Court File No. A-73-24 (Lead appeal)
A-29-23
A-30-23

FEDERAL COURT OF APPEAL

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION

Respondent

A N D B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

CANADIAN CONSTITUTION FOUNDATION

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDENTS, CANADIAN CIVIL LIBERTIES ASSOCIATION AND CANADIAN CONSTITUION FOUNDATION

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OVERVIEW

1. The Canadian Civil Liberties Association (**"CCLA"**) and Canadian Constitution Foundation (**"CCF"**) jointly respond to the Attorney General of Canada's (**"AGC"**) interlocutory appeal. This appeal concerns the application judge's decision to grant the CCLA and CCF's joint motion under Rule 312 to file an affidavit attaching a selection of evidence from the Public Order Emergency Commission (**"POEC evidence"**). This evidence included:

- evidence relating to the recommendations that the Clerk of the Privy Council gave to the Prime Minister regarding the use of *Emergencies Act*;
- evidence relating to the policing plan and the police's assessment of the tools available to address the situation on the ground in February 2022; and
- evidence relating to the intelligence assessment of the threat situation prior to the declaration of a public order emergency in February 2022.

2. It is not disputed that the *Emergencies Act* formally vests certain powers in the Governor-in-Council (**"GIC"**). However, the application judge concluded that these powers were *de facto* exercised by the Cabinet.[1] On appeal, the AGC makes two arguments that attempt to undermine this conclusion.

3. First, the AGC's core contention is that the GIC, and not the Cabinet, was the decision-maker under the *Emergencies Act*. Based on this premise, the AGC argues that the POEC evidence was inadmissible, because it includes government documents that were before the Cabinet and the Prime Minister but not before the GIC, and because it includes testimony before the POEC regarding deliberations of the Cabinet and one of its committees, the Incident Response Group (**"IRG"**), but not those of the GIC.

4. The principal difficulty with this submission is that suggests that there is some sort of independent decision-making that occurs when the GIC convenes, when that is

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[1] *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2023 FC 118, at paras. 34 to 36.

not the case: as a matter of constitutional convention, the GIC is bound to act on the advice of Cabinet. In this case, it is clear that the Prime Minister (following meetings with the Cabinet and the IRG), and not the Governor General, made the decision to proclaim a public order emergency.[2] Accepting the AGC's argument would mean that documents before the Prime Minister that were not put before the Governor General would not be relevant. But clearly they are: indeed, the Invocation Memorandum to the Prime Minister "captur[ed] all that [the Privy Council] thought was necessary, pulling it all together in one spot, the culmination … of the public service advice to the Prime Minister on the decision as to whether or not to invoke this legislation".[3] This is precisely the sort of "fuller and more accurate record will promote the proper determination of the applications on their merits".[4]

5. The application judge recognized all of this, and he was correct to do so.[5] The AGC advanced substantially similar arguments on an earlier motion brought by the CCF under Rule 317, which the application judge also rejected for the same reasons.[6] That motion initially sought the minutes of the IRG, which met three times in the days leading up to the invocation of the *Emergencies Act*, on the basis that those minutes were part of the Certified Tribunal Record. This question was never resolved as the AGC voluntarily disclosed the minutes to the parties.

6. Second, the AGC argues that the application judge's analysis was "tainted" because the POEC evidence was not before the GIC at the time of its decision,[7] and therefore, that "the application judge erred in his reasonableness review methodology."[8] This argument is premised on the first argument — that the GIC was the decision-maker. Accordingly, the AGC's second argument fails if the Court rejects its first argument.

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2 *Proclamation Declaring a Public Order Emergency*, SOR/2022-20.
3 Commission Testimony of Clerk Charette and Deputy Clerk Drouin (excerpts) (November 18, 2022) [AB, Vol. 1, Tab 11.8, at p. 416, lines 19-20].
4 *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, at para. 13 [emphasis added].
5 *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2023 FC 118, at para. 35.
6 *Canadian Constitution Foundation v. Canada (Attorney General)*, 2022 FC 1233, at paras. 50 to 60.
7 AGC Memorandum, at paras. 189 to 193.
8 AGC Memorandum, at para. 178.

7. Importantly, the AGC has not seriously advanced the alternative argument that, even if the application judge was right that the Cabinet was the *de facto* decision-maker, he nonetheless erred in applying the Rule 312 test set out in *Forest Ethics Advocacy Association v. National Energy Board*.[9] This Court has described such decisions as "discretionary" and only to be interfered with where the appellant establishes an error of law or a palpable and overriding error of fact or mixed fact and law.[10] No such error has been shown in this case: the evidence was properly admitted, as it was either before the decision-maker (e.g., the Invocation Memorandum) or was critical background to understanding it (e.g., the testimony of the Clerk and the Prime Minister as to how the Invocation Memorandum figured into the decision-making process). For the reasons the application judge gave, this evidence falls squarely into the permissible uses on judicial review. Accordingly, as long as this Court agrees that the Cabinet was the decision-maker, this Court ought to defer to the application judge's conclusion that the POEC evidence was relevant and admissible.

