Court File: A-73-24 (Lead Appeal)

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

-and-

CANADIAN CIVIL LIBERTIES ASSOCIATION

Respondent

-and-

ATTORNEY GENERAL OF ALBERTA

Intervener

and-

ATTORNEY GENERAL OF SASKATCHEWAN

Intervener

AND BETWEEN:

Court File: A-29-23

ATTORNEY GENERAL OF CANADA

Appellant

-and-

CANADIAN CIVIL LIBERTIES ASSOCIATION

Respondent

AND BETWEEN:

Court File: A-30-23

ATTORNEY GENERAL OF CANADA

Appellant

-and-

CANADIAN CONSTITUTION FOUNDATION

Respondent

AND BETWEEN:

Court File: A-74-24

ATTORNEY GENERAL OF CANADA

Appellant

-and-

CANADIAN CONSTITUTION FOUNDATION

Respondent

-and-

ATTORNEY GENERAL OF ALBERTA

Intervener

and-

ATTORNEY GENERAL OF SASKATCHEWAN

Intervener

AND BETWEEN:

Court File: A-75-24

ATTORNEY GENERAL OF CANADA

Appellant

-and-

EDWARD CORNELL AND VINCENT GIRCYS

Respondents

AND BETWEEN:

Court File: A-76-24

CANADIAN FRONTLINE NURSES and KRISTEN NAGLE

Appellant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

COMBINED MEMORANDUM OF FACT AND LAW
OF THE ATTORNEY GENERAL OF CANADA

(Responding to the Appeal in A-76-24 and the Cross-Appeals in A-73-24 and A-74-24, and Replying to the Interveners – per the Court Orders dated June 11, 2024 (Monaghan JA), Aug. 14, 2024 (Gleason JA) and Sept. 12, 2024 (Heckman JA)

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OVERVIEW

1. This Court should dismiss the appeal by Kristen Nagle and Canadian Frontline Nurses (CFN) of the application judge's decision to dismiss their application because they lacked standing. The application judge made no palpable and overriding error in finding that Ms. Nagle and CFN lacked direct standing under s. 18.1 of the *Federal Courts Act* as they were not affected by either the *Emergency Economic Measures Order* (the "*Economic Order*") or the *Emergencies Measures Regulations* (the "*Regulations*"). He also made no palpable and overriding error in dismissing their application on discretionary equitable grounds because they lacked clean hands. He gave Ms. Nagle and CFN an opportunity to be heard. However, they provided evasive and inaccurate statements under oath, disregarded both the law and judge's instructions, and engaged in inappropriate and offensive statements during the hearing. There is no basis for interfering with the application judge's decision to deny standing, and no merit to their 1960 *Canadian Bill of Rights* submissions in any event, most notably because they have no basis for advancing a property rights claim as their accounts were never frozen.

2. There is also no basis for interfering with the application judge's finding of no breach of freedom of association under s. 2(c) of the *Charter* on CCLA and CCF's cross-appeal. Their arguments turn on a flawed interpretation of s. 2(c) that is inconsistent with a purposive interpretation of this provision and its internal limits. Just as freedom of expression under s. 2(b) does not protect violent speech, freedom of peaceful assembly under s. 2(c) does not protect gatherings that employ force in the form of enduring or intractable occupations of public space that block local residents' ability to carry out their daily lives. Nor does it protect circumstances where there is a reasonable basis to expect a physically coercive assembly, i.e., one that breaches the peace. Subsection 2(c) does not require the state to sit by idly until an assembly turns violent or otherwise breaches the peace.

3. In the alternative, any limit on s. 2(c) was justified under s. 1 of the *Charter*. The *Regulations'* objective of peacefully and effectively ending the unlawful occupations and blockades, and preventing their recurrence across the country, was pressing and substantial—which no party denies. The measures chosen to implement this goal were carefully tailored to limit any impact on peaceful assembly, and fell within a range of reasonable solutions to the crisis at hand. Local or lesser measures would not have achieved the same objectives.

4. The interveners, the Attorneys General of Alberta (Alberta) and Saskatchewan (Saskatchewan), fail to establish any basis for finding that the Governor in Council (GIC) acted unreasonably in determining there were reasonable grounds to believe a public order emergency existed that necessitated taking temporary and targeted measures to address that emergency. The interveners fall into the very same error as the application judge: they perform their own *de novo* assessment on an expanded record, beyond what was before the GIC, and draw their own conclusions with the benefit of hindsight about whether a public order emergency existed in February 2022. This is not what *Vavilov* permits or requires when applying the reasonableness standard of review.

5. Moreover, the interveners' repeated assertions that the GIC invoked the *Emergencies Act (EA)* based on "convenience," "efficiency," "preference" or mere "policy desirability" lack any basis in fact. None of the GIC's emergency instruments refer to any such considerations. Nor does the s. 58 Explanation, which provided the rationale for issuing the declaration and communicated a reasonable and justified basis for invoking the *EA*.

6. There is equally no basis for a "strict" interpretation of the *EA* based on the division of powers, or for applying the correctness standard of review to the GIC's decision to make the declaration, as advocated by Saskatchewan. The emergency branch of the federal "peace, order and good government" power is a well-accepted component of Canadian federalism, and the parties do not challenge the constitutionality of the *EA* on division of powers grounds in any event. Reading new requirements into the *EA* (*e.g.*, by requiring the GIC to wait for provinces to canvass their statute books and confirm their lack of authority or capacity) sits at odds with the modern approach to statutory interpretation and the very purpose of the *EA*, which is to permit a rapid response to urgent, critical situations. The *EA* requires the GIC to determine whether there are reasonable grounds to believe the "urgent and critical situation" is one that "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*." That is precisely what the GIC determined to be the case, after reasonably engaging with provincial officials throughout the crisis and consulting premiers at the First Ministers meeting. The *EA* imposes no requirement to get agreement from the provinces, and Saskatchewan's reliance on caselaw and principles relating to the duty to consult in s. 35 Aboriginal rights cases is unfounded.

PART I – STATEMENT OF FACTS

7. Canada relies on the Statement of Facts in its main Memorandum of Fact and Law, and disagrees with the Nagle/CFN statement of facts. Canada also takes issue with Alberta and Saskatchewan's attempts to re-argue the facts and re-characterize the evidence, as addressed below in replying to the interveners' submissions.

8. With respect to the appellants, Canada disagrees with Nagle/CFN's presentation of Canada's position at the case management conference on February 22, 2022 and hearing of Nagle/CFN's moot motion to "stay" the emergency measures on February 25, 2022—after these measures were revoked on February 23, 2022.[1] As the transcript and reasons show, the application judge agreed with Canada that this motion should be dismissed as moot and found CFN's arguments to be without merit, particularly given the lack of evidence that Ms. Nagle had ever been a "designated person" who would have been subject to the *Regulations*.[2]

9. Canada also disagrees with Nagle/CFN's claim that the AGC "smeared [Ms Nagle's] character and accused her of being untruthful" after it "failed to obtain […] evidence" of Ms. Nagle's association with "symbols of hate and ideologically motivated violent extremists."[3] Ms. Nagle's evidence on cross-examination established her contact in Ottawa with Jeremy MacKenzie, the founder of Diagolon, the extremist group whose motto is "gun or rope"[4] and whose insignia would later be found on body armour seized when arrests were made at the Coutts border blockade. Ms. Nagle also knew Mr. MacKenzie had been arrested prior to coming to Ottawa, in January 2022, after police found firearms, prohibited magazines, ammunition, and body armour at his home.[5] In addition, Ms. Nagle acknowledged seeing demonstrators wearing yellow Stars of David featuring the words "non vaxx," among other hate symbols present at the Ottawa occupation. [6] As

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[1] Nagle/CFN Memorandum of Fact and Law (MOFL) at para 20.
[2] *Canadian Frontline Nurses v Canada (AG)*, 2022 FC 284 [***CFN***] at paras 16-20, 27.
[3] Nagle/CFN MOFL at para 25.
[4] Coleman Affidavit, Ex QQQQQ, AB, Vol 7, Tab 13.11, p 4319.
[5] *CFN* at para 41; Transcripts from the Cross-Examination of Kristen Nagle, conducted June 24, 2022 [**Nagle Transcript**], pp 37-38, 41-44, AB, Vol 12, Tab 17.3, pp 6599-6600, 6603-6606.
[6] *CFN* at para 43; Nagle Transcript, pp 114-117, AB, Vol 12, Tab 17.3, pp 6676-6679 and Exs C and F, AB, Vol 12, Tabs 17.3.9 and 17.3.10, pp 6769 and 6770.

for her credibility, the application judge found: "the transcript of Nagle's cross-examination is replete with examples of her efforts to avoid answering questions. Her responses lacked transparency and candour."[7]

PART II – POINTS IN ISSUE

10. The issues addressed in this memorandum are as follows:

(a) The application judge made no palpable and overriding error in finding that Ms. Nagle and CFN lacked standing or in dismissing their application on discretionary equitable grounds because they lacked clean hands;

(b) The application judge made no error in finding that the *Regulations* did not unjustifiably limit freedom of association under s. 2(c) of the *Charter*;

(c) The application judge made no error in finding that the *Economic Order* and *Regulations* did not violate the 1960 *Canadian Bill of Rights*; and

(d) The interveners' submissions offer no basis for concluding that the GIC's discretionary decision to declare a public order emergency under the *EA* was unreasonable or otherwise unlawful.

PART III – SUBMISSIONS

A. STANDARDS OF APPELLATE REVIEW

11. The application judge's decision that Ms. Nagle and CFN lacked direct standing, and his decision to dismiss their application because they lacked clean hands, were first instance discretionary decisions. These decisions attract the palpable and overriding error standard of appellate review.[8]

12. As the Supreme Court of Canada has made clear, citing with approval Justice Stratas's description in *South Yukon Forest*, palpable and overriding error is "a highly deferential standard of review… . 'Palpable' means an error that is obvious. 'Overriding' means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not

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[7] *CFN* at para 183.
[8] *Laurentian Pilotage Authority v Corporation des Pilotes de Saint-Laurent Central Inc.*, 2019 FCA 83 [***Laurentian Pilotage***] at paras 28-29, 35, 42; see also *Oceanex Inc. v Canada (Transport)*, 2019 FCA 250 at para 11.

enough to pull at leaves and branches and leave the tree standing. The entire tree must fall."[9] The Supreme Court has also cautioned that "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye."[10]

13. With respect to the constitutional issues, correctness review applies.[11] Correctness review also applies to the alleged legal errors related to the 1960 *Canadian Bill of Rights*.[12]

B. RESPONSE TO NAGLE/CFN APPEAL: NO PALPABLE AND OVERRIDING ERROR IN FINDING NO STANDING AND NO CLEAN HANDS

14. The application judge made no palpable and overriding error in dismissing the Nagle/CFN application for lack of standing. There was no evidence to separate any of Ms. Nagle's actions from those of her organization, and no evidence to establish that Ms. Nagle or CFN had any standing because they were never named a "designated person" or "designated entity" under the *Regulations*, or would ever be charged as such following revocation of the emergency proclamation.[13] The application judge also made no error in dismissing the Nagle/CFN application because they lacked clean hands.[14]

1) No error in finding Nagle/CFN lacked standing under s. 18.1

15. In Federal Court judicial review proceedings, s. 18.1 of the *Federal Courts Act* governs direct standing. A person seeking direct standing must establish that the challenged decision "directly affects" their rights, imposes an obligation on them, or causes them harm.[15] As the

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[9] *Benhaim v St-Germain*, 2016 SCC 48, [2016] 2 SCR 352 [***Benhaim***] at para 38, citing *South Yukon Forest Corp v R.*, 2012 FCA 165, 4 BLR (5th) 31 at para 46.
[10] *Benhaim* at para 39, citing *JG v Nadeau*, 2016 QCCA 167 at para 77.
[11] *Canada (MCI) v Vavilov*, 2019 SCC 65, [2019] 2 SCR 653 [***Vavilov***] at paras 17, 57; *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [***Housen***] at paras 8-9.
[12] *Housen* at para 105.
[13] *CFN* at paras 178-181.
[14] *CFN* at para 182-185.
[15] *Laurentian Pilotage* at para 31-32; Transcript of April 3, 2023 proceedings before Justice Mosely [**Transcript 03-APR-2023**], pp 7-9, AB Vol 15, Tab 28, pp 7816 - 7818; *Federal Courts Act,* RSC 1985, C. F-7, s. 18.1(1); *Unifor v Vancouver Fraser Port Authority*, 2017 FC 110 [***Unifor***] at para 29; *Friends of the Canadian Wheat Board v Canada,* 2011 FCA 101 at para 21; *League for Human Rights of B'nai Brith Canada v Odynsky,* 2010 FCA 307 at para 58.

application judge noted, while courts should not give the words "directly affected" a restricted meaning, the evidence must show more than a mere interest in a matter.[16] This Court's jurisprudence also confirms that any direct effects on a person must be non-speculative.[17] This requirement reduces the "unnecessary proliferation of marginal or redundant suits" and "screen[s] out the mere busybody."[18]

16. Among the applicants below, the application judge found that Messrs. Cornell and Gircys alone had direct standing (as they had accounts that were frozen under the *Economic Order*) and that both CCLA and CCF had public interest standing. By contrast, the application judge found that Ms. Nagle and CFN, along with Messrs. Jost and Ristau, lacked direct standing (and did not seek public interest standing).[19] Only Ms. Nagle and CFN dispute this finding on appeal, and their submissions fail to establish any palpable and overriding error.

17. As the application judge noted, Nagle/CFN claimed direct standing based mainly on their "potential liability" in the event of a retroactive application of the *Economic Order* and *Regulations*, in light of s. 43 of the *Interpretation Act*.[20] On appeal, Nagle/CFN reference this argument only at the end of their memorandum – as a "mootness" submission.[21] But however the argument is framed, the application judge made no error in finding it lacked any "air of reality."

18. Neither Ms. Nagle nor the CFN was ever named a "designated person" or a "designated entity" under the *Economic Order*. None of their accounts were ever frozen, nor were they ever the subject of any measures taken under the *EA*.[22] As the application judge noted, "it is inconceivable at this stage in the aftermath of the February 2022 events that any public body with the authority to investigate and prosecute any hypothetical offences Nagle may have committed, would pursue charges against her or the CFN now."[23]

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[16] *CFN* at para 159, citing *Unifor* at para 29.
[17] *Hupacasath First Nation v Canada (MFAIT)*, 2015 FCA 4 at para 104.
[18] *Canadian Council of Churches v Canada (MEI)*, 1992 CanLII 116, [1992] 1 SCR 236, p 252.
[19] *CFN* at paras 174-190.
[20] RSC 1985, c I-23, s. 43.
[21] Nagle/CFN MOFL at paras 78-82.
[22] Nagle Transcript, p. 126 line 11 to p. 136, line 23, Ex 4, AB Vol 12, Tab 17.3, pp 6588-6598.
[23] *CFN* at paras 179.

19. The application judge made no error in determining that the authorities cited by the applicants in relation to s. 43 of the *Interpretation Act*—which related to historical crimes—had any bearing on the facts of this case, as "the involvement of Nagle and the CFN in the events of February 2022 was discoverable by the authorities at the time."[24]

20. Ms. Nagle and CFN continued to fundraise and express their views after the GIC invoked the *EA*. Even if there were any temporary reduction in donations to CFN (which was not proven[25]), this would be a purely financial consideration, not a basis for granting standing.[26] The commercial consequences of an administrative decision of general application are not a basis for a public-law challenge to the decision. The application judge made no palpable and overriding error.

