

Introduction

N O M I C L A I R E L A Z A R A N D
J O C E L Y N S T A C E Y *

On February 14, 2022, Canadians watched the *Emergencies Act*¹ in action for the first time. Enacted in 1988 against the backdrop of the 1970 use of the *War Measures Act*,² the *Emergencies Act* had lain dormant for over 30 years. Then, in the winter of 2022, the federal government declared a public order emergency in response to the ‘Freedom Convoy’, a protest movement that culminated in a weeks-long occupation of Ottawa and blockades of border-crossings across the country. The declaration of emergency lasted nine days, during which federal emergency measures empowered police to clear public spaces of semi-trucks and protesters, and, with deterrent intent, to freeze the financial accounts of those engaged in specific convoy-supporting activities.

This first *Emergencies Act* experience offered critical lessons. Given the gravity of emergency powers in rule of law centered countries, citizens, scholars, and lawmakers must consider these lessons with care. With insights from the Final Report of the Public Order Emergency Commission and broader public debate, this is an opportune moment for Parliament and the public to revisit the *Emergencies Act* in light of 21st century conditions. Does the Act adequately address contemporary threats while maintaining

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¹ RSC 1985, c 22 (4th Supp), s. 63(1).

² RSC 1985, c W-2 (repealed 1988).

appropriate constraints on the exercise of extraordinary powers? Do the Act's many accountability mechanisms function as they should? Emergency law is always safer when designed in times of peace: Canada can't wait for the next crisis to do this critical work of reform.

This Special Issue contributes to these debates with insights from a range of experts. While many of these essays begin with a look back at what happened, together, we look forward. We make recommendations for law reform in light of Convoy-specific lessons, but also in response to the likely challenges ahead, as we face climate change, geopolitical instability and other interlocking amplifiers of crisis.

In this introduction, we first situate emergency powers in the rule of law context. We then offer a brief account of the events of January and February 2022, the federal emergency response and its oversight. Finally, we summarize this Special Issue's key contributions and recommendations for reform while also drawing attention to the changing complexities and rhythm of emergencies that future-oriented legislation must face.

I. LEGISLATING FOR EMERGENCIES

Emergency powers are hard to get right. The more constraints are written into emergency law, the greater the risk that Government will lack necessary flexibility to deal with some novel, unanticipated crisis. But without effective constraints, emergency powers have historically invited abuse.³ The challenge of emergency powers is thus to engineer constraints – formal and informal, legal and political – that will support flexibility while sustaining the rule of law.

Canada's *Emergencies Act* was deliberately designed to attempt this balance, in reaction to abuses of the *War Measures Act* (WMA). That Act had been rapidly drafted, and quickly passed as Canada went to war with Germany in 1914. It delegated vast power from the legislature to the executive, effectively allowing wartime government to rule by decree, and leaving minimal scope for judicial oversight.⁴

³ Clinton Rossiter, *Constitutional Dictatorship* (Transaction Press, 2003).

⁴ Rhonda L. Hinker & Jim Mochoruk eds., *Civilian Internment in Canada: Histories and Legacies* (Winnipeg: University of Manitoba Press, 2020); Dominique Clément, "The October Crisis of 1970: Human Rights Abuses Under the *War Measures Act*" (2008) 42:2 J Can Studies 160; Jack Lindsay, "Canada's fractured emergency management system" (2023) – 46:1 Man LJ 163.

For example, in *Re George Edwin Grey*, the Supreme Court noted: “[W]e are living in extraordinary times which necessitate the taking of extraordinary measures. At all events all we, as a court of justice, are concerned with is to satisfy ourselves what powers Parliament intended to confer and that it possessed the legislative jurisdiction requisite to confer them.”⁵ Courts continued to show the executive great deference on the use of emergency measures that extended well after the wars had ended.⁶ Exemplifying this deference, Viscount Haldane reasoned that “very clear evidence that the crisis had wholly passed away would be required to justify the judiciary... in over-ruling the decision of the government that exceptional measures were still requisite.”⁷

