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THE EMERGENCE OF EMERGENCY IN CANADA: WHAT CAN DEMOCRATIC INSTITUTIONS DO?

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The decision of the Federal Court of Canada on January 23 2024, regarding the judicial review of the first-ever use of the Emergency Act (and related measures enacted) in February 2022 to address protests due to Covid-19 restrictions, marks a significant moment in recent Canadian history. Since 1988, the EA has replaced the War Measures Act, shaping the framework for enacting emergency measures and ensuring their alignment with constitutional principles.

We will approach the decision by first analysing the political context that led to the invocation of the EA, then addressing the FC's main lines of reasoning, and finally exploring some of its implications in light of the constitutional path underlying the 1982 Canadian Constitution.

Going back to the days of heightened concern about the Covid-19 threat, on 19 November 2021 the Public Health Agency of Canada announced that as of January 15 2022, certain groups of foreign nationals who had previously been exempted from the vaccination requirement for entry into Canada would now be required to be fully vaccinated. On January 13 2022, the Minister of Health clarified that unvaccinated Canadian truck drivers would not be denied entry into Canada, but would have to meet some strict requirements. Following these very widespread measures, a group of individuals prepared to travel across Canada to protest

(alongside other legal actions targeting other policy decisions related to the pandemic emergency) in Ottawa under the slogan "Freedom Convoy 2022". On January 22 2022, the convoy left British Columbia on its way to a planned demonstration in Ottawa on January 29 2022, arousing great apprehension in both the political institutions and the media. On February 13 2022, the Federal Cabinet met to discuss the situation, and on 14 February 2022 the Governor in Council proclaimed a Public Order Emergency under the EA to deal with the repercussions of the Freedom Convoy, and revoked it on February 23 2022 (de facto, the final decision to invoke and revoke the POE rested with the Prime Minister, with the approval and support of the Federal Cabinet). The EA's invocation was consequently challenged before the FC, a national trial court based in Ottawa that adjudicates legal disputes arising in federal jurisdiction. It is important to highlight the legal dimension of the POE in the context of the EA, as the latter provides for the definition of a 'national emergency', a threshold that must be met before any of the four types of emergencies (including the POE) can be invoked. The POE declaration pursuant to the EA must then be interpreted in view of what is set out in para. 3 (*the national emergency threshold*) and paras. 16-17 (*the POE threshold*) of the EA. Accordingly, the government must believe on reasonable grounds that: a) there was an urgent and critical situation of a temporary nature that seriously endangered the safety of Canadians; b) the emergency arose from activities directed toward the threat or use of serious violence against persons or property; c) the emergency was of such proportions or nature that it exceeded the capacity or authority of a province to deal with; d) the emergency could not be effectively dealt with by any other federal law and e) the emergency required the taking of special temporary measures.

This array of requirements, characterized by both stringency and vagueness, constitutes the focal point of significant concern and debate, occupying approximately 60% of the length in the FC's decision. The FC's reasoning is extensive and complex, so it is only possible to touch on four key points and passages. The first deals with the mootness of the case, that is, the fact that “there is no longer a live issue between the parties

and an order will have no practical effect" (¶124). The matter is decided under the Borowski doctrine, applying the court's discretion on the basis of the presence of an adversarial context and, primarily, judicial economy, which considers "whether the matter is likely to recur and is evasive of review, and whether the matter is of national or public importance" (¶142). The most important factor is the strict legal evasiveness of this kind of decision-making and, in the absence of the exercise of discretion in this case, "the courts will have no role in reviewing the legality of such a decision" (¶148). Having granted discretion, the FC must answer the questions that define our three remaining main points: a) was the Proclamation unreasonable and ultra vires?; b) did the powers created by the emergency measures violate the Charter, and, if so, can they be saved under section 1?; c) did the measures violate the Canadian Bill of Rights?
The first question entails the determination of which standard of review to apply under the Vavilov doctrine. Given that the issue at hand concerns not the EA itself, but rather the reasonableness of its invocation and the constitutionality of its administrative consequences, the FC selects the reasonableness review standard. Central to this standard is assessing whether the decision to issue the Proclamation "bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (¶212). The FC concludes that there was no national emergency that justified the invocation of the EA and therefore the decision to proceed was unreasonable and ultra vires, arguing that the provinces had both the capacity and the authority to tackle the critical problems and that the application of existing federal law was capable of addressing them. In addition, the Justice found that the threshold of "the threat or use of serious violence against persons or property" had not been met, given the vague and abstract nature of the POE declaration, which was based on speculation without concrete evidence rather than the "reasonable grounds to believe" standard. On the other two questions, the FC concluded that there were no violations of the Canadian Bill of Rights, although as far as the Charter was concerned, there were infringements of freedom of expression and the right to be

safe against unreasonable searches or seizures, while there were no breaches of freedom of association and the right to life, liberty and security of the person. However, in the FC's view, these infringements do not satisfy the 'reasonable limits' standard of section 1 of the 1982 Canadian Constitution, because they fail the minimum impairment test for two reasons: 1) they have been applied across Canada rather than being spatially specified, and 2) less harmful alternatives were available (¶353).