PART I — STATEMENT OF FACTS

8. The Respondents rely on the facts as set out in their respective memoranda on the main appeal.

PART II — POINTS IN ISSUE

9. The sole point at issue on the interlocutory appeal is whether the application judge erred in identifying the Cabinet as the *de facto* decision-maker under the *Emergencies Act*.

PART III — SUBMISSIONS

10. The AGC argues that the application judge erred for the following *two* reasons:

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9 *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88, at paras. 4 to 6.

10 *Maximova v. Canada (Attorney General)*, 2017 FCA 230, at para. 4. See also *Atwood v. Canada (Attorney General)*, 2023 FC 959, at para. 17.

(A) The Emergencies *Act* confers powers on the GIC, not on "any individual minister or collective of ministers", such as the Cabinet.[11]

(B) The Cabinet "is a political body that has no legal status", and "exists only as a matter of constitutional convention" and therefore "cannot qualify as a federal board, commission, or other tribunal under s. 2 and s. 18.1 of the *Federal Courts Act* because it cannot exercise powers conferred under an Act of Parliament".[12]

11. The Respondents reject both arguments:

(A) Decisions of the GIC, including those made under the *Emergencies Act*, are *de facto* made by the Cabinet and not by the GIC itself.

(B) It is not necessary for the Cabinet to have legal status for it *de facto* to make decisions for the GIC; in any event, Parliament has conferred legal status on the Cabinet.

A. GIC Decisions are *de facto* made by the Cabinet and not by the GIC itself

12. The application judge held:[13]

> [The AGC's] attempt to distinguish the Cabinet from the GIC is dissociated from constitutional convention and the practical functioning of the executive. Decisions of the GIC are *de facto* made by Cabinet and not by the GIC itself.

13. In reaching this conclusion, the application judge relied on his earlier decision in *CCF 2022*, where he held:

- "Decisions of the GIC are always *de facto* made by Cabinet and not by the GIC itself."[14]

- "[W]here s. 17(1) of the *Emergencies Act* authorizes the GIC to declare a public order emergency, this must be understood as conferring power upon Cabinet and/or its committees."[15]

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11 AGC Memorandum, at para. 182.
12 AGC Memorandum, at para. 183.
13 *Canadian Civil Liberties Association v. Canada (Attorney General),* 2023 FC 118, at para. 34.
14 *Canadian Constitution Foundation v. Canada (Attorney General),* 2022 FC 1233, at para. 56.
15 *Canadian Constitution Foundation v. Canada (Attorney General),* 2022 FC 1233, at para. 56.

- The argument that the GIC, not the Cabinet, was the decision-maker "ignores the reality that the Cabinet, informed by the discussions before the IRG, was the decision maker responsible for the declaration of the *Emergency Proclamation* and subsequent regulations" and "is dissociated from constitutional convention and the practical functioning of the executive."[16]

- "Where the Constitution or a statute requires that a decision be made by the "Governor General in Council" […] [t]he cabinet (or a cabinet committee to which routine Privy Council business has been delegated) will make the decision, and send an "order" or "minute" of the decision to the Governor General for signature".[17]

14. The application judge's conclusions are correct. They are supported by: (i) the constitutional convention of responsible government, which is reflected in longstanding constitutional practice dating back to the earliest days of Confederation; (ii) the jurisprudence of the Supreme Court of Canada; (iii) federal government manuals available to the public that describe the structure of public administration; (iv) the *Public Order Emergency Commission Report* (**"*POEC Report*"**); (v) the manner in which the *Emergencies Act* was invoked; and (vi) the materials included in the CTR by the Appellant for the underlying judicial review.

(i) The constitutional convention of responsible government

15. The essence of responsible government is that the formal head of state (a role performed nationally by the Governor General) "must always act under the "advice" (meaning direction) of ministers who are members of the legislative branch and who enjoy the confidence of a majority in the elected house of the legislative branch."[18] In this way, "real power is exercised by the elected politicians who give the advice."[19]

16. As Peter Hogg and Wade Wright have noted, "the rules which govern [the convention of responsible government in Canada] are almost entirely 'conventional',

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16 *Canadian Constitution Foundation v. Canada (Attorney General),* 2022 FC 1233, at paras. 52 to 53.

17 *Canadian Constitution Foundation v. Canada (Attorney General),* 2022 FC 1233, at para. 55 [emphasis in original], quoting Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021), at § 9:5, "The cabinet and the Privy Council".

18 Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021), at § 9:1, 9:3.

19 Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021), at § 9:1.

that is to say, they are not to be found in the ordinary legal sources of statute or decided cases".[20] Their seminal text, *Constitutional Law of Canada*, provides a trenchant review of this convention.

