

The Problem of Threshold in the *Emergencies Act* – A Triple Incapacity Model

K A R I N L O E V Y *

ABSTRACT

This paper argues that the framing of the threshold for declaring a national emergency in section 3 of Canada's *Emergencies Act* reproduces an unhelpful anxiety that is commonplace among theorists and practitioners of emergency powers – namely: the concern that unexpected catastrophic events require exceptional, ungovernable powers to handle them. Section 3 defines the thresholds for a national emergency within a *triple-incapacity framework*: incapacity on a provincial level (or) incapacity on a federal level (and) legal incapacity. On the face of it, this framework creates a very high threshold for the declaration of emergencies, but it also reproduces a language of exception that orients officials and the public towards the very extreme case in which competence is lost. This is an incongruous framing – it is responsible for ambiguity and endless quarrels about whether there is “no other law” and “no other capacity”, evading the purpose of emergency government which should be focused on capacities: the ability to construct and reconstruct – regularized, coordinated, multifaceted, multijurisdictional emergency management capabilities.

Keywords: *Emergency Powers, The Emergencies Act, National Emergency, Carl Schmitt, State of Exception, Report of the Public Inquiry into the 2022 Public Order Emergency.*

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I. INTRODUCTION

Emergency powers theorists and practitioners often understand “emergency” as a threshold concept, defining emergencies by the fact that they raise occasions for the use of special, exceptional powers. This partly follows Carl Schmitt’s dubious characterization of emergency as a “borderline concept” which can neither be codified nor circumscribed factually, a case in which “the preconditions and the content of jurisdictional competence are necessarily unlimited.”¹

According to Schmitt, a real emergency is one which the sovereign decides it is – because the sovereign can act against the law to declare the threat and how it should be solved.

There are reasons to reject Schmitt’s characterization, yet even those who embrace liberal law and institutions are influenced by the anxiety that it raises.² They still define emergencies as extreme liminal events: A threshold is placed at the very limit of capacity, signifying the very limit of law – yet contained by law. But this framing encourages a politics of emergency governance focused on incapacity and liminality, concealing the core questions of capacity that emergencies raise: what is the threat? who is capable of identifying threats? on the basis of what knowledge, and what evidence? Using which processes, methods, and standards, for identification? In consultation and cooperation with which agencies and jurisdictions, etc.? Assuming emergency is liminal and exceptional sidelines these critical questions.³

¹ Carl Schmitt, *Political Theology: Four Chapters on the Theory of Sovereignty*, Schwab George trans. (Chicago: University of Chicago Press, 2005) at 5-6.

² I thank an anonymous reader for stressing that one cannot understand Schmitt’s theory of emergency in a manner detached from his infamous embrace of a genocidal form of totalitarianism (see for example, Bill Scheuerman, “Carl Schmitt and the Nazis” 23(1991) *German Politics & Society*, 71-79). I agree completely. What is distinct about Carl Schmitt’s emergency powers theory is exactly its totalitarian impetus. This is why it is important to expose the Schmittian traces that often appear in liberal democratic instruments whose explicit aim is to ensure legally constrained emergency management—such as Canada’s *Emergencies Act*.

³ For more on how emergency powers theories and doctrines that treat emergencies as an exception, sideline the mundane, day to day questions and problems of the field, see Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (New York,

Canada's 1985 *Emergencies Act* clearly rejects a Schmittian theory of emergencies through its detailed definition, constrained scope of powers and mechanisms of accountability. And yet some of its language reproduces the anxiety of threshold. What is the emergency that the Act envisions? The Act defines "a national emergency" in Section 3 as an urgent, critical situation, temporary in nature that 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 – seriously threatens the ability of the Government of Canada to preserve sovereignty, security, and territorial integrity of Canada; and that it "cannot be effectively dealt with under any law of Canada"*.

