially the exercise of powers by an elected Parliament—may be threatened when legislative authority is delegated to the executive. The reaction to the 2022 Public Order Emergency illustrates just how divisive the use of emergency powers can be. One author goes so far as to write that, in a "practical" sense, an emergency only exists when there is "public and congressional agreement" on the necessity of executive action.[23]

On the other hand, it is also dangerous to the legitimacy of emergency powers that some normative constraints may be overridden, including legal rights and the requirement for state action to be blessed by the public's representatives in Parliament. If the common law and the constitution are the "legal repository of the moral values of the people",[24] then they should also have something to say about emergency action. The abuse of Japanese Canadians during the Second World War is a dramatic illustration of "occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals"—a reason why we have a constitution.[25]

Therefore, to be legitimate, emergency powers legislation should serve two goals to the greatest extent possible. First, they should maximize popular participation in executive action, such as through the continued involvement of Parliament. Second, they should maintain the same normative constraints which bind the government in normal times, such as the continued operation of a constitution with entrenched rights. However, emergency powers legislation must also recognize the greater concentration of authority and flexibility in decision-making that the executive requires in a crisis. As we will see, historical

22. Grégoire Webber, "The Duty to Govern and the Rule of Law in an Emergency", in Jane Philpott et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 175 at 180.

23. John P Roche, "Executive Power and Domestic Emergency: The Quest for Prerogative" (1952) 5:4 Western Political Q 592 at 608.

24. David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (London, UK: Hart Publishing, 1997) 279 at 280, referring to the views propounded by William Blackstone, *Commentaries on the Laws of England*, vol 1 (Chicago: Callaghan, 1884) at 123–28.

25. *Quebec Secession Reference*, *supra* note 13 at para 74.

regimes governing emergency measures in Canada granted extraordinary powers to the executive with few guarantees of legitimacy.

II. Emergency Powers in Canadian History

Prior to the passage of the *Emergencies Act* in 1988, states of emergency in Canada were administered either through the common law power of martial law or the *War Measures Act* of 1914 and its successors. Canadian history demonstrates the troubling nature of emergency powers and their potential for misuse.

A. Martial Law

At common law, the Crown or Parliament could suspend the civil courts and invoke martial law in wartime or insurrection.[26] In 1917, Lord Halsbury wrote for the Judicial Committee of the Privy Council that, when a state of war existed, administration of law was impossible and the use of force outside the rule of law was permitted:

> [W]hat is called "martial law" is no law at all. The notion that "martial law" exists by reason of the proclamation [of the Crown] is an entire delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not.[27]

Martial law was declared in Lower Canada (now Quebec) during the Patriote Rebellions of 1837–38. Sir John Colborne, the province's colonial administrator, was advised by British officials that "[w]hen the regular courts are open, so that criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown" to invoke martial law without parliamentary authorization.[28] By November 1838,

26. For historical discussions of the common law emergency power, see Frederick Pollock, "What Is Martial Law?" (1902) 18:2 L Q Rev 152; Herbert Marx, "The Emergency Power and Civil Liberties in Canada" (1970) 16:1 McGill LJ 39; and Kim Lane Scheppele, "North American Emergencies: The Use of Emergency Powers in Canada and the United States" (2006) 4:2 Int'l J Const L 213.

27. *Tilonko*, *supra* note 15.

28. Joint Opinion of the Attorney and Solicitor General, Sir John Campbell and Sir R M Rolfe, as to the power of the Governor of Canada to proclaim Martial Law, 16 January 1838, in William Forsythe, *Cases and Opinions on Constitutional Law* (London: Stevens & Haynes, 1869) 198–99, online: <archive.org> [perma.cc/42JG-BRDA].

Colborne believed that the area southeast of Montreal "had reverted to a state of nature" controlled by French-Canadian rebels—erroneously, according to historian Murray Greenwood—and a General Court Martial was instituted.[29] Colborne himself decided guilt, innocence, and punishment on the advice of military officers serving as deputy judge advocates.[30] *Habeas corpus*, the right to a jury trial, and the rules of evidence were suspended.[31] There were only seven acquittals among the 104 people tried before the Court Martial. Twelve men were publicly hanged, and 58 were exiled to the penal colony at Botany Bay.[32] A petition to the Court of Queen's Bench to quash the proceedings was dismissed on the grounds that only the Imperial Parliament had jurisdiction to supervise the exercise of delegated authority—the justices had "abdicated any significant role in preserving the rule of law".[33] While military forces have been called in aid of the civil power at various points in Canadian history, martial law has never been invoked again.[34]

Clearly, the exercise of unreviewable powers by the executive and the military during a state of martial law is illegitimate. Sociologically, popular participation in state action is almost non-existent; and normatively, there are no checks and balances, such as judicial review by impartial courts of law, which can ensure that emergency powers are exercised in a manner consistent with moral values and the constitution.

B. The War Measures Act

During the First and Second World Wars, Parliament expanded the executive's emergency powers in both the United Kingdom and Canada. Britain's *Defence of the Realm Act* gave the War Cabinet many legislative functions.[35] Cabinet regulations under the *Act* "comprised the entire governance of the war effort from the acquisition of huge factories . . . on down to the regulation of dog shows and the supply of cocaine to actresses".[36]

Canada's *War Measures Act* similarly delegated Parliament's lawmaking authority to Cabinet. Under section 4, "war, invasion, or insurrection, real or apprehended" could be proclaimed by the Governor in Council.[37] The

29. F Murray Greenwood, "The General Court Martial of 1838–39 in Lower Canada: An Abuse of Justice", in W Wesley Pue & Barry Wright, eds, *Canadian Perspectives on Law & Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 249 at 250–51.
30. *Ibid* at 255.
31. *Ibid* at 257–58.
32. *Ibid* at 255.
33. *Ibid* at 271.
34. Marx, *supra* note 26 at 51–56.
35. 1914 (UK), 4 & 5 Geo V, c 29.
36. Rossiter, *supra* note 10 at 156–57.
37. *War Measures Act*, *supra* note 8, s 4.

proclamation itself was conclusive evidence that an emergency existed.[38] The powers of the Governor in Council, upon proclamation, were set out in section 6:

> The Governor in Council shall have the power to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada.[39]

Canada was governed under the 1914 *War Measures Act* and its successor legislation for "more than a quarter of the years" leading up to its repeal in 1988.[40] The act was used "to impose censorship [and] to outlaw socially unacceptable organizations".[41] Most notoriously, it was used to intern and confiscate the property of thousands of "enemy aliens" during the World Wars.[42]

Courts were acquiescent. In one English case, Scrutton LJ found that it was not judges' responsibility to question wartime orders: "It has been said that a war could not be conducted on the principles of the Sermon on the Mount", he wrote.[43] "It might also be said that a war could not be carried on according to the principles of Magna Charta".[44] Emergency regulations exiling more than 4000 Japanese Canadians were ultimately upheld by the Privy Council, which held: "It is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation".[45]

Challenges to the government's use of the *War Measures Act* during the First World War resulted from orders in council which cancelled exemptions from conscription issued by local draft boards under the *Military Service Act.*[46]

38. *Ibid.*

39. *Ibid*, s 6.

40. For the various acts of Parliament and the years they were invoked, see Patricia Peppin, "Emergency Legislation and Rights in Canada: The War Measures Act and Civil Liberties" (1993) 18:1 Queen's LJ 129 at 130–31.

41. *Ibid* at 131.

