Court File No: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN TRANSPORTATION AGENCY

Intervener

APPLICANT'S SUPPLEMENTARY BOOK OF AUTHORITIES

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TO: **THE ATTORNEY GENERAL OF CANADA**

AND TO: **CANADIAN TRANSPORTATION AGENCY**

Tab	Authority
1.	*Ahamed v. Canada*, 2020 FCA 213
2.	*C.D. Lee trucking Ltd. v. Industrial Wood and Allied Workers of Canada*, 1998 CanLII 6678 (BC SC)
3.	*Canada v. Bowker*, 2023 FCA 133
4.	*Canadian Frontline Nurses v. Canada (Attorney General)*, 2024 FC 42
5.	*CNG Transmission Corp. v. Canada (National Energy Board) (T.D.)*, 1991 CanLII 13583 (FC), [1992] 1 FC 346
6.	*Hameed v. Canada (Prime Minister)*, 2024 FC 242 (CanLII)
7.	*International Air Transport Association et al. v. AGC and CTA* (SCC 40614)
8.	*Mercer v Yukon (Government of)*, 2023 YKSC 59
9.	*Pothier c. Canada (Attorney General)*, 2024 FC 478

para. 5

Federal Court of Appeal | Cour d'appel fédérale

Date: 20201210

Docket: A-206-19

Citation: 2020 FCA 213

2020 FCA 213 (CanLII)

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
LOCKE J.A.

BETWEEN:

CANADIAN WESTERN TRUST COMPANY AS TRUSTEE OF THE FAREED AHAMED TFSA

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard by online video conference hosted by the registry on October 22, 2020.

Judgment delivered at Ottawa, Ontario, on December 10, 2020.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: GAUTHIER J.A.
DE MONTIGNY J.A.

Federal Court of Appeal | Cour d'appel fédérale

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2020 FCA 213 (CanLII)

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REASONS FOR JUDGMENT

LOCKE J.A.

I. Overview

[1] This decision concerns an appeal from a decision of the Tax Court of Canada (2019 TCC 121, per Pizzitelli J.) which dismissed the appellant's motion to compel the respondent, as part of discovery, to provide certain documents and answers to certain questions. The appellant's motion

was in the context of an appeal before the Tax Court in which the parties agree that the only issue in dispute concerns the interpretation of a statutory provision. Specifically, the question is whether trading activities of the kind carried on by the appellant constitute carrying on a business so as to require the payment of tax despite the appellant being a Tax-Free Savings Account (TFSA) trustee.

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[2] The appellant alleges many errors by the Tax Court, but not all of these have to be addressed in order to dispose of this appeal.

[3] The parties agree, and I concur, that the standard of review in this appeal is as contemplated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*). The standard of correctness applies to questions of law (see *Housen* at para. 8), but findings of fact or of mixed fact and law, unless there is an extricable question of law, are reviewable only where the court below has made a palpable and overriding error (see *Housen* at paras. 10 and 36).

[4] The appellant adds that this Court should not defer to a motions judge on findings of fact or mixed fact and law where that judge has failed to demonstrate impartiality. The appellant argues that the Tax Court gave rise to a reasonable apprehension of bias by (i) basing its decision on a number of issues that had not been raised or addressed by the parties, and (ii) awarding costs in any event of the cause.

II. Bias

[5] I will deal with the bias argument first. I start by noting that bias allegations do not lend themselves to a standard of review analysis at all: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para. 55. If an appellant is successful in showing that a lower court's decision gave rise to a reasonable apprehension of bias, then the appeal will be allowed based on a breach of natural justice arising from that bias. On the other hand, if an appellant is not successful in such an argument, then bias cannot be the basis of a successful appeal. Either way, deference is not a factor. Parties are simply entitled to an impartial decision.

[6] In any case, the appellant's arguments on bias come nowhere near what is required. The appellant recognizes its legal burden, which is to show that an informed person, viewing the matter realistically and practically – and having thought the matter through – would think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly (*Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 at para. 60; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282 at paras. 20-21, 26; *Badawy v. 1038482 Alberta Ltd.*, 2019 FCA 150 at para. 21).

[7] The appellant's assertions concerning issues not raised or addressed by the parties and costs awarded in any event of the cause are clearly insufficient. If the Tax Court had erred on either of these points, such an error might be a basis to allow the appeal, but it would not, without more, suggest bias. Moreover, the appellant's list of seven findings and rulings by the

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Tax Court that were not subject to argument (see paragraph 38 of the appellant's memorandum of fact and law) is unconvincing. Most of those points were not determinative and were unnecessary to the Tax Court's decision. For example, as discussed below, the appellant mischaracterizes the Tax Court's comments concerning the limits of its power to review a decision to redact portions of documents produced under the *Access to Information Act*, R.S.C. 1985, c. A-1 (AIA). Moreover, those comments were not the basis of the Tax Court's decision to refuse to order the production of unredacted versions of those documents.

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[8] I agree with the respondent, and the appellant acknowledges, that bias allegations should not be undertaken lightly because they call into question not simply the personal integrity of the judge, but the integrity of the administration of justice (*R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193 at para. 113). I also agree with the respondent that bias allegations should not have been made in this appeal.

III. Analysis of Substantive Issues on Appeal

[9] My discussion of the substantive issues is not organized in the same way as the appellant has organized its arguments, but it addresses all of the discovery questions in issue.

[10] I preface this analysis by noting an overarching argument by the appellant that the errors allegedly made by the Tax Court were extricable errors of law, and hence subject to review on a standard of correctness. The appellant argues that, though the Tax Court correctly stated the legal test to be applied, it failed to apply that test. I disagree that this case concerns any extricable error of law. Rather, the appellant's arguments are effectively that the Tax Court erred in its

application of the law to the facts of this case. I am not convinced that the Tax Court failed to apply the legal test described in its decision, or applied a different legal test. It follows that the standard of palpable and overriding error applies.

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A. *Public Documents*

[11] The Tax Court found that certain of the documents sought by the appellant are in the public domain, and refused to order production for that reason, since such an order would amount to requiring the respondent to do the appellant's research.

[12] The appellant argues that the documents said to be available to the public are not, in fact, publicly available since the appellant has been unable to obtain the documents despite diligent efforts. The appellant does not argue that such documents are confidential, or impossible to obtain. For example, question 11 asserts that the documents sought therein are "very difficult to obtain." Also, question 14 argues simply that "[i]t may be easier for the respondent to locate" the documents sought therein.

[13] In my view, such documents are publicly available even if they are allegedly difficult to obtain. The Tax Court did not err in characterizing the appellant's request as an effort to have the respondent do its research, and in refusing to order production of such documents.

[14] This section addresses the appellant's questions 11-14.

B. *Non-Public Documents*

[15] The Tax Court also refused to order production of, and answers to questions about, internal Department of Finance documents on the basis, among other things, that they are of very little or no relevance to the statutory interpretation issue in the underlying appeal before the Tax Court.

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[16] The discussion in this section addresses the appellant's questions 24-30, 36, 38 and 39. Questions 24-30 all concern a redacted table that the appellant obtained pursuant to a request under the AIA. The table is entitled "Comparison of tax characteristics of proposed LSP and DSP and existing RRSP and RESP" and is dated January 19, 2007. The appellant notes that LSP later came to be referred to as TFSA when they were introduced in the *Budget Implementation Act, 2008*, S.C. 2008, c. 28, which was tabled on February 26, 2008, and received Royal Assent on June 18, 2008. The appellant focuses on the third page of the table, and a row entitled "Carrying on a business." On that row, entries under the columns headed "LSP" and "RRSP" read, respectively, "Exemption applies only to income derived from investing of funds, thus unrelated business income would be taxable" and "Taxable on unrelated business income." Questions 24-30 are reproduced here:

> 24. Does this table accurately reflect the Department of Finance's policy in January 2007 on the kind of business income that is taxable or exempt to a TFSA and an RRSP?
>
> 25. If so, what is meant by "unrelated business income"?
>
> 26. The table seems to imply that "related business income" is exempt. If so, what is meant by related taxable income?
>
> 27. Does this table accurately reflect the Department of Finance's (and Parliament's) legislative intent and policy in relation to the kind of business

> income that is taxable or exempt to a TFSA and an RRSP when section 246.2(6) [sic, 146.2(6)] was enacted?
>
> 28. If the table does not accurately reflect such policy, or the policy was subsequently changed as a matter of fact, when was that policy changed?
>
> 29. As a matter of fact, what policy replaced it?
>
> 30. If the policy was changed please produce any document produced by or in the possession of the Department of Finance which supports such a change (including, but not limited to memoranda or other guidance provided by the Policy Division of the Department of Finance).

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[17] By these questions, the appellant asks about the meaning of certain references in the table, whether the table reflects the "legislative intent and policy" of the Department of Finance and Parliament, any changes to such policy, and documents related to any such changed policy.

[18] The remaining questions in issue in this section, questions 36, 38 and 39, seek (i) an unredacted version of this and other documents obtained pursuant to a request under the AIA, and (ii) admissions that said documents were made in the usual and ordinary course of business.

[19] On the overarching issue of relevance, the Tax Court correctly noted various general principles applicable to discovery, including (i) that it should be broadly and liberally construed, (ii) that the threshold is lower in discovery than at trial, (iii) that earlier drafts of a final position paper do not have to be disclosed, and (iv) that even where relevance is established, the Court has a residual discretion to refuse document production.

[20] The appellant argues that the redacted internal Department of Finance documents are relevant to statutory interpretation, and should be produced in unredacted form. The appellant

argues that documents prepared by government employees participating in the legislative process are admissible as permissible extrinsic aids. The appellant argues that relevance is not limited to documents that are published or otherwise available to the public.

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[21] The Tax Court based its finding that the internal documents in question are of marginal relevance on *Superior Plus Corp. v. Canada*, 2016 TCC 217 at para. 34, which provides such documents are not relevant to ascertaining the Minister's mental process in auditing and assessing a taxpayer, unless they have been communicated to the Minister. The respondent argues that the Tax Court was correct to apply the same reasoning to statutory interpretation: internal finance documents that have not been communicated to the Minister are not relevant to ascertaining Parliamentary intent.

[22] It is tempting to follow this reasoning and to agree with the respondent's position that documents must be publicly available in order to be relevant to statutory interpretation. Otherwise, it would be possible for members of the public to be left without access to certain information that is necessary to fully understand a particular law with which they are required to comply. Such a situation would be problematic for the reasons mentioned in *Pepper (Inspector of Taxes) v. Hart*, [1992] 3 W.L.R. 1032 at 1042 (U.K.H.L.):

> A statute is, after all, the formal and complete intimation to the citizen of a particular rule of the law which he is enjoined, sometimes under penalty, to obey and by which he is both expected and entitled to regulate his conduct. We must, therefore, I believe, be very cautious in opening the door to the reception of material not readily or ordinarily accessible to the citizen whose rights and duties are to be affected by the words in which the legislature has elected to express its will.

[23] Notwithstanding this concern, the appellant argues that the scope of documents that could be relevant to statutory interpretation is viewed more broadly. For example, the appellant cites *Delisle v. Canada (Attorney General)*, [1999] 2 S.C.R. 989 (*Delisle*), which concerned an argument that a provision of a federal statute violated the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11. As part of his analysis on behalf of the majority of the Court in *Delisle*, Bastarache J. considered the purpose of the statutory provision in question in the course of interpreting it. At para. 17, he stated as follows:

> […]Although extrinsic sources may be used to interpret legislation and to determine its true meaning, when the meaning of the challenged provision is clear, they are of little assistance in determining the purpose of a statute in order to evaluate whether it is consistent with the *Charter*. Generally, the Court must not strike down an enactment which does not infringe the *Charter* in its meaning, form or effects, which would force Parliament to re-enact the same text, but with an extrinsic demonstration of a valid purpose. That would be an absurd scenario because it would ascribe a direct statutory effect to simple statements, internal reports and other external sources which, while they are useful when a judge must determine the meaning of an obscure provision, are not sufficient to strike down a statutory enactment which is otherwise consistent with the *Charter*. Legislative intent must have an institutional quality, as it is impossible to know what each member of Parliament was thinking. It must reflect what was known to the members at the time of the vote. It must also have regard to the fact that the members were called upon to vote on a specific wording, for which an institutional explanation was provided. The wording and justification thereof are important precisely because members have a duty to understand the meaning of the statute on which they are voting. This is more important than speculation on the subjective intention of those who proposed the enactment. (emphasis added)

[24] This passage recognizes the potential relevance of internal documents to the interpretation of "obscure" statutory provisions. It is not clear what constitutes "obscure", and I do not reach a conclusion on this point. I note that this passage does not state clearly whether internal, non-public documents can be relevant to statutory interpretation. In fact, the focus on

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"what was known to the members [of Parliament] at the time of the vote," suggests that non-public documents are not relevant.

[25] Ruth Sullivan, in *Sullivan on the Construction of Statutes*, 6th ed., (Toronto: LexisNexis, 2014) at §23.11 casts a broad net for the types of documents that can be relevant to statutory interpretation:

> Like evidence of external context, opinions about the purpose and meaning of legislation can be found anywhere: before enactment, in the materials generated by government employees participating in the legislative process (instructing officers, drafters, legal opinion givers) and, after enactment, in interpretive guidelines issued by administrative agencies, in judicial or administrative case law and in the daily decisions of government employees charged with administering the legislation. Until recently, the primary source of opinion about the meaning of legislation was judicial case law. Courts were unwilling to look at the practice of bureaucrats or the opinions of administrative tribunals and, except for standard textbooks, scholarly opinion was largely ignored. The current tendency, however, is to look at any material that meets the threshold test of relevance and reliability.

[26] Again, this passage does not state clearly that non-public documents can be relevant to statutory interpretation. However, it does appear that the legislative process (during which relevant documents could be created) begins early. In *Mikisew Cree First Nation v. Canada*, 2018 SCC 40, [2018] 2 S.C.R. 765 (*Mikisew*) at para. 120, Brown J. stated that "the legislative process begins with a bill's formative stages, even where the bill is developed by ministers of the Crown." Brown J went on in paragraph 121 to state

> Public servants making policy recommendations prior to the formulation and introduction of a bill are not "executing" existing legislative policy or direction. Their actions, rather, are directed to informing potential changes to legislative policy and are squarely legislative in nature.

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[27] Care must be taken not to read *Mikisew* too broadly. That case concerned whether the law-making process (described at paragraph 116 thereof as the steps from initial policy development to royal assent) was subject to the Crown's duty to consult indigenous peoples about steps that could adversely affect their rights. *Mikisew* was not concerned with statutory interpretation.

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[28] Sullivan, relying on the Newfoundland Court of Appeal decision in *Reference re Upper Churchill Water Rights Reversion Act* (1982), 134 D.L.R. (3d) 288, 36 Nfld. & P.E.I.R. 273, rev'd [1984] 1 S.C.R. 297 (*Upper Churchill*), goes on at §23.13 to state:

> When the purpose of a provision is discussed or its meaning explained during the enactment process, and the legislation is then passed on that understanding, the explanation or discussion offers persuasive (if not conclusive) evidence of the legislature's intent.

[29] However, the Supreme Court of Canada in *Upper Churchill* offered a more nuanced approach to the relevance of extrinsic evidence. After discussing the relaxation of the former general exclusionary rule against admissibility of extrinsic evidence, the Court stated at p. 318:

> It will therefore be open to the Court in a proper case to receive and consider extrinsic evidence on the operation and effect of the legislation. In view of the positions of the parties, particularly the appellants' contention that the *Reversion Act* has extra-provincial effect, this is, in my opinion, such a case.
>
> I agree with the Court of Appeal in the present case that extrinsic evidence is admissible to show the background against which the legislation was enacted. I also agree that such evidence is not receivable as an aid to construction of the statute. However, I am also of the view that in constitutional cases, particularly where there are allegations of colourability, extrinsic evidence may be considered to ascertain not only the operation and effect of the impugned legislation but its true object and purpose as well. This was also the view of Dickson J. in the *Reference re Residential Tenancies Act, 1979*, [[1981] 1 S.C.R. 714], at p. 721, where he said:

> In my view a court may, in a proper case, require to be informed as to what the effect of the legislation will be. The object or purpose of the Act in question may also call for consideration though, generally speaking, speeches made in the Legislature at the time of enactment of the measure are inadmissible as having little evidential weight.
>
> This view is subject, of course, to the limitation suggested by Dickson J., at p. 723 of the same case, that only evidence which is not inherently unreliable or offending against public policy should be admissible…

[30] Not only does the Supreme Court leave room for cases where extrinsic evidence will not be relevant, but it also limits the issues to which such evidence might be relevant. Moreover, it should be noted that *Upper Churchill* was in a constitutional law context, in which the Supreme Court has traditionally been more open to extrinsic evidence (see p. 317).

[31] In the end, though there are good reasons to be reluctant to consider non-public documents in the exercise of statutory interpretation, it is difficult to state unequivocally that such documents could never be relevant. The better question is whether the documents in question in the present appeal have an institutional quality such that they could represent the government's position concerning the legislation at issue. If not, such documents are not relevant.

[32] It is important to bear in mind that this appeal concerns whether the Tax Court made a palpable and overriding error in applying the law to the facts. Accordingly, this Court owes deference to the Tax Court on issues of mixed fact and law.

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[33] It is also important to bear in mind that jurisprudence must always be considered in its proper factual context. It is helpful to observe that questions 24-30 in this case concern a document that predates the legislative provision of interest. That document is hence similar to the "earlier drafts of a final position paper" which do not have to be disclosed (see paragraph 19 above).

[34] The Tax Court was equivocal about the relevance of the internal documents in question. At paragraph 18 of its decision, in dealing with discovery question 39, it concluded that they "have very little or no relevance." The Tax Court did not state here that the documents in question had no relevance whatsoever. Therefore, I understand the Tax Court's refusal to order production of the unredacted documents sought in question 39 to be an exercise of its residual discretion to refuse document production even when the documents in question may have marginal relevance.

[35] Later, the Tax Court reached the same conclusion at paragraph 34 concerning questions 24-30. Here, the Tax Court did not equivocate as it did at paragraph 18; it simply stated that the internal documents in question were "irrelevant." However, the Tax Court stated that it was adopting the same reasoning as in paragraph 18, and I take that to include the equivocation. Finally, at paragraphs 37 and 38, the Tax Court reached the same conclusion about questions 36 and 38, agreeing with the respondent's position that the documents in question were "irrelevant." Again, I take the Tax Court's conclusion to include the equivocation of paragraph 18.

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[36] In my view, the Tax Court made no palpable and overriding error in refusing to order production of unredacted copies of the internal documents in question. Nor did the Tax Court make any palpable and overriding error in refusing to order that the respondent answer questions related to such documents.

[37] Before concluding this section, I wish to address two aspects of the Tax Court's reasons. First, the appellant argues that paragraph 12 suggests that the Tax Court does not have the power to overrule the Information Commissioner's refusal to order production of an unredacted version of a document that has been obtained, with redactions, by means of an AIA request. That is not what the Tax Court stated, and it is incorrect. The criteria applicable to production of documents during discovery are quite distinct from those applicable to disclosure of documents under the AIA. It is clear from the Tax Court's reasons that it was of the view that the internal documents in question were of marginal relevance. As indicated above, this was a proper basis to refuse production. The reference to challenging the redaction of documents with the Information Commissioner seems to have been simply a suggested alternative approach that the appellant could try.

[38] The second aspect of the Tax Court's reasons that I wish to address concerns paragraph 38. There, the Tax Court referred to "earlier versions" of certain documents that the appellant seeks. The appellant asserts that it never requested earlier versions of any documents. Again, the conclusion concerning the marginal relevance of internal documents remains, and that was a proper basis for refusing questions thereon. If the Tax Court was confused about the specific internal documents in issue, it makes no difference here. Even if such an error were palpable, it

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would not be overriding. It is clear that the Tax Court would have refused to order the questions answered regardless of whether or not they were earlier versions. In any case, I believe that the Tax Court was not confused. As indicated in paragraph 33 above, I believe that it was referring to old documents discussing possible policies that might be considered "earlier drafts of a final position paper," and which need not be produced.

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C. *Legal Position vs. Legal Argument*

[39] The Tax Court refused to order that the respondent provide information concerning factual assumptions surrounding the object, spirit and purpose and the policy behind the statutory provisions in issue. It based itself, in part, on the view that the appellant was seeking more than the respondent's legal position, but rather information concerning the respondent's legal argument (to which it is not entitled in discovery). The Tax Court was satisfied that the respondent's legal position was already clear.

[40] The appellant objects arguing that the information it seeks concerns the respondent's legal position and is relevant.

[41] In my view, the Tax Court did not err either in observing that factual assumptions are matters for pleading, not discovery, or in finding that the respondent has already communicated its legal position. The appellant has not convinced me that the Tax Court made a palpable and overriding error or erred on an extricable question of law in concluding that the respondent had already made its position clear and that ordering answers to the questions in issue would invite legal argument.

[42] Paragraph 27 of the Tax Court decision (as well as paragraph 18 thereof) cites an *obiter dicta* statement in *Madison Pacific Properties Inc. v. Canada*, 2019 FCA 19 at para. 28 (*MP Properties*) in support of the conclusion that the questions in issue lacked relevance because the statutory interpretation issue in dispute in the underlying appeal before the Tax Court is a question of law, not a question of fact:

> [27] […]The statutory interpretation of these sections is a question of law, and not a matter of fact and is for the Court to ultimately determine at trial as referenced in *MP Properties* by Gleason J. at paragraph 28 above referred to, the Appellant is entitled to know the Respondent's position on the law, but not its [*sic*] evidence it relies on nor its legal argument.[…]

[43] In my view, the statements in *MP Properties* and by the Tax Court should not be taken as an indication that a party is not entitled during discovery to obtain, and ask questions about, relevant documents simply because they concern a question of law. Rather, I understand these statements to mean that a party may not use discovery to question an opposing party as to which of the documents on the record will be relied on for which legal arguments. Such questions essentially seek the opponent's legal argument rather than its legal position.

[44] The discussion in this section addresses the appellant's questions 1, 2, 10 and 19.

D. *Draft Statement of Agreed Facts*

[45] The Tax Court refused to order that the respondent indicate any facts described in the draft Statement of Agreed Facts that it disputes. In doing so, the Tax Court noted the appellant's own position that the facts at issue are already admitted by the respondent. The Tax Court also

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noted that the draft Statement of Agreed Facts is privileged and confidential, and further that it was not proper to ask whether the respondent refutes any question amongst many.

[46] In my view, the appellant's assertion that all of the facts included in the draft Statement of Agreed Facts have already been admitted in the pleadings is sufficient to dismiss this aspect of the appeal (see paragraphs 83 and 125 of its memorandum). In light of this acknowledgement, it follows that the appellant does not point to any facts in the draft Statement of Agreed Facts that are in dispute, which would be necessary to justify requiring the respondent to answer. Reviewing the pleadings carefully, it appears that the respondent does not actually admit everything in the draft Statement of Agreed Facts. Though most of the statements in the document are admitted, it seems that a few are not. Therefore, the appellant's assertion that all of the facts in the document are admitted appears to be untrue. In any case, this does not change the fact that it was appropriate to refuse to order an answer to the appellant's question since the appellant does not assert any unadmitted facts which could justify such an order.

[47] Even though it is not necessary to address this point, I note that the appellant argues that the Tax Court erred at paragraph 22 in stating:

> A party should not be put in the position on discovery of having to recall by memory all of the facts that may have been admitted in the pleadings.

[48] The appellant suggests that the reference to "recall by memory" indicates that the Tax Court failed to understand that the discovery in issue was in writing (not in person) and that the Minister had abundant time to prepare its answers. I disagree. I do not believe that the Tax Court misunderstood the circumstances of the discovery. Paragraphs 1 and 12 of the reasons clearly

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recognize that the discovery was in writing. Reading paragraph 22 as a whole, I believe that the Tax Court was concerned with the burden on the respondent of having to answer such a broad question with myriad potential implications.

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[49] The discussion in this section addresses the appellant's question 31.

IV. Conclusion

[50] For the foregoing reasons, I would dismiss the present appeal with costs.

[51] The parties agreed on the amounts of their respective costs. Accordingly, I would set the respondent's costs of this appeal at an all-inclusive amount of $2,750.

"George R. Locke"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-206-19
STYLE OF CAUSE:	CANADIAN WESTERN TRUST COMPANY AS TRUSTEE OF THE FAREED AHAMED TFSA v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	BY ONLINE VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 22, 2020
REASONS FOR JUDGMENT BY:	LOCKE J.A.
CONCURRED IN BY:	GAUTHIER J.A. DE MONTIGNY J.A.
DATED:	DECEMBER 10, 2020

APPEARANCES:

Timothy W. Clarke	FOR THE APPELLANT
Perry Derksen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

QED Tax Law Corporation Vancouver, British Columbia	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT

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paras. 2-3, 21, 39-40, 43-46, 50-51, 53-58

Date: 19981126
Docket: A981590
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of Section 2 of the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241; and the Decision of the British Columbia Labour Relations Board

BETWEEN:

C.D. LEE TRUCKING LTD.

PETITIONER

AND:

INDUSTRIAL WOOD AND ALLIED WORKERS OF CANADA (IWA CANADA), CLC, LOCAL UNION NUMBER 1-424, THE BRITISH COLUMBIA LABOUR RELATIONS BOARD, KEITH OLEKSIUK, in his capacity as Chair of the British Columbia Labour Relations Board appointed under s. 115 of the British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244; PINE LAKE CONSTRUCTION LTD; and R 274 ENTERPRISES LTD.

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE PITFIELD

Counsel for the Petitioner:	Randal Kaardal Lisa Hynes
Counsel for IWA Canada:	Camran Chaichian
Counsel for Labour Relations Board and Keith Oleksiuk	Frank Borowicz Keith Mitchell

1998 CanLII 6678 (BC SC)

[1] C.D. Lee Trucking Ltd. applies, pursuant to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241 for an order of certiorari or prohibition directed to the Labour Relations Board and its Chair, Mr. Oleksuik, in relation to matters involving the company and Industrial Wood and Allied Workers of Canada, Local 1-424 which are presently before the Board.

[2] The substance of the petitioner's complaint is that a telephone conversation between Mr. Oleksiuk and a union official, the communication of the fact of the call to Vice-Chair Barbara J. Junker, and the substitution of Vice Chair Paul Johnston in place of Ms. Junker as the panel to deal with the matters in dispute, raised a reasonable apprehension of bias or contravened the principle of natural justice permitting a party to be heard with respect to matters affecting it. The petitioner also says that the telephone conversation compromised the independence of the Board.

[3] The petitioner says that for any of the foregoing reasons, it cannot be assured an impartial adjudication by the Board of rights and obligations as between it and the Local and relief is required in respect of the proceedings.

Chronology

[4] The facts giving rise to the complaint are the following.

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[5] On October 23, 1996, the Local was certified as the bargaining agent for employees of Pine Lake Construction Ltd. No collective agreement was concluded between the Local and Pine Lake before May 31, 1997, at which date approximately one-half of the assets of Pine Lake were purchased by Lee Trucking.

[6] Between June 26 and September 5, 1997, the Local filed unfair labour practice complaints with the Board and applied to it for common employer and successor employer declarations in relation to the acquisition of assets by Lee Trucking.

[7] On September 3, 1997, Vice-Chair Junker was established as a panel to hear the application. Ms. Junker conducted a case management hearing on September 30th during which she made procedural rulings with respect to the complaints. She set November 3 and 4, 1997 as the dates for hearing.

[8] In a letter dated October 30, 1997 directed to Ms. Junker, counsel for the Local expressed concern about the orders made at the case management hearing, requested reasons for one of her decisions in respect of which the Local expressed an intention to appeal, and made application in writing for an order compelling the production of documents by Lee Trucking.

[9] In a letter dated October 31, 1997 addressed to Ms. Junker, counsel for the Local requested an adjournment of the hearing scheduled for November 3 and 4, 1997. In his letter, counsel stated the Local had lost all confidence that it would

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receive a fair hearing and indicated it would like to address that issue with the Board's Associate Chair (Adjudication).

[10] Further correspondence from counsel for the Local to Ms. Junker followed on November 20, 1997. The discussion with the Associate Chair (Adjudication) did not take place.

[11] On February 23, 1998, counsel for the Local wrote to the Board requesting new hearing dates. In the absence of a reply, counsel for the Local wrote to Mr. Oleksuik on March 13, 1998 complaining of the handling of the case by Ms. Junker. Counsel requested that the matter be reassigned "to someone who can take some control of it and possibly get matters back on track".

[12] On March 25, 1998, Mr. Oleksuik refused the Local's request stating as follows:

> In your letter you take issue with certain procedural rulings in the above-captioned matters and request that the Vice-Chair assigned to these matters be replaced on the basis of your client's lack of confidence arising from those rulings.
>
> A careful review of your letter provides no basis on which the Board would seriously engage this request. Indeed, in the absence of an application under the Code that would allow for a full and proper process dealing with your concerns about the proceedings, it would be wholly inappropriate for the Board to adopt the position which you have requested. Accordingly, I must advise you that your request will not be entertained.

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[13] On May 5, 1998, counsel for the Local wrote to the Board asking whether the parties would be receiving hearing dates with respect to the Local's complaint. A copy of the letter was sent to counsel for Lee Trucking and to Mr. Everitt who was a senior IWA official. Mr. Everitt was named as the Local's contact person in material filed with the Board.

[14] On May 5, 1998, Mr. Everitt telephoned Mr. Oleksuik. Neither Lee Trucking nor counsel on its behalf was advised of Mr. Everitt's intention to speak to him.

[15] On May 6, 1998, Ms. Junker wrote to counsel for the Local, Lee Trucking and Pine Lake as follows:

> I am in receipt of a letter from counsel for the Union dated May 5, 1998. Further to that letter and Chair Oleksuik's conversation with Frank Everitt, this is to confirm that due to my acting role over the next three months, this matter will be assigned to another Vice-Chair.

[16] On May 11, 1998, the case was assigned to Vice-Chair Johnston who wrote to counsel for the parties on May 11, 1998 as follows:

> This is to confirm that a case management meeting has been scheduled for August 6, 1998 at 9:30 a.m. at the Labour Relations Board, 800-360 West Georgia Street, Vancouver, B.C.

[17] This application for judicial review was filed June 10, 1998.

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[18] It is not disputed that Mr. Oleksuik and Mr. Johnston were active as union representatives and Ms. Junker was active as an employer's representative in labour matters prior to their respective appointments to the Board.

Summary of Positions

[19] Lee Trucking claims that the decision, by whomever made, to reassign the case from Ms. Junker to another panel should be subject to *certiorari*. It also claims that the conduct of the Board warrants an order prohibiting any panel from hearing the Local's complaints of unfair labour practices, and the applications for common employer and successor declarations.

[20] Lee Trucking says the decision with respect to the panel was made without all parties to the proceeding being afforded an opportunity to be heard. Alternatively, the decision, and the manner and context in which it was made, gives rise to a reasonable apprehension of bias on the part of the Board.

[21] Finally, Lee Trucking says the telephone conversation, and the action in response to it irrevocably damages the appearance of the Board's administrative independence with respect to the proceedings involving the Local’s complaints and applications.

[22] The Board submits that the actions of Mr. Oleksiuk and Ms. Junker should not be impugned. It says there was no denial of

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natural justice or procedural fairness which would entitle Lee Trucking to relief; the facts and circumstances do not give rise to any reasonable apprehension of bias on the part of the Board and more particularly, on the part of Mr. Johnston who has been assigned to hear the case; and there has been no interference with the appearance of the Board's administrative independence with respect to proceedings before it. The Board does not agree that the latter objection, should it be factually well-founded, provides any legal basis for relief.

[23] The Local adopts all submissions made on behalf of the Board.

Analysis

Status of Labour Relations Board in Review Proceeding

[24] The Board claims that where an allegation of bias or reasonable apprehension of bias has been made, it is entitled to be heard in order to explain the record and lead evidence with respect to the circumstances giving rise to the allegation.

[25] Lee Trucking adopts a more restrictive view, saying that the Board is entitled to explain the record and, if necessary, its jurisdiction but not to appear in an attempt to explain or justify its conduct.

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[26] The Board's appearance as a party in the proceeding is contemplated by s. 15(1) of the ***Judicial Review Procedure Act***. However, in the absence of clear language giving it the same status in the proceeding as that enjoyed by the complainant or applicant, courts have restricted the nature and extent of the submissions a tribunal may make in the course of the review proceeding.

[27] A tribunal is restricted "to an explanatory role with reference to the record before [it] and to the making of representations relating to jurisdiction" (see ***Re Northwestern Utilities Ltd. and City of Edmonton*** (1978), 89 D.L.R. (3d) 161 (S.C.C.), at page 177).

[28] A tribunal is permitted to make representations with respect to the reasonableness of its method of consideration of a matter before it and the reasonableness of its decision where it is alleged to have lost jurisdiction by virtue of making a patently unreasonable decision (see ***CAIMAW, Local 14 v. Paccar of Canada Ltd***. (1989), 62 D.L.R. (4th) 437 (S.C.C.).

[29] A tribunal is not permitted to make submissions in relation to an allegation that it has transgressed its authority by its failure to adhere to the rules of natural justice (see ***Northwestern Utilities***, *supra*, p. 179).

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[30] A tribunal may provide evidence of relevant circumstances in order that the court will be in a position to determine whether the circumstances create a reasonable apprehension of bias. It is the application of this principle in the circumstances of this case which causes difficulty.

[31] The principle was considered in ***Ringrose v. College of Physicians and Surgeons of Alberta*** (1975), 52 D.L.R. (3d) 584 (Alta. C.A.). In that instance, the executive committee of the College resolved to suspend Ringrose pending investigation by the discipline committee of complaints against him. The executive committee's decision was set aside on application to the court.

[32] After the executive committee decision was quashed, the discipline committee completed its investigation and recommended disciplinary action against Ringrose. The College acted on the report and suspended Ringrose. He appealed the suspension as he was allowed to do in accordance with provisions of the ***Medical Profession Act,*** R.S.A., 1970, c. 230.

[33] The principal ground of appeal was that there was a reasonable apprehension of bias arising from the fact that one of the members of the discipline committee who had participated in its decision making process was also a member of the executive committee. It was alleged that the officer might not

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be objective and impartial and would feel obliged to support the executive committee's decision although it was wrongful.

[34] Affidavit evidence provided by the registrar of the College was admitted for the purpose of explaining that the officer who was a member of both the executive and discipline committees had not participated in the wrongful decision of the executive committee which had led to the initial suspension, the executive committee had not provided any information to the officer in relation to its proceedings, and the officer was a member of the executive committee by virtue of being a vice-president of the College.

[35] The affidavit evidence was admitted for the purpose of establishing what could have been readily determined by Ringrose had he made reasonable inquiry, namely that the officer had not sat as a member of both the discipline and executive committees when each made its decision. The Court of Appeal made it clear that it was not dealing with a case where an individual who was a member of both committees had participated in the decision making process of each.

