

Federal Court



Cour fédérale

Date: 20230301

**Dockets: T-306-22
T-316-22
T-347-22
T-382-22**

Ottawa, Ontario, March 1, 2023

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

Docket: T-306-22

CANADIAN FRONTLINE NURSES AND KRISTEN NAGLE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-316-22

AND BETWEEN:

**CANADIAN CIVIL LIBERTIES
ASSOCIATION**

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-347-22

AND BETWEEN:

CANADIAN CONSTITUTION FOUNDATION

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-382-22

AND BETWEEN:

**JEREMIAH JOST, EDWARD CORNELL,
VINCENT GIRCYS,
AND HAROLD RISTAU**

Applicants

and

**GOVERNOR IN COUNCIL,
HIS MAJESTY IN RIGHT OF CANADA,
ATTORNEY GENERAL OF CANADA AND
MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

ORDER

UPON motion in writing by the Respondent, Attorney General of Canada, pursuant to Rules 369 and 312 of the *Federal Courts Rules*, SOR/98-106, for an order granting leave to file an affidavit additional to those provided for in Rule 307, namely the Supplemental Affidavit of Rebecca Coleman in the herein proceedings which are to be heard together;

AND UPON reading the motion record of the Respondent and the responding motion record of the Canadian Civil Liberties Association (CCLA) in T-316-22 and the Written Representations of the Respondent in Reply;

AND UPON considering that by Order dated January 26, 2023 the Court granted leave to the CCLA in T-316-22 and the Canadian Constitutional Foundation (CCF) in T-316-22 to file an affidavit additional to those provided for in Rule 306, namely the Affidavit of Cara Zwibel, containing a selection of documents, transcripts and witness summaries produced during the proceedings of the Public Order Emergency Commission (“POEC”);

AND UPON considering that by Order dated January 27, 2023 the same selection of documents, transcripts and witness summaries were also permitted to be included with respect to a Rule 312 motion brought by the Applicants in T-382-22;

AND UPON considering that in the present motion, the Respondents in the four judicial review applications seek leave to file the Supplemental Affidavit with a selection of POEC transcript excerpts described as follows:

- a. Volume 26, Transcripts from POEC dated November 18, 2022, excerpts from the testimony of Privy Council Clerk J. Charrette pages 162-165, 170-173, and 181-197 attached as Exhibit A;
- b. Volume 23, Transcripts from POEC dated November 15, 2022, excerpts from the testimony of RCMP Commissioner B. Lucki, pages 71-73, 84 and 196-198, attached as Exhibit B;

- c. Volume 28, Transcripts from POEC dated November 22, 2022, excerpts from the testimony of Minister M. Mendicino, pages 61-66, 75-79 and 84-86, attached as Exhibit C;
- d. Volume 31, Transcripts from POEC dated November 25, 2022, excerpts from the testimony of Prime Minister J. Trudeau, pages 47-57, 83-85, 102-104, 181-187 and 191, relating to policing plans and CSIS's threat assessment, attached as Exhibit D;
- e. Volume 27, Transcripts from POEC dated November 21, 2022, excerpts from the testimony of the Director of Canadian Security Intelligence Service (CSIS), D. Vigneault, pages 56-59, attached as Exhibit E;

The Respondent maintains the position that it took on the joint motion of the CCLA and CCF which the Court dealt with in *Canadian Civil Liberties Association et al v Canada (Attorney General)*, 2023 FC 118 [*CCLA 2023*]. That position is that none of the additional evidence, which the Court granted leave to introduce in *CCLA 2023*, should be before the Court on the underlying applications for judicial review. That position not having been accepted by the Court, the Respondent submits that it would be in the interests of justice to admit the proposed additional evidence.

In *CCLA 2023*, I set out the preliminary requirements for determining the admissibility of evidence on a Rule 312 motion and the exceptions to the general principle that the evidentiary record on judicial review is restricted to the record that was before the decision-maker. When the preliminary requirements are satisfied, an applicant must still convince the Court that it should

exercise its discretion to grant an order under Rule 312. The overriding consideration is whether the interests of justice will be served by permitting the additional affidavit to be admitted.

The CCLA, in general, opposes the filing of the Supplemental Affidavit on the grounds that while the transcripts meet the low thresholds for relevance, portions are not admissible and it would not be in the interests of justice to admit them. They contend that they are prejudiced by the Respondent's late decision to proffer this evidence. It is now being offered, they argue, to improperly augment the reasons for the decision at issue in the applications for judicial review. Had the Respondent wished to rely on the evidence of the government members and public officials, the CCLA argues that it should have been submitted by way of affidavit in a timely manner. The CCF, in a separate filing, endorses the CCLA's position.

The CCLA accepts that part of Exhibit "A", the transcript of the Clerk of the Privy Council's testimony is admissible. This part, pages 162-165 of the Clerk's evidence, recounts a series of events that led to what has been described as the "Invocation Memorandum". Pages 166-169 and 174-175 were admitted in *CCLA 2023*. The Respondent seeks to have pages 170-173 and 181-197 in which the Clerk clarifies or explains what is in the Invocation Memorandum also admitted. The CCLA objects to this on the ground that it buttresses the document in ways that are not permissible on judicial review. It was the Invocation Memorandum itself, they contend, and not the Clerk's further *ex post facto* explanation or internal reasoning, that formed the basis for the decision to invoke the *Emergencies Act*.