The FC's legal reasoning involves a plurality of problems that can be schematically clustered into three categories: 1) issues about federalism, as well as 2) constitutional problems of concrete nature and 3) more abstract constitutional issues.

The federal issues are behind the observations raised by the province of Alberta in this case. Alberta claims - and the Justice agrees - that the executive 'has to respect the principles of federalism' (¶227) and that "federal disagreement with provincial decisions not to exercise particular powers is not a sufficient basis to conclude that the situation exceeded the capacity or authority of the provinces or could not be effectively dealt with under existing law" (¶234). Inaction by the provinces does not imply incapacity, so the executive cannot invoke the EA "because it is convenient, or because it may work better than other tools at their disposal or available to the provinces" (¶253).

The federal issue is also raised by the POE Commission chaired by Justice Rouleau, who openly criticises the role of the Ontario executive in (not) dealing with the situation in Ottawa.

The concrete constitutional issue revolves around the relationship between the judiciary and the political institutions, and the whether and the how the proclamation of a national emergency and the subsequent measures should be reviewed. While the executive claims for itself a high degree of discretion and substantial non-justiciability of emergency measures (which was the issue at the heart of the mootness question), the FC stated that "while the ultimate decision of whether to invoke the Act is highly discretionary, the determination of whether the objective legal thresholds were met is not and attracts no special deference" (¶210) and it is "more akin to the legal determinations courts make, governed by

legal authorities, not policy" (Ibid.).
The problem is further exacerbated by the substantial overlap with the POEC inquiry, which, by offering a very different account of the events surrounding the protests, actually claims that the Federal Government has met the requirements for invoking the EA. While, as Justice Rouleau rightly points out, "the Commission's role is distinct from that of a court" (POEC's final report, vol. 1, page 184), his legal pedigree and the fact that his "assessment of the circumstances must therefore inevitably involve a consideration of the Act's requirements" (Ibid.) mark a material overlap that has been the harbinger of much discussion. Finally, the executive missed the deadline to respond to the findings and recommendations provided by Justice Rouleau in his final report on POE.
The concluding issue inherently concerns the relationship between constitutionalisation and the increasingly widespread technique of normative conflict resolution such as proportionality, balancing and strict/intermediate scrutiny in US, as opposed to the "rights as trumps model". The process of constitutionalisation involves the creation of a rich panoply of rights that enjoy a heightened level of protection in the legal system. Constitutionalisation, on the other hand, raises the problem of the ever-increasing conflict among rights and between rights and the range of political actions that democratic institutions can and/or must take ("policies"). The importance of rights (and the interests they protect) is inversely proportional to the weight of non-constitutionally protected interests. Where rights are to function as 'trump cards' against utilitarian and welfarist interests and justifications, any restriction or overriding of them for reasons other than the protection of other competing constitutional rights (including constitutionally protected rights by appropriate invocation of national emergency) is an alteration of the very nature of rights.
It is precisely this problem that the 1982 Canadian Constitution addresses in Section 1, claiming that "the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*".

What is at stake in the debate on the concept of rights is where to set the threshold, how we materially define the reasonableness of limits. The FC argued that the conditions for declaring a national emergency and a POE were not met because they were based on a “an overstatement of the situation known to the Government at that time” (¶248) and that “the harassment of residents, workers and business owners in downtown Ottawa and the general infringement of the right to peaceful enjoyment of public spaces there, while highly objectionable, did not amount to serious violence or threats of serious violence” (¶295).

At the same time, the FC argues that in order to uphold a limitation on a right guaranteed by the Charter, there must be a "pressing and substantial objective" of sufficient importance to justify overriding a constitutionally protected right. The FC, however, argues that Charter infringements are unjustified not because of a questionable objective (“there was no real dispute between the parties that the government had a pressing and substantial objective when they enacted the measures”, ¶351), but only on the basis of the inadequacy of the measures taken. If FC's argument is conclusive, a logical but rather contradictory lower threshold of reasonableness seems to emerge with respect to the competing constitutional rights protected when a national emergency is invoked: the harassments and the infringement of a pleasant enjoyment of a public space are arguments that trump freedom of expression, despite the fact that “political speech is granted *the highest level of protection*” (¶345).

All of these issues, including the legality of the EA's invocation and the POE's proclamation, will be at the heart of the Government's appeal against the Court's ruling and, if necessary, will be tested in the Supreme Court in the coming months.