This language envisions a *triple-incapacity threshold*: incapacity on a provincial level, (or) incapacity on a federal level (and) legal incapacity. In other words, in order for its measures to be activated, the language of the Act requires a state of deep collapse of aptitude: collapse of provincial authority, (or) collapse of the ability to preserve sovereignty in the government of Canada (and) collapse of law. While this seems to create a high threshold for the declaration of emergencies, it replicates a Schmittian anxiety about the liminal case. It is oriented to the extreme case in which competence is lost. Yet at this very moment of extreme incapacity it births (or imagines) an all-powerful executive who can really take charge. This framing is inconsistent with the Act's overarching attempt to constrain the exercise of executive power – and it is responsible for endless arguments about whether there was really "no other law", or there was really "no other capacity" anywhere to be found. To successfully confront the myriad and multileveled problems that emergencies bring about, we should reject this politics of incapacity and focus instead on laws and capacities that help avert the need for exceptional, extraordinary powers.

Part II outlines the problem of threshold in the theory of emergency powers and the anxieties of "exception" that it typically generates. Part III then shows how a logic of exception frames the threshold in section 3 of the *Emergencies Act*⁴ suggesting a politics of incapacity detrimental to the purpose of emergency government and to the explicit aim of the *Emergencies Act*. The paper concludes by suggesting the Rouleau Report's interpretation

Cambridge University Press, 2016).

⁴ RSC 1985, c 22 (4th Supp).

of the *Emergencies Act*'s threshold normalizes section 3's exceptional language, effectively lowering the threshold for invoking the Act.

II. THE PROBLEM OF THRESHOLD IN EMERGENCY POWERS THEORY

In traditional emergency powers theory, the question "what is the threshold for declaring an emergency" is crucial, and often devastating. Emergencies are commonly held to be unexpected, and therefore vaguely defined events. We assume that only those organs authorized to declare the threshold has been met, (normally the executive, or 'sovereign') and to decide on measures taken in response, can be defined in advance. Threshold decisions are assumed to be political, not juridical, while only the emergency measures themselves may be subject to judicial oversight.⁵

But solving the problem of the threshold by pointing to an agent is insufficient. For one, "authorizing an agent" doesn't capture the range of questions "meeting the threshold" demands. Defining and identifying threats is a complex matter. Declarations by authorized organs are often contested both around the conditions amounting to an emergency and with regards to appropriate methods and procedures for identifying threats, the relevant parties involved in the process, and the standards and benchmarks for declaring different types of threats. This means the question of threshold requires foregrounding problems of definitions, not just identifying who gets to decide.⁶

⁵ For an example of this approach in the practice of emergency powers see the decision by the majority opinion in the House of Lords *Belmarsh Case (A and others v Secretary of State for the Home Department)* [2004] UKHL 56; [2005] 2 AC 68. In this case the majority used the framework of article 15 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953)) to maintain a distinction between the problems of defining and identifying a public emergency threatening the life of the nation, and the problem of defining the measures as 'strictly required' to handle the emergency. Two levels of scrutiny are then applied - deference to the executive on the two first questions and strict scrutiny on the third. This solution generated gaps and instabilities in the decision, positization of a definition of emergency as inherently impossible to define, and a legal politics of executive exclusivity over defining the emergency. See analysis in Karin Loevy, *What is an Emergency? The Legal Politics of Defining the "Undefinable"*, (2016) 22 ILSA J Int'l & Comp L 155-228.

⁶ See also, Nomi Claire Lazar, "What's 'Necessary' under the *Emergencies Act*?" in this

Carl Schmitt's reading of emergency as a threshold concept illustrates this distortion.⁷ Right after defining the sovereign as 'he who decides on the exception', Schmitt turns, in *Political Theology* to a terminological account of borderline concepts: 'a borderline concept is not a vague concept but one pertaining to the outermost sphere'.⁸ The exception, he tells us, is a general concept in the theory of the state – it does not apply to any emergency decree or state of siege. It is there to signify a threshold moment, a moment of decision, which is also the moment where the sovereign emerges because it is he who can distinguish between what's normal, and what's truly exceptional. It is he who decides where the borderline is.