The WMA authorized numerous rights-restricting measures during and after both World Wars. These included bans on associations and labour strikes; suspending habeas corpus and curtailing access to the courts; and the overtly-discriminatory internment, dispossession and exile of “persons of the Japanese race.”⁸

Public opinion around the WMA’s potential for abuse came to a head when it was used for a third and final time in response to the 1970 October Crisis. At that time, the Front de Libération du Québec (FLQ) had committed hundreds of terror attacks: bombings, robberies, murders and kidnappings. In response, then Québec Premier Robert Bourassa, together with then Montreal Mayor Jean Drapeau requested federal and military assistance, invoking the aid to the civil power. Then Prime Minister Pierre Elliott Trudeau invoked the WMA, aiming to restore order. The RCMP performed thousands of warrantless searches. Nearly five hundred people

⁵ (1918) 57 SCR 150 at 181-182.

⁶ *Reference re Wartime Leasehold Regulations*, (1950) SCR. 124; *Fort Frances Pulp and Paper Co. v Manitoba Free Press Co.*, [1923] 3 DLR 629 (UK JCPC)).

⁷ *Ibid*, *Fort Frances Pulp and Paper Co* at 635.

⁸ Patricia Peppin, "Emergency Legislation and Rights in Canada: The *War Measures Act* and Civil Liberties" (1993) 18:1 *Queen's LJ* 129. Specifically on the use of emergency measures against Japanese persons: Eric M. Adams, Jordan Stanger-Ross and the Landscapes of Injustice Research Collective “Constitutional Wrongs: The Wartime Constitution and Japanese Canadians” in Barry Wright, Susan Binnie & Eric Tucker eds, *Canadian State Trials, Volume V: World War, Cold War, and Challenges to Sovereignty, 1939-1990* (Toronto: University of Toronto Press, 2022) 44.

were arrested without charge and held without trial. Most were ultimately released while only a few FLQ members were convicted.⁹

The RCMP's widely condemned activities, emboldened by the WMA, prompted Government to strike the McDonald Commission in 1977. Among the Commission's recommendations, in their 1981 report,¹⁰ were several that led directly into the design of the *Emergencies Act*. The McDonald Commission recommended:

- Distinguishing war measures from other emergencies.
- Increasing legislative oversight of executive action during an emergency, including giving Parliament the power to confirm or revoke an emergency.
- Requiring publicity with respect to measures and evidence related to an emergency in progress, and where those measures or evidence must be secret, review by an in camera Parliamentary Committee.
- Including in any emergency legislation, reference to the requirement to respect Canada's rights commitments (i.e. *International Covenant on Civil and Political Rights* (ICCPR) and the Canadian Bill of Rights).¹¹

Soon after, Parliament set about a new legislative design for emergency powers in Canada that would respond to three interrelated factors: a) the shortcomings of the WMA, b) the novel rights context brought about by the coming into force of Canada's Charter of Rights and Freedoms, and accession to the ICCPR, and c) the recommendations of the McDonald Commission.

To address these issues, the *Emergencies Act* incorporated multiple forms of legal and public accountability, ensured compensation procedures for emergency expropriations of labour and goods; established four, tiered categories of emergency, each enabling a suitable set of powers; and included, in the Act's preamble, explicit reference to the constraints of the ICCPR, *Canadian Bill of Rights* and the *Canadian Charter of Rights and Freedoms*.

⁹ Canada, Parliament, *House of Commons Debates*, 28 Vol 3, (3 February 1971) at 3034, (Minister of Justice Hon. John N. Turner).

¹⁰ Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report: Freedom and Security under the Law* (Ottawa, Minister of Supply and Services Canada, 1981).

¹¹ *Ibid*, vol 2, at 1067-1116.