17. As Hogg and Wright note, "[i]n a democracy, it would of course be unacceptable for real powers of government to be possessed by an unelected official, whether a Queen, a King, a Governor General or a Lieutenant Governor"; "[r]esponsible government transfers the real power to the elected Prime Minister".[21] Thus, "the Governor General and the Lieutenant Governors, who are not elected officials, do not exercise any personal initiative or discretion in the exercise of the normal powers of government."[22]

18. The Governor General's role and her relationship to responsible government is particularly significant because "[t]he statute books will reveal that the Canadian Parliament and provincial Legislatures to this day usually confer major powers of government upon the Governor General in Council (often shortened to the "Governor in Council")."[23] Indeed, as the AGC notes in this appeal, the *Emergencies Act* grants powers to the GIC,[24] and the *Interpretation Act* defines the GIC to mean "Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the King's Privy Council for Canada".[25]

19. The practical upshot of the AGC's argument that "the GIC is the sole decision maker under the *EA*" is that the Governor General exercised independent authority to decide whether to invoke the Act — a radical departure from the convention of

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20 Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2007), at § 9:3, cited in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2022 ONCA 74, at para. 112 (*per* Lauwers J.A., dissenting, but not on this point).

21 Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021), at § 9:1.

22 Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021), at § 9:1.

23 Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021), at § 9:3.

24 AGC Memorandum, at para. 182, citing *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), ss. 17(1), 19(1).

25 AGC Memorandum, at para. 184; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 35.

responsible government and, indeed, if taken seriously, would mark a radical break from longstanding constitutional practice.

20. The reality is that decisions of the GIC are made by the Cabinet, as the Governor General has no choice but to confirm the Cabinet's "advice" (i.e., its decisions). The Cabinet is "the only active part of the Privy Council" and it "exercises the powers of that body".[26] Hogg and Wright explain in no uncertain terms that, once the Cabinet's advice arrives before the Governor General, she has no choice but to confirm it (which, incidentally, is why a more limited range of materials is placed before the Governor General than was before the Cabinet):

> The Governor General does not preside over, or even attend, the meetings of the cabinet. The Prime Minister presides. Where the Constitution or a statute requires that a decision be made by the "Governor General in Council" (and this requirement is very common indeed), there is still no meeting with the Governor General. The cabinet (or a cabinet committee to which routine Privy Council business has been delegated) will make the decision, and send an "order" or "minute" of the decision to the Governor General for signature (which by convention is automatically given). Where a statute requires that a decision be made by a particular minister, then the cabinet will make the decision, and the relevant minister will formally authenticate the decision.[27]

21. Justice Malcolm Rowe and Nicolas Déplanche make the same point in their article, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis": "Although the *Constitution Act, 1867* recognizes the executive authority of the Queen as exercised by the Governor General, federally, and the Lieutenant

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[26] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021), at § 9:5.

[27] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021), at § 9:5. It is true that the Governor General has certain "personal prerogatives" or "reserve powers" that may be exercised in her discretion. The contours of this discretion are contested, but Hogg provides examples of when they may arise: "when a government continues in office after it has lost the confidence of the House of Commons, or after the House of Commons has been dissolved", or "after a very close election, or after a schism in a political party, where for a period it is difficult to determine whether or not the government does enjoy the confidence of a majority in the House of Commons" (Hogg, at §. 9:16). In these rare and extreme circumstances, the Governor General may have a discretion to refuse to follow the Cabinet's advice. But nothing of that sort occurred here, and the AGC has made no argument regarding what exceptional circumstance would have imbued the Governor General with independent discretion here.

Governors in the provinces, by convention these powers are exercised by the Cabinet and, in certain instances, by the First Minister—the Prime Minister, federally, the Premier, provincially."[28]

22. The AGC's assertion that "[t]he GIC was convened separately [from the Cabinet] and duly constituted to perform its constitutionally assigned role, and it exercised the powers Parliament gave to it under ss. 17(1) and 19(1) of the *EA*" is therefore a fiction, as such meetings never take place.[29] Clerk Charette explained this in her testimony before the POEC, which is summarized below.

23. Finally, that the Cabinet *de facto* exercises the GIC's power is a longstanding constitutional practice dating back to the earliest days of Confederation. Section 93(3) of the *Constitution Act, 1867* and s. 22 of the *Manitoba Act* provide "[a]n appeal shall lie to the Governor in Council" to challenge any provincial decisions affecting denominational school rights. In the 19th century, the Cabinet heard appeals under these provisions. Those Cabinet appeals were not heard by the GIC, but rather, by a subcommittee of the Cabinet, which reported to the full Cabinet, which in turn made the decision.[30] In other words, the formal legal powers of the GIC were in practice exercised by the Cabinet.

(ii) Supreme Court of Canada jurisprudence

24. The relevant Supreme Court jurisprudence consistently respects the convention of responsible government and, in particular, has long recognized that decisions of the GIC are *de facto* made by the Cabinet. The leading decision is *AGC v. Inuit Tapirisat*, where the Court considered an application for judicial review of a decision of the GIC under s. 64 of the *National Transportation Act*, which allowed appeals from decisions of the CRTC to the GIC.[31] The Court treated the GIC and the Cabinet as one and the

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28 Malcolm Rowe and Nicolas Déplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis", (2020) 98:3 Can. Bar Rev. 431, at p. 433.

29 AGC Memorandum, at para. 187.

30 Gordon Bale, "Law, Politics and the Manitoba School Question: Supreme Court and Privy Council" (1985) 63:3 Can. Bar. Rev. 461, at p. 484.