And so, at the center of Schmitt's observation, is not any 'emergency' but a very specific one: it is that special kind – 'which is not codified in the existing order and can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like'.⁹ It is not just an emergency situation, but one which 'cannot be circumscribed factually and made to conform to a preformed law.'¹⁰ It is the ultimate, radical other – 'the exception'.

We know why this narrow, liminal, borderline phenomenon was important for Schmitt, a key theorist of the antiliberal state. For Schmitt, the rule of law is either anti-political, or – it is a sham, and therefore a state that ties itself to legality – "a rule of law state" – is too weak or too corrupt. The extreme, liminal exception provides an opportunity to save the liberal order from the clutches of the rule of law – because it creates a truly political moment: an opportunity for a sovereign to decide between the normal and the exceptional. This ever-present power to decide destroys the harmful idea of the rule of law and makes the purely political a constant reality underlying authority. What remains is a politics akin to a distinction between friend and enemy and the conditions under which such distinction is possible, also makes the 'political' possible. Another way to put it is that Carl Schmitt is drawn to the liminal, exceptional, because according to him, the boring,

volume.

⁷ *Political Theology*, *supra* note 1.

⁸ *Ibid.*

⁹ *Ibid.*, at 6

¹⁰ *Ibid.*

repetitious, ‘general’ has no political meaning without the passionate attention that exception requires.¹¹

It is therefore interesting to ask why other theorists, less skeptical of liberal law and liberal political institutions, remain drawn to this narrow threshold concept of emergency. Some thinkers in the liberal tradition are interested in framing emergencies as undefinable exceptions not because they believe, like Schmitt, in an all-powerful sovereign, but because they are interested in designing an institutional mechanism that is so powerful that it can handle every imaginable and unimaginable exigency. This grandiose liberal project is expressed for example in the often quoted maxim by Alexander Hamilton that “it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them”, and therefore “no constitutional shackles can wisely be imposed on the power to which the care of it is committed”.¹² But emergency powers scholars who quote Hamilton’s truism often ignore the fact that it does not relate to emergency powers at all. Instead, it is used to justify the *Union* itself as an ultimately powerful instrument. Since it is tasked with the common defense it must possess all necessary powers to fulfill its task. The exigency for Hamilton is not a particular emergency but a natural reason to create a *Union*.

In a similar fashion, the highly influential American emergency powers theorist, Clinton Rossiter, in his 1948 book *Constitutional Dictatorship*, was not interested in the definition of any particular emergency, but invested in designing an ideal institution (dictatorship) that can handle (within a constitutional system), any exceptional threat. The problem for him is the nature and scope of such institution. He wanted constitutional dictatorship to shine as a different type of dictatorship than the fascist kind. He wanted dictatorship to take on the features of antiquity and universality – “for it is coeval and coextensive with constitutional government itself”.¹³ Here too emergency is assumed as an exception, in order to give rise to an all-powerful institution that can handle it.

¹¹ *Ibid* 15.

¹² In Clinton Rossiter, (ed.), *The Federalist Papers* (New York: New American Library, 1961), No. 23, p. 153 (Alexander Hamilton).

¹³ “The distinction” he stressed, “between Lincoln and Stalin, Churchill and Hitler should be obvious”. Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New Brunswick: Transaction, 2002; originally published 1948) at 8.

Finally, Oren Gross and Fionnuala Ni Aolain, leading contemporary emergency powers scholars, preface their comprehensive treatment of the problem of emergency powers with the claim that “The term emergency is by its nature an elastic concept which may defy precise definition.”¹⁴ Because emergencies are too elastic to be captured by clear definitions, and because emergency powers tend to extend and become permanent, it is particularly important to ask what are – if any – the available, realistic controls over the use of such powers. The fact of un-definability is assumed and becomes a motivation to inquire how best to manage control over such ‘uncontrollable’ phenomenon.

But describing the problem of defining the emergency in terms of threshold or break in normal capabilities brings with it another tacit unexamined assumption: that normal conditions are supposedly predictable, managed, stable, and the basis for productive society and norm development.¹⁵ The threshold is understood against a false background of normality with its correct, or at least ordered definable categories. It creates a distinction between normal, known, predictable, and its “other” – total collapse, and ultimately justifies the power that polices the distinction.¹⁶ Whether they recognize and celebrate liminality (like Schmitt), or marginalize it by focusing on an all-powerful agent who can police it (like Hamilton and Rossiter) or on how to overcome it (like Gross and Ni-Aolain), thresholds for so many thinkers, maintain a forced distinction between normal order and its threatening other.