At the front end of decision-making, the *Emergencies Act* sets out a labyrinth of unusually strict criteria for declaring emergencies and issuing emergency measures. Throughout its invocation, decisions are subject to continuous parliamentary oversight. At the back end, we find the requirement for an inquiry whenever the Act is used: the executive must stand and justify itself for any use of power under the *Emergencies Act*. At least as important, this back-end provision encourages self-policing at the front end. Whatever government chooses to do, they know in advance they will be held accountable. There is evidence that governments behave with greater caution when public scrutiny is inevitable, and legal scrutiny probable.¹² Then, with the facts placed before the public through the inquiry process, it is the public who ultimately decides. For, in a democracy the people are sovereign and elections ensure we have the final say, even on emergency measures.

Threaded through the *Emergencies Act* is a commitment to holding Government accountable for the use of emergency powers. Accountability – in its intertwined legal and public manifestations – is a necessary condition for trust in representative government and a critical element of the rule of law. It sits at the very heart of our political system. Legal accountability in the *Emergencies Act* flows from judicial oversight of compliance with the statutory requirements, the Charter and other elements of constitutional law. This legal accountability, by judging the facts and holding government to formal account, facilitates broader forms of public accountability. But legality alone doesn't determine the rightness of state action. For one, our standards are and should be higher than "was it legal?" And further, as noted above, courts tend to defer to the executive on emergency matters, so legality works best in tandem with broader forms of public accountability.

Accountability mechanisms can be challenging to maintain in a crisis. Day-to-day governance involves layers of accountability: policies undergo public consultation, bills are debated through multiple readings, Parliamentary Committees invite diverse perspectives and deliberate, the press and public scrutinize the process, courts review, and ultimately, we hold elections. But urgency necessitates speed and decisive action. This shifts deliberation to the period after a decision has been taken. Earlier

¹² Christoph Schreuer, "Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights" (1982) 9 *Yale J World Public Order* 113.

forms of emergency powers, and many contemporary emergency laws too, sidestep checks and balances entirely. Provincial public health laws and many provincial emergency statutes continue to do so.¹³ Often, contested claims of secrecy exacerbate these conditions. So, the design of public accountability mechanisms suitable for times of crisis, inclusive of, but also beyond resort to the courts, is crucial. Accountability mechanisms have to work in order to work. And its 2022 invocation provided our first glimpse of the *Emergencies Act*'s accountability mechanisms in practice.

II. THE *EMERGENCIES ACT*'S FIRST TEST

On January 28, 2022, the Freedom Convoy rolled into Canada's capital city. While its roots lie deeper,¹⁴ this movement galvanized around resistance to pandemic measures, and culminated in border blockades and the effective occupation of the City of Ottawa. The immediate spark for the protests was a federal COVID-19 measure requiring vaccination for truckers crossing the US-Canada border. Truckers and their supporters mobilized a national protest movement through social media, raised hundreds of thousands of dollars through crowdfunding platforms¹⁵ and successfully captured the attention of virtually all governments in Canada. With ceaseless honking, sporadic violence, vandalism and revelry,¹⁶ loosely-organized factions of protesters made their presence impossible to ignore. From the end of January and into February, convoy protests were staged in cities across the country and protesters blockaded a number of border crossings, including Windsor, Coutts, Emerson and the Pacific Highway.¹⁷ But the protest centred on Ottawa, where most participants made their way. There, some called for Canada's elected government to be replaced through

¹³ Jocelyn Stacey, *Governing Emergencies in an Interjurisdictional Context* (Ottawa: Public Order Emergency Commission, 2023); Lara Khoury, et al, "Governments' Accountability for Canada's Pandemic Response" (2022) 43 J Public Health Policy 222.

¹⁴ Canada, Report of the Public Inquiry into the 2022 Public Order Emergency (Ottawa: POEC, 2023) (Chair: Hon Paul S. Rouleau) [POEC Final Report], vol 2: Analysis (Part 1) at 74-82.

¹⁵ *Ibid*, vol 2: Analysis (Part 1), chapter 13, 353-396.

¹⁶ *Ibid*, vol 2: Analysis (Part 1), at 184-185 and 193-198.