31 *Att. Gen. of Can. v. Inuit Tapirisat et al.*, [1980] 2 S.C.R. 735.

same. For example, the Court described appeals to the GIC as "Cabinet appeals".[32] The Court stated that the government respondent was:[33]

> the occupant of the office of the Governor General of Canada at the time of the commencement of these proceedings and the then members of the federal Cabinet, collectively described in the style of cause as the Governor in Council.

25. The Court also noted that under s. 64 of the Act, "in the past the GIC has proceeded by way of an actual oral hearing in which the petitioner and the contending parties participated", by which it meant "meetings or hearings in which the parties appeared before some or all of the Cabinet".[34] It explained that "the supervisory power of s. 64 … *is* vested in members of the Cabinet", that "[u]nder s. 64 the Cabinet, as the executive branch of government, was exercising the power delegated by Parliament", and that the Cabinet had a broad discretion to decide appeals "unless otherwise directed in the enabling statute".[35]

26. The Court has treated the Cabinet and the GIC interchangeably in subsequent decisions under s. 64 of the *National Transportation Act*.[36] In *Vancouver Island Railway*, Justice McLachlin (as she then was) stated (dissenting, but not on this point): "The Cabinet, represented by the Governor in Council, possesses only the powers Parliament chooses to confer upon it."[37]

27. The Supreme Court has confirmed that decisions of the GIC are *de facto* made by the Cabinet in other cases. The *CAP Reference* held that regardless of whether the decision-maker is referred to as the "Governor in Council", the "Cabinet", the

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32 *Att. Gen. of Can. v. Inuit Tapirisat et al.,* [1980] 2 S.C.R. 735, at p. 757.
33 *Att. Gen. of Can. v. Inuit Tapirisat et al.,* [1980] 2 S.C.R. 735, at p. 741.
34 *Att. Gen. of Can. v. Inuit Tapirisat et al.*, [1980] 2 S.C.R. 735, at p. 755 (emphasis added).
35 *Att. Gen. of Can. v. Inuit Tapirisat et al.,* [1980] 2 S.C.R. 735, at p. 754 to 755 (emphasis in original).
36 *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41, at p. 119 (*per* Iacobucci J.); *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, at para. 40.
37 *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re),* [1994] 2 S.C.R. 41, at p. 140 (*per* McLachlin J., dissenting, but not on this point).

"government", or the "executive", the reality is that many executive powers are exercised by the Cabinet:[38]

> Once a government is in place, democratic principles dictate that the bulk of the Governor General's powers be exercised in accordance with the wishes of the leadership of that government, namely the Cabinet. So the true executive power lies in the Cabinet. And since the Cabinet controls the government, there is in practice a degree of overlap among the terms "government", "Cabinet" and "executive".

28. The convention of responsible government was the substantive basis for the holdings in *Inuit Tapirisat* and the *CAP Reference* that the GIC's decisions are *de facto* made by the Cabinet, since the Cabinet controls the executive when it commands the confidence of Parliament.

29. The Supreme Court's decision in *Wells v. Newfoundland* governs how courts should approach legal challenges to government decisions where, as a matter of constitutional convention, the real decision lies elsewhere.[39] *Wells* held the provincial Crown liable in damages for the elimination of a public office through legislation, on the premise that the executive frequently *de facto* controls the legislature. *De facto* executive control of the legislature arises from the constitutional convention of responsible government. In reaching its conclusion, *Wells* stated: "[t]he Court should not be blind to the reality of Canadian governance".[40] This judicial mindset — one of clear-eyed realism — should also guide the Court on the interlocutory appeal, and lead it to reject the Appellant's argument.

30. Accepting the Appellant's argument could severely impair the efficacy of judicial review, because of the centrality of the record before the decision-maker to judicial review. As *Canada (Minister of Citizenship and Immigration) v. Vavilov* explained, the reasons for an executive decision must be read "in light of the record and with due sensitivity to the administrative regime in which they were given".[41]

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38 *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at pp. 546-47.
39 *Wells v. Newfoundland*, [1999] 3 S.C.R. 199.
40 *Wells v. Newfoundland,* [1999] 3 S.C.R. 199, at para. 54.
41 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 103.

Identifying the correct the decision-maker determines the content of the record. If courts do not have the correct record before them because they have failed to identify the actual decision-maker, they cannot properly discharge their core constitutional responsibility to control the legality of executive action.

31. In addition, failing to recognize the Cabinet as the *de facto* decision-maker for the GIC creates the perverse incentive to shift decisions from Ministers to the GIC in order to limit the record on judicial review. As the application judge reasoned in *CCF 2022*, accepting the AGC's arguments: "would effectively prevent any Court from reviewing materials relied upon by the Cabinet under any circumstances, even where confidentiality under s. 39 is never invoked".[42] In practical terms, if the Attorney General's argument were accepted, the record before the Federal Court in this case would have consisted only of the instruments under review (i.e., the *Proclamation*, the *Regulations*, and the *Economic Order*), the Section 58 Explanation, and the s. 39 certificate — but would not include, for example, the Invocation Memorandum that actually sets out the reasoning the Prime Minister relied on in deciding whether to invoke the Act.

