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Perrin Beatty, architect of Emergencies Act not yet convinced feds were right to invoke it over Freedom Convoy

An independent 'Public Order Emergency Commission' led by Ontario appeals court judge justice Paul Rouleau is now in place to examine the decision making of authorities and the events of February's convoys.

MIKE LAPOINTE

With multiple inquiries into the first-ever invocation of the Emergencies Act by the federal government now in full swing, the chief architect of the legislation, former Progressive Conservative federal solicitor general Perrin Beatty, said he's not yet convinced that the invocation of the act in February was justified.

Beatty said "the quid pro quo for giving governments extraordinary powers is that there has to be extraordinary accountability." But at this point, he said there isn't yet enough transparency for that accountability to take place. For that reason, Beatty said he doesn't have enough information to make an informed decision about whether the government acted responsibly when it invoked the act on Feb. 14 in response to the ongoing occupation of downtown Ottawa and border blockades across the country.

"Nor do other Canadians, and we're be-

ing asked to accept it largely on faith," said Beatty, who is now the president of the Canadian Chamber of Commerce.

During the most recent meeting of the Special Joint Committee Examining the Government's Declaration of Emergency, held on April 26, Justice Minister David Lametti (LaSalle-Émard-Verdun, Que.) was criticized for invoking cabinet confidentiality in response to questions from committee members.

"When the government invokes the Emergencies Act, the obligation it takes on is to be as transparent as possible if it wants to maintain the confidence of the public," said Beatty.

The argument has often been made that lifting of cabinet confidentiality or suspending the claim to confidentiality would be prejudicial to future governments as it would limit their ability to be able to operate effectively, said Beatty.

"That tends to be the default position of the Privy Council Office and of most governments, but it's also convenient in

that it helps to avoid accountability," Beatty said, adding that the government has, at all times, the discretion to decide to suspend the rule and to provide documents and other information.

"It's discretionary, and I would hope that they would use their discretion to the greatest degree possible to ensure that Canadians are satisfied that they have all of the information they need to make a decision on whether or not the invocation of the act was justified," said Beatty, noting that he has not personally taken a position on that point given the lack of information at this point.

In designing the Emergencies Act, which became law in 1988 and replaced the much heavier-handed War Measures Act, Beatty said the Mulroney government recognized there would be emergencies "that none of us could foresee with any precision." Beatty was solicitor general under Brian Mulroney from 1985-86.

"There would inevitably be emergencies

in the future where the government would need extraordinary powers and have a need to act very quickly,” said Beatty. “Our goal was to build in a role for Parliament, right from the outset, that Parliament would have to approve it, rescind it at any time, and would oversee the exercise of the powers of the act at all times.”

In addition to sunset provisions that require the government to return to Parliament to extend any emergency powers, “there was the further need for accountability, whether to the courts under the Charter of Rights and Freedoms or after the fact with an ex post facto independent review,” said Beatty.

According to the April 25 order in council, an inquiry must be held into the circumstances leading to the declaration of emergency being issued, as well as the measures taken for dealing with the emergency.

In addition to blockades in Windsor, Ont., Coutts, Alta., Emerson, Man., and the Pacific Highway border crossing in British Columbia, the “Freedom Convoy” descended on Ottawa in late January, staying put well into February. Disrupting neighborhoods and effectively driving business activity in the downtown core to a halt, thousands of protesters converged—initially to express their discontent with COVID-19 public health mandates, but other rightwing political agendas latched onto the protest as well; some of them were extreme. Police began pushing protesters off of Wellington Street and out of the area on Feb. 18, after nearly three weeks of occupation by hundreds of vehicles from across Canada.

Prime Minister Justin Trudeau (Pap-

ineau Que.) announced the establishment of the Public Order Emergency Commission on April 25, and appointed Ontario appeals court judge Justice Paul Rouleau to head the inquiry as commissioner.

First appointed as a justice of the Superior Court of Ontario in 2002, Rouleau was appointed to the Ontario Court of Appeal three years later in 2005. In his role as commissioner, Rouleau is expected to submit a final report to the government on his findings and recommendations by Feb. 20, 2023, to be tabled in the House of Commons and the Senate.

According to the Prime Minister’s Office, the job of the commission will be to examine the circumstances leading to the declaration of the Emergencies Act and the measures taken in response to the emergency, including the evolution of the convoy over a number of weeks, the impact of funding and disinformation, the economic impact, and the efforts made by police and other responders prior to and after the emergency declaration was made on Feb. 14. The order was revoked on Feb. 23.

Justice minister invokes cabinet confidentiality in special committee meeting In addition to Lametti, Public Safety Minister Marco Mendicino (Eglinton-Lawrence, Ont.), director of the Canadian Security Intelligence Service (CSIS) David Vigneault, and RCMP Commissioner Brenda Lucki also appeared before the April 26 committee meeting.