42. See e.g. Eric M Adams, Jordan Stanger-Ross, and the Landscapes of Injustice Research Collective, "Constitutional Wrongs: The Wartime Constitution and Japanese Canadians, c. 1942–6", in Barry Wright, Eric Tucker & Susan Binnie, eds, *Canadian State Trials Volume V: World War, Cold War, and Challenges to Sovereignty, 1939–1990* (Toronto: Osgoode Society for Canadian Legal History, 2022) 44.

43. *Ronnfeldt v Phillips and others* (1918), 35 TLR 46 at 47 (Eng CA).

44. *Ibid*.

45. *Co-Operative Committee on Japanese Canadians et al. v Attorney-General of Canada et al.*, [1947] 1 DLR 577 at 586, 1946 CanLII 361 (UKJCPC).

46. *Military Service Act*, SC 1917 (6-7 Geo V), c 19.

In *Re Lewis*, the Appellate Division of the Alberta Supreme Court held that these orders were outside the powers granted by the *War Measures Act*, or *ultra vires*.[47] The court found that the *War Measures Act* did not provide authority to override another act of Parliament.[48]

The government was alarmed and issued an order in council purporting to overrule *Lewis*.[49] They also obtained the cooperation of the Supreme Court of Canada in orchestrating a test case affirming the validity of their orders: *Re Gray*.[50] Government lawyers prepared the plaintiff's case for him; and Anglin J, meeting in chambers with officials, was persuaded to exercise a rarely-used power to hear the case at first instance.[51] In a decision issued just a day after the oral arguments, the Supreme Court of Canada upheld the emergency orders as *intra vires*. Chief Justice Fitzpatrick found that section 6 had delegated almost infinite powers to Cabinet:

> The Governor in Council shall have the power to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada.[52]

It would be "absurd and impossible", the chief justice continued, to deny the government the "power to amend [statute or common] law as a war measure, no matter how urgent or necessary that might be for public safety".[53]

In October 1970, Prime Minister Pierre Trudeau controversially invoked the *War Measures Act* for a final time. That fall, Quebec was convulsed by terrorist attacks committed by the Front de libération du Québec (FLQ), including the kidnappings of the labour minister, Pierre Laporte, and a British diplomat, James Cross.[54] Near the end of an all-day Cabinet meeting on October 15, it was agreed, based on the available intelligence, that raids on suspected FLQ

47. *Re Lewis* (1918), 13 Alta LR 423 at 436, 1918 CanLII 642 (ABSC (App Div)).

48. *Ibid*.

49. *Canada Gazette*, 20 July 1918, vol 52, no 3 at 42. The validity of this order was never challenged in court.

50. In *Re George Edwin Gray* (1918), 57 SCR 150, 1918 CanLII 533 (SCC) [*Gray*].

51. Patricia I McMahon, "Conscription and the Courts: The Case of George Edwin Gray, 1918", in Barry Wright, Eric Tucker & Susan Binnie, eds, *Canadian State Trials Volume IV: Security, Dissent, and the Limits of Toleration in War and Peace, 1914–1939* (Toronto: Osgoode Society for Canadian Legal History, 2015) 132 at 142–47.

52. *Gray*, *supra* note 50 at 158–59.

53. *Ibid* at 158.

54. John English, *Just Watch Me: The Life of Pierre Elliott Trudeau, 1968–2000* (Toronto: Alfred A Knopf Canada, 2009) at 73–97.

members had to be conducted that night to prevent further attacks. The Minister of Justice, John Turner, advised that the *War Measures Act* should be invoked to ensure that the raids were legal, and the prime minister agreed.[55] Laporte's dead body was found in the trunk of a car the next morning.[56] Regulations under the *War Measures Act* declared membership in the FLQ to be a criminal offence, and suspended the requirements for bail and search warrants.[57] 436 people were detained during the crisis, most of whom turned out to be innocent.[58] Trudeau's emergency regulations were ultimately upheld as constitutional under the *Bill of Rights* and as *intra vires* the *War Measures Act*.[59]

Unlike the common law power of martial law, under the *War Measures Act*, the executive's emergency powers are derived from an act of Parliament, which aids their normative legitimacy. The constitutionality and *vires* of the *War Measures Act* orders were also susceptible to judicial review, providing one normative safeguard.

However, the *War Measures Act* did not go nearly far enough to ensure the legitimacy of emergency action. Under the *War Measures Act*, the proclamation of an emergency was conclusive evidence that an emergency existed, preventing the proclamation from being judicially reviewed.[60] The danger of this situation to the normative legitimacy of emergency action is illustrated by the October Crisis, where the Trudeau government was criticized for acting rashly in the absence of a real emergency—using "a sledgehammer to crack a peanut", as New Democrat Leader Tommy Douglas said.[61] Moreover, during the World Wars, fervid support of the war effort seemingly made judicial review of *War Measures Act* orders illusory. As the historian Patricia McMahon has written, the Supreme Court of Canada in *Gray* was only too willing to "validate the circumvention of procedural protections afforded by the normal legislative process" and allow the Borden government to rewrite statute law by decree.[62] And courts could not prevent the civil rights abuses inflicted on Japanese Canadians during the Second World War.

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55. "The F.L.Q. Situation", *Cabinet Conclusions* (15 October 1970, afternoon session) at 5 (online): <library-archives.canada.ca> [perma.cc/NL2H-9JZ4].

56. English, *supra* note 54 at 89.

57. Eric S Block & Adam Goldenberg, *Emergency Law in Canada: Commentary and Legislation* (Toronto: LexisNexis, 2021), s 1.1.1(b).

58. Robert Bothwell & John English, *Canada Since 1945: Power, Politics and Provincialism* (Toronto: University of Toronto Press, 1989) at 371–72.

59. *Gagnon v R*, 1971 CarswellQue 5, [1971] Que CA 454 (QCCA) [*Gagnon*]; *Canadian Bill of Rights*, SC 1960, c 4.

60. *War Measures Act*, *supra* note 8, s 4.

61. *House of Commons Debates*, 28-3, vol 1 (16 October 1970) at 197–98 [*1970 Hansard*].

62. McMahon, *supra* note 51 at 133–34.

Pierre Trudeau promised on October 16, 1970, that "legislation of a less comprehensive nature" would be passed to replace the *War Measures Act*.[63] That legislation was ultimately enacted by a different government eighteen years later.

III. The *Emergencies Act*

Writing just prior to the October Crisis, Herbert Marx proposed three additions to a new emergency law: the introduction of an entrenched bill of rights, an affirmation of parliamentary control over the executive, and judicial review of emergency proclamations and orders.[64] The *Emergencies Act*, which was ultimately passed in 1988, together with the newly enacted *Charter*, took up all of these suggestions. The responsible minister, Perrin Beatty, told the House of Commons that the purpose of the new legislation was to "provide a unified and coherent set of measures to respond to emergencies while incorporating maximum safeguards of fundamental rights and freedoms".[65]

The *Emergencies Act* constrains the exercise of emergency powers in several ways. First, it requires that the government have "reasonable grounds" to believe that a "national emergency" exists, defined as:

> An urgent and critical situation of a temporary nature that
>
> (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
>
> (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada and that cannot be effectively dealt with under any other law of Canada.[66]

The definition of a national emergency was drafted to align with the *Anti-Inflation Act Reference*.[67] In that case, the Supreme Court of Canada held that the federal government could rely on the emergency branch of the peace, order, and good government power if there was a "rational basis" for believing there was an "urgent and critical situation adversely affecting all Canadians" which

63. *1970 Hansard*, supra note 61 at 194.

64. Marx, *supra* note 26 at 89–91.

65. *House of Commons Debates*, 33-2, vol 9 (16 November 1987) at 10807 [*1987 Hansard*].

66. *Emergencies Act*, *supra* note 3, s 3.

