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‘Get cracking’: joint committee reviewing emergency powers should not get ‘bogged down’ debating scope, experts say

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“If they can’t proceed in a non-partisan fashion they should just go home,” says Wesley Wark of the extended debate by the joint parliamentary committee about how much to cover in its review of the powers exercised during the February invocation of the Emergencies Act.

More than a month after the government invoked and revoked the Emergencies Act to end the illegal occupation in downtown Ottawa, the special parliamentary committee, created under the same law to offer oversight on the government’s extraordinary powers, is still “wrestling” with the scope of its mandate. But one national security expert is warning the committee should avoid playing politics, or “pack up and go home.”

After three hours of public debate and testimony on March 29, the 11 members of Special Joint Committee on the Declaration of Emergency agreed to set aside another meeting to discuss privately how they will proceed. The debate centred on whether the act prevents the

committee from looking into the circumstances of the emergency as part of the study, because another section expressly outlines that purpose for a separate, independent inquiry. The four Conservative, NDP, and Bloc Québécois MPs seemed keen to take a broader approach, while the three Liberal MPs, and some Senators, suggested that interpretation would not be in keeping with legal principles.

NDP MP Matthew Green (Hamilton Centre, Ont.), one of three co-chairs, noted the committee was “wrestling” with language in the legislation, but argued the committee should choose a liberal interpretation when confronted with that ambiguity in an effort to better understand the illegal blockades that strangled Ottawa’s downtown streets for more than three weeks and related protests shut off key Canada-U.S. border crossings in Alberta, Manitoba, and Ontario in February.

National security expert Wesley Wark said it’s expected a committee created by a 34-year-old law—and meeting for the first time ever—“might have a little

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“If they can’t proceed in a non-partisan fashion they should just go home, just declare the committee null and void” if they can’t agree it should proceed in a “nonpartisan fashion, with a consensus report that is designed to provide some early indications that could be then fully taken up by the inquiry,” said Wark, a senior fellow at the Centre for International Governance, in an interview with The Hill Times.

“Putting up walls” that constrain the ability for Parliamentarians to fulfill the committee’s purpose is not helpful, suggested Cara Zwibel, director of the Fundamental Freedoms Program with the Canadian Civil Liberties Association,

which has challenged the federal government's use of the act in court.

"I wouldn't want the committee to get sort of bogged down in trying to keep things in a very narrow framing that might actually hinder its ability to really look critically at what happened here."

Wark said many of the provisions before the parliamentary committee are no longer "fit for purpose," from legislation that "sat on the shelf for 34 years." The committee's primary function, for example, is to serve as oversight for powers used by the government during an emergency, and it's meant to submit a report within seven sitting days after the expiration of the declaration.

The government invoked the Emergencies Act on Feb. 14 and revoked it on Feb. 23.

But that shouldn't stop the special joint parliamentary committee from doing its work, which Wark said should include wide terms of reference and act as a prelude to the more significant inquiry, which the act says must be called within 60 days of revocation, and report back to the Senate and House in 360 days.

Act's terms for committee a 'floor not a ceiling,' says CCLA The inquiry as outlined in Sec. 63 is tasked with looking into the "circumstances that led to the declaration," and is the most important part of the act, agreed Errol Mendes, a professor of constitutional and international law at the University of Ottawa.

Sec. 62, meanwhile, outlining the parliamentary committee's terms, tasks MPs and Senators with analyzing the "exercise of powers and the performance of duties and functions." To Mendes, it's clear the drafters wanted different mean-

ings for those two sections, with the parliamentary committee focused "on a temporal period," looking at the powers and actions taken while the emergency was in effect.

"So that requires, essentially, a focus on who exercised the power, on what basis did they exercise the power, and then on that basis, what performance of duties was done," he said. That work should consider if there was inappropriate exercise of power and probe whether the government could have done "the wrong thing in ordering a public order, as opposed to a public welfare emergency."

While examining the exercise of powers is the "core subject" of the review committee, it doesn't preclude Parliamentarians from looking further, said Zwibel.

"The way that [Sec. 62] defines what the committee is looking at is a floor and not a ceiling," she said.

"I think it would be artificial to try and separate those things, because how the powers are exercised is probably very closely linked to the rationale for creating an emergency in the first place," said Zwibel, who was not surprised by the different interpretations Parliamentarians were taking.