[36] With respect to admissibility, Prowse J.A. writing for the Court of Appeal stated the following at page 589:

> In my view these cases merely support the conclusion that when circumstances exist from which a reasonable apprehension of bias arises evidence is not admissible for the purpose of establishing that a

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> person the law presumes to be biased was not in fact biased. They do not purport to deal with the question of the admissibility of evidence for the purpose of having the relevant circumstances before the Court so that it may consider whether in those circumstances a reasonable apprehension of bias arises.

[37] The Court of Appeal went on to conclude that in authorizing individuals to act in overlapping or crossover capacities, the legislature reposed confidence in them to act impartially. In this respect the Court followed the reasoning of the Supreme Court of Canada in ***Law Society of Upper Canada v. French*** (1974), 49 D.L.R. (3d) 1.

[38] In ***Ringrose*** the affidavit evidence was not tendered to explain away any reasonable apprehension of bias but to demonstrate that the presumption of impartiality, notwithstanding crossover committee membership, remained operative because no individual had participated in the decision making process of both committees. Independence and process were not suspect as a result.

[39] The decision of the Alberta Court of Appeal was affirmed on appeal to the Supreme Court of Canada (1979), 67 D.L.R. (3d) 559.

[40] The principle was also considered in ***P.P.G. Industries Canada Ltd. v. A.- G. Can.*** (1975), 65 D.L.R. (3d) 354 (S.C.C.). In his reasons, Laskin C.J.C. stated that "the introduction of

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evidence to explain away a situation which raised a reasonable apprehension of bias affecting that party's position in respect of a decision which he challenged" would not be permitted.

[41] In ***P.P.G. Industries***, the Attorney General of Canada had applied to impugn a decision of the Anti-Dumping Tribunal on the basis that one of its decisions, affecting a party which had been a former client of the chairman, had been signed by the chairman. Evidence was admitted to explain that while the chairman had signed the decision reached by two other members of the Tribunal, he had not been involved in the decision and had only signed because that was thought to be, in accordance with legal advice a formal requirement in respect of tribunal decisions. Absence of participation in the hearing or decision making process dispelled the apprehension of bias.

[42] The ***P.P.G. Industries*** case is similar to ***Ringrose***, *supra*, and stands for the proposition that evidence will be admitted to establish that one, against whom an allegation of bias in respect of a decision is made, did not participate in the decision making process. Neither case supports the proposition that explanations of roles may be offered when participation in the impugned decision making process is apparent on the record and a reasonable apprehension of bias arises as a result of it.

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[43] The question with which I must be concerned is whether the circumstances of which Lee Trucking complains, standing alone, raise a reasonable apprehension of bias.

Bias or Apprehension of Bias

[44] The issue before me is not whether Mr. Oleksiuk was actually biased, but whether the fact of his telephone conversation with Mr. Everitt, his discussion of the conversation with Ms. Junker and the appointment of a new panel almost immediately thereafter could properly cause a reasonably well informed person to have a reasonable apprehension of a biased appraisal or judgment affecting the applicant, however unconscious or unintentional the effect might be (see ***CNG Transmission Corp. v. Canada (National Energy Board)*** (1991), 3 Admin. L.R. (2d) 149) (F.C.T.D.)).

[45] Apprehension of bias is not restricted to any particular type of power being exercised by the Board. If a reasonable apprehension of bias arises in relation to the exercise of any of the Board's functions, judicial review is available. I refer to ***Newfoundland Telephone Co. v. Board of Commissioners of Public Utilities*** (1992), 89 D.L.R. (4th) 289 (S.C.C.), at page 297:

> All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine. This was recognized in ***Nicholson v. Haldimand-Norfolk (Region)***

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> ***Board of Police Commissioners*** (1978), 88 D.L.R. (3d) 671, [1979] 1 S.C.R. 311, 78 C.L.L.C. Chief Justice Laskin at p. 681 held:
>
> > ...the classification of statutory functions as judicial, *quasi* judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question...
>
> Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal: see ***Martineau v. Matsqui Institution (Disciplinary Board)*** (1979), 106 D.L.R. (3d) 385, 50 C.C.C. (2d) 353, [1980] 1 S.C.R. 602. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness.

[46] There are objective factors which compel me to be concerned about the appearance of fairness and impartiality in this case.

[47] With remarkable candour, Ms. Junker reported to the parties in her letter of May 6, 1998 that one of the factors affecting her decision to reassign the matter was a telephone conversation between Mr. Everitt and Mr. Oleksiuk.

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[48] The union was represented by counsel who had earlier been chastised for suggesting that a reassignment should occur. This notwithstanding, Mr. Everitt, by-passing counsel and Ms. Junker, telephoned the Chair directly. That action on his part was wholly improper. It can be construed to have had one purpose only: to persuade the Chair to take action in a matter which was not proceeding as Mr. Everitt would like.

[49] Mr. Oleksiuk accepted the call from Mr. Everitt and embarked upon some discussion of the case with him. He should not have done so. If he were unable to avoid the conversation with Mr. Everitt, he should have refrained from conveying any of Mr. Everitt's comments to Ms. Junker.

[50] Without regard for any of the content, it is entirely reasonable for anyone not a party to the conversation to conclude from Ms. Junker's letter that her reassignment was, in part, at the least, a response to the improper conversation between Mr. Everitt and Mr. Oleksiuk which had the result desired by Mr. Everitt.

[51] The Board is a quasi-judicial body upon which is conferred extensive jurisdiction and power to regulate labour matters. The impact of its decisions upon parties who come before it and the promotion of harmony between employees and employers require the Board to be, and objectively be seen to be, scrupulous, fair, judicious and impartial in its process and

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proceedings. It is of fundamental importance that justice should not only be done, but be manifestly and undoubtedly seen to be done (see ***R. v. Sussex Justices***; ***McCarthy***, Ex parte, [1924] 1 K.B. 256).

[52] The effect of Ms. Junker's letter to counsel on May 6th is to acknowledge that the conversation between Mr. Oleksiuk and Mr. Everitt entered into the decision making process. It is not open to the Board to attempt to minimize the significance of the conversation in relation to the assignment through the affidavit of Ms. Junker which, if accepted, would attribute the reassignment solely to her workload pressures.

[53] Given the record of the Local's objections to Ms. Junker's conduct of the case over a period of months and the fact that the reassignment did not produce an early hearing date but a case management conference to take place three months down the road, an interested party could reasonably apprehend and be concerned that the conversation extended to matters other than the need for an early hearing date.

[54] Should I be in error in that regard with the result that the explanation provided by Ms. Junker is admissible, I would not hesitate to find that the reasonable apprehension of bias on the part of Mr. Oleksiuk was not displaced by her affidavit.

[55] If the Board should be entitled to adduce evidence that the telephone conversation was inconsequential in the decision

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making process, it should have tendered the affidavit evidence of Mr. Oleksiuk so that the court could know of all aspects of the conversation from the evidence of a participant, rather than knowing only of the part that may have been reported to Ms. Junker (see ***Ringrose***, *supra*, at page 561 per Dickson C.J.C.). No affidavit of Mr. Oleksuik was filed in the proceeding.

[56] I find that there was a reasonable apprehension of bias in relation to the removal of Ms. Junker as panel and the assignment of Mr. Johnston to that position.

[57] I cannot accede to the submission of counsel for the Board that Mr. Oleksiuk's conversation with Mr. Everitt should not occasion relief because Lee Trucking makes no allegation of bias against Ms. Junker or Mr. Johnston.

[58] The conversation between the Chair and the union official infected Ms. Junker and Mr. Johnston with the apprehension of bias virus. In the absence of judicial intervention, the virus will persist. That is particularly so given that the chair of the board is charged with the statutory responsibility for the appointment of panels. While the chair may act through a delegate, he ultimately remains responsible for the decisions with respect to the appointment of panels.

Lack of Procedural Fairness

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[59] In addition to creating an apprehension of bias, the fact that Mr. Oleksiuk entertained representations from one of the parties and imparted those representations to Vice-Chair Junker without hearing from the other party constituted a departure from the requirement that all parties be heard in relation to matters of consequence in proceedings before the Board.

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[60] The common law requirement is codified in s. 126(1) of the ***Labour Relations Code*** providing that the Board must give full opportunity to the parties to a proceeding to present evidence and make submissions. In this case, the Chair should have insisted upon receipt of a formal application from the Local, with notice to Lee Trucking, in order that all matters of concern to the Local in relation to the proceeding could have been addressed.

Independence of the Board

[61] At the core of judicial independence is freedom, on the part of a decision maker, from interference or attempted interference by government, pressure groups, or any individual with the decision making process. The principle has been the subject of recent comment by the Supreme Court of Canada in ***Canada (Minister of Citizenship and Immigration) v. Tobiass*** (1997), 151 D.L.R. (4th) 119. The principle is equally applicable to quasi-judicial tribunals.

[62] Mr. Everitt's telephone call without notice to the other side was an attempt to improperly affect the course of proceedings before the Board. The fact of the call itself must be criticized but the mere fact the attempt was made would not necessitate judicial intervention.

[63] As I have noted, it is the actions of the Chair and Vice-Chair in response to the call which raised the apprehension of bias and resulted in a departure from the rules of procedural fairness giving rise to the need for judicial intervention. More need not be said on the subject of independence as a result.

Exhaustion of Internal Remedies

[64] The Board submits that if a reasonable apprehension of bias was created, judicial review is premature because Lee Trucking did not exhaust the remedies provided by the ***Labour Relations Code.***

[65] In the ordinary course an applicant for judicial review should first exhaust internal remedies. The requirement need not be adhered to where there are compelling reasons to the contrary (see ***Adams v. Workers' Compensation Board*** (1989), 42 B.C.L.R. (2d) 228 (B.C.C.A.) at page 230); or where the internal remedy is not likely to be both adequate and effective (see ***Spence v. Prince Albert Board of Police Commissioners***

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(1987), 25 Admin. L.R. 90, at page 109). Departure from the general rule is in the discretion of the court.

[66] Where, as here, the subject of concern is a reasonable apprehension of bias on the part of the Chair in whom the ***Code*** reposes responsibility for the appointment of panels, it is my opinion that an internal review of the kind contemplated by s. 141 of the ***Labour Relations Code*** does not provide an effective alternative remedy.

[67] That is particularly so having regard for the fact that an aggrieved party must apply for leave to have the Board reconsider a decision. Section 141(2) of the ***Code*** provides that leave shall not be granted in the absence of new evidence or a decision of the Board inconsistent with the principles expressed or implied in the ***Code*** or any other ***Act*** dealing with labour relations.

[68] In the circumstances of this case, an internal review would compel a defence to or explanation of the conduct by those against whom the allegations are made. If a defence to or explanation of conduct is inappropriate in the context of judicial review based on apprehension of bias, it is no better in the course of internal review.

[69] The present circumstances are different from those before the court in the case of ***B.C.G.E.U. v. Labour Relations Board***

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of British Columbia (1986), 2 B.C.L.R. (2d) 66 to which reference was made by counsel for the Board. In that case the apprehension of bias was less apparent and the review provisions of ***The Labour Code***, R.S.B.C. 1979, c. 212 governing internal review were more permissive than those in the present ***Code***.

[70] The circumstances also differ from those in ***Carriere v. British Columbia (Labour Relations Board)***, [1995] B.C.J. No. 2927 where apprehension of bias was not in issue.

Relief

[71] Relief is required in the circumstances of this case. While *certioari* may apply in respect of the decision, whether made by Ms. Junker or Mr. Oleksiuk, quashing her removal would result in reversion to the state of affairs as they existed at May 5, 1998. In the circumstances that is an inappropriate result.

[72] I am not prepared to say that the Board is incapable of adjudicating the dispute between Lee Trucking and the Local. I do conclude, however, that it is inappropriate to repose the responsibility for assignment or hearing in any of Mr. Oleksiuk, Ms. Junker or Mr. Johnston.

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[73] I will therefore order that Mr. Oleksiuk, Ms. Junker and Mr. Johnston are prohibited from involving themselves in any way with the subject matter of any complaint between Lee Trucking and the Local.

[74] The matter is referred back to the Board for disposition on the basis that the person holding the office of Associate Chair (Adjudication) at the date of judgment shall, within 30 days of that date establish a panel comprised of a Vice-Chair and members, equal in number, representative of employers and employees, respectively, as contemplated by s. 117(5)(f) of the ***Labour Relations Code***. The panel so constituted shall dispose of all matters now before the Board in relation to Lee Trucking and the Local.

[75] The petitioner is entitled to costs.

"Pitfield, J."

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para. 16

Federal Court of Appeal | Cour d'appel fédérale

Date: 20230608

Docket: A-82-22

Citation: 2023 FCA 133

2023 FCA 133 (CanLII)

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

MARGO DIANNE BOWKER

Respondent

Heard at Vancouver, British Columbia, on March 29, 2023.

Judgment delivered at Ottawa, Ontario, on June 8, 2023.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
GLEASON J.A.

Federal Court of Appeal | Cour d'appel fédérale

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GLEASON J.A.

BETWEEN:

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Appellant

and

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Respondent

REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] In reasons reported as 2021 TCC 14, the Tax Court of Canada allowed the respondent Ms. Margo Dianne Bowker's appeal from the Minister of National Revenue's assessment of a penalty of $139,000, more or less, pursuant to subsection 163(2) of the *Income Tax Act*, R.S.C. 1985 c. 1 (5th Supp.) (the ITA) for, colloquially, gross negligence in making a false statement in

an income tax return. The circumstances giving rise to the penalty were that the respondent relied on a firm of tax preparers to draft and file on her behalf an amended return for her 2010 taxation year in which she claimed large business and capital losses when she had never operated a business. The respondent was essentially passive in the exercise and gave the tax preparers and her husband free rein without any oversight on her part. The Minister refused the claimed losses and imposed the gross negligence penalty.

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[2] After giving the parties the opportunity to make submissions on the issue of costs, the Tax Court awarded the respondent partial indemnity costs equal to 75% of her actual legal expenses (including taxes) and 100% of her disbursements. This is an appeal of that decision, which was reported as 2022 TCC 43 (the Decision). There is no issue as to the disbursements.

[3] His Majesty the King (the appellant) appeals from the Tax Court's award of costs on three grounds. First on the basis that the Tax Court fettered its discretion in deciding *a priori* that the costs should fall within a given range. Secondly that the Tax Court erred in principle in its treatment of three factors which are to be considered in the award of costs, namely the result of the proceeding, any settlement offer and pre-litigation conduct which prolonged the proceedings. Lastly, it submits that the Tax Court breached the appellant's right to procedural fairness in considering a factor that the parties had not raised in their submissions, without giving him the chance to make representations on that factor in coming to its conclusion.

[4] For the reasons which follow, I would allow the appeal with costs and return the matter to the trial judge for a fresh determination of the costs payable to the respondent.

II. Relevant statutory provisions

[5] In its decision, the Tax Court reviewed those factors identified in Rule 147 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (the Rules) which it considered relevant. In order to give an idea of the scope of Rule 147, I reproduce all of the factors it mentions below:

147 (1) The Court may determine the amount of the costs of all parties involved in any proceeding, the allocation of those costs and the persons required to pay them.	147 (1) La Cour peut fixer les frais et dépens, les répartir et désigner les personnes qui doivent les supporter.
…	…
(3) In exercising its discretionary power pursuant to subsection (1) the Court may consider,	(3) En exerçant sa discrétion conformément au paragraphe (1), la Cour peut tenir compte :
(*a*) the result of the proceeding,	*a*) du résultat de l'instance;
(*b*) the amounts in issue,	*b*) des sommes en cause;
(*c*) the importance of the issues,	*c*) de l'importance des questions en litige;
(*d*) any offer of settlement made in writing,	*d*) de toute offre de règlement présentée par écrit;
(*e*) the volume of work,	*e*) de la charge de travail;
(*f*) the complexity of the issues,	*f*) de la complexité des questions en litige;
(*g*) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,	*g*) de la conduite d'une partie qui aurait abrégé ou prolongé inutilement la durée de l'instance;
(*h*) the denial or the neglect or refusal of any party to admit anything that should have been admitted,	*h*) de la dénégation d'un fait par une partie ou de sa négligence ou de son

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	refus de l'admettre, lorsque ce fait aurait dû être admis;
(*i*) whether any stage in the proceedings was,	*i*) de la question de savoir si une étape de l'instance,
(i) improper, vexatious, or unnecessary, or	(i) était inappropriée, vexatoire ou inutile,
(ii) taken through negligence, mistake or excessive caution,	(ii) a été accomplie de manière négligente, par erreur ou avec trop de circonspection;
(i.1) whether the expense required to have an expert witness give evidence was justified given	i.1) de la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants :
(i) the nature of the proceeding, its public significance and any need to clarify the law,	(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,
(ii) the number, complexity or technical nature of the issues in dispute, or	(ii) le nombre, la complexité ou la nature des questions en litige,
(iii) the amount in dispute; and	(iii) la somme en litige;
(*j*) any other matter relevant to the question of costs.	*j*) de toute autre question pouvant influer sur la détermination des dépens.

[6] The liability for gross negligence in making a false statement in an income tax return arises from subsection 163(2) of the ITA:

(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a	(2) Toute personne qui, sciemment ou dans des circonstances équivalant à faute lourde, fait un faux énoncé ou une omission dans une déclaration, un formulaire, un certificat, un état ou une réponse (appelé « déclaration » au présent article) rempli, produit ou présenté, selon le cas, pour une année d'imposition pour l'application de la

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taxation year for the purposes of this Act, is liable to a penalty …	présente loi, ou y participe, y consent ou y acquiesce est passible d'une pénalité …

[7] The provision which allows the Minister to waive or cancel a penalty, as proposed by the respondent, is subsection 220(3.1) of the ITA:

(3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.	(3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

[8] In order to avoid repetition, I will summarize the parts of the Tax Court's reasons which are in issue in my analysis.

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III. Analysis

[9] The first error which the appellant raises is the Tax Court's determination that partial indemnity costs in this case should fall in the range of 50% to 75% of the respondent's actual legal expenses. The appellant argues that this amounts to a fettering of discretion.

[10] The appellant then argues that the Tax Court misunderstood or misapplied the following items in Rule 147(3):

> (*a*) the result of the proceeding,
>
> (*d*) any offer of settlement made in writing, and
>
> (*g*) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding.

[11] In addition, the appellant claims that the Tax Court breached its right to procedural fairness in relation to item (*g*).

[12] These then are the issues in this appeal.

[13] In their submissions on the standard of review, the parties referred to the venerable formula according to which a discretionary decision may be set aside if the tribunal (here, the Tax Court) considered irrelevant factors, failed to consider relevant factors or reached an unreasonable conclusion: appellant's memorandum of fact and law (MFL) at para. 25, respondent's MFL at para. 17. The respondent also referred to the appellate standard of review in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*), namely correctness for

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questions of law and palpable and overriding error for questions of fact or mixed fact and law, unless an extricable question of law is found, in which case correctness applies: respondent's MFL at para. 16.

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[14] In *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at paragraph 72, this Court held that the standard of review of discretionary decisions was the same as in *Housen*. Since the discretion exercised in awarding costs does not differ in kind from that exercised in other contexts, it is my view that this discretion should be reviewed on the same basis as other discretionary decisions, that is on the standard set out in *Housen*.

[15] As a result, the scope of the factors referred to in subsection 147(3) of the Rules is a question of law reviewable on the standard of correctness and the application of those factors to the facts of a case is a question of mixed fact and law, reviewable for palpable and overriding error, except in the case of an extricable error of law in which case, the correctness applies to that error.

[16] In its most recent pronouncement on the subject, the Supreme Court has held that questions of procedural fairness are legal questions to be reviewed on the correctness standard: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th) 328 (*Abrametz*), at paras. 26-30. The issue in that case was whether the Law Society's conduct amounted to an abuse of process. While not every instance of procedural fairness amounts to an abuse of process, every abuse of process amounts to a breach of procedural fairness: *Blencoe v. British*

Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 S.C.R. 307 at paras. 151-155 (per Lebel J. dissenting, but not on this point). As a result, any debate as to whether questions of procedural fairness are questions of law reviewable on the standard of correctness – see *Hussey v. Bell Mobility Inc.*, 2022 FCA 95, 2022 C.L.L.C. 210-052 at para. 24, *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at paras. 54-56 – has been put to rest.

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[17] With these comments in mind, I now turn to the appellant's allegations of error.

A. *The Tax Court's use of a range of possible outcomes*

[18] In discussing the principles applicable to an award of costs, the Tax Court correctly held that the Court was not limited to applying Tariff B of Schedule II of the Rules. Rule 147(4) provides that:

> The Court may fix all or part of the costs with or without reference to Schedule II, Tariff B and, further, it may award a lump sum in lieu of or in addition to any taxed costs.

[19] The Court then considered the basis upon which lump sum costs, that is, partial indemnity, substantial indemnity or full indemnity, could be awarded. The Court quoted three legal texts dealing with costs. It cited Mark M. Orkin & Robert G. Schipper, *The Law of Costs*, 2nd ed. (Toronto, Ontario: Thomson Reuters, 1987) (loose-leaf updated October 2021, release 6) (*Orkin*) for the proposition "that the traditional degree of indemnification of party-to-party costs has been between 50% and 75% of solicitor-client costs or substantial indemnity costs": Decision at para. 28. The Court acknowledged that there was no binding authority that costs

should be awarded in that range. It also commented that this proposition was not universally accepted and that according to another text – Janet Walker & Lorne Mitchell Sossin, *Civil Litigation* (Toronto, Ontario: Irwin Law, 2010), traditionally partial indemnity costs fall closer to 50% while according to another text – Linda S. Abrams & Kevin Patrick McGuinness, *Canadian Civil Procedure Law*, 2nd ed. (Markham, Ontario: LexisNexis Canada, 2010), the range of partial indemnity in the Ontario courts falls between 40% and 60% of solicitor-client costs: Decision at para. 28. It can be seen from this that there is no consensus in the field as to the breadth of the range, particularly at the upper end.

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[20] Citing the decision in *Guibord v. R.*, 2011 FCA 346, 2012 D.T.C. 5030, the Tax Court held that the only binding direction given to it by this Court was that quantum of costs must be reasonable and determined on a principled basis: Decision at para. 29.

[21] The Court concluded its discussion of this point as follows:

> That being said, for consistency purposes, in my view, the 50% to 75% range of solicitor-client costs should be used unless there are exceptional circumstances.
>
> Decision at para. 30

[22] The Court then reviewed the factors set out in Rule 147(3), finding that some favoured costs at the higher end of the range while others were neutral. In the end, it reviewed its conclusions on those factors and held as follows:

> In this case, the success of the [respondent] at trial and the importance of the amount at issue for the [respondent] weigh heavily in favour of an award of costs at the upper-limit of the partial indemnity costs range mentioned above.
>
> Furthermore, the importance of the issue decided by the Court, the offer to settle made by the [respondent] and the conduct of the Minister before the

> commencement of the proceeding all favour an increased partial indemnity costs award. Based on their cumulative effect, I have determined that the [appellant] should pay the [respondent] what is in my view the maximum amount of costs allowable within the applicable range, that is 75% of her incurred legal fees.
>
> Decision at paras. 90-91

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[23] The appellant argues that the Court erred, by fettering its discretion, in limiting the range of costs to 50%-75% of solicitor-client costs while the respondent argues that the appellant places too much emphasis on the sequence in which the Tax Court ordered its analysis, that is, dealing with the issue of the range before examining the various relevant factors.

[24] It is true that the argument that the Court fettered its discretion arises from the fact that the Court established the range before it had even considered the factors set out in Rule 147(3).

[25] When one reviews the Tax Court's analysis of the various factors listed in Rule 147(3), it is apparent that the Court's focus is on how each factor moves the needle higher or lower in the 50%-75% range that it had previously selected. But a review of like cases undertaken after the Tax Court had addressed the various factors may have pointed to the possibility of a lower range. The fact that the possibility of a lower range was precluded by the approach taken by the Tax Court is an indicator that the Tax Court had, in fact, fettered its discretion and, in doing so, erred in law.

[26] Beyond this, the summary of the Tax Court's reasoning on the appropriate range makes it clear that the ranges it considered were not specific to the Tax Court, nor were they consistent. The Court considered three legal texts that set out different ranges. The Court acknowledged that

the range it preferred, that set out in *Orkin*, was not unanimously accepted and cited a number of Tax Court cases that awarded costs that fell outside that range: *Paletta Estate v. The Queen*, 2021 TCC 41, 2021 D.T.C. 1032 (45%), *Damis Properties Inc. v. The Queen*, 2021 TCC 44, 2021 D.T.C. 1038 [*Damis*] (35%), *Cameco Corporation v. The Queen*, 2019 TCC 92, 2019 D.T.C. 1066 (35%), *CIT Group Securities (Canada) Inc. v. The Queen*, 2017 TCC 86, 2017 D.T.C. 1050 (36%), *Invesco Canada Ltd. v. R.*, 2015 TCC 92, [2015] G.S.T.C. 52 (40%), *Klemen v. R.*, 2014 TCC 369, 2015 D.T.C. 1040 (30%).

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[27] The Tax Court recognized that costs must be awarded on a principled basis (Decision at paras. 22, 29, 34) which implies that the award must not be arbitrary: *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 at para. 45, *Mohammad v. Canada (C.A.)*, 1997 CanLII 6356 (F.C.A.), [1998] 1 F.C. 165 at para. 30, *Monsanto Canada Inc. v. Janssens*, 2009 FC 318, 343 F.T.R. 234 at para. 52.

[28] The Tax Court's selection of the 50% to 75% range was made in the name of consistency. Unfortunately, the sources cited showed no consistency. Assuming that the Court had in mind that its award should be consistent with other decisions of the Tax Court, it is notable that it did not cite other costs decisions of the Tax Court to demonstrate that the amount which it awarded was consistent with what had been done in other cases.

[29] The Tax Court was right to advance consistency as a basis upon which to base an award of costs but it erred in principle in not addressing the Court's own jurisprudence in setting a range of possible awards. The Court's own jurisprudence is important because a lack of

consistency in the treatment of comparable cases leads to arbitrary results: see *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317 at para. 138, *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609 at para. 18.

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[30] Consistency is important for another reason. A consistent approach to costs leads to predictability. Litigants' decision-making is improved if they are able to assess, to a reasonable degree, the potential quantum of costs to which they may be exposed in the event of an adverse result. To the extent that a secondary purpose of costs is to encourage proportionality and advance settlements (Decision at para. 19), a reasonable grasp of one's potential exposure to costs can only assist in achieving those purposes.

[31] This is not to say that a judge awarding costs on a lump sum basis must conduct a statistically sound review of prior costs awards to arrive at an appropriate amount. It simply means that a decision as to an appropriate award of costs must be grounded in the Court's past practice and jurisprudence. A good example of this approach can be found in *Damis*. In the case at bar, an analysis of, or reference to, cases with comparable facts would have provided useful guidance on an appropriate level of costs.

[32] It is important to note that this approach is simply a means by which the broad discretion available to judges in awarding costs can be exercised in a principled, non-arbitrary manner.

B. *The result of the proceeding - Rule 147(3)(a)*

[33] After having established that the range of partial indemnity was 50% to 75% of a party's solicitor-client costs, the Tax Court reviewed the various factors listed in Rule 147(3) of the Rules, beginning with the factor found at Rule 147(3)(*a*): the result of the proceeding. The Court noted that the result of the proceeding could affect the award of costs in two ways. In the first instance, it determines who, in the normal course, is entitled to costs, which, normally, is the successful party.

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[34] In describing the second way in which success could affect the award of costs, the Court first quoted *Lux Operating Limited Partnership v. The Queen*, 2018 TCC 214, 2018 D.T.C. 1156 (*Lux*), which was relied upon by the respondent in this Court:

> In my view, when determining the quantum of costs to be awarded, the result of the proceeding is only an appropriate factor to consider if it is possible for a party to have had mixed success in the proceeding. … If a proceeding involves a single issue over which there are a number of different potential outcomes (e.g. a valuation issue), the degree of a party's success on that issue will be relevant to the quantum of costs. However, when the only issue before the Court is a black-or-white issue on which there is no potential for partial success, the fact that a party succeeded on that issue should not, in my view, affect the quantum of costs awarded. The party achieved success. That success was no better or worse than what the party could have hoped to achieve and thus neither argues for higher nor lower costs.
>
> *Lux* at para. 10 (my emphasis).

[35] Having cited this passage from *Lux*, the Tax Court proceeded to take a position at odds with it, namely that where a party faced an "all or nothing issue", the level of success could be taken into consideration by the Court in fixing the amount of costs. In the end, the Court found that the respondent's case was of the black or white variety, in which she had achieved 100%

success, a result which the Court found weighed heavily in favour of increased costs: Decision at paras. 51-52.

[36] It is true that the respondent's success in persuading the Court that she was not grossly negligent was a factor that could be taken into consideration by the Court, but only on the issue of her entitlement to costs. The reason for this is that the factors which might favour an increase (or decrease) in a successful party's costs are set out in the remaining factors identified in Rule 147(3). Awarding costs on the basis of the result and then enhancing those costs on the basis of the result is double counting that factor. The Tax Court erred in law in defining the scope of this factor.

[37] In addition, the Tax Court's conclusion is, as noted, at odds with the passage which it quoted from *Lux* to the effect that success in an all or nothing case should not affect costs. That said, while the decision in *Lux* was not binding on the Court, the doctrine of judicial comity would require the Court to justify its departure from the finding of another judge of the Tax Court on the same question: *R. v. Sullivan*, 2022 SCC 19, [2022] S.C.J. No. 19 at paras. 73-75. The failure to do so was also an error of law.

C. *Any offer of settlement made in writing - Rule 147(d)*

[38] Prior to trial, the respondent made an offer to settle the matter on the following terms:

> 1. The Minister of National Revenue ("Minister") will reassess her 2010 taxation year so as to:
>
> > (a) vacate the penalties assessed under subsection 163(2) of the *Income Tax Act* R.S.C., 1985 c. 1 (5th Supp.) (the "Act") and

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> section 38(1) of the *Income Tax Act* (British Columbia), R.S.B.C. 1966, c. 215 by the notice of assessment dated June 12, 2014; and
>
> (b) assess a penalty in the amount of $2,500 under paragraph 162(7)(b) of the Act in respect of the [respondent's] failure to comply with her duty or obligation under the Act to prevent the filing of the Amended Return (defined below); and [sic]

[39] This text was taken from counsel's letter at pages 52-61 of the Appeal Book setting out the respondent's settlement offer. The numeral 1 opposite the first sentence and the presence of "and" at the conclusion of paragraph (b) of the offer suggest that there is more to it than appears on page 52. Unfortunately, page 53 does not resolve the issue but immediately sets out the respondent's explanation of her settlement offer. However, in a later part of the letter (at page 60 of the Appeal Book), it is said that the offer was made on a "without costs" basis. This leads to the conclusion that, in return for the concessions sought in paragraph 1, Mrs. Bowker offered to waive her costs.

[40] It is important to note that the respondent also proposed an alternate basis for settlement in the form of a request pursuant to subsection 220(3.1) of the ITA that the Minister cancel the penalty assessed under subsection 163(2). I will address the respondent's principal offer first and then her alternate offer.

[41] Subsection 162(7) of the ITA reads as follows:

(7) Every person (other than a registered charity) or partnership who fails	(7) Toute personne (sauf un organisme de bienfaisance enregistré) ou société de personnes qui ne remplit pas une déclaration de renseignements selon les modalités et dans le délai prévus par la présente loi ou le Règlement de l'impôt sur le

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(*a*) to file an information return as and when required by this Act or the regulations, or	revenu ou qui ne se conforme pas à une obligation imposée par la présente loi ou ce règlement est passible, pour chaque défaut 00 sauf si une autre disposition de la présente loi (sauf les paragraphes (10) et (10.1) et 163(2.22)) prévoit une pénalité pour le défaut — d'une pénalité égale, sans être inférieure à 100 $, au produit de la multiplication de 25 $ par le nombre de jours, jusqu'à concurrence de 100, où le défaut persiste.
(*b*) to comply with a duty or obligation imposed by this Act or the regulations	
is liable in respect of each such failure, except where another provision of this Act (other than subsection 162(10) or 162(10.1) or 163(2.22)) sets out a penalty for the failure, to a penalty equal to the greater of $100 and the product obtained when $25 is multiplied by the number of days, not exceeding 100, during which the failure continues.	

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[42] The law as to settlements in the income tax context is relatively settled. The following passage from *Galway v. M.N.R.*, 1974 CanLII 2465 (FCA), [1974] 1 FC 600 (*Galway*) at page 602 is the classic formulation of the principle:

> […] the Minister has a statutory duty to assess the amount of tax payable on the facts as he finds them in accordance with the law as he understands it. It follows that he cannot assess for some amount designed to implement a compromise settlement and that, when the Trial Division, or this Court on appeal, refers an assessment back to the Minister for re-assessment, it must be for re-assessment on the facts in accordance with the law and not to implement a compromise settlement.
>
> See also *CIBC World Markets Inc. v. Canada*, 2012 FCA 3, [2012] F.C.J. No. 30 at paras. 22-24, *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26 at para. 26.

[43] The Tax Court found that the respondent's offer of settlement was principled because she "recognized having committed a breach in her duty not to make false statements in her tax returns": Decision at para. 63. This is not accurate, as the respondent only conceded that "her

failure to adequately monitor and make inquiries of an authorized representative … could constitute a failure to comply with her duty under the Act not to allow the filing of false statements in a return": Appeal Book at 59. The respondent did not concede that she had been negligent, only that she could have been.

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[44] In any event, the respondent argued that her negligence made her liable for the lesser penalty set out in subsection 162(7) of the ITA. The respondent further argued that, since there was no other provision of the ITA which provided a penalty for negligently making false statements in an income tax return, paragraph 162(7)(*b*) applied.

[45] The question of whether paragraph 162(7)(*b*) applies is a question of statutory interpretation. It is settled law that a statute must be interpreted according to its text, context, and purpose: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General*), 2011 SCC 53, [2011] 3 S.C.R. 471 at paras. 32-33, *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30, [2022] S.C.J. No. 30 at paras. 8-9.

[46] It is true that the words of paragraph 162(7)(*b*) are broad enough to include negligence in the preparation of an income tax return, assuming that such an obligation exists. Not every error in an income tax return is the result of negligence since, given the complexity of the ITA, errors can result from a simple misapprehension of the requirements of the legislation or from an incorrect appreciation of the relevance of the facts. On the other hand, it is likely that some errors are the result of the failure to take reasonable care in the preparation of an income tax return.

However, it is significant that Parliament has chosen to penalize only negligence which is sufficiently egregious to merit the vituperative epithet of “gross negligence”.

[47] What does the context within which section 162(7) generally, and paragraph 162(7)(*b*) in particular, are found, tell us about the interpretation of those provisions? Section 162 deals with penalties for failures in relation to filing returns or failing to provide information as and when required. Paragraph 162(7)(*a*) addresses the failure to file an information return as and when required, whereas paragraph 162(7)(*b*) addresses the failure to comply with a duty or obligation imposed by the ITA or the regulations.