2) No error in finding Nagle/CFN lacked clean hands

21. The application judge likewise made no error in dismissing the Nagle/CFN application for lack of clean hands. Courts may decline to grant judicial review remedies to a party that engages in misconduct or otherwise does not come before the Court with clean hands, including by failing to be candid during cross-examinations or showing bad faith, a lack of transparency or candour.[27]

22. The application judge made no palpable and overriding error in finding at least three grounds of disentitling conduct in this case.[28] First, as the application judge noted, during Ms. Nagle's stay motion before the application judge on February 25, 2022, Ms. Nagle circumvented the Court's instructions against broadcasting a virtual hearing to which she had been granted remote access. This misconduct involved posting a screenshot of the Court's proceeding on Instagram, contrary to the Court's policies,[29] and eventually resulted in Ms. Nagle being removed

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[24] *CFN* at paras 180.
[25] Nagle Transcript, Qs 764-765, AB Vol 12, Tab 17.3, p. 6698.
[26] *CFN* at para 165, citing *Island Timberlands LP v Canada (Minister of Foreign Affairs),* 2009 FCA 353 at para 7.
[27] *Homex Realty v Wyoming*, [1980] 2 SCR 1011 at pp. 1033-1038; *Thanabalasingham v Canada*, 2006 FCA 14 at paras 9-11; *Debnath v Canada*, 2018 FC 332 at para 20-28; *Narte v Gladstone*, 2021 FC 433 at paras 33-34; *Balouch v Canada*, 2004 FC 1599 at paras 11 & 14; *Mutanda v Canada,* 2005 FC 1101 at paras 16-17; *Canada v PSAC*, 1999 CanLII 9380 at para 230.
[28] *CFN* at paras 182-184.
[29] Transcript of Proceedings, T-306-22, Friday, Feb 25, 2022, pp. 6-8 [**Stay Transcript**], AB Vol 2, Tab 12.2, pp 634 -636; See Federal Court, General Policy Statement re: Virtual Hearings, Part

from the hearing webinar. Although Ms. Nagle's counsel confirmed to the Court that his client's posts had been deleted,[30] it turned out screenshots of the stay proceeding were also being posted on a backup Instagram account "Kristen_Nagle2."[31] When this was raised with the application judge, Ms. Nagle (through her counsel) denied this was her backup account and intimated that someone else may have created it.[32] However, in the later cross-examination on her affidavit, she admitted she owned the Instagram feed with the handle "Kristen_Nagle2" yet failed to explain why she misled the Court at the stay hearing.[33]

23. Second, Ms. Nagle's cross-examination was "replete with examples of her efforts to avoid answering questions. Her responses lacked transparency and candour."[34] The application judge was not required to list all the instances of evasive or implausible testimony, which undermined Ms. Nagle's credibility and demonstrated a penchant for conspiratorial views. But, for example:

> (a) Ms. Nagle would not admit that diesel fumes from idling trucks in Ottawa impacted air quality or could cause health issues; she blamed respiratory problems on wearing facemasks;[35]
>
> (b) She did not accept that Ottawa residents were disturbed by truck horn noise, claiming that her own three-year-old slept through it. But she later admitted that she placed a "big headset [on her child] to protect his ears";[36]
>
> (c) When asked if she would be concerned to see the flag of the Three Percenters—a listed terrorist entity[37]—at the protests, she did not agree and provided an evasive response;[38]

"E" (prohibiting recording of the proceeding); Federal Court, Update #8 and Consolidated Covid-19 Practice Direction, s. 19 (livestreaming and recording prohibited); Federal Court, Policy on Public and Media Access (permission must be sought to record or photograph proceedings), AB Vol 34, Tab 12.4 pp 1009-1023.

[30] Stay Transcript, p. 8, lines 1-13, AB Vol 2, Tab 12.2, p. 636.

[31] Stay Transcript, p. 26, line 10-22, AB Vol 2, Tab 12.2, p. 654.

[32] Stay Transcript, p. 26, lines 23-27, AB Vol 2, Tab 12.2, p. 654.

[33] Nagle Transcript, p. 183, lines 12-19, AB Vol 12, Tab 17.3, p. 6745; see Ex S and T (admitted by Order of Milczynski AJ, November 16, 2022), AB Vol 12, Tabs 17.3.12 and 17.3; Stay Transcript, p. 26, line 25 and p. 27, line 1, AB Vol 2, Tab 12.2, pp 654, 655 and Tab 17.4, p 6777.

[34] *CFN* at para 183.

[35] Nagle Transcript, p. 63, line 2 to p. 64, line 6, AB Vol 12, Tab 17.3, pp 6625-6626.

[36] Nagle Transcript, p. 57, line 25 to p. 62, line 4, esp. p. 59, lines 8-12, AB Vol 12, Tab 17.3, pp 6619, 6624, 662.

[37] Currently Listed Entities accessed on November 1, 2024 on the Public Safety website.

[38] Nagle Transcript, p. 89, line 11 to p. 92, line 19, AB Vol 12, Tab 17.3, pp 6651 – 6654.

(d) Although she saw Convoy protesters wearing yellow Stars of David, like those the Nazis made Jews wear during the Holocaust, Ms. Nagle said they did so "to bring attention to the discrimination and segregation of Canadian citizens in a two-tiered system", referring to the vaccinated and unvaccinated. She eventually admitted that this comparison ought not to be made, but did not bring it to the attention of the Convoy organizers with whom she was associated;[39]

(e) When shown a photo of a protest banner with the words "Assassin Trudeau" which used the Nazi lightning bolt "SS" symbol in place of the letters "ss" in "assassin," Ms. Nagle was evasive and hesitant to acknowledge the impropriety of this Nazi symbolism, suggesting that the "SS" lightning bolt symbol "could look like fours actually, when I stare at it" – although it was a matter of "interpretation;"[40]

(f) Ms. Nagle was shown a CFN Facebook post on COVID-19 vaccine policies which stated: "We know all medical mandates are unethical" and also stated "We know it was necessary to establish a Nuremberg Code so that the atrocities of history never reoccur again. We know that the Standards of Practice for nursing and medicine are being violated, and harm is being done."[41] She was then asked about whether she thought invoking the Holocaust and Nazi atrocities, i.e., the experiments conducted on prisoners in concentration camps which led to the Nuremberg Code, was an analogy to current vaccination policies. Her answers were evasive. Ms. Nagle insisted on the need for healthcare workers to engage in "critical thinking," before suggesting they needed "to be reminded" of the Nuremberg Code, before finally agreeing it was not a legitimate analogy.[42]

(g) Ms. Nagle mocked accounts of local residents' lives being disrupted by the Convoy.[43] She endorsed a post on her Instagram account stating: "If you're inconvenienced by our non-compliance, I feel for you, we've been inconvenienced by your compliance for two years, suck it up butter cup."[44]

24. Unfortunately, this behaviour continued at the judicial review hearing, as noted by the application judge. Rather than making legal submissions, Nagle/CFN's lead counsel used his time to make what the application judge described as "inappropriate and offensive political statements."[45] These "grandstanding remarks" dwelled on the genesis of the Freedom Convoy,

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[39] Nagle Transcript, p. 113, line 14 to p. 117 line 16; Exhibit F (admitted by Order of Milczynski AJ, November 16, 2022), AB Vol 12, Tabs 17.3, 17.3.10 and 17.4, pp 6560, 6770 and 6777.
[40] Nagle Transcript, p. 103, line 3 to p. 107 line 18, AB Vol 12, Tab 17.3, pp 6665-6669.
[41] Nagle Transcript, Exhibit 2 (CFN Facebook, May 14, 2022), AB Vol 12, Tab 17.3.2, pp 6757.
[42] Nagle Transcript, p. 107, line 14 to p. 110, line 21, AB Vol 12, Tab 17.3, pp 6669 - 6672.
[43] See for example, Nagle Transcript, p. 75 line 2 to p. 78 line 2, AB Vol 12, Tab 17.3, pp 637 - 6640.
[44] Nagle Transcript, p. 64, line 12 to p. 67, line 15, Exhibit 1 to Cross Exam, AB Vol 12, Tab 17.3, pp 6626 - 6629 and Tab 17.3.1, p 6576.
[45] *CFN* at 184-185; Transcript 03-APR-2023, pp 51-76, AB Vol 15, Tab 28, pp 6613 -6638.

global vaccine mandates, and associated policies, and the application judge found they were "clearly intended to play to the audience observing the hearing remotely."[46] After "repeated instructions" to have counsel address the legal issues, the application judge felt obliged to interject: "You have belaboured the point beyond any sensible argument" and "I'm now seriously regretting my decision to allow you to be heard, Mr. Cowling. If that's all you're going to present, then it's absolutely of no assistance to the Court."[47]

25. The application judge made no error in dismissing Nagle/CFN's application based on their misconduct throughout the proceedings.[48]

3) No merit to new bias and fairness arguments

26. Finally, there is no merit to Ms. Nagle and CFN's attempt to deflect the application judge's findings on lack of clean hands by introducing new "bias" and fairness arguments. They made no bias allegation either in their written pleadings below or at the judicial review hearing. As to the claim that COVID-19 policies at the time showed "the bias that the Prime Minister had shown towards people who shared their beliefs with respect to COVID vaccination and restrictive measures,"[49] this is the same sort of meritless political statement the appellants were rebuked for by the Court below.

27. Their fairness argument is equally without merit, as it confuses the appellants' misconduct in using oral submissions to grandstand with their right to be heard. It also lacks an intelligible foundation, as the application judge did hear from Nagle/CFN at the hearing, after lead counsel was asked to cease his inappropriate and offensive political statements. Nagle/CFN's second counsel made submissions on the merits of the judicial review, "many" of which they claim were adopted by the Court.[50] They cannot make this argument while also claiming they were not heard.

28. An appeal is not an opportunity to rewind the clock. While the application judge gave Nagle/CFN an opportunity to be heard at the judicial review, it was open to him to find lead

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[46] *CFN* at para 145.
[47] Transcript 03-APR-2023, pp 51-62, AB Vol 15, Tab 28, pp 7860-7871.
[48] *CFN* at para 185.
[49] CFN MOFL at paras 46-50.
[50] CFN MOFL at para 36.

counsel's submissions brought nothing of value to the proceedings[51] and instead amounted to a series of politically charged remarks "one expects to see on social media" rather than in legal argument.[52] There is no basis for this Court to intervene.

C. CROSS-APPEAL RESPONSE: NO UNJUSTIFIED LIMIT ON S. 2(C) OF *CHARTER*

29. The cross-appeal of the CCLA and CCF should be dismissed. The application judge made no error in finding that the *Regulations* did not limit freedom of peaceful assembly under s. 2(c) of the *Charter*.[53] These *Regulations* did not prohibit peaceful assembly in Canada; rather, they prohibited "public assembly that may reasonably be expected to lead to a breach of the peace" through specific forms of serious coercive activity that fall outside s. 2(c)'s scope of protection. Given the limited scope of activities prohibited by the *Regulations* and the range of threats, recurring blockades, and intractable occupations that led to the declaration of a public order emergency, the *Regulations* did not limit freedom of peaceful assembly. These *Regulations* were limited, proportionate, and tailored to the objective of achieving a swift, orderly, and peaceful end to the crisis – and protecting against its immediate recurrence. Even if these *Regulations* limited freedom of peaceful assembly (which Canada denies), any such limit was justified under s. 1.

1) The *Regulations* did not limit s. 2(c) of the *Charter*

30. Section 2 of the *Charter* protects fundamental freedoms, including freedom of thought, belief, opinion, and expression (s. 2(b)), freedom of peaceful assembly (s. 2(c)), and freedom of association (s. 2(d)). Canada has appealed the application judge's finding of an unjustifiable limit on freedom of expression under s. 2(b), but the respondents have not appealed the application judge's finding of no limit on freedom of association under s. 2(d). The sole issue raised by the cross-appeals is thus whether the application judge erred in finding no unjustified limit on freedom of peaceful assembly under s. 2(c).

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[51] *CFN* at paras 184, 185; Transcript 03-APR-2023, pp 52-53, 60-62, AB Vol 15, Tab 28, pp 7861 – 7862, 7869 -7871.
[52] Transcript of April 5, 2023, proceeding before Justice Mosley, p 120-121, AB Vol 15, Tab 30, pp 8262 -8263.
[53] *CFN* at paras 310-314.

31. CCLA and CCF have failed to establish any such error. While they argue that the application judge's s. 2(c) findings cannot be reconciled with his s. 2(b) findings, and that ss. 2 and 4 of the *Regulations* prohibited constitutionally protected forms of peaceful assembly raising no more than the "prospect of a breach of the peace," these arguments rest on a flawed interpretation of s. 2(c), not a purposive interpretation that respects its internal limits.

*a) **Purposive interpretation of s. 2(c) does not include gatherings involving the use of force***

32. Section 2(c) of the *Charter* has received limited judicial interpretation. Many cases involving activities that might engage s. 2(c) have instead been argued and decided through the lens of freedom of expression under s. 2(b), focusing on the expressive aspects of the assembly in issue.[54] But while freedom of expression and freedom of peaceful assembly share certain values in common, the two protections are separate and distinct.

33. Section 2(c) lists "peaceful assembly" separately from other protected freedoms. This separate freedom is collective, spatial, and performative in nature.[55] Section 2(c) also includes an express internal qualifier: "peaceful." Its basic purpose is thus to permit people to gather *peacefully*.[56] As the Québec Court of Appeal has held, freedom of peaceful assembly does not protect riots or other gatherings that seriously disturb the peace.[57] The Ontario Superior Court has also held that freedom of peaceful assembly does not include a freedom to physically impede or blockade lawful activities.[58] These cases reflect s. 2(c)'s purpose of protecting *peaceful* assembly.

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[54] E.g., *BCGEU v BC (AG)*, 1988 CanLII 3, [1988] 2 SCR 214*; BC Teachers' Fed. v BC Public School Employers' Assn.*, 2009 BCCA 39 at para 39, leave to appeal ref'd, [2009] SCCA No. 160, [2009] SCCA No. 161; *Figueiras v Toronto (City) Police Services Board*, 2015 ONCA 208 [***Figueiras***].

[55] Jamie Cameron, Freedom of Peaceful Assembly and Section 2(c) of the *Charter: Report for the Public Order Emergency Commission* (Ottawa: Public Order Emergency Commission, Sept 2022), [**Cameron**] at p. 23; see also: Basil S. Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada" (2018) Vol. 8, Iss. 1, Art. 4 Western Journal of Legal Studies, p. 4.

[56] *Koehler v Newfoundland and Labrador*, 2021 NLSC 95 at paras 45-46.

[57] *R c Lecompte*, 2000 CanLII 8782 [***Lecompte***] at para 16 (QCCA); contrary to CCLA's submission at para 201 of their MOFL, there is no reason to discount this unanimous decision of the Québec Court of Appeal as "pure legal opinion."

[58] *Guelph (City) v Soltys*, 2009 CanLII 42449 at para 26 (ONSC).

34. The application judge applied this purposive interpretation of freedom of peaceful assembly and its internal limits, finding that "gatherings that employ physical force, in the form of enduring or intractable occupations of public space that block local residents' ability to carry out the functions of their daily lives, in order to compel agreement [with the Convoy's objectives] are not constitutionally protected." [59]

35. This approach to s. 2(c)'s "peaceful" requirement is analogous to s. 2(b)'s exclusion of "violent" expression. Although these fundamental freedoms play important roles in Canadian society, neither extends to activities like riots, intractable occupations, or blockades that involve the use of force.

36. Violence falls outside the scope of protected freedom of expression because it limits free choice and freedom of action,[60] and undermines a central purpose of the freedom, which is to facilitate dialogue. As the Supreme Court of Canada has noted, "[v]iolence prevents dialogue rather than fostering it."[61]

37. By analogy, an assembly that employs force is not a collective, performative act in support of fundamental democratic values, but a form of physical imposition that coerces acquiescence. This use of force and domination of public space is inimical to fundamental freedoms and readily distinguished from mere disruption, which is an established feature of peaceful assembly.

38. The application judge thus made no error in concluding that there was no limit on s. 2(c) based on the evidence supporting "a finding that the notion of blockading and occupying the downtown core of the Nation's Capital and other major centres, including cross border ports of entry, with massive trucks, falls within the scope of the authorizing enactment."[62] Marshalling vehicles to close off public streets is not itself an assembly, nor is it incidental to an assembly; it is a distinct coercive act that may be regulated without limiting freedom of peaceful assembly.