(iii) Federal government manuals

32. The federal government has issued a series of manuals on public administration, which expressly state that decisions of the GIC are *de facto* made by the Cabinet.

- The **"Guide to Making Federal Acts and Regulations"** (2nd ed, 2001) "describes the steps to be followed to transform policy into Federal Acts and regulations" and its "main audience … consists of officials in the Government of Canada who are involved in the law-making process" including "supporting a Minister in obtaining Cabinet approval to draft legislation".[43] Chapter 2 is the "Cabinet Directive on Law-Making".[44] In a section entitled "Fundamentals of the Government's Law-making Activity", under the sub-heading "Constitutional Considerations", it

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42 *Canadian Constitution Foundation v. Canada (Attorney General),* 2022 FC 1233, at para. 56.

43 Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations - 2nd edition* (Ottawa: Privy Council Office, 2001), CanLIIDocs 235, at p. 1.

44 Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations - 2nd edition* (Ottawa: Privy Council Office, 2001), CanLIIDocs 235, at pp. 3-17. *Cabinet Directive on Law-Making* is also published separately as 2018 CanLIIDocs 11061.

states: "Parliament may delegate regulatory authority to Cabinet (the Governor in Council)".[45]

- **"A Guide for Ministers and Secretaries of State"** (2002) "sets out the duties and responsibilities of the Prime Minister, Ministers including Ministers of State, and Secretaries of State. It also outlines key principles of responsible government in Canada."[46] Annex A is entitled "Federal Government Institutions: The Executive". In section A.3 "The Ministry, the Cabinet and the Governor in Council", it states:[47]

  > The Governor in Council is the term for the Cabinet acting in a legal capacity. Formally, it is the Governor General acting on the advice of the Cabinet. Parliament does not assign powers to the Cabinet or to Ministers collectively, but rather to the Governor in Council.

- **"Open and Accountable Government"** (2015) "sets out core principles regarding the roles and responsibilities of Ministers in Canada's system of responsible parliamentary government."[48] Annex F ("Federal Government Institutions: the Executive"), section F.3 ("The Ministry, the Cabinet and the Governor in Council") repeats verbatim the language regarding Cabinet and the GIC from "A Guide for Ministers and Secretaries of State".[49]

33. These manuals are public documents, available on the Government of Canada website and (in one instance) on CanLII. Their legal force is recognized to a degree in cases like *Agraira* and *Kanthasamy*, which make use of similar documents in interpreting legislation.[50] Also relevant here is the weight given by English courts to Ministerial statements in Parliament reported in Hansard regarding the interpretation of ambiguous statutory language. Lord Steyn explained the rationale for this position in English law:

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45 Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations - 2nd edition* (Ottawa: Privy Council Office, 2001), CanLIIDocs 235, at p. 7.

46 Canada, Privy Council Office, *A Guide for Ministers and Secretaries of State* (Ottawa: Privy Council Office, 2002), online, Introduction.

47 Canada, Privy Council Office, *A Guide for Ministers and Secretaries of State* (Ottawa: Privy Council Office, 2002), online, at p. 32.

48 Canada, Privy Council Office, *Open and Accountable Government* (Ottawa: Privy Council Office, 2015), online, at p. vii.

49 Canada, Privy Council Office, *Open and Accountable Government* (Ottawa: Privy Council Office, 2015), online, at p. 58.

50 *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, at paras. 32-41, citing *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at para. 85.

> the executive ought not to get away with saying in a parliamentary debate that the proposed legislation means one thing in order to ensure the passing of the legislation and then to argue in court that the legislation bears the opposite meaning. … If such a consequence prevailed it might tend to undermine confidence in the legal system.[51]

34. The same principle is applicable here. The rule of law requires that the government take consistent positions across different institutional settings on legal issues. It cannot assert one position in public in these manuals, and argue the opposite in court. To countenance otherwise "might tend to undermine confidence in the legal system."

(iv) The Public Order Emergency Commission

35. In the main appeal, the AGC relies on the *POEC Report*. It is therefore relevant that the *POEC Report* frequently treats the GIC and Cabinet interchangeably, specifically in the context of the *Emergencies Act*. Here is a non-exhaustive set of examples, taken from *Volume 2: Analysis (Part I)* (emphasis added):

> The *Emergencies Act* has four main parts. First, it establishes the types of situations in which the federal Cabinet can declare an emergency. Second, it outlines the process for how proclamations of emergency begin and end. Third, it sets out the types of powers that the federal Cabinet can exercise while an emergency proclamation is in effect. Finally, it establishes a series of oversight and review mechanisms related to Cabinet's use of its emergency powers.[52]
>
> …
>
> There are important differences between the four types of emergency that can be declared under the *Emergencies Act*. The most significant difference is that the powers granted to Cabinet vary with the kind of emergency declaration. In a war emergency, Cabinet retains a general regulation-making authority that contains relatively few limits. For the other three forms of emergency, however, the Act specifies the types of orders Cabinet can make.

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51 Johan Steyn, "*Pepper v Hart*: a Re-examination" (2001) 21:1 *Oxford Journal of Legal Studies* 59 at p. 67.