[48] The question which arises is why a penalty of very broad application (assuming the interpretation proposed by the respondent) would be tucked away in a paragraph within a subsection dealing with a specific failure to file certain documents. This question can be answered in part by reference to the canon of construction known as *noscitur a sociis*:

> Counsel for the respondent submits that this finding can be justified by the rule of interpretation *noscitur a sociis*. According to that rule, “[a]n expression's meaning may be revealed by its association with others” and where general and specific words are associated together and are capable of analogous meaning, the general words should be restricted to the specific meaning unless this would be contrary to the clear intention of Parliament.
>
> *Vancouver Art Metal Works Ltd v. Canada (C.A.)*, 1993 CanLII 2930 (FCA), [1993] 2 F.C. 179 at 185. See also *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846 at para. 30

[49] Following this principle, the scope of paragraph 162(7)(*b*) would be limited by the general tenor of section 162 dealing with various failures to file returns or to provide information and the specific context of paragraph 162(7)(*a*) dealing with the failure to file information

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returns. In other words, the general language of paragraph 162(7)(*b*) would be limited to instances of failure to file returns or to provide information not specifically enumerated in the balance of section 162.

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[50] This interpretation is confirmed by the manner in which the penalty for non-compliance is calculated. It will be recalled that the penalty is the greater of $100 or the product obtained when $25 is multiplied by the number of days, not exceeding 100, during which the failure continues. This formula, and a closely related one which includes payment of a percentage of the tax otherwise payable, are used in most other provisions in which the default being penalized is a failure to file (or late filing): see subsections 162(1), 162(2), 162(2.1), 162(7.1), 162(8) and 162(10). The nature of the penalty set out in subsection 162(7) strongly suggests that the duty or obligation referred to in paragraph 162(7)(*b*) is one to which the passage of time is material, such as in the case of late filing or non-filing of required returns or failing to provide required information.

[51] As a result, the context of paragraph 162(7)(*b*) strongly suggests that the general words which appear there should be interpreted more narrowly than proposed by the respondent.

[52] The purpose of paragraph 162(7) generally is to serve as an inducement to taxpayers and others to provide the information which they are required to provide in a timely manner. The time factor in the calculation of the penalty incentivizes delinquent taxpayers to file promptly, to avoid the increase of the penalty over time.

[53] As a result, I am of the view that, notwithstanding the broad words of paragraph 162(7)(*b*), it is limited to obligations to file returns or to provide information as and when it is required. This means that it would not apply to the case of returns that were filed when required but were negligently prepared. That being the case, the respondent's settlement proposal was not one which the Minister could have accepted as the lower penalty under paragraph 162(7)(*b*) was not available to the respondent.

[54] There is another basis upon which the proposal made by the respondent was not principled. Neither the respondent nor the Tax Court cited jurisprudence in which a taxpayer was assessed a penalty for negligently making a false statement in an income tax return, let alone for the possibility of having otherwise been negligent in the preparation of an income tax return. While it is apparent that taxpayers should not be negligent in the preparation of their income tax returns, if only for their own protection in avoiding unexpected assessments or reassessments and accumulated interest, Parliament has not chosen to penalize simple negligence. Mrs. Bowker's proposal invited the appellant to penalize conduct which Parliament had not penalized so that she might offer a compromise settlement.

[55] The respondent carefully invited the appellant to draw that conclusion that she was negligent even though she was not prepared to admit that she had in fact been negligent, only that she could have been. In those circumstances, the respondent's offer consisted of pointing out the weaknesses of the appellant's case and offering him a compromise based upon the possibility of her liability for a lesser penalty.

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[56] In those circumstances, it is difficult to see how the respondent's offer could be principled.

[57] The respondent's alternate submission was that the matter could be settled on the basis of the Minister's cancellation of the penalty assessed under subsection 163(2) of the ITA pursuant to subsection 220(3.1) of the ITA. That provision reads as follows:

(3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.	(3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

[58] The basis of the respondent's request was that the penalty was grossly excessive, disproportionate and overly punitive: Appeal Book at 59-60.

[59] The penalty imposed by subsection 163(2) is not a discretionary penalty which can be imposed or not in the Minister's discretion. It is a statutory penalty which applies if it is found

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that a person has knowingly or in circumstances amounting to gross negligence, made, or acquiesced in the making of, a false statement in an income tax return.

[60] Bearing in mind that the appellant must proceed "on the facts in accordance with the law and not to implement a compromise settlement" (*Galway* at 602), we must assume that in assessing the respondent in the way he did, the appellant's view was that the facts and the law, as he knew or understood them, justified the conclusion that the respondent's conduct in relation to her income tax return amounted to gross negligence.

[61] As long as the appellant was satisfied that the respondent had been grossly negligent, he was bound to give effect to the statutory penalty. If he was not satisfied, his obligation was to vacate the assessment and not to substitute a lesser non-statutory penalty. This is true even if the Minister, while being convinced of the respondent's gross negligence, believed that the penalty was too harsh in all the circumstances. This is so because the penalty is prescribed by law. It is not for the Minister to rewrite the law so as to temper its harshness.

[62] On the other hand, once the Court finds that the taxpayer was grossly negligent and dismisses the appeal (or if the taxpayer abandons the appeal), the Minister can subsequently waive or cancel the gross negligence penalty, in whole or in part, for various reasons having to do with the taxpayer's personal circumstances. It is at this point that considerations of excessiveness and disproportionality may be given effect. This respects Parliament's intention in imposing a non-discretionary penalty for gross negligence while respecting the Minister's discretion to cancel the penalty as provided in subsection 220(3.1). In cancelling the penalty, the

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Minister is engaged in administering the penalty and not in modifying the legal consequences of the taxpayer's gross negligence.

[63] Given that the matter proceeded to trial, we must presume that, notwithstanding the respondent's offer of settlement, the appellant remained convinced that she had acted in a grossly negligent way in relation to false statements in her income tax return.

[64] The Tax Court's detailed enumeration of the many ways in which the Minister could have satisfied himself that the respondent was not negligent, does not change this result. The principle in *Galway* rests on the Minister's view of the facts and the law, not on what the Minister's view might have been.

[65] The result is that the respondent's settlement offer was not a principled offer in the sense that it was not one which the appellant could accept, having regard to the facts as he knew them and the law as he understood it. As a result, the failure to accept the offer was a neutral factor in the determination of the appropriate award of costs.

[66] That said, it is important to point out that it would have been possible for the appellant to have agreed to a settlement of the respondent's appeal, though not on the basis proposed by the respondent. Rather than filing a notice of appeal, the respondent could have approached the Minister with a request to waive some portion of the penalty, based on her personal circumstances.

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[67] The fact that the respondent appealed the reassessment did not mean that she could no longer apply for a waiver; it just made it a little more complicated. The respondent could offer to abandon her appeal without costs – thereby conceding the issue of gross negligence – on the basis that the Minister would consider her request for a waiver of some portion of the penalty. The complication is that the waiver could only be based on the respondent's personal circumstances. It is not open to the Minister to waive some portion of the penalty on the basis of his estimate of his chances of success in the litigation as this amounts to an unprincipled compromise for the sake of a settlement. The question of gross negligence is a binary one. Either the respondent was guilty of gross negligence or she was not. If the appellant has doubts about the strength of his case, he must either proceed with the litigation or vacate the assessment. He cannot "split the difference" by reducing the penalty. At paragraph 67 of its reasons, the Tax Court found that since the "[respondent's] settlement offer was more favourable to the [appellant] than the result obtained at trial, this weighs in favour of an increased assessment of costs". While this might be the case if the offer was one capable of acceptance by the Minister, it has no application to cases where, as here, the offer is not capable of acceptance.

[68] As a result, the Tax Court's conclusion that the appellant's failure to accept the respondent's offer of settlement justified an increase in costs, contained an extricable error of law, namely the scope of paragraph 162(7)(*b*), and was therefore reviewable on the standard of correctness.

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D. *Pre-litigation conduct and breach of procedural fairness*

[69] The Tax Court devoted 12 paragraphs of its reasons to the failure of the Minister's representatives to interview the respondent before the commencement of the proceedings. The Tax Court's view was that this failure was conduct prior to the litigation that prolonged the proceeding and that weighed heavily in favour of increased costs.

[70] It is not contentious that the parties did not raise the issue of pre-litigation conduct in their submissions and that the Tax Court did not advise them of its intention to pursue this line of inquiry. The appellant argues that the Tax Court breached the duty of procedural fairness in depriving him of the opportunity to address this matter before the Court relied upon it as a factor justifying an increase in costs. The respondent argues that, even if the appellant's right to procedural fairness was breached, it was not a palpable and overriding error and so, does not justify the Court's intervention.

[71] The respondent's argument does not take into account the Supreme Court's decision in *Abrametz* that questions of procedural fairness are questions of law to be assessed on the standard of correctness: *Abrametz* at paras. 26-30.

[72] One must be careful about finding a breach of procedural fairness when a court addresses one factor in a list of factors which are relevant to the result of the proceeding. In this case, both parties were no doubt aware that the Tax Court was entitled to work its way down the list of factors in Rule 147(3) and that it was not unusual for the Court to touch upon factors which were

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not specifically pleaded by the parties. The inclusion of factors such as "any other matter relevant to the question of costs" – Rule 147(3)(*j*) – is the door through which such considerations arrive. There are two circumstances which take this case out of the normal course of events.

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[73] The first is the Tax Court's view of the scope of "other matters which are relevant to the question of costs". The Tax Court cited this Court's decision in *Canada v. Martin*, 2015 FCA 95 (*Martin*) as authority for the proposition that "in exceptional circumstances, a Court can consider a party's conduct prior to a proceeding if that conduct unduly and unnecessarily lengthen [sic] the proceeding": Decision at para. 78.

[74] The paragraph in *Martin* upon which the Tax Court relied reads, in its material parts, as follows:

> In exercising its discretion on costs the Tax Court may consider a number of factors, including the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the "proceeding" (Rule 147(3)(*g*)) and whether any stage in the "proceeding" was improper, vexatious or unnecessary (Rule 147(3)(*i*)(i)). The Tax Court has discretion to award or refuse costs in respect of a "part of a proceeding" (Rule 147(5)(*a*)).
>
> *Martin* at para. 21

[75] With respect, this passage does not authorize an inquiry into pre-litigation conduct. The Tax Court dealt with Rule 147(3)(*g*) earlier in its reasons and found that the conduct of counsel did not affect the duration of the proceedings. As for Rule 147(3)(*i*)(i), it is of no assistance to the Tax Court as it deals with whether "any stage in the proceeding was … unnecessary". Proceeding is a defined term which means "an appeal or reference". It follows that pre-litigation

conduct is not a stage in the proceeding. In the circumstances, the appellant cannot be faulted for failing to recognize that the Tax Court would consider pre-litigation conduct in assessing costs.

[76] The second factor is that the appellant had information which was relevant to the issue of his agents' ability to interview the respondent, namely that there was documentary evidence that the respondent would only deal with the appellant in writing. As a result, the ability to interview the respondent as well as the results of such an interview are speculative.

[77] A finding of breach of procedural fairness renders a decision liable to be overturned: *Cardinal v. Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643 at para. 23, *Université du Québec à Trois-Rivières v. Larocque*, 1993 CanLII 162 (SCC), [1993] 1 S.C.R. 471 at 493. However, a court may exercise its discretion to not grant a remedy for breach of procedural fairness where the result is inevitable: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202 at 228-229, *Rebello v. Canada (Justice)*, 2023 FCA 67 at para. 16.

[78] While the issue of pre-litigation conduct was but one of several factors which the Tax Court considered in awarding costs, it was one of a smaller number of factors weighing heavily in favour of increased costs: Decision at paras. 90-91. Some of those factors, notably the respondent's success at trial, the applicable range of partial indemnity awards, and the respondent's offer of settlement, have been found to be either incorrectly understood or incorrectly applied. As a result, it cannot be said that the result upon reconsideration is inevitable.

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[79] As a result, this breach of procedural fairness justifies remitting the matter to the Tax Court for reconsideration.

IV. Conclusion

[80] In summary, I find that the Tax Court breached the parties' right to procedural fairness in not giving them notice of its intention to address pre-litigation conduct as a factor in awarding costs. This deprived the appellant of the opportunity to bring relevant facts to the Court's attention. This failure justifies setting aside the Tax Court's award of costs and returning the matter to the trial judge for reconsideration.

[81] The Tax Court also erred in law in fettering its discretion as to the range of partial indemnity, the effect of success at trial, and in its conclusion that the respondent's offer to settle was principled. These errors would also justify returning the matter to the Tax Court. In making a fresh determination of the respondent's entitlement to costs, the Tax Court should act in accordance with the principles set out in these reasons.

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[82] I would therefore allow the appeal with costs, set aside the Tax Court's judgment and return the matter to the trial judge for a fresh determination of the costs payable to the respondent.

"J.D. Denis Pelletier"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
Mary J.L. Gleason J.A."

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-82-22
STYLE OF CAUSE:	HIS MAJESTY THE KING v. MARGO DIANNE BOWKER
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 29, 2023
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. GLEASON J.A.
DATED:	JUNE 8, 2023

APPEARANCES:

Laura Zumpano Natasha Tso	FOR THE APPELLANT
Alistair G. Campbell	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE APPELLANT
Legacy Tax + Trust Lawyers Vancouver, British Columbia	FOR THE RESPONDENT

2023 FCA 133 (CanLII)

Federal Court | Cour fédérale

paras. 160-161, 173, and 186-190

Date: 20240129

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

Citation: 2024 FC 42

2024 FC 42 (CanLII)

Ottawa, Ontario, January 29, 2024

PRESENT: The Honourable Mr. Justice Mosley

Docket: T-306-22

BETWEEN:

CANADIAN FRONTLINE NURSES and KRISTEN NAGLE

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-316-22

AND BETWEEN:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-347-22

AND BETWEEN:

CANADIAN CONSTITUTION FOUNDATION

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

ATTORNEY GENERAL OF ALBERTA

Intervener

Docket: T-382-22

AND BETWEEN:

JEREMIAH JOST, EDWARD CORNELL, VINCENT GIRCYS AND HAROLD RISTAU

Applicants

and

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

Respondents

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AMENDED REASONS FOR JUDGMENT

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I. Introduction

[1] These are reasons for judgment in four applications for judicial review under sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 [*Federal Courts Act*], of the decision by the Governor in Council (GIC) to declare a Public Order Emergency (POE) and to approve additional measures in order to end disruptive protests in Ottawa and other locations in Canada.

[2] As the outcome of the four applications varies in certain respects, separate judgments, will be issued for each application. The following reasons apply to the common elements and explain the different outcomes.

II. Overview

[3] The Applicants in the four applications before the Court challenge Order in Council P.C. 2022-106, the *Proclamation Declaring a Public Order Emergency*, SOR/2022-20 [the Proclamation] issued pursuant to s 17(1) of the *Emergencies Act*, RSC 1985, c 22 (4th Supp) on February 14, 2022 [the "*Emergencies Act*", the "EA" or the "Act"]. Also under review are Order in Council P.C. 2022-107, the *Emergency Measures Regulations*, SOR/2022-21 [the "Regulations"] and Order in Council P.C. 2022-108, the *Emergency Economic Measures Order*, SOR/2022-22, [the "Economic Order"] made on February 15, 2022 pursuant to s 19(1) of the Act.

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[4] The Attorney General of Alberta ~~responded to a notice of constitutional question in one of the applications and also~~ sought and obtained leave to intervene to make submissions on several non-constitutional questions.

[5] The Attorney General of Canada brought motions to strike the applications on the grounds that they were moot and that most of the Applicants lacked standing.

[6] As these reasons will explain, I have determined that the Applicants, Kristen Nagle, Canadian Frontline Nurses, Jeremiah Jost and Harold Ristau, lack standing to challenge the Proclamation, the Regulations and the Economic Order. Their applications will be dismissed for that reason. I accept that Edward Cornell and Vincent Gircys have direct standing to challenge the Proclamation, Regulations and Economic Order as they were directly affected by them. I grant the Canadian Civil Liberties Association (CCLA) and the Canadian Constitution Foundation (CCF) public interest standing. I have concluded that the applications of those with standing should be heard notwithstanding that the applications are moot as a result of the revocation of the Proclamation and termination of the related instruments.

[7] On the substantive issues, I have concluded that the applications of Edward Cornell and Vincent Gircys, the CCLA and the CCF must be granted in part for reasons discussed below. In brief, I find that the reasons provided for the decision to declare a public order emergency do not satisfy the requirements of the *Emergencies Act* and that certain of the temporary measures adopted to deal with the protests infringed provisions of the *Canadian Charter of Rights and*

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Freedoms – Part I of the *Constitution Act, 1982 adopted as Schedule B to the Canada Act 1982*, 1982, c. 11 (U.K.) [*Charter*] and were not justified under section 1 of the *Charter*.

[8] I find that the temporary measures were not incompatible with the *Canadian Bill of Rights*, SC 1960, c 44 [*Canadian Bill of Rights*] as had been argued by Messrs. Jost, Ristau, Cornell and Gircys, collectively the Jost Applicants.

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III. **The Parties**

A. The Applicants

[9] The first two of the four Applications for Judicial Review were filed in the Federal Court by Ms. Kristen Nagle and Canadian Frontline Nurses [CFN] and by the Canadian Civil Liberties Association [CCLA], on February 17 and 18, 2022 respectively. The other two Applications were filed on February 22 and 23, 2022 by the Canadian Constitutional Foundation [CCF] and by the Jost Applicants.

(1) Kristen Nagle and Canadian Frontline Nurses

[10] Kristen Nagle is a Canadian citizen and Ontario resident. Ms. Nagle is a former registered nurse and is a member and director of the CFN. Her registration was suspended by the Ontario College of Nurses due to complaints about her actions at other protests including at hospitals applying vaccine mandates and treating patients suffering from COVID-19 during the pandemic.

[11] The CFN is incorporated under the *Canada Not-for-profit Corporations Act*, SC 2009, c 23. CFN's materials describe it as a "proud advocate of medical freedom" and that its missions are "to unite nurses across Canada, educate the public and ensure that Canadian healthcare reflects the highest ethical standards." Arguments made on behalf of the CFN in these proceedings are the same as those made by Ms. Nagle. It is clear that she is the directing mind and will of the organization.

[12] Ms. Nagle and, through her, CFN, claim to be "opposed to unreasonable COVID-19 related mandates and restrictions that have been implemented by various levels of Canadian governments" during the pandemic.

[13] In their application, Nagle and CFN assert direct standing based on their participation in the "Freedom Convoy 2022". It is unclear from the evidence how CFN participated other than through the person of Ms. Nagle. There is no evidence that any of the assertions made on behalf of the CFN in these proceedings result from resolutions of the membership or board of the organization or are anything other than expressions of Ms. Nagle's personal views.

[14] Ms. Nagle arrived in Ottawa on January 28, 2022 and took up residence in a hotel near the protest sites with her husband and children. Ms. Nagle claims that she provided material support to other participants during the protests, such as the distribution of funds donated to the CFN and by providing access to her hotel room for showers. She claims that she was described as a major participant in the protest by a Member of Parliament but there is no supporting

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evidence of this. The CFN logo does appear among others on “Freedom Convoy 2022” promotional materials.

[15] Neither Ms. Nagle nor the CFN were identified by the Royal Canadian Mounted Police (RCMP) to financial service providers as an individual or entity to whom the Regulations and the Economic Order applied. Their bank accounts and other resources were not frozen. However, Ms. Nagle averred that donations to the CFN diminished as a result of the Proclamation and imposition of the Regulations and the Economic Order. As a result, she and her family chose to leave Ottawa.

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(2) The Jost Applicants

[16] The four Jost Applicants are private Canadian citizens who assert direct standing based on their participation in the Ottawa protest.

[17] Jeremiah Jost participated in the protests around Parliament Hill from January 29, 2022. He asserts he also financially supported other protest participants in Ottawa.

[18] Edward Cornell is a Canadian military veteran who also participated in the Ottawa protests. His bank account and credit cards were frozen following the Proclamation and making of the Economic Order.

[19] Vincent Gircys is a retired police officer. He participated in the Ottawa protest and his bank account and credit cards were also frozen following the invocation of the Act.

[20] Harold Ristau is a pastor and Canadian military veteran who briefly attended the protests in Ottawa and led participants in prayer, issuing a benediction and praying at the War Memorial. He claims that following his return home he experienced discrimination in his work place and other ill effects due to his participation in the protests, which limited his ability to enjoy his freedom of religion.

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(3) Canadian Civil Liberties Association

[21] Founded in 1974, CCLA describes itself as an independent, non-profit, non-governmental organization dedicated to defending and promoting fundamental human rights and civil liberties. The CCLA brought its application on the basis of public interest standing.

[22] CCLA asserts it has been holding governments accountable since its inception by ensuring human rights and freedoms are fostered and observed and that the rule of law is upheld. CCLA claims to advocate on behalf of all people in Canada to ensure the maintenance of the critical balance between civil liberties and competing public and private interests. CCLA has been granted leave to intervene in cases before courts at many levels and asserts that it has contributed to the development of jurisprudence in respect of civil liberties and the application of the *Charter*.

(4) Canadian Constitution Foundation

[23] Founded in 2002, the CCF describes itself as an independent, national and non-partisan charity that seeks to protect constitutional freedoms through education, communication and litigation. It also brought its application on the basis of public interest standing.

[24] The CCF has appeared before all levels of courts in Canada and submits that it has contributed to the development of constitutional law jurisprudence. It has been granted intervener status by the Supreme Court of Canada in 13 cases.

[25] The Respondent did not dispute that the CCLA and the CCF had a valid public interest in these proceedings but argued that their participation was not required as at least two of the Jost Applicants had direct standing.

B. The Respondent (moving party on the Motions to Strike)

[26] The Attorney General of Canada is named as the sole Respondent in three of the four applications. In the fourth application, in Docket: T-382-22, the Jost Applicants named the Governor in Council, Her Majesty in Right of Canada and the Minister of Public Safety and Emergency Preparedness in addition to the Attorney General of Canada.

[27] The Crown is not a federal board, commission or other tribunal for the purposes of sections 18 and 18.1 of the *Federal Courts Act* and cannot, therefore, be a respondent in these proceedings. Decisions by the Governor in Council and the Minister in the execution of their public duties are subject to judicial review. They are represented in these proceedings by the Attorney General of Canada as Respondent.

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C. The Intervener

[28] On March 14, 2022, the Jost Applicants filed and served an Amended Notice of Constitutional Question under s 57 of the *Federal Courts Act* on each of the provincial Attorneys General. ~~Only the Attorney General of Alberta responded to the Notice.~~ The Attorney General of Alberta ~~also~~ sought and was granted leave on May 5th, 2022 to intervene in the CCLA and CCF files to make submissions on several non-constitutional questions.

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IV. **The Context**

[29] This portion of these reasons will summarize the background to the applications and the making of the Proclamation, Regulations and Economic Order. I do not propose to revisit the detailed history of events, which were thoroughly canvassed in the five volume report of the Public Order Emergency Commission (POEC), released on February 17, 2023. However, I consider it necessary to situate these reasons in the context of those events, as I understand them.

[30] The facts recited below are drawn from the records of the parties filed in each application including the supplementary records based on later disclosures. There has been less dispute in these proceedings about what happened than with how the events should be characterized in applying the law. Where there has been any controversy about the facts, I have scrutinized the relevant evidence with care to determine "whether it is more likely than not that an alleged event occurred": *F.H. v McDougall*, 2008 SCC 53 at para 49.

(1) Public Health Orders

[31] On November 19, 2021, the Public Health Agency of Canada announced that, as of January 15, 2022, certain groups of foreign nationals who were, up to that point, exempt from vaccine requirements for entry to Canada would now be required to be fully vaccinated, including essential service providers such as truck drivers. Similar measures were put in place by the United States government at the border with Canada.

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[32] On January 13, 2022, the Minister of Health clarified that an unvaccinated Canadian truck driver could not be denied entry into Canada, but would need to meet requirements for pre-entry, arrival and Day 8 testing as well as quarantine requirements.

(2) Protests in Ottawa and border blockades

[33] As a result of those travel restrictions, a group of individuals prepared to drive across Canada to protest in Ottawa under the name “Freedom Convoy 2022”. On January 22, 2022, the Convoy departed from Prince Rupert, British Columbia, on its way to a planned demonstration in Ottawa scheduled for January 29, 2022. The Convoy’s route to Ottawa was widely publicized and other vehicles and individuals joined along the way.

(a) Ottawa

[34] On January 28, 2022, the Convoy arrived in Ottawa. At this point, it consisted of hundreds of vehicles of various types including tractor-trailer units and thousands of individuals

who intended to protest Canada's public health response to the COVID-19 pandemic and the new vaccination requirements for cross-border truckers. The protestors and vehicles occupied much of the downtown core of Ottawa including streets in the vicinity of the Parliamentary precinct, the Supreme Court of Canada and the Federal Courts. Among other things, the effect was to block vehicular traffic and pedestrian access to offices, businesses, churches and residences in the affected area.

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[35] Over the next few days, the protest became a blockade of downtown government, business and residential districts accompanied by incessant noise from truck horns, train type whistles, late night street parties, fireworks and constant megaphone amplified hollers of "freedom". Fumes from the exhausts of diesel and gasoline engines permeated the air and seeped into neighbouring premises. Containers of fuel were being brought in constantly to keep the vehicles running and to provide heat. There were reported incidents of harassment, minor assaults and intimidation. This created intolerable conditions for many residents and workers in the district.

[36] Between January 30 and February 2, 2022, the demonstrators began to erect structures and organize for a prolonged occupation of the core of the national capital. The Ottawa Police Service (OPS) appeared to be unable to cope with the situation. The OPS Chief declared "there may not be a policing solution" and "there need to be other elements brought in to find a safe, swift and sustainable end to this demonstration that's happening here and across the country".

[37] On February 3, 2022, the Mayor of Ottawa submitted a request for additional resources to the Federal and Provincial governments to deal with the protest. The same day, Convoy organizers held a press conference where they stated that they would remain in the city until all COVID-19 mandates were revoked. On February 6, 2022, the Mayor declared a state of emergency.

[38] On February 7, 2022, the Provincial Operations Intelligence Bureau, a branch of the Ontario Provincial Police (OPP), identified the Convoy as a "threat to national security", and the OPS requested an additional 1,800 police officers from other agencies. The same day, a ten-day interim injunction was granted by Justice McLean of the Ontario Superior Court of Justice to "silence the honking horns" and to prevent other by-law breaches by truckers parked in the streets of downtown Ottawa.

[39] Between February 8 and February 10, 2022, the Convoy numbered approximately 418 vehicles and additional cars and trucks were arriving with protestors. Children were estimated to be present in 25 percent of the vehicles. A counter-protest on February 13, 2022 saw hundreds of residents on suburban streets blocking access to vehicles headed to downtown Ottawa. Convoy participants, or their supporters, allegedly engaged in a concerted effort to flood Ottawa's emergency services with calls designed to overwhelm the services' capacity to respond. Donations to fund the protest were received by a crowdfunding site, GiveSendGo. Information subsequently released indicated that 55.7 percent of the funds received, totalling $3.6 million USD were made by U.S. based donors.

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[40] On February 10, 2022, the Prime Minister convened the Incident Response Group (IRG), an emergency committee and coordination body of Cabinet and senior public servants whose role is to advise the Prime Minister in the event of a national crisis. The Prime Minister and the President of the United States discussed the situation on February 11, 2022. Further meetings of the IRG took place on February 12 and 13, 2022. The Government of Ontario declared a state of emergency and, on February 12, 2022, enacted a regulation to protect critical infrastructure.

[41] Information considered by the IRG, according to its minutes, included that extremist elements were taking part in the protest. These included members of an organization known as "Diagolon" which reportedly proposed to establish a "diagonal" country from Alaska to Florida under the slogan "gun or rope". The founder, Jeremy MacKenzie, was arrested in January 2022, before coming to protest in Ottawa, after police found firearms, prohibited magazines, ammunition and body armour at his home. Moreover, one of MacKenzie's associates, Derek Harrison, had made a video in which he reportedly expressed his desire to turn the Freedom Convoy protest into "our own January 6th" event, alluding to the storming of the US Capitol. One of the Applicants, Ms. Nagle, was in contact with MacKenzie when she was in Ottawa.

[42] The purpose of referring to this information is not to indicate whether the concerns about Diagolon or the charges against MacKenzie were well-founded. But it is information that was before Cabinet when the decision to invoke the EA was made.

[43] Visible symbols of hate were seen to be held or worn by protestors in media photographs of the occupation. The Applicants, Mr. Jost and Ms. Nagle acknowledged under cross-

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examination having seen demonstrators wearing yellow Star of David emblems featuring the words “non vaxx” in comparison to the symbols victims of the Holocaust were forced to wear. News articles reported protestors with flags featuring swastikas, and signs bearing the Nazi “SS” symbol, as well as Confederate flags.

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[44] Some of those involved in organizing the protest brought with them a document purporting to be a draft memorandum of understanding between a group called “Canada Unity”, the Senate of Canada and the Governor General. The draft memorandum proposed to form a joint committee to assume government functions in return for which the convoy would cease its occupation of Ottawa. When it was pointed out that this proposition was devoid of any constitutional reality, it appears to have been ignored by others on the scene. But it illustrates an effort by some of those involved in the protest to interfere with the democratic process and undermine the government.

[45] During the events in Ottawa, smaller protests sprang up elsewhere in cities across the country but those were largely managed and resolved within less than a day or two by local law enforcement.

(b) Border blockades

[46] On January 29, 2022 a blockade began at the Sweetgrass-Coutts, Alberta, border crossing. On February 5, 2022, the Minister of Municipal Affairs of Alberta wrote to the Federal Ministers occupying the portfolios of Public Safety and Emergency Preparedness seeking federal assistance, including equipment and personnel, to move about 70 trucks and semi-tractor trailers

as well as approximately 75 personal and recreational vehicles. The Alberta Minister noted that the RCMP had exhausted all local and regional options to alleviate the disruption. By February 11, 2022, between 200 and 250 additional Convoy vehicles had gathered at Milk River, 18 km from Coutts, where the police had set up a checkpoint to limit access to Coutts. Only about 40 vehicles remained at Coutts itself.

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[47] On February 6, 2022, a second blockade began at the Ambassador Bridge in Windsor, Ontario, the country's busiest border crossing. On February 11, 2022, the Superior Court of Justice granted an injunction aimed at ending this blockade. On February 13, 2022, the police removed participants and approximately 44 charges were laid. The next day, traffic resumed but the City of Windsor nonetheless declared a state of emergency. Over $390 million in trade with the United States was affected each day of the blockade.

[48] On February 8, 2022, a third blockade was set up on the provincial highway leading to and from the Sarnia Blue Water Bridge, Ontario; Canada's second busiest border crossing. Access was restored on February 14, 2022.

[49] On February 10, 2022, a fourth blockade began north of Emerson, Manitoba. Up to 75 vehicles were involved in the blockade, which allowed cargo like medical supplies and livestock to pass. On February 11, 2022, the Premier of Manitoba sent a letter to the Prime Minister urging immediate and effective federal action regarding the blockade. A fifth blockade began on February 12, 2022 near the Peace Bridge port of entry at Fort Erie, Ontario, Canada's third

busiest land border crossing. On February 14, 2022, the OPP and Niagara Regional Police were able to restore the flow of traffic.

[50] Also on February 12, 2022, protesters' vehicles broke through a RCMP barricade in South Surrey, British Columbia, heading to the Pacific Highway port of entry and forced the closure of the highway at the Canada-U.S. border. By the end of February 14, 2022, 16 people had been arrested in relation to this blockade. By the morning of February 15, 2022, the roads were clear.

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[51] Early on February 14, 2022, RCMP officers executed a warrant issued under the *Criminal Code* RSC 1985, c C-46 [*Criminal Code* or *Code*] and raided two camper trailers and a mobile home at Coutts, arrested 11 individuals and seized a cache of weapons, including 14 firearms, a large supply of ammunition and body armour. Four individuals were charged with conspiracy to commit murder and other offences. Some of the body armour seized was marked with the Diagolon insignia.

(3) Invocation of the *Emergencies Act*

[52] The full Cabinet met on February 13, 2022 to discuss the situation. The question of whether to invoke the *Emergencies Act* was then delegated to the Prime Minister, *ad referendum.* In making the decision, the Prime Minister had the benefit of a memorandum from the Acting Clerk of the Privy Council recommending invocation (the Invocation Memorandum).

[53] On February 14, 2022, the Governor in Council [GIC] declared a public order emergency under the *Emergencies Act,* the Proclamation, to end the disruptions and blockades occurring

across the country. There were an estimated 500 trucks and other vehicles remaining in downtown Ottawa at the time.

[54] On February 15, 2022, the GIC enacted the Regulations, as well as the Economic Order. The RCMP completely restored access to the Coutts border crossing that same day and reached a resolution with the protestors at the Emerson blockade.

[55] Between February 15 and February 23, 2022, the RCMP disclosed information from the OPP, OPS and its own investigations on approximately 57 named entities and individuals to financial service providers, resulting in the temporary freezing of about 257 accounts under the Economic Order.

[56] On February 16, 2022, the Public Safety Minister brought a motion before the House of Commons pursuant to section 58 of the Act to confirm the declaration of the public order emergency proclaimed on February 14, 2022. The blockade at Emerson in Manitoba was completely cleared that day.

[57] Subsection 58(1) of the Act requires that an explanation for the reasons for issuing the declaration [the “Section 58 Explanation”] and a report on any consultations with the Lieutenant Governors in Council [LGIC] of the provinces with respect to the declaration [the “Consultation Report”], shall be laid before each House of Parliament within seven sitting days after the declaration is issued. The Section 58 Explanation and the Consultation Report were tabled before each House on February 16, 2022.

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[58] Following declaration of the Proclamation and making of the Regulations and Economic Order a number of protestors left the blockades in Ottawa. From February 17 to 21, 2022, the police in Ottawa arrested 196 people, of whom 110 were charged with offences, removed 115 vehicles and dismantled the barricades on the streets.

[59] The motion to confirm the Proclamation was adopted in the House of Commons on February 21, 2022. A motion to confirm the Proclamation was then tabled in the Senate and debate began in that chamber on February 22, 2022. By then the RCMP had contacted financial service providers and advised them that they no longer believed the identified individuals and entities previously disclosed were engaged in prohibited conduct or activities covered under the Regulations and Economic Order.

[60] On February 23, 2022, the declaration of a public order emergency was revoked with the issuance of the *Proclamation Revoking the Declaration of a Public Order Emergency*, SOR/2022-26 [the "Revoking Proclamation"]. Issuance of the Revoking Proclamation had the effect of terminating the Regulations and Economic Order under the terms of the Act. The Ontario government also lifted its state of emergency that day.

[61] Under subsection 62(1) of the *Emergencies Act*, a parliamentary review committee must review the "exercise of powers and the performance of duties and functions pursuant to a declaration of emergency." Accordingly, a Special Joint Committee on the Declaration of Emergency was established by motion of the Senate and House of Commons on March 3, 2022.

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[62] On April 25, 2022, Order in Council P.C. 2022-392 was issued under subsection 63(1) of the Act to cause an inquiry to be held into the circumstances that led to the declaration and the measures taken for dealing with the emergency. The Public Inquiry was to report to both Houses of Parliament by February 20, 2023.