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[59] *CFN* at para 313.
[60] *R v Khawaja*, 2012 SCC 69, [2012] 3 SCR 555 [***Khawaja***] at paras 67 and 70.
[61] *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 SCR 141 at para 72.
[62] *CFN* at para 312.

*b) **Purposive interpretation of s. 2(c) does not include assembly that may reasonably be expected to lead to breaches of the peace***

39. Contrary to the CCLA and CFN's submissions, the application judge also made no error in holding that the *Regulations'* prohibitions on assemblies that may reasonably be expected to lead to breaches of the peace did not limit s. 2(c) of the *Charter*.

40. The application judge reviewed the *EA* and the regulation-making authority it creates, and acknowledged that this authority contains "anticipatory language" in s. 19(1)(a)(i), which expressly authorizes the making of orders or regulations that prohibit "any public assembly that may reasonably be expected to lead to a breach of the peace." As the application judge held, the legislation clearly permits special measures to prevent public assemblies of this nature, specifically those that may reasonably be expected to lead to a breach of the peace by causing serious disruption to the movement of persons, goods, or trade; interfering with critical infrastructure; or supporting of threats or use of acts of serious violence.[63] To support this core prohibition and prevent attendance at or near prohibited assemblies, the *Regulations* also prohibited certain additional activities, such as travel to a prohibited assembly, travel to or attendance at prohibited assemblies by minors, and the provision of property to facilitate or participate in a prohibited assembly.[64]

41. Reading these provisions in their entire context and in a manner consistent with the legislation's purposes,[65] they did not limit the freedom of peaceful assembly under s. 2(c) of the *Charter*. Just as s. 2(b) does not protect threats of violence, s. 2(c) does not protect assemblies that may reasonably be expected to lead to breaches of the peace by seriously disrupting the movement of persons or goods or trade, interfering with the functioning of critical infrastructure, or supporting the threat or use of acts of serious violence against persons or property. As the Supreme Court has noted, "Threats of violence, like violence, undermine the rule of law […] threats of violence take away free choice and undermine freedom of action. They undermine the very values and social conditions that are necessary for the continued existence of freedom of expression."[66]

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[63] *CFN* at para 312; *Regulations,* s 2(1).
[64] *Regulations*, ss 2(2)–5; s. 58 Explanation, AB Vol 6, Tab 13.9.1.
[65] *Re Rizzo & Rizzo Shoes Ltd*, 1998 CanLII 837, [1998] 1 SCR 27 at paras 21-22.
[66] *Khawaja* at para 70.

42. Section 2(c) does not protect circumstances where there is a reasonable basis to expect a non-peaceful assembly—e.g., a physically coercive assembly. Even the threat of a non-peaceful assembly involves a form of coercion, which undermines free choice and freedom of action, and is inconsistent with the democratic value of the collective, performative gatherings protected by s. 2(c). Accordingly, s. 2(c) does not require the state to sit by idly until an assembly turns violent or otherwise breaches the peace—the state can intervene proactively where there is a reasonable basis to expect a non-peaceful assembly.

2) <u>Any limit on s. 2(c) was justified under s. 1</u>

43. While the *Charter* protects the freedom of peaceful assembly, this freedom is also subject to reasonable limits under s. 1 of the *Charter*. Any limit on s. 2(c) here was reasonable.

44. Neither the CCF nor the CCLA contests that the *Regulations* pursued a pressing and substantial purpose. This purpose was to peacefully end the unlawful occupations and blockades and their significant adverse impacts, and to prevent their recurrence. Given the complementary prohibitions in s. 5 of the *Regulations* on travel to a prohibited assembly, travel to or attendance at these assemblies by minors, and financial support for a prohibited assembly, this purpose included stopping both direct and indirect participation in gatherings that involve or may reasonably be expected to involve the use of force, including the Convoy's blockades and the protracted occupation of Ottawa. The *Regulations* aimed to implement an *effective* solution to this multifaceted crisis by including measures preventing inflows into areas that would interfere with the safe and timely removal of the blockades and occupations, and risk re-establishing the disruption after its initial dispersal.[67]

45. The measures chosen to implement this goal were carefully tailored to limit any impact on peaceful assembly. As Commissioner Rouleau noted:

> In my view, Cabinet went to significant lengths to tailor the prohibition. It did not prohibit all anti-government protests, but only those that were likely to result in a breach of the peace as well as the serious disruption of the movement of persons, goods or trade, interference with critical infrastructure, or the support or threat or use of acts of serious violence (which is not constitutionally protected). This tailoring made a difference. Protests lawfully continued in various locations,

[67] See Canada's appellant MOFL at para 165.

> including just outside of the town of Milk River, Alberta, and at the Canadian War Museum in Ottawa, Ontario.[68]

46. Given this tailoring, there is no merit to CCF's argument that the Regulations went too far because "the problem of the blockades was confined to Ottawa, but the *Regulations* applied nationally."[69] This submission relies on a dramatic understatement of the nature, scale, and complexity of the crisis identified by the application judge, and suffers from the same erroneous hindsight bias as many of the application judge's findings. It also sits at odds with the application judge's own finding that the blockades and occupations extended beyond downtown Ottawa to "other major centres, including cross border ports of entry."[70]

47. As Professor Cameron acknowledged in her POEC research report on s. 2(c), "at a certain point – which, depending on the circumstances, may be earlier or later – the duration of an assembly may impose a disproportionate impact on other public interests." In considering limitations on freedom of assembly, Professor Cameron also noted that "Where there is a high level of disruption – such as the extended blocking of traffic – an assembly can be dispersed when the disruption is 'serious and sustained'."[71]

48. Here, as the reasons provided in the s. 58 Explanation made clear, the GIC faced much more than an "extended blocking of traffic." As of February 15, the occupation of Ottawa had endured for more than two weeks, and no resolution of the crisis had resulted from the City of Ottawa's declaration of a state of emergency on February 6,[72] Justice McLean's injunction on February 7,[73] or the Ontario government's declaration of a province-wide state of emergency on

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[68] *Report of the Public Inquiry into the 2022 Public Order Emergency*, vol 3 (Ottawa: His Majesty the King in Right of Canada, 2023), p 253 ["**POEC Report**"].
[69] CCF MOFL at para 156.
[70] *CFN* at para 312; see also para 354.
[71] Cameron, p. 43.
[72] *CFN* at para 37; Coleman Affidavit, paras 45, 48, 112, Exs QQ, TT, GGGGG, AB, Vol 7, Tab 13.11, at 3564, 3583, 3899-3900, 3915-20, 4252; Ross Affidavit, Ex D, "Ottawa declares state of emergency as police boost enforcement, target protest's fuel supply," AB, Vol 4, Tab 13.6, at 1351, 1389-98.
[73] *CFN* at para 38; Coleman Affidavit, paras 56, 57, 112, Exs BBB, CCC, GGGGG, AB, Vol 7, Tab 13.11, at 3567, 3583, 3965-72, 3973-78, 4252-53.

February 11.[74] As of February 14, there were approximately 500 trucks and other vehicles in downtown Ottawa and, in the application judge's words, the situation stood at "an impasse."[75] Local tow truck drivers had refused to work with governments to remove trucks in the blockade, individuals formerly employed in law enforcement or who had served in the military had appeared alongside Convoy organizers to provide logistical and security advice, and children had been brought to the occupation to limit law enforcement intervention. Police were unable to enforce the rule of law, and the OPS police chief would resign the following day.[76] Protesters also attempted to impede access to the International Airport in Ottawa and threatened to blockade railway lines.[77]

49. Border blockades had also been springing up across the country, most notably at the crucial Ambassador, Bluewater and Peace Bridges in Ontario, as well as at the Coutts/Sweetgrass border crossing in Alberta, the Surrey, British Columbia border crossing, and the Emerson, Manitoba port of entry. When the *Regulations* were made on February 15, 2022, one day after the arrests and discovery of a cache of firearms, high-capacity magazines, and body armour bearing extremist insignia at Coutts, the situation across Canada remained "concerning, volatile and unpredictable."[78]

50. As the s. 58 Explanation emphasized, the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians remained real. Demonstrations continued to pop up across the country, and it was impossible to know where the next blockade might arise.[79] When police dispersed the blockades at Windsor and Coutts, this created a risk that the demonstrators would simply regroup and re-establish a blockade at a new

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[74] *CFN* at para 40; Ontario Declaration of Emergency, Coleman Affidavit, paras 71, 73, 112, Exs TTT, RRR, GGGGG, AB, Vol 7, Tab 13.11, pp 3571-3572, 3583, 4050-4052, 4065-4071, 4254; Shragge Affidavit, Ex A, s. 58 Explanation ["**s. 58 Explanation**"], pp 3-4, AB, Vol 6, Tab 13.9.1, pp 3403-3404.
[75] *CFN* at paras 53 and 249.
[76] s. 58 Explanation AB, Vol 6, Tab 13.9.1, p 3405.
[77] *CFN* at para 63; s. 58 Explanation, p 11, AB, Vol 6, Tab 13.9.1, p 3410.
[78] s. 58 Explanation, AB, Vol 6, Tab 13.9.1, p 3403.
[79] s. 58 Explanation, AB, Vol 6, Tab 13.9.1, pp 3403-3409; Coleman Affidavit, Ex ZZZZ, Ex WWWWW, AB, Vol 7, Tab 13.11, pp 4220-4222, 4623-4635; Supplemental Coleman Affidavit, Ex D, POEC, Prime Minister Trudeau, AB, Vol 12, Tab 17.2, pp 6541-6543.

location.[80] Threats of occupations and blockades continued across the country well after invocation of the *EA*.[81] The use of social media and encrypted chat apps to coordinate blockades and occupations across the country was also a national phenomenon supporting a national solution.[82]

51. In this context, the prohibition on public assembly that may reasonably be expected to lead to a breach of the peace—itself a form of physical coercion—could not reasonably have been limited to any particular province or locale. Further, the unpredictability and the intractability of the blockades created a "reasonable apprehension of harm"[83] that justified the use of precautionary measures to prevent the blockades from degenerating into violence and to meet the objective of safely ending the unlawful assemblies and preventing new ones.[84] To be both "dissuasive and preventive," the prohibition on unlawful protests had to be national. [85]

52. The *Regulations* were thus proportional in any limit on s. 2(c). As the Supreme Court held in *R v Sharpe*, it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end to establish "minimal impairment." Rather, the government need only show that "the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account."[86]

53. In this case, and particularly given the urgency and circumstances of the crisis at hand, the temporary measures chosen by the GIC were minimally impairing. The *Regulations* were not a

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[80] The s. 58 Explanation refers to the need for efforts to ensure the Ambassador Bridge and Coutts entry points remained open after they were cleared: AB, Vol 6, Tab 13.9.1, pp 3402, 3406; see also POEC Report, Vol 3, p 253.
[81] Coleman Affidavit, Ex ZZZZ, Ex FFFFF, Ex HHHHH, Ex JJJJJ, Ex KKKKK and Ex PPPPP: Revocation of the *Emergencies Act*, AB, Vol 12, Tab 17.2, pp 4214-4219,4242-4244, 4260-4263, 4276-4284, 4285-4287, 4311-4313; s. 58 Explanation, AB, Vol 6, Tab 13.9.1
[82] s. 58 Explanation, AB, Vol 6, Tab 13.9.1; Coleman Affidavit, Ex RRRRR, Ex WWWWW, AB, Vol 7, Tab 13.11, pp 4324-4371,4623-4635; Nagle Cross–Exam Transcript, AB, Vol 12, Tab 17.3, p 6690; Supplemental Coleman Affidavit, Ex A, POEC Charrette/Drouin, AB, Vol 12, Tab 17.2, pp 6491-6494.
[83] *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45 [***Sharpe***], paras 85, 88, 89, 103.
[84] *Lecompte* at para 17.
[85] POEC Report, Vol 3, p 254.
[86] *Sharpe* at para 96 [underlining by SCC].

complete ban, but a proportional limitation related to the time, place, or manner of assembly[87] that contained a number of exceptions.[88] Moreover, during the limited period of invocation, peaceful protesters were free to protest outside of limited protected areas.[89] Much like Ontario's COVID-19 restrictions on religious gatherings were found to be minimally impairing due their time-limited duration, the *Regulations* here were only in force for the limited time required to achieve the legislative ends.[90]Once order was re-established and the *EA* was revoked, peaceful protesters were once again able to resume such protest on Parliament Hill.

54. The *Regulations* were minimally impairing, and their collective benefit outweighed any deleterious effects. Any breach of s. 2(c) was proportional and justified.

D. NO BREACH OF THE 1960 *CANADIAN BILL OF RIGHTS*

55. On appeal, only Ms. Nagle and CFN argue that the *Economic Order* and *Regulations* violated the 1960 *Canadian Bill of Rights* (***CBR***).[91] The application judge rejected this argument, finding that while the *CBR* applied to the *EA*, the *Regulations*, and the *Economic Order*, there was no inconsistency.[92]

56. The application judge made no palpable and overriding error in denying Ms. Nagle and CFN standing, so there is no basis for the Court to consider *CBR* arguments on this appeal. And while Saskatchewan—as an intervener—also tries to raise *CBR* arguments, an intervener "has no standing to amend the notice of appeal and add new issues."[93] In any event, the application judge did not err in finding no breach of the *CBR*.

57. The *Economic Order* and *Regulations* did not violate s. 1(a) of the *CBR*. Subsection 1(a) of the *CBR*—which does not enjoy full constitutional status[94]—recognizes that "in Canada there have existed and shall continue to exist [...] (a) the right of the individual to […] enjoyment of

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[87] See *Ramsden v Peterborough (City)*, 1993 CanLII 60 (SCC), [1993] 2 SCR 1084 at p 1105.
[88] *Regulations*, s 4(3).
[89] See, similarly, *R v Banks*, 2007 ONCA 19 at para 131.
[90] *Ontario (AG) v Trinity Bible Chapel*, 2023 ONCA 134 at para 119.
[91] *CFN* at para 108.
[92] *CFN* at paras 8, 360 and 362-369.
[93] *Canada (MCI) v Canadian Council for Refugees*, 2021 FCA 13 [***CCR***] at para 28.
[94] *Hogan v The Queen*, 1974 CanLII 185, [1975] 2 SCR 574 at 583-585.

property, and the right not to be deprived thereof except by due process of law."[95] However, this right is not absolute: the *CBR* protects the rights and freedoms of those "living together in an organized society subject to a rational, developed and civilized system of law which imposes limitations on the absolute liberty of the individual."[96]

58. The principal problem for Ms. Nagle and CFN is that the *Economic Order* did not interfere with their property. Neither had their accounts frozen. Their challenge is thus an abstract attack on the *Economic Order*, speculating that they *could* have been treated unfairly *if* their accounts had actually been frozen. But a law's fairness cannot be challenged in the abstract.[97]

59. Whether any process obligations have been met cannot be determined in the abstract or in advance. By definition, an actual decision-making process is required for analysis. Given that the appellants suffered no property interference, there is no way for them to challenge, or for the Court to evaluate, a decision-making process that did not occur in relation to them.

60. Ms. Nagle and CFN are thus left to challenge only the actual making of the *Economic Order* (and the *Regulations*). However, as the Supreme Court of Canada made clear in *Authorson*, the *CBR's* process protections do not apply to the making of a law of general application (a legislative decision) – such as the making of the *Economic Order* (and the *Regulations*) – and only to the application of a law of general application to specific facts (an administrative decision).[98]

61. More generally in relation to the interplay between this unique statutory context and potential process requirements, the content of procedural fairness is "eminently variable, inherently flexible and context-specific."[99] In the context of an emergency, procedural fairness requirements need not always be satisfied when the initial decision is made,[100] but can be satisfied later in the process if the measures are maintained or continued after the immediate urgency.[101]

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[95] *Canadian Bill of Rights*, SC 1960, c 44, s.1(a).
[96] *Robertson and Rosetanni v The Queen*, 1963 CanLII 17, [1963] SCR 651 at p 655.
[97] *Green v Law Society of Manitoba*, 2017 SCC 20, [2017] 1 SCR 360 paras 18 and 54–56.
[98] *Authorson v Canada (AG)*, 2003 SCC 39, [2003] 2 SCR 40 at paras 40-41 [***Authorson***].
[99] *Vavilov* at para 77.
[100] *Cardinal v Kent Institution*, [1985] 2 SCR 643 at para 16.
[101] *Ross v Mohawk Council of Kanesatake*, 2003 FCT 531 at para 79.