67. Emergency Preparedness Canada, *supra* note 3 at 6–9; [1976] 2 SCR 373, 1976 CanLII 16 (SCC).

was beyond the capacity of provincial legislatures or other statutes to address.[68] The "reasonable grounds" standard is derived from criminal law and requires that a person "must not be acting solely on a hunch, but rather is required to act on reasonable and specific inferences drawn from the known facts of the situation".[69]

The *Act* then requires the Governor in Council to select from four different types of emergency—public welfare emergencies, public order emergencies, international emergencies, and war emergencies—each of which provides a different menu of powers.[70] Beatty called this a necessary change from the all-or-nothing *War Measures Act*, which he criticized for making "no provision for dealing either moderately with peacetime disasters or for a measured and prudent response to international tension".[71] Measures enacted by the Governor in Council under these powers must be considered, also on reasonable grounds, to be "necessary for dealing with the emergency".[72]

When proclaiming an emergency, the government must submit an explanation of their reasons for doing so to Parliament,[73] which then supervises the exercise of emergency powers in three ways. First, it has the power to revoke the proclamation of an emergency.[74] Second, the *Emergencies Act* contains sunset provisions requiring the executive to ask Parliament for authorization of the emergency within a certain period of time, ranging from 120 days for a war emergency to 30 days for a public order emergency.[75] Third, within two sitting days after an emergency order or regulation is enacted, it must be presented to Parliament to amend or revoke.[76] The government is also required to complete a public inquiry into the emergency and present it to Parliament within a year after the emergency has elapsed.[77]

Courts also supervise the use of emergency powers. First, the *Charter* and *Bill of Rights* remain operative under the *Emergencies Act*. Second, normal administrative law remedies are available, and courts may evaluate whether a national emergency existed, whether emergency measures exceeded the powers

68. *Ibid* at 425 (per Laskin CJ) & 436 (per Ritchie J); *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91.

69. *R v Mann*, 2004 SCC 52 at para 41.

70. *Emergencies Act*, *supra* note 3, ss 6, 17, 28 & 38.

71. *1987 Hansard*, *supra* note 65 at 10808.

72. *Emergencies Act*, *supra* note 3, ss 8, 19 & 30. Note that the powers under a war emergency are subject to a lower standard of review, being "necessary or advisable" to deal with the emergency: *ibid*, s 40. This mirrors the language under the *War Measures Act*, *supra* note 8, s 6.

73. *Emergencies Act*, *supra* note 3, s 58.

74. *Ibid*, ss 10, 21, 32 & 41.

75. *Ibid*, ss 7(2), 18(2), 29(2) & 39(2).

76. *Ibid*, s 61.

77. *Ibid*, s 63.

granted by the *Emergencies Act*, and whether emergency measures were necessary to deal with the crisis.[78]

The *Emergencies Act* lay on the statute books unused for decades after its passage. "The Oka Crisis in 1990, the 2010 G20 Protest in Toronto, the 2020 Pipeline and Railway Protest, and various protests blocking emergency health workers and hospital entrances during the COVID-19 pandemic", among other crises, came and went without resort to emergency powers—that is, until February 14, 2022.[79]

IV. The 2022 Public Order Emergency

A. The Emergency

In the winter of 2022, convoys of truck drivers and other protesters against public health measures instituted blockades in various locations across Canada, most notably on Ottawa's Wellington Street outside the houses of Parliament.[80] On February 14, a cache of guns was discovered by police at a blockade at the Coutts, Alberta, border crossing.[81] At 3:41 PM that day, the clerk of the Privy Council, Janice Charette, handed in a "Decision Note" to the prime minister which recommended the proclamation of a public order emergency. Charette noted the economic threat posed by the protesters, the potential for civil unrest, and the "concerning, volatile, and unpredictable" state of events.[82] Prime Minister Trudeau accepted this recommendation, and the Governor in Council proclaimed a public order emergency.[83]

The Governor in Council then enacted two emergency measures. First, the *Emergency Measures Regulations* prohibited assemblies which interfered with "critical infrastructure", "protected places" designated by police, transportation,

78. Block & Goldenberg, *supra* note 57, s 1.3.2.

79. Leah West, Michael Nesbitt & Jake Norris, "Invoking the Emergencies Act in Response to the Truckers' 'Freedom Convoy 2022': What the Act requires, how the Government justified the invocation, and whether it was lawful" (2022) 70 Crim LQ 262 at 262.

80. For a short first draft of the history of these events, see Paul Wells, *An Emergency in Ottawa: The Story of the Convoy Commission* (Toronto: Sutherland House, 2023). A detailed chronology is provided by West, Nesbitt & Norris, *supra* note 79 at 271–78; and in Rouleau Report, Vol 1, *supra* note 6 at 27–131.

81. "Mounties seize guns and arrest 13 protesters at border blockade in Alberta", *CBC News* (14 February 2022), online: <cbc.ca> [perma.cc/E8VY-GCC3].

82. Clerk of the Privy Council, "Invoking the Emergencies Act to End Nation-Wide Protests and Blockades" (14 February 2022) at 7–8, online: <publicorderemergencycommission.ca> [perma.cc/LD9X-FYLA].

83. *Proclamation Declaring a Public Order Emergency*, SOR/2022-20.

or trade, or which threatened violence.[84] The *Regulations* also enabled the government to require people to render "essential goods and services" on demand, for reasonable compensation.[85] Second, the *Emergency Economic Measures Order* required financial institutions to turn over their information on people who had violated the *Emergency Measures Regulations*, and empowered the Department of Finance to suspend the bank accounts of offenders.[86] Violations of these measures were punishable as criminal offences.

On February 16, the government presented its explanation for proclaiming an emergency to Parliament, as required by section 58 of the *Emergencies Act*.[87] The government had to satisfy two requirements under the *Emergencies Act* to show that the proclamation was justified. First, there must have been reasonable grounds to believe in the existence of a national emergency, defined in section 3 as an "urgent and critical situation" exceeding the capacity of provincial legislatures or other statutes.[88] Second, there must also have been reasonable grounds to believe in the existence of a "public order emergency", defined in section 16 as "an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency".[89] The phrase "threats to the security of Canada", in turn, refers to the *Canadian Security Intelligence Service Act*, which contains a multipart definition of the term.[90] In declaring the public order emergency, the government argued that the following branch of the definition had been met, stating:

> activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state . . . but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to [above].[91]

In the section 58 explanation, the government cited five reasons for proclaiming a public order emergency: the breakdown of order associated with

84. *Emergency Measures Regulations*, SOR/2022-21, ss 2 & 6.

85. *Ibid*, s 7.

86. *Emergency Economic Measures Order*, SOR/2022-22.

87. *Frontline Nurses*, *supra* note 7 at para 57.

88. *Emergencies Act*, *supra* note 3, s 3.

89. *Ibid*, s 16.

90. *Ibid*; *Canadian Security Intelligence Service Act*, RSC 1985, c 22 (4th Supp).

91. *Ibid*, s 2. See Factum of the Attorney General of Canada on Merits of Judicial Review, *Canadian Frontline Nurses v Canada (Attorney General)* at para 53, online: <ccla.org/major-cases-and-reports/emergencies-act/#materials> [perma.cc/ZWV2-H73G] [AGC Factum, *Frontline Nurses*].

the blockades; their adverse effects on the Canadian economy and on Canada's relations with the United States; the interruption of cross-border supply chains; and a potential for further unrest and violence.[92] The government did not distinguish which reasons established the existence of a national emergency under section 3 and which established the existence of "threats to the security of Canada" under section 16. The section 58 explanation also did not provide a rationale for the specific measures which were adopted, except to say that they were "necessary" and "carefully tailored" to avoid contravening the *Charter*.[93]

B. The Public Inquiry

On February 23, 2022, the Public Order Emergency was declared at an end.[94] As required by the *Emergencies Act*, a public inquiry was convened, chaired by Rouleau JA of the Court of Appeal for Ontario. Commissioner Rouleau ultimately concluded "with reluctance" that the decision to invoke the *Act* was justified.[95] Because this was not a formal application for judicial review, the Commissioner did not discuss a standard of review; instead, he directly considered whether Cabinet had reasonable grounds to use emergency powers and whether the measures were necessary. This suggests that, in effect, a correctness standard was applied.