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V. **Decision under review**

A. The Proclamation

[63] The proclamation of the public order emergency on February 14, 2022 was an act of the Governor in Council. The final decision to invoke the Act and declare an emergency was a decision of the Prime Minister with the approval and support of Cabinet. The formal documents conveying the recommendation of Cabinet were submitted to the GIC by the Minister of Public Safety and Emergency Preparedness.

[64] The Proclamation declared that the Governor in Council believed, on reasonable grounds, that a public order emergency existed and necessitated the taking of special measures for dealing with the emergency.

[65] The Proclamation specified that the emergency was constituted of:

> a) the continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force, which blockades are being carried on in conjunction with activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property, including

critical infrastructure, for the purpose of achieving a political or ideological objective within Canada,

b) the adverse effects on the Canadian economy — recovering from the impact of the pandemic known as the coronavirus disease 2019 (COVID-19) — and threats to its economic security resulting from the impacts of blockades of critical infrastructure, including trade corridors and international border crossings,

c) the adverse effects resulting from the impacts of the blockades on Canada's relationship with its trading partners, including the United States, that are detrimental to the interests of Canada,

d) the breakdown in the distribution chain and availability of essential goods, services and resources caused by the existing blockades and the risk that this breakdown will continue as blockades continue and increase in number, and

e) the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians;

[66] The Proclamation further specified that the special temporary measures anticipated by the GIC are:

a) measures to regulate or prohibit any public assembly — other than lawful advocacy, protest or dissent — that may reasonably be expected to lead to a breach of the peace, or the travel to, from or within any specified area, to regulate or prohibit the use of specified property, including goods to be used with respect to a blockade, and to designate and secure protected places, including critical infrastructure,

b) measures to authorize or direct any person to render essential services of a type that the person is competent to provide, including services related to removal, towing and storage of any vehicle, equipment, structure or other object that is part of a blockade anywhere in Canada, to relieve the impacts of the blockades on Canada's public and economic safety, including measures to identify those essential services and the persons competent to render them and the

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provision of reasonable compensation in respect of services so rendered,

c) measures to authorize or direct any person to render essential services to relieve the impacts of the blockade, including to regulate or prohibit the use of property to fund or support the blockade, to require any crowdfunding platform and payment processor to report certain transactions to the Financial Transactions and Reports Analysis Centre of Canada and to require any financial service provider to determine whether they have in their possession or control property that belongs to a person who participates in the blockade,

d) measures to authorize the Royal Canadian Mounted Police to enforce municipal and provincial laws by means of incorporation by reference,

e) the imposition of fines or imprisonment for contravention of any order or regulation made under section 19 of the *Emergencies Act*; and

f) other temporary measures authorized under section 19 of the *Emergencies Act* that are not yet known.

B. Reasons for the decision

[67] When an administrative decision maker is required by the legislative scheme to provide reasons for its decision, the reasons are the "primary mechanism by which [they] show that their decisions are reasonable"; their purpose is to "demonstrate 'justification, transparency and intelligibility'": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 81. "Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies": *Vavilov* at para 86.

[68] In these proceedings, the Section 58 Explanation constitutes the reasons for the decision.

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[69] In addition, further to requests for production under Rule 317 of the *Federal Courts Rules* SOR/98-106 [*Federal Courts Rules*], the annotated agendas and minutes of the several IRG and Cabinet meetings leading to the decision, with redactions, were disclosed to the Court and to the Applicants as they were made available to the POEC. Those minutes and agendas, along with the Invocation Memorandum and the Consultation Report, provide necessary context for understanding how the decision came to be made.

C. Procedural history

[70] These proceedings were under case management from the outset with a Judge and Associate Judge presiding over conferences with counsel for the parties and dealing with motions and procedural issues as they arose.

[71] A motion seeking a temporary interlocutory order to stay the Proclamation while it remained in effect was dismissed as moot when the Proclamation was revoked: *Canadian Frontline Nurses v Canada (Attorney General)*, 2022 FC 284.

[72] Following requests for documentary production of records pertaining to the issuance of the Proclamation under Rule 317 of the *Federal Courts Rules*, the Respondent replied on March 15, 2022 with a letter from the Assistant Clerk of the Privy Council objecting to disclosure of records on the basis of Cabinet Confidentiality.

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[73] On or about April 1, 2022, the Applicants were served with a certificate signed by the then Interim Clerk of the Privy Council respecting the application of s. 39 of the *Canada Evidence Act*, RSC, 1985, c C-5 [*CEA*] to the following documents:

1) Submission to the GIC from the Minister of Public Safety and Emergency Preparedness, dated February 2022, regarding the proposed Order in Council directing that a proclamation be issued pursuant to subsection 17(1) of the Emergencies Act, including the signed Ministerial recommendation, a draft Order in Council regarding a proposed proclamation, a draft proclamation, and accompanying materials;

2) The record recording the decision of the GIC concerning the Emergency Proclamation, dated February 2022;

3) Submission to the GIC from the Minister of Public Safety and Emergency Preparedness, dated February 2022, regarding the proposed Order in Council pursuant to subsection l9(l) of the Emergencies Act and concerning emergency measures Regulations, including the signed Ministerial recommendation, a draft Order in Council regarding proposed emergency measures Regulations, draft Regulations, and accompanying materials;

4) The record recording the decision of the GIC concerning emergency measures Regulations, dated February 2022;

5) Submission to the GIC from the Minister of Public Safety and Emergency Preparedness, dated February 2022, regarding the proposed Order in Council pursuant to subsection 19(1) of the Emergencies Act and concerning an emergency economic measures order, including the signed Ministerial recommendation, a draft Order in Council regarding a proposed emergency economic measures order, a draft order, and accompanying materials.

6) The record recording the decision of the GIC concerning an emergency economic measures order, dated February 2022.

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[74] A motion brought by the CCF for an Order pursuant to Rule 75 of the *Federal Courts Rules* to extend the scope of their application was dealt with in *Canadian Constitution Foundation v Canada (Attorney General)*, 2022 FC 1232. The Court dismissed the motion on the basis that materials pertaining to the Revoking Proclamation were not before the GIC when the decision under review was made.

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[75] On July 19, 2022, the Respondent delivered redacted minutes of the meetings of the IRG on February 10, 12, and 13, 2022 and of Cabinet on February 13, 2022 to the Court and the Applicants. The Chair's annotated and redacted agendas for the IRG meetings were delivered to the parties on July 22, 2022. The documents bear notations that the redactions were made pursuant to privilege claims under *CEA* sections 37, 38 and 39, and in addition, for claims of solicitor-client privilege and for lack of relevance.

[76] A second *CEA* section 39 certificate was issued on August 4, 2022.

[77] On August 26, 2022 the Court dismissed a motion brought by the CCF for an Order directing the Respondent to deliver the items for which Cabinet Confidence had been claimed in an unredacted form and on a counsel-only basis, subject to undertakings: *Canadian Constitution Foundation v Canada (Attorney General)*, 2022 FC 1233 [*CCF v Canada*].

[78] A motion brought by the Jost Applicants for an Order to compel production of the records and documents listed in the March 31, 2022 *CEA* section 39 Certificate was dismissed: *Jost v Canada (Governor in Council)*, 2022 FC 1514 [*Jost v Canada*].

[79] On November 9, 2022, following further discussions with the parties, the Respondent withdrew the majority of its section 37 and 38 claims. The Applicants did not challenge the claims made under solicitor-client privilege or the remaining *CEA* claims. The Court dealt with them in an Order issued on January 9, 2023 following an *ex parte* and *in camera* proceeding with the assistance of an independent, security cleared, *amicus curiae*.

[80] On December 12, 2022, CCF and CCLA filed a joint motion in writing under Rule 369 for an order, pursuant to Rule 312, granting leave to the CCLA to file an additional affidavit containing a selection of evidence from the POEC. A few days later, the Jost Applicants filed a similar motion seeking leave to file a supplementary record containing evidence from the POEC and other material.

[81] On January 27, 2023, the Court granted the CCF and CCLA joint motion in *Canadian Civil Liberties Association v Canada (Attorney General),* 2023 FC 118, and dismissed the Jost motion in *Jost v Canada (Governor in Council),* 2023 FC 120. On February 3, 2023, the Respondent filed a Notice of Appeal commencing an interlocutory appeal of the decision to grant the CCF and CCLA motion and seeking an order placing the appeal in abeyance pending the final order on the merits of the underlying applications.

[82] On February 6, 2023, the Respondent filed a motion to admit a supplemental affidavit, pursuant to Rule 312, containing evidence from the POEC. On March 1, 2023, the Court issued an Order granting the motion in part. That decision completed the procedural steps prior to the hearing, which took place on April 3-5, 2023.

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VI. **Evidence**

[83] The parties filed extensive evidence, including affidavits, responses to Rule 317 requests, excerpts from debates in the House of Commons, testimony from the POEC hearings, internal and external communications from the three levels of government, media reports and press releases. Over one hundred and fifty exhibits were attached to one Government paralegal's affidavit alone. In total, the record exceeded 11,000 PDF pages. Accordingly, I will not review the evidence in detail but refer only to elements I consider significant.

(1) Nagle/CFN

[84] Kristen Nagle submitted two affidavits to describe her involvement in the Ottawa protest and attached exhibits, including videos, Facebook and Twitter posts to support her assertions. She was present at the protest from January 28, 2022 to February 19, 2022. She was closely cross-examined on her affidavits and exhibits, including the videos she had made during the protest, and on her involvement in other anti-vaccination protests, which led to charges under Ontario public health legislation.

[85] Nagle/CFN also submitted the affidavit of Tom Marazzo, a supporter of the Ottawa protests and volunteer spokesperson and fundraiser. His bank account and credit cards were frozen on February 18, 2022.

[86] The affidavit of a member of the law firm representing Nagle/CFN was tendered to introduce video statements of the Prime Minister, Deputy Prime Minister and Justice Minister

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describing the implications of the Regulations and Economic Order. In addition, the affidavit introduced foreign and domestic media reports, public opinion surveys, excerpts from the House of Commons proceedings and a “Tweet” from the account of the President of El Salvador. I will not comment on what I thought of that item.

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(2) CCLA

[87] The CCLA filed the affidavit of the Director of the Criminal Justice Program, Abigail Deshman. She provides background on the CCLA, its expertise with respect to constitutional rights, its long involvement in civil liberties cases and contribution to the debates on the inception of the EA in 1988. The affidavit describes other litigation related to the COVID-19 pandemic in which the association was involved. This evidence was relevant to the question of whether the association should be granted public interest standing.

[88] Ms. Deshman’s affidavit also serves to describe the events leading to and following the invocation of the EA based largely on media reports. Published reactions from provincial premiers are also attached as exhibits.

[89] Additional documents were introduced through the affidavit of Cara Zwibel in support of the joint motion of the CCLA and CCF to file a supplementary record, which the Court granted. Key among these were documents relating to the recommendation from the Clerk of the Privy Council to the Prime Minister, the Invocation Memorandum, and excerpts of testimony from the POEC proceedings including that of the Prime Minister and the Clerk.

(3) CCF

[90] The CCF relied on the affidavits of an associate lawyer to introduce some 58 documents, which were also included in the CCLA record. The CCF provided copies of the Ontario and Nova Scotia Regulations issued in response to the protests. The affidavit also introduced numerous media reports, police press releases, statements from the Premiers of Ontario and Manitoba, orders issued by the Superior Court of Justice of Ontario and federal government records pertaining to the deliberations leading to the Declaration.

(4) Jost Applicants

[91] Affidavits from each of the four Applicants describing their personal histories and involvement in the Ottawa protest were filed. A photo of Reverend Ristau in his former military uniform was attached as an exhibit to his affidavit. A copy of the disclosure report made by the RCMP in relation to Mr. Gircys' involvement in the protest was attached to his affidavit. The report led to his accounts being frozen. The Jost Applicants also relied on exhibits attached to the affidavits of Rebecca Coleman, a Department of Justice paralegal, which form part of the Respondent's record.

[92] Each of the Jost Applicants were cross-examined by the Respondent and several additional exhibits were identified.

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(5) Respondent

[93] The Respondent filed the affidavits of Steven Shragge, Superintendent Denis Beaudoin and Rebecca Coleman.

[94] Mr. Shragge is a Senior Policy Advisor with the Privy Council Office Security and Intelligence Secretariat. He provides support to the National Security and Intelligence Advisor to the Prime Minister and to the Cabinet process for matters within his area of responsibility. He described himself as having operational knowledge of the mandates, memberships and practices of decision making and coordination structures within the Cabinet but acknowledged having no direct knowledge of the deliberation and decision making discussions during the days immediately preceding the declaration of a public order emergency on February 14, 2022.

[95] Mr. Shragge described the preparation and tabling of the Section 58 Explanation and Consultation Report attached as exhibits to his first affidavit. He refers to the content of the Section 58 Explanation and states that the decision to issue the Declaration was informed by "robust discussions" at three meetings of the IRG. However, as Mr. Shragge put it during cross-examination, he had no "visibility" at those meetings and could not personally speak to what "robust" meant in the circumstances. He was not involved in the writing of the Section 58 Explanation and was not able to be of much assistance in shedding light on the deliberations either because he did not know or because of objections to questions put to him on the ground of Cabinet confidentiality.

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[96] Superintendent Beaudoin had an operational role in the implementation of the EA measures. He was responsible for overseeing the use of the Economic Order and developed the process used by the RCMP for sharing information with financial institutions. The Economic Order did not specify the procedure under which financial services providers would identify individuals or entities that met the definition of "designated person". Making it up as they went along, the RCMP developed a template for sharing information with the financial service providers about persons believed to be directly or indirectly involved in activities prohibited under the Regulations. An example of that template is attached to his affidavit. Another is attached to Mr. Gircys' affidavit which pertains to him. The RCMP did not generate the information but received it from the OPP and OPS and facilitated its dissemination to financial institutions. The banks and other service providers would report back to the RCMP under s 5 of the Economic Order on any steps that were taken with the information.

[97] In total, Superintendent Beaudoin averred, the RCMP disclosed information on approximately 57 entities and individuals to financial service providers and approximately 257 accounts were frozen.

[98] On cross-examination, Superintendent Beaudoin acknowledged that the RCMP officers involved in this process did not apply a standard, such as reasonable grounds, before sharing information with the financial institutions.

[99] Ms. Colman's affidavits were employed to introduce a large number of media articles, press releases and police statements and Court materials pertaining to the protests.

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VII. **Legal Framework**

[100] The *Emergencies Act* was enacted in the aftermath of the controversy over invocation of the former *War Measures Act*, RSC 1927, c 206, in response to the 1970 terrorist acts in Quebec. The Act contains a number of threshold components and deliberate checks and balances. These include the definition of "national emergency" as constituting an "urgent and critical situation of a temporary nature" which creates a situation that either "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 "seriously threatens the ability of the Government to preserve the sovereignty, security and territorial integrity of Canada."

[101] Moreover, a national emergency can only be found to exist if the situation "cannot be effectively dealt with under any other law of Canada."

[102] Under the Act, for a public order emergency to be declared, there is the additional requirement that there must be a "threat to the security of Canada" drawing on the definition of such threats provided in section 2 of the *Canadian Security Intelligence Service Act*, RSC, 1985, c C-23 (*CSIS Act*). The specific clause of that definition relied upon in issuing the Proclamation in February 2022 concerns "activities…directed toward or in support of the **threat or use of acts of serious violence** against persons or property for the purpose of achieving a political, religious or ideological objective…" [Emphasis added].

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[103] In addition to the terms of the Act, the Proclamation and the related Regulations and Economic Order, it will be necessary in these reasons to refer to the relevant provisions of the *Charter, Canadian Bill of Rights and the CSIS Act* , which are set out in the attached Annex "A". The Invocation Memorandum submitted to the Prime Minister recommending the invocation of the Act, the section 58 Explanation and the Consultation Report tabled in both Houses of Parliament as justification, are attached in Annex "B".

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VIII. **Issues**

A. *Preliminary issues*

[104] As noted above, on April 12, 2022, the Respondent introduced a motion and counter-motion to strike the four Applications on the basis that they were all moot and that none of the Applicants, save for Cornell and Gircys, had standing to challenge the Proclamation and related instruments. It was decided early in the case management process that the motions would not be dealt with until a hearing on the merits was scheduled and they would then be argued at the outset of the hearing.

[105] The Respondent's motions raise the following issues:

A. Whether the Applications are moot, and if so, whether the Court should nonetheless exercise its discretion to hear the Applications;

B. Whether the Applications should be struck for lack of standing save for two of the Jost Applicants who, the Respondent concedes, have direct standing.

[106] The parties submitted extensive written argument on the preliminary issues. In light of that, I limited the amount of time for oral argument on the motions at the beginning of the hearing on April 3, 2023. In addition, I indicated at the outset of the hearing that I agreed with the Respondent that Jost and Ristau lacked standing for reasons to be provided later. I recognized that the direct standing of Cornell and Gircys was conceded by the Respondent. Accordingly, they would be heard on the merits subject to my findings on mootness.

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[107] Apart from the determination regarding the standing of Jost and Ristau, I advised the parties that I would reserve my decisions on the motions.

B. *Substantive issues*

[108] Nagle/CFN submitted that their Application raised issues of whether the Proclamation was *ultra vires* as there was no public order emergency as defined by the Act, and whether the Regulations and Economic Order violate the *Charter* and the *Canadian Bill of Rights*.

[109] CCLA argued that their Application raises the following issues:

- Whether the decision to issue the Proclamation was unreasonable and *ultra vires*;
- If not, whether the prohibitions contained at sections 2, 4, 5 and 10 of the Regulations violated sections 2(b)(c)(d) and 7 of the *Charter*, and whether sections 2 or 5 of the Economic Order infringed section 8 of the *Charter*;
- If so, whether the infringed rights, if any, can be justified under section 1 of the *Charter*.

[110] Similarly, the CCF argued that their Application concerns the following issues:

- Did Cabinet have reasonable grounds to conclude that the protests were threats to the national security of Canada?
- Did Cabinet have reasonable grounds to conclude that the protests could not be effectively dealt with under existing law?
- Did the powers created by the Regulations and Economic Measures violate sections 2(b)(c) and 8 of the charter and can they be saved under section 1?

[111] In their written argument, the Jost Applicants submitted that this case put the following matters in issue:

- What is the test for invocation of the Act, and based on that test, was the invocation of the Act in this case lawful and constitutional?
- Is the phrase throughout the Act "special temporary measure" void for vagueness under s.7 of the *Charter*, unjustifiable under s 1, and therefore requiring a remedy under s 52(1) of the *Constitution Act, 1982*?
- If no, are the "special temporary measures" passed under section 19 of the Act, *ultra vires* of s 19, or in the alternative, do the provisions of the Economic Order violate section 8 of the *Charter*, and are unjustifiable under s.1, thereby requiring a declaration under s.52(1) of the *Constitution Act, 1982* to that effect?

[112] In addition, the Jost Applicants alleged violation of the protection of property rights under section 1(a) of the *Canadian Bill of Rights*. That allegation was also included in their Amended Notice of Constitutional Questions filed on March 14, 2022.

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[113] At the hearing, counsel for the Jost Applicants chose to focus on their *Charter* arguments and only briefly asserted infringement of the *Canadian Bill of Rights.* They did not pursue the other questions set out in their factum and Amended Notice of Constitutional Questions.

[114] However, in their oral argument, the Jost Applicants raised fresh questions relating to the application of several international agreements, the Vienna Convention on the Law of Treaties and principles of customary international law. These matters were mentioned but not discussed in their Notice of Application and were not identified as issues or addressed in their Memorandum of Fact and Law. As result, the Respondent had not dealt with them in their written submissions and were not prepared to speak to them in oral argument. The Respondent therefore objected to these arguments being considered.

[115] As a general rule unless the situation is exceptional, new arguments not presented in a party's Memorandum of Fact and Law should not be entertained as to do so would prejudice the opposing party and could leave the Court unable to fully assess the merits of the new arguments. The Court retains the discretion to accept new arguments not raised in a party's memorandum. However, as the Applicants did not raise any exceptional situation or authority for presenting these arguments for the first time at the hearing the Court will not consider them: *Rouleau-Halpin v Bell Solutions Techniques*, 2021 FC 177 at paras 33-34.

[116] Had I accepted that they were admissible, the Jost Applicants' international law arguments would have been of little assistance in these proceedings in view of the principles discussed in *Entertainment Software Association v Society of Composers, Authors and Music*

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Publishers of Canada, 2020 FCA 100 at paras 76 to 92. [*Entertainment Software*]. In short, as stated by Justice Stratas, domestic law prevails and the Constitution of Canada is supreme (*Entertainment Software* at para 79).

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[117] I note that the Preamble of the *Emergencies Act* states that in taking the special temporary measures authorized by the Act, the Governor in Council must have regard to the *International Covenant on Civil and Political Rights* (ICCPR). In *Quebec (AG) v Moses*, 2010 SCC 17 at para 101 the Supreme Court of Canada said as follows:

> The wording of a statute's preamble often provides insight into the statute's purpose or goal that can be helpful to a court interpreting it. According to s. 13 of the federal Interpretation Act, R.S.C. 1985, c. I-21, "[t]he preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object." […]Although a legislative preamble will never be determinative of the issue of legislative intent since the statute must always be interpreted holistically, it can nevertheless assist in the interpretation of the legislature's intention […]

[118] Accordingly, the reference in the Preamble to the ICCPR may serve as an interpretative aid as to the legislative intent of the EA. However, it is clear from the legislative history and language of the Act that the intent and purpose of the EA was to preserve and protect fundamental rights even in emergency situations where special temporary measures may be required. Thus, it is not necessary to refer to the ICCPR to interpret the provisions of the Act. The modern principle of interpretation set out in *Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 21[*Rizzo & Rizzo*] governs. It requires that the words of the Act "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

[119] The Respondent submits that the issues are simply whether the decision to invoke the Act and to make the Regulations and Economic Order are reasonable and constitutional.

[120] The intervener, the Attorney General of Alberta, made submissions on five questions:

1. What is the definition of "national emergency" in section 3(a) of the Act requiring that it must be "of such proportions or nature as to exceed the capacity or authority of a province to deal with it"?

2. What is the interpretation of the phrase in section 3 of the Act "cannot be effectively dealt with under any other law of Canada"?

3. What are the implications of the requirement in section 17(2)(c) of the Act that the declaration of public order emergency specify the areas of Canada to which the effects of the emergency extend?

4. What is the interpretation of the requirement in section 25(1) of the Act to consult with the provinces?

5. What is the relationship between sections 19(1) and 19(3) of the Act?

[121] In my view, in addition to the preliminary questions relating to mootness and standing, the issues raised by the parties and the Intervener may be summarized in three broad questions:

1. Was the Proclamation unreasonable and *ultra vires* of the Act?

2. Did the powers created by the Economic Order and Regulations violate sections 2(b)(c)(d), 7 or 8 of the *Charter*, and, if so, can they be saved under section 1?

3. Did the Regulations and Economic Order violate the *Canadian Bill of Rights*?

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IX. **Argument and Analysis**

A. Preliminary issues

(1) Test for a motion to strike

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[122] The Court's jurisdiction to strike a proceeding derives from its inherent jurisdiction to control its own process*: Lukas v Canada (President, Natural Sciences and Engineering Research Council)*, 2015 FC 267 at para 24, cited with approval in *1397280 Ontario Ltd v Canada (Employment and Social Development)*, 2020 FC 20 at para 11; see also *Rebel News Network Ltd v Canada (Leaders' Debates Commission)*, 2020 FC 1181 at para 32 [*Rebel News*]. The threshold applicable on a motion to strike is whether the application is "bereft of any possibility of success". As discussed in *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33 [*Wenham*] the Court uses the "plain and obvious" threshold or "doomed to fail" standard. Taking the facts pleaded as true, the Court examines whether the application:

> …is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf. Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

Citing *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 47.

[123] The Court must read the notice of application to get at its “real essence” and “essential character” by reading it “holistically and practically without fastening onto matters of form”: *Wenham* para 34. An application can be doomed to fail on a preliminary objection, as in this instance, because of mootness: *Wenham* para 36.

(2) Test for mootness

[124] A matter is moot when there is no longer a live issue between the parties and an order will have no practical effect: *Borowski v Canada (Attorney General),* [1989] 1 SCR 342 at p 353 [*Borowski*]. The Respondent brought its motion to strike the four applications for judicial review on the basis that all the applications are moot since they seek remedies in respect of legislative instruments that are no longer in effect, as the Public Order Emergency ended and the Proclamation, Regulations and Economic Order were revoked on February 23, 2022. Accordingly, the Respondent argues, there is no live controversy between the parties and nothing concrete or tangible for the Court to opine on that will impact the rights and interests of the parties.

[125] The Court may nonetheless choose to exercise its discretion to hear a moot application upon considering: (1) the presence of an adversarial context; (2) the appropriateness of applying scarce judicial resources; and (3) the Court’s sensitivity to its role relative to that of the legislative branch of government: *Borowski*, pp 358-362.

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[126] The Court may also decline to exercise its discretion to hear moot matters when the requesting party did not come to the Court with clean hands: *Merck Frosst Canada Inc. v Canada*, 1999 CanLII 7859 at para 6 (FCA); *Narte v Gladstone*, 2021 FC 433 at paras 33-34.

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[127] In these proceedings, all of the Applicants except for Nagle/CFN conceded that there was no longer a live controversy between the parties as a result of the Revoking Proclamation and that the matter is now moot. They all contend that should the Court find that the matter is moot, it should nonetheless exercise its discretion to hear the applications.

(3) The Respondent's position

[128] In essence, the Respondent contends, the four applications are requests for declarations which fail to provide live issues for judicial resolution as they cannot sustain a moot case in and of itself: *Rebel News* at para 64. A mootness finding cannot be avoided because declaratory relief is sought: *Fogal v Canada*, 1999 CanLII 7932 (FC) at paras 24-27, *Rahman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137, at paras 17-21. A declaration may be granted only if it will have practical utility and will settle a live controversy between the parties: *Income Security Advocacy Centre v Mette*, 2016 FCA 167 at para 6, citing *Daniels v Canada (Indian Affairs and Northern Development*), 2016 SCC 12 at para 11, *Solosky v The Queen*, [1980] 1 SCR 821 and *Borowski*. In the present case, the Respondent argues, there is no such practical utility.

[129] Moreover, the Respondent submits the Court should avoid expressing an opinion on a question of law where it is not necessary to do so to dispose of the case as abstract constitutional

pronouncements may prejudice future cases: *Phillips v Nova Scotia Commissioner of Inquiry into the Westray Mine Tragedy*, [1995] 2 SCR 97 at paras 9-12; *Mackay v Manitoba*, [1989] 2 SCR 357 at p 361-2; *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 at p 1099-1101. Where a proceeding will not have a practical effect on the rights of the parties, it has lost its primary purpose, the Respondent argues, and the Court should not devote scarce resources to it: *Amgen Canada Inc v Apotex Inc*, 2016 FCA 196 at para 16 [*Amgen*]. A "mere jurisprudential interest" does not satisfy the need for a concrete and tangible controversy: *Air Canada Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 7 [*CUPE v Air Canada*].

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[130] In the present matter, according to the Respondent, the Applicants have already obtained the relief sought as the measures are no longer in effect; any declaration that the Emergency Measures were invalid or not *Charter*-compliant would provide no practical utility and there is no tangible relief to be provided that warrant this Court's intervention. This is not a case where there is a need to settle uncertain jurisprudence: *Amgen* at para 16. Nor is the Act evasive of review as it provides for adequate oversight and review mechanisms in its provisions for a Public Inquiry and Parliamentary Review.

(4) Positions of the Applicants

[131] The CCLA, CCF and the Jost Applicants concede that their applications are moot but argue that the Court should exercise its discretion to hear them as the *Borowski* factors weigh in their favour. Over the past year, they argue, the parties have presented and continue to present the necessary adversarial context, judicial economy supports hearing this case, which raises

once-in-a-generation issues that are evasive of review, and the Court's role is to explain whether the government's action was reasonable and *Charter*-compliant. Should the Court decide otherwise, they contend, the result is that any proclamation of a public order emergency and imposition of extraordinary measures of a brief duration will never be judicially reviewed. Revocation under the Act should not immunize the executive branch from judicial review, they argue.

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[132] Cornell and Gircys add that in their case, the proceedings should be allowed to continue as the Respondent concedes that they have direct standing. The Court should therefore exercise its discretion to hear their case even if it is otherwise moot, they argue.

[133] The Nagle/CFN applicants submit that insofar as they are concerned the matter is not moot and a live controversy exists because their rights and liabilities were affected or may be affected notwithstanding the revocation of the Proclamation and cancellation of the Regulations and Economic Order by virtue of section 43 of the *Interpretation Act*, R.S.C., 1985, c. I-21 [*Interpretation Act*].

(a) Analysis

(i) Presence of an adversarial context

[134] The requirement for an adversarial context is to make sure that the issues are "well and fully argued by parties who have a stake in the outcome": *Borowski*, p. 359. The necessary adversarial context exists where "both sides, represented by counsel, take opposing positions"

(*CUPE v Air Canada* at para 10), where the parties continue to defend opposed positions on the issue (*Laurentian Pilotage Authority v Corporation des Pilotes de Saint-Laurent Central Inc.*, 2019 FCA 83 at para 27 [*Laurentian Pilotage*]), and where an application has been "fully argued on the merits" by the Attorney General of Canada and a public interest organization (*Democracy Watch v Canada (Attorney General*), 2018 FCA 195 at para 15, [*Democracy Watch*]).

[135] Since it was decided over a year ago that the Respondent's motions would not be heard and determined before the date scheduled for the hearing on the merits, the parties have continued to vigorously argue their respective positions. The several contested motions in the past year are, in my view, sufficient evidence of the existence of an adversarial context. Considerable time, energy and resources have been invested in these cases from all parties. The issues have been highly contested and zealously argued throughout.

[136] I agree with Cornell and Gircys that there remains a "tangible and concrete" dispute between the parties. The issues are not simply academic for them as they were directly affected by the invocation of the Act, which, as will be discussed below, arguably had an impact upon their *Charter* rights.

[137] There may be no immediate "collateral consequence" from these applications that could determine related proceedings between the parties, a factor to be taken into consideration as the Respondent contends. However, the existence of collateral consequences are not always essential in determining whether to exercise the court's discretion to hear a case despite its mootness,

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especially when the subject matter may otherwise be evasive of review: *N.B. (Minister of Health) v G.(J.)*, [1999] 3 SCR 46 at para 45 [*G.(J.)*].

[138] Nagle/CFN argue that they remain liable to prosecution for breaching the Regulations. I do not accept this. As I discuss further, below, in relation to standing, the possibility of a prosecution against either Nagle or the CFN is entirely hypothetical given subsequent events and the passage of time. Moreover, their assertion of a potential claim for compensation for *Charter* damages or under subsection 48(1) of the Act is speculative given the lack of evidence of any harm to Nagle or the CFN. In the result, I am satisfied that there is no live controversy between them and the Respondent.

[139] These matters are distinguishable from the applications dealt with in *Ben Naoum v Canada*, 2022 FC 1463 [*Ben Naoum*], a case relied upon by the Respondent. In those proceedings, four judicial review applications challenging Canada's vaccine mandates for air and rail passengers were struck. Among the reasons why Associate Chief Justice Gagné declined to hear them were that the mandates had been revoked and declaratory relief would bring no practical utility. However, by the time those matters came before the Court, the federal and provincial health safety measures adopted in the pandemic had already been constitutionally challenged across the country as they were in full force and effect. As a result, there was no uncertain jurisprudence to be resolved: *Ben Naoum* at para 42. Similarly, in *Lavergne-Poitras v Canada*, 2022 FC 1391 it was found that the application was not evasive of review in part because it was already being considered in other courts.

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[140] In other cases cited by the Respondent in support of their motion to strike, the decisions at issue had already been reviewed at first instance.: *Spencer v Canada*, 2023 FCA 8; *Right to Life Association of Toronto v Canada*, 2022 FCA 220; *Fibrogen, Inc v Akebia Therapeutics, Inc*., 2022 FCA 135; *Canada v Ermineskin Cree Nation*, 2022 FCA 123; *Wojdan v Canada*, 2022 FCA 120. That is not the situation here as there has been no prior determination by the Courts of the validity of the decision at issue.

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[141] In my view, the Applicants have established that an adversarial context continues to exist and have built a record upon which meaningful judicial review of the decision to invoke the Act and issue the Proclamation and related instruments can occur.

(ii) Judicial Economy

[142] Under the judicial economy analysis, courts can consider whether the matter is likely to recur and is evasive of review, and whether the matter is of national or public importance: *Borowski* at p 353. The Respondent does not dispute that the matter is of national and public importance but contends that alone is insufficient in the absence of an additional "social cost in leaving the matter undecided": *Borowski* at p 362. The Respondent suggests that the likelihood of recurrence is uncertain given the exceptional circumstances in which the Act was invoked and contend that further declarations will not be evasive of review going forward in light of the requirements for both a public inquiry and parliamentary review.

[143] I disagree. The risk of other episodes of public disorder of the nature which occurred in February 2022 can not be discounted. While the circumstances were exceptional up to that point

in time, there can be no guarantee that there will not be a recurrence of similar events, or worse, in light of the rise of extremist elements within our society prepared to take their opposition to government policies to another level of protest, and to whip up support for such protests through the extraordinary reach of social media.

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[144] I agree with the Applicants that neither the Public Inquiry nor the Special Joint Committee of the House of Commons and the Senate, required by the Act to examine the Declaration of Emergency, are substitutes for judicial review. Without dismissing in any way the importance of those procedures, their roles are not to adjudicate upon the legality and constitutionality of the measures adopted under the Act. Rather, their roles are to consider the events which took place and to make recommendations that, without legislative or other action, have no legal effect. While they are both important accountability mechanisms, they are legally and practically distinct from the Court's adjudicative function: *Canadian Civil Liberties Association v Canada (Attorney General)*, 2023 FC 118, at paras. 56-57. The present proceedings are thus not duplicative of the work done by the POEC or that being undertaken in the Parliamentary process, contrary to the Respondent's submission.

[145] I am conscious of the reality that as a single puisne judge I may err on the findings I make in these reasons. However, such errors can be cured on appellate review. Neither the Commission nor the Parliamentary Committee process are susceptible to appeal.

[146] The Respondent submits that the invocation of the *Emergencies Act* is not evasive of judicial review because the Federal Court is accessible 24 hours a day, 365 days a year for urgent

applications. The Respondent argues that, if necessary, interim stay orders could be issued and time frames abridged. It is true that interim injunctive relief may be rapidly accessed from the Court, but this remedy is generally sought in the context of a long-standing dispute between the parties and there is an adequate evidentiary basis for a considered decision to be rendered promptly.

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[147] As the history of these proceedings demonstrates, it can be difficult to obtain the evidence required to bring an application for an injunction against actions by the government when the Executive is in control of the information underlying the decision and unwilling to disclose it. In this instance, at the outset, very little information about the grounds for invocation of the Act was disclosed beyond the Section 58 Explanation. Production requests for material records, under Rule 317 of the *Federal Courts Rules*, were actively resisted by the Respondent under several heads of privilege including broad claims of Cabinet confidentiality.