62. Here, as the s. 58 Explanation described, the emergency in question required swift action to disrupt funding. Requiring prior notices, consultations, or hearings would undermine the very purpose of the *Emergencies Act*, and impose an unnecessary burden on the justice system given the temporary nature of the emergency measures.[102] In addition, the RCMP developed a template for sharing information it had gathered with financial service providers and tried to contact many individuals or entities whose information was to be disclosed, to confirm their ongoing participation in prohibited activities.[103] Combined with the onus on financial services providers to determine "on a continuing basis" whether a person was participating in the unlawful activities, and the fact that once a person stopped engaging in prohibited activities they were no longer a designated person and the powers under s. 2 no longer applied to them,[104] the procedural protections in the emergency measures complied with any due process requirement in the *CBR*.

63. It is untenable to draw an analogy between the procedural requirements in this context—an emergency and temporary cessation of dealing by financial service providers—and the criminal law standards proposed by Saskatchewan. The intervener's anachronistic repurposing of the *CBR* misunderstands its meaning and effect. Section 1(a) codifies procedural protections against the deprivation of property that existed in 1960.[105] Saskatchewan has not shown that its favoured process requirements would have been standard in any analogous scenario in 1960. "Importing" new process requirements that Saskatchewan admits are sourced in *Charter* jurisprudence and not in the *CBR* must be rejected.

64. The application judge made no error in dismissing the *CBR* claims. As he noted, this case did not squarely address the enjoyment of property protection in s. 1(a) of the *CBR*.[106]

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[102] *CFN* at para 369.
[103] Affidavit of Denis Beaudoin, sworn April 4, 2022 [**Beaudoin Affidavit**] at paras 25–27, AB Vol 8, Tab 13.12, p 4675.
[104] Beaudoin Affidavit, para 29, AB, Vol 8, Tab 13.12, p 4675.
[105] *Authorson* at paras 10, 44, 52, 57).
[106] *CFN* at para 369.

E. REPLY TO INTERVENERS: THE GIC ACTED REASONABLY IN DECLARING A PUBLIC ORDER EMERGENCY

65. The intervener submissions of Alberta and Saskatchewan fail to establish any basis for finding that the GIC acted unreasonably in determining there were reasonable grounds to believe that a public order emergency existed that required targeted, temporary measures to end the nationwide crisis. Although Alberta repeatedly claims that the GIC invoked the *EA* based on "policy desirability," "convenience," "efficiency" or "preference,"[107] this is baseless. No such considerations are evident in the s. 58 Explanation, which reasonably sets out in a logical and coherent manner why the *EA*'s requirements were met.

1) The Interveners Wrongly Try to Re-Argue the Facts

66. Canada continues to rely on the facts presented in its main memorandum in this matter. Canada disagrees with the interveners' various attempts to re-argue the facts and re-characterize the evidence, which not only exceeds the proper scope of reasonableness review, but also exceeds the proper scope of intervener submissions.

67. The interveners, like the application judge, improperly embark on a *de novo* analysis on an expanded record to draw their own conclusion about whether a public order emergency existed in February 2022.[108] In a proper review of whether the GIC reasonably exercised its powers, including if the GIC believed on reasonable grounds that a public emergency order existed, a court must consider if it was reasonable for the GIC to conclude, on the record before it at the time it made the decision,[109] that it had reasonable grounds to believe a public order emergency existed.[110] In other words, what matters on review is the *GIC*'s reasonable belief based on the record before the GIC at the time.[111]

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[107] Alberta MOFL at paras 24, 32, 34, 35, 37.
[108] *Vavilov* at paras 116 and 125.
[109] The materials before the GIC for each instrument were limited to the Minister of Public Safety's submission to the GIC (including the signed Ministerial recommendation, the draft instrument and accompanying materials) and the Council's record of decision. See the Rule 317 Description of material constituting a confidence of the Queen's Privy Council for Canada, AB, Vol 10, Tab 15.3, pp 6150-6151.
[110] *Spencer v Canada (Health)*, 2021 FC 621, [2021] 3 FCR 581 [***Spencer***] at para 250.
[111] *Vavilov* at para 125; *Tsleil-Waututh Nation v Canada (AG),* 2017 FCA 128 at paras 85-87.

68. Consistent with these concerns, Canada disagrees with Alberta's factual assertion that the situation in Coutts was "resolved" on February 14, 2022 because arrests were made early that morning before the public order emergency was proclaimed. This assertion fundamentally misunderstands the significance of what happened at Coutts. The significance was not just the existence of an entrenched blockade that was disrupting $48 million in trade per day and the transport of crucial goods, medical supplies, food, and fuel across the Canada–U.S. border; nor was it even the fact that this was one of over a dozen protests impacting ports of entry operations in the weeks leading up to February 14, 2022.[112] Rather, the most important aspect of what happened at Coutts was its potential for serious violence and loss of life, marked by the discovery of a cache of weapons during the arrests, including 14 firearms, a large supply of ammunition, high-capacity magazines and body armour, some of which was marked with the insignia of the extremist group, Diagolon.[113] As the s. 58 Explanation noted, this made it clear there were elements within the protests that were prepared to engage in violence – up to and including gun violence.[114]

69. The arrests at Coutts thus did not "resolve" the situation facing the GIC; instead, they underscored how matters had reached a new height of both urgency and emergency in the ongoing crisis. The application judge himself found that the discoveries of weapons, ammunition, and other materials at Coutts was "deeply troubling and greatly influenced" the invocation of the *EA*, as did the possibility that "similar findings would emerge at any of the other blockades across the country."[115] Commissioner Rouleau, meanwhile, found that Coutts was "clearly a situation that could reasonably be viewed as meeting the definition under s. 2(c) of the *CSIS Act*, but that CSIS had not identified as such."[116] The same reasoning applied to whether "the risk of similar groups of politically or ideologically motivated violent actors being present at other protests met the definition in s. 2(c) although CSIS had not identified them."[117]

70. To suggest that the situation at Coutts was "resolved" – as Alberta does – is to once again ignore the s. 58 Explanation and view the situation with the benefit of hindsight and after-the-fact

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[112] s. 58 Explanation, pp 7–11, AB, Vol 6, Tab 13.9.1, p 3406-3410.
[113] *CFN* at para 51; Coleman Affidavit, Ex. QQQQQ, AB, Vol 7, Tab 13.11, pp 3574, 4314-4323.
[114] s. 58 Explanation, p 6, AB, Vol 6, Tab 13.9.1, p 3405.
[115] *CFN* at para 242.
[116] POEC Report Vol 1, p 208.
[117] POEC Report Vol 1, p 208.

certainty that this incident would end up being an isolated incident in the Convoy protests across the country.[118] There was no such certainty on February 14, 2022. On that date, it was reasonable for the GIC to consider these risks in deciding to declare a public order emergency.

2) The GIC's Interpretation of the *EA* Was Reasonable and Consistent with the Federal Division of Powers and the Nature of the Emergency Power

71. Like the application judge, the interveners set off on the wrong footing. Rather than reviewing the s. 58 Explanation and assessing whether the GIC's interpretation of the *EA* was reasonable (*i.e.*, defensible in light of the *EA*'s text, context, and purpose), the interveners interpret the *EA* for themselves and draw their own conclusions about its requirements. This is not reasonableness review; it is disguised correctness review.[119]

72. Contrary to the interveners' submissions, the *Constitution Act, 1867* does not require the *EA* to be interpreted strictly or with restraint and hesitation, rather than in a purposive manner to permit an effective response to national emergencies beyond provincial capacity or authority. There are several good reasons for this.

73. First, no party to these appeals has challenged the constitutional validity of the *EA* on division of powers grounds. Indeed, this is an appeal of a judicial review proceeding under administrative law principles, where the only constitutional issues relate to whether the *Regulations* and *Economic Order* are consistent with ss. 2 and 8 of the *Charter*. Saskatchewan improperly argues division of powers issues and that the GIC's decision to declare a public order emergency attracts the correctness standard. But Saskatchewan must take the issues on appeal as they have been framed by the parties and cannot expand them.[120] Reasonableness remains the standard of review applicable to the GIC's discretionary decision to invoke the *EA*.

74. Second, the very purpose of the emergency branch of the federal power to make laws for the "peace, order and good government" of Canada (POGG) is to allow Parliament to legislate

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[118] *Taylor v Newfoundland and* Labrador, 2020 NLSC 125 at para 455.
[119] *Coldwater First Nation v Canada (AG)*, 2020 FCA 34, [2020] 3 FCR 3 at para 28; *Vavilov* at para 83.
[120] *CCR* at paras 27-32.

irrespective of the usual division of powers to address emergencies.[121] Therefore, while the *EA* allows the federal government to encroach on provincial jurisdiction, this is unremarkable. That is the *raison d'être* of the emergency branch of POGG and a settled feature of Canadian federalism.

75. Moreover, even the constitutional threshold that would apply to a division of powers challenge to federal emergency legislation is not the strict one Alberta and Saskatchewan propose. As Laskin CJ noted in the *Anti-Inflation Act Reference*, the Court's task is to determine whether the GIC had a "rational basis" for finding that an emergency existed at the time – and not to make a definitive finding on whether an emergency existed in the past.[122] In such cases, the burden of proof lies on the opponents of legislation to establish the *absence* of a rational basis – or, as Ritchie J described it, to provide "very clear evidence that an emergency had not arisen when the statute was enacted."[123]

76. A narrow, strict interpretation of the *EA* and the emergency measures is thus not justified by the interveners' references to federalism and division of powers principles and jurisprudence. Contrary to Alberta's submission, the GIC had no duty—constitutional or otherwise—to "discuss the constitutional underpinnings" of the *EA*. The constitutional validity of the *EA* has not been challenged on division of powers grounds, and the *EA* must be presumed to be consistent with the POGG emergency power. The reasonableness of the GIC's decision turns on whether the GIC's determination that the requirements of the *EA* were met is defensible, taking into account the legal and factual context.

77. In the emergencies context, there is also no merit to Saskatchewan's reliance on caselaw addressing the general branch of the federal trade and commerce power, which authorizes the regulation of intraprovincial trade. The Supreme Court of Canada has interpreted the general trade and commerce power restrictively to preserve the broad scope of provincial jurisdiction over property and civil rights. In *Reference re Securities Act*, the Supreme Court held that securities

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[121] Peter W. Hogg, Wade Wright, *Constitutional Law of Canada*, 5th Ed., Chapter 17, Peace, Order, and Good Government: § 17:10-12 [**Hogg & Wade**], primarily discussing the *Anti-Inflation Act Reference*, 1976 CanLII 16, [1976] 2 SCR 373 [***Anti-Inflation Act Reference***].
[122] *Anti-Inflation Act Reference* at pp 423, 425, and Hogg & Wade at § 17:10.
[123] *Anti-Inflation Act Reference* at pp 439, and Hogg & Wade at § 17:10.

regulations had "long been considered local concerns subject to provincial legislative competence over property and civil rights within the province" and that the securities market had not "so changed that the regulation of all aspects of securities now falls within the general branch of Parliament's power over trade and commerce under s. 91(2)." [124] The Court's concerns cited by Saskatchewan – about one power being used to "effectively eviscerate another"[125] – relate to the permanent federal regulation of a new area, not to temporary federal action in areas of provincial competence under the emergency branch of the POGG power, where usual division-of-powers limits do not apply and which the Court has interpreted broadly.

78. Contrary to Alberta's submissions at paragraphs 17 and 20 (and the application judge's reasons), neither principles of federalism (which include the POGG emergency power) nor the *EA* require the GIC to wait "while the provinces or territories determine whether they have the capacity or authority to deal with the threat or, if not, could enact what is lacking in their respective legislative or regulatory tool boxes."[126] Nothing in s. 3(a)'s definition of a "national emergency" delegates the assessment of provincial capacity or authority to up to 10 provincial and 3 territorial governments when Canada is threatened by the sort of serious and dangerous situations contemplated by the concept of a national emergency. The provision also does not require an exhaustive search of provincial and territorial statute books, which would be wholly impracticable in responding to an urgent crisis. To the contrary, the *EA* requires the GIC to assess whether it has reasonable grounds to believe the "urgent and critical situation" it faces is one that "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*."

79. These words necessarily do not impose a test of strict provincial impossibility, but instead raise the possibility of there being a national emergency when a situation exceeds *either* the operational capacity of a province to deal with it *or* a province's legal authority to deal with it. Either the situation's "proportions or nature" (as found on the reasonable grounds to believe standard) can lead to this conclusion. This wording allows for the conclusion that even though

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[124] 2011 SCC 66, [2011] 3 SCR 837 at para 6, cited at paras 10 and 60 of Alberta's MOFL.
[125] *Ibid* at para 7.
[126] *CFN* at para 241.

provincial legal authority may theoretically be sufficient to deal with the situation, in practice the province may not have the capacity to do so. For example, provinces might have the *authority* to respond to a natural disaster in a public welfare emergency, but may lack the *capacity* to do so. In other instances (e.g., targeting the funding of the Convoy occupations and blockades), the measures may clearly fall outside provincial competence.

80. The *EA* thus affords the GIC discretion in the context of fast-moving crises where judgment calls must be made quickly. An exercise of this discretion attracts deference consistent with the constitutional principles underlying Parliament's jurisdiction in emergency situations and the scope given to it in assessing national security threats, where the emphasis is likewise on "precautionary and preventive principles" and avoiding being "too late" – which could have tragic consequences.[127]

81. Fundamentally, the strict interpretation urged by the interveners sits at odds with the modern approach to statutory interpretation, which considers the text, context and purpose of the relevant provisions.[128] As outlined in Canada's main memorandum, none of these factors support the interveners' approach – particularly given the *Interpretation Act's* requirement that "[e]very enactment shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[129] The interveners have failed to establish that a narrow interpretation is the only tenable one, or that the GIC's interpretation was otherwise unreasonable.

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[127] *Secretary of State for the Home Department v Rehman*, [2001] UKHL 47 at paras 22, 56 and 62; *Suresh v Canada*, 2002 SCC 1, [2002] 1 SCR 3 at para 33 and 85; *Charkaoui (Re)*, 2003 FC 1419 at paras 126–128; *R v Cornell*, 2010 SCC 31, [2010] 2 SCR 142 at para 24. For the most recent statement of this Court on the wide margin of appreciation to be accorded to GIC decision-making, see *Canadian National Railway Company v Halton (Regional Municipality),* 2024 FCA 160 at paras 93-94, 101-102.

[128] *Vavilov* at paras 117-121; the SCC has clarified that even in the penal context, strict construction is a presumption of last resort and does not supersede the usual principles of interpretation, especially in light of s. 12 of the *Interpretation Act*. See *R v Jaw*, 2009 SCC 42, [2009] 3 SCR 26 at para 38; *R v Hasselwander*, 1993 CanLII 90, [1993] 2 SCR 398 at 413; *R v Mac*, 2002 SCC 24, [2002] 1 SCR 856 at paras 3-6.

[129] *Interpretation Act*, RSC 1985, c I-21, s 12.

3) The GIC Reasonably Interpreted the Threat of Serious Violence Requirement

82. There is no merit to Saskatchewan's argument that the GIC erred in interpreting s. 16 of the *EA*, which requires a "threat or use of acts of serious violence against persons or property." While Saskatchewan is correct that the *EA* pre-dated all sorts of societal and technological changes that impact the threats posed by emergencies (e.g., cell phones, social media, crowd-sourced funding – to say nothing of encrypted chat apps and modern extremist movements), the GIC acted reasonably in taking all of those factors into account in deciding whether it had reasonable grounds to believe there was a national emergency and a threat to the security of Canada.