Commissioner Rouleau found that both criteria for proclaiming a public order emergency were met. First, based on the threat of violence at blockade sites, and because "this was a national situation, requiring national measures such as cutting off funding to the protests, which no province had the authority to do", Commissioner Rouleau concluded that there were reasonable grounds to perceive an "urgent and critical situation" beyond the capacity of the provinces or other laws.[96] Therefore, there were reasonable grounds to proclaim a national emergency under section 3. Second, according to Commissioner Rouleau, the "serious violence against persons or property" contemplated by the definition of "threats to the security of Canada" was met by the physical and psychological violence at blockade sites: there were reasonable grounds for Cabinet to believe "the point at which order breaks down and freedom cannot be secured or is seriously threatened" had been reached.[97] Therefore, the government had reasonable grounds to proclaim a public order emergency under section 16.

92. Department of Justice, "February 14, 2022 Declaration of Public Order Emergency: Explanation pursuant to subsection 58(1) of the *Emergencies Act*" (16 February 2022) at 4–12, online: <justice.gc.ca> [perma.cc/45AS-QLWP].

93. *Ibid* at 13–14.

94. *Proclamation Revoking the Declaration of a Public Order Emergency*, SOR/2022-26.

95. Rouleau Report, Vol 1, *supra* note 6 at 247.

96. *Ibid* at 199–202 & 211.

97. *Ibid* at 210.

Commissioner Rouleau proceeded to evaluate whether the measures adopted by the Cabinet were "necessary" to deal with the public order emergency. He adopted a deferential stance, based on the fact that the "*Emergencies Act* is designed to permit swift action, and it is unlikely that measures adopted under the law will be models of perfection".[98] The majority of the measures were found to be necessary, except for the provision in the *Emergency Measures Regulations* which allowed police to designate "protected places", which was too vaguely drafted to be appropriate.[99] Commissioner Rouleau emphasized that a measure need not be effective to be justified; the government merely requires reasonable grounds to believe the measure was necessary. For example, although Commissioner Rouleau found that a prohibition on foreign nationals entering Canada to participate in an unlawful assembly was ineffective in resolving the crisis, "it was reasonable [for Cabinet] to consider that individuals would come to Canada to physically join the protests, and it was appropriate to take measures to prevent this".[100]

Whether the emergency measures had violated the *Charter* was not part of Commissioner Rouleau's mandate, and he did not consider this question.

C. Frontline Nurses

Different conclusions were reached by Mosley J of the Federal Court of Canada, who heard an application by Canadian Frontline Nurses, the Canadian Civil Liberties Association, and other advocacy groups seeking a declaration that the proclamation of a public order emergency was unlawful and that the emergency measures unjustifiably infringed *Charter* rights. The applicants did not submit that the emergency measures exceeded the statutory authority granted by the *Emergencies Act*, nor that the government's orders were unnecessary to respond to the emergency.[101]

Justice Mosley applied a standard of reasonableness review to the government's conduct.[102] Although he accepted that the proclamation of emergency "authorized the Government of Canada to interfere with the constitutional division of powers", he found that it did not "did not disrupt the fundamental legal order of Canada other than on a temporary and limited basis", and therefore the rule of law did not require correctness review.[103]

98. *Ibid* at 224.

99. *Ibid* at 233–34.

100. *Ibid* at 237.

101. See Factum of CCLA on Merits of Judicial Review, *Canadian Frontline Nurses v Canada (Attorney General)* online: <ccla.org> [perma.cc/ZWV2-H73G].

102. *Frontline Nurses*, *supra* note 7 at paras 195 & 201.

103. *Ibid* at para 199.

However, he rejected the government's submission that, as matters of policy, the decisions under the *Emergencies Act* were entitled to special deference.[104]

Justice Mosley held that the section 58 explanation constituted the "reasons" for the government's decision to proclaim an emergency.[105] Justice Mosley found two faults with the explanation. First, he concluded—unlike Commissioner Rouleau—that economic disruptions were not included in the "serious violence to persons or property" component of the definition of a public order emergency, and the government's reliance on them was therefore unreasonable.[106] Second, Mosley J found that the dismantling of blockades by police outside Ottawa—for example, in Coutts and at the Ambassador Bridge in Windsor—demonstrated that there was no national emergency which "could not have been effectively dealt with under other laws of Canada".[107] Therefore, he concluded, the proclamation of emergency was unreasonable.[108]

Justice Mosley determined that there were no breaches of the freedoms of peaceful assembly and association, nor was there a breach of section 7 of the *Charter*.[109] However, he did conclude that the freedom of expression of protesters who were at the blockade sites peacefully was infringed.[110] He also concluded that "the failure to require that some objective standard be satisfied" before protesters' banking information was seized by authorities, akin to the reasonable grounds standard to issue search warrants, meant that the *Emergency Economic Measures Order* violated the right against unreasonable searches in section 8 of the *Charter*.[111] The applicants did not contest that the measures had a pressing and substantial objective, or that they were rationally connected to the goal of clearing out the blockades.[112] However, Mosley J concluded that, because the measures were not targeted to Ontario—"which faced the most intransigent situation"—and because less invasive alternatives were available through the regular criminal law, these *Charter* violations failed the "minimal impairment" branch of the *Oakes* test and were not saved by section 1.[113]

104. *Ibid* at para 209.

105. *Ibid* at paras 68–69.

106. *Ibid* at para 296. Commissioner Rouleau held that an economic disruption which "is significant enough to put the life, health, and safety of Canadians in danger" may constitute a public order emergency: Rouleau Report, Vol 1, *supra* note 6 at 198.

107. *Frontline Nurses*, *supra* note 7 at paras 254–255.

108. *Ibid*.

109. *Ibid* at paras 314, 317 & 324.

110. *Ibid* at para 309.

111. *Ibid* at paras 326, 327 & 341.

112. *Ibid* at paras 351–352.

113. *Ibid* at paras 352–354.

V. Discussion

The *Emergencies Act* does not fully resolve the problems of illegitimacy resulting from emergency action. However, it is a positive step forward from the *War Measures Act*, and many of its deficiencies are not readily soluble. One way the courts or Parliament can foster legitimacy is by imposing a strict standard of review on emergency action.

In this section of the paper, I begin by evaluating the legislative scheme of the *Emergencies Act*. I then propose a framework for the judicial review of emergency proclamations, orders, and regulations, and comment on the approach taken by Mosley J in *Frontline Nurses*.

A. The Legislative Scheme

Three benefits of the *Emergencies Act* regime are apparent. The first is that the *Charter* continues to operate. This would tend to support the normative legitimacy of emergency action, as courts could continue to enforce civil rights in the same manner they could prior to the proclamation of an emergency. Given that a national emergency would constitute a powerfully "pressing and substantial objective" for government action, it is possible that *Charter* rights infringements would often be readily justified under section 1.[114] However, these infringements would still need to be "prescribed by law", and their necessity "in a free and democratic society" justified before the courts.[115] At a minimum, this suggests that, contrary to Schmitt's criticism of the liberal constitution, states of emergency are not an "exception" from the regular order where the state enters a lawless void.

