

Court File No.: T-347-22

FEDERAL COURT

BETWEEN:

CANADIAN CONSTITUTION FOUNDATION

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

Application for Judicial Review under Sections 18 and 18.1 of the
Federal Courts Act, R.S.C. 1985, c. F-7

AND BETWEEN:

Court File No.: T-316-22

CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

Application for Judicial Review under Sections 18 and 18.1 of the
Federal Courts Act, R.S.C. 1985, c. F-7

**NOTICE OF MOTION OF THE ATTORNEY GENERAL OF ALBERTA
FOR LEAVE TO INTERVENE PURSUANT TO RULE 110**

TAKE NOTICE THAT the Attorney General of Alberta (“**AG of Alberta**”) will make a motion in writing to the Federal Court under Rule 369 of the *Federal Courts Rules*, SOR/98-106.

THE MOTION IS FOR an order pursuant to Rule 110(c) of the *Federal Courts Rules*, adding the AG of Alberta as an intervener in these proceedings in respect of the matters raised in this Notice of Motion.

THE GROUNDS FOR THE MOTION ARE:

- 1) The matters upon which the AG of Alberta seeks to intervene are questions of general importance and significant public interest. The Court’s determination on these matters will have an impact nationally and on Alberta;
- 2) The invocation of the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.) by the Governor in Council is unprecedented. For nearly 35 years, it has existed as an extraordinary tool of last resort for exceptionally dire circumstances that might face our nation. Fortunately, it had remained unused—until eight weeks ago, when it was invoked by the Governor in Council under the guise of a “national emergency” to respond to localized protests;
- 3) The provisions in Part II of the *Emergencies Act* resorted to by the Governor in Council expressly require that, before the powers under it are exercised, specific statutory conditions must be met;
- 4) It is important that all such conditions are met, as otherwise the *Proclamation Declaring a Public Order Emergency*, SOR/2022-20 (“**Proclamation**”), *Emergency Measures Regulations*, P.C. 2022-107, SOR/2022-21 and *Emergency Economic Measures Order*, P.C. 2022-108, SOR/2022-22 (collectively, the “**Enactments**”) are outside the scope of legislative power and are *ultra vires*;
- 5) The underlying Applications for Judicial Review raise important questions about the proper interpretation of the *Emergencies Act*, and the scope of the powers granted to the Governor in Council. One important aspect of that interpretation is recognition of the deference to be given to the provinces that is specifically contemplated in in the text of the *Emergencies Act*;

- 6) The AG of Alberta has a direct interest in these issues, as Alberta is one of the provinces to which the Enactments applied; it is a province that experienced, and resolved, a blockade at which the Enactments were purportedly targeted; and the development of the law on these issues would affect the province if the *Emergencies Act* is invoked in the future;
- 7) The AG of Alberta's interests support its intervention to argue that the use of the powers under the *Emergencies Act* must be confined to situations in which all the criteria set out in the legislation are strictly met, as this serves as an important safeguard for the principle of federalism, which is part of the bedrock of Canada's constitutional framework;

Proposed Submissions of the AG of Alberta

- 8) If this motion is granted, the AG of Alberta intends to make submissions on five points regarding the interpretation of the statutory powers granted to the Governor in Council:
 - a) To meet the definition of "national emergency" in s. 3(a) of the *Emergencies Act*, it must be "of such proportions or nature as to exceed the capacity or authority of a province to deal with it". This must be interpreted narrowly, and requires considering available provincial legislation;
 - b) To meet the definition of "national emergency" in s. 3 of the *Emergencies Act* requires that it "cannot be effectively dealt with under any other law of Canada". This is an imperative direction that must be interpreted narrowly, and requires that the Governor in Council must be satisfied that it is impossible to use existing federal legislation, such as the *Criminal Code*, to deal with the purported "national emergency";
 - c) The requirement in s. 17(2)(c) of the *Emergencies Act* to specify in the area of Canada to which the effects of the emergency extend in the declaration of public order emergency, if those effects do not extend to the whole of Canada, is an imperative direction. It must be interpreted strictly, such that a declaration would be *ultra vires* to the extent that it is