¹⁷ *Ibid*, vol 2: Analysis (Part 1), chapters 10-11, at 272-331.

an invented constitutional mechanism,¹⁸ or through divine intervention.¹⁹ Others demanded an end to all COVID-19 measures.²⁰ Many simply wanted their concerns and frustrations with governmental overreach, built up over two hard pandemic years, to be heard.²¹

In Ottawa, police found themselves paralysed and, for a range of reasons²² unable to safely enforce law and order. As citizens' frustration with the police's failure to confront weeks of noise, disorder, danger, and a generalised sense of menace increased, Ottawans eventually formed a counter-protest, a vigilante force that aimed to block the trucks from traveling into the city core.²³ At the same time, concerns grew about broader economic disruption and supply chain issues arising from blockades at the Windsor border crossing.²⁴

Then, a cache of weapons was found at the Coutts blockade, underscoring the potential for serious violence.²⁵ While law enforcement seemed to be making progress removing the blockades in Coutts and Windsor, paralysis in Ottawa and perceived escalating national risk, meant the federal government sought a response that could resolve these circumstances quickly and safely. On February 14th, the federal government declared a Public Order Emergency under section 17(1) of the Act. It remained in place until February 23rd, enabling financial and other emergency measures that together empowered a nationally sourced, joint policing force. Remarkably, the decisive end to the emergency was achieved without any serious injuries or deaths, though questions about the legality, justification and unintended impacts of the emergency measures lingered.²⁶

¹⁸ *Ibid*, vol 2: Analysis (Part 1), at 108. See also: *Canada Unity Memorandum of Understanding*, (3 December 2021), online: (PDF) <archive.org/details/convoymou2022>.

¹⁹ Christian Zschke "Tage des Zorns" (22 February 2022) *Süddeutsche Zeitung* online: <www.sueddeutsche.de/politik/kanada-ottawa-blockade-trucker-corona-impfung-justin-trudeau-1.5533828?reduced=true> at 3. (in German).

²⁰ POEC Final Report, *supra* note 14, vol 2: Analysis (Part 1), at 94-97.

²¹ *Ibid*, vol 2: Analysis (Part 1), at 108.

²² *Ibid*, vol 2: Analysis (Part 1) at 204-220.

²³ *Ibid*, vol 2: Analysis (Part 1) at 221-2.

²⁴ *Ibid*, vol 2: Analysis (Part 1) at 308-310.

²⁵ *Ibid*, vol 2: Analysis (Part 1) at 322-323.

²⁶ *Ibid*, vol 1: Executive Summary (Part 1) at 123-131.

The crisis and its aftermath revealed a range of challenges and questions with respect to the design and operation of the Act and also with those tasked with preventing emergencies in the first place, particularly the police.

Many of these shortcomings and problems were raised in the POEC's five volume Final Report for the Public Order Emergency Commission, tabled with Parliament on February 17, 2023. The POEC reluctantly expressed qualified approval of the government's decision to use the *Emergencies Act* to end the crisis. More cautiously, he endorsed only certain elements of the special, temporary measures – including restrictions on movement and property rights. The Commission's mandated role was to gather the facts and lay them before the public. And in this respect the Commission fulfilled its role in the overall framework of the Act, promoting the rule of law by facilitating public accountability.

In Recommendation 55, the POEC asks Parliament to respond to his Final Report.²⁷ In the interests of meeting that obligation, it is now time for Parliament to consider amendments to the Act and for all levels of government to reflect on their successes and failures. Parliament, together with the Canadian public, must consider what must be done not only to address the Act's past shortcomings, but to prepare our emergency institutions for a future in which crises and emergencies may become more common, and more complex.

The papers in this volume respond to, build upon and critique the POEC Final Report's recommendations in the service of this aim. They answer questions around the *Emergencies Act*'s threshold, scope and implementation of emergency powers, and around mechanisms of accountability. And they indicate where additional review is needed to ensure that any reforms to the *Emergencies Act* work in concert with the laws and programs that undergird its operation.