"Lawyers, we can find things to argue about, regardless how clear language is," she said with a laugh.

Committee sets aside second meeting to debate scope The committee voted on March 29 to keep that debate going in private on April 5 among the seven MPs and four Senators, more than half of whom are former lawyers: Liberals Rachel Bendayan (Outremont, Que.), Arif Virani (Parkdale-High Park, Ont.), Yasir Naqvi (whose Ottawa Centre rid-

ing was ground zero for the protests), Conservative MP Larry Brock (Brantford-Brant, Ont.), Bloc Québécois MP Rhéal Fortin (Rivière-du-Nord, Que.), and Conservative Senator Claude Carignan (Quebec) Conservative MP Glen Motz (Medicine Hat-Cardston-Warner, Alta.) is a former police officer, while CSG Senator Vernon White (Ontario) was once Ottawa's police chief, Senator Gwen Boniface (Ontario) was commissioner of the Ontario Provincial Police from 1998 to 2006, and PSG Senator Peter Harder (Ontario), is a former deputy minister in the Department of Public Safety.

Former federal defence minister Perrin Beatty, who was a member of cabinet in the Progressive Conservative governments of Joe Clark, Brian Mulroney and Kim Campbell, told the committee that his goal in drafting the 1988 law was to "create as much accountability and scrutiny as possible" and encouraged the members to take a broad approach to its review.

Beatty, who said he had not seen enough information to determine whether or not invoking the act was the right call to address the crisis, said there's "apt to be overlap" with the inquiry, but that is "healthy in a democracy."

Back in 1987, the government never anticipated a future emergency, declared on Feb. 14, would end as rapidly and before the oversight committee held its first meeting, said Beatty, noting some surprise that it took the House a week to vote on the matter on Feb. 21 (ultimately passing with NDP support).

The Liberal MPs pressed Beatty, as the drafter of the legislation, why he didn't write a broad mandate for the committee

if that was the intention. They pointed to key legal principles—the legislator does not legislate in vain, and the expression of one thing excludes others, namely studying the “circumstances” is left to the inquiry—to suggest the intent of the law necessitates a narrow focus on the powers by the committee. Beatty said the opposite was the case: that if he wanted a narrow approach, that would have been explicit in the legislation.

Sen. White, too, said he sees the language as “extremely prescriptive,” and that the committee’s work is limited to the “guardrails” outlined in Sec. 62.

“Regardless of what we want, this isn’t about our wants, right? At the end of the day, we still are limited back to the guardrail [of Sec.] 62. I may not like how it reads, but it is pretty clear to me,” he said.

“I just can’t see that latitude given to us,” White said later.

“If you find that the basis for invoking the act in the first place, that the criteria were not met,” replied Beatty, “the threshold was not met, then everything that flowed from the decision of invoking the act was improper as a consequence, as well, as you’re looking at how those powers were used. It’s entirely appropriate for you to do that.”

Carignan, for example, said it would be important for the committee to look at the seizure of bank accounts and the judicial foundation of that exercise of powers.

Parliamentarians, and the committee whose members signed an oath of secrecy, have access today to information that Parliament didn’t have, at the time that it voted, Beatty noted.

Green also highlighted that fact, saying his vote on Feb. 21 alongside 24 NDP colleagues supporting the emergency order was based on information that was publicly available at the time.

“Given that the House order was provided after its revocation, it’s now my intention to retroactively reflect on the proportionality, including the circumstances leading up to the invocation of the act, to fully understand,” he said.

Virani, though, said the instructions setting up the committee and inquiry are “not just harmonious but prevents possible duplication or inconsistency.”

What he found “troubling” was the preliminary review committee doing a much wider review than intended creates “the potential for having two simultaneous investigations into the same subject matter, which could render opposite results.”

It’s essential the committee set aside partisan differences and put Canada’s national interest first to heal the wounds of the crisis experienced during the protracted blockades, said Beatty.

“Our body politic is wounded at the present time. We need to heal those wounds,” he said. “The obligation of Parliament at this point is to do everything you can to try to heal the divisions that have been created. And that means transparency and collaboration, and a lack of partisanship is critical.”

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