I agree with the Respondent that the Clerk's evidence at pages 170 to 173 would complete the excerpt admitted in *CCLA 2023* to assist the Court in understanding the decision making process and the role of the Invocation Memorandum in that process. I also agree with the Respondent that the excerpt of the Clerk's testimony at pages 181-197 would provide further, balanced context for assessing the Applicants' substantive submissions on the Invocation Memorandum's discussion of the threat context, specifically the blockade at Coutts, Alberta. However, Ms. Charette's self-described "layman's interpretation" of whether the protest was lawful or not is inadmissible. Similarly, her personal interpretation of the applicable law beginning on page 192, which constitutes argument and bolstering of the Respondent's position, is also inadmissible.

The CCLA, supported by the CCF, does not contest the admissibility of the transcript of Commissioner Lucki's testimony, Exhibit "B". Nor do they contest the admissibility of the testimony of David Vigneault, Exhibit "E".

The CCLA concedes that a portion of Minister Mendocino's testimony (Exhibit "C") is admissible, that being a portion explaining whether he read the Commissioner's email about the exhaustion of available policing tools. As this testimony is uncertain, the CCLA would not oppose the admission of a summary of that evidence which they propose. However, they object to the admission of the remainder of Exhibit "C" which includes evidence of how the Commissioner's testimony would not have changed the Minister's view of the necessity of invoking the *Emergencies Act* on the ground that it is hypothetical in nature and goes to the

merits of the matter decided by the decision maker. Moreover, they argue, it had been open to the Respondent to put the Minister's actual submissions to the decision maker in evidence.

The questions put to Minister Mendocino by Commission Counsel about Commissioner Lucki's email to his Chief of Staff on February 13, 2022 did invite him to hypothesize about whether a statement therein would have changed his mind had he been aware of it. For that reason, I agree that the questions and answers on that topic are inadmissible and must be deleted from the exhibit. However, the summary proposed by the CCLA does not adequately convey the uncertainty of the Minister's evidence as to whether he was aware of the statement and his evidence on that is, in my view, admissible. I also agree with the Respondent that the Minister's evidence situates the Commissioner's email in the context of his many briefings with her during that period and his preoccupations at the time about the risk of violence. This is not bootstrapping of the reasons expressed for the decision and is responsive to the evidence tendered by the Applicants for which leave was granted in *CCLA 2023*. In my view, it is admissible.

With regard to the Prime Minister's testimony before the POEC, in *CCLA 2023* the Court granted leave for the admission of three pages of that evidence on the limited basis that they were necessary background context to explain the development and use of the Invocation Memorandum. The testimony which the Respondent now seeks to have admitted expands on the reasons why the Prime Minister chose to accept the advice in the Memorandum and invoke the *Emergencies Act*. The CCLA argues that the reasons for that decision have already been released in the Explanation required under s 58 of the *Act*. Permitting the Respondent to now supplement

those reasons with the Prime Minister's testimony would, the CCLA contends, offend the rule against supplementing the bases for a decision set out in a decision maker's reasons: *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299, at para 41 [*Stemijon*].

The Respondent contends that the excerpts adduced as Exhibit "D" are not "bootstrapping" or bolstering per *Stemijon* but necessary background context as the Court had accepted could be admitted in *CCLA 2023*. I agree that for the most part the excerpts explain the Prime Minister's preoccupations at the time of the events, which led to the decision to invoke the *Emergencies Act*. To the extent the excerpts chosen by the Respondent go beyond that to justify the decision on an *ex post facto* basis, they can be disregarded. Otherwise, these excerpts are admissible.

The parties agree that should the Prime Minister's testimony about the policing plan be accepted, the plan itself should be admitted contrary to the position previously taken by the CCLA in *CCLA 2023*. The Court accepts the plan may now be included in the CCLA's record.

The parties vigorously disagree about whether the Respondent's Rule 312 evidence could have been filed earlier. The CCLA and CCF would not have objected as strenuously to the admission of this evidence had the Respondent chosen to put it forward at the same time as their joint Rule 312 motion. That would have been preferable in my view but I accept that the Respondent found itself in an awkward situation given the position it had taken on the admissibility of the evidence in general. That was a principled position although the Court did

not agree with it. The Respondent continues to maintain its stance on the issue on a “without prejudice” basis despite their present efforts to adduce the additional evidence.

The Applicants are not seriously prejudiced by the timing of this motion and the Respondent is in the same situation of having to prepare its record without knowing of the outcome. The Applicants will have a reasonable opportunity to address the Respondent’s Rule 312 evidence in both their written Replies and oral submissions before the Court.

Subject to my comments above, I am satisfied that the preliminary requirements of admissibility and relevancy are satisfied and that the interests of justice will be served by permitting the additional affidavit to be admitted.

The parties seek no costs and none will be awarded.

THIS COURT ORDERS that:

1. The Motion is granted in part;
2. The Respondents are granted leave to file the Supplemental Affidavit and Exhibits “A-E” subject to the following:
 - (a) Exhibit “A” shall be revised to redact the opinions expressed at the bottom of page 171, all of page 172, top of page 173, all of pages 192, 193, 194, 195, 196 and 197;

- (b) Exhibit “C” shall be revised to redact the question and answer beginning at line 17 of page 75 to the end of page 76, and all of page 84;
- 3. The “Policing Plan” referenced in *CCLA 2023* may now be included in the Applicants’ records; and
- 4. No costs are awarded for this motion.

“Richard G. Mosley”