As Canada approaches this important task, it is wise to keep in mind the caveat that humility should inform amendments to the Act. As Lindsay, Ramraj, and West, Norris and Nesbitt in this volume all caution, changes to any legislation, especially when narrowly reactive, can have unintended consequences, particularly where that legislation specifically applies to inherently unpredictable occurrences. There is no getting emergency powers just right, because a threshold flexible enough to deal with some future event may invite abuse in some other future circumstance. This is one

²⁷ *Ibid*, vol 3: Analysis (Part 2) and Recommendations at 336.

reason informal constraints that incentivize good judgment and the correlative promise of continuous public accountability are so critical to the rule of law in times of crisis. But we can aspire to better without aspiring to perfection.

III. THE COLLECTION

The first cluster of articles address critical issues around the threshold for declaring an emergency. Definitions create thresholds and thresholds yield power, so such questions are central to maintaining the rule of law in emergency conditions. Notably, a crucial issue before the POEC was the definition of “threats to the security of Canada.” Currently, the *Emergencies Act* borrows this definition from section 2 of the *Canadian Security Intelligence Service Act*²⁸ (CSIS Act). A great deal of testimony before the Commission turned on the question of the interpretation and appropriateness of using the CSIS Act definition in the *Emergencies Act* context, and ultimately, the POEC Final Report recommended Parliament decouple these Acts.²⁹ Whether this is the correct course of action is the subject of two articles in this volume.

Leah West, Jake Norris, and Michael Nesbitt argue against this course of action. They argue that the tether to the CSIS Act is necessary because of the particularities of threats arising from espionage, terrorism and the like which require a measure of objectivity and expertise that the definition and context of the CSIS Act provide. West, Norris and Nesbitt also take up the issue of whether threats to critical infrastructure and economic security are sufficient to trigger the *Emergencies Act*. They argue that, if Parliament wants emergency powers available for such scenarios, it should make this explicit in the Act’s definition of emergency. This position is echoed by Professor Gallant, below, on the scope of available emergency powers.

On the connection between the *Emergencies Act* and CSIS Act, Hoi Kong takes the opposite view, arguing that importing the definition of threats to the security of Canada from the CSIS Act is inappropriate. He notes that these two laws have distinct purposes and ought to have tailored definitions to match. More generally, Kong argues that a range of ambiguities in the

²⁸ RSC 1985, c C-23.

²⁹ POEC Final Report, *supra* note 14, vol 3: Analysis (Part 2) and Recommendations at 315, see Recommendation 31.

Act's threshold language can and ought to be removed, since these unnecessarily render the law subject to interpretive uncertainty. Here, he notes in particular the phrase "any other law of Canada" which probably does not, but may nonetheless be interpreted to, include laws across jurisdictions.

Furthermore, since thresholds and definitions go hand in hand with accountability, Kong advocates bolstering the legislation's requirement that Government give explicit reasons for their actions both at the time of a declaration, and when measures are used.

Nomi Claire Lazar concurs with the critical importance of reason-giving, and provides a framework for doing so. In her paper on the concept of necessity – a critical element of emergency thresholds – she argues the *Emergencies Act* should require Government to explain clearly and publicly why emergency powers are specifically necessary, not just at the declaration stage, but also, through amendments to section 61, with respect to specific measures. To facilitate this form of reason-giving, Lazar provides tools that elucidate the concept of necessity, and a template to assist Governments, Parliament, and the public in clearly articulating, and then assessing, the necessary connections between means to end the crisis, and between ending the crisis and the public good.

In her paper, Karin Loevy questions this approach entirely. A focus on thresholds and definitions, she argues, recreates a space of Schmittian exception, fallaciously cordoning off what cannot be regulated, managed, or contained, from what can. Far better, she argues, to focus on continuities of capacities and values, which redirects governments away from endless definitional quarrels toward coordination.

Along with questions of definition and threshold come questions around the necessary scope of powers. This includes powers we may reasonably expect might prevent the need for a state of emergency – such as policing powers – or else the powers to respond when the threshold for an emergency declaration is met. Three papers address these issues in diverse jurisdictional contexts.

