"Threats to the Security of Canada": The Case for a Single Stringent Standard

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I. INTRODUCTION

On what basis can the Governor in Council reasonably conclude that there are "threats to the security of Canada" that justify invoking the *Emergencies Act*?[1] This question was front and centre during the recently concluded fact-finding hearings of the Public Order Emergency Commission (the "Commission"). What appeared at the outset to be a straightforward matter of statutory interpretation has become one of the central disputes in this case.

The government has tacitly acknowledged that the Governor in Council's justification for invoking the *Emergencies Act* on February 14, 2022 hinges on its broad interpretation of its own powers — *i.e.*, that it is permitted to interpret "threats to the security" differently from the Canadian Security Intelligence Service ("CSIS") despite the fact that the *Emergencies Act* expressly states that "threats to the security of Canada" bears the same meaning assigned to it in section 2 of the *Canadian Security Intelligence Service Act*.[2] As I intend to demonstrate in the following article, the government's legal interpretation — which the public only learned of for the first time during the hearings — is contrary to the principles of statutory interpretation and recent Supreme Court of Canada jurisprudence. The Governor in Council is bound to interpret the definition of "threats to the security of Canada" set out in the CSIS Act based on the ordinary meaning of the words and in virtually the same manner as CSIS.

In the following article, I begin by setting out the high legislative threshold for declaring a public order emergency, which includes a reasonable determination that there are threats to the security of Canada, as defined in section 2 of the CSIS Act. I then discuss how what appeared to be a clear legislative standard at the outset began to shift during the Commission hearings. Following this, I discuss the

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[1] *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.).

[2] *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 [hereinafter "CSIS Act"].

government's alternative interpretation to "threats to the security of Canada" as set out in its Closing Submissions. I then evaluate the merits of the government's position, both as a matter of interpretation, and as applied to the government's own description of the facts. I conclude by observing that while the Governor in Council cannot interpret the statutory threshold much differently from CSIS, which is a pure question of law, it is permitted to reach opposing factual determinations based on that same legal standard. This, however, does not appear to have occurred in the present case.

II. THE HIGH LEGISLATIVE THRESHOLD FOR DECLARING A PUBLIC ORDER EMERGENCY

The threshold for declaring a public order emergency under the *Emergencies Act* is extremely high. Pursuant to section 16, a public order emergency is "an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency".[3] This definition establishes three separate hurdles for the government to overcome. First, the government must show that there is an emergency arising from "threats to the security of Canada".[4] If it can meet this initial burden, it must then show that the situation rises to the level of a "national emergency" — a term that has two additional statutory requirements. To constitute a national emergency, the situation must be such that it (1) either (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or (b) seriously threatens the ability of the government of Canada to preserve the sovereignty, security and territorial integrity of Canada; and (2) cannot be effectively dealt with under any other law of Canada.[5]

While it could certainly be argued that none of these criteria was met on the facts of the case,[6] it is the first issue — whether there existed "threats to the security of Canada" — that, in my view, will be most consequential in a future judicial review. For unlike the issue of whether there existed a "national emergency", the disagreement over whether there were "threats to the security of Canada" is not primarily about whether the legal standard was reasonably met on the facts — which would undoubtedly garner judicial deference — but what the appropriate legal standard *is*. In other words, it is a pure question of law.

As noted above, section 16 of the *Emergencies Act* defines a public order

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[3] *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), s. 16.

[4] *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), s. 16; *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 2.

[5] *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), s. 3.

[6] See, for example, Leah West, Michael Nesbitt & Jake Norris, "Invoking the Emergencies Act in Response to the Truckers' 'Freedom Convoy 2022': What the Act Requires, How the Government Justified the Invocation, and whether It Was Lawful" (2022) 70:2 Crim. L.Q. 262.

emergency as an emergency that arises from "threats to the security of Canada". That section then defines "threats to the security of Canada" to have the same meaning assigned by section 2 of the CSIS Act.[7] The *Emergencies Act* thus adopts the very same definition of "threats to the security of Canada" found in the CSIS Act. This is significant. Even in the absence of such a provision, there is a presumption that the same words carry the same meaning across statutes — particularly those dealing with the same subject matter (unless a contrary intent is clear).[8] The theory is that each statute is but a piece of a much larger puzzle — being the *corpus juris* (body of law)[9] — and that the legislature would therefore intend a consistent meaning across its enactments. In other words, even if section 16 did not reference the CSIS Act definition, it would be at least arguable that "threats to the security of Canada" in the *Emergencies Act* ought to bear the same meaning as the CSIS Act. The express incorporation of the CSIS Act definition removes any lingering doubts. The phrase must have the same meaning in both enactments.