Second, the *Emergencies Act* provides two sets of criteria by which to evaluate the proclamation of an emergency: the definition of a national emergency as well as the definitions of the various types of emergencies—the "double test", as Beatty called it.[116] Requiring the choice of a particular type of emergency strengthens the powers of the court, Parliament, and the public to determine whether the government's course of action was justified, by providing criteria by which to gauge the government's decision. These requirements are instructions from Parliament to the courts to interrogate emergency action and not simply defer to the government, as occurred under the *War Measures Act*. Courts applying these criteria with rigour would strengthen the normative legitimacy of emergency action.

Third, the *Emergencies Act* requires Parliament to remain involved in the exercise of emergency powers, with the legislature having the ultimate power

114. *R v Oakes*, 1986 CanLII 46 at para 69 (SCC) [*Oakes*]; *Charter*, *supra* note 7, s 1.

115. *Oakes*, *supra* note 114.

116. *1987 Hansard*, *supra* note 65 at 10811.

to revoke a proclamation of emergency and to amend or nullify emergency orders or regulations. This is a marked difference from the *War Measures Act*, which largely sidelined the legislature and, under *Gray*, even empowered the Governor in Council to override other acts of Parliament.[117] The requirement for legislative approval would tend to disincentivize reckless use of emergency powers and would support the popular legitimacy of emergency action. It would also support the normative legitimacy of emergency action, as approval by an elected Parliament could be a reason why a decision ought to be supported.

And yet there are still several problems to consider. First of all, parliamentary oversight may not be a significant constraint on executive action. Jeffrey Simpson refers to a prime minister backed by a majority in the House of Commons as a "friendly dictator", given the limited powers of opposition members.[118] Mary Liston, who considers Parliament to be the "least effective and most marginalized branch of government",[119] notes that the legislature's traditional ability to monitor the exercise of executive power has been weakened in modern times.[120] These issues may be compounded during a crisis. Political scientists refer to a "rally-around-the-flag" effect, or "the tendency for public support for leaders and their policies in times of increased threat".[121] The willingness of legislators to back the government during a crisis is demonstrated by the swift passage of the *War Measures Act* with little debate upon the outbreak of war in 1914.[122] This could mean that Parliament would approve emergency action lacking normative legitimacy.

Liston's proposed remedy for parliamentary weakness, greater judicial oversight,[123] is not a panacea. Both the legislature and the courts may be compromised during a crisis. Concurring in a 1948 decision of the Supreme Court of the United States, Jackson J noted that:

> [The "war power"] is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes

117. *Gray*, *supra* note 50.

118. Jeffrey Simpson, *The Friendly Dictatorship* (Toronto: McClelland & Stewart, 2002).

119. Mary Liston, "The Most Opaque Branch? The (Un)Accountable Growth of Executive Power in Canadian Government" in Richard Albert, Paul Daly & Vanessa A MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 19 at 19.

120. See *ibid* at 39–55.

121. Joshua D Kertzer, "Public Opinion about Foreign Policy", in Leonie Huddie et al, eds, *The Oxford Handbook of Political Psychology*, 3rd ed (New York: Oxford University Press, 2023) 447 at 458–59.

122. See F Murray Greenwood, "The Drafting and Passage of the War Measures Act in 1914 and 1927: Object Lessons in the Need for Vigilance", in Pue & Wright, *supra* note 29, 291 at 294.

123. Liston, *supra* note 119 at 58.

> moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures.[124]

Peter Rosenthal, for example, offers the passions and pressures of war as an explanation for courts' acceptance of Japanese internment during the Second World War.[125] *Gray* provides a clear Canadian case where judges may become willing participants in government action out of a desire to assist the war effort.[126] Another example of this phenomenon comes from the United States during the Korean War. Prior to signing an executive order authorizing the military to seize steel mills to avert a strike, President Harry Truman met privately with Vinson CJ, who advised Truman that the order was lawful under the war power.[127] Chief Justice Vinson, who had been appointed by Truman, was one of three justices who dissented from the Supreme Court's ultimate ruling that Truman overstepped his executive authority and violated the Constitution.[128]

Bruce Ackerman argued that the best solution to these problems was to create a "political economy" which would disincentivize the unjustified use of emergency powers.[129] Ackerman generally praised Canada's *Emergencies Act*. However, he said that it should have included a "supermajoritarian escalator", where greater legislative majorities would be required to maintain a state of emergency the longer it persisted.[130] Such a system, Ackerman says, would in most cases "call an early halt" to unjustified emergency declarations without resort to the courts.[131] However, this scheme would not be infallible. Absent a constitutional amendment—which appears exceedingly unlikely—a simple half-plus-one parliamentary majority could repeal the supermajority provision.[132]

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124. *Woods v Miller Co*, 333 US 138 at 146 (1948).

125. Peter Rosenthal, "The New Emergencies Act: Four Times the War Measures Act" (1991) 20:3 Man LJ 563 at 599.

126. See McMahon, *supra* note 51.

127. David McCullough, *Truman* (New York: Simon & Schuster, 1992) at 897.

128. *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 (1952).

129. Bruce Ackerman, "The Emergency Constitution" (2004) 113:5 Yale LJ 1029.

130. *Ibid* at 1061–62.

131. *Ibid* at 1067.

132. An ill-fated scheme along the same lines was Britain's *Fixed Term Parliaments Act*, 2011, c 14 (UK), which required two-thirds approval from the House of Commons for the prime minister to trigger an election sooner than five years. When it became expedient for the government to call an early election, a new statute was passed overriding the supermajority requirement: *Early Parliamentary General Election Act*, 2019, c 29 (UK). The supermajority requirement has since been repealed: *Dissolution and Calling of Parliament Act*, 2022, c 11 (UK).

Another serious limitation in the *Emergencies Act* is that judicial and parliamentary accountability mechanisms are necessarily reactive: they cannot prevent unjustified emergency action by the executive. As Rosenthal writes, "there is no conceivable judicial remedy for the overall harm to society that could be caused by a government using an emergency declaration for political purposes".[133] This criticism may be true, but also has no practical solution, considering the demands of an emergency. The entire premise behind granting the executive emergency powers is that there are circumstances where traditional legislative deliberation would take too long. As Lazar writes, the *Emergencies Act*'s policy of "incorporating a range of forms of democratic deliberation, but with the temporality of the deliberation shifted" to follow, rather than precede, executive action is perhaps the best possible compromise.[134] And, by their very nature, judicial remedies cannot prevent the injustice which resulted in the proceeding before the court. They can, however, serve the objectives of compensating a victim, vindicating their rights, and deterring future injustices.[135]

Next, Tom Sorrell has argued that an individual's culpability in creating a crisis makes their use of unlawful acts to resolve it less normatively legitimate.[136] In the context of emergency action by the state, this issue could also weaken sociological legitimacy, as people might be less likely to support the use of emergency powers in a crisis they blame the government for creating. Requiring that a crisis cannot have been created by the government for the *Emergencies Act* to be invoked is particularly relevant to the 2022 Public Order Emergency, given the criticism of how the government managed the protests.[137] However, it is difficult to see how this could be implemented in practice: What would happen if government incompetence creates a genuine crisis which cannot be resolved without emergency powers? Accountability for these kinds of mistakes should not come by denying the government needed powers, but through the democratic process, informed by public inquiries and court applications by groups with public interest standing.

Finally, the "reasonable grounds to believe" standard for proclaiming an emergency is deferential, motivated by the executive's "high measure of expertise or disproportionate access to relevant information" during an

133. Rosenthal, *supra* note 125 at 590.

134. Lazar, "On Necessity Under the *Emergencies Act*", *supra* note 17 at 14.

135. See e.g. McLachlin CJ's discussion of the purposes of *Charter* damages in *Vancouver (City) v Ward*, 2010 SCC 27 at paras 25–31.