With respect to policing, Kent Roach argues that a critical tool in policing dangerous situations, both to prevent the need for emergency powers, and to respond through them, is appropriate political direction to the police. To secure this limited but important scope for elected representatives to direct the police in a crisis, Roach argues that the phrase

“police operational independence” must be removed from provincial and federal policing and emergency legislation, wherever it appears.

Jamie Cameron and Robert Diab also turn their minds to the importance of getting powers right, both to prevent, and to respond to, emergent events. Appropriate exercise of policing and other powers is necessary not just to prevent emergencies as such, but also to secure the robust exercise of critical democratic rights and freedoms. If police fail to secure the conditions of safe protest, protesters can’t safely exercise their rights. Cameron and Diab hold that to ensure “integrated command and control” in the policing of large protests it is critical that legislation be passed that clearly delineates police powers and responsibilities and allows for easy coordination among police services.

Michelle Gallant takes up the question of powers available under an emergency declaration, and specifically, the resort to financial and property control measures. Noting that this approach became the norm in the context of addressing organized crime and international terrorism, she worries about the implications for property rights of importing this tool for use in the public order context. To bring such powers under the rule of law, Gallant suggests section 19 of the *Emergencies Act* address their availability explicitly. Explicitness, particularly tied to the reason-giving Lazar and Kong advocate, facilitates accountability. In addition, Gallant recommends that reference to Charter and other constraints on rights limitations be moved from the preamble and added to the operative sections of the Act that deal with emergency measures. This would serve a useful signaling function reinforcing that emergency powers must not depart from constitutional requirements and the rule of law.

Many of the contributions in this Special Issue pick up on the twin themes of transparency and accountability. Each author applauds the Act’s existing mechanisms for securing these values but also advocates for reforms that would clarify and enhance them. Importantly, contributors identify and address the critical question: accountability to whom?

Dwight Newman, KC takes up the *Emergencies Act* requirement to consult with the provinces. As a key check on the use of emergency powers in a federal system, Newman highlights the need to articulate standards for what this consultation ought to look like. He observes the urgent need to extend the consultation requirement to Indigenous peoples to bring the legislation into compliance with Canadian constitutional law. Kong, too, sees an accountability gap. He advocates for the inclusion of municipalities

in the *Emergencies Act* consultation requirement, reflecting the reality that local governments are frequently at the front-lines of emergency response.

Jocelyn Stacey squarely addresses the challenge of interjurisdictional accountability. Relying on well-rehearsed practices in environmental law – a related field of overlapping responsibilities – she notes how the inquiry requirement presents an opportunity for breaking out of jurisdictional silos to enhance interjurisdictional accountability.

Other contributions focus on mechanisms for strengthening oversight of the executive. In this vein, Kong, Lazar and Newman all note the need for enhanced transparency, identifying how the *Emergencies Act* can require precision in the reasons given for deploying emergency powers and the timely transmission of information to Parliament. Improved transparency enables institutions overseeing the executive to carry out their job. Whether it is Parliamentary debate followed by a free vote (as suggested by Newman), the mandatory inquiry, open public discourse, or judicial review, precise and timely reasons by the executive foster close scrutiny and help counter risks of executive overreach in times of emergency.

The *Emergencies Act*'s mandatory public inquiry features prominently in this Special Issue with a number of contributors unpacking what we learned from the first such Commission. How can future inquiries better serve their public accountability function?

Geneviève Cartier observes certain salient, unusual qualities of the *Emergencies Act* inquiry requirement – its lack of connection to the *Inquiries Act*, its acute risk of politicization, and its legislated time constraint. Cartier endorses the use of the *Inquiries Act* to constitute Public Order Emergency Commission and adjusting the legislated timeline, as the POEC Final Report also recommends (#37 and 50). But she argues that the *Emergencies Act* ought also to have a clear mandate confining the investigation to essentials.