Section 2 of the CSIS Act enumerates four potential types of "threats to the security of Canada". As we shall see, it is the third — (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state — that is potentially applicable in this case.[10] In essence, subsection 2(c) is a threat akin to terrorism, or at least some form of "extremism".[11]

III. SHIFTING THE LEGAL GOALPOSTS

On February 15, 2022, the day after Prime Minister Trudeau declared a public order emergency, the Governor in Council published the *Proclamation Declaring a Public Order Emergency* (the "*Proclamation*").[12] The *Proclamation* implicitly acknowledged that the declaration of a public order emergency requires "threats to the security of Canada" as that term is defined in the CSIS Act. It anchored the declaration to "activities that are directed toward or in support of the threat or use

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[7] *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), s. 16; *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 2.

[8] *Vale Canada Ltd. v. Schwartz*, [2022] M.J. No. 118, 2022 MBCA 51 at para. 26 (Man. C.A.).

[9] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, MN: Thomson/West, 2012) at 252-255.

[10] *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 2.

[11] See West *et al.* on CSIS's own expansion of its interpretation of s. 2(c): Leah West, Michael Nesbitt & Jake Norris, "Invoking the Emergencies Act in Response to the Truckers' 'Freedom Convoy 2022': What the Act Requires, How the Government Justified the Invocation, and whether It Was Lawful" (2022) 70:2 Crim. L.Q. 262.

[12] *Proclamation Declaring a Public Order Emergency*, P.C. 2022-108 (2022), Can. Gaz. Part II, No. 156.

of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada", thereby adopting the language of subsection 2(c) of the CSIS Act.

Cabinet echoed this same position several days later in its "explanation of the reasons for issuing the declaration" (the "Explanation"). As with the *Proclamation,* the Explanation referenced "the threat or use of acts of serious violence against persons or property for the purpose of achieving a political or ideological objective" — the very same wording found in subsection 2(c) of the CSIS Act. The Governor in Council (and Cabinet) therefore left no doubt that it considered itself bound by the CSIS Act definition of "threats to the security of Canada" and that it was anchoring its declaration to subsection 2(c) in particular.

Moreover, there was no indication, either in the *Proclamation* or the Explanation, that the Governor in Council could interpret this statutory threshold differently from CSIS or beyond the ordinary meaning of the words. On the contrary, the *Proclamation* and the Explanation left the impression that the meaning of "threats to the security of Canada" was a straightforward matter of statutory interpretation.

After the Commission began, however, the goalposts began to shift. CSIS director David Vigneault confirmed that CSIS did *not* assess that the protests and blockades constituted a threat to the security of Canada based on the CSIS Act definition — a crucial concession if there is a single statutory threshold for CSIS and the Governor in Council.[13] However, Director Vigneault also stipulated that the *Emergencies Act* and the CSIS Act deal with distinct issues and that he had advised the Prime Minister on February 13 that he supported invoking the *Emergencies Act* as he believed this was required *despite CSIS not assessing the situation as a threat to the security of Canada*.[14]

Jody Thomas, National Security and Intelligence Advisor to the Prime Minister, went even further. On November 17, she testified that the government had received legal advice that the definition of "threats to the security of Canada" in the *Emergencies Act* "*is not limited by the CSIS Act*", calling the CSIS Act definition "very narrow and outdated".[15] Ms. Thomas's statement — and the legal advice the government had apparently received — contradicted the clear language of the

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[13] Catharine Tunney, "CSIS didn't feel convoy protests constituted a national security threat under the law: documents" (November 14, 2022), online: *CBC News* <https://www.cbc.ca/news/politics/convoy-protest-emergencies-act-ottawa-1.6648413>. See also Public Order Emergency Commission, Closing Submissions of the Government of Canada, at para. 314.

[14] Public Order Emergency Commission, Closing Submissions of the Government of Canada, at paras. 314–316.

[15] Marieke Walsh, "Federal government rejected CSIS definition of national-security threat when it invoked the Emergencies Act" (November 17, 2022), online: *The Globe and Mail* <https://www.theglobeandmail.com/politics/article-federal-government-rejected-csis-definition-of-national-security/>.