52 Canada, Public Order Emergency Commission, the Hon. Paul S. Rouleau, *Report of the Public Inquiry into the 2022 Public Order Emergency*, *Volume 2: Analysis (Part 1)* (2023), online at p. 34.

> The *Emergencies Act* can be invoked when the government reasonably believes that the conditions for one of the four types of emergency have been met. If Cabinet believes that such a situation exists, and that special temporary measures must be taken, it may proclaim an emergency.[53]
>
> Once an emergency is proclaimed, the federal Cabinet is empowered to make various types of orders and regulations which, when made, have the force of law. … Under a public order emergency declaration, Cabinet may make orders or regulations it reasonably believes are necessary under the circumstances … However, there are limits on Cabinet's power to make orders and regulations.[54]
>
> The *Emergencies Act* also contains several statutory restrictions on what the orders and regulations made by Cabinet can do. … Rather, Cabinet must exercise its powers with the view of achieving, to the extent possible, concerted action with each impacted province.[55]
>
> … Cabinet must make a decision to continue the emergency, and Parliament must vote to confirm the continuation. … Any further extensions must follow the same process of continuation by Cabinet, followed by approval by Parliament. … Parliament also has a role in reviewing the exercise of emergency powers by Cabinet. … Through this power, Parliament continues to exercise some law-making authority even though it is Cabinet that makes emergency measures under the Act.[56]

(v) The invocation of the *Emergencies Act*

36. Treating the Cabinet as *de facto* making the decision of the GIC is particularly important because of the way in which the *Emergencies Act* was actually invoked. As referenced above (at para. 22), AGC asserts that "[t]he GIC was convened separately from Cabinet and duly constituted to perform its constitutionally assigned role".[57] But as Clerk Cherette explained in her sworn testimony before the POEC, the Cabinet

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53 Canada, Public Order Emergency Commission, the Hon. Paul S. Rouleau, *Report of the Public Inquiry into the 2022 Public Order Emergency, Volume 2: Analysis (Part 1)* (2023), online at p. 36.

54 Canada, Public Order Emergency Commission, the Hon. Paul S. Rouleau, *Report of the Public Inquiry into the 2022 Public Order Emergency, Volume 2: Analysis (Part 1)* (2023), online at p. 37.

55 Canada, Public Order Emergency Commission, the Hon. Paul S. Rouleau, *Report of the Public Inquiry into the 2022 Public Order Emergency, Volume 2: Analysis (Part 1)* (2023), online at p. 38.

56 Canada, Public Order Emergency Commission, the Hon. Paul S. Rouleau, *Report of the Public Inquiry into the 2022 Public Order Emergency, Volume 2: Analysis (Part 1)* (2023), online at p. 39.

57 AGC Memorandum, at para. 187.

delegated the invocation decision to the Prime Minister on February 13, 2022 and he exercised that authority on February 14, 2022:[58]

> MR. MITCH McADAM: Yeah, I'm confused because I think you said earlier today that under the *Emergencies Act* it's the Governor-in-Council that invokes the Act.
>
> MS. JANICE CHARETTE: Yeah.
>
> MR. MITCH McADAM: So if the Cabinet didn't meet again, how did the Act get invoked? Was the power to do so delegated to the Prime Minister? Or just how did that happen?
>
> MS. JANICE CHARETTE: Yeah. The decision in terms of invocation was left with the -- was left *ad referendum* to the decision of the Prime Minister following his consultation with the leaders of the provinces and territories amongst other deliberations that he might undertake.

37. The Cabinet could not have delegated the power to invoke the *Emergencies Act* to the Prime Minister unless it possessed this power itself. The Prime Minister's role in the Cabinet, as a deliberative body, should also not be discounted. As the Supreme Court recognized in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, "[f]irst ministers preside over Cabinet, set Cabinet agendas, determine Cabinet's membership and its internal structure (e.g., the number, nature, and membership of Cabinet committees), set Cabinet procedures, and have the right to identify the consensus and determine what Cabinet has decided".[59] That case concerned the role of a provincial premier, whose "roles and activities" were described as "inseparable from Cabinet and its deliberations".[60]

38. Treating the Cabinet as *de facto* making the decision of the GIC is also consistent with the way in which the federal government purported to discharge the *Emergencies Act*'s requirement under s. 25 for the GIC to consult with the Lieutenant Governor in Council of each province prior to declaring a public order emergency. As

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58 Commission Testimony of Clerk Charette and Deputy Clerk Drouin (excerpts) (November 18, 2022) [AB, Vol. 1, Tab 11.8, at p. 421, lines 13-24].

59 *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4, at para. 46.