Adam Goldenberg agrees with the need for a clearer mandate for the mandatory inquiry. He argues that it is critical to reduce potentially confusing overlap among accountability mechanisms. For Goldenberg, the function of the inquiry (as a mechanism of public accountability) must be clearly demarcated from the role of the court in interpreting the *Emergencies Act* and evaluating whether the invocation of emergency powers was legally justified.

Finally, a number of contributions suggest more comprehensive reforms. Cloye-iis, Judith Sayers, reminds of the obligation that “[t]he Government of Canada ..., in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the [United Nations Declaration on the Rights of Indigenous Peoples].”³⁰ Aligning the *Emergencies Act* with the United Nations Declaration on the Rights of Indigenous Peoples may generate more than minor amendments to the legislation. Genuine consultation and cooperation with Indigenous peoples on legislative reform requires an openness on the part of the federal government to rethinking the overall approach to the Act in order to recognize and affirm the right to self-determination of Indigenous peoples.

Comprehensive reforms must engage the entire emergency management system, comprised not only of the *Emergencies Act* but also its partner legislation, the *Emergency Management Act*. Jack Lindsay underscores the need to see the *Emergencies Act* in this more comprehensive framework. That system has been subject to decades of shuffling and rearranging between ministerial portfolios as well as piecemeal law and policy reform. Systematic and comprehensive reform, in Lindsay’s view, requires lawmakers revisit whether the *Emergencies Act*’s current four categories of emergency (public welfare, public order, international and war) are appropriate and whether the Act delegates the right powers for emergency response. These questions can only be properly answered with a clear view of the federal government’s entire emergency management program.

Finally, Lindsay, along with Victor V. Ramraj and Karin Loevy, emphasize the need for reforms that seriously address prevention, risk reduction and preparedness. None deny the reality that, in some instances, resort to emergency measures will be required. But all highlight the need to widen our gaze from high drama and reactionary emergency response to attend to the many complex – but often known and foreseeable – failures that lead governments to rely on emergency measures. As Ramraj eloquently cautions, “only a sustained focus on coordination, prevention, and the dangers of polarization – across multiple levels of government (federal, provincial, municipal, Indigenous), multiple sectors (public, private, not-for-profit and transnational), and international and intergovernmental bodies – can help make Canada’s *Emergencies Act* truly a measure of last resort.”

³⁰ United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14, s.5.

The articles in this Special Issue cover a wide range of important issues, each of which deserves lawmakers' attention in the run up to possible reforms. Many of these papers address specific lessons from the 2022 emergency. Yet most gesture toward broad, critical issues for the future, a future likely to be defined by instability from, not least, the climate crisis, shifting geopolitics and global health threats.

Indeed, climate change brings braided threats, with complex jurisdictional responsibility. Extreme weather events, already intensifying as the climate warms, default to provincial or territorial jurisdiction under Canadian law. But disasters may fan mutually fueling economic, public health and political crises too, crossing jurisdictional lines and generating conditions for conflict or cooperation. Cooperation across all levels of government – Indigenous, federal, provincial, territorial, municipal and international – will be necessary to address interlocking and cascading crises. Yet conditions of hyper-partisanship and misinformation may push this goal even further out of reach.

The very frequency and the novel rhythm of emergencies likely to arise in the climate era should also give us pause. Current crisis institutions like emergency powers were designed to manage the unusual, unforeseen case and are ill-equipped for a possible future where crisis may sit closer to the center of politics. To prepare for this future would require that we acknowledge that key assumptions about the timing and rhythm of crisis politics underlying the design of our current institutions, may cease to hold going forward. If crises no longer take place in rare, discrete blocks of time, and if politics grows less stable, will there be sufficient downtime for comprehensive review and cool-headed deliberation? This possibility threatens the rule of law.

Worse, when, historically, states resorted to frequent states of emergency, democratic governance has fallen into disrepute, fuelling further political crisis³¹ And already, both climate mitigation advocates and climate change deniers have increasingly advocated authoritarian governance.³² This raises the risks of too-available emergency power.

³¹ Rossiter, *supra* note 3.