83. Saskatchewan relies on an academic article to suggest it is inconsistent with rules of statutory interpretation to argue that the meaning of "threats to the security of Canada" must be read in the context of the *EA* rather than in the context of the *CSIS Act*. However, the article does not actually suggest this as a general proposition. To the contrary, the article notes the incorporation of *international agreements* as a distinct example of when "interpretation may be incorporated" because those agreements "are subject to their own interpretive rules under arts. 31 and 32 of the Vienna Convention on the Law of Treaties."[130] That is not the context here. The modern approach to statutory interpretation requires consideration of the context and purpose of the *EA* in considering the meaning of the incorporated text in s. 16.[131]

84. There is equally no merit to Saskatchewan's claim that the GIC exceeded its authority by relying on "economic considerations" to invoke a public order emergency. Here, Saskatchewan errs in the same manner as the application judge, who failed to apply the principles of reasonableness review and erroneously concluded that although the "harm being caused to Canada's economy, trade and commerce, was very real and concerning, it did not constitute threats or the use of serious violence to persons or property."[132]

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[130] John Mark Keyes, "Incorporation by Reference in Legislation" (2004) 25:3 Stat L Rev 180 at 182 **(**Saskatchewan BOA Tab 5, PDF page 134**)**.
[131] *Re Rizzo & Rizzo Shoes Ltd*, 1998 CanLII 837, [1998] 1 SCR 27 [***Rizzo & Rizzo***] at paras 21-22; see also Canada's appellant MOFL at paras 120-124, 136-138.
[132] *CFN* at para 296.

85. Such a finding was not for the application judge to make, and neither Saskatchewan nor the application judge provide any basis for it. Neither engages with, or even acknowledges, the harms to Canadians and threats of harm identified in the s. 58 Explanation. As that explanation noted, rendering critical infrastructure unusable was akin to physically damaging it, and created the same danger to Canadians' safety and security. The GIC acted reasonably in finding reasonable grounds to believe that the ongoing situation amounted to "serious violence" with respect to property. The blocking of borders risked harming Canadians due to its impacts on the economy, directly affected businesses and their employees, shortages of foods and medicines, and Canada's international reputation for trade and investment.[133]

4) <u>The GIC Reasonably Found Emergency Exceeded Provincial Capacity or Authority</u>

86. With respect to the requirements of s. 3(a) of the *EA*, the interveners once again fall into the very same error as the application judge: they perform their own assessment of an expanded record and, with the benefit of hindsight, draw their own conclusions about whether the emergency exceeded provincial capacity or authority. This is not what *Vavilov* permits or requires when applying the reasonableness standard of review. Based on the reasoning in the s. 58 Explanation, the GIC's conclusion that it had reasonable grounds to believe that the emergency exceeded provincial capacity or authority is defensible. That is a full answer to the interveners' challenge.

87. In any event, the interveners' reassessment lacks merit. Contrary to Alberta's claims, Canada has not argued that provincial incapacity was established based on concerns that the situation was not being "resolved quite as quickly as it would like" or that Canada preferred "a different approach not based in existing authorities."[134] Rather, both of the scenarios posited by Commissioner Rouleau to illustrate when provincial incapacity could be established under s. 3(a) were met here: (1) the emergency extended beyond provincial borders, such that no single province could resolve it entirely; and (2) at least one province indicated the emergency was beyond its capacity or authority, such that the provinces collectively were unable to resolve the crisis.[135]

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[133] s. 58 Explanation, AB, Vol 6, Tab 13.9.1; Supplemental Coleman Affidavit, Ex C, POEC Mendicino, AB, Vol 12, Tab 17.2, pp 6518-6533.
[134] Alberta MOFL at para 23, citing Canada's appellant MOFL at paras 117, 127, 215.
[135] POEC Report Vol 3, pp 235-236

88. Not only were the blockades occurring nation-wide and geographically disparate, mobile, and continually evolving in nature, but three provinces (Ontario, Alberta and Manitoba) had indicated their incapacity to resolve the situation at various points.[136] As Commissioner Rouleau observed, it was also "reasonably foreseeable that if the protests continued to spread as anticipated, absent federal action, provincial resources would be insufficient, as they had proved to be in Ontario and Alberta."[137]

89. Invoking the *EA* was thus not only responsive to the national scale and increasingly grave nature of the situation (underscored by the events at Coutts), but also forward-looking. It was hardly a matter of "policy desirability" as Alberta suggests.[138]

90. There is equally no merit to the contention that the GIC somehow misapplied the requirement that provincial authority or capacity be exceeded. As noted above, s. 3(a) of the *EA* requires an assessment of provincial authority *and* capacity. The s. 58 Explanation's reference to the emergency being one that "cannot effectively be dealt with" by the provinces or territories is a reasonable operationalization of that requirement, or another way of saying that provincial capacities have been exceeded. In fact, Commissioner Rouleau used a similar formulation in his Report, noting that the emergency must be "such that no single province would be capable of resolving the entire situation, because the emergency extends beyond provincial boundaries." [139]

91. This is a complete answer to Alberta's assertion that it had provincial measures available to achieve similar results as those targeted by the *Regulations* and *Economic Order*. Alberta's measures still would not have resolved what the GIC tenably believed, on reasonable grounds, was an urgent and critical situation of such proportions or nature as to exceed the capacity of a province to deal with it. Moreover, although Alberta's *Emergency Management Act* may have permitted the province to compel towing services, no provincial state of emergency was ever proclaimed. Alberta's *Critical Infrastructure Defence Regulation*, meanwhile, limits its definition of "essential

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[136] *Ibid*; s. 58 Explanation, AB, Vol 6, Tab 13.9.1, pp 3400-3413; Supplemental Coleman Affidavit, Ex D, POEC Prime Minister Trudeau, AB Vol 12 Tab 17.2, pp 6534
[137] POEC Report Vol 3, pp 235-236.
[138] Alberta MOFL at paras 16 and 23.
[139] POEC Report Vol 3, pp 234-235 [underlining added].

infrastructure" to various health care facilities – in no way comparable to the broad designation of protected places under s. 6 of the *Regulations*. Finally, Alberta plainly could not have legislated or regulated measures equivalent to the *Economic Order*'s "cease dealing" provisions, which applied to a wide range of federally and provincially regulated financial entities.[140]

92. Alberta's suggestion that Canada's approach to s. 3(a) of the *EA* fails to account for multiple provinces' ability to cooperate to deal with a situation extending beyond their borders misses the point. While situations could well arise in which multiple provinces might be able to resolve a crisis collectively, that possibility did not apply on the facts of this case because one or more provinces had indicated an incapacity to resolve the situation. This meant the provinces collectively would not have been able to resolve the crisis.[141]

5) The GIC Reasonably Found Emergency Could Not Be Dealt with Effectively under Any Other Law of Canada

93. Alberta's submissions fail to establish that the GIC lacked a rational basis for believing that the emergency could not be dealt with effectively under any other law of Canada. Although they place great weight on the use of the term "*adéquatement*" in the French text of s. 3(a) of the *EA* ("*il n'est pas possible de faire face adéquatement sous le régime des lois du Canada*"), this does not advance their position. An "adequate" response is necessarily "effective." By the same token, an ineffective response would be inadequate.

94. There is equally no merit to Alberta's reliance on a speech by an *opposition* MP, John Rodriguez, during debates on the *EA*, as proof that Parliament intended for the GIC to have to "go through all the laws of the land, and the various codes to ensure that what it has to do cannot be done under those particular codes. It is only after the Government has gone through that process that it can then declare an emergency"[142] No such legislative intent can be gleaned from this

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[140] *Economic Order*, s. 3.
[141] See Canada's appellant MOFL at para 173.
[142] Canada, Parliament, *House of Commons Debates*, 33rd Parl, 2nd Sess, Vol 12 at 14773 (25 April 1988), cited at para 33 of Alberta's MOFL.

isolated statement by one opposition MP.[143] What is more persuasive in statutory interpretation are the remarks of government ministers like the then Minister of National Defence, the Hon. Perrin Beatty, who emphasized how the *EA* permitted the GIC to make judgments calls about the "direction events are in danger of moving and about how quickly the situation could deteriorate" as well as "what the government is capable of doing without exceptional powers, and on whether these capabilities are likely to be effective and sufficient."[144]

95. Section 3(a) of the *EA* does not ask whether there is another law that may potentially apply to offer some form of limited redress. Rather, it asks whether the situation as a whole can be *effectively* dealt with under the existing regime of Canadian laws. This is not a question of "expedience" or "convenience" as Alberta repeatedly asserts. While different tools were used with different degrees of success at various locations in response to the blockades and occupations, no tools were ever identified with the capacity to effectively resolve the national crisis as a whole. Blockades continued to arise across the country even after law enforcement successes.[145] The tools that became available under the *Economic Order* and *Regulations*, on the other hand, targeted the emergency at the national level with measures that had not been available up until that point.

96. Finally, there is also no merit to Alberta's suggestion at paragraph 31 that "any other law of Canada" included the possibility of creating federal common law "exclusion zones" in any way equivalent to the designation of protected places under the *Regulations*. Although Alberta cites *Figueiras* in support of this proposition, in that case the Ontario Court of Appeal actually found that the police stopping and searching a person's bag during the 2010 G20 summit in Toronto violated both the common law right to travel on a public highway and freedom of expression under 2(b) of the *Charter*.[146] The common law police power to limit access to certain areas was also

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[143] *R v D.L.W.*, 2016 SCC 22 at para 118; *Guindon v Ontario (MNR)* (2006), 207 OAC 135 (ON SCDC) at paras 49-51, citing *R v Heywood*, [1994] 3 SCR 761 at paras 39-41. See also Ruth Sullivan, *Sullivan on the Construction of Statutes*, online ed. at § 23.89-23.90; Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Thomson Reuters, 2011) at p 468; cp. reliance on statements of the sponsoring minister in *Rizzo & Rizzo Shoes* at paras 34-5; *Perron-Malenfant v Malenfant (Trustee of)*, [1999] 3 SCR 375 at paras 35-6.

[144] House of Commons Committees, Legislative Committee on Bill C–77, *Evidence,* 33–2, Vol 1, No 1, pp 13–14 (Hon. Perrin Beatty, Minister of National Defence).

[145] See paras 164-168, 209-222, 247-248 of Canada's appellant MOFL.

[146] *Figueiras* at paras 77, 81, 138-139.

qualified as "not a general power; it is confined to proper circumstances, such as fires, floods, car crash sites, crime scenes and the like."[147] *Figueiras* is no authority for the proposition that there is a federal common law power that the GIC unreasonably failed to consider that could have effectively dealt with the national emergency facing the country in February 2022.

6) Section 19(2) of *EA* Did Not Apply Because the Declaration Was National in Scope

97. Contrary to Alberta' submissions, and consistent with the s. 58 Explanation, the public order emergency in issue was a national emergency with effects experienced across Canada. It could not reasonably be limited to specific geographical areas, nor was it so limited. Accordingly, s. 19(2) of the *EA* – which applies to public order emergencies that specify "that the effects of the emergency extend only to a specified area of Canada" – was not engaged.

98. Indeed, the s. 58 Explanation set out the national effects of the Convoy blockades and occupations. It noted that they were occurring across the country and that it was impossible to predict where new blockades would be established.[148] The national effects of the blockades were also a concern for the Incident Response Group (IRG).[149] To prevent continued proliferation of the blockades across Canada, the GIC reasonably applied emergency measures across Canada.

99. Further, the s. 58 Explanation described how the participants and financial support for the ongoing blockades came from across Canada and also included significant international funding.[150] Therefore, the GIC reasonably determined that the *Regulation*'s prosecution provision had to operate nationally to achieve its dual purpose of peacefully dispersing blockades and preventing the formation of new ones. Similarly, the GIC reasonably determined that the *Economic Order* had to apply nationally to prevent the continued financial support of the blockades from potentially exempt provinces or credit unions under provincial jurisdiction. To effectively and peacefully end the crisis and prevent further blockades from developing elsewhere, the GIC reasonably determined that the emergency measures had to be national in scope.[151]

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[147] *Ibid* at paras 59-60.
[148] s. 58 Explanation, AB, Vol 6, Tab 13.9.1, pp 3400-3413.
[149] Affidavit of Rebecca Coleman, Exhibits OOO, RRR, YYY, ZZZZ, BBBBB, FFFFF, and HHHHH, AB Vol 12 Tab 17.2 pp 4040, 4050, 4097, 4220, 4226, 4242, 4260.
[150] s. 58 Explanation, AB, Vol 6, Tab 13.9.1, pp 3400-3413, esp. 3402.
[151] See also paras 164-168, 209-222, 247-248 of Canada's appellant MOFL.

100. Furthermore, nothing in the text, context, or purpose of s. 17(2)(c) of the *EA* requires that this provision be interpreted narrowly. Rather, a contextual and purposive interpretation of the language of this section suggests that the GIC can consider a broad range of effects in determining whether they are national in scope. Comparing the text of this section with the equivalent text relating to a public welfare emergency under s. 6(2)(c) of the *EA*, the latter speaks of the "direct" effects of the emergency ("*si le sinistre ne touche pas directement tout le Canada*"), whereas s. 17(2)(c) speaks simply of its effects, without specifying more. Had Parliament wished to limit the range of effects in s. 17(2)(c), it would have included the same language used with respect to public welfare emergencies.

101. The GIC reasonably interpreted ss. 17(2)(c) and 19(2) of the *EA* to include a broad range of effects and appropriately concluded that the emergency had national effects. Accordingly, there was no obligation – and it would have been ineffective – to restrict application of the emergency measures to a specific geographic location under s. 19(2).

7) The Consultation with the Provinces Accorded with s. 25

102. Canada's consultations with the provinces and territories before invoking the *EA* were reasonable. The interveners mistakenly conflate the *EA*'s consultation requirement with an obligation to obtain agreement from all provinces. The Consultation Report confirms that reasonable consultation occurred, which is all that the *EA* requires. The declaration of a public order emergency depends on the agreement of a province only if the effects of the emergency are confined to that province, which was not the case here.

103. Absent any express legislative requirements regarding the elements of, and procedure for, statutorily mandated consultation, the Federal Court has held that the required scope of the consultation can be determined in accordance with the modern principle of statutory interpretation.[152] Justice Strickland also observed that jurisprudence relating to the duty to consult owed to Indigenous peoples, relied on by Saskatchewan, "has limited relevance" in non-Indigenous contexts.[153]

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[152] *Democracy Watch v Canada (AG),* 2018 FC 1290 at paras 75-78.
[153] *Ibid* at paras 91-92 and 97.

104. This is because the duty to consult with respect to Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982* flows from the *sui generis* unwritten constitutional principle of the honour of the Crown, which itself arises from the reconciliatory imperative required by the assertion of Crown sovereignty over pre-existing Indigenous peoples.[154] It is not analogous to other forms of consultation by definition and its requirements cannot be imported into other contexts (like the consultations required by s. 25 of the *EA*). Saskatchewan cannot bootstrap a "constitutional" right to consultation based on s. 35 of the *Constitution Act, 1982* and cites no other jurisprudence in support of the claim that such a right exists with respect to s. 25 of the *EA* (or indeed use of the POGG emergency power).

105. As for what s. 25(1) of the *EA* actually requires, this section includes no indication that the provinces must agree with the federal assessment that a public order emergency exists. Rather, the provision states simply that "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."

106. This language contrasts with s. 25(3), which applies in cases "where the effects of the emergency are confined to one province." In such cases, the GIC "may not issue a declaration of a public order emergency […] unless the lieutenant governor in council of the province has indicated to the Governor in Council that the emergency exceeds the capacity or authority of the province to deal with it." The fact that s. 25(3) expressly requires the agreement of the single affected province strengthens the interpretation that s. 25(1) requires no provincial agreement.

107. Moreover, it is to be expected that provinces may not all share the same view on federal action. Indeed, this was the case here. Reading the consultation requirement strictly could easily risk preventing the GIC from acting swiftly in response to an emergency, or giving too much weight to the views of provinces that disagree. Again, the urgency inherent in assessing and responding to emergency situations, the deference afforded to federal exercises of the emergency power, and the deference owed to GIC decisions generally also inform the interpretation of the consultation requirement in s. 25(1).