60 *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4, at para. 46.

indicated in the "Report to the Houses of Parliament: *Emergencies Act* Consultations", and as confirmed in the testimony above, the Prime Minister (not the GIC) discharged this requirement through "his consultation" with provincial and territorial First Ministers (not their respective Lieutenant Governors in Council) on February 14, 2022.[61]

(vi) The Certified Tribunal Record

39. The contents of the CTR concede that the Cabinet *de facto* exercised the powers of the GIC under the *Emergencies Act*. Along with its Notice of Application, the CCF requested production of records related to the *Emergency Proclamation* under Rule 317. The AGC's Response to the Rule 317 Request listed six documents: the submissions to the GIC regarding the *Emergency Proclamation*, the *Regulations*, and the *Economic Order*, and the GIC's record of decision regarding these legal instruments.[62] The Clerk of the Privy Council subsequently issued a certificate under s. 39 of the *Canada Evidence Act* over these materials in their entirety.[63] The CCF brought a motion that the response to its Rule 317 request was incomplete.[64] The motion sought an order that the Appellant deliver the minutes of the meetings of the IRG on February 10, 12, and 13, 2022, and of the Cabinet on February 13, 2022.

40. Prior to hearing of the CCF's motion, the Appellant delivered annotated and redacted agendas and minutes of the three IRG meetings, as well as minutes of the Cabinet meeting.[65] These now constitute part of the CTR.

41. When disclosing these materials, the AGC did not qualify or contest either their admissibility or relevance, because they related to the deliberations of the "wrong" decision-maker — the Cabinet. On the contrary, the AGC itself refers to these materials in their written submissions both in the court below and before this Court, which

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61 Affidavit of Steven Shragge, sworn April 2, 2022 ["**Shragge Affidavit**'] Ex B, "Report to the Houses of Parliament: *Emergencies Act* Consultations", at pp. 2, 5 [AB, Vol 6, Tab 13.9.2, pp 3416-3419].

62 *Canadian Frontline Nurses v. Canada (Attorney General)*, 2024 FC 42, at para. 72.

63 *Canadian Frontline Nurses v. Canada (Attorney General)*, 2024 FC 42, at para. 93.

64 *Canadian Constitution Foundation v. Canada (Attorney General),* 2022 FC 1233, at para. 4.

65 *Canadian Frontline Nurses v. Canada (Attorney General)*, 2024 FC 42, at para. 75.

presupposes their admissibility and relevance.[66] Since these materials relate exclusively to the deliberations of the Cabinet (and one of its committees, the IRG) and the materials that were before it and the Prime Minister, the AGC has implicitly recognized that the Cabinet was the *de facto* decision-maker for the invocation of the *Emergencies Act*.

B. **The Cabinet has legal status, but it need not have such status to be a *de facto* decision-maker**

42. The Cabinet need not have legal status to be the *de facto* decision-maker for the GIC, including with respect to the *Emergencies Act*. All that is required is for the Cabinet to exist. There can be no dispute that the Cabinet is the executive committee of the King's Privy Council for Canada, or that it exercises functions on behalf of that body.

43. In any event, the Cabinet has legal status. While the Cabinet may have once been a body with no legal status that only existed as a matter of constitutional convention, this is no longer the case. Parliament conferred legal status on the Cabinet in several pieces of legislation that regulate access to "Confidences of the King's Privy Council of Canada": the *Access to Information Act*, *Canada Evidence Act*, the *Corrections and Conditional Release Act*, and the *Privacy Act*.[67] That legislation governs various documents described by reference to "Council":

> "a memorandum the purpose of which is to present proposals or recommendations to Council" (e.g. section 39(2)(a) of the *Canada Evidence Act*);
>
> "a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions" (e.g. section 39(2)(b) of the *Canada Evidence Act*);

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[66] AGC Federal Court Memorandum, at fn. 25, 28, 29, 157; AGC Memorandum, fn. 22, 25, 26, 197, 203 and 233.

[67] *Access to Information Act,* R.S.C. 1985, c. A-1; *Canada Evidence Act,* R.S.C. 1985, c. C-5; *Corrections and Conditional Release Act,* S.C. 1992, c. 20; and the *Privacy Act,* R.S.C. 1985, c. P-21.

"an agendum of Council or a record recording deliberations or decisions of Council" (e.g. section 39(2)(c) of the *Canada Evidence Act*); and

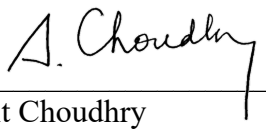
and "a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d)" (e.g. section 39(2)(e) of the *Canada Evidence Act*).

44. Those statutes all contain the following definition: "Council means the King's Privy Council for Canada, committees of the King's Privy Council for Canada, Cabinet and committees of Cabinet."[68] The plain and ordinary meaning of this definition is that it confers legal status on the Cabinet and its committees. It does so to regulate access to Cabinet confidences. It would be nonsensical for Parliament to regulate the records of a body that did not have any legal status.

PART IV – ORDER SOUGHT

45. The Court should dismiss the interlocutory appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of October, 2024.



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[68] *Access to Information Act,* R.S.C. 1985, c. A-1, s. 69(2); *Canada Evidence Act,* R.S.C. 1985, c. C-5, s. 39(3); *Corrections and Conditional Release Act,* S.C. 1992, c. 20, s. 196(2); and the *Privacy Act,* R.S.C. 1985, c. P-21, s. 70(2).