[148] As argued by the CCF, a public order emergency is a paradigmatic example of a matter that is evasive of review because it will almost always be over and moot by the time a challenge can be heard on the merits. For arguably comparable examples see *Tremblay v Daigle*, [1989] 2 SCR 530, p 539*; G.(J.)* at para 47; *Doucet-Boudreau v Nova Scotia (Minister of Education),* 2003 SCC 62 at para 20; *Mazzei v British Columbia (Director of Adult Forensic Psychiatric Services),* 2006 SCC 7 para 15; *A.C. v Manitoba (Director of Child and Family Services),* 2009 SCC 30 at para 174; *Mission Institution v Khela*, 2014 SCC 24 at para 14; *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 at para 15; and *R. v Penunsi,* 2019 SCC 39 at para 11.

[149] The Act's definition of a "public order emergency" requires that it be temporary, which means that such order will likely have ended long before any legal challenges to the proclamation of an emergency are heard by the courts. The timeline of this case illustrates this point. If the Court declines to hear these cases, a precedent may be established that so long as the government can revoke the declaration of an emergency before a judicial review application can be heard, the courts will have no role in reviewing the legality of such a decision.

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[150] There would thus be an "additional social cost" in leaving the issues raised in these proceedings undecided, as the Act vests extraordinary powers in the Executive, including the power to create new offences without recourse to Parliament, or public debate, and the power to act in core areas of provincial jurisdiction without provincial consultation or consent.

[151] Uncertainty as to when and how the Act can be invoked necessarily creates a "social cost" in that, in the next emergency, the government may take similar measures without the benefit of the guidance of the courts on their reasonableness or compliance with the *Charter*. In the result, the interests of judicial economy do not foreclose the hearing of these applications.

(iii) Court's sensitivity to its role relative to that of the legislative branch of government.

[152] The courts must be sensitive to their role as the adjudicative branch in our political framework as pronouncing judgment in a moot case may be viewed as making law in the abstract, a task reserved for the legislative branch: *Borowski* at p. 362; *Amgen* at para 16. A court

may decline to exercise its discretion to hear a moot case where Parliament also has a role in considering the same issues: *Democracy Watch* at paras 20-22.

[153] I agree with the Respondent that the Act's requirements for a Parliamentary review process and a public inquiry calls for an extra measure of caution. However, a review of the legislative history of the Act demonstrates that Parliament itself contemplated judicial review of emergency declarations.

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[154] The Bill introducing the Act in 1984 was amended to drop the loose requirement that Cabinet only needed to be "of the opinion" that an emergency existed, in favour of the requirement that there be "reasonable grounds" for such a decision. The expressly stated purpose of this wording was to empower courts to judicially review emergency proclamations: Bill C-77, *An act to authorize the taking of special temporary measures to ensure safety during national emergencies and to amend other Acts in consequence thereof* (First Reading) (June 26, 1987) [*Bill C-77*]; *Minutes of Proceedings and Evidence of the Legislative Committee*, 33rd Parl., 2nd Sess., Vol. 1, No. 1 (February 23, 1988), pp. 15 to 16.

[155] A reviewing court may have reference to the legislative history of an enactment as part of the context but that evidence must be examined with caution. The authentic meaning of an enactment must be read according to the modern rules of interpretation set out in *Rizzo & Rizzo.* But "the information obtained from parliamentary debates can be particularly useful when it confirms that the interpretation given is correct": *MediaQMI v Kamel*, 2021 SCC 23 at paras 37-38.

[156] Here it is clear that the change in the draft bill resulting in the present language was made so that there would be an opportunity for judicial review. This was done in the full consideration of the legislators that the Act, as drafted, called for both a Public Inquiry and a Parliamentary Review, as the debates clearly indicate. This, it was recognized, was to ensure that Canadians would be able to challenge in the courts any Proclamation and related statutory instruments made by the Executive. As stated by the Supreme Court of Canada in *Catalyst Paper Corporation v North Cowichan (District)*, 2012 SCC 2 at para 10:

> It is a fundamental principle of the rule of law that state power must be exercised in accordance with the law. The corollary of this constitutionally protected principle is that superior courts may be called upon to review whether particular exercises of state power fall outside the law. We call this function "judicial review".

[157] I am satisfied that the legislative history of the Act weighs heavily in favour of the exercise of the Court's discretion to hear the applications.

(5) Conclusion on mootness

[158] Taking the public and national importance of the subject matter into account, which is not disputed by the Respondent, and my conclusions on the factors of judicial economy and respect for the legislative process, and subject to my remarks below about standing, I am satisfied that the applications should be heard notwithstanding their mootness.

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(6) Test for standing

[159] To bring an application for judicial review in this Court a litigant must, generally, establish that they are "anyone directly affected by the matter in respect of which relief is sought": s 18.1(1) of the *Federal Courts Act*. While the Court has held that the words "directly affected" should not be given a restricted meaning, the evidence must show more than a mere interest in a matter: *Unifor v Vancouver Fraser Port Authority*, 2017 FC 110 at para 29.

[160] An applicant claiming direct standing must show that the impugned decision a) directly affects their rights; b) imposes legal obligations on them; or c) prejudicially affects them: *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.

[161] The criteria for public interest standing were set out in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37 [*DESW*]; see also *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 [*Council of Canadians with Disabilities*] which confirmed the *DESW* test. In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed proceeding is a reasonable and effective way to bring the issue before the courts.

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(a) Respondent's position

[162] The Respondent submits that Nagle/CFN and the Jost Applicants, save for Cornell and Gircys, lack direct standing as they are not "anyone directly affected by the matter in respect of which relief is sought" as required by s 18.1(1) of the *Federal Courts Act*.

[163] The Respondent further adds that Nagle, Gircys, Jost and Ristau demonstrated a lack of clean hands by providing inaccurate, unfounded and exaggerated statements in their evidence, and have approached the judicial review with a lack of candour. For that reason, the Respondent argues, the Court should decline to exercise its discretion to recognize or grant standing in their favour.

[164] The Respondent argues that neither Kristen Nagle nor the CFN were adversely affected by the invocation of the Public Order Emergency and enactment of the related instruments. By her own evidence, Ms. Nagle continued to willingly act in contravention of the measures by, among other things, soliciting donations, distributing funds and providing material support to the demonstrators. However, she was not the subject of any disclosures to financial institutions or, otherwise described to be a "designated person", her bank accounts and financial resources were not frozen and she was not forcibly removed from participating in the Convoy. She chose to leave on February 19, 2022, of her own accord. Ms. Nagle continued to express her views and to fundraise after the invocation of the Act; she was never charged nor was she ever the subject of any measures taken under the Act.

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[165] As for the CFN, the Respondent argues that there is no evidence suggesting that anyone other than Nagle acted on behalf of the organization, that any director, member or employee of CFN other than Nagle attended the Convoy, that CFN took any action separate from Nagle, or that the *Emergency Measures* affected CFN any differently than they affected Nagle. CFN was not named a designated entity and its bank account was not frozen. Any potential liability Nagle and the CFN might subsequently face from their involvement is entirely speculative. Moreover, the Respondent submits, even if the *Emergency Measures* had caused a temporary reduction in financial contributions to CFN, judicial review cannot be used to protect interests that are strictly commercial in nature: *Island Timberlands LP v Canada (Minister of Foreign Affairs)*, 2009 FCA 353 at para 7 [*Island Timberlands*].

[166] Similarly, the Respondent submits, Jeremiah Jost and Harold Ristau did not have their bank accounts frozen nor were they more affected by the Emergency Measures than any other member of the public. The restrictions imposed by the Regulations on participation in the protest in downtown Ottawa applied equally to all members of the public. Jost and Ristau were not forcibly removed from downtown Ottawa nor were they otherwise specifically targeted by law enforcement. They left of their own accord.

[167] As for the CCLA and the CCF, the Respondent submits that they should not be granted public interest standing because their proposed arguments are moot and duplicate arguments made by the Applicants with direct standing i.e., Cornell and Gircys.

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(b) Applicants' positions

(i) Nagle/CFN

[168] Nagle, and through her the CFN, asserts direct standing based on her participation in the Ottawa protests. Neither claims public interest standing. They deny that their solicitation and distribution of funds are transactions of a "strictly commercial nature"; rather they contend, the purpose underlying soliciting and distributing funds was to facilitate the peaceful assembly of participants in the Convoy in Ottawa and their peaceful expression of dissatisfaction with government policies.

[169] Nagle freely acknowledges having violated the Regulations and the Economic Order for days after their implementation. While the instruments remained in effect, she argues, this made her liable to being charged, and the CFN's funds frozen, for her expression of dissent and financial support to the Convoy. She contends that this had a chilling effect on her activities and thus she refrained from distributing funds as openly as she had before the Proclamation. Moreover, she states in her affidavit, donations to the CFN markedly declined and, as a result, she felt compelled to cease her participation and that of the CFN in the protest.

[170] Ms. Nagle contends that she and the organization continue to be liable because of the operation of s 43 of the *Interpretation Act* notwithstanding revocation of the Act and cancellation of the Regulations and Economic Order. The effect of s 43 in this context, she submits, is to preserve the right of the authorities to investigate and prosecute her and the CFN for their involvement in the protests even long after revocation: *Chen v Canada (Citizenship and*

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Immigration), 2018 FC 608 at para 7 [*Chen*]; *R. v Ferkul*, 2019 ONCJ 893 [*Ferkul*] at para 4. A declaration by this Court that the Regulations and Economic Order breached their rights under the *Canadian Bill of Rights* or the *Charter*, or that the Proclamation was *ultra vires*, would eliminate their liabilities, she contends.

(ii) Jost and Ristau

[171] As noted, the Respondent concedes that Cornell and Gircys have standing as persons directly affected by the decision under review. Jeremiah Jost also asserts that he was directly and substantially harmed by the Act as he was carrying out his *Charter* rights to protest in Ottawa when the Act was invoked. He submits that he received notice of police threats to charge protestors, witnessed police brutality and was shoved by the police and his clothes were torn because of the enforcement of the Regulations. Thus, Jost argues his rights to liberty, mobility and freedom of expression were adversely affected, and the Court should therefore recognize that he has direct standing to challenge the Proclamation and related instruments.

[172] Harold Ristau participated in the Convoy protest in Ottawa for just one day, on February 12, 2022, before the Regulations and Economic Order came into effect. He confirmed in his affidavit and on cross-examination that the measures did not impede his ability to participate to anything on that day. His bank accounts were not subsequently frozen and no other action was taken by the police or other authorities against him. Ristau claims that, upon returning home, he suffered negative consequences that were caused by the Proclamation. These, as he described in his affidavit, and acknowledged on cross-examination, appear to have been due to reactions from

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other persons within his religious community and place of work who did not agree with his views, and were not due to any action taken by the government or the police.

(iii) CCLA and CCF

[173] While the CCLA and CCF have brought separate applications for review, they have worked closely together in these proceedings. The CCLA has a long history of promoting human rights and civil liberties. The CCF's focus is more on constitutional issues as its name indicates. They submit that public interest standing is a matter of discretion to be exercised in a purposive, flexible and generous manner. The purpose is to ensure that state action conforms to the Constitution and statutory authority and to provide practical and effective ways to challenge the legality of state action: *DESW* at para 31.

(c) Conclusion on standing

[174] As noted above, at the opening of the hearing on April 3, 2023, I advised counsel for the Jost Applicants that on the basis of the record and the transcripts of cross-examination of Jost and Ristau, I agreed with the position of the Respondent that neither of them had standing but Cornell and Gircys had direct standing to be heard on the merits. Having considered the matter further I see no reason to alter that conclusion.

[175] Among the four Jost Applicants, Mr. Ristau had the least claim to standing as none of what he claims to have experienced can be directly connected to the Proclamation and Emergency Measures. His visit to Ottawa was brief and the negative consequences, which he

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says followed, occurred at his place of work and within his religious community. The relationship between the Emergency Measures and the alleged harms from private persons is speculative and unsubstantiated. Ristau was not, in my view, a person affected by the decision to issue the Proclamation in any meaningful way.

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[176] While Mr. Jost claims to have suffered ill effects as a result of the operations to clear the protestors from downtown Ottawa, they were all transitory. No actions were taken to freeze his resources. Mr. Jost chose to remain in the area notwithstanding clear instructions to depart and was present when the police clearance operation began. He conceded on cross-examination that the Emergency Measures did not impede his ability to attend and participate in the protests. He continued to receive and distribute money to other protestors. While his right to express dissent may have been briefly affected, that was only within the physical confines of the area subject to the Regulations. He was free to leave that area and to continue to express his dissent elsewhere. Jost's evidence lacked candour and was evasive and misleading on cross-examination. He denied, for example, that loud truck horns were blown at night despite incontrovertible evidence of this including his own video recording.

[177] Edward Cornell and Vincent Gircys were directly affected by the Emergency Measures in that their accounts were frozen. Gircys made exaggerated and misleading statements in his evidence about the effect of the invocation of the Act upon him unsupported by any medical or psychological evidence but I do not find that they amount to grounds to deny him standing. The Respondent made no claim of "unclean hands" against Cornell. As a result, I was satisfied that their applications should proceed.

[178] As noted, the Nagle/CFN claim to direct standing is primarily based on s. 43 of the *Interpretation Act.* That section deals with the effect of repeal and revocation of a statute or regulation. Accordingly, they argue, revocation of the Proclamation does not preclude the prosecution of charges against them under the terms of the Regulations and Economic Order as they were during the duration of the Proclamation. They submit that Nagle in her personal capacity, and the organization as an "entity", both fell within the meaning of "designated persons" set out in the *Economic Order* while those instruments were operative because of their activities in support of the Convoy. Accordingly, they argue, they remain subject to potential liability under those provisions, which makes them persons affected under the terms of s. 18.1 of the *Federal Courts Act.*

[179] At the outset of the hearing, I considered whether there was any "air of reality" to this argument, which would justify the recognition of standing for Nagle and the CFN. The Respondent's position is essentially that the argument is highly speculative and the Court should not entertain the possibility that there is any substance to it. I have come to agree with the Respondent's position largely because 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. In the unlikely event that might happen, it would remain open to Nagle and the CFN to seek a determination on the constitutionality of the impugned provisions if they chose to do so.

[180] This is not a case of a historical crime discovered long after the statute has been amended which, in my view, is what section 43 of the *Interpretation Act* is intended to address. The

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involvement of Nagle and the CFN in the events of February 2022 was discoverable by the authorities at the time. Neither *Chen* nor *Ferkul* are of assistance to them. *Chen* dealt with the application of foreign law and did not address the question of delayed enforcement of a repealed Canadian statute. *Ferkul* deals with the change in the legal framework for cannabis sales and a *Charter* challenge to repealed legislation.

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[181] To the extent that donations to the CFN may have diminished after the invocation of the Act that is, as the Respondent argues, purely a financial consideration that does not support a finding that Nagle and the organization should be granted standing: *Island Timberlands*, at para 7.

[182] I am also of the view that Nagle did not bring her application for judicial review with clean hands. The decision to grant standing or to hear a moot application as a matter of fairness constitutes discretionary equitable relief. The clean hands doctrine recognizes that a court can decline to grant equitable relief in favour of a party who has acted unlawfully, shown bad faith or lacked transparency: *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 at para 37; *Laurentian Pilotage* at para 41.

[183] While the Respondent points to Nagle's history of prior misbehaviour, the clean hands doctrine applies to a party's conduct during the court proceedings. Nagle has demonstrated bad faith in these proceedings. At the very outset, in February 2022, she circumvented the Court's instructions against broadcasting a virtual hearing to which she had been granted remote access.

Moreover, the transcript of Nagle's cross-examination is replete with examples of her efforts to avoid answering questions. Her responses lacked transparency and candour.

[184] During the hearing in April 2023, the Court was offended by the behaviour of lead counsel for Nagle/CFN. Despite repeated instructions to address the issues, counsel repeatedly made inappropriate and offensive political statements. These grandstanding remarks were clearly intended to play to the audience observing the hearing remotely. I will note that junior counsel for Nagle/CFN, who presented argument in reply to the Respondent later in the hearing, did not engage in the same misconduct.

[185] Apart from these concerns, having reread their memorandum of fact and law and the transcript of their oral submissions, I am satisfied that Nagle/CFN bring nothing of value to these proceedings. As a result, I find that they lack standing. Their application for judicial review is dismissed and will not be considered further in these reasons.

[186] As for the CCLA and CCF, I have no doubt that their participation in these proceedings meets the criteria set out in *DESW* for public interest standing. As stated by the Supreme Court of Canada at paras 35-36 of *DESW*:

> [35] From the beginning of our modern public interest standing jurisprudence, the question of standing has been viewed as one to be resolved through the wise exercise of judicial discretion. As Laskin J. put it in Thorson, public interest standing "is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process" (p. 161); see also pp. 147 and 163; Nova Scotia Board of Censors v. McNeil, 1975 CanLII 14 (SCC), [1976] 2 S.C.R. 265, at pp. 269 and 271; Borowski, at p. 593; Finlay, at pp. 631-32 and 635. The decision to grant or refuse standing involves the careful exercise of judicial

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> discretion through the weighing of the three factors (serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means). Cory J. emphasized this point in Canadian Council of Churches where he noted that the factors to be considered in exercising this discretion should not be treated as technical requirements and that the principles governing the exercise of this discretion should be interpreted in a liberal and generous manner (pp. 256 and 253).
>
> [36] It follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.

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[187] The legal issues raised in these proceedings are justiciable and both the CCLA and CCF have a genuine interest in the subject matter, which the Respondent does not contest. The two organizations also provide strong public law capabilities to compliment the more limited substantive arguments raised by Cornell and Gircys. In the circumstances, their applications are in my view, a reasonable and effective means to bring these issues before the Court. Both the CCLA and the CCF have the capacity to present the evidence and argument required to assist the Court in reaching a just determination of the issues, which upholds the principle of legality.

[188] The participation of individuals with direct standing, i.e., Cornell and Gircys, is not a bar to granting public interest standing. Nor would it serve, in my view, as a reasonable and effective means of bringing the issues before the Court to limit the proceedings to the two private litigants. While, as stated in *DESW* at para 37, a party with standing as of right is to be preferred all other relevant considerations being equal, that is not the case here. Neither the evidence submitted nor the arguments advanced by the private litigants would have been sufficient to deal with the issues in these proceedings. The CCLA and CCF brought organized and effective submissions to

the issues before the Court. Moreover, this case transcends the interests of those most directly affected by the Proclamation and related measures: *DESW* at para 51.

[189] Contrary to the Respondent's submissions, there has been a definite advantage in having counsel for the two public interest organizations working alongside, and to some extent guiding, the private litigants to move these proceedings to the point where the issues could be argued on their merits. And there is no suggestion that either Cornell or Gircys wish to exclude CCLA or CCF from the proceedings.

[190] As stated in *Council of Canadians with Disabilities* at para 40, the whole purpose of public interest standing is "to prevent the immunization of legislation or public acts from any challenge". In the circumstances, I am satisfied that granting public interest standing to the CCLA and CCF will satisfy that purpose.

B. Substantive issues

(1) Standard of Review

[191] The Proclamation, Regulation and Economic Order at issue in these proceedings are forms of executive legislation delegated to the Governor in Council by Parliament: EA s 17(1); *Interpretation Act* s 18. Proclamations, Regulations and orders made in the execution of a power conferred by or under an Act of Parliament are statutory instruments as defined in the *Statutory Instruments Act* RSC, 1985, c S-22, s 2. Conferral of the authority to issue such instruments on the Governor in Council by Act of Parliament, as opposed to under a Royal Prerogative, means

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effectively that they are made by the federal Cabinet. While that may seem obvious, in these proceedings the Respondent argued that a distinction had to be drawn between decisions made by Cabinet, which are subject to privilege under s 39 of the *CEA*, and the formal issuance of the results of those decisions by the Governor in Council. I disagreed for reasons set out in *CCF v Canada*.

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[192] The Governor in Council had the authority to make these instruments on the recommendation of Cabinet. What is at issue is the legality of the Proclamation and related instruments. And that entails a determination of whether they were made in accordance with the governing legal framework including the legislation which delegated the authority to the Executive and prescribed how it was to be exercised. It is the role of the courts to make that determination through judicial review.

[193] As explained by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 27 [*Dunsmuir*], judicial review is intimately connected with the preservation of the rule of law, a constitutional principle which the courts have a duty to enforce. All wielders of public power, including at the highest levels of the Executive, must be reviewable and accountable to the law. How that is done requires the reviewing court to first determine the appropriate standard or standards of review to apply. The leading authority for this is now the decision of the Supreme Court of Canada in *Vavilov*.

[194] In the absence of a legislated standard, or a review related to a breach of natural justice or procedural fairness, the presumption is that the court is to engage in a reasonableness review:

Vavilov at para 23. There are three key exceptions to this presumption: constitutional questions; general questions of law of central importance to the legal system as a whole; and jurisdictional questions. For these, the court is to engage in a correctness review: *Vavilov* at paras 17, 53.

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[195] The Respondent, the CCLA and the CCF agree that the reasonableness standard of review applies to Cabinet's decision to invoke the EA and issue the Proclamation and related measures. They disagree on what reasonableness requires in this context.

[196] The Respondent submits that the correctness standard applies to whether the Economic Order and Regulations are *Charter* compliant or comply with the *Canadian Bill of Rights*, citing *Vavilov* at para 17.

[197] The Jost Applicants contended in their Memorandum of Fact and Law that correctness should be the standard for review of the decision to issue the Proclamation on the ground that it raised a question of law of central importance to the legal system as a whole requiring a single determinate answer. They also submitted in their written argument that the *Emergencies Act* was contrary to the *Constitution Act 1867* on division of powers grounds but that position was not pursued at the hearing. In their written reply, they also argued that correctness is the appropriate standard of review on the application of the *Canadian Bill of Rights.*

[198] The Court is not bound by the position taken by the parties as to the appropriate standard of review and has to make its own assessment: *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 17. In this instance, apart from constitutional questions, the sole exception to the

presumption that the standard should be reasonableness that might apply is whether the applications raise general questions of law of central importance to the legal system as a whole. Examples of such questions include those with legal implications for many other statutes or for the proper functioning of the justice system as a whole. It is not enough for the question to raise an issue of "wider public concern": *Mason v Canada (Citizenship and Immigration)* 2023 SCC 21 at para 47 [*Mason*].

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[199] While the invocation of the *Emergencies Act* was extraordinary and authorized the Government of Canada to interfere with the constitutional division of powers and to adopt any measure necessary to combat the emergency, it did not disrupt the fundamental legal order of Canada other than on a temporary and limited basis. Nor did it have legal implications for many other statutes or for the proper functioning of the justice system as a whole. For those reasons, the presumption of reasonableness is not displaced.

[200] These proceedings involve challenges under the *Charter* to the related measures adopted to implement the Proclamation and not to the enabling statute itself. As stated in *Vavilov*, at para 57, a distinction is to be drawn between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Charter* and those in which the issue on review is whether a provision of the enabling statute violates the *Charter*. The administrative decision maker's interpretation of the statute in the latter case will be reviewed for correctness.

[201] In these proceedings, the provisions of the EA, which authorized the special measures set out in the Regulations and the Economic Order are not challenged. Thus, the standard remains reasonableness with deference owed to the decision maker and its specialized expertise.

[202] Regarding the issuance of the Proclamation, the question for the Court is whether the Governor in Council, acting on the recommendation of Cabinet, reasonably formed the belief that reasonable grounds existed to declare a public order emergency under s 17 of the Act. As defined in the jurisprudence, the "reasonable grounds to believe" evidentiary standard requires more than mere suspicion and less than proof on a balance of probabilities: *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114 [*Mugesera*]. Reasonable belief is the "point where credibly-based probability replaces suspicion." *Hunter* at para 167. It is a probability, rather than possibility based standard: *R. v Chehil* 2013 SCC 49 at para 27. Whether Cabinet had sufficient evidence to satisfy the standard when the decision was made to invoke the Act is a key issue in these proceedings.

[203] In assessing the lawfulness or "*vires*" of the Economic Order and Regulations, the reasonableness standard will also apply: *Portnov v Canada (Attorney General)*, 2021 FCA 171 at para 10 [*Portnov*]; *Innovative Medicines Canada v Canada (Attorney General)*, 2022 FCA 210 at paras 26-44; *International Air Transport Association v Canadian Transportation Agency*, 2022 FCA 211 at paras 186-190.

[204] In conducting reasonableness review, deference is warranted and it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any

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relevant factor: *Kanthasamy v Canada (Minister of Citizenship and Immigration*), 2015 SCC 61 [*Kanthasamy*] at para 112; *Vavilov* at para 13.

> Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

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[205] Reasonableness review does not give the decision-maker free rein in interpreting the enabling statutes or license to enlarge their powers beyond what the legislature intended: *Vavilov* para 68. The Court must respect Parliament's drafting choices and cannot amend the statute as it sees fit: *Reference re Impact Assessment Act*, 2023 SCC 23 at para 193.

[206] The parties disagree on how "robust" the review of a Cabinet decision may be. The Respondent argues that an extraordinarily high degree of deference should be given to Cabinet because of its status "at the apex of the Canadian executive developing policy in many disparate areas" and because its determinations are "based on wide considerations of policy and the public interest, assessed on polycentric criteria". Such "quintessentially executive" decisions should be "unconstrained and very difficult to set aside": *Vavilov* at paras 108, 110; *Entertainment Software* at paras 28-32; *Gitxaala Nation v Canada*, 2016 FCA 187 [*Gitxaala Nation*] at para 150; *Raincoast Conservation Foundation v Canada (Attorney General)*, 2019 FCA 224 at paras 18–19; *Portnov* at para 44.

[207] The CCLA submits that while Cabinet's decision to invoke the Act is owed deference, the Respondent goes too far in suggesting that it is "unconstrained and very difficult to set aside". This ignores, the CCLA argues, the important distinction between the objective determination of whether the statutory thresholds in s. 17 of the EA were met and the discretionary decision of whether to invoke the Act. While the latter attracts substantial deference, the margin of appreciation to be afforded the former is narrow: *Gitxaala Nation* at para 153.

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[208] The CCF submits that while Cabinet may be the ultimate decision making authority, it only has the powers conferred on it by the Constitution, statute and the common law. *Vavilov,* citing *Roncarelli v Duplessis*, [1959] SCR 121 at p 140, affirmed that there is no such thing as absolute and untrammelled discretion and any exercise of discretion must accord with the purposes for which it was given: *Vavilov* at para 108.

[209] Some statutes do confer upon Cabinet an "unconstrained" discretion to make decisions "based on wide considerations of policy and the public interest, assessed on polycentric criteria", as discussed in the Federal Court of Appeal decisions relied upon by the Respondent. However, the relevant provisions of those statutes are very broadly drafted and do not import objective standards constraining the exercise of administrative discretion as are found in the *Emergencies Act*, such as the requirement for "reasonable grounds to believe".

[210] I agree with the CCLA and the CCF that the question of whether a Cabinet decision is unconstrained in the way urged by the Respondent turns on the statutory text and context of the

provisions at issue. The *Emergencies Act* contains objective legal thresholds that must be satisfied before a Proclamation may issue. And these thresholds are "more akin to the legal determinations courts make, governed by legal authorities, not policy": *Entertainment Software* at para 34. Thus, while the ultimate decision of whether to invoke the Act is highly discretionary, the determination of whether the objective legal thresholds were met is not and attracts no special deference beyond that set out in *Vavilov.*

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[211] In this instance, as discussed in *Vavilov* at para 124 and *Mason* at para 71, the Court may conclude that the "interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision".

(2) Was the decision to issue the Proclamation unreasonable and ultra vires the Act?

[212] The main question underlying the three applications is whether the decision to issue the Proclamation "bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision": *Vavilov* at para 99.

[213] By factual constraints, the Court needs to consider the evidentiary record and general factual matrix that bore on the decision, and the key legal constraints include the governing statutory scheme and the principles of statutory interpretation: *Vavilov* at paras 108-110, 120 and 126.

[214] As noted above, at the hearing counsel for Cornell and Gircys chose not to make most of the substantive arguments set out in their Memorandum of Fact and Law, other than those pertaining to the *Charter* and *Canadian Bill of Rights*. This is to their credit as much of the content of the Memorandum was irrelevant in my view. They indicated that they would rely on the submissions made by counsel for the CCLA and CCF regarding the reasonableness of the decision. Accordingly, the following discussion focuses on those arguments. Where relevant, I will also discuss the Intervener's arguments.

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(a) The Court draws no adverse inference from the privilege claims.

[215] The CCLA and the CCF ask the Court to draw an adverse inference against the Respondent on both the administrative law and *Charter* issues because of the extensive redaction of the contents of key documents under s 39 of the *CEA*, in particular portions of the minutes of the February 13, 2022 Cabinet meeting. They did not link this argument to the privilege claims under *CEA* sections 37 and 38 or the protected solicitor client communications.

[216] The Respondent rejected a proposal for counsel-eyes-only disclosure and went on to "cherry pick" the information it would disclose, the Applicants argue, over their "constant and firm objection" to the non-disclosure of that content. In support, they reference authorities which have found that a court may draw an adverse inference in the face of assertions of privilege and "constant and firm objection" to non-disclosure *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72 at para 111, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at paras 165-166 [*RJR-MacDonald*]; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128, at para 54. I note that in these

cases, adverse inferences were not drawn, except in *RJR-MacDonald* where the Court said, at para 166, that it would be difficult not to infer that the results of the withheld studies must undercut the government's claim.

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[217] In a ruling on a motion for production, I declined to go behind the section 39 certificates issued in these proceedings. For reasons that are set out in *Jost v Canada*, I found that there was no basis to question the validity of the certificates.

[218] I am satisfied that even if it is possible to draw an adverse inference against the Government in the circumstances, it is not necessary for the Court to do so in order to decide the substantive issues in these proceedings. The Section 58 Explanation serves as the reasons for the decision to invoke the EA whether or not there were extensive *CEA* s 39 redactions. Moreover, by the conclusion of the preparatory steps, there was considerably more disclosure of related documents and adequate evidence before the Court, in my view, to determine whether the reasonableness standard had been met or the *Charter* and *Canadian Bill of Rights* had been infringed. I am not persuaded that there is an evidentiary basis for concluding that the redacted information would disclose that the GIC either lacked the information required to make the decision or that the redacted information contradicted its belief that the invocation of the EA was necessary. In any event, given the conclusions I have reached, an adverse inference would make no difference to the outcome.

(b) Was there a national emergency?

[219] Paragraph 3 (a) of the Act reads as follows:

> 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 …
>
> and that cannot be effectively dealt with under any other law of Canada.

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[220] As set out in section 16 of the Act, a public order emergency arises from threats to the security of Canada that are so serious as to be a national emergency.

[221] Subsection 17(1) authorizes the GIC to declare a public order emergency when it believes, on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency. Paragraph 17(2)(c) requires that if the effects of the emergency do not extend to the whole of Canada, the area of Canada to which the effects extend shall be specified. Where the declaration specifies that the effects of the emergency extend only to a specified area of Canada, subsection 19(1) provides that the power to make orders and Regulations is limited to that area.

(i) Argument

[222] The Applicants, and Alberta, contend that one of the key questions in these applications is not simply whether it was "wise" for the GIC to invoke the EA, but whether the option was even available at law on the evidence before them. Before taking that step, they argue it was necessary for the GIC to first reasonably determine that the statutory thresholds had been met.

[223] The Applicants argue that there was no, or insufficient, evidence that the lives, health or safety of Canadians were seriously endangered beyond the capacity or authority of the provinces to deal with the situation or, that it could not effectively be dealt with under any other law of Canada. The Intervener, Alberta, shares that view.

[224] Alberta submits that one of the relevant questions for the GIC to address before invoking the EA was whether the proportions of the situation were such as to exceed the capacity of the provinces. And in assessing whether provincial authority was exceeded, the question was whether the situation was of such a nature as to exceed the province's powers of intervention. Where a province has the capacity or authority to deal with the situation, as Alberta says it had, it was not a proper use of the "Peace, Order and Good Government" emergency power for the federal government to intervene because of a concern that the situation may not be resolved as quickly as it would like or, through a different approach that didn't involve existing authorities.

[225] The Applicants and Alberta submit that the GIC declared the emergency to be present throughout the country, in contradiction with the requirement to specify which areas were affected as per section 17(2)(c) of the Act.

[226] The Respondent submits that it was reasonable for the GIC to have an objective basis for its belief that the requirements of a public order emergency had been met, based on the compelling and credible information that was before Cabinet: *Canada (Minister of Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 30. The Court should guard against a hindsight analysis and assess the GIC's actions in the context that existed at the time. The Act did not

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require the section 58 Explanation to engage in a detailed assessment of the facts, but rather to outline them in a general way.

[227] Regarding provincial capacity, Alberta argues that in order for the GIC to conclude that there was a national emergency, it was necessary for it to ask whether the proportions of the situation were such as to exceed the capacity of the provinces. Similarly, with respect to provincial authority, the GIC had to consider whether the situation exceeded a province's powers of intervention. To do so, the GIC had to consider existing provincial legislation, the provincial power to implement new measures and ability to enforce federal laws such as the *Criminal Code.* Alberta argues that in meeting the test under section 3(a) the GIC has to respect the principles of federalism and focus on whether such provincial capacity or authority exists.

[228] Alberta submits that the Section 58 Explanation misstates the test for declaring a national emergency as a situation "that cannot effectively be dealt with by the provinces or territories". The correct test is whether any other law of Canada cannot effectively deal with the emergency or that the situation exceeds the capacity or authority of a province to deal with it. Similarly, the Invocation Memorandum recommending the invocation of the Act misstated the test as whether the situation could not uniquely be dealt with by the provinces or territories.

[229] The misstated test caused the GIC to focus on whether the provinces were "effectively dealing with" the situation, Alberta submits. The evidentiary records show, it is argued, that the evidence before the GIC would not support a finding that the test was met had it been properly applied. And it is misleading to contend, they say, as the Respondent does, that section 3(a) does

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not relate to examining provincial authorities but rather "relates to whether the emergency extends beyond provincial borders, preventing any one province from resolving the entire crisis." Provinces, Alberta observes, cannot act extra-territorially. But in this instance employing the *Criminal Code* and the RCMP, as the provincial law enforcement body, Alberta was able to deal with the situation at Coutts without the benefit of the EA special measures and before they were enacted and applied.

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[230] Parliament's intent in enacting the legislation was to ensure the Act would be a measure of last resort and, in particular, only where the provisions of existing Federal law could not handle the situation as ultimately occurred at Coutts, the Applicants and Alberta agree. In dealing with the threat of violence there, the RCMP acted under the authority of judicial search warrants issued pursuant to the *Criminal Code.* That incident did not amount to a truly "national" threat in the Applicants and Alberta's views. Nor was there any real issue of incapacity: whatever dangers existed could have been dealt with under existing Canadian law as both operational capacity and legal authority were available.

[231] The Section 58 Explanation suggests that the police in Ottawa were unable to enforce the rule of law in the downtown core due to the overwhelming volume of protesters. However, it is unclear how the Proclamation could respond to this issue since the Regulations and Economic Order did not increase the operational capacity of the police; if the issue was that the police could not enforce the rule of law, new laws would not be helpful, the Applicants submit.