- proclaimed for areas of Canada beyond those to which actual effects of the public order emergency extend;
- d) Subsection 25(1) of the *Emergencies Act* requires that, “before the Governor in Council issues, continues or amends a declaration of a public order emergency, the lieutenant governor in council of each province in which the effects of the emergency occur shall be consulted with respect to the proposed action”. To be meaningful, this provision must require substantial weight be given to those views prior to any invocation of the *Emergencies Act*;
 - e) Enactments issued under the power granted by s. 19(1) of the *Emergencies Act* are expressly limited by s. 19(3), which states in relevant part: “The power under subsection (1) to make orders and regulations... shall be exercised... with the view of achieving, to the extent possible, concerted action with each province with respect to which the power... is exercised or performed”. The limitations in s. 19(3) are not superfluous. They are essential to maintaining the principles of federalism, which underpin the functioning of our nation. The *vires* of an exercise of power under s. 19(1) must be interpreted with due consideration to the requirements of s. 19(3);

Alberta’s Significant Interest and Unique Perspective

- 9) The powers under the *Emergencies Act* are extraordinary. They permit incursion by the Government of Canada into matters that would, absent a true national emergency, be areas of provincial jurisdiction. If not properly invoked with careful attention to statutory requirements, exercising these powers compromises the rights of the province of Alberta that are enshrined in our constitution;
- 10) The AG of Alberta has a significant interest in ensuring that clear guidance is established for the use of the *Emergencies Act*. That issue has the potential to impact Alberta, and all of its citizens, in future situations in which the Government of Canada may wish to use the *Emergencies Act* as a tool;

- 11) The AG of Alberta's participation will assist the Court and provide an important provincial perspective. Unlike the parties, Alberta is one of the provinces to which the duty of consultation is owed, and is well placed to make arguments respecting the scope of that duty;
- 12) The Enactments regulate property and civil rights, local works and undertakings, and matters of a merely local nature, which are matters generally reserved to the provinces under s. 92 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.). A provincial perspective on whether the Enactments were validly invoked, and therefore properly respect the balance of federalism that lies at the core of the strict conditions on the powers enshrined in the *Emergencies Act*, is therefore helpful;
- 13) The issues upon which the AG of Alberta seeks to make submissions are raised by the Notices of Application, which allege that the Enactments are unlawful because they do not meet key legislative requirements in the *Emergencies Act*;
- 14) The AG of Alberta's position will not be adequately asserted by any of the parties and the interests of justice are better served by the AG of Alberta's intervention;
- 15) The AG of Alberta will not unduly delay or complicate the proceedings and will adhere to any existing timelines set by the Court, and indeed will already be participating as an intervener as of right on constitutional issues in these Applications pursuant to s. 57 of the *Federal Courts Act*, RSC 1985, c F-7;

Procedural Requests

- 16) The AG of Alberta has already sent notice that it is intervening in Court File No. T-347-22 as of right pursuant to the Notice of Constitutional Question ("NCQ") served upon it on March 31, 2022. The AG of Alberta also intends to intervene in Court File No. T-316-22 as of right pursuant to the NCQ that will need to be served under the *Federal Courts Act*;

- 17) The AG of Alberta proposes filing one joint memorandum of fact and law in respect of both these matters, not to exceed 20 pages, which would address the issues raised in this Notice of Motion and the constitutional issues raised in the NCQs;
- 18) The AG of Alberta requests permission to make oral submissions at the hearing, not to exceed 20 minutes;
- 19) The AG of Alberta asks that no costs be awarded for or against him for this motion or for his participation as an intervener if the motion is granted.

Statutory Provisions and Further Grounds Relied Upon

- 1) *Federal Courts Rules*, SOR/98-106, and particularly Rules 3, 53, 110, and 369;
- 2) *Emergencies Act*, RSC 1985, c 22 (4th Supp);
- 3) *Interpretation Act*, RSC 1985, c I-21, s. 11;
- 4) *Criminal Code*, RSC 1985, c C-46;
- 5) Such further and other grounds as this Honourable Court may deem just.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- 1) Affidavit of Robert Andrews sworn April 7, 2022;
- 2) Such further and other material as this Honourable Court may allow.

Signed this 8th day of April, 2022



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