PART V — LIST OF AUTHORITIES

A. Legislation

1. *Access to Information Act,* RSC 1985, c A-1.
2. *Canada Evidence Act,* RSC 1985, c C-5.
3. *Corrections and Conditional Release Act,* SC 1992, c 20.
4. *Emergencies Act*, RSC 1985, c 22 (4th Supp).
5. *Interpretation Act*, RSC 1985, c I-21.
6. *Privacy Act,* RSC 1985, c P-21.
7. *Proclamation Declaring a Public Order Emergency*, SOR/2022-20.

B. Jurisprudence

8. *Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36.
9. *Att. Gen. of Can. v. Inuit Tapirisat et al.,* 1980 CanLII 21 (SCC), [1980] 2 SCR 735.
10. *Atwood v. Canada (Attorney General),* 2023 FC 959.
11. *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re),* 1994 CanLII 81 (SCC), [1994] 2 SCR 41.
12. *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65.
13. *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2023 FC 118.
14. *Canadian Constitution Foundation v. Canada (Attorney General)*, 2022 FC 1233.
15. *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 (CanLII), [2014] 2 SCR 135.
16. *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88.
17. *Kanthasamy v. Canada (Citizenship and Immigration),* 2015 SCC 61.

18. *Maximova v. Canada (Attorney General),* 2017 FCA 230.

19. *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2022 ONCA 74.

20. *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2024 SCC 4.

21. *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525.

22. *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128.

23. *Wells v. Newfoundland*, 1999 CanLII 657 (SCC), [1999] 3 SCR 199.

C. Secondary Sources

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25. Canada, Privy Council Office, *A Guide for Ministers and Secretaries of State* (Ottawa: Privy Council Office, 2002), online.

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27. Canada, Privy Council Office, *Open and Accountable Government* (Ottawa: Privy Council Office, 2015), online.

28. Canada, Public Order Emergency Commission, the Hon. Paul S. Rouleau, *Report of the Public Inquiry into the 2022 Public Order Emergency*, *Volume 2: Analysis (Part 1)* (2023), online.

29. Hogg, Peter & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021).

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APPENDIX A – STATUTES AND REGULATIONS

***Access to Information Act*, R.S.C. 1985, c. A-1, s. 69(2)**

Certificate under *Canada Evidence Act*	**Certificat en vertu de la *Loi sur la preuve au Canada***
69.1 (1) Where a certificate under section 38.13 of the *Canada Evidence Act* prohibiting the disclosure of information contained in a record is issued before a complaint is filed under this Part in respect of a request for access to that information, this Part does not apply to that information.	**69.1 (1)** Dans le cas où a été délivré au titre de l'article 38.13 de la *Loi sur la preuve au Canada* un certificat interdisant la divulgation de renseignements contenus dans un document avant le dépôt d'une plainte au titre de la présente partie à l'égard d'une demande de communication de ces renseignements, la présente partie ne s'applique pas à ces renseignements.
Certificate following filing of complaint	**Certificat postérieur au dépôt d'une plainte**
(2) Notwithstanding any other provision of this Part, where a certificate under section 38.13 of the *Canada Evidence Act* prohibiting the disclosure of information contained in a record is issued after the filing of a complaint under this Part in relation to a request for access to that information,	**(2)** Par dérogation aux autres dispositions de la présente partie, dans le cas où a été délivré au titre de l'article 38.13 de la *Loi sur la preuve au Canada* un certificat interdisant la divulgation de renseignements contenus dans un document après le dépôt d'une plainte au titre de la présente partie relativement à une demande de communication de ces renseignements :
(a) all proceedings under this Part in respect of the complaint, including an investigation, appeal or judicial review, are discontinued;	**a)** toutes les procédures — notamment une enquête, un appel ou une révision judiciaire — prévues par la présente partie portant sur la plainte sont interrompues;
(b) the Information Commissioner shall not disclose the information and shall take all necessary precautions to prevent its disclosure; and	**b)** le Commissaire à l'information ne peut divulguer les renseignements et prend les précautions nécessaires pour empêcher leur divulgation;
(c) the Information Commissioner shall, within 10 days after the certificate is published in the *Canada Gazette*, return the information to the head of the government institution that controls the information	**c)** le Commissaire à l'information renvoie les renseignements au responsable de l'institution fédérale dont relève le document dans les dix jours suivant la publication du

	certificat dans la *Gazette du Canada*.

***Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 39(3)**

Definition of Council	**Définition de Conseil**
(3) For the purposes of subsection (2), **Council** means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.	**(3)** Pour l'application du paragraphe (2), **Conseil** s'entend du Conseil privé de la Reine pour le Canada, du Cabinet et de leurs comités respectifs.

***Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 196(2)**

Definition of Council	**Définition de Conseil**
(2) For the purposes of subsection (1), Council means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.	**(2)** Pour l'application du paragraphe (1), **Conseil** s'entend du Conseil privé de la Reine pour le Canada, du Cabinet et de leurs comités respectifs.

***Privacy Act*, R.S.C. 1985, c. P-21, s. 70(2).**

Definition of Council	**Définition de Conseil**
(2) For the purposes of subsection (1), **Council** means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.	**(2)** Pour l'application du paragraphe (1), **Conseil** s'entend du Conseil privé de la Reine pour le Canada, du Cabinet et de leurs comités respectifs.