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[154] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at paras 20 and 27.

108. With these principles in mind, the application judge made no error in finding that the *EA* did not require unanimous agreement from the provinces before the GIC could declare that an emergency exists.[155] Even if most—or even all—Premiers informed the Prime Minister that in their view invocation of the *EA* was not required in their provinces, their views were not determinative or binding on the GIC.

109. As the application judge noted, from the outset of the crisis in late January 2022, there was extensive engagement between federal and provincial ministers and officials to assess the situation across the country, as described in the Consultation Report laid before each House of Parliament in accordance with s. 25 of the *EA*.[156] This Report outlined no fewer than 30 instances of federal engagement with provinces and territories, municipalities and law enforcement agencies from the beginning of the crisis in late January 2022 up to the First Minister's meeting on February 14, 2022. This included numerous bilateral engagements by federal ministers with the Premier of Alberta and other Alberta ministers, along with various Federal-Provincial-Territorial meetings of senior public officials.[157]

110. On February 14, 2022, a meeting of First Ministers was convened by the Prime Minister to consult premiers on whether to declare a public order emergency. All premiers participated, and as the Consultation Report noted, "[e]ach premier was given the opportunity to provide his/her perspectives on the current situation – both nationally and in their own jurisdiction – and whether a declaration of public order emergency should be issued." A variety of views and perspectives were shared. While there was disagreement as to whether the *EA* should be invoked, or applied nationally, several premiers did express their support. During the meeting, "the Prime Minister emphasized that a final decision had not yet been made, and that the discussion amongst First Ministers would inform the Government of Canada's decision." [158]

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[155] *CFN* at para 245.
[156] *CFN* at para 244; Report to the Houses of Parliament: *Emergencies Act Consultations* (Minister of Public Safety, February 16, 2022) [**Consultation Report**].
[157] Consultation Report, pp. 2-5.
[158] *Ibid*, pp. 5-7.

111. Contrary to Saskatchewan's assertions that "there was no opportunity to provide input" and the First Ministers' meeting "was just an opportunity to blow off steam," this meeting reasonably satisfied the requirement in s. 25(1) of the *EA* that the Lieutenant Governors in Council of each province in which the effects of the emergency occur be consulted before the GIC declares a public order emergency.[159]

112. Moreover, engagement with the provinces did not end at the First Ministers' meeting on February 14; the Office of the Prime Minister spoke with the Office of the Premier of British Columbia, as Chair of the Council of the Federation, before the decision was made on February 14, to offer briefings to premiers' offices and explain the role of the provinces and territories under the *EA*. There was also outreach and communication with the premiers of Ontario and Saskatchewan, Ministers in Quebec, and premiers' offices in Quebec, Ontario and Newfoundland and Labrador.[160]

113. The Prime Minister also wrote to all premiers on February 15, 2022 to outline why the GIC had declared a public order emergency and to explain the types of emergency measures that would be available. This letter addressed issues raised during discussions, particularly with respect to national application of the declaration of a public order emergency. It also emphasized the targeted use of the measures, that measures would supplement and not replace provincial and municipal authorities; that the emergency measures could be employed by local police; and that the RCMP would be engaged only when requested by local authorities.[161]

114. The interveners' arguments on consultation should be rejected. The consultation requirements in the *EA* were reasonably met.

8) The Declaration Did Not Impair Provincial Ability to Take Their Own Measures

115. There is no evidence that the declaration of a public order emergency restricted or impaired Alberta, Saskatchewan, or any other province's efforts to deal with the national emergency as it

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[159] *CFN* at para 244.
[160] *CFN* at para 244; Consultation Report, pp. 8-9.
[161] *CFN* at para 244; Consultation Report, pp. 8.

was unfolding in their specific province, nor were the provinces impaired from taking an active role in addressing the emergency.

116. Although the interveners downplay the fact that Alberta and Manitoba made formal requests to the federal government for assistance on February 5th, including Alberta's request for equipment and personnel to deal with the obstructions at Coutts,[162] this request confirms that Alberta wanted the federal government to take action. As Alberta's letter noted, the RCMP had "exhausted all local and regional options to alleviate the week-long service disruptions at this important international border."[163] And this was before between 200 and 250 additional Convoy vehicles had gathered at Milk River, the police checkpoint set up to limit access to the blockade at Coutts, and of course before the discovery of guns, ammunition and body armour during the arrests at Coutts on February 14.[164]

117. As noted above, the federal government engaged provinces on how the measures would work and how both levels of government could best assist each other, which is the sort of concerted action identified in s. 19(3)(b) of the *EA*. Complaints about the degree of cooperation or assistance provided (e.g., a lack of tow trucks) are easily made, but are really political rather than legal complaints.

118. The invocation of the *EA* did not suspend provincial legislation, nor did it compel provinces to invoke their own emergency legislation or take any other measures. As for the Alberta's suggestion that the arrests at Coutts the morning of February 14, 2022 meant that it had "successfully managed the impacts of all protests in the province" and the invocation of the *EA* was thus not necessary, this ignores two critical considerations.

119. First, without hindsight (and any ability to test the counterfactual scenario demonstrating what would have happened if the *EA* had not been invoked), there was no guarantee on February

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[162] Affidavit of Madeleine Ross dated February 22, 2022 at Exhibit Q, AB, Vol 4, Tab 13.3.24, p 1467 and as noted in the s. 58 Explanation at pp 3-4, s. 58 Explanation, AB, Vol 6, Tab 13.9.1, pp 3402-3403.
[163] *CFN* at para 46; Affidavit of Madeleine Ross dated February 22, 2022 at Exhibit Q, AB, Vol 4, Tab 13.6, pp 1353, 1468; s. 58 Explanation, AB, Vol 6, Tab 13.9.1, pp 3403-3403.
[164] Coleman Affidavit, para 75, Ex VVV, AB, Vol 7, Tab 13.11, pp 3574, 4075-4082.

14, 2022 that further blockades would not occur at Coutts or elsewhere (particularly given the number of vehicles at Milk River).

120. Second, as noted above, it ignores the significance of the cache of firearms discovered during the arrests of Coutts in relation to the GIC's decision to invoke, based on concerns about the seriousness and scale of the threat uncovered there, and the risk of similar groups of politically or ideologically motivated violent actors within other protests. The arrests at Coutts did not resolve the national crisis that invocation of the *EA* and the ordering of the emergency measures targeted.

121. There is equally no merit to Alberta's novel submission that s. 19(3) must be interpreted as precluding impairment of a province's decision not to take action. The statutory interpretation principle of *expressio unius* – "the expression of one thing is the exclusion of the other" – does not support this interpretation, given the affirmative wording of this part of s. 19(3) ("not unduly impair the ability of any province to take measures, under an Act of the legislature of the province, for dealing with an emergency in the province"). Indeed, Alberta's proposed interpretation implies reading in a provincial veto on the exercise of the power to make orders and regulations once an emergency has been declared. This goes far beyond the provision's requirement to not unduly impair a province's own efforts to deal with the emergency and, to the extent possible, work in concerted action.

9) Saskatchewan's s. 8 *Charter* Argument Lacks Merit

122. Saskatchewan's argument that s. 2 of the *Economic Order* infringed s. 8 *Charter* rights lacks merit. Contrary to Saskatchewan's platitudinous conclusion that a "taking is still a taking, even if it is only temporary," the "cease dealings" provisions did not authorize a "taking" – or even a temporary taking. Money was never seized, as Commissioner Rouleau noted in finding no seizure under s. 8.[165] The provision required only that financial service providers "cease dealing" or suspend services to designated persons, while they were engaged in specified prohibited activities. Its sole purpose was to discourage such participation, as part of an explicitly temporary measure to bring the public order emergency to an end.[166]

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[165] POEC Report, Vol 3, pp 264-265.
[166] s. 58 Explanation, AB, Vol 6, Tab 13.9.1.p. 3400.

123. Otherwise, Canada denies any infringement of s. 8 for the reasons provided in its main memorandum, and further submits that any limitation on s. 8 rights was justified under s. 1 of the *Charter* as also argued in its main memorandum.

PART IV – ORDER SOUGHT

124. Canada asks the Court to grant its appeal, dismiss the Nagle/CFN appeal with costs, and dismiss the CCLA and CCF cross-appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, Ottawa, and Toronto this 8th day of November, 2024.

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4. *Federal Courts Act,* RSC 1985, C. F-7, s. 18.1(1)
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APPENDIX A – STATUTES AND REGULATIONS

Emergencies Act, RSC 1985, c 22, (4th Supp)	***Loi sur les mesures d'urgence,* L.R.C. (1985), ch. 22 (4e suppl.)**
National emergency **3** For the purposes of this Act, a ***national emergency*** is an urgent and critical situation of a temporary nature that **(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 that cannot be effectively dealt with under any other law of Canada.	**Crise nationale** **3** Pour l'application de la présente loi, une situation de crise nationale résulte d'un concours de circonstances critiques à caractère d'urgence et de nature temporaire, auquel il n'est pas possible de faire face adéquatement sous le régime des lois du Canada et qui, selon le cas : **a)** met gravement en danger la vie, la santé ou la sécurité des Canadiens et échappe à la capacité ou aux pouvoirs d'intervention des provinces; **b)** menace gravement la capacité du gouvernement du Canada de garantir la souveraineté, la sécurité et l'intégrité territoriale du pays.
Declaration of a public order emergency 17 **(1)** When the Governor in Council believes, on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency, the Governor in Council, after such consultation as is required by section 25, may, by proclamation, so declare.	**Proclamation** 17 **(1)** Le gouverneur en conseil peut par proclamation, s'il croit, pour des motifs raisonnables, qu'il se produit un état d'urgence justifiant en l'occurrence des mesures extraordinaires à titre temporaire et après avoir procédé aux consultations prévues par l'article 25, faire une déclaration à cet effet.
Contents **(2)** A declaration of a public order emergency shall specify **(a)** concisely the state of affairs constituting the emergency; **(b)** the special temporary measures that the Governor in Council anticipates may be	**Contenu** **(2)** La déclaration d'état d'urgence comporte : **a)** une description sommaire de l'état d'urgence; **b)** l'indication des mesures d'intervention que le gouverneur en conseil juge

necessary for dealing with the emergency; and	nécessaires pour faire face à l'état d'urgence;
(c) if the effects of the emergency do not extend to the whole of Canada, the area of Canada to which the effects of the emergency extend.	**c)** si l'état d'urgence ne touche pas tout le Canada, la désignation de la zone touchée.
Orders and regulations	**Gouverneur en conseil**
19 **(1)** While a declaration of a public order emergency is in effect, the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency:	19 **(1)** Pendant la durée de validité de la déclaration d'état d'urgence, le gouverneur en conseil peut, par décret ou règlement, prendre dans les domaines suivants toute mesure qu'il croit, pour des motifs raisonnables, fondée en l'occurrence :
(a) the regulation or prohibition of	**a)** la réglementation ou l'interdiction :
(i) any public assembly that may reasonably be expected to lead to a breach of the peace,	**(i)** des assemblées publiques dont il est raisonnable de penser qu'elles auraient pour effet de troubler la paix,
(ii) travel to, from or within any specified area, or	**(ii)** des déplacements à destination, en provenance ou à l'intérieur d'une zone désignée,
(iii) the use of specified property;	**(iii)** de l'utilisation de biens désignés;
(b) the designation and securing of protected places;	**b)** la désignation et l'aménagement de lieux protégés;
(c) the assumption of the control, and the restoration and maintenance, of public utilities and services;	**c)** la prise de contrôle ainsi que la restauration et l'entretien de services publics;
(d) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered; and	**d)** l'habilitation ou l'ordre donnés à une personne ou à une personne d'une catégorie de personnes compétentes en l'espèce de fournir des services essentiels, ainsi que le versement d'une indemnité raisonnable pour ces services;
(e) the imposition	**e)** en cas de contravention aux décrets ou règlements d'application du présent article, l'imposition, sur déclaration de culpabilité :
(i) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or	**(i)** par procédure sommaire, d'une amende maximale de cinq cents dollars et d'un emprisonnement maximal de six mois ou de l'une de ces peines,

(ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment, for contravention of any order or regulation made under this section.	**(ii)** par mise en accusation, d'une amende maximale de cinq mille dollars et d'un emprisonnement maximal de cinq ans ou de l'une de ces peines.
Idem	**Idem**
(3) The power under subsection (1) to make orders and regulations, and any powers, duties or functions conferred or imposed by or pursuant to any such order or regulation, shall be exercised or performed	**(3)** Les décrets et règlements d'application du paragraphe (1) et les pouvoirs et fonctions qui en découlent sont appliqués ou exercés :
(a) in a manner that will not unduly impair the ability of any province to take measures, under an Act of the legislature of the province, for dealing with an emergency in the province; and	**a)** sans que soit entravée la capacité d'une province de prendre des mesures en vertu d'une de ses lois pour faire face à un état d'urgence sur son territoire;
(b) with the view of achieving, to the extent possible, concerted action with each province with respect to which the power, duty or function is exercised or performed.	**b)** de façon à viser à une concertation aussi poussée que possible avec chaque province concernée.
Consultation	**Consultation**
25 **(1)** Subject to subsections (2) and (3), 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.	25 **(1)** Sous réserve des paragraphes (2) et (3), le gouverneur en conseil, avant de faire, de proroger ou de modifier une déclaration d'état d'urgence, consulte le lieutenant-gouverneur en conseil de chaque province touchée par l'état d'urgence.
Idem	**Idem**
(2) Where the effects of a public order emergency extend to more than one province and the Governor in Council is of the opinion that the lieutenant governor in council of a province in which the effects of the emergency occur cannot, before the issue or amendment of a declaration of a public order emergency, be adequately	**(2)** Lorsque plus d'une province est touchée par un état d'urgence et que le gouverneur en conseil est d'avis que le lieutenant-gouverneur en conseil d'une province touchée ne peut être convenablement consulté, avant la déclaration ou sa modification, sans que soit compromise l'efficacité des mesures envisagées, la consultation peut avoir lieu après la prise des mesures mais avant le dépôt de la motion de ratification devant le Parlement.
	Pouvoirs ou capacité de la province

consulted without unduly jeopardizing the effectiveness of the proposed action, the lieutenant governor in council of that province may be consulted with respect to the action after the declaration is issued or amended and before the motion for confirmation of the declaration or amendment is laid before either House of Parliament. **Indication** **(3)** The Governor in Council may not issue a declaration of a public order emergency where the effects of the emergency are confined to one province, unless the lieutenant governor in council of the province has indicated to the Governor in Council that the emergency exceeds the capacity or authority of the province to deal with it.	**(3)** Le gouverneur en conseil ne peut faire de déclaration en cas d'état d'urgence se limitant principalement à une province que si le lieutenant-gouverneur en conseil de la province lui signale que l'état d'urgence échappe à la capacité ou aux pouvoirs d'intervention de la province.
***Federal Courts Act,* R.S.C., 1985, c. F-7** **Application for judicial review** 18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. **Time limitation** (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	***Loi sur les Cours fédérales,* L.R.C. (1985), ch. F-7** **Demande de contrôle judiciaire** **18.1 (1)** Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande. **Délai de présentation** **(2)** Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder. **Pouvoirs de la Cour fédérale**

Powers of Federal Court (3) On an application for judicial review, the Federal Court may (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal. **Grounds of review** (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record; (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; (e) acted, or failed to act, by reason of fraud or perjured evidence; or (f) acted in any other way that was contrary to law. **Defect in form or technical irregularity**	**(3)** Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut : **a)** ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable; **b)** déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral. **Motifs** **(4)** Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas : **a)** a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer; **b)** n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter; **c)** a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier; **d)** a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose; **e)** a agi ou omis d'agir en raison d'une fraude ou de faux témoignages; **f)** a agi de toute autre façon contraire à la loi. **Vice de forme** **(5)** La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may (a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and (b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.	uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.
***Interpretation Act*, R.S.C., 1985, c. I-21** **Enactments deemed remedial** **12** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. **Effect of repeal** **43** Where an enactment is repealed in whole or in part, the repeal does not **a)** revive any enactment or anything not in force or existing at the time when the repeal takes effect, **(b)** affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder, **(c)** affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed, **(d)** affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or **(e)** affect any investigation, legal proceeding or remedy in respect of any	***Loi d'interprétation*, L.R.C. (1985), ch. I-21** **Principe et interprétation** **12** Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet. **Effet de l'abrogation** **43** L'abrogation, en tout ou en partie, n'a pas pour conséquence : **a)** de rétablir des textes ou autres règles de droit non en vigueur lors de sa prise d'effet; **b)** de porter atteinte à l'application antérieure du texte abrogé ou aux mesures régulièrement prises sous son régime; **c)** de porter atteinte aux droits ou avantages acquis, aux obligations contractées ou aux responsabilités encourues sous le régime du texte abrogé; **d)** d'empêcher la poursuite des infractions au texte abrogé ou l'application des sanctions — peines, pénalités ou confiscations — encourues aux termes de celui-ci;

right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment, penalty or forfeiture referred to in paragraph (d), and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed.	**e)** d'influer sur les enquêtes, procédures judiciaires ou recours relatifs aux droits, obligations, avantages, responsabilités ou sanctions mentionnés aux alinéas c) et d). Les enquêtes, procédures ou recours visés à l'alinéa e) peuvent être engagés et se poursuivre, et les sanctions infligées, comme si le texte n'avait pas été abrogé.
***Canadian Bill of Rights*, S.C. 1960, c. 44** **Recognition and declaration of rights and freedoms** **1** It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, **(a)** the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; **(b)** the right of the individual to equality before the law and the protection of the law; **(c)** freedom of religion; **(d)** freedom of speech; **(e)** freedom of assembly and association; and **(f)** freedom of the press.	***Déclaration canadienne des droits*, S.C. 1960, ch. 44** **Reconnaissance et déclaration des droits et libertés** 1 Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe : a) le droit de l'individu à la vie, à la liberté, à la sécurité de la personne ainsi qu'à la jouissance de ses biens, et le droit de ne s'en voir privé que par l'application régulière de la loi; b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi; c) la liberté de religion; d) la liberté de parole; e) la liberté de réunion et d'association; f) la liberté de la presse.