III. THE TRIPLE INCAPACITY MODEL IN SECTION 3 OF THE *EMERGENCIES ACT*

The *Emergencies Act* operates under a distinctly non-Schmittian framework. It was designed to protect rights, address distinct types of emergency, promote executive accountability, and respect federalism.¹⁷ This

¹⁴ Oren Gross & Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006) at 5.

¹⁵ Which Gross and Ni Aolain identified as ‘the assumption of separation’. *Ibid*, 12.

¹⁶ For an illuminating treatment of the continuity between times of normalcy and emergency, and the norms of crisis government, see Nomi Clair Lazar, *States of Emergency in Liberal Democracies* (Cambridge University Press, 2009).

¹⁷ Canada, *Report of the Public Inquiry into the 2022 Public Order Emergency* (Ottawa: POEC, 2023) (Chair: Hon Paul S. Rouleau), [Rouleau Report] vol 2:, Analysis (Part 1) at 32.

approach addressed dangerous shortcomings in the *War Measures Act*. That Act left little room for legislative or judicial oversight in declaring or ending emergencies and usurped provincial jurisdiction without consultation.¹⁸

[t]he *Emergencies Act* was not simply an attempt to build in additional safeguards. It was an attempt to enact an entirely different framework for the management of national emergencies – one that reflected a range of concerns that included, but were not limited to, the need to protect civil liberties and constitutional rights.¹⁹

Everything about the new Act seems to negate a Schmittian principle of unconstrained power for unconstrained events. As Nomi Claire Lazar and Jocelyn Stacey maintained in a recent post to *The Conversation*, “The *Emergencies Act* takes the rule of law seriously”.²⁰ The *Emergencies Act* establishes types of emergencies,²¹ delineates processes for proclamations and resolutions of emergency.²² It delineates emergency powers²³ which are by no means “unlimited.” They must be consistent with the Charter of Rights and Freedoms and the Canadian Bill of Rights,²⁴ and can only infringe on a Charter right if they constitute a reasonable limit to the right

¹⁸ *Ibid* at 30-34.

¹⁹ *Ibid*, at 34.

²⁰ Nomi Claire and Jocelyn Stacey, “Emergencies Act Inquiry Final Report is a Reminder that We All Have a Role in Upholding the Rule of Law”, (21 February 2023) *The Conversation*, online: theconversation.com/emergencies-act-inquiry-final-report-is-a-reminder-that-we-all-have-a-role-in-upholding-the-rule-of-law-200230.

²¹ Unlike the WMA, which focused exclusively on war, invasion, and real or apprehended insurrection, the *Emergencies Act* allows the federal government to respond to four distinct types of emergencies: (1) public welfare emergencies, such as natural disasters and pandemics (s.5); (2) public order emergencies, which arise out of threats to the security of Canada(s.16); (3) international emergencies, such as acts of intimidation or coercion by foreign states (s.27); and (4) war emergencies (s.37).

²² For example: because of concerns surrounding federalism, the federal government usually needs to consult affected provinces before making such a proclamation. The general rule is that the federal government must consult the executive branches of each province in which the effects of the emergency occur (s. 25 (1)). Once an emergency is proclaimed, it will automatically expire after a set period unless it is renewed. The length of a proclamation varies depending on the type of emergency. In the case of a public order emergency, the proclamation lasts 30 days.

²³ Once the emergency is proclaimed the federal cabinet is empowered to make various types of orders which will have the force of law (ss.8(1)(j), 19(1)(e) 30(1)(1), 40(3) and 19(1)).