Emergencies Act, not to mention the Governor in Council's own stated justification in the *Proclamation*, along with the Explanation. It was an extraordinary assertion that the government could essentially act extra-legally, dangerously reminiscent of President Nixon's infamous comment that "when the president does it, that means that it is not illegal". The troubling nature of her statement aside, the clear implication was that the government knew it could not meet the stringent standard of the CSIS Act and was therefore attempting to circumvent it.

Several days later, Attorney General David Lametti walked back Ms. Thomas's statement and the legal opinion the government had supposedly received (though the government continued to assert privilege over that opinion).[16] He acknowledged that the Governor in Council was bound by the CSIS Act definition, but argued, as had Director Vigneault, that the Governor in Council and CSIS need not interpret or apply the statutory definition in precisely the same manner — that the Governor in Council is a different decision-maker and thus considers far wider "inputs" than does CSIS. AG Lametti's testimony was then fleshed out (and expanded upon) in the government's Closing Submissions.

IV. THE GOVERNMENT'S CLOSING SUBMISSIONS

On December 9, 2022, following the conclusion of the hearings, the government delivered its Closing Submissions. The Closing Submissions acknowledge the three-part test set out above and that "threats to the security of Canada" bears the same meaning as section 2 of the CSIS Act.[17] The Closing Submissions also make express reference to the Explanation and acknowledge that the only branch of the CSIS Act definition applicable to this case is subsection 2(c), which, as set out above, requires "the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective. . ."[18]

So far, so good. But the government then proceeds to muddy the legal waters.

The Closing Submissions state that the Governor in Council must apply "threats to the security of Canada" in an "evolving manner" to "account for the development of modern threats" and "encompass modern events that could not have been anticipated when the statute was passed in the 1980s".[19] This argument presents as a classic motte and bailey. It is either saying something uncontroversial, in which

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[16] Catharine Tunney, "Emergencies Act inquiry lawyer calls out an 'absence of transparency' as solicitor-client privilege invoked" (November 23, 2022), online: *CBC News* <https://www.cbc.ca/news/politics/lametti-emergencies-act-1.6660939>.

[17] Public Order Emergency Commission, Closing Submissions of the Government of Canada, at paras. 537-539.

[18] Public Order Emergency Commission, Closing Submissions of the Government of Canada, at para. 546.

[19] Public Order Emergency Commission, Closing Submissions of the Government of Canada, at paras. 548-549.

case it is of very limited practical relevance, or it is advocating something contrary to accepted principles of statutory interpretation, in which case it should be rejected.

No one would dispute that the "activities" referred to in subsection 2(c) of the CSIS Act need not be the same activities that would have existed in the 1980s. On the other hand, the law requires that these activities are: (1) within or related to Canada; (2) directed toward or in support of the threat or use of acts of serious violence against persons or property; and (3) for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state. The law is clear that courts are to assess what a statute meant *at the time of enactment*.[20] Where a term is intended to be dynamic — such as "activities" — new phenomena can come within the original meaning from time to time, but the meaning itself does not change.[21] The Governor in Council is therefore perfectly entitled to consider "modern sophistication in means, speed of movement of persons/s goods and speed of communications", but it cannot escape the requirement that there be a serious threat to persons or property for the purpose of achieving a political, religious or ideological objective.

It is ultimately unclear what if any import this argument is meant to have. In any event, it is the government's second argument, which echoes the testimony of Attorney General Lametti, that is more nuanced and merits consideration: that while the Governor in Council is bound by the definition of "threats to the security of Canada" in the CSIS Act, it is not bound by CSIS's own interpretation and application of that definition. In particular, the government argues that "serious violence to persons" need not rise to the level of lethality, and that "serious violence to property" need not involve physical damage to that property. The merits of this argument are the subject of the following section.

V. ASSESSING THE GOVERNMENT'S POSITION

Prior to the Supreme Court of Canada's decision in *Canada v. Vavilov*,[22] it was arguable that the Court had left open the door for administrative decision-makers to offer divergent, and even contradictory, interpretations of the same statutory language.[23] But with the Court's decision in *Vavilov*, administrative discretion, and the Court's corresponding deference to an administrator's statutory interpretation, has been curtailed. The Closing Submissions cite *Vavilov*, but the paragraph cited

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[20] *R. v. Perka*, [1984] S.C.J. No. 40, [1984] 2 S.C.R. 232 (S.C.C.).

[21] See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, ON: LexisNexis Canada, 2014) at paras. 6.16-6.22.

[22] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.) [hereinafter "*Vavilov*"].