APPENDIX B – AUTHORITIES RELIED ON (NOT HYPERLINKED)

(a) Peter W. Hogg, Wade Wright, *Constitutional Law of Canada*, 5th Ed., Chapter 17, Peace, Order, and Good Government: § 17:10-12

(b) Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at § 23.89-23.90

(c) Pierre-André Côté, The Interpretation of Legislation in Canada, 4th ed (Toronto: Thomson Reuters, 2011) at p 468

Constitutional Law of Canada, 5th Ed. § 17:10

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§ 17:10. Inflation

Legal Topics

The most recent application of the emergency doctrine by the Supreme Court of Canada is to be found in the *Anti-Inflation Reference* (1976),[1] in which the federal Anti-Inflation Act was upheld as an emergency measure. The Anti-Inflation Act, 1975, and regulations made thereunder, controlled increases in wages, fees, prices, profits, and dividends (“wage and price controls” for short). The control scheme was administered by federal tribunals and officials. The scheme was temporary, the Act automatically expiring at the end of 1978 unless terminated earlier or extended by the government with parliamentary approval. After the Act had been in force for six months (and many collective agreements and prices had been adjusted under its provisions), the federal government referred the Act to the Court for a decision as to its constitutionality. The Court, by a majority of seven to

two, held that the Act was valid as an exercise of the federal Parliament's emergency power. At the time when the control programme was announced, there had been a period of about twenty months of double-digit inflation in Canada, and the inflation had been accompanied by relatively high rates of unemployment. The majority of the Court held that this situation could be characterized by the government and Parliament as an emergency.[2]

The most serious difficulty with this conclusion[3] was that the Act itself, although it contained a preamble which purported to recite the reasons for the legislation, did not assert the existence of an emergency. This omission pointed to the conclusion, which was accepted only by the two dissenting judges,[4] that the government and Parliament had proceeded on the basis that federal power existed under the national concern branch of p.o.g.g. and that no showing of emergency was required.

The factual material that was filed in the *Anti-Inflation Reference*[5] included an economic study, which was agreed to by a substantial section of Canadian professional economic opinion, and which was not seriously challenged, asserting that Canadian inflation was not only on the wane when the controls were introduced in October 1975 but that it had never been particularly serious in its effects on living standards (which had continued to rise), or by comparison with the United States and other trading nations (whose rates of inflation were similar), or by comparison with other periods of recent Canadian history (this was Canada's third period of double-digit inflation since the second world war).[6]

Nevertheless, Laskin C.J., with whom Judson, Spence and Dickson JJ. agreed, held that the Court “would be unjustified in concluding, on the submissions in this case and on all the material put before it, that the Parliament of Canada did not have a rational basis for regarding the

Anti-Inflation Act as a measure which, in its judgment, was temporarily necessary to meet a situation of economic crisis imperilling the well-being of Canada as a whole and requiring Parliament's stern intervention in the interests of the country as a whole".[7] It will be noted that this passage carefully disclaims any judicial duty to make a definitive finding that an emergency exists. All that the Court need do is to find that a "rational basis" exists for a finding of emergency. Moreover, it is not necessary for the proponents of the legislation to establish a rational basis, it is for the opponents of the legislation to establish the absence of a rational basis. Ritchie J., who wrote a concurring opinion with which Martland and Pigeon JJ. agreed, did not use the language of rational basis, but he also cast the burden of proof onto the opponents of the legislation. He adopted the test used in the war measures cases,[8] and held that "a judgment declaring the Act to be ultra vires could only be justified by reliance on very clear evidence that an emergency had not arisen when the statute was enacted".[9] And, without discussing the evidence to that effect which had been presented, he held that it did not satisfy his test.[10]

In a constitutional case, where the validity of legislation depends upon findings of fact concerning the social or economic condition of the country, it is obviously impossible for the Court to make definitive findings. Moreover, judicial restraint requires that a degree of deference be paid to the governmental judgment upon which the legislative policy was based. However, the formulations in the *Anti-Inflation Reference*, especially when read in the light of the persuasive factual material before the Court which denied the existence of an emergency, make it almost impossible to challenge federal legislation on the ground that there is no emergency.[11] This means that the federal Parliament can use its emergency power almost at will.

Footnotes

1 Re Anti-Inflation Act, [1976] 2 S.C.R. 373.

2 Laskin C.J. used the word “crisis”, but did not suggest that it meant anything different from emergency. Ritchie J. used the term “emergency”.

3 My criticism of this decision should be taken with a grain of salt, since I was one of the counsel (representing the Canadian Labour Congress) on the losing side!

4 Beetz J., with whom de Grandpré J. agreed, held that Parliament cannot rely on its emergency power “unless it gives an unmistakable signal that it is acting pursuant to its extraordinary power”: [1976] 2 S.C.R. 373, 463. Compare MacDonald v. Vapor Canada, [1977] 2 S.C.R 134, where Laskin C.J. insisted (at p. 171) that an exercise of federal power to implement a treaty “must be manifested in the implementing legislation and not left to inference”. Yet Laskin C.J. in the *Anti-Inflation Reference* was content for an exercise of the emergency power to be left to inference.

5 The Canadian Labour Congress annexed to its factum a study of inflation in Canada by Richard G. Lipsey, a professor of economics at Queen's University, and it later filed telegrams from thirty-eight other economists associating themselves with Lipsey's conclusions. See ch. 60, Proof, under heading §§ 60:8 to 60:13, “Evidence”.

6 The recurring nature of double-digit inflation was demonstrated by its occurrence again in Canada (and other western nations) in 1980–82. However, this time the federal Parliament chose not to exercise the vast emergency powers which it had presumably acquired, contenting itself with wage controls in the federal public sector (five per cent of the workforce) and exhortations to voluntary restraint

elsewhere. I cannot resist commenting that, if double-digit inflation really were an emergency, one would expect sterner remedies than these.

7 Re Anti-Inflation Act, [1976] 2 S.C.R. 373, 425.

8 Fort Frances Pulp and Power Co. v. Man. Free Press Co., [1923] A.C. 695, 706.

9 Re Anti-Inflation Act, [1976] 2 S.C.R. 373, 439.

10 Beetz J., with whom de Grandpré J. agreed, dissented on the ground that the Act gave no indication that it was enacted to meet an emergency. Accordingly, he did not go on to consider the burden or standard of proof which was appropriate.

11 For full discussion, see P.W. Hogg, “Proof of Facts in Constitutional Cases” (1976) 26 U. Toronto L.J. 386.

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Constitutional Law of Canada, 5th Ed. § 17:11

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§ 17:11. Temporary character of law

Legal Topics

There is one important limitation on the federal emergency power: it will support only temporary measures.[1] This is usually regarded as a self-evident proposition, based on the fact that an emergency is a temporary phenomenon. One is entitled to question, however, the usefulness of this limitation. It is in any case primarily formal, because an ostensibly temporary measure can always be continued in force by Parliament, while an ostensibly permanent measure can be repealed at any time. More importantly, an emergency, although itself temporary, may be caused by structural defects in the social or economic order which need to be corrected not only to cure the emergency, but also to prevent the occurrence of future emergencies. Yet preventive legislation would surely have to be permanent.[2]

The new deal statutes, which were enacted to deal with the depression of the 1930s, had this dual character: they were designed not only to help alleviate the immediate suffering of the depression, but also to provide permanent economic security which it was hoped would prevent a similar disaster in the future. Perhaps unemployment insurance is the best example of a permanent preventive measure, but minimum wage laws, anti-combine laws and natural products marketing regulation—other Canadian new deal measures—were also perceived by government in the same way. Nevertheless, in the *Unemployment Insurance Reference* (1937)[3] and companion cases,[4] the Privy Council struck down most of the new deal legislation, and while it appears that their lordships' primary reason was that the depression did not qualify as a genuine emergency, it is a fair inference that they were influenced by the permanent nature of the new deal measures. Similarly, in the *Board of Commerce* case (1922),[5] federal legislation to control hoarding and profiteering caused by the economic dislocation which was the aftermath of the first world war was held to be unconstitutional. Once again, the Privy Council, while also doubting that a peacetime economic problem could be characterized as an emergency, was influenced by the ostensibly permanent character of the proposed controls.[6]

The contrast between the new deal cases and the *Board of Commerce* case, on the one hand, and the *Anti-Inflation Reference*,[7] on the other, is too obvious to require elaboration. It cannot be explained solely in conventional legal terms, but it is the fact that in the former cases the impugned legislation was permanent while in *the Anti-Inflation Reference* the legislation was temporary. No permanent measure has ever been upheld under the emergency power.[8]

Footnotes

1 Re Anti-Inflation Act, [1976] 2 S.C.R. 373, 427, 437, 461, 467; R. v. Crown Zellerbach, [1988] 1 S.C.R. 401, 432.

2 In other contexts “prevention” has been held to be on the same basis as “cure”: A.-G. Ont. v. Canada Temperance Federation, [1946] A.C. 193, 207.

3 A.-G. Can. v. A.-G. Ont. (Unemployment Insurance), [1937] A.C. 355.

4 See A.-G. Can. v. A.-G. Ont. (Labour Conventions), [1937] A.C. 326; A.-G. B.C. v. A.-G. Can. (Price Spreads), [1937] A.C. 368; A.-G. B.C. v. A.-G. Can. (Natural Products Marketing), [1937] A.C. 377; A.-G. B.C. v. A.-G. Can. (Farmers' Creditors Arrangement), [1937] A.C. 391; A.-G. Ont. v. A.-G. Can. (Canada Standard Trade Mark), [1937] A.C. 405.

5 Re Board of Commerce Act, [1922] 1 A.C. 191.

6 Re Board of Commerce Act, [1922] 1 A.C. 191, 197 where the point is explicit.

7 Re Anti-Inflation Act, [1976] 2 S.C.R. 373.

8 A possible exception is Lovibond v. Grand Trunk Ry. Co., [1939] O.R. 305 (C.A.), where the federal expropriation of shares in the Grand Trunk Ry. Co. was upheld. Masten J.A. (at p. 344), delivering one of two concurring opinions, offered the emergency branch of p.o.g.g. as one of two bases for the legislation.

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Constitutional Law of Canada, 5th Ed. § 17:12

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§ 17:12. Relationship between national concern and emergency

Legal Topics

The “gap” branch of p.o.g.g. stands on its own and requires no reconciliation with the “national concern” and “emergency” branches.[0.50] But the relationship between the national concern and emergency branches does require examination.

One point has been settled by the course of decision since the abolition of appeals to the Privy Council. It is clear that the Privy Council was wrong in asserting that only an emergency would justify the invocation of the p.o.g.g. power. *Johannesson v. West St. Paul* (1952),[1] *Munro v. National Capital Commission* (1966),[2] *R. v. Crown Zellerbach* (1988),[3] *Ontario Hydro v. Ontario* (1993)[4] and the *Greenhouse Gas Pollution Pricing Act Reference* (2021)[4.50] establish that the emergency test

cannot be the exclusive touchstone. Clearly, for some class of cases the national concern doctrine will suffice to justify the invocation of p.o.g.g. But, unless we are to repudiate the Haldane and post-Haldane decisions altogether, we must accept that there is a class of case for which only an emergency will suffice to found federal power. The problem then is to draw the line between these two different classes.

One possible dividing line must be rejected at the outset. It is not possible to argue that laws affecting property and civil rights must satisfy the emergency test, while laws not affecting property and civil rights need only satisfy the national concern test. In *Johannesson*,[5] what was in issue was the validity of a municipal zoning by-law which purported to limit the establishment of aerodromes in a municipality. In *Munro*,[6] what was in issue was the validity of a federal expropriation of a farmer's land to create a green belt in the national capital region. In *Crown Zellerbach*,[7] what was in issue was a federal law prohibiting the dumping of logging waste in provincial waters. Zoning, expropriation and logging are normally within property and civil rights in the province, and so all three cases had a profound impact upon property and civil rights in the province. Yet it was the national concern doctrine, not the emergency doctrine, which was applied in the cases.[7.50]

W.R. Lederman, in an article which appeared in the Canadian Bar Review in 1975,[8] suggested a more sophisticated reconciliation of the cases. He pointed out that such subject matters as aviation, the national capital region and atomic energy each had “a natural unity that is quite limited and specific in its extent”.[9] He contrasted these “limited and specific” subject matters with such sweeping categories as environmental pollution, culture or language. If the sweeping or pervasive categories were enfranchised as federal subject matters simply on the basis of national concern, then there would be no limit to the reach of federal legislative powers and the existing distribution of

legislative powers would become unstable. Accordingly, in normal times, such categories had to be broken down into more specific and meaningful categories for the purpose of allocating legislative jurisdiction; on this basis some parts of the sweeping categories would be within federal jurisdiction and other parts would be within provincial jurisdiction. Only in an emergency could the federal Parliament assume the plenary power over the whole of a sweeping category.