²⁴ *Ibid*, Preamble.

in question. The Act's preamble also mentions that Cabinet "must have regard to the International Covenant on Civil and Political Rights".²⁵ The Act also establishes a particularly thick oversight system: legislative and judicial.²⁶

In view of this anti-Schmittian framework that seems to take the rule of law seriously, it is particularly disturbing when – on the issue of threshold – the Act slips back to a darker Schmittian sphere, expressing the old anxiety of "exception", in section 3.

Here, we are suddenly back in a language "pertaining to the outermost sphere."²⁷

The section creates a definition of a particular type of emergency, "a national emergency," that works as a threshold to use the Act's new powers. What are its features?

First, it is an urgent and critical situation, it is temporary in nature, and it *cannot be effectively dealt with under any other law of Canada* (other than the *Emergencies Act*).

Second, it 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, (if it is not the type that seriously endangers the lives, health or safety of Canadians and exceeds provincial capacity) it *seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada*.

²⁵ Furthermore, no order or regulation can have the effect of amending the *Emergencies Act* itself, nor can it provide for the detention, imprisonment, or internment of Canadian citizens or permanent residents on the basis of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability (s. 4).

²⁶ The House of Commons and Senate votes on whether an emergency declaration is justified (s. 58) and continues to exercise control over the length and continuation of the declaration (ss.23(1) and 60) and may terminate it early (s. 59). Parliamentary review may also revoke any order or regulation under the declaration at any time (s.61(3), (4) and (8)). A Parliamentary Review Committee reviews Cabinet's performance of its functions under a declaration of emergency during the emergency and after it ends (s. 62). In addition, a commission of inquiry is established after the emergency ends to examine the circumstances that led to the emergency and report to Parliament within 360 days of the emergency's end (s. 63). Finally, both the proclamation of emergency and the exercise of powers under the Act are subject to judicial review on constitutional as well as administrative law grounds.

²⁷ *Political Theology*, *supra* note 1 at 5.

On the one hand the definition reiterates the universal concern of emergency legislation: how to create a mechanism of dictatorship (in the neo-Roman meaning of the term²⁸), which enables exceptional power, but only in a contained, limited manner – limited by authorization, by overarching norms, by other mechanisms (oversight, review etc.), and limited in time. The threshold in section 3 is defined accordingly: as limited, constrained, a critical situation, and temporary; one which seriously endangers lives, one that seriously threatens the very integrity of the rule, etc.

But the definition also conflates threshold with exception – pushing the anticipated situation triggering the Act, at least rhetorically – further off the cliff of the normal. Not only must it be extreme, but a capacity to respond has reached its end, whether locally, provincially, or federally. And not only are capacities threatened – it is the national law itself (law of Canada) that must be absent. And here, on the “other side” of normal government, on the “other side” of law, is where a truly heroic exceptional Act[or] comes to play, with new sets of powers – to be used in a limited manner – only to bring Canada back to the right side, the normal side, the ordered side of the border. A mechanism is born out of the depth of incapacity to quickly bring back normal, legitimate, capable authority.

As a reminder: for Schmitt not every “danger” or “threat” constitutes a “state of exception”. In fact, regular emergencies codified in law are **not** exceptions. Only such threat that exceeds legal capacity, that brings into question the existence of the rule of law state, that gives rise to sovereign decision – is a Schmittian exception. The language of section 3 of the *Emergencies Act* attempts to *bring back into positive law* a Schmittian exceptional moment: marking the (re)birth – not of an all-powerful sovereign – but of a newly justified, emboldened executive, unlimited- yet limited by law.

²⁸ On the Roman Dictatorship as a governance mechanism that enables the smooth move back and forth from normal government for normal situations to exceptional government for exceptional situation, and back, see John Ferejohn and Pasquale Pasquino, “The Law of the Exception: A Typology of Emergency Powers,” *International Journal of Constitutional Law* 2 (2004): 210–239, and Bernard Manin, “The Emergency Paradigm and the New Terrorism, What if the end of terrorism was not in sight?” In Baume S., Biancamaria Fontana, (dir. de), *Les usages de la séparation des pouvoirs* (Paris: Michel Houdiard, 2008) pp. 136-171 available at <<http://as.nyu.edu/docs/IO/2792/emerg.pdf>>.