[232] The Section 58 Explanation also suggests that there was an inability to compel tow trucks to clear vehicles in Ontario. The Applicants submit that military aid was an answer to this problem, as the military could have supplemented the Ottawa police and assist with towing. This, however, was considered by the IRG and discounted as an option for a reason redacted in the minutes further to a *CEA* s 38 claim, which the Court upheld. That reason was valid.

[233] One problem, according to the Section 58 Explanation, was that, outside of Ontario, the police could not compel insurance companies to cancel or suspend the insurance of designated vehicles or persons. The Applicants and Alberta submit that the provinces could have obtained this power by using their respective emergency legislation, e.g. Alberta's *Emergency Management Act*, RSA 2000, c E-6.8. The fact that provinces did not exercise those powers should not mean that they were not available and cannot justify invoking the EA, they argue.

[234] Provincial decisions not to use authorities within their jurisdictions is not incapacity, Alberta submits. Federal disagreement with provincial decisions not to exercise particular powers is not a sufficient basis to conclude that the situation exceeded the capacity or authority of the provinces or could not be effectively dealt with under existing law. The Applicants contend that the existence of available authorities is fatal to the GIC's assertion of incapacity. The phrase in section 3 of the EA, "cannot be effectively dealt with" cannot be read to mean "will not be effectively dealt with".

[235] The Applicants and Alberta argue that the EA does not permit the federal government to override a provincial government's decision not to exercise its powers, as federal emergency

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powers sit upon a delicate constitutional foundation. The EA's definition of "national emergency" requires that emergencies "transcend" provincial authorities before justifying resort to the Constitution's "Peace Order and Good Government" emergency power. Thus, they contend, emergency powers are only available in times of genuine provincial incapacity and not simply provincial inaction. It was unreasonable for the GIC to conclude that the requisite thresholds in the Act had been met given the abundance of available alternative authorities.

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[236] The Respondent disputes that other legislative tools were available to effectively resolve the protests and occupations occurring across the country. None were ever identified with the capacity to effectively resolve the protests and occupations taking place across the country. It was reasonable for the GIC to believe that the emergency could not have been dealt with effectively under any other law of Canada, as required by section 3 of the EA. Even if other laws could apply, it was open to the GIC to determine that they would not be effective in curtailing the emergency in a safe and timely manner.

[237] The Act does not require that a law has to be tried and proven to be ineffective before a public order emergency can be declared, the Respondent argues. That is contrary to the purpose of the legislation and the threshold of a belief held on reasonable grounds. The situation was dynamic and continuously unfolding in the days leading up to the invocation. The GIC must be able to act before it is too late. The cost of failure can be high: *Suresh v Canada*, 2002 SCC 1, [2002] 1 SCR 3 at para 85 [*Suresh*].

[238] The Respondent points to the comments of the Minister of Justice at the Legislative Committee of the House of Commons considering *Bill C-77*, the EA legislation:

> When the country is threatened by serious and dangerous situations, the decision whether to invoke emergency powers is necessarily a judgment call, or more accurately a series of judgment calls. It depends not only on an assessment of the current facts of the situation, but even more on judgments about the direction events are in danger of moving and about how quickly the situation could deteriorate. Judgments have to be made, not just about what has happened or is happening, but also about what might happen.
>
> In addition, to decide about invoking exceptional measures, judgments have to be made about what the government is capable of doing without exceptional powers, and on whether these capabilities are likely to be effective and sufficient.

[239] In this instance, the Respondent argues that the GIC had reasonable grounds to believe a national emergency existed and the Court should not reweigh the evidence before Cabinet at the time. The textual, contextual and purposive elements of the EA require considerable deference based on what was known at the time and reasonably foreseeable.

[240] As for whether the Declaration should have specified only certain areas of Canada, the Respondent submits that the effects were being experienced across Canada and it was not reasonable to limit the application of the Act. It was reasonable, for example, for the GIC to consider based on what was uncovered at Coutts, that similar actors might be present at other blockades or in the Ottawa occupation. When the decision was made to invoke the EA, there was no certainty that the events were isolated or resolved.

(ii) Analysis and conclusion on whether there was a national emergency.

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[241] It may be considered unrealistic to expect the Federal Government to wait when the country is “threatened by serious and dangerous situations”, as the Respondent characterizes the events of January and February 2022, 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. However, that is what the *Emergencies Act* appears to require.

[242] It is not disputed that the discoveries of weapons, ammunition and other materials at Coutts was deeply troubling and greatly influenced the Cabinet in recommending the invocation of the Act. As did the possibility that similar findings would emerge at any of the other blockades across the country.

[243] While the widely published images of people enjoying the hot tub and bouncy castle set up in proximity to Parliament Hill and the War Memorial suggests a benign intent, there were undoubtedly others present there and elsewhere at the blockades across the country with a darker purpose. And there were threats expressed in social media and other online communications of an intent to resist efforts by the police to dismantle the existing blockades and set up new ones at different locations. But those threats were being dealt with by the police of provincial and local jurisdiction outside of Ottawa.

[244] 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

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section 25 of the Act. A meeting of First Ministers was convened by the Prime Minister on February 14, 2022 to consult premiers on whether to declare a public order emergency. All premiers participated. There was disagreement as to whether the Act should be invoked, or applied nationally. Several premiers expressed support. Others took the position that it was not required in their provinces. In my view, contrary to the views of Alberta, this meeting satisfied the requirement in section 25(1) of the Act that the LGIC of each province, in which the effects of the emergency occur, be consulted before there is a declaration of a public order emergency.

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[245] I agree with the Respondent that the Act does not require that there be unanimous agreement from the Provinces before the Federal Government can declare that an emergency exists. But most Premiers informed the Prime Minister that invocation of the Act was not required in their provinces as their legislation and law enforcement authorities could deal with the situation, as they had for example, in Quebec. Those opposed included the Premier of Alberta where the use of existing federal criminal law measures and Alberta's *Critical Infrastructure Defence Act*, SA 2020, c C-32.7, by the RCMP and provincial officials had defused the situation at Coutts as the EA was being invoked.

[246] It bears noting that the Alberta Minister of Municipal Affairs had previously written to Federal Ministers asking for the loan of equipment and personnel to deal with the border blockade at Coutts. And one of the Premiers opposed to the invocation of the Act, the then Premier of Manitoba, was also on the record describing the situation as "urgent".

[247] The Prime Minister's letter to all premiers on February 15, 2022 to outline the reasons why the GIC decided to declare a public order emergency responded to the question of whether the declaration should apply nationally. The letter emphasized that the measures would be applied to targeted areas and would supplement, rather than replace, provincial and municipal authorities.

[248] Section 17(2)(c) of the Act requires that if the effects of the emergency did not extend to the whole of Canada, the area of Canada to which it did extend shall be specified. While the word "area" in the legislative text is singular, per section 33(2) of the *Interpretation Act* that includes the plural. Thus, it was open to the GIC to specify several or many areas that were affected by the emergency excluding others where the situation had not arisen or was under control. However, the Proclamation stated that it "exists throughout Canada". This was, in my view, an overstatement of the situation known to the Government at that time. Moreover, in the first reason provided for the proclamation, which referenced the risk of threats or use of serious violence, language taken from section 2 of the *CSIS Act*, the emergency was vaguely described as happening at "various locations throughout Canada".

[249] I understand that the concern was that new blockades could emerge at any pressure point across the country but the evidence available to Cabinet was that these were being dealt with by local and provincial authorities, through arrests and superior court injunctions, aside from the impasse which remained in Ottawa.

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[250] The Prime Minister's letter did not directly address the requirement in section 3(a) of the EA that the situation be of such proportions or nature as to exceed the capacity or authority of a province to deal with it. As of February 15, 2022, this was only true in Ontario because of the situation in Ottawa and that was in part due to the inability of the provincial and municipal authorities to compel tow truck drivers to assist in the removal of the blockading vehicles. It is not clear why that could not have been dealt with under the provincial legislation. The use of military heavy equipment was considered but dismissed for reasons which remain redacted but I accept as valid. There appears to have been no obstacle to assembling the large number of police officers from a variety of other forces ultimately required to assist the OPS to remove the blockade participants.

[251] The Section 58 Explanation expresses a serious concern on behalf of the GIC for the economic impacts relating to the operation of the border crossings and international trade interests. It notes that trade between Canada and the U.S. is crucial to the economy and the lives and welfare of all Canadians. Blockades and protests at points along the Canada-U.S. border had already had a severe impact on Canada's economy. The Explanation provides details of those impacts and their effects on Canada's relationships with its trading partners, including the U.S. that was detrimental to the interests of Canada.

[252] The potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians is addressed at some length in the Section 58 Explanation. The document contends that "[t]he Freedom Convoy could also lead to an increase of individuals who support ideologically motivated violent extremism (IMVE) and the prospect

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for serious violence." The Explanation notes that since the convoy began there had been a significant increase in the number and duration of incidents involving threats of violence assessed to be politically or ideologically motivated. It asserts that the OPS had been unable to enforce the rule of law in the downtown core due to the overwhelming volume of protesters. That is a debatable conclusion, as there appear to have been more compelling reasons for the failure of the OPS to prevent the occupation of the city, such as a failure of leadership and determination, together with a mistaken assumption that the protest would be short lived.

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[253] Due to its nature and to the broad powers it grants the Federal Executive, the *Emergencies Act* is a tool of last resort. The GIC cannot invoke the *Emergencies Act* because it is convenient, or because it may work better than other tools at their disposal or available to the provinces. This does not mean that every tool has to be used and tried to determine that the situation exceeded the capacity or authority of the provinces. And in this instance, the evidence is clear that the majority of the provinces were able to deal with the situation using other federal law, such as the *Criminal Code,* and their own legislation.

[254] The Section 58 Explanation concludes that the ongoing protests had "created a critical, urgent, temporary situation that is national in scope and cannot effectively be dealt with under any other law of Canada." While I agree that the evidence supports the conclusion that the situation was critical and required an urgent resolution by governments the evidence, in my view, does not support the conclusion that it could not have been effectively dealt with under other laws of Canada, as it was in Alberta, or that it exceeded the capacity or authority of a province to

deal with it. That was demonstrated not to be the case in Quebec and other provinces and territories including Ontario, except in Ottawa.

[255] For these reasons, I conclude that there was no national emergency justifying the invocation of the *Emergencies Act* and the decision to do so was therefore unreasonable and *ultra vires*. Should I be found to have erred in that conclusion, I will proceed to discuss the threshold requirement that for a public order emergency to be declared it must meet the definition set out in section 16 of the Act.

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(c) Was the *"*threats to the security of Canada*"* threshold met?

[256] In a general sense, it was reasonable for the GIC to be alarmed at the impact of the blockades and the effects they were having on cross-border trade. Those effects could be said to fall within a broader sense of "threats to the security of Canada" or, more generally, the concept of "national security".

[257] The meaning of "national security" is not defined in the statutes. In *Suresh*, the Supreme Court of Canada recognized that the concept was difficult to define because it was highly fact-based and political in a general sense. At para 85, the Court concluded that a broad and flexible approach to the meaning of the words was required along with a deferential standard of judicial review.

[258] In this court, after an extensive review of the authorities, Justice Simon Noël concluded that national security means "at minimum, the preservation of the Canadian way of life,

including safeguarding of the security of persons, institutions and freedoms in Canada": *Canada (Attorney General) v Canada (Commission of Inquiry into the actions of Canadian Officials in Relation to Maher Arar* 2007 FC 766 at para 68 [*Arar*].

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[259] A broad and flexible interpretation of the words "threats to the security of Canada" could encompass the concerns which led the GIC to issue the Public Order Emergency Declaration. Had the meaning of those words not been limited by reference to another statute, and applying a deferential standard of review, I would have found that the threshold was satisfied. However, the words "threats to the security of Canada" do not stand alone in the Act and must be interpreted with reference to the meaning of that term as it is defined in section 2 of the *CSIS Act* and incorporated in section 16 of the EA.

[260] "Threats to the security of Canada", in section 2 of the *CSIS Act*, refers to four types of activities. Only one of the four is relevant to these proceedings. Under paragraph 2 (c), threats to the security of Canada means:

> (c) activities within or relating to Canada directed toward or in support of the **threat or use of acts of serious violence against persons or property** for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state…
>
> [Emphasis added]

[261] The definition excludes lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in the four paragraphs including (c).

[262] The Proclamation specified five reasons to justify the declaration of a public order emergency. The first draws directly from the language of the *CSIS Act*. The second, third and fourth reasons pertain to adverse effects on the economy, trade relations and the breakdown in the distribution chain and availability of essential goods, services and resources. The fifth reason cites "the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians."

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[263] The first reason specified in the Proclamation cites the threat or use of serious violence against persons or property:

> The continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force, which blockades are being carried on in conjunction with activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada.

[264] The Section 58 Explanation summarizes this as "[t]hreats to the security of Canada include the threat or use of acts of serious violence against persons or property for the purpose of achieving a political or ideological objective." It then sets out the full text of the five specified reasons for the Proclamation and provides an explanation for why each justified the temporary measures adopted to deal with the emergency. In reference to the first reason it states:

> Violent incidents and threats of violence and arrests related to the protests have been reported across Canada. The RCMP's recent seizure of a cache of firearms with a large quantity of ammunition in Coutts, Alberta, indicated that there are elements within the protests that have intentions to engage in violence. Ideologically motivated violent extremism adherents may feel empowered by the

> level of disorder resulting from the protests. Violent online rhetoric, increased threats against public officials and the physical presence of ideological extremists at protests also indicate that there is a risk of serious violence and the potential for lone actor attackers to conduct terrorism attacks.

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[265] There is no dispute that the activities in question in these proceedings were carried out, for the purpose of achieving a political or ideological objective within Canada. The participants in the protests in Ottawa and elsewhere were explicit in demanding changes to government policy. Some of the participants went further in demanding a change in government. The question is whether the activities were directed toward, or in support of the threat or use of acts of serious violence, as the definition requires.

(d) Was there evidence of threats or use of acts of serious violence?

(i) Argument

[266] The use of “serious violence” in the definition indicates that it imposes an elevated threshold, the Applicants argue. They say that the actions and their consequences contemplated in the Proclamation and as described in the Section 58 Explanation, fall far short of the required standard. Loss of cross-border trade, for example, while a valid cause for government concern cannot reasonably be construed as “serious violence”, they argue.

[267] The Applicants contend that the record does not show that there was compelling and credible information before the GIC that there were reasonable grounds to believe in the existence of threats to the security of Canada, as defined by the *CSIS Act*, when the decision was made to issue the Proclamation.

[268] In fact, they submit, Cabinet was presented with evidence to the contrary: the Director of CSIS confirmed in his advice to Cabinet that the Service did not assess that the protests constituted a threat to the security of Canada. That view should have carried great weight with Cabinet, the Applicants argue, even if it was not binding on Cabinet, which had other inputs to consider. The February 13, 2022 Cabinet minutes demonstrate that the concerns of the National Security Intelligence Advisor were centered on the blockades at the multiple ports of entry, the active role of social media in promoting the protests and the effectiveness of "slow roll vehicle activity". It was also noted that invoking the Act would "likely galvanize the broader anti-government narratives" and could "increase the number of Canadians holding extreme anti-government views." But that would be a consequence, not a reason for invoking the Act, the Applicants submit.

[269] There is evidence in the record that an alternative threat assessment, possibly differing from that prepared by CSIS, was to be provided by the National Security Intelligence Advisor but was never submitted. Rather, the final piece of advice produced was the Invocation Memorandum, signed by the Clerk of the Privy Council, which the Prime Minister described in testimony before the POEC as "essential" to him in the decision making process.

[270] A substantial amount of the Invocation Memorandum is redacted under *CEA* s. 39 and solicitor client privilege. The unredacted text of the document describes the EA, the nature of a public order emergency that may constitute a national emergency, the measures that may be adopted to deal with the emergency, subject to *Charter* limitations, the factual background and

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the process followed leading to the decision to be made. It was noted that all measures taken under the EA had to be carefully circumscribed to avoid being overbroad.

[271] The Invocation Memorandum sets out the test for declaring a public order emergency including the definition of threats to the security of Canada in the *CSIS Act*. The memorandum advised the Prime Minister that the Privy Council Office was of the view that the evidence collected to date supported a determination that the criteria required to declare a public order emergency pursuant to the EA had been met. It also went further, however, to note that the conclusion "may be vulnerable to challenge".

[272] The Applicants acknowledge that the discovery at Coutts of weapons and ammunition fell within the meaning of threats of "serious violence". They argue, however, that this was a unique and isolated incident that did not support the countrywide invocation of the EA, as, in the absence of any similar events elsewhere, nothing suggested a broader threat to the "security of Canada", and Coutts was in any event largely resolved prior to the enactment of the special measures using existing federal law.

[273] Aside from Coutts, threats of serious violence were absent, the Applicants contend. For example, in Ottawa, the police had made just 26 arrests by February 12, 2022, and none were for serious violent crimes. The Applicants submit that it was unreasonable for the Invocation Memorandum to conclude there were "definitely elements within this movement that have intentions to engage in violence", based solely on the events at Coutts, and that the presence of

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ideological extremists at protests indicated a risk of serious violence and the potential for lone attackers to conduct terrorist attacks.

[274] The Applicants argue that the need for "reasonable grounds to believe" called for "an objective basis for the belief based on compelling and credible information that involved a reasonable probability, not just the possibility, of violence: *R v Beaver*, 2022 SCC 54 at para 72(6) [*Beaver*]. They contend that this requirement was not met as the Section 58 Explanation only included vague references to the potential increase in unrest and violence, and undefined "threats to oppose measures to remove the blockades".

[275] The Respondent disputes the relevance of authorities such as *Beaver*, taken from the criminal law context, and argues that a standard of reasonable probability does not apply here. What is required, they say, is consideration of whether it was reasonable for the GIC to have an objective basis for its belief that the requirements of a public order emergency were met: *Spencer v Canada (Health)*, 2021 FC 621 at para 250 [*Spencer-FC*].

[276] The Respondent concedes that the requirement for there to be a "threat or use of acts of serious violence against persons or property" means that there must be something more than a threat of minor acts of violence. They do not accept that this must require the use of or attempted use of actual violence that endangers the life or safety of another person, or inflicts severe psychological damage, as the Applicants contend. The Respondent argues that the statute does not require a probability that such would occur. The Applicants' interpretation, the Respondent

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submits, stems from the definition of a "serious personal injury offence" under s 752 of the *Criminal Code*, which has no application in this context.

[277] The Respondent further argues that to understand the meaning of "serious violence" in the context of the EA it is necessary to consider the legislative history of s. 2(c) of the *CSIS Act* and not just that of the EA. The adjective "serious" was added to the *CSIS Act* definition to avoid capturing minor acts of political violence, such as throwing tomatoes at politicians. In this case, the Respondent submits, there were cumulative threats of serious violence to individuals, including the threat of lethal violence against law enforcement and elected officials – along with the general atmosphere of intimidation, harassment and lawlessness. Cutting off the main supply lines of essential goods, food, fuel and medicine to all parts of the country also created a threat that could have lead to unrest and serious violence, according to the Respondent.

(ii) Analysis and conclusion on whether the threshold was met.

[278] It is true, as the Respondent submits, that the adjective "serious" was added to the definition in the *CSIS Act* to avoid capturing minor acts of violence or damage to property. Parliament wished the same threshold to apply to the declaration of a public order emergency for threats or acts of violence against persons or property.

[279] Guidance as to the meaning of a "serious" threat in the context of national security can be found in *Suresh* at para 90:

> …The threat must be "serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence

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> and in the sense that the threatened harm must be **substantial rather than negligible.**
>
> [Emphasis added.]

[280] Substantial harm in the context of violence or threats of violence against persons must rise to the level, in my view, of at least that contemplated by the term "bodily harm" in the *Criminal Code*. The *Code* defines "bodily harm" in section 2 as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature". The Supreme Court has interpreted that definition to cover any "hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant": *R v CDK*, [2005] 3 SCR 668 at para 20. I agree with the Respondent that the meaning of "serious violence" in s. 2(c) of the *CSIS Act*, as imported into the *Emergencies Act*, does not require threats of violence, or actual violence, rising to the level of death or endangerment of life.

[281] Serious violence to property could encompass the several offences in the *Code* relating to destruction or damage to property, including critical infrastructure, which are punishable on indictment. In particular, destruction or damage to critical infrastructure could amount to serious violence to property should it take down systems such as the electrical grid or natural gas supply required to heat homes and run industries across the country. Absent any authority in support of the proposition, I am unable to find that the term encompasses the type of economic disruption that resulted from the border crossing blockades, troubling as they were. It may be that Parliament will wish to revisit the question of whether the *CSIS Act* definition, which serves the several purposes of that statute, adequately covers the different harms that may result from an

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emergency situation when they may fall short of “serious violence” to property. This Court can only apply the law as it finds it. It has no discretion to do otherwise: *R v Osborn*, [1971] SCR 184 at p 190; *Reyes v Canada*, 2019 FCA 7 at para 9.

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[282] There is often confusion about the meaning of the “reasonable grounds to believe” standard as courts have frequently used the terms “reasonable and probable grounds”, discussed in *Hunter v Southam Inc* [1984] 2 SCR 145 at 167 [*Hunter*]. The phrase was employed in the criminal statutes until revisions in the mid-1980s began to drop the “and probable” words as surplusage. But the term continues to appear in authorities such as *Beaver*. In *Mugesera*, at para 114, the Supreme Court was clear that the “reasonable grounds to believe” standard requires something more than mere suspicion but less than the standard applicable in civil matters of proof on the balance of probabilities. Reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information.

[283] *Spencer-FC*, relied upon by the Respondent, does not assist in this analysis as the legislative provision at issue there, section 58 of the *Quarantine Act*, SC 2005, c 20, gave the GIC the authority to issue a prohibition order if it is of the opinion that certain criteria were met, including that there is no reasonable alternative. The requirement to be met on judicial review, as the Court found in *Spencer-FC*, was whether there was a reasonable basis in the record to support that opinion, including the criterion of no alternative, applying a deferential standard of review. In my view, this is less than an objective basis for the belief based on compelling and credible information.

[284] I agree with the Applicants that the CSIS assessment that there were no threats to the security of Canada within the meaning of the paragraph (c) definition must be given some weight. The parties agreed that it is not determinative of whether the GIC could or could not invoke the Act. Nor is it determinative that the Director of CSIS ultimately agreed with the decision to invoke. Cabinet had available to it other sources of information which could satisfy the definition of threats to national security. The GIC was not limited to considering the intelligence collected by CSIS in exercising its responsibilities. Or bound by the Service's analysis of that intelligence.

[285] How much weight should the Service assessment be given? I expressed doubt at the hearing that it should weigh heavily. The definition of "threats to the security of Canada" in the *CSIS Act* was designed for a different purpose. The definition was intended to constrain the activities of the new security service and to serve as a threshold for the exercise of its non-intrusive investigative powers and its ability to obtain a warrant for more intrusive measures. It was not designed for the purposes of the EA.

[286] When Bill C-77 to enact the EA was being considered, the *CSIS Act* definition had the virtue of having been recently considered and adopted by Parliament and was dropped into the draft legislation to respond to concerns that its scope was otherwise too broad and would capture minor threats or use of violence. The effect was to raise the level of the test to be met by the GIC before a public order emergency could be declared. The GIC had to have reasonable grounds to believe that the threats to the security of Canada described in s. 2 of the *CSIS Act* existed.

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[287] This Court may share the views of those who think that a definition designed to constrain the investigative actions of the security service is ill-suited to serve as a threshold for the invocation of emergency powers by the GIC. Particularly when there may be other valid reasons for declaring an emergency such as those set out in the Proclamation and Section 58 Explanation. But the Court cannot rewrite the statute and has to take the definition as it reads.

[288] Cabinet was in the same position when it was considering how to deal with the situation it was facing in February 2022. It had to consider whether the statutory test was met. Were there reasonable grounds to believe that the people protesting in Ottawa and elsewhere across Canada had engaged in activities directed toward or in support of the threat or use of acts of serious violence against persons or property? This is, as discussed above, an objective standard "more akin to the legal determinations courts make, governed by legal authorities, not policy": *Entertainment Software* at para 34. And while the ultimate decision of whether to invoke the Act is highly discretionary, the determination of whether the objective legal thresholds were met is not and attracts no special deference. There is only room for a single reasonable interpretation of the statutory provision: *Mason* at para 71.

[289] The Clerk had cautioned the Prime Minister that PCO's conclusion that the criteria for declaring a public order emergency had been met was "vulnerable to challenge". Properly so, in my view, as the evidence in support of PCO's analysis was not abundant. It rested primarily on what was uncovered at Coutts, Alberta when the RCMP executed search warrants and discovered firearms, ammunition and the indicia of right wing extremist elements.

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[290] The Section 58 Explanation states that "[v]iolent incidents and threats of violence and arrests related to the protests have been reported across Canada." But these reports were vague and unspecified apart from allegations that tow truck drivers in Ottawa had been threatened should they assist the police. What that meant is unclear. The only specific example of threats of serious violence provided is Coutts. Arrests related to the protests may have amounted to evidence of activities directed toward or in support of the threat or use of acts of serious violence against persons or property, but the arrests, aside from those at Coutts, appear to all have been for minor offences. There had yet to be any actual serious violence or threats of it, other than in Coutts, when the decision was made. The Prime Minister acknowledged this in his POEC testimony:

> "And the fact that there was not yet any serious violence that had been noted was obviously a good thing, but we could not say that there was no potential for serious violence"

(Respondent's record at p 90 citing the POEC transcript at p 53).

[291] There was a great deal of speculation about what might happen if the protests were not brought to an end. This was raised several times in the POEC testimony of the Minister of Public Safety. He said this, for example, at pages 77-78 of the transcript, referring to Coutts:

> One thing I didn't mention was that my worry, my real fear, was that had that operation not gone down peacefully, that it might have sparked other gun violence across the country.
>
> […]
>
> My concern was that this was -- that this information was highly sensitive. It involved a hardened cell. It involved guns. It involved ideological symbolism, potentially. And that if that operation to arrest those individuals did not go efficiently, and smoothly and peacefully, that it may have created a chain reaction elsewhere across the country, because there were past reports about the presence of guns."

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[292] The potential for serious violence, or being unable to say that there was no potential for serious violence was, of course, a valid reason for concern. But in my view, it did not satisfy the test required to invoke the Act particularly as there was no evidence of a similar "hardened cell" elsewhere in the country, only speculation, and the situation at Coutts had been resolved without violence.

[293] Much of the Section 58 Explanation is devoted to the deleterious effects of the blockades on Canada's economy. The strongest connection to activities directed toward or in support of the threat or use of acts of serious violence against persons or property is found in the section of the explanation discussing the fifth specified reason for the Proclamation – the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians. This section speculates that the convoy could lead to an increase in the number of individuals who support ideologically motivated violent extremism. It describes other events related to anti-public health measures and protests in Quebec and Atlantic Canada and the situation in Ottawa.

[294] While these events are all concerning, the record does not support a conclusion that the Convoy had created a critical, urgent and temporary situation that was national in scope and could not effectively be dealt with under any other law of Canada. The situation at Coutts was dealt with by the RCMP employing provisions of the *Criminal Code.* The Sûreté du Québec dealt with the protests in that province and the Premier expressed his opposition to the *Emergencies Act* being deployed there. Except for Ottawa, the record does not indicate that the police of local jurisdiction were unable to deal with the protests.

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[295] Ottawa was unique in the sense that it is clear that the OPS had been unable to enforce the rule of law in the downtown core, at least in part, due to the volume of protesters and vehicles. The harassment of residents, workers and business owners in downtown Ottawa and the general infringement of the right to peaceful enjoyment of public spaces there, while highly objectionable, did not amount to serious violence or threats of serious violence.

[296] This is not to say that the other grounds for invoking the Act specified in the Proclamation were not valid concerns. Indeed, in my view, they would have been sufficient to meet a test of "threats to the security of Canada" had those words remained undefined in the statute. As discussed in *Suresh* and *Arar*, the words are capable of a broad and flexible interpretation that may have encompassed the type of harms caused to Canada by the actions of the blockaders. But the test for declaring a public order emergency under the EA requires that each element be satisfied including the definition imported from the *CSIS Act*. The harm being caused to Canada's economy, trade and commerce, was very real and concerning but it did not constitute threats or the use of serious violence to persons or property.

[297] For these reasons, I am also satisfied that the GIC did not have reasonable grounds to believe that a threat to national security existed within the meaning of the Act and the decision was *ultra vires.*

C. Did the powers created by the Economic Order and Regulations violate sections 2(b)(c)(d), 7 or 8 of the *Charter*, and, if so, can they be saved under section 1?

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[298] The Applicants submit that, regardless of the reasonableness of the Proclamation, the Regulations and Economic Order infringed on the *Charter* rights and freedoms guaranteed by sections 2, 7 and 8 and cannot be justified under section 1.

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[299] The Respondent argues that the *Charter* was not infringed and that the special measures were, in any event justified.

[300] As noted above, the standard of review of the GIC decision to adopt the special measures is reasonableness: *Vavilov* at para 57. In this instance the legislation incorporates a mixed subjective and objective threshold "…believes on reasonable grounds…" - in section 19(1), the provision authorizing the making of the impugned special measures. In authorizing orders or regulations with respect to public assemblies, the legislation adds an additional objective threshold – "that may reasonably be expected to lead to a breach of the peace,…".

[301] It is clear from the record of Cabinet deliberations and the Invocation Memorandum that the GIC was aware that the intent of the *Emergencies Act* was to preserve and protect fundamental rights protected under the *Charter* even in dire situations.

(a) *Section 2*

[302] The Applicants argue that the Regulations violated the fundamental freedoms set out in section 2 in the *Charter*. Specifically, they argue the prohibition on public assembly in section 2 of the Regulations, the prohibition on travel to an assembly in section 4 and the prohibition on

providing property at section 5 inhibit basic and essential forms of democratic participation, and infringe the freedoms of expression, peaceful assembly and association.

(i) Freedom of thought, belief, opinion and expression.

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[303] The Applicants submit that sections 2, 4 and 5 of the Regulations infringe *Charter* section 2(b) freedom of thought, belief, opinion and expression in ways that meet the requirements set out by the *Supreme Court* in *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at p. 978:

1. The activities targeted by the Regulations are all expressive in a way that goes to the core of the freedom, i.e. the right to protest government action (*Figueiras v Toronto (Police Services Board*), 2015 ONCA 208 at para 69);

2. The method or location of the expressive activity does not remove it from the scope of protected expression as the protests were by and large peaceful and occurred often on public streets;

3. The prohibitions contained in the Regulations had the effect or the purpose of restricting freedom of expression and were designed to stop protest.

[304] The Respondent contends that there was no infringement to the freedoms guaranteed by s. 2(b) of the *Charter*, because harmful activities like violence, threats of violence, and non-

peaceful assembly are not protected: *R v Khawaja*, 2012 SCC 69 at paras 67, 70. The Regulations only prohibited participation in public assemblies that might reasonably be expected to breach the peace by disrupting movements of persons or goods or seriously interfering with trade or with critical infrastructure, or supporting the threat or use of serious violence. Such actions are not constitutionally protected or free from reasonable limits.

[305] In reply, the Applicants submit that to say protests are not protected insofar as they could be reasonably expected to lead to a breach of the peace is a novel restriction on section 2(b) rights since the only internal limit to date is violence: *R v Keegstra*, [1990] 3 SCR 697 at p 731. Additionally, they submit, the Regulations go beyond capturing the threat or use of acts of serious violence, they also capture mere disruption.

[306] Protests are inherently disruptive and are constitutionally protected political expression that goes to the core of the freedom: *Harper v Canada (Attorney General*), 2004 SCC 33 at paras 47 and 66, [*Harper-2004*].

[307] Moreover, the Applicants argue, the effect of the Regulations was to criminalize attendance at the protests by anyone, no matter if they participated in the actual conduct leading to a breach of peace. By criminalizing the entire protest, the Regulations limited the right to expression of protestors who wanted to convey dissatisfaction with government policies, but who did not intend on participating in the blockades.

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[308] I agree with the Applicants that the scope of the Regulations was overbroad in so far as it captured people who simply wanted to join in the protest by standing on Parliament Hill carrying a placard. It is not suggested that they would have been the focus of enforcement efforts by the police. However, under the terms of the Regulations, they could have been subject to enforcement actions as much as someone who had parked their truck on Wellington Street and otherwise behaved in a manner that could reasonably be expected to lead to a breach of the peace.

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[309] One aspect of free expression is the right to express oneself in certain public spaces. By tradition, such places become places of protected expression: *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 at para 61. To the extent that peaceful protestors did not participate in the actions of those disrupting the peace, their freedom of expression was infringed.

(ii) Freedom of peaceful assembly.

[310] Similarly, the Applicants submit, the prohibition on public assembly and travel to an assembly infringes section 2(c) of the *Charter*, which protects freedom of peaceful assembly. The prohibition on public assembly captures any assembly that may lead to a breach of the peace, they argue, thus it prohibits an assembly before it occurs and before it becomes an assembly that falls outside of the scope of 2(c).

[311] The Respondent argues that section 2(c) was not infringed because the Regulations did "not prohibit all anti-government protests, only those that were likely to result in a breach of peace". Moreover, the Regulations were carefully tailored to include exceptions and did not

apply to a person who resided in, worked in, or had a reason other than to participate or facilitate a non-peaceful assembly. The decision to adopt the special measures calls for deference particularly when addressing a complex issue and the measures are among several reasonable alternatives.

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[312] I note that section 19(1)(a)(i) of the EA 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". This is anticipatory language. The legislation clearly permits special measures to prevent public assemblies that will likely lead to a breach of the peace. The evidence supports 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.

[313] I agree with the Respondent 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 protestors' objective] are not constitutionally protected."

[314] I therefore find no breach of the *Charter* right of peaceful assembly.

(iii) Freedom of Association

[315] Regarding *Charter* section 2(d), the Applicants argue that the prohibition on public assembly and on travel to an assembly infringes freedom of association, which serves to protect

individuals “banding together in the pursuit of common goals” and “empowering individuals to achieve collectively what they could not achieve individually”: *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 58 and 62. By prohibiting individuals from meeting and forming associations in the form of protest and discouraging the collective pursuit of common goals, the Regulations strike at the heart of this freedom.

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[316] The Respondent submits that the Applicants misapprehend the nature of the protection. Freedom of association protects only the associational aspect of activities, such as the freedom to form and maintain associations, not the activity itself: *Harper-2004* at para 125.

[317] In my view, the special measures adopted to deal with the occupation of Ottawa and blockades at other locations did not infringe upon the participants’ freedom of association. They were free to communicate with each other in pursuit of their collective goals and form whatever organization they thought necessary to do so elsewhere. I find no breach of *Charter* section 2(d).

(b) *Section 7*

[318] In section 7, the *Charter* guarantees the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[319] Section 10(2) of the Regulations created penalties for failure to comply with the special measures. Summary conviction could lead to a fine of up to $500 and imprisonment for up to six

months, whereas conviction upon indictment could lead to a fine of up to $5,000 and imprisonment for up to five years.