In the *Anti-Inflation Reference* (1976),[10] Lederman appeared as counsel for one of the unions opposed to the legislation, and he and the other counsel urged his distinction upon the Court with a view to establishing that wage and price controls—a sweeping category—had to satisfy the stricter emergency test. The distinction was accepted by Beetz J., whose opinion provided the first, and still most comprehensive, attempt by a Supreme Court of Canada judge to reconcile the emergency cases with the national concern cases.[11] Beetz J.'s opinion was a dissent, but it will be recalled that on this point Ritchie J. agreed with him. (The disagreement was over the question whether the legislation was in fact a recognizable response to an emergency.) This meant that Beetz J.'s opinion on this point enjoyed the support of five members—a majority of the Court, because de Grandpré J. agreed with Beetz J.; and Martland and Pigeon JJ. agreed with Ritchie J. This aspect of Beetz J.'s opinion also seems to have been accepted by the Court in later cases.[12]

In his opinion, Beetz J. expressly acknowledged his indebtedness to Lederman's article.[13] In accordance with the thesis of that article, he refused to accept that a subject matter as broad as “inflation” could be accepted as a new head of federal power: it was “totally lacking in specificity”; it was “so pervasive that it knows no bounds”; the recognition of such a “diffuse” subject matter “would render most provincial powers nugatory” and “destroy the equilibrium of the

Constitution”.[14] Rather, the Anti-Inflation Act should be classified for constitutional purposes not in terms of the Act's “ultimate purpose” (to contain inflation) but in terms of its “operation” and “effects”,[15] and in these more specific terms the Act was in relation to wages, prices and profits, which were matters within property and civil rights in the province. In normal times, therefore, wage and price controls were outside the competence of the federal Parliament. In an emergency, however, the power of the federal Parliament “knows no limit other than those which are dictated by the nature of the crisis. But one of those limits is the temporary nature of the crisis”.[16]

The thesis advanced by Lederman and adopted by Beetz J. is that the p.o.g.g. power performs two separate functions in the Constitution. First, it gives to the federal Parliament *permanent* jurisdiction over “distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern”, for example, aeronautics and the national capital region.[17] Secondly, the p.o.g.g. power gives to the federal Parliament *temporary* jurisdiction over all subject matters needed to deal with an emergency. On this dual function theory, it is not helpful to regard an emergency as being simply an example of a matter of national concern. As Beetz J. said, “in practice the emergency doctrine operates as a partial and temporary alteration of the distribution of power between Parliament and the provincial Legislatures”.[18]

This theory certainly explains most of the cases. The leading “emergency” cases did involve legislation which asserted a sweeping new category of federal power over property, prices, wages or persons: for example, combinations, hoarding, prices and profits;[19] prices;[20] labour relations and standards;[21] the marketing of natural products;[22] rents;[23] and deportation.[24] Accordingly, in these cases the legislation

was upheld only if there was an emergency. The leading "national concern" cases each involved legislation over a more distinct and specific subject matter: for example, aeronautics;[25] the national capital region;[26] the control of marine pollution by the dumping of substances;[27] atomic energy;[28] and minimum national standards of greenhouse gas price stringency to reduce greenhouse gas emissions.[29] Accordingly, in these cases, no emergency was required, and the legislation was upheld if the subject matter was judged to be of national concern.[30]

Not all of the cases fit the theory. *Russell v. The Queen* (1882)[31] and the *Margarine Reference* (1951)[32] do not sit easily together. If the federal prohibition of one product—alcohol or margarine—requires an emergency, as *Margarine* implies, then *Russell* is wrong. If, however, the subject matter of alcohol or margarine is sufficiently specific that it requires only a showing of national concern, as *Russell* implies, then the courts were wrong to call for an emergency in *Margarine.* On the other hand, even if the national concern test is the appropriate one, one can justify the result of *Margarine* on the ground that the prohibition of a particular product lacking any special strategic importance was not sufficiently national in its dimensions; but it is not easy to see the national concern in *Russell*, especially as the legislation was brought into force by local votes. The *Unemployment Insurance Reference* (1937)[33] also gives difficulty. One would have thought that unemployment insurance was sufficiently specific to qualify as a new judge-made head of federal power, and that it had the requisite national concern. And, even if an emergency was necessary for this and the other "new deal" statutes, one would have thought that the depression of the 1930s qualified. But *Russell* and the *Unemployment Insurance Reference* are difficult to explain on any theory. Probably, both cases were wrongly decided.

Footnotes

0.50 However, in the *Greenhouse Gas Pollution Pricing Act Reference*, 2021 SCC 11, Rowe J., in dissent, said that the distinction between the gap branch and the national concern branch adopted in this book (and, it must be said, in other commentary, which is cited in para. 499 of his opinion) is neither supported by the case law nor useful, and that the p.o.g.g. power, properly understood, only has two branches: an emergency branch and a national concern branch, which incorporates the gap branch (see para. 459; see also paras. 478, 499–528). Brown J., who wrote separately in dissent, agreed with this suggestion (at para. 398). One key implication of this view is that the test that applies to national concern branch cases would also apply to gap branch cases – even if, as argued in this book, the gap branch is only engaged by a lacuna in the text of the division of powers (see para. 500). Rowe J. acknowledged that this view "could be seen as unorthodox" (at para. 478). Wagner C.J., who wrote for the majority of the Court, did not explicitly reject Rowe J.'s reformulation of the branches of the p.o.g.g. power, but did explicitly reject Rowe J.'s articulation of the national concern test (at para. 139) – which, as Rowe J. acknowledged, was informed by his understanding of "the affinity between 'gap' and 'national concern'" (at para. 500).

1 Johannesson v. West St. Paul, [1952] 1 S.C.R. 292.

2 Munro v. National Capital Commission, [1966] S.C.R. 663.

3 R. v. Crown Zellerbach, [1988] 1 S.C.R. 401.

4 Ontario Hydro v. Ont., [1993] 3 S.C.R. 327.

4.50 Re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11.

5 Johannesson v. West St. Paul, [1952] 1 S.C.R. 292.

6 Munro v. National Capital Commission, [1966] S.C.R. 663.

7 R. v. Crown Zellerbach, [1988] 1 S.C.R. 401.

7.50 In Re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, the Supreme Court of Canada rejected (at para. 137) a variation on this argument – that matters that originally fell within provincial heads of power other than s. 92(16) (dealing with matters "of a merely local or private nature in the province"), including those matters falling within the broad provincial head of power in s. 92(13) over "property and civil rights", cannot become matters of national concern by "acquiring national dimensions".

8 "Unity and Diversity in Canadian Federalism" (1975) 53 Can. Bar Rev. 597; see also G. Le Dain, "Sir Lyman Duff and the Constitution" (1974) 12 Osgoode Hall L.J. 261, 293.

9 "Unity and Diversity in Canadian Federalism" (1975) 53 Can. Bar Rev. 597, 610.

10 Re Anti-Inflation Act, [1976] 2 S.C.R. 373.

11 Laskin C.J., with whom Judson, Spence and Dickson JJ. agreed, applied the emergency branch, but he suggested (at 419) that the national concern branch could also have sustained the legislation. However, he did not pursue this idea; in particular, he did not explain his disagreement with Beetz J.'s carefully reasoned opinion that the legislation could *not* be sustained by the national concern branch, which on this had attracted a majority.

12 In R. v. Crown Zellerbach, [1988] 1 S.C.R. 401, Le Dain J., writing for the majority of the Court, said (at 431–432) that the national concern branch is "separate and distinct" from the emergency

branch, and he applied the national concern branch without reference to the requirements of the emergency branch. This indicated agreement with Beetz J. La Forest J., who dissented, also seemed to assume the correctness of Beetz J.'s analysis. In Re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, Wagner C.J., writing for the majority of the Court, provided a review of the national concern branch cases that pointed (at para. 97) to Beetz J.'s opinion in the *Anti-Inflation Reference* as the opinion that had clarified "[t]he precise distinction between emergency cases and national concern cases".

13 Re Anti-Inflation Act, [1976] 2 S.C.R. 373, 451; he also acknowledged his indebtedness to G. Le Dain, "Sir Lyman Duff and the Constitution" (1974) 12 Osgoode Hall L.J. 261.

14 Re Anti-Inflation Act, [1976] 2 S.C.R. 373, 458. Accord, R. v. Crown Zellerbach, [1988] 1 S.C.R. 401, 431–432.

15 Re Anti-Inflation Act, [1976] 2 S.C.R. 373, 452.

16 Re Anti-Inflation Act, [1976] 2 S.C.R. 373, 461.

17 Re Anti-Inflation Act, [1976] 2 S.C.R. 373, 457.

18 Re Anti-Inflation Act, [1976] 2 S.C.R. 373, 461.

19 Re Board of Commerce Act, [1922] 1 A.C. 191.

20 Fort Frances Pulp and Power Co. v. Man. Free Press Co., [1923] A.C. 695.

21 Toronto Electric Commissioners v. Snider, [1925] A.C. 396; A.-G. Can. v. A.-G. Ont. (Labour Conventions), [1937] A.C. 326.

22 A.-G. B.C. v. A.-G. Can. (Natural Products Marketing), [1937] A.C. 377.

23 Re Wartime Leasehold Regulations, [1950] S.C.R. 124.

24 Co-op. Committee on Japanese Canadians v. A.-G. Can., [1947] A.C. 87.

25 Johannesson v. West St. Paul, [1952] 1 S.C.R. 292.

26 Munro v. National Capital Commission, [1966] S.C.R. 663.

27 R. v. Crown Zellerbach, [1988] 1 S.C.R. 401.

28 Ontario Hydro v. Ont., [1993] 3 S.C.R. 327.

29 Re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11.

30 In Re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, several interveners argued (with some support from the Attorney General of Canada – see para. 395) that the legislation involved – the federal Greenhouse Gas Pollution Pricing Act – could be sustained by the emergency branch. However, the majority of the Court, per Wagner C.J., held that the legislation was authorized by the national concern branch, and so did not address the emergency argument. The emergency argument was rejected by Brown J. in dissent (at paras. 399–403). Rowe J., who wrote a separate dissenting opinion, also concurred with Brown J.'s opinion (at paras. 459, 594, 616).

31 Russell v. The Queen (1882), 7 App. Cas. 829.

32 Canadian Federation of Agriculture v. A.-G. Que., [1951] A.C. 179.

33 A.-G. Can. v. A.-G. Ont. (Unemployment Insurance), [1937] A.C. 355.

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The fact that all the parties in the legislature affirmed the primacy of the Code in these circumstances lent the legislative history significant weight.

§23.88 ***Appropriate weight.*** With the demise of the exclusionary rule, the courts now face the challenge of formulating principles that may be used in assessing the weight of this material. Some things are clear. For example legislative history that is itself ambiguous, contradictory or inconclusive may be disregarded. In *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, LeBel J. wrote:

> Although both parties rely on Hansard evidence related to the movement of the hedging provision from the Regulation to the Act, I find that evidence to be ambiguous and of little assistance in this case. Accordingly, any analysis of the 1987 amendments must be grounded in an examination of the scheme and context of the revised Act.[124]

In A.Y.S.A. *Amateur Youth Soccer Association v. Canada (Revenue Agency)*, McLachlin C.J. wrote:

> ... I have difficulty accepting the government's 'occupied field' argument based on excerpts from *Hansard*. ...
>
> ... [T]here is nothing in the passages cited by the government to indicate that the creation of the RCAAA [registered Canadian amateur athletic association] regime precluded the registration of other sports associations as charities. Parliament can be taken to have put its mind to the question of which athletic associations would qualify as RCAAAs and to have chosen nationwide organizations only. It may also be that Parliament was operating under the assumption that athletic associations were not considered charitable at common law, which explains the special provisions ensuring charity-like status for RCAAAs (*House of Commons Debates*, vol. VII, 1st Sess., 28th Parl., April 2, 1969, at p. 7423). However, neither of these propositions evince a parliamentary intent to freeze the development of the common law on charitable status or to occupy the field for all amateur sports. ...[125]

§23.89 The weight accorded particular materials is appropriately assessed in terms of a court's reasons for admitting them in the first place. There are two main justifications for admitting legislative history. First, when materials that explain the purpose or meaning of legislation or its intended effects are brought to the attention of the legislature, which then proceeds to enact it, an interpreter may legitimately infer that the legislature enacted the legislation on the understanding expressed in the materials. When the interpretive issue before the court is specifically and clearly addressed by the Minister or a representative of the

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124 [2006] S.C.J. No. 20, [2006] 1 S.C.R. 715, at para. 39 (S.C.C.). See also *R. v. Summers*, [2014] S.C.J. No. 26, 2014 SCC 26, at paras. 6, 54 (S.C.C.); *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, [2012] S.C.J. No. 71, 2012 SCC 71, at para. 107 (S.C.C.).

125 [2007] S.C.J. No. 42, [2007] 3 S.C.R. 217, at paras. 12-13 (S.C.C.).

Minister, the legislative history may bear considerable weight.[126] Second, although courts are the official and ultimate interpreters of legislation, they are appropriately influenced by authoritative opinion.

§23.90 In judging the authority of legislative history materials, there is no reason why the courts should not acknowledge the actual role played by Cabinet and government bureaucracies in the preparation of legislation. Formal and prepared statements by responsible ministers delivered to the legislature at second reading are the most frequently relied on legislative history, presumably because those statements are taken to express the government's intent. Although government intent is not the same as legislative intent, in a parliamentary system the government is most often the source of the legislative initiative and the author of the legislative text.[127] An explanation of the meaning or purpose of a text or its intended application is normally considered authoritative when it issues from the person who made the text as opposed to some third party. In addition to the remarks of the sponsoring Minister, reliance may also be placed on the explanations of the parliamentary secretary who typically speaks for the Minister at third reading and on the testimony of ministry officials before legislative committees. In the case of private member's bills, the authority of the maker would attach to the remarks of the member introducing the bill, who is assumed to be responsible for its content.

§23.91 The authority of a minister or an official can be undermined, of course, if it appears that partisan politics may have distorted the accuracy of their statements to the legislature or a legislative committee. In *Ontario Teachers' Federation v. Ontario (Attorney General)* Gouge J.A. wrote:

> While the court can consider admissible extrinsic evidence of purpose, it must be careful to ensure that the evidence has an institutional quality that reflects the intention of the legislature and not just the individual motivation of a particular member of the government.
>
> ...
>
> Expressions of motivation by individual government actors must be scrutinized to see that they truly reflect legislative intent, rather than simply individual concerns.[128]

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126 In *Warner v. Metropolitan Police Commissioner*, [1969] 2 A.C. 256, at 279 (H.L.), Lord Reid suggested that although the exclusionary rule was basically sound, "there is room for an exception where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or the other."

127 Government bills typically begin with a memorandum from Cabinet which sets out the parameters of the legislation. No government bill goes forward without Cabinet approval.

128 [2000] O.J. No. 2094, 49 O.R. (3d) 257, at paras. 32-34 (Ont. C.A.). On this basis, ministerial statements or government publications of the sort relied on in the *Upper Churchill Water Reversion Act Reference*, made outside the legislature and addressed to the public at large, arguably should receive only minimal weight.

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the reader's right to rely on the letter of the law interpreted in its context.

SUBSECTION 4

CLARITY OF PARLIAMENTARY HISTORY

The weight afforded to parliamentary history must be proportional to the clarity of the information that can be obtained with respect to legislative intent. In both *Construction Gilles Paquette Ltée* v. *Entreprises Végo Ltée* and *Doré* v. *Verdun (City)*, Gonthier J. underlined the fact that the texts consulted indicated clearly the intention of the legislature.[82] On the other hand, in *R.* v. *Davis*, Lamer CJ. deprecated the role of parliamentary history because the information "does not shed much light on the meaning [. . .]".[83]

Likewise, it is useful to establish a certain hierarchy for the contents of the parliamentary history used. For example, statements by the minister sponsoring a bill should be considered more persuasive than partisan comments from the Official Opposition.[84] Additionally, an amendment passed by the legislature as a whole should generally be considered to provide a clearer indication of legislative intent than an individual's answer to a question given, almost extemporaneously at a commission hearing or parliamentary committee.

* * *

The Supreme Court's openness in recent years to the use of parliamentary history is certainly a noteworthy evolution in the law of interpretation in Canada. In fact, it is undoubtedly the most significant development in this area in the last thirty years.

82. *Construction Gilles Paquette ltée* v. *Entreprises Végo ltée*, [1997] 2 S.C.R. 299, 311: "In the case at bar, the parliamentary debates show that the legislature's reading of the provision was clear and uncontroversial and confirm that the interpretation given is correct"; *Doré* v. *Verdun*, [1997] 2 S.C.R. 862, 885: "In the case at bar, the parliamentary history makes a number of references to the scope of art. 2930 C.C.Q. and even express a unanimous intention on the part of the legislators."
83. *R.* v. Davis, [1999] 3 S.C.R. 759, par. 50.
84. See *Perron-Malenfant* v. *Malenfant (Trustee of)*, [1999] 3 S.C.R. 375, par. 35-36, where Justice Gonthier refers to statements by the minister sponsoring the bill and to those of another member.