³² Ross Mittiga, "Political Legitimacy, Authoritarianism, and Climate Change" (2021) 116:3 *American Poli Sci Rev* 998. See also Jocelyn Stacey, "The Public Law Paradoxes of Climate Emergency Declarations" (2022) 11:2 *Transnat'l Envtl L* 291.

Where general stability prevails, punctuated by crisis rarely, our emergency institutions help our system of government withstand occasional shocks, or even clusters of shocks. Where this no longer holds, our emergency institutions will no longer be fit for purpose. Could our existing emergency powers absorb more continuous shocks? How, for example, would the one-year commission of inquiry function in the midst of cascading emergencies? How will diverse jurisdictions work together? Will the distinct categories in the *Emergencies Act* be suitable for complex crises in the climate age? Our multi-jurisdictional systems for emergency management are ill prepared for these challenges.

In this context, it is not only the federal government that must seize the opportunity to address problems in our emergency framework. Provinces and territories, too, must take the opportunity to ask whether their emergencies statutes are really up to the task of addressing anticipated future emergencies in line with the rule of law. Many such statutes contain few if any provisions for accountability, and this is acutely so with respect to public health legislation. While the attention of Canadians was focused on the vast power made possible by the *Emergencies Act*, vastly less accountable provincial legislation, used vastly more often, has received little or no attention. Canadians should demand better.

History shows that, when, as with the *Emergencies Act*, crisis institutions are designed in times of peace and sober thinking, they are better designed in the interests of safety and the rule of law. Now is the time for lawmakers to address shortcomings in Canada's emergencies legislation revealed by the last event. Now is the time to ready our country for the challenges to come.

APPENDIX OF PROPOSED REFORMS:

Definitions & Thresholds

1. Define threats to the security of Canada in the *Emergencies Act* itself (Kong)
2. Threats to the security of Canada must remain tied to CSIS Act (West et al)
3. Amend Section 3 to replace “law of Canada” with “law of Parliament” (Kong)
4. Amend Section 61 to require government to give explicit reasons why an order or measure is necessary (Lazar)

Scope of Powers & Policing

5. Clearly authorize or prohibit the use of emergency powers to address economic harm and threats to critical infrastructure. And if authorized, clearly limit the scope of powers permitted (West et al)
6. Review and reform section 19 to clearly authorize or constrain the use of property and financial control measures (Gallant)
7. Remove the phrase “police operational independence” from Ontario legislation and refrain from including this type of language in federal policing and emergencies legislation (Roach)
8. Enact public order police legislation to clearly define public order events, assign lead authority to policing these events and set out clear powers and constraints (Cameron and Diab)

Transparency & Accountability

9. Urgently reform the Act to reflect Canada’s constitutional duty to consult with and accommodate Indigenous peoples (Newman)
10. Amend section 25 to include municipalities in consultation processes (Kong)
11. Work with provinces to develop guidelines setting standards for consultation (Newman)
12. Set a clear expectation of free votes in Parliament for oversight of executive action under the *Emergencies Act* (Newman)

13. Amend Sections 17 and 58 to require a statement explaining how the declaration responds to the threat that gave rise to the emergency declaration (Kong)
14. Amend Section 63 to extend the timeline to 360 days once the Commission is constituted (Cartier)
15. Amend Section 63 to clarify and limit the mandate of the inquiry (Cartier, Goldenberg)
16. Amend Section 63 to require the inquiry be called pursuant to Part I of the *Inquiries Act* (Cartier)
17. Amend Section 63 to enable joint inquiries with other affected jurisdictions (Stacey)

Comprehensive study and reform

18. Consult and cooperate with Indigenous peoples to comprehensively reform the *Emergencies Act* to align with the UN Declaration on the Right of Indigenous Peoples, as required by UNDA (Sayers)
19. Review and revise, as needed, all four categories of emergency to ensure they fit with contemporary threats (Lindsay)
20. Review the *Emergency Management Act* at same time as the *Emergencies Act* to ensure the whole federal program works together (Lindsay)
21. Focus on capacity building, prevention and coordination (Loevy, Ramraj)