[320] The Applicants argue that this provision creating an offence punishable by imprisonment engages the liberty interest protected by section 7 of the *Charter* and was geographically overbroad, citing *R v Heywood*, [1994] 3 SCR 761 at p. 794 [*Heywood*]. Section 10(2) exposed everyone in Canada to punishment for contravention of the Regulations, regardless of whether they were present in an area where the protests were taking place. The principle of overbreadth proscribes any law that is "so broad in scope that it includes some conduct that bears no relation to its purpose": *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 112.

[321] The fact that no one was actually charged is irrelevant, the Applicants submit. It is the overbroad application and not the implementation that concerns section 7. Infringement of the liberty interest protected by section 7 can be based on reasonable hypotheticals that have not yet materialized: *R v Hills*, 2023 SCC 2 at para 70. The fact that the Regulations were only in force for 9 days and not used outside of "red zones" does not alleviate the section 7 problem, according to the Applicants. During those 9 days, they applied to places where no Convoy-related protests had occurred or were expected to occur. As such, the Regulations were overbroad.

[322] The Respondent submits that there is no overbreadth and that reliance on *Heywood* is misplaced as the *Criminal Code* provision in question in that case covered many places where the prohibited conduct could not take place. In this instance, the blockades and occupations were

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nation-wide. Moreover, the Regulations prohibited only a narrow, defined range of activities and did so for no more than 9 days. Thus, the Regulations were tailored to limit constitutional rights no more than reasonably necessary to address the issues.

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[323] It is likely that in considering what the scope of the Regulations should be; Cabinet and the GIC were concerned that they could be confronted with what might be described as a "whack-a-mole" scenario. Whenever one blockade or occupation was contained, another would pop up at a different location. There was evidence of attempts to have convoy-style disruptions in other locations, such as downtown Toronto, at other border crossings and in Quebec.

[324] At first impression, the extension of the temporary measures throughout the country including where no disruption had occurred would appear to have been overbroad. However, a party asserting a violation of section 7 must not only show that the impugned law interfered with or deprived them of their life, liberty or security of the person, which laws do all the time, but also that the deprivation in question is not in accordance with the principles of fundamental justice: *Carter v Canada (Attorney General* 2015 SCC 5 at para 55. In this instance, the deprivation was temporary in nature and subject to judicial review as these proceedings have demonstrated. In the result, I am not prepared to find a breach of section 7.

(c) Section 8

[325] Section 8 provides that everyone has the right to be secure against unreasonable search or seizure. A search will be reasonable under section 8 if it is authorized by law, if the law itself is

reasonable, and if the search was carried out in a reasonable manner: *R v Caslake*, [1998] 1 SCR 51 at para 10 citing *R v Collins*,[1987] 1 SCR 265 and *Hunter*.

[326] The issue here, the Applicants submit, is whether the law that authorized the search, the Economic Order, was reasonable. They submit a law will be reasonable when it reasonably balances the importance of the state objective with the degree of impact on the individual's privacy interest: *R v Rodgers*, 2006 SCC 15 at para 27.

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[327] A reasonable provision authorizing a search must create a system of: 1) prior authorization, 2) determined by a neutral third party not involved in the investigation, and 3) on the standard of "reasonable and probable grounds to believe" that an offence has been committed and that evidence of the offence will be found in the place subject to the search: *Hunter* at pp. 160 to 168. As noted above, the words "and probable" no longer appear in most of the relevant *Code* provisions. But the standard remains the same.

[328] The Applicants argue that two of the provisions of the Economic Order contravene *Charter* section 8. First, section 2(1) of the Economic Order empowered financial institutions to freeze the assets of any designated person, which constitutes a seizure within the meaning of *Charter* s. 8. Second, section 5 of the Economic Order required financial institutions to disclose private information, such as what money people have and how they spent it, regarding designated persons, to the RCMP or CSIS. That is a search, the Applicants contend.

[329] The Applicants submit that government authorities requesting private data from non-state entities can constitute a search by the state under section 8 of the *Charter*: *R v Spencer*, 2014 SCC 43 at para 6 [*Spencer - SCC*]; *R v Marakah*, 2017 SCC 59 at para 19, [*Marakah*]. "Designated persons", those whose information was provided by the RCMP to the financial institutions, had a reasonable expectation of privacy in the subject matter, i.e., their private financial and transactional records. Reasonable expectations of privacy have been found in relation to records held by Internet Service Providers, even if they lack direct control over the records: *Spencer-SCC* at para 66. A search may also reveal details about the choices and lifestyles of an individual: *Marakah*, at paras 31-32; *R v Patrick* 2009 SCC 17 at para 32.

[330] Here, the Applicants submit, the Economic Order required banks to disclose a great deal of information about a designated person's finances and how their money was being used, information which had the potential to reveal information about the most intimate details of someone's life.

[331] The Respondent contends that the Economic Order did not authorize activity that constitutes a "seizure" within the meaning of *Charter* s. 8. The authority cited for this proposition is *Quebec (AG) v Laroche*, 2002 SCC 72 at paras 52-53 [*Laroche*].

[332] *Laroche* involved restraint orders and warrants for the seizure of vehicles issued under the *Criminal Code* due to irregularities in relation to the insurance files for the vehicles. The restraint order and warrants were ultimately upheld by the Supreme Court. At paragraph 52, Justice LeBel, for the majority, defined a seizure in the context of *Charter* s. 8 by reference to earlier decisions. In *R v Dyment*, [1988] 2 SCR 417 at p 431 [*Dyment*] the essence of a seizure

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was described as “the taking of a thing from a person by a public authority without that person’s consent.” Similarly in *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission),* [1990] 1 SCR 425 at p 493 [*Thomson Newspapers*] it was said to be “the taking hold by a public authority of a thing belonging to a person against that person’s will.”

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[333] At paragraph 53 of *Larouche,* Justice LeBel discussed limitations on the scope of the word “seizure” which, he said, were to be found in the context in which the process (of taking a thing from a person without their consent) is carried out. These were necessary, he said, to avoid expanding the scope of the protection to include property rights which the *Charter* did not protect. In support of this interpretation Justice LeBel cited a text which states:

> Specifically, where property is taken by governmental action for reasons other than administrative or criminal investigation a “seizure” under the *Charter* has not occurred.
>
> *Search and Seizure Law in Canada,* at p.2-5*:* S.C. Hutchison, J.C. Morton and M.P. Bury.

[334] This is the basis for the Respondent’s position that there was no “seizure” of the frozen bank accounts. I have considerable difficulty with that position as I stated at the hearing. While the purpose of *Charter* s 8 is to protect privacy rights and not property, governmental action that results in the content of a bank account being unavailable to the owner of the said account would be understood by most members of the public to be a “seizure” of that account as defined in *Dyment* and *Thomson Newspapers* above. Alternatively, I am satisfied that the disclosure of information about the bank and credit card accounts of the “designated persons” by the financial institutions to the RCMP constituted a “seizure” of that information by the government.

Financial records are part of the "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state": *R. v. Plant*, 3 SCR 281 at p 293; see also *Schreiber v Canada (Attorney General)*, [1998] 1 SCR 841 at para 19 [*Schreiber*]. Bank account and credit card information can reveal personal details about someone such as their financial status and lifestyle choices: *Schreiber* at para 55. As such, Messrs. Cornell and Gircys had a strong expectation of privacy in their financial records and that interest was protected by s. 8 of the *Charter*.

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[335] The Applicants further submit that section 5 of the Economic Order did not meet the requirements of a reasonable search, as there was no prior authorization or involvement of a neutral third party such as a judge. The Economic Order also failed to require reasonable grounds before the search was conducted.

[336] Financial institutions had to disclose information "without delay" anytime they had a "reason to believe", that someone was a designated person. The Economic Order did not define or provide any guidance on what the standard for that belief was. This, the Applicants submit, was an insufficient basis to intrude upon an expectation of privacy: *R v MacKenzie*, 2013 SCC 50 at para 41.

[337] On the evidentiary record, the names were provided to the financial institutions by the RCMP and that was considered sufficient to require disclosure to the police. The absence of any objective standard was confirmed by Superintendent Beaudoin, who oversaw the implementation of the Economic Order. He acknowledged in cross-examination that the RCMP did not apply a

standard of either reasonable grounds or a standard of reasonable suspicion, and all they required was “bare belief”.

[338] The Applicants submit that the procedure adopted compares unfavourably with that set out in the *Proceeds of Crime (Money Laundering*) *and Terrorist Financing Act*, SC 2000, c.17, where reports of suspicious transactions by entities are made to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), an independent agency that serves as a middle layer between financial institutions and law enforcement. In turn, FINTRAC gives information out to the police only in specified circumstances and where there are “reasonable grounds to suspect”. The Applicants argue the financial institutions were effectively acting as agents of the police and became “part of government”: *R v Buhay*, 2003 SCC 30 at para 25. Thus, the Applicants argue, the Economic Order was unreasonable and violated section 8.

[339] The Respondent concedes that the searches authorized by sections 5 and 6 of the Economic Order engaged *Charter* s 8. They argue that the searches were reasonable due to their limited scope, duration, and targeted focus. And since they were non-criminal in nature, the standards imposed by s. 8 are more flexible, and the Court’s analysis has to regard the purpose for which the search occurs. Any effect that the searches conducted under sections 5 and 6 had on the privacy interests of the individuals affected was proportionate to the important objective of responding to the public order emergency and thus consistent with the *Charter*.

[340] In requiring the financial institutions to act on the instructions of the RCMP, in my view, the Economic Order effectively enlisted them as subordinates of the government and engaged

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Charter s. 8: *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 53. While the financial institutions were private entities and thus normally beyond the reach of the *Charter*, the activity in question here can be ascribed to government. The act was truly "governmental" in nature to implement the temporary measures enacted by the GIC and thus brought the banks and other financial services providers within the scope of section 8 to the extent of that activity: *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 44.

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[341] I find that the failure to require that some objective standard be satisfied before the accounts were frozen breached s. 8. Whether that could be justified in the circumstances depends on a section 1 analysis.

(d) Section 1

[342] The party seeking to uphold a limitation on a right or freedom guaranteed by the *Charter* bears the burden on a preponderance of probability to demonstrate that the infringement is justified: *R v Oakes*, [1986] 1 SCR 103 at paras 66-67. Two central criteria must be satisfied. First the objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *Oakes* para 69. This is usually referred to as a "pressing and substantial objective". Second, the means chosen must be shown to be reasonable and demonstrably justified as proportionate to the objective: *Oakes* at para 70. The infringing measures must be justified based on a "rational inference from evidence or established truths": *RJR-MacDonald* at para. 128. Bare assertions will not suffice: evidence, supplemented by common sense and inference, is needed: *R v Sharpe*, 2001 SCC 2 at para 78.

[343] The Applicants contend that the government has adduced little evidence to support the assertion that any infringement of Charter rights are demonstrably justified, even if deference is accorded. The issue is whether the right was infringed "as little as is reasonably possible" within a range of reasonable options leaving a reasonable margin of actions available to the state: *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 194.

[344] To consider whether a violation of section 2(b) can be saved under section 1, the Applicants submit, the Court must assess the level of protection the targeted expression is entitled to: *R v Lucas*, [1998] 1 SCR 439 at para 34 [*Lucas*]. The closer the expression is to the core values underpinning section 2(b), the more difficult it will be to justify limiting it: *Lucas* at para 34; *Thomson Newspapers* at para 91.

[345] Political speech is granted the highest level of protection because of its essential role in democratic life: See *R v Guignard*, 2022 SCC 14 at para 20; *Harper-2004* at para 66; *Harper v Canada*, 2000 SCC 57 at para 20. Since the Regulations directly target a political demonstration and the right to free expression of the protestors, the Applicants submit that the highest level of protection is warranted in this case. While parked trucks obstructing the roads and blaring horns are not "high value" speech, the Regulations did not simply prohibit this conduct, which was already illegal under provincial and municipal law, but criminalized the attendance of every single person at those protests regardless of their actions.

[346] By applying throughout Canada, the Applicants submit, the Regulations exposed everyone in the country to their reach: the fact that they were not enforced in particular areas is

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inconsequential because they still applied everywhere. The Regulations impaired the right to free expression more than was necessary. They captured bystanders who did not agree with the blockades, did not create them and protested in a non-disruptive way. The Regulations also criminalized travelling to a protest where there might have been a blockade, no matter the person's purpose for being there and whether an actual breach of the peace had occurred or not. This, the Applicants argue, is not minimally impairing.

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[347] The Respondent submits that the measures were carefully tailored to the objectives to swiftly end the national emergency, which could not be effectively dealt under any other law of Canada. Moreover, the EA measures were minimally impairing in terms of the time they were in force (February 14 to February 23, 2022), which was the shortest amount of time possible to manage the emergency. The measures were promptly revoked when the situation was stabilized. The Economic Order did not prescribe any lasting impacts on the designated persons beyond the time that it was in effect.

[348] It was necessary for the measures to apply nationwide, the Respondent submits, rather than be limited to specific provinces or municipalities as protests continued to spring up in different locations. It was unknown where the next one might arise.

[349] With regard to the infringement of section 8, a finding that a search and seizure power is unreasonable leaves little room for upholding the law as reasonable under section 1. In this context, the Applicants argue that the Economic Order also fails on minimal impairment and could not be upheld under section 1. The search power contained in section 5 of the Economic

Order did not minimally impair the right against unreasonable search and seizure as it required extensive financial disclosure to law enforcement, predicated on an unconstitutional “any reason to believe” standard, subject to no system of prior authorization.

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[350] The Respondent submits that the collective benefit of, swiftly and peacefully, ending the blockades outweighed any deleterious effects. The EA measures were a balanced, measured and proportionate approach to the national emergency. The negative effects of the Economic Order were inevitable, but the successful deterrent effect outweighed any deleterious impacts. The measures were tailored in length and to narrow the prohibitions. It did not prohibit all protests or demonstrations, only those likely to result a breach of peace.

(i) Conclusion on section 1 justification

[351] There was no real dispute between the parties that the government had a pressing and substantial objective when they enacted the measures: to clear out the blockades that had formed as part of the protest. Only the Jost Applicants in their Memorandum contended that the objective was not pressing and substantial but they failed to provide any argument in support of that position and did not press it at the hearing. The CCF and CCLA acknowledge that the Regulations and Economic Order were rationally connected to the goal of ending the blockades.

[352] I agree with the Respondent that the objective was pressing and substantial and that there was a rational connection between freezing the accounts and the objective, to stop funding the blockades. However, the measures were not minimally impairing.

[353] Minimal impairment requires that the measures affect the rights as little as reasonably possible, they must be "carefully tailored": *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 66. The Regulations and Economic Order fail the minimal impairment test for two reasons: 1) they were applied throughout Canada; and 2) there were less impairing alternatives available.

[354] The scope of the Declaration and the measures could have been limited to Ontario which faced the most intransigent situation. And possibly Alberta, although the Coutts situation had been resolved when the Act was invoked. Elsewhere the authorities were able to use existing legislative tools such as the *Criminal Code* and provincial public safety statutes to remove blockades and prevent new ones from being established without the threat or use of serious violence from the protesters.

[355] The Respondent's position is that it was necessary to apply the measures across Canada because the participants in the several blockades came from across the country, as did their financial support. That may have been a compelling reason if there was evidence that the measures would not have achieved their objective if they did not have effect throughout the country. But that evidence was not part of the Respondent's record.

[356] Those that were targeted by the Economic Order appear to have all been present at the major blockade sites, notably Ottawa. And there is no evidence that the financial institutions would have refused to cooperate with the implementation of the measures if, for example, their account holders resided in Prince Edward Island or the Territories which had no illegal protests and had travelled to Ottawa to participate in the blockade.

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[357] The Respondent acknowledges that the suspension of bank accounts and credit cards affected joint account holders and credit cards issued on the accounts to other family members and suggests that it was unavoidable. Indeed the Jost Applicants submitted evidence of that happening to one of them. Thus someone who had nothing to do with the protests could find themselves without the means to access necessaries for household and other family purposes while the accounts were suspended. There appears to have been no effort made to find a solution to that problem while the measures were in effect.

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[358] Of particular concern from a section 1 justification perspective is that there was no standard applied to determine whether someone should be the target of the measures or process to allow them to question that determination. As described by Superintendent Beaudoin in cross-examination, it was all informal and *ad hoc.*

[359] Having found that the infringements of *Charter* sections 2(b) and 8 were not minimally impairing, I find that they were not justified under section 1.

D. Did the Regulations and Economic Order violate the *Canadian Bill of Rights*?

[360] The Preamble to the *Emergencies Act* states that the "special temporary measure" are subject to the *Canadian Bill of Rights.*

[361] Section 1 (a) of the *Canadian Bill of Rights* provides that: "[i]t is hereby recognized and declared that in Canada there have existed and continue to exist […] the right of the individual to […] enjoyment of property, and the right not to be deprived thereof except by due process of

law." Section 2 requires that "[e]very law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be construed and applied as not to abrogate, abridge or infringe …any of the rights or freedoms herein recognized and declared…" There is no notwithstanding clause in the EA.

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[362] Part II of the Act which created the *Canadian Bill of Rights*, extends its application to any law, including Regulations, within the legislative authority of the Parliament of Canada that existed before or after the coming into force of the Act. There is, therefore, no question that it applies to the *Emergencies Act*, the Regulations and the Economic Order. Any provision inconsistent with the *Canadian Bill of Rights* is to be declared inoperative: *The Queen v Drybones*, [1970] SCR 282.

[363] While many of the provisions of the *Canadian Bill of Rights* were superseded by the adoption of the *Charter* in 1982, it continues to operate: *Singh v Canada (Minister of Employment and Immigration)* [1985] 1 SCR 177 at page 224. And was described as "quasi-constitutional legislation" in *Bell Canada v Canada Telephone Employees Association*, 2003 SCC 36 at para 28.

[364] The *Canadian Bill of Rights* provides two protections not expressly available in the *Charter*. The first is the protection of the enjoyment of property in section 1(a), the deprivation of which must occur through the due process of law. The second protection is found in section 2(e) which guarantees a fair hearing in accordance with the principles of fundamental justice for

the determination of rights and obligations: *Authorson v Canada (Attorney General)*, 2003 SCC 39 at para 34 [*Authorson*].

[365] As noted above, Messrs. Cornell and Gircys had their accounts frozen, as a result of the Declaration and imposition of the Economic Order. As a consequence, they have standing to seek a declaration as to the alleged conflict between the EA's measures and the *Canadian Bill of Rights*: *Smith, Kline & French v Attorney General of Canada*, [1986], 1 FC at p 298 [*Smith*].

[366] In their written argument and Amended Notice of Constitutional Question, the Jost Applicants, of which Messrs. Cornell and Gircys were then part, alleged that the Economic Order infringed sections 1 and 2 of the *Canadian Bill of Rights* as they pertain to due process and property rights. A similar assertion was made in oral argument. No authority was cited in support of the proposition other than by reference to the terms of the *Canadian Bill of Rights* itself. In reply to the Respondent's written argument, the Jost Applicants contended that the Economic Order was in clear contravention of due process property rights at common law and pursuant to the *Canadian Bill of Rights,* again without citing authority for the proposition.

[367] In far ranging oral argument at the hearing, referencing *Charter* section 8 and due process concerns, counsel argued that Cornell and Gircys were entitled to have a hearing in a court before their accounts could be frozen. Their submissions envisaged a small army of prosecutors, defence counsel and judges being mobilized to deal with the cases before any concrete action could be taken against the participants' property interests. Counsel likened such a process to the busy dockets in criminal courts across the country.

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[368] The Respondent did not reply to the claims regarding the *Canadian Bill of Rights* raised by the Jost Applicants in their written argument. But in responding to Nagle/CFN's similar claims, the Respondent argued that the process followed by the RCMP complied with due process of law requirements. The content of those requirements being "eminently variable, inherently flexible and context-specific": *Vavilov*, at para 77. And in the context of an emergency, the requirements need not always be satisfied when the initial decision is made but can be later if maintained or continued after the immediate urgency: *Ross v Mohawk Council of Kanesatake*, 2003 FCT 531 at para 79.

[369] This is not a case in my view that squarely addresses the enjoyment of property protection in section 1(a) of the *Canadian Bill of Rights.* The freezing of Messrs. Cornell and Gircy's bank accounts was of short duration. While no doubt inconvenient, it did not cause them significant harm and they were both able to manage without quick access to cash or the use of credit cards. I agree with the Respondent that in this context, due process did not require that the special measures be put on hold while counsel and courts were engaged and hearings conducted. This would be contrary to the very purpose of the *Emergencies Act* and an unnecessary burden on the justice system given the temporary nature of the special measures.

X. **Conclusion**

[370] At the outset of these proceedings, while I had not reached a decision on any of the four applications, I was leaning to the view that the decision to invoke the EA was reasonable. I considered the events that occurred in Ottawa and other locations in January and February 2022 went beyond legitimate protest and reflected an unacceptable breakdown of public order. I had

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and continue to have considerable sympathy for those in government who were confronted with this situation. Had I been at their tables at that time, I may have agreed that it was necessary to invoke the Act. And I acknowledge that in conducting judicial review of that decision, I am revisiting that time with the benefit of hindsight and a more extensive record of the facts and law than that which was before the GIC.

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[371] My preliminary view of the reasonableness of the decision may have prevailed following the hearing due to excellent advocacy on the part of counsel for the Attorney General of Canada had I not taken the time to carefully deliberate about the evidence and submissions, particularly those of the CCLA and CCF. Their participation in these proceedings has demonstrated again the value of public interest litigants. Especially in presenting informed legal argument. This case may not have turned out the way it has without their involvement, as the private interest litigants were not as capable of marshalling the evidence and argument in support of their applications.

[372] I have concluded that the decision to issue the Proclamation does not bear the hallmarks of reasonableness – justification, transparency and intelligibility – and was not justified in relation to the relevant factual and legal constraints that were required to be taken into consideration. In my view, there can be only one reasonable interpretation of EA sections 3 and 17 and paragraph 2(c) of the *CSIS Act* and the Applicants have established that the legal constraints on the discretion of the GIC to declare a public order emergency were not satisfied.

[373] As discussed above, I have found that Kristen Nagle, Canadian Frontline Nurses, Jeremiah Jost and Harold Ristau lack standing to seek judicial review of the decision and their

applications are dismissed for that reason. I recognize that Edward Cornell and Vincent Gircys have direct standing to challenge the decision and grant public interest standing to the CCLA and CCF. I find that the remaining Applicants have established that the decision to issue the Proclamation was unreasonable and led to infringement of *Charter* rights not justified under section 1. Their applications are granted to that extent. I find no reason to apply the *Canadian Bill of Rights.*

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(1) Remedies

[374] The Applicants all sought declaratory relief if any of the legislative instruments were found to be unreasonable or unconstitutional. Gircys and Cornell went further in their Memorandum of Fact and Law to request a declaration that the *Emergencies Act* is inconsistent with s 91, s 92 and s 96 of *The Constitution Act, 1867*, 30 & 31 Vict, c 3, and, to the extent of those inconsistencies, is of no force or effect pursuant to s 52(1) of the *Constitution Act*. As they did not make that argument at the hearing, I took it to have been abandoned. In any event, I considered it to be of no merit. This case was not about the constitutionality of the Act but, rather, how it was applied in this instance.

[375] Judgments will be issued in each Application to reflect the conclusions I have reached.

(2) Costs

[376] The public interest litigants have not requested costs and none will be awarded to them. Gircys and Cornell requested costs in their Notice of Application and having succeeded on key

elements, are entitled to be compensated, at least for the hearing. I will not award them costs for the preliminary steps in these proceedings which I considered to be often misguided or for the preparation of the largely irrelevant memorandum of fact and law that was filed. They may confer with the Respondent on what would be a reasonable cost award for the hearing, including disbursements. If a joint position is not reached the parties may submit within thirty days of the receipt of these reasons written representations not exceeding five pages in length for the Court to determine an appropriate award.

"Richard G. Mosley"
Judge

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ANNEX A / ANNEXE A

***Emergencies Act*, RSC 1985, c 22 (4th Supp)**

Preamble

WHEREAS the safety and security of the individual, the protection of the values of the body politic and the preservation of the sovereignty, security and territorial integrity of the state are fundamental obligations of government;

AND WHEREAS the fulfilment of those obligations in Canada may be seriously threatened by a national emergency and, in order to ensure safety and security during such an emergency, the Governor in Council should be authorized, subject to the supervision of Parliament, to take special temporary measures that may not be appropriate in normal times;

AND WHEREAS the Governor in Council, in taking such special temporary measures, would be subject to the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights and must have regard to the International Covenant on Civil and Political Rights, particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency;

NOW THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

(…)

National Emergency

3 For the purposes of this Act, a national emergency is an urgent and critical situation of a temporary nature that

***Loi sur les mesures d'urgence*, LRC 1985, c 22 (4e suppl)**

Préambule

Attendu :

que l'État a pour obligations primordiales d'assurer la sécurité des individus, de protéger les valeurs du corps politique et de garantir la souveraineté, la sécurité et l'intégrité territoriale du pays;

que l'exécution de ces obligations au Canada risque d'être gravement compromise en situation de crise nationale et que, pour assurer la sécurité en une telle situation, le gouverneur en conseil devrait être habilité, sous le contrôle du Parlement, à prendre à titre temporaire des mesures extraordinaires peut-être injustifiables en temps normal;

qu'en appliquant de pareilles mesures, le gouverneur en conseil serait assujetti à la Charte canadienne des droits et libertés ainsi qu'à la Déclaration canadienne des droits et aurait à tenir compte du Pacte international relatif aux droits civils et politiques, notamment en ce qui concerne ceux des droits fondamentaux auxquels il ne saurait être porté atteinte même dans les situations de crise nationale,

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

(…)

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

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possible de faire face adéquatement sous le régime des lois du Canada et qui, selon le cas :

(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

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) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada

b) menace gravement la capacité du gouvernement du Canada de garantir la souveraineté, la sécurité et l'intégrité territoriale du pays.

and that cannot be effectively dealt with under any other law of Canada.

(…)

PART II

Public Order Emergency

Definitions

16 In this Part,

declaration of a public order emergency means a proclamation issued pursuant to subsection 17(1); (*déclaration d'état d'urgence)*

public order emergency means an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency; (*état d'urgence)*

threats to the security of Canada has the meaning assigned by section 2 of the Canadian Security Intelligence Service Act. (*menaces envers la sécurité du Canada)*

Définitions

16 Les définitions qui suivent s'appliquent à la présente partie.

déclaration d'état d'urgence Proclamation prise en application du paragraphe 17(1). (*declaration of a public order emergency*)

état d'urgence Situation de crise causée par des menaces envers la sécurité du Canada d'une gravité telle qu'elle constitue une situation de crise nationale. (*public order emergency)*

menaces envers la sécurité du Canada S'entend au sens de l'article 2 de la Loi sur le service canadien du renseignement de sécurité. (*threats to the security of Canada*)

Declaration of a public order emergency

17 (1) When the Governor in Council believes, on reasonable grounds, that a public order

Proclamation

17 (1) Le gouverneur en conseil peut par proclamation, s'il croit, pour des motifs

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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.

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 necessary for dealing with the emergency; and

(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.

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 nécessaires pour faire face à l'état d'urgence;

c) si l'état d'urgence ne touche pas tout le Canada, la désignation de la zone touchée.

Effective date

18 (1) A declaration of a public order emergency is effective on the day on which it is issued, but a motion for confirmation of the declaration shall be laid before each House of Parliament and be considered in accordance with section 58.

Prise d'effet

18 (1) La déclaration d'état d'urgence prend effet à la date de la proclamation, sous réserve du dépôt d'une motion de ratification devant chaque chambre du Parlement pour étude conformément à l'article 58.

Expiration of declaration

(2) A declaration of a public order emergency expires at the end of thirty days unless the declaration is previously revoked or continued in accordance with this Act.

Cessation d'effet

(2) La déclaration cesse d'avoir effet après trente jours, sauf abrogation ou prorogation antérieure en conformité avec la présente loi.

Orders and Regulations

19 (1) While a declaration of a public order emergency is in effect, the Governor in

Gouverneur en conseil

19 (1) Pendant la durée de validité de la déclaration d'état d'urgence, le gouverneur en

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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:

(a) the regulation or prohibition of

(i) any public assembly that may reasonably be expected to lead to a breach of the peace,

(ii) travel to, from or within any specified area, or

(iii) the use of specified property;

(b) the designation and securing of protected places;

(c) the assumption of the control, and the restoration and maintenance, of public utilities and services;

(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

(e) the imposition

(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

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) la réglementation ou l'interdiction :

(i) des assemblées publiques dont il est raisonnable de penser qu'elles auraient pour effet de troubler la paix,

(ii) des déplacements à destination, en provenance ou à l'intérieur d'une zone désignée,

(iii) de l'utilisation de biens désignés;

b) la désignation et l'aménagement de lieux protégés;

c) la prise de contrôle ainsi que la restauration et l'entretien de services publics;

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) en cas de contravention aux décrets ou règlements d'application du présent article, l'imposition, sur déclaration de culpabilité :

(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,

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(ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment,

(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.

for contravention of any order or regulation made under this section.

Restriction

(2) Where a declaration of a public order emergency specifies that the effects of the emergency extend only to a specified area of Canada, 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, may be exercised or performed only with respect to that area.

Limitation

(2) Dans les cas où la déclaration ne concerne qu'une zone désignée du Canada, les décrets et règlements d'application du paragraphe (1) et les pouvoirs et fonctions qui en découlent n'ont d'application qu'à l'égard de cette zone.

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

Idem

(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.

(…)

(…)

Revocation by Governor in Council

22 The Governor in Council may, by proclamation, revoke a declaration of a public

Abrogation par le gouverneur en conseil

22 Le gouverneur en conseil peut, par proclamation, abroger une déclaration d'état

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order emergency either generally or with respect to any area of Canada effective on such day as is specified in the proclamation.

(…)

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.

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

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.

Effect of expiration of declaration

26 (1) Where, pursuant to this Act, a declaration of a public order emergency expires either generally or with respect to any area of Canada, all orders and Regulations

d’urgence soit de façon générale, soit pour une zone du Canada, à compter de la date fixée par la proclamation.

(…)

Consultation

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

(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

(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.

Cessation d’effet

26 (1) Dans les cas où, en application de la présente loi, une déclaration d’état d’urgence cesse d’avoir effet soit de façon générale, soit à l’égard d’une zone du Canada, ses décrets ou

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made pursuant to the declaration or all orders and Regulations so made, to the extent that they apply with respect to that area, as the case may be, expire on the day on which the declaration expires.

Effect of revocation of declaration

(2) Where, pursuant to this Act, a declaration of a public order emergency is revoked either generally or with respect to any area of Canada, all orders and Regulations made pursuant to the declaration or all orders and Regulations so made, to the extent that they apply with respect to that area, as the case may be, are revoked effective on the revocation of the declaration.

Effect of revocation of continuation

(3) Where, pursuant to this Act, a proclamation continuing a declaration of a public order emergency either generally or with respect to any area of Canada is revoked after the time the declaration would, but for the proclamation, have otherwise expired either generally or with respect to that area,

> **(a)** the declaration and all orders and Regulations made pursuant to the declaration, or
>
> **(b)** the declaration and all orders and Regulations made pursuant to the declaration to the extent that the declaration, orders and Regulations apply with respect to that area,

as the case may be, are revoked effective on the revocation of the proclamation.

Effect of revocation of amendment

(4) Where, pursuant to this Act, a proclamation amending a declaration of a public order emergency is revoked, all orders and Regulations made pursuant to the amendment

règlements d'application, ainsi que les dispositions des autres décrets ou règlements qui concernent cette zone, cessent d'avoir effet en même temps.

Abrogation

(2) Dans les cas où, en application de la présente loi, la déclaration est abrogée soit de façon générale, soit à l'égard d'une zone du Canada, ses décrets ou règlements d'application, ainsi que les dispositions des autres décrets ou règlements qui concernent cette zone, sont abrogés en même temps.

Cas de prorogation

(3) Dans les cas où une proclamation de prorogation de la déclaration soit de façon générale, soit à l'égard d'une zone du Canada est abrogée après la date prévue à l'origine pour la cessation d'effet, générale ou pour la zone, de la déclaration, celle-ci, ses décrets ou règlements d'application, ainsi que les dispositions des autres décrets ou règlements qui concernent la zone, sont abrogés en même temps.

Cas de modification

(4) Dans les cas où, en application de la présente loi, une proclamation de modification de la déclaration est abrogée, les décrets ou règlements consécutifs à la modification, ainsi que les

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and all orders and Regulations to the extent that they apply pursuant to the amendment are revoked effective on the revocation of the proclamation.

(…)

dispositions des autres décrets et règlements qui lui sont consécutifs, sont abrogés en même temps.

(…)

58 (1) Subject to subsection (4), a motion for confirmation of a declaration of emergency, signed by a minister of the Crown, together with an explanation of the reasons for issuing the declaration and a report on any consultation with the lieutenant governors in council of the provinces with respect to the declaration, shall be laid before each House of Parliament within seven sitting days after the declaration is issued.

58 (1) Sous réserve du paragraphe (4), il est déposé devant chaque chambre du Parlement, dans les sept jours de séance suivant une déclaration de situation de crise, une motion de ratification de la déclaration signée par un ministre et accompagnée d'un exposé des motifs de la déclaration ainsi que d'un compte rendu des consultations avec les lieutenants-gouverneurs en conseil des provinces au sujet de celle-ci.

Summoning Parliament or House

(2) If a declaration of emergency is issued during a prorogation of Parliament or when either House of Parliament stands adjourned, Parliament or that House, as the case may be, shall be summoned forthwith to sit within seven days after the declaration is issued.

Convocation du Parlement ou d'une chambre

(2) Si la déclaration est faite pendant une prorogation du Parlement ou un ajournement d'une de ses chambres, le Parlement, ou cette chambre, selon le cas, est immédiatement convoqué en vue de siéger dans les sept jours suivant la déclaration.

Summoning Parliament

(3) If a declaration of emergency is issued at a time when the House of Commons is dissolved, Parliament shall be summoned to sit at the earliest opportunity after the declaration is issued.

Dissolution de la Chambre des communes

(3) Si la déclaration est faite alors que la Chambre des communes est dissoute, le Parlement est convoqué en vue de siéger le plus tôt possible après la déclaration.

Tabling in Parliament after summoned

(4) Where Parliament or a House of Parliament is summoned to sit in accordance with subsection (2) or (3), the motion, explanation and report described in subsection (1) shall be laid before each House of Parliament or that House of Parliament, as the case may be, on

Dépôt devant le Parlement après convocation

(4) Dans les cas où le Parlement, ou une de ses chambres, est convoqué conformément aux paragraphes (2) ou (3), la motion, l'exposé et le compte rendu visés au paragraphe (1) sont déposés devant chaque chambre du Parlement ou devant cette chambre, selon le cas, le premier jour de séance suivant la convocation.

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the first sitting day after Parliament or that House is summoned.

Consideration

(5) Where a motion is laid before a House of Parliament as provided in subsection (1) or (4), that House shall, on the sitting day next following the sitting day on which the motion was so laid, take up and consider the motion.

Vote

(6) A motion taken up and considered in accordance with subsection (5) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.