136. Tom Sorrell, *Emergencies and Politics* (New York: Cambridge University Press, 2013) at 4–5.

137. See e.g. the factual findings in Rouleau Report, Vol 1, *supra* note 6 at 144–59; and Kent Roach, "The February Emergency: Intelligence, Policing and Governance Failures and the Future of Charter-Proofed Emergencies" (2022) 70:2 Crim LQ 195.

emergency.[138] In the absence of rigorous judicial review, this requirement might become toothless, rendering the administrative law remedies available under the *Emergencies Act* helpless to constrain normatively illegitimate government conduct. However, as will be argued in the paper's next section, there is ample justification for courts to impose a strict standard of review on emergency proclamations, orders, and regulations.

B. Judicial Review of Emergency Measures

The recognition of a strict standard of review, either by the courts or by statutory amendment, would enhance the normative legitimacy of action under the *Emergencies Act*. The law of judicial review supports such a standard.

Because Parliament did not specify the standard of review in the *Emergencies Act*, determining the appropriate standard is left to the courts.[139] In *Canada (Minister of Citizenship and Immigration) v Vavilov* (*Vavilov*), the Supreme Court of Canada laid down a general presumption of reasonableness review, which could be rebutted by either legislative intent or the rule of law.[140] The court has recognized at least three instances where the rule of law requires correctness review: "constitutional questions", "general questions of law of central importance to the legal system as a whole", and "questions related to the jurisdictional boundaries between two or more administrative bodies".[141] The general principle behind these exceptions is that applying correctness review "respects the unique role of the judiciary in interpreting the Constitution" and allows courts to provide final answers to "questions for which the rule of law requires consistency".[142]

As "rules with a degree of general application made pursuant to an express statutory grant of power", proclamations of emergency and emergency orders or regulations are subordinate or delegated legislation to the *Emergencies Act*.[143] Historically, a third standard of review was used to determine if subordinate legislation was within the power of its enabling statute, or *intra vires*.

138. Craig Forcese & Aaron Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy*, 2nd ed (Toronto: Irwin Law, 2005) at 594.

139. *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at paras 35–36 [*Vavilov*].

140. *Ibid* at para 17.

141. *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 42–43. An additional category of correctness review, where courts share first instance jurisdiction with an administrative body, was found to result from the rule of law and legislative intent in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at para 40.

142. *Vavilov*, *supra* note 139 at para 53.

143. John M Evans, "Reviewing Delegated Legislation After *Vavilov*: *Vires* or Reasonableness?" (2021) 34:1 Can J Admin L & Prac 1 at 4.

Subordinate legislation was presumptively valid unless the challenging party demonstrated that it was "irrelevant", "extraneous", or "completely unrelated" to the governing statute.[144] The highly deferential stance of *vires* review is seen in the judicial treatment of *War Measures Act* orders.[145]

In November 2024, the Supreme Court of Canada properly recognized that the "irrelevant", "extraneous", and "completely unrelated" standard was inconsistent with the robust review of administrative decision-making called for in *Vavilov*. Justice Côté, writing for the Court in *Auer v Auer* (*Auer*), confirmed that the *vires* of subordinate legislation was subsumed into the *Vavilov* framework, and that the general standards of correctness or reasonableness review would apply.[146] When considering the reasonableness of subordinate legislation, Côté J held that the reasoning process should be "deduced" from the surrounding context, but instructed courts not to examine the "policy merits" behind the decision.[147]

In *Frontline Nurses*, Mosley J applied a blanket reasonableness standard of review to evaluate the legality of the proclamation of emergency and the subsequent emergency measures.[148] In contrast, this paper proposes that the following standards of review apply to actions under the *Emergencies Act*:

1. Proclamations of emergency should be subject to correctness review.
2. (a) Determining whether emergency orders and regulations are consistent with the separation of powers between Parliament and the executive should be reviewed for correctness. Otherwise, determining whether these measures are legally justified and within the powers granted by the *Emergencies Act* should be reviewed for reasonableness.

   (b) Determining whether the effects of emergency measures comply with the *Charter* should be reviewed for reasonableness.

1. Proclamations of Emergency

Applying *Vavilov*, the rule of law requires that proclamations of emergency be reviewed for correctness. While the Supreme Court of Canada has signalled

144. *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras 24–28.

145. For perhaps the most extreme example, see *Gray*, *supra* note 50.

146. *Auer v Auer*, 2024 SCC 36 at paras 44–49 [*Auer*].

147. *Ibid* at paras 50–65.

148. *Frontline Nurses*, *supra* note 7 at paras 201–203.

that the bar for adding a new category of correctness review is high,[149] the review of emergency proclamations could fall into one of two existing categories. First, declarations of emergency have clear constitutional effects: by empowering the executive to legislate, they necessarily weaken, or at least alter, the "foundational principle" of parliamentary supremacy.[150] For example, the Supreme Court of the United Kingdom has held that executive action which frustrates, "without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive" is unconstitutional.[151]

Second, determining whether an emergency has been validly proclaimed would have general importance to resolving other questions relevant to the legal system as a whole. Even where the real-world scope of an emergency seems minor, the legal effect of the proclamation remains exceptionally significant, implicating the enforcement of other federal and provincial statutes and particular emergency measures. It is at least arguable that the effect of an emergency proclamation is so profound that it is "a sweeping, transcendent point suffused with constitutional or quasi-constitutional principle".[152]

In *Frontline Nurses*, Mosley J purported to apply a reasonableness standard of review to the proclamation of emergency. He contended that the proclamation did not fall into the "constitutional questions" category of correctness review in *Vavilov* because its effects on the federal-provincial division of powers and the separation of powers between the legislative and executive branches of government were temporary.[153] This argument is not convincing. After all, an unjustly proclaimed emergency could become permanent in the absence of judicial intervention. Deferring to the executive's judgment in these circumstances would not only weaken the rule of law, but threaten the normative legitimacy of the use of emergency powers.

However, it is debatable to what extent Mosley J actually applied a reasonableness standard. His reasons bear hallmarks of so-called "disguised correctness review", where a court claims to defer to the administrator's judgment but instead makes its own interpretation of the facts and law. This has been described as the construction of a "yardstick" by which "to measure what the administrator did".[154] For example, Mosley J's statement "I conclude that there was no national emergency justifying the invocation of the *Emergencies*

149. See the majority reasons in *Mason*, *supra* note 141 at paras 36–54.

150. *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 54.

151. *R (on the application of Miller) v The Prime Minister; Cherry v Advocate General for Scotland*, [2019] UKSC 41 at para 50.

152. *Portnov v Canada (Attorney General)*, 2021 FCA 171 at para 13.

153. *Frontline Nurses*, *supra* note 7 at paras 198–199.

154. *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 28, cited in *Vavilov*, *supra* note 139 at para 83.

Act and the decision to do so was therefore unreasonable"[155] suggests that, rather than beginning with an analysis of the administrator's reasons, Mosley J instead began with his own independent evaluation of the situation in February 2022.