Lametti invoked cabinet confidentiality multiple times as the reason he could not provide information throughout the meeting, at one point in response to a question from NDP MP Matthew Green

(Hamilton Centre, Ont.), when he noted that cabinet confidence “is a fundamental principle in the Westminster system.”

“As well as solicitor-client privilege, which is also a fundamental principle according to our Supreme Court, in our legal system,” he said.

Shortly after, Senator Peter Harder asked Lametti: “at what point did you feel that the invocation of the act was not only but the best choice available to the government, and as I asked Mr. Mendicino, why did it take 24 days?” “It was an unprecedented situation, and obviously I will not divulge cabinet confidence, nor will I betray solicitor-client privilege,” said Lametti. “That being said, we watched the situation, we watched it evolve, we watched authorities try to deal with the situation that they had in hand, and we consulted all the way through.”

The act was invoked when it became clear to the government that the situation was national in scope, that threshold definitions under the act were met, and that provinces or other local authorities were not capable of handling it on their own, said the justice minister.

University of Ottawa law professor Yan Campagnolo, who studies constitutional law, said that he wasn’t surprised that Lametti refused to provide some answers to the parliamentary committee on the basis of cabinet secrecy, adding that it is “extremely rare” for a government to disclose cabinet confidences in the context of parliamentary proceedings.

“However, the minister should not rely on cabinet secrecy to refuse to share with a parliamentary committee the factual and background information underpinning the decision to declare the state

of emergency,” wrote Campagnolo in an email to The Hill Times.

Although Campagnolo said it’s still unclear whether commissioner Rouleau will be given access to the relevant cabinet documents, there have been three inquiries in the past that have had access, including the McDonald Commission on the RCMP Security Service (1977-1981), the Gomery Commission on the Sponsorship Scandal (2004-2006), and the Oliphant Commission on the Mulroney-Schreiber Affair (2008-2010).

Wesley Wark, a security expert and senior fellow at the Centre for International Governance (CIGI), said cabinet confidentiality is an inevitable issue that the commission is going to have deal with.

“It’s not surprising that it’s come up from the attorney general, because it’s ultimately the attorney general who may have to decide whether or not the government is going to invoke Sec. 38 of the Canada Evidence Act, which is one of the tools the government has to block access to the release of sensitive information,” said Wark.

But he also said he believes there will be a negotiated process between the commissioner and the government—specifically the Privy Council Office—about the details of surrounding access to information, which was not laid out in the order in council.

“My hope in that regard is that whatever memorandum of understanding is arrived at, that the commissioner will feel able to make that public so that a public audience for this year-long undertaking will have some appreciation of how the commissioner is going to proceed,” said Wark.

Calling cabinet confidence “a crucial element” of Canada’s Westminster style of government, Wark said it’s fully understandable and “not a matter of any kind of coverup,” that governments of any political stripe would want to protect the confidentiality of those individual ministerial conversations around the cabinet table.

Wark said the commissioner should have access to information surrounding the outcome of deliberation processes in cabinet, in terms of what decisions were arrived at and the chronology.

“I think critical to all of this will be to understand the role of the Incident Response Group, which for me, was a real signal that the government was getting ready to invoke the Emergencies Act when they started to refer the Ottawa protest, in particular, to the group,” said Wark. “It’ll be a matter of discussion between the commissioner and the government in terms of what can be said in public about that.”

Christian Leuprecht, a Munk senior fellow and policy studies professor at Queen’s University as well as a professor in leadership at the Royal Military College, told The Hill Times he would like to see a royal commission put in place, “precisely because the parameters of a commission of inquiry are too narrow, and the government will be able to withhold vast amount of material by invoking cabinet confidences.”

“So the public will basically hear whatever the government wants it to hear,” said Leuprecht in an email to The Hill Times. “I would say the scope is pretty narrow, about the minimum the government had to do under the [Emergencies Act]. And it waited 60 days for a rea-

son: make the story go away, by dragging it into the summer.”

Leuprecht said the invocation of the Emergencies Act “to deal with a couple of thousand protesters” shows that Canada’s national security architecture is “wholly inadequate,” adding that any government’s “first and foremost obligation is to keep its citizens and the country safe and secure.”

According to Pierre-Alain Bujold, Privy Council Office spokesperson, the Public Order Emergency Commission will conduct its work independently from the government and will examine the circumstances that led to the declaration being issued and the measures taken in response to the emergency. Bujold also said the government will not presuppose what information the commission will ask for and will engage directly with the commission on those matters to ensure it can complete its work.

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