

Q&A With Professor Leah West: The *Emergencies Act* and the "Freedom Convoy"

CCS Summer Student Tina Tai sat down with Professor Leah West (Assistant Professor of International Affairs, Carleton University) to discuss the various legal issues surrounding the Trudeau government's use of the federal Emergencies Act in response to the "freedom convoy" protests in early 2022.

Q: Generally speaking, what is the *Emergencies Act*, and how does it work?

A: The *Emergencies Act* is significant in that it's the only real federal emergency legislation that we have in Canada. It gives the federal government the power to create new rules in an emergency without having to go to Parliament to pass a new law.

Invoking the *Emergencies Act* allows the executive (branch of government) to create new rules and new offenses — and to use powers it normally wouldn't have — without having to go to Parliament to pass legislation.

The federal *Emergencies Act* is unique because there are these four types of emergencies — public welfare, public order, international, and war emergencies — and it gives the federal government specific powers that are necessary for dealing with the emergency. A really good example is a public welfare emergency, like COVID. A pandemic is a public welfare emergency: it's caused by a disease or outbreak, and for that you need different powers than you would for, say, the outbreak of a war.

Q: What reasons did the government give for invoking the *Emergencies Act* for the first time in Canadian history, and what type of emergency did it declare?

A: The government declared a public order emergency. An important thing to think about here is the way the *Emergencies Act* is structured. You can't just have a public order emergency; you have to have a public order emergency that rises to the level of a national emergency. So, there are actually two separate thresholds.

For it to be a national emergency, you have to have an urgent and critical situation. That situation has to be of a temporary nature, and it has to do one of two things. It either seriously endangers the lives, health, or safety of Canadians — so here, you're looking at something that provincial power just can't handle, where you need the power of the federal government or of multiple provinces to deal with it — or it's an urgent critical condition that seriously threatens the ability of the government to preserve the sovereignty, security, and territorial integrity of Canada. A third threshold is that it cannot be effectively dealt with under any other law of Canada.

In this case, the government said they were declaring a public order emergency on both criteria. The difficulty, though, is that “threats to the security of Canada” is not defined in the *Emergencies Act*. It’s defined in the *Canadian Security Intelligence Service Act*, and there are four different things that are captured there: espionage, foreign influenced activities, terrorism, and subversion.

In this case, the language used by the government, in their justification laid before Parliament, basically said that what gave rise to a national emergency was terrorism, or violent extremism. But did the emergency arise from that? Or did the emergency create an opportunity for that? The *Act* says the emergency has to *arise* from it, not just be something that can be leveraged by those who seek to hurt people or use violence for political ends. The really sticky legal question is, can we say that terrorism really gave rise to that public order emergency? Or was it a by-product of it?

Reflecting on this question, it might be that the *Act* needs to be transformed at some point down the road to reflect what really happened, because maybe we should create the opportunities for governmental action when peaceful protests are co-opted for violent ends. In such cases, the government should be able to take swift and decisive actions to reduce the security threat.

Q: How did the government use the powers that it unlocked through the *Act*? In other words, what specific measures did it take to address the disruption caused by the Freedom Convoy?

A: One of the key ones they used was the creation of a “no-go zone,” so they were able to create designate areas that people couldn’t go into — for example, around Parliament Hill. They also quickly deputized police officers from different jurisdictions so they could enforce provincial and municipal bylaws in Ottawa.

Another thing that was repeated was the need for tow-truck drivers. Under the *Emergencies Act*, for a public order emergency, you can compel people to perform services that they’re capable of performing. So, we saw tow-truck drivers working in Ottawa to clear trucks.

The other thing that doesn’t exist anywhere under provincial emergency legislation was the financial restrictions. They made it an offence to provide financial assistance to those supporting the protest. They also created new reporting obligations on financial institutions around cryptocurrency, and they were able to freeze the assets of certain individuals who were involved in the protests.

Q: The *Act* states that it can only be used if no other laws can be used to deal with the alleged emergency. In your opinion, are there other laws that could have been used to effectively deal with the Freedom Convoy and its associated activities?