[23] See Gerard Kennedy, "Wilson v. AECL: A Missed Opportunity to Protect the Rule of Law in Administrative Law" (September 1, 2016), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/wilson-v-aecl-a-missed-opportunity-to-protect-the-rule-of-law-in-administrative-law/>.

makes it clear that an administrator's authority to interpret a statute depends entirely upon the particular statutory language.[24] Where a legislature has used broad and open-ended language — most notably, the ever-elusive term "public interest" — it is signalling an intent for the administrator to have flexibility in its interpretation.[25] Conversely, where the legislature has used precise and narrow language, the administrator's discretion will be tightly constrained.[26]

The relevant provisions of the *Emergencies Act* and the CSIS Act clearly fall on the narrow and constrained end of the spectrum. There is a manifest legislative intent to establish a single standard of "threats to the security of Canada". Parliament could have simply repeated the language of the CSIS Act in the *Emergencies Act*. The fact that it expressly incorporated the CSIS Act definition is the clearest indication that the term should be given one consistent meaning regardless of who the decision-maker is. Moreover, the CSIS Act definition uses relatively narrow terms with well-established meanings. The least precise word in subsection 2(c) is the term "serious", as this is a qualitative term that imports some degree of subjectivity. But even here we have relatively clear-cut language. Two administrators may reasonably disagree about how severe violence must be before it is considered "serious violence", but both would concede that the word connotes a high level or degree of violence — if not violence causing death, then at least violence causing severe bodily harm.

The other terms in subsection 2(c) are even narrower and less capable of reasonable disagreement. Violence clearly denotes physical force.[27] As such, violence to persons denotes physical injury to individuals, while violence to property denotes physical damage to tangible property. Moreover, the text is clear that the threat or use of serious violence must be *for the purpose* of achieving a political, religious or ideological *objective*. The serious violence must therefore be a means to a larger objective, rather than an end unto itself. Put another way, the

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[24] Public Order Emergency Commission, Closing Submissions of the Government of Canada, at para. 555, citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at para. 110 (S.C.C.).

[25] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at para. 110 (S.C.C.).

[26] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at para 110 (S.C.C.).

[27] See *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 at para. 234 (S.C.C.):

> The primary meaning of the word "violence" according to the *Shorter Oxford English Dictionary* (3rd ed. 1987) is "[t]he exercise of physical force so as to inflict injury on or damage to persons or property." This is the sense in which the term was used in *Dolphin Delivery*, as is evident from the following passage at p. 588:
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> > That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct.

underlying objective must be the cause of the threat or use of serious violence, not merely correlated with it.[28] Were it otherwise, the drunken and belligerent bar patron who gets into a heated political exchange with another customer and uses a pool cue to commit serious violence against his ideological adversary would constitute a "threat to the security of Canada". Suffice it to say, this is not what Parliament intended.

In sum, subsection 2(c) offers the administrative decision-maker relatively little room to manoeuvre. The text says what it says, and the plain meaning is bolstered by reference back to what section 2 of the CSIS Act delineates: threats to the security of Canada. By any standard, this refers to something more than mere criminality. And contrary to the government's assertion that CSIS interprets its powers in a "narrow manner",[29] CSIS has, if anything, interpreted its mandate expansively.[30] The Governor in Council's and CSIS's respective interpretation of subsection 2(c) must therefore be essentially *ad idem*, with, at most, a subtle variation between the two.

The government argues in its Closing Submissions that "serious violence" to persons need not rise to the level of lethality that CSIS typically considers.[31] This contention, while arguable, is also a red herring, since the threats did apparently rise to the level of lethal violence in certain cases — notably in Coutts, Alberta. Why then did CSIS not consider the situation to constitute a threat to the security of Canada? One plausible explanation is that the threat in Coutts had peacefully resolved by the time the *Emergencies Act* was invoked — and, as such, there was simply no longer a "threat of serious violence to persons".

It is also not apparent, even taking the government's best case at face value, that any threat of serious violence to persons was for the purpose of achieving a political, religious or ideological objective. The government argues that Canada faced "escalating, unlawful protests and illegal blockades across the country that included acts or threats of serious violence to persons or property linked with a stated purpose

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[28] Similarly, as West *et al.* have noted, for extremism to form the basis of a declaration of national emergency, the extremism must cause the emergency: See Leah West, Michael Nesbitt & Jake Norris, "Invoking the Emergencies Act in Response to the Truckers' 'Freedom Convoy 2022': What the Act Requires, How the Government Justified the Invocation, and whether It Was Lawful" (2022) 70:2 Crim. L.Q. 262.