In any case, a correctness standard of review should not permit the reviewing court to use hindsight or information that was not before the decision maker. This is mandated by the "reasonable grounds to believe" standard for proclaiming a national emergency under the *Emergencies Act*. It is ironic that Commissioner Rouleau, applying a correctness standard of review, found that the proclamation of emergency was justified, while Mosley J, applying a deferential reasonableness standard, found that it was illegal. A key distinction between the justices' approaches is the extent to which they use subsequent events to evaluate the government's decisions. Much of what we have learned since February 2022 throws cold water on the idea that Canada was truly in a state of emergency. Most obviously, the fact that the Coutts blockade was resolved "without violence . . . much outside the ordinary 'bust' that happens routinely in every big city in the country" suggests that regular police powers would have been sufficient.[156] Moreover, as Leah West and colleagues argue, there were additional powers which the federal government could have brought to bear under the *Criminal Code* and the *Security Offences Act* before resorting to the *Emergencies Act*.[157]

Commissioner Rouleau was willing to overlook these deficiencies because he found that it was reasonable to believe that the situation "was worsening and at risk of becoming dangerous and unmanageable", in part due to the discovery of weapons at Coutts.[158] Justice Mosley, on the other hand, held that the resolution of protests outside Ontario by provincial authorities demonstrated that utilizing the *Emergencies Act* was unnecessary, and found that it was only "debatable" that increased violence in Ottawa might have resulted if an emergency was not proclaimed.[159] Justice Mosley admits that these conclusions were made with hindsight:

> I had and continue to have considerable sympathy for those in government who were confronted with this situation. Had I been at their tables at that time, I may have agreed that it was necessary to invoke the Act. And I acknowledge that in conducting judicial review of that decision, I am revisiting that time with the benefit of hindsight and a more extensive

155. *Frontline Nurses, supra* note 7 at para 255.

156. West, Nesbitt & Norris, *supra* note 79 at 284.

157. *Ibid* at 285–86; RSC 1985, c C-46; RSC 1985, c S-7.

158. Rouleau Report, Vol 1, *supra* note 6 at 217.

159. *Frontline Nurses*, *supra* note 7 at paras 252–255.

> record of the facts and law than that which was before the GIC.[160]

The reasonable grounds test is applied in a variety of contexts in the criminal law. One of these is to evaluate whether police officers are justified in making warrantless arrests. In those circumstances, courts recognize that "Judicial reflection is not a luxury the officer can afford", and "The officer must make his or her decision based on available information which is often less than exact or complete".[161] Therefore, judicial review of whether reasonable grounds existed is conducted from the perspective of a reasonable person "standing in the shoes of the police officer" at the time of the arrest, and "is assessed in light of the facts and circumstances known at the time the . . . decision was made".[162]

Given the condensed time pressure and lack of information during an emergency, the same considerations should have coloured the reasonable grounds standard in the *Emergencies Act* context against the use of hindsight. In *Frontline Nurses*, the court should therefore have asked: "Would a reasonable person, standing in the shoes of the Governor in Council on February 14, 2022, have reasonable grounds to proclaim a public order emergency?" By contrast, the question Mosley J seems to ask is: "Knowing what we do today, was there actually a public order emergency on February 14, 2022?" Beatty, testifying in 1987 about the proposed *Emergencies Act*, noted that "the decision whether to invoke emergency powers . . . depends not only on an assessment of the current facts of the situation, but even more on judgments about the direction events are in danger of moving and about how quickly the situation could deteriorate".[163] By using hindsight to evaluate those judgments, courts would unduly constrain emergency action and unfairly penalize the government for acting on incomplete information.

2(a). Emergency Orders or Regulations: Lawfulness

The story with respect to emergency orders or regulations is more complicated. Whether emergency orders or regulations may override other acts of Parliament (as in *Gray*) or frustrate Parliament's functions—issues that were not considered in *Frontline Nurses*—should be reviewed for correctness. Given

160. *Ibid* at para 370.

161. *R v Golub* (1997), 34 OR (3d) 743 at 750, 1997 CanLII 6316 (ONCA), quoted with approval in *R v Beaver,* 2022 SCC 54 at para 72.

162. *R v Storrey*, [1990] 1 SCR 240 at 250, 1990 CanLII 125 (SCC); Anne-Marie Boisvert, "The Reasonable Grounds to Believe Standard in Canadian Criminal Law", in Rouleau Report, Vol 5, *supra* note 17, 6–1 at 6–20.

163. Canada, House of Commons, Legislative Committee on Bill C-77, *Evidence*, 33-2, vol 1, No 1 (15 December 1987) at 13–14, cited in Rouleau Report, Vol 1, *supra* note 6 at 217.

the constitutional implications of such a measure, it would be antithetical to the rule of law to create uncertainty by deferring to the executive's judgment.

However, *Vavilov* and *Auer* recognize that other so-called jurisdictional questions flowing from orders or regulations—including the interpretation of the other powers granted by the *Emergencies Act*—would be reviewed only for reasonableness.[164] Similarly, the "necessity" of emergency measures to respond to the emergency is reviewable only for reasonableness. This is the approach which Mosley J purports to apply.[165]

Where a reasonableness review of emergency measures is undertaken, it may be functionally difficult to distinguish from correctness. Reasons are not issued when an order in council is enacted, and where reasons are not required, *Vavilov* admits that reasonableness review will inevitably "focus on the outcome".[166] A "robust" application of reasonableness review,[167] focusing on the outcome of the decision-making process and attuned to the severity of its impacts, may in practice be very similar to the court simply asking itself whether the outcome was correct.

However, the strictness of this standard of review would be warranted. *Vavilov* calls for justification which is "responsive" to the decision's impact,[168] and it is difficult to imagine potential impacts greater than the unjust exercise of emergency powers. Moreover, bearing in mind the limitations of judicial review during a crisis, it would enhance the normative legitimacy of emergency action for courts to require measures to fall within a narrow range of reasonable outcomes.

Given the difficulties inherent in crisis governance, it could be argued that emergencies require the executive to be given a free hand, and that rigorous reasonableness review would hamper the effectiveness of emergency action. Under this argument, the factual uncertainty of an emergency is the context which colours reasonableness review towards greater, not lesser, deference. This point is well taken, but does not outweigh the need for a strict standard of review over emergency action, for two reasons. First, the reasonable grounds to believe standard to adopt measures under the *Emergencies Act* already relieves the executive from liability where they have acted reasonably, even where the factual context is unclear and the deliberative process is rushed.[169] Second, imposing sufficient legal constraints on the government to ensure that their actions are justified will aid the legitimacy, and thereby the effectiveness, of emergency action. As Webber writes, the willingness of citizens to "do their

164. *Vavilov*, *supra* note 139 at paras 65–68; *Auer*, *supra* note 146 at paras 22–23.

165. *Frontline Nurses*, *supra* note 7 at para 203.

166. *Vavilov*, *supra* note 139 at para 138.

167. *Mason*, *supra* note 141 at para 63.

168. *Ibid* at para 81.

169. Forcese & Freeman, *supra* note 138 at 594.

part" and comply during an emergency "requires directives that are apt to be followed".[170]

2(b). Emergency Orders or Regulations: *Charter* Compliance

Finally, a reasonableness standard of review should also be applied to determine whether the effects of emergency measures are justifiable under the *Charter*.

Determining the appropriate standard of review for *Charter* issues is complex. Prior to *Vavilov*, the Supreme Court of Canada held, in *Doré v Barreau du Québec* (*Doré*), that the question of whether the effects of an administrative decision unjustifiably violated the *Charter* was to be evaluated on a reasonableness standard, as it was an application of law to the facts which deserved deference.[171] In December 2023, that approach was unanimously reaffirmed by the Court in *Commission scolaire*, where *Doré* was applied to find an administrative decision unreasonable for failing to proportionately balance the values represented by section 23 of the *Charter*.[172] According to Côté J, "the reviewing court must . . . examine the decision maker's reasoning process to assess whether, given the relevant factual and legal constraints, the decision reflects a proportionate balancing of *Charter* rights or the values underlying them".[173] Otherwise, the decision is unreasonable.