A: Basic *Criminal Code* and bylaw. At every level of government, there were things that could have been done.

The province had the capacity to create no-go zones and we already had bylaw that made it

an offence to park in the middle of the street. The *Criminal Code* could have been used. Other things like measures under the *National Defense Act* could potentially have been used but I think the idea of military in the streets lining up against protestors is not something anybody wanted to see.

So all kinds of stuff could have been done. At the end of the day though, it wasn't. So, one has to wonder whether the interpretation of the *Act* includes not just asking whether there are laws that could be used, but what if they're not being used? What if other levels of government refuse to use the authorities that they have? Then should the federal government have the power to step in?

The *Act* doesn't seem to provide for that. The *Act* doesn't seem to create opportunities when there are other laws that exist but aren't being used effectively. And again, that might be something we want to look at going forward.

Q: Did the Freedom Convoy meet the threshold of a situation that “seriously endangers the lives, health or safety of Canadians” or that “seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada”?

A: The first one is easier to meet. I certainly believe that the life, health, and safety of individuals in Ottawa and at the borders were threatened. The government talked about borders being closed and not being able to get medications into Canada, so I think you can make the argument that that was met. The other one is harder.

Can we really say the sovereignty and territorial integrity of Canada was threatened by the convoy and these blockages? I don't think we ever saw the government lose a grip on its sovereignty.

Just because members of the convoy had desires to topple the government doesn't mean their actions necessarily actually threatened the sovereignty of Canada. I think the way the government framed it is that the economic impact and the impact on trade relationships were so damaged that it threatened Canada's security and sovereignty, and that seems to be a bit of a stretch to me.

Q: Even though this is the first time the *Act* has been invoked, is there any jurisprudence that can tell us whether this invocation was legally valid?

A: No. The first question for a court would be whether or not even adjudicating is necessary now, given that we have both a preliminary review committee and an independent commission of inquiry looking at these issues. The court would be tasked with reviewing the reasonableness of the Governor-in-Council's decision, and the reasonableness of their reasonable belief that the criteria for invocation of the *Act* were met (the standard for both would be pretty deferential).

The bigger issue, in terms of government accountability, is whether or not what Canadians were told about the need for the invocation of the *Act* really did line up with the facts, and

whether or not the government really believed the legal threshold was met, or whether inventive legal reasoning was used to get the government to a point where it could invoke the *Act*.

It could be that, because the *Act* was written 30 years ago, it's no longer fit for purpose, and the government had to get inventive to use the tool that it wanted to use. But that is problematic from the rule of law perspective.

Q: Contrary to common misconceptions, the *Charter of Rights* still applies when the *Emergencies Act* has been invoked. In your opinion, did the measures adopted by the government infringe any *Charter* rights? And, more importantly, how might these infringements be justified?

A: Certainly, there were limits on *Charter* rights, but whether or not they were justified is definitely the more important question. You're talking about restricting people's freedom of movement and freezing their bank accounts — that certainly goes to their security and liberty rights. We also prevented people from protesting and gathering with one another to advance their political beliefs — these are all infringements on freedom of expression.

As for whether or not the limits were reasonable: I think if we truly had a national emergency, where people's lives were threatened, and Canada's security was threatened, then the limits imposed seem pretty reasonable. They seem minimally impairing (to use the language of the *Oakes* test).

If we take the government's word for it, then, the limits seem reasonable, but so much of this is fact dependant. The facts have been filtered through anecdotal incidents from people on the ground or news reporting.

I don't know what the security risks were. There are lots of security risks that, in the moment, aren't revealed. I don't think the government has given us enough facts yet, and I'm waiting for an independent actor who has access to those facts to make that determination.

Basically, the *Emergencies Act* is like a "do not break glass unless in an emergency," and now that the glass is broken I'm worried about people reaching in too easily to use it. Applying the *Act* has shown us where the *Act* itself is weak, so we now really need to revisit it and see if it's still fit for purpose.