IV. NORMALIZING THE EXCEPTION

In view of this return to Schmittian language, it is revealing to see how the Commissioner's Report pulled the threshold back to the sphere of the "normal". The report interpreted section 3's *triple incapacity model* in a way that normalized and positivized the language of exception. According to Commissioner Rouleau's interpretation, section 3 does not require a collapse of ability or a collapse of law. It is not that there are no laws or regular powers. The threshold is met not when they are exhausted or do not exist, but when they are not used effectively, or successfully:

It is clear that legal tools and authorities existed; the problem was that these powers, such as the power to arrest, were not being used because doing so was not thought to be an effective way to bring the unlawful protests to a safe and timely end.²⁹

In other words, the *triple incapacity model*, we learn from the report, only requires the reasonable assessment by the executive that existing capacities are not applied or not effective.

Why then use such prohibitive, liminal language in the Act, a language that, as we saw, creates an impression of the end of capacity and the limit of law – when in fact – all that is required is an assessment by the executive that existing capacities and existing laws are not deemed effective by the government?

In a way, this shift – the shift from incapacity to efficiency – exposes an even deeper, concrete politics of emergencies as a politics of capacity. The problem is not that law doesn't exist or that capabilities are gone. It is that they are not as effective as they should be to respond. We are not in an outermost sphere at all – in fact, we are in the everyday life of governance, in which every day, perfectly regular problems spill over from one jurisdiction to another and success is not guaranteed. According to this interpretation the *Emergencies Act* is not by any means exceptional. It is another regular tool of governance.

²⁹ Rouleau Report, *supra* note 15, vol 3: Analysis (Part 2) and Recommendations at 204. See also on page 237: "Although there continued to be laws such as the Criminal Code that, if effectively used, could bring the protests under control, it was apparent that law enforcement had serious concerns about using those powers, including whether engaging in enforcement action would give rise to unacceptable safety risks for police, protesters, and bystanders. This is as an example of a law being legally available, but ineffective due to the practical realities of the situation". *Ibid.*

Perhaps this is one reason why – from the government’s point of view – it makes sense to maintain the language of objective, formal incapacity. In the guise of an extremely exceptional case – the government is saying to all other authorities – you have failed. By that it quickly reverses the claims against its own failure of legitimacy and capacity in the context of the management of one emergency (Covid 19), against other agents – and is at that very moment reborn as an effective and legitimate hero of another emergency (the Convoy). A formal language of exception interpreted as a regular tool of governance is useful for a government that seeks to reestablish its authority and legitimacy in the face of strong criticism.

V. CONCLUSION

That the Commissioner’s Report normalized and positivized the language of threshold in section 3, then brought it down from the violent realm of incapacity and exception to a regular politics of capacity and governance, is in line with the Report’s overall practical approach to the intricate questions arising from the crisis. Instead of focusing on politicized quarrels and allegations, the Commissioner’s Report ignored them and was able to concentrate on a myriad concrete and avoidable failures on all levels of participation, in all stages of the management of events, from anticipation to response. This is indeed the direction that emergency powers theorists and practitioners should follow: to reject the politics of exception and incapacity and instead focus on law and capacity.

But if we recognize that the purpose of emergency law is not to normalize exception but to carefully construct and reconstruct regularized, coordinated, multijurisdictional capabilities, we should also not lose sight of the price that the Commissioner’s Report’s interpretation of the language of section 3 carries with it. While still maintaining that the threshold is “very high”,³⁰ its interpretation lowered the threshold substantially. The *triple incapacity threshold* turned out to be a very mild threshold. It is not about incapacity at all, but about relative effectiveness and relative success. The government may invoke the Act whenever it perceives a threat of substance and assesses that existing capacities are not doing the job fast enough, or efficiently enough. If this is the case, the *Emergencies Act* risks becoming a regular feature of governance in Canada (as similar mechanisms had already

³⁰ *Ibid.*, at 272.

become in many other countries), more legalized, more controlled, but still – a regular mechanism for executive expansion and growing reach.