However, in the June 2024 *York Region* decision, a majority of the Supreme Court of Canada held that correctness review applied to a labour arbitrator's conclusion that schoolteachers lacked a reasonable expectation of privacy in the contents of their work computers under section 8 of the *Charter*.[174] As Karakatsanis and Martin JJ wrote, dissenting on this point, the question under review was "individualized" and involved "the application of the *Charter* . . . to a specific factual and statutory context",[175] factors which had previously justified deference.[176] Justice Rowe, writing for the majority, held that the "issue of constitutionality on judicial review—of whether a *Charter* right arises, the scope of its protection, and the appropriate framework of analysis—is a

170. Webber, *supra* note 22 at 182.

171. *Doré v Barreau du Québec*, 2012 SCC 12 at para 7 [*Doré*].

172. *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 [*Commission scolaire*].

173. *Ibid* at para 73.

174. *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 [*York Region*].

175. *Ibid* at para 122.

176. *Doré*, *supra* note 171 at para 36.

'constitutional questio[n]' that requires 'a final and determinate answer from the courts'", necessitating correctness review under *Vavilov*.[177]

Frustratingly, neither *Doré* nor *Commission scolaire* were distinguished by Rowe J, leaving the law uncertain. Taken literally, Rowe J's broad framing of the "constitutional questions" category of correctness review would seem to encompass every application of the *Charter* by administrative decision makers. Reading *York Region* together with *Commission scolaire*, one possible rule is that the question of whether the *Charter* applies to a decision and the decision maker's interpretation of *Charter* rights—including whether rights exist under the facts of the case—are evaluated for correctness; while the question of whether the effects of a decision violated the *Charter* is reviewed for reasonableness. The difference is granular, but maintains the "scope/application distinction" which commentators have read into *Vavilov* and *Doré*.[178]

In *Frontline Nurses*, Mosley J purports to apply a reasonableness standard of review on the *Charter* issues; but, as with his analysis of the proclamation of emergency, his reasons smack of correctness review.[179] Indeed, Mosley J does not even seriously attempt to ground his judgment in the language of reasonableness, considering whether the *Charter* had been violated and then applying the *Oakes* test, with *Doré* deference nowhere to be found.[180] The *Doré* standard of review allows for "a range of reasonable outcomes", implying that a measure which is not the least impairing might be upheld, so long as it is proportionate.[181] It is likely that the problems which Mosley J noted with the emergency measures—that they were not geographically confined to Ontario and that police could have obtained financial information through regular search warrants—would also have rendered the measures unreasonable under the *Doré* test. These were options "reasonably open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives" of restoring order and public safety, and therefore the measures were not proportionate.[182] However, it is not sufficient to say, as Mosley J does, that because "the measures were not minimally impairing, I find that they were not justified", without considering whether the measures fell into an acceptable range.[183] This is disguised correctness review.

177. *York Region*, *supra* note 174 at para 63, citing *Vavilov*, *supra* note 139 at paras 53 & 55.

178. See Paul Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (Vancouver: UBC Press, 2023) at 163.

179. *Frontline Nurses*, *supra* note 7 at paras 200–201.

180. See *ibid* at paras 355–359.

181. *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 81, cited in *Commission scolaire*, *supra* note 172 at para 72.

182. *Ibid*.

183. *Frontline Nurses*, *supra* note 7 at para 359.

Doré is a controversial decision, and it is beyond the scope of this paper to determine whether it should be overruled.[184] However, replacing *Doré* with a correctness standard of review would lead to undesirable results. If *Doré* was overruled, the *Oakes* test would be applied to determine whether the effects of emergency measures which violate the *Charter* can be saved under section 1. Importantly, the *Oakes* test requires that the measure "impair 'as little as possible' the right or freedom in question".[185] It is arguable that this approach would boost the normative legitimacy of emergency orders and regulations, as there would be no range of reasonable measures which the government could select from: the least invasive alternative would always be required. Such a stringent standard makes sense in normal circumstances, when there is ample time to consider all the options. But it might become problematic given the lack of time and information available to make a decision in a crisis, as it would leave the government open to being second-guessed with the benefit of hindsight, even where they have reasonably considered the effects of their decision on *Charter* rights. Allowing a narrow range of reasonably impairing measures to be upheld under section 1, as determined by a robust application of reasonableness review, seems to be a better way to balance the competing objectives of preserving normative legitimacy and allowing the government leeway to quickly determine an appropriate measure, even if it is an imperfect one.

Summing up, the *Emergencies Act* represents a clear step forward from the *War Measures Act* by providing for constitutional rights, parliamentary oversight, and judicial review. Deficiencies in the *Emergencies Act* may be an inherent result of the delegation of emergency powers during a time-sensitive crisis. Based on the principles underlying judicial review, including the need to guarantee the legitimacy of government action, a strict standard of review should be mandated either by the courts or by amending the *Emergencies Act.*

Conclusion

In 1971, the Court of Appeal of Quebec upheld the emergency measures issued during the October Crisis. The parties challenging the regulations attempted to rely on the scholarly critique of a law professor at McGill University.[186] Justice Brossard dismissed those concerns, writing that "between

184. Paul Daly, noting the reluctance of reviewing courts to defer to the government on the extent of *Charter* protections, has argued that *Doré* should be overruled, if only so that "the law as stated [is] in line with the law as applied": *supra* note 178 at 160.

185. *Oakes*, *supra* note 114 at para 70, citing *R v Big M Drug Mart Ltd*, 1985 CanLII 69 at para 139 (SCC).

186. The article cited was JN Lyon, "Constitutional Validity of Sections 3 and 4 of the Public Order Regulations, 1970" (1971) 18:1 McGill LJ 136.

commentators on the law and judges charged with applying it, there is often a lack of pragmatism and realism distinguishing theoreticians from practitioners".[187]

This criticism is apt to a discussion of the *Emergencies Act*. The act balances numerous competing goals including, as Commissioner Rouleau has written, the tensions between "order and freedom", "speed and deliberation", and "rules and exceptions".[188] If we accept that crises may arise where legislative deliberation must give way to rule by the executive, then the *Emergencies Act*, through its provisions for retroactive parliamentary oversight, judicial review, and the continued application of the *Charter*, aids the sociological and normative legitimacy of emergency action. However, courts should adopt a strict standard of judicial review for emergency proclamations, orders, and regulations. Because of their effects on the Constitution and the legal system as a whole, the rule of law requires emergency proclamations and emergency measures which implicate the separation of powers to be reviewed for correctness. Otherwise, a robust application of the reasonableness standard should be used for emergency measures. Of course, Parliament is free to legislate their own strict standard of review, and should be encouraged to do so.

By adopting a reasonableness standard to evaluate whether the proclamation of emergency was legal, Mosley J's decision in *Frontline Nurses* did not follow this framework. There are other inconsistencies in his reasoning. For example, Mosley J's reasons often suggest a form of disguised correctness review which is inconsistent with both *Vavilov* and *Doré*. Moreover, Mosley J's use of hindsight within the reasonable grounds to believe test imposes a threshold for emergency proclamations which is too stringent, penalizing the government for acting based on incomplete information about a situation with the potential to deteriorate. However, Mosley J's willingness to hold the government to account and uphold the rule of law is admirable.

In the end, the success of the *Emergencies Act* depends on the good will of judges, parliamentarians, and voters. "Good institutions are never enough. Ultimately the protection of these rights devolves upon citizens themselves".[189]

187. *Gagnon*, *supra* note 59 at para 128.

188. Rouleau Report, Vol 1, *supra* note 6 at 186–87.

189. Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Toronto: Penguin Canada, 2004) at 51–52.