[29] Public Order Emergency Commission, Closing Submissions of the Government of Canada, at para. 560.

[30] See Leah West, Michael Nesbitt & Jake Norris, "Invoking the Emergencies Act in Response to the Truckers' 'Freedom Convoy 2022': What the Act Requires, How the Government Justified the Invocation, and whether It Was Lawful" (2022) 70:2 Crim. Law Quarterly 262.

[31] Public Order Emergency Commission, Closing Submissions of the Government of Canada, at para. 565.

of achieving a change in government policy".[32] The link between the protest/blockades *as a whole* and a desire to achieve a change in government policy, however, does not mean that the *particular individuals* who threatened violence did so for the purpose of achieving that political objective. Indeed, it is at least notable that none of the individuals arrested in Coutts was charged with a terrorism-related offence.[33]

The Closing Submissions also propose an alternative interpretation of "serious violence to property", arguing that "violence" should not be restricted to physical damage, but should also include blockades.[34] This interpretation, however, is contrary to the ordinary meaning of the words. As noted above, "serious violence to property" clearly denotes actual physical damage. Speaking metaphorically, we might say that the government's interpretation does "violence" to the words. But Parliament clearly intended to convey a literal meaning. Adopting an overly expansive interpretation under the guise of realizing the supposed "purpose"[35] of the *Emergencies Act* ignores the legislative intent actually evident in the text and threatens to supplant the principle of legislative supremacy with executive supremacy.

VI. CONCLUSION – SAME STANDARD, DIFFERENT DECISIONS

The government notes, correctly, in its Closing Submissions that it is the Governor in Council — not CSIS — that decides whether a public order emergency exists. The government further argues that the Governor in Council may consider information that CSIS would not be permitted to use for its own activities.[36] Assuming this is true, what it amounts to is not a different legal standard, but the potential for the Governor in Council to reach a *different decision in applying the same standard*.

The *Emergencies Act* says that the Governor in Council can declare a public order emergency where it believes on reasonable grounds that such an emergency exists. What is reasonable in a particular circumstance naturally varies based on the evidence and the context of the decision-maker. The Governor in Council, in other words, is bound by the very same legal standard as CSIS, but in applying that same

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[32] Public Order Emergency Commission, Closing Submissions of the Government of Canada, at para. 564.

[33] Public Order Emergency Commission, Closing Submissions of the Government of Canada, at para. 136. Charges included mischief, uttering threats and weapons offences. Four of the individuals were also charged with conspiracy to commit murder of police officers.

[34] Public Order Emergency Commission, Closing Submissions of the Government of Canada, at para. 568.

[35] Public Order Emergency Commission, Closing Submissions of the Government of Canada, at para. 568.

[36] Public Order Emergency Commission, Closing Submissions of the Government of Canada, at paras. 555-556.

standard, there may be instances where it reaches a different conclusion — for example, because it is privy to evidence that CSIS did not have the opportunity to consider.

The notion that "reasonable decision-makers may disagree reasonably", however, is not ultimately the thrust of the government's position. There is no indication that the Governor in Council had access to information that CSIS did not, or that it interpreted the available evidence differently. Instead, the government argues that the Governor in Council operates on a different legal standard than does CSIS. This is exemplified by the evidence of Director Vigneault. Crucially, Director Vigneault did not assert that CSIS would have considered the situation to be a "threat to the security of Canada" if it had access to the same evidence as the Governor in Council but, instead, that based on the *same evidence*, the Governor in Council should consider the matter to be a threat to the security of Canada even though CSIS did not.[37]

The government's argument must be rejected. The text of the *Emergencies Act* could not be clearer. There is but a single stringent standard for determining that there are threats to the security of Canada, and that standard is set out in plain language in section 2 of the CSIS Act. Parliament could have established different standards for different decision-makers, but it chose not to. That choice may or may not have been wise, but it must be respected.

If the government believes, as the Prime Minister's National Security and Intelligence Advisor evidently does, that the *Emergencies Act* is "outdated", then there is an obvious remedy: legislative amendment. But unless and until that occurs, the government must continue to conduct itself in accordance with the original and ordinary meaning of the text. That may prove inconvenient, but inconvenience is a price readily worth paying to maintain a government of laws.

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[37] Public Order Emergency Commission, Closing Submissions of the Government of Canada, at paras. 314-316.