Revocation of declaration

(7) If a motion for confirmation of a declaration of emergency is negatived by either House of Parliament, the declaration, to the extent that it has not previously expired or been revoked, is revoked effective on the day of the negative vote and no further action under this section need be taken in the other House with respect to the motion.

(…)

Review by Parliamentary Review Committee

62 (1) The exercise of powers and the performance of duties and functions pursuant to a declaration of emergency shall be reviewed by a committee of both Houses of Parliament designated or established for that purpose.

Membership

Étude

(5) La chambre du Parlement saisie d'une motion en application des paragraphes (1) ou (4) étudie celle-ci dès le jour de séance suivant celui de son dépôt.

Mise aux voix

(6) La motion mise à l'étude conformément au paragraphe (5) fait l'objet d'un débat ininterrompu; le débat terminé, le président de la chambre met immédiatement aux voix toute question nécessaire pour décider de la motion.

Abrogation de la déclaration

(7) En cas de rejet de la motion de ratification de la déclaration par une des chambres du Parlement, la déclaration, sous réserve de sa cessation d'effet ou de son abrogation antérieure, est abrogée à compter de la date du vote de rejet et l'autre chambre n'a pas à intervenir sur la motion.

(…)

Examen

62 (1) L'exercice des attributions découlant d'une déclaration de situation de crise est examiné par un comité mixte de la Chambre des communes et du Sénat désigné ou constitué à cette fin.

Composition du comité

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(2) The Parliamentary Review Committee shall include at least one member of the House of Commons from each party that has a recognized membership of 12 or more persons in that House and at least the Leader of the Government in the Senate or Government Representative in the Senate, or his or her nominee, the Leader of the Opposition in the Senate, or his or her nominee, and the Leader or Facilitator who is referred to in any of paragraphs 62.4(1)(c) to (e) of the Parliament of Canada Act, or his or her nominee.

(2) Siègent au comité d'examen parlementaire au moins un député de chaque parti dont l'effectif reconnu à la Chambre des communes comprend au moins douze personnes, et au moins le leader ou représentant du gouvernement au Sénat, ou son délégué, le leader de l'opposition au Sénat, ou son délégué, et le leader ou facilitateur visé à l'un ou l'autre des alinéas 62.4(1)c) à e) de la Loi sur le Parlement du Canada, ou son délégué.

Oath of secrecy

(3) Every member of the Parliamentary Review Committee and every person employed in the work of the Committee shall take the oath of secrecy set out in the schedule.

Serment du secret

(3) Les membres du comité d'examen parlementaire et son personnel prêtent le serment de secret figurant à l'annexe.

Meetings in private

(4) Every meeting of the Parliamentary Review Committee held to consider an order or regulation referred to it pursuant to subsection 61(2) shall be held in private.

Réunions à huis clos

(4) Les réunions du comité d'examen parlementaire en vue de l'étude des décrets ou règlements qui lui sont renvoyés en application du paragraphe 61(2) se tiennent à huis clos.

Revocation or amendment of order or regulation

(5) If, within thirty days after an order or regulation is referred to the Parliamentary Review Committee pursuant to subsection 61(2), the Committee adopts a motion to the effect that the order or regulation be revoked or amended, the order or regulation is revoked or amended in accordance with the motion, effective on the day specified in the motion, which day may not be earlier than the day on which the motion is adopted.

Abrogation ou modification

(5) Si, dans les trente jours suivant le renvoi prévu par le paragraphe 61(2), le comité d'examen parlementaire adopte une motion d'abrogation ou de modification d'un décret ou d'un règlement ayant fait l'objet du renvoi, cette mesure s'applique dès la date prévue par la motion; cette date ne peut toutefois pas être antérieure à celle de l'adoption de la motion.

Report to Parliament

(6) The Parliamentary Review Committee shall report or cause to be reported the results of its review under subsection (1) to each House of Parliament at least once every sixty

Rapport au Parlement

(6) Le comité d'examen parlementaire dépose ou fait déposer devant chaque chambre du Parlement un rapport des résultats de son examen au moins tous les soixante jours pendant

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days while the declaration of emergency is in effect and, in any case,

(a) within three sitting days after a motion for revocation of the declaration is filed under subsection 59(1);

(b) within seven sitting days after a proclamation continuing the declaration is issued; and

(c) within seven sitting days after the expiration of the declaration or the revocation of the declaration by the Governor in Council.

Inquiry

63 (1) The Governor in Council shall, within sixty days after the expiration or revocation of a declaration of emergency, cause an inquiry to be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency.

Report to Parliament

(2) A report of an inquiry held pursuant to this section shall be laid before each House of Parliament within three hundred and sixty days after the expiration or revocation of the declaration of emergency.

***Emergency Measures Regulations*, SOR/2022-21**

Prohibition — public assembly

2 (1) A person must not participate in a public assembly that may reasonably be expected to lead to a breach of the peace by:

la durée de validité d'une déclaration de situation de crise, et, en outre, dans les cas suivants :

a) dans les trois jours de séance qui suivent le dépôt d'une motion demandant l'abrogation d'une déclaration de situation de crise en conformité avec le paragraphe 59(1);

b) dans les sept jours de séance qui suivent une proclamation de prorogation d'une situation de crise;

c) dans les sept jours de séance qui suivent la cessation d'effet d'une déclaration ou son abrogation par le gouverneur en conseil.

Enquête

63 (1) Dans les soixante jours qui suivent la cessation d'effet ou l'abrogation d'une déclaration de situation de crise, le gouverneur en conseil est tenu de faire faire une enquête sur les circonstances qui ont donné lieu à la déclaration et les mesures prises pour faire face à la crise.

63 (1) Dépôt devant le Parlement

(2) Le rapport de l'enquête faite en conformité avec le présent article est déposé devant chaque chambre du Parlement dans un délai de trois cent soixante jours suivant la cessation d'effet ou l'abrogation de la déclaration de situation de crise.

***Règlement sur les mesures* d'urgences, DORS/2022-21**

Interdiction – assemblée publique

2 (1) Il est interdit de participer à une assemblée publique dont il est raisonnable de penser qu'elle aurait

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pour effet de troubler la paix par l'un des moyens suivants:

(a) the serious disruption of the movement of persons or goods or the serious interference with trade;

a) en entravant gravement le commerce ou la circulation des personnes et des biens;

(b) the interference with the functioning of critical infrastructure; or

b) en entravant le fonctionnement d'infrastructures essentielles;

(c) the support of the threat or use of acts of serious violence against persons or property.

c) en favorisant l'usage de la violence grave ou de menaces de violence contre des personnes ou des biens.

Minor

(2) A person must not cause a person under the age of eighteen years to participate in an assembly referred to in subsection (1).

Mineur

(2) Il est interdit de faire participer une personne âgée de moins de dix-huit ans à une assemblée visée au paragraphe (1).

Prohibition — entry to Canada — foreign national

3 (1) A foreign national must not enter Canada with the intent to participate in or facilitate an assembly referred to in subsection 2(1).

Interdiction – entrée au Canada – étranger

3 (1) Il est interdit à l'étranger d'entrer au Canada avec l'intention de participer à une assemblée visée au paragraphe 2(1) ou de faciliter une telle assemblée.

Exemption

(2) Subsection (1) does not apply to

Exemption

(2) Le paragraphe (1) ne s'applique pas aux personnes suivantes :

(a) a person registered as an Indian under the Indian Act;

a) une personne inscrite à titre d'Indien sous le régime de la Loi sur les Indiens;

(b) a person who has been recognized as a Convention refugee or a person in similar circumstances to those of a Convention refugee within the meaning of subsection 146(1) of the Immigration and Refugee Protection Regulations who is issued a permanent resident visa under subsection 139(1) of those Regulations;

b) la personne reconnue comme réfugié au sens de la Convention, ou la personne dans une situation semblable à celui-ci au sens du paragraphe 146(1) du Règlement sur l'immigration et la protection des réfugiés, qui est titulaire d'un visa de résident permanent délivré aux termes du paragraphe 139(1) de ce règlement;

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(c) a person who has been issued a temporary resident permit within the meaning of subsection 24(1) of the Immigration and Refugee Protection Act and who seeks to enter Canada as a protected temporary resident under subsection 151.1(2) of the Immigration and Refugee Protection Regulations;

(d) a person who seeks to enter Canada for the purpose of making a claim for refugee protection;

(e) a protected person;

(f) a person or any person in a class of persons whose presence in Canada, as determined by the Minister of Citizenship and Immigration or the Minister of Public Safety and Emergency Preparedness, is in the national interest.

c) la personne qui est titulaire d'un permis de séjour temporaire au sens du paragraphe 24(1) de la Loi sur l'immigration et la protection des réfugiés et qui cherche à entrer au Canada à titre de résident temporaire protégé aux termes du paragraphe 151.1(2) du Règlement sur l'immigration et la protection des réfugiés;

d) la personne qui cherche à entrer au Canada afin de faire une demande d'asile;

e) la personne protégée;

f) sa présence au Canada est, individuellement ou au titre de son appartenance à une catégorie de personnes, selon ce que conclut le ministre de la Citoyenneté et de l'Immigration ou le ministre de la Sécurité publique et de la Protection civile, dans l'intérêt national.

Travel

4 (1) A person must not travel to or within an area where an assembly referred to in subsection 2(1) is taking place.

Minor– travel near public assembly

(2) A person must not cause a person under the age of eighteen years to travel to or within 500 metres of an area where an assembly referred to in subsection 2(1) is taking place.

Exemptions

(3) A person is not in contravention of subsections (1) and (2) if they are

(a) a person who, within of the assembly area, resides, works or is moving through that area for reasons

Déplacements

4 (1) Il est interdit de se déplacer à destination ou à l'intérieur d'une zone où se tient une assemblée visée au paragraphe 2(1).

Déplacements à proximité d'une assemblée publique – mineur

(2) Il est interdit de faire déplacer une personne âgée de moins de dix-huit ans, à destination ou à moins de 500 mètres de la zone où se tient une assemblée visée au paragraphe 2(1).

Exemptions

(3) Ne contrevient pas aux paragraphes (1) et (2) :

a) la personne qui réside, travaille ou circule dans la zone de l'assemblée, pour des motifs autres que de prendre part à l'assemblée ou la faciliter;

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other than to participate in or facilitate the assembly;

(b) a person who, within the assembly area, is acting with the permission of a peace officer or the Minister of Public Safety and Emergency Preparedness;

(c) a peace officer; or

(d) an employee or agent of the government of Canada or a province who is acting in the execution of their duties.

b) la personne qui, relativement à la zone d'assemblée, agit avec la permission d'un agent de la paix ou du ministre de la Sécurité publique et de la Protection civile;

c) l'agent de la paix;

d) l'employé ou le mandataire du gouvernement du Canada ou d'une province qui agit dans l'exercice de ses fonctions.

Use of property — prohibited assembly

5 A person must not, directly or indirectly, use, collect, provide make available or invite a person to provide property to facilitate or participate in any assembly referred to in subsection 2(1) or for the purpose of benefiting any person who is facilitating or participating in such an activity.

Utilisation de biens – assemblée interdite

5 Il est interdit, directement ou non, d'utiliser, de réunir, de rendre disponibles ou de fournir des biens — ou d'inviter une autre personne à le faire — pour participer à toute assemblée visée au paragraphe 2(1) ou faciliter une telle assemblée ou pour en faire bénéficier une personne qui participe à une telle assemblée ou la facilite.

Designation of protected places

6 The following places are designated as protected and may be secured:

(a) critical infrastructures;

(b) Parliament Hill and the parliamentary precinct as they are defined in section 79.51 of the Parliament of Canada Act;

(c) official residences;

(d) government buildings and defence buildings

(e) any property that is a building, structure or part thereof that primarily serves as a monument to honour persons

Désignation de lieux protégés

6 Les lieux suivants sont protégés et peuvent être aménagés :

a) les infrastructures essentielles;

b) la cité parlementaire et la Colline parlementaire au sens de l'article 79.51 de la Loi sur le Parlement du Canada;

c) les résidences officielles;

d) les immeubles gouvernementaux et les immeubles de la défense;

e) tout ou partie d'un bâtiment ou d'une structure servant principalement de monument érigé en l'honneur des

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who were killed or died as a consequence of a war, including a war memorial or cenotaph, or an object associated with honouring or remembering those persons that is located in or on the grounds of such a building or structure, or a cemetery;

personnes tuées ou décédées en raison d'une guerre — notamment un monument commémoratif de guerre ou un cénotaphe —, d'un objet servant à honorer ces personnes ou à en rappeler le souvenir et se trouvant dans un tel bâtiment ou une telle structure ou sur le terrain où ceux-ci sont situés, ou d'un cimetière;

(f) any other place as designated by the Minister of Public Safety and Emergency Preparedness.

f) tout autre lieu désigné par le ministre de la Sécurité publique et de la Protection civile.

Direction to render essential goods and services

7 (1) Any person must make available and render the essential goods and services requested by the Minister of Public Safety and Emergency Preparedness, the Commissioner of the Royal Canadian Mounted Police or a person acting on their behalf for the removal, towing and storage of any vehicle, equipment, structure or other object that is part of a blockade.

Ordre de fournir des biens et services essentiels

7 (1) Toute personne doit rendre disponibles et fournir les biens et services essentiels demandés par le ministre de la Sécurité publique et de la Protection civile, du commissaire de la Gendarmerie royale du Canada, ou la personne agissant en leur nom pour l'enlèvement, le remorquage et l'entreposage de véhicules, d'équipement, des structures ou de tout autre objet qui composent un blocage.

Method of request

(2) Any request made under subsection (1) may be made in writing or given verbally by a person acting on their behalf.

Modalités

(2) La demande faite au titre du paragraphe (1) peut être faite par écrit ou communiquée verbalement ou la personne agissant en son nom.

Verbal request

(3) Any verbal request must be confirmed in writing as soon as possible.

Demande verbale

(3) La demande verbale est confirmée par écrit dès que possible.

Period of request

8 A person who, in accordance with these Regulations, is subject to a request under section 7 to render essential goods and services must comply immediately with that request until the earlier of any of the following:

Période de validité

8 Quiconque fait l'objet d'une demande au titre de l'article 7 pour la fourniture de biens et de services essentiels est tenu de s'y conformer dans les plus brefs délais jusqu'à la première des dates suivantes :

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(a) the day referred to in the request**;**

(b) the day on which the declaration of the public order emergency expires or is revoked; or

(c) the day on which these Regulations are repealed.

a) la date indiqué à la demande;

b) la date de l'abrogation ou la cessation d'effet de la déclaration d'état d'urgence;

c) la date de l'abrogation du présent règlement

Compensation for essential goods and services

9 (1) Her Majesty in right of Canada is to provide reasonable compensation to a person for any goods or services that they have rendered at their request under section 7, which amount must be equal to the current market price for those goods or services of that same type, in the area in which the goods or services are rendered.

Indemnisation pour les biens et services essentiels

9 (1) Sa Majesté du chef du Canada accorde une indemnité raisonnable à la personne pour les biens fournis et les services rendus à sa demande aux termes de l'article 7 dont le montant équivaut au taux courant du marché pour les biens et services de même type, dans la région où les biens ont été fournis ou où les services ont été rendus.

Compensation

(2) Any person who suffers loss, injury or damage as a result of anything done or purported to be done under these Regulations may make an application for compensation in accordance with Part V of the Emergencies Act and any Regulations made under that Part, as the case may be.

Indemnisation

(2) Toute personne qui subit des dommages corporels ou matériels entraînés par des actes accomplis, ou censés l'avoir été, en application du présent règlement peut, à cet égard, présenter une demande d'indemnisation conformément à la partie V de la Loi sur les mesures d'urgence et à ses règlements d'application, le cas échéant.

Compliance — peace officer

10 (1) In the case of a failure to comply with these Regulations, any peace officer may take the necessary measures to ensure the compliance with these Regulations and with any provincial or municipal laws and allow for the prosecution for that failure to comply.

Application des lois

10 (1) En cas de contravention au présent règlement, tout agent de la paix peut prendre les mesures nécessaires pour faire observer le présent règlement ou toutes lois provinciales ou municipales et permettre l'engagement de poursuites pour cette contravention.

Contravention of Regulations

(2) In the case of a failure to comply with these Regulations, any peace officer may take the necessary measures to ensure the compliance and allow for the prosecution for that failure to comply

Pénalités

(2) Quiconque contrevient au présent règlement est coupable d'une infraction passible, sur déclaration de culpabilité :

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(a) on summary conviction, to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding six months or to both; or

(b) on indictment, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding five years or to both.

***Emergency Economic Measures Order*, SOR/2022-22**

Definitions

1 The following definitions apply to this Order:

designated person means any individual or entity that is engaged, directly or indirectly, in an activity prohibited by sections 2 to 5 of the Emergency Measures Regulations. (personne désignée)

entity includes a corporation, trust, partnership, fund, unincorporated association or organization or foreign state. (entité)

Duty to cease dealings

2 (1) Any entity set out in section 3 must, upon the coming into force of this Order, cease

(a) dealing in any property, wherever situated, that is owned, held or controlled, directly or indirectly, by a designated person or by a person acting on behalf of or at the direction of that designated person;

(b) facilitating any transaction related to a dealing referred to in paragraph (a);

(c) making available any property, including funds or virtual currency, to

a) par procédure sommaire, d'une amende maximale de 500 $ et d'un d'emprisonnement maximal de six mois, ou de l'une de ces peines;

b) par mise en accusation, d'une amende maximale de 5 000 $ et d'un emprisonnement maximal de cinq ans, ou de l'une de ces peines.

***Décret sur les mesures économiques d'urgence*, DORS/2022-22**

Définitions

1 Les définitions qui suivent s'appliquent au présent décret :

personne désignée Toute personne physique ou entité qui participe, même indirectement, à l'une ou l'autre des activités interdites au titre des articles 2 à 5 du Règlement sur les mesures d'urgence. (designated person)

entité S'entend notamment d'une personne morale, d'une fiducie, d'une société de personne, d'un fonds, d'une organisation ou d'une association dotée de la personnalité morale ou d'un État étranger. (entity)

Obligations de cesser les opérations

2 (1) Dès l'entrée en vigueur du présent décret, les entités visées à l'article 3 doivent cesser :

a) toute opération portant sur un bien, où qu'il se trouve, appartenant à une personne désignée ou détenu ou contrôlé par elle ou pour son compte ou suivant ses instructions**;**

b) toute transaction liée à une opération visée à l'alinéa a) ou d'en faciliter la conclusion;

c) de rendre disponible des biens — notamment des fonds ou de la monnaie

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or for the benefit of a designated person or to a person acting on behalf of or at the direction of a designated person; or

(d) providing any financial or related services to or for the benefit of any designated person or acquire any such services from or for the benefit of any such person or entity.

virtuelle — à une personne désignée ou à une personne agissant pour son compte ou suivant ses instructions, ou au profit de l'une ou l'autre de ces personnes;

d) de fournir des services financiers ou connexes à une personne désignée ou à son profit ou acquérir de tels services auprès d'elle ou à son profit.

Insurance policy

(2) Paragraph 2(1)(d) does not apply in respect of any insurance policy which was valid prior to the coming in force of this Order other than an insurance policy for any vehicle being used in a public assembly referred to in subsection 2(1) of the Emergency Measures Regulations.

Police d'assurance

(2) Toutefois, l'alinéa 2(1)d) ne s'applique pas à l'égard d'une police d'assurance effective — au moment de l'entrée en vigueur du présent décret — portant sur un véhicule autre que celui utilisé lors d'une assemblée publique visée au paragraphe 2(1) du Règlement sur les mesures d'urgence.

Duty to determine

3 The following entities must determine on a continuing basis whether they are in possession or control of property that is owned, held or controlled by or on behalf of a designated person:

Vérification

3 Il incombe aux entités mentionnées ci-après de vérifier de façon continue si des biens qui sont en leur possession ou sous leur contrôle appartiennent à une personne désignée ou sont détenus ou contrôlés par elle ou pour son compte :

(a) authorized foreign banks, as defined in section 2 of the Bank Act, in respect of their business in Canada, and banks regulated by that Act;

a) les banques étrangères autorisées, au sens de l'article 2 de la Loi sur les banques, dans le cadre de leurs activités au Canada, et les banques régies par cette loi;

(b) cooperative credit societies, savings and credit unions and caisses populaires regulated by a provincial Act and associations regulated by the Cooperative Credit Associations Act;

b) les coopératives de crédit, caisses d'épargne et de crédit et caisses populaires régies par une loi provinciale et les associations régies par la Loi sur les associations coopératives de crédit;

(c) foreign companies, as defined in subsection 2(1) of the Insurance

c) les sociétés étrangères, au sens du paragraphe 2(1) de la Loi sur les sociétés

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Companies Act, in respect of their insurance business in Canada;

(d) companies, provincial companies and societies, as those terms are defined in subsection 2(1) of the Insurance Companies Act;

(e) fraternal benefit societies regulated by a provincial Act in respect of their insurance activities and insurance companies and other entities regulated by a provincial Act that are engaged in the business of insuring risks**;**

(f) companies regulated by the Trust and Loan Companies Act;

(g) trust companies regulated by a provincial Act;

(h) loan companies regulated by a provincial Act;

(i) entities that engage in any activity described in paragraphs 5(h) and (h.1) of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act;

(j) entities authorized under provincial legislation to engage in the business of dealing in securities or to provide portfolio management or investment counselling services;

(k) entities that provide a platform to raise funds or virtual currency through donations; and

d'assurances, dans le cadre de leurs activités d'assurance au Canada;

d) les sociétés, les sociétés de secours et les sociétés provinciales, au sens du paragraphe 2(1) de la Loi sur les sociétés d'assurances;

e) les sociétés de secours mutuel régies par une loi provinciale, dans le cadre de leurs activités d'assurance, et autres entités régies par une loi provinciale qui exercent le commerce de l'assurance;

f) les sociétés régies par la Loi sur les sociétés de fiducie et de prêt;

g) les sociétés de fiducie régies par une loi provinciale;

h) les sociétés de prêt régies par une loi provinciale;

i) les entités qui se livrent à une activité visée aux alinéas 5h) et h.1) de la Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes;

j) les entités autorisées en vertu de la législation provinciale à se livrer au commerce des valeurs mobilières ou à fournir des services de gestion de portefeuille ou des conseils en placement;

k) les plateformes collaboratives et celles de monnaie virtuelle qui sollicitent des dons**;**

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(l) entities that perform any of the following payment functions:

(i) the provision or maintenance of an account that, in relation to an electronic funds transfer, is held on behalf of one or more end users,

(ii) the holding of funds on behalf of an end user until they are withdrawn by the end user or transferred to another individual or entity,

(iii) the initiation of an electronic funds transfer at the request of an end user,

(iv) the authorization of an electronic funds transfer or the transmission, reception or facilitation of an instruction in relation to an electronic funds transfer, or

(v) the provision of clearing or settlement services.

l) toute entité qui exécute l'une ou l'autre de fonctions suivantes :

(i) la fourniture ou la tenue d'un compte détenu au nom d'un ou de plusieurs utilisateurs finaux en vue d'un transfert électronique de fonds**,**

(ii) la détention de fonds au nom d'un utilisateur final jusqu'à ce qu'ils soient retirés par celui-ci ou transférés à une personne physique ou à une entité,

(iii) l'initiation d'un transfert électronique de fonds à la demande d'un utilisateur final,

(iv) l'autorisation de transfert électronique de fonds ou la transmission, la réception ou la facilitation d'une instruction en vue d'un transfert électronique de fonds,

(v) la prestation de services de compensation ou de règlement.

Registration requirement — FINTRAC

4 (1) The entities referred to in paragraphs 3(k) and (l) must register with the Financial Transactions and Reports Analysis Centre of Canada established by section 41 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act if they are in possession or control of property that is owned, held or controlled by or on behalf of a designated person.

Inscription obligatoire — Centre

4 (1) Les entités visées aux alinéas 3k) et l) doivent s'inscrire auprès du Centre d'analyse des opérations et déclarations financières du Canada constitué par l'article 41 de la Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes s'ils ont en leur possession un bien appartenant à une personne désignée ou détenu ou contrôlé par elle ou pour son compte ou suivant ses instructions.

Reporting obligation — suspicious transactions

(2) Those entities must also report to the Centre every financial transaction that occurs or that is attempted in the course of their activities and in respect of which there are reasonable grounds to suspect that

Opérations douteuses

(2) Elles doivent également déclarer au Centre toute opération financière effectuée ou tentée dans le cours de ses activités et à l'égard de laquelle il y a des motifs raisonnables de

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soupçonner qu'elle est liée à la perpétration — réelle ou tentée — par à une personne désignée :

(a) the transaction is related to the commission or the attempted commission of a money laundering offence by a designated person; or

a) soit d'une infraction de recyclage des produits de la criminalité;

(b) the transaction is related to the commission or the attempted commission of a terrorist activity financing offence by a designated person.

b) soit d'une infraction de financement des activités terroristes.

Reporting obligation — other transactions

(3) Those entities must also report to the Centre the transactions and information set out in subsections 30(1) and 33(1) of the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations.

Autres opérations

(3) Elles doivent également déclarer au Centre les opérations visées aux paragraphes 30(1) ou 33(1) du Règlement sur le recyclage des produits de la criminalité et le financement des activités terroristes.

Duty to disclose — RCMP or CSIS

5 Every entity set out in section 3 must disclose without delay to the Commissioner of the Royal Canadian Mounted Police or to the Director of the Canadian Security Intelligence Service

Obligation de communication à la GRC et au SCRC

5 Toute entité visée à l'article 3 est tenue de communiquer, sans délai, au commissaire de la Gendarmerie royale du Canada ou au directeur du Service canadien du renseignement de sécurité :

(a) the existence of property in their possession or control that they have reason to believe is owned, held or controlled by or on behalf of a designated person; and

a) le fait qu'elle croit que des biens qui sont en sa possession ou sous son contrôle appartiennent à une personne désignée ou sont détenus ou contrôlés par elle ou pour son compte;

(b) any information about a transaction or proposed transaction in respect of property referred to in paragraph (a).

b) tout renseignement portant sur une transaction, réelle ou projetée, mettant en cause des biens visés à l'alinéa a).

Disclosure of information

6 A Government of Canada, provincial or territorial institution may disclose information to any entity set out in section 3, if the disclosing institution is satisfied that the

Communication

6 Toute institution fédérale, provinciale ou territoriale peut communiquer des renseignements au responsable d'une entité visée à l'article 3, si elle est convaincue que les

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disclosure will contribute to the application of this Order.

***Proclamation Declaring a Public Order Emergency,* SOR/2022-20**

A Proclamation

Whereas 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;

Whereas the Governor in Council has, before declaring a public order emergency and in accordance with subsection 25(1) of the Emergencies Act, consulted the Lieutenant Governor in Council of each province, the Commissioners of Yukon and the Northwest Territories, acting with consent of their respective Executive Councils, and the Commissioner of Nunavut;

Now Know You that We, by and with the advice of Our Privy Council for Canada, pursuant to subsection 17(1) of the Emergencies Act, do by this Our Proclamation declare that a public order emergency exists throughout Canada and necessitates the taking of special temporary measures for dealing with the emergency;

And We do specify the emergency as constituted of

(a) the continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force, which blockades are being carried on in conjunction with activities that are directed toward or in support of the threat or

renseignements aideront à l'application du présent décret.

***Proclamation déclarant une urgence d'ordre public,* DORS/2022-20**

Proclamation

Attendu que la gouverneure en conseil croit, pour des motifs raisonnables, qu'il se produit un état d'urgence justifiant en l'occurrence des mesures extraordinaires à titre temporaire;

Attendu que la gouverneure en conseil a, conformément au paragraphe 25(1) de la Loi sur les mesures d'urgence, consulté le lieutenant-gouverneur en conseil de chaque province, les commissaires du Yukon et des Territoires du Nord-Ouest agissant avec l'agrément de leur conseil exécutif respectif et le commissaire du Nunavut avant de faire la déclaration de l'état d'urgence,

Sachez que, sur et avec l'avis de Notre Conseil privé pour le Canada, Nous, en vertu du paragraphe 17(1) de la Loi sur les mesures d'urgence, par Notre présente proclamation, déclarons qu'il se produit dans tout le pays un état d'urgence justifiant en l'occurrence des mesures extraordinaires à titre temporaire;

Sachez que Nous décrivons l'état d'urgence comme prenant la forme suivante :

a) les blocages continus mis en place par des personnes et véhicules à différents endroits au Canada et les menaces continues proférées en opposition aux mesures visant à mettre fin aux blocages, notamment par l'utilisation de la force, lesquels blocages ont un lien avec des activités qui visent à favoriser l'usage de la violence grave ou de menaces de

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use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada,

violence contre des personnes ou des biens, notamment les infrastructures essentielles, dans le but d'atteindre un objectif politique ou idéologique au Canada,

(b) the adverse effects on the Canadian economy — recovering from the impact of the pandemic known as the coronavirus disease 2019 (COVID-19) — and threats to its economic security resulting from the impacts of blockades of critical infrastructure, including trade corridors and international border crossings,

b) les effets néfastes sur l'économie canadienne — qui se relève des effets de la pandémie de la maladie à coronavirus 2019 (COVID-19) — et les menaces envers la sécurité économique du Canada découlant des blocages d'infrastructures essentielles, notamment les axes commerciaux et les postes frontaliers internationaux,

(c) the adverse effects resulting from the impacts of the blockades on Canada's relationship with its trading partners, including the United States, that are detrimental to the interests of Canada,

c) les effets néfastes découlant des blocages sur les relations qu'entretient le Canada avec ses partenaires commerciaux, notamment les États-Unis, lesquels effets sont préjudiciables aux intérêts du Canada,

(d) the breakdown in the distribution chain and availability of essential goods, services and resources caused by the existing blockades and the risk that this breakdown will continue as blockades continue and increase in number, and

d) la rupture des chaînes de distribution et de la mise à disposition de ressources, de services et de denrées essentiels causée par les blocages existants et le risque que cette rupture se perpétue si les blocages continuent et augmentent en nombre,

(e) the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians;

e) le potentiel d'augmentation du niveau d'agitation et de violence qui menaceraient davantage la sécurité des Canadiens;

And We do further specify that the special temporary measures that may be necessary for dealing with the emergency, as anticipated by the Governor in Council, are

Sachez que Nous jugeons les mesures d'intervention ci-après nécessaires pour faire face à l'état d'urgence :

(a) measures to regulate or prohibit any public assembly — other than lawful advocacy, protest or dissent — that may reasonably be expected to lead to a breach of the peace, or the travel to, from or

a) des mesures pour réglementer ou interdire les assemblées publiques — autre que les activités licites de défense d'une cause, de protestation ou de manifestation d'un désaccord —

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within any specified area, to regulate or prohibit the use of specified property, including goods to be used with respect to a blockade, and to designate and secure protected places, including critical infrastructure,

dont il est raisonnable de penser qu'elles auraient pour effet de troubler la paix, ou les déplacements à destination, en provenance ou à l'intérieur d'une zone désignée, pour réglementer ou interdire l'utilisation de biens désignés, notamment les biens utilisés dans le cadre d'un blocage, et pour désigner et aménager des lieux protégés, notamment les infrastructures essentielles,

(b) measures to authorize or direct any person to render essential services of a type that the person is competent to provide, including services related to removal, towing and storage of any vehicle, equipment, structure or other object that is part of a blockade anywhere in Canada, to relieve the impacts of the blockades on Canada's public and economic safety, including measures to identify those essential services and the persons competent to render them and the provision of reasonable compensation in respect of services so rendered,

b) des mesures pour habiliter toute personne compétente à fournir des services essentiels ou lui ordonner de fournir de tels services, notamment l'enlèvement, le remorquage et l'entreposage de véhicules, d'équipement, de structures ou de tout autre objet qui font partie d'un blocage n'importe où au Canada, afin de pallier les effets des blocages sur la sécurité publique et économique du Canada, notamment des mesures pour cerner ces services essentiels et les personnes compétentes à les fournir, ainsi que le versement d'une indemnité raisonnable pour ces services,

(c) measures to authorize or direct any person to render essential services to relieve the impacts of the blockade, including to regulate or prohibit the use of property to fund or support the blockade, to require any crowdfunding platform and payment processor to report certain transactions to the Financial Transactions and Reports Analysis Centre of Canada and to require any financial service provider to determine whether they have in their possession or control property that belongs to a person who participates in the blockade,

c) des mesures pour habiliter toute personne à fournir des services essentiels ou lui ordonner de fournir de tels services afin de pallier les effets des blocages, notamment des mesures pour réglementer ou interdire l'usage de biens en vue de financer ou d'appuyer les blocages, pour exiger de toute plateforme de sociofinancement et de tout fournisseur de traitement de paiement qu'il déclare certaines opérations au Centre d'analyse des opérations et déclarations financières du Canada et pour exiger de tout fournisseur de services financiers qu'il vérifie si des

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biens qui sont en sa possession ou sous son contrôle appartiennent à une personne qui participe à un blocage,

(d) measures to authorize the Royal Canadian Mounted Police to enforce municipal and provincial laws by means of incorporation by reference,

d) des mesures pour habiliter la Gendarmerie royale du Canada à appliquer les lois municipales et provinciales au moyen de l'incorporation par renvoi,

(e) the imposition of fines or imprisonment for contravention of any order or regulation made under section 19 of the Emergencies Act; and

e) en cas de contravention aux décrets ou règlements pris au titre de l'article 19 de la Loi sur les mesures d'urgence, l'imposition d'amendes ou de peines d'emprisonnement**,**

f) other temporary measures authorized under section 19 of the Emergencies Act that are not yet known.

f) toute autre mesure d'intervention autorisée par l'article 19 de la Loi sur les mesures d'urgence qui est encore inconnue.

In testimony whereof, We have caused this Our Proclamation to be published and the Great Seal of Canada to be affixed to it.

En foi de quoi, Nous avons pris et fait publier Notre présente Proclamation et y avons fait apposer le grand sceau du Canada.

WITNESS:

TÉMOIN :

Our Right Trusty and Well-beloved Mary May Simon, Chancellor and Principal Companion of Our Order of Canada, Chancellor and Commander of Our Order of Military Merit, Chancellor and Commander of Our Order of Merit of the Police Forces, Governor General and Commander-in-Chief of Canada.

Notre très fidèle et bien-aimée Mary May Simon, chancelière et compagnon principal de Notre Ordre du Canada, chancelière et commandeure de Notre Ordre du mérite militaire, chancelière et commandeure de Notre Ordre du mérite des corps policiers, gouverneure générale et commandante en chef du Canada.

At Our Government House, in Our City of Ottawa, this fourteenth day of February in the year of Our Lord two thousand and twenty-two and in the seventy-first year of Our Reign.

À Notre hôtel du gouvernement, en Notre ville d'Ottawa, ce quatorzième jour de février de l'an de grâce deux mille vingt-deux, soixante et onzième de Notre règne.

BY COMMAND,

PAR ORDRE,

Deputy Registrar General of Canada

Le sous-registraire général du Canada,

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Simon Kennedy

***Canadian Security Intelligence Service Act*, RSC 1985, c C-23**

Definitions

2 In this Act,

(…)

threats to the security of Canada means

(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,

(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and

(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,

Simon Kennedy

***Loi sur le service canadien du renseignement de sécurité*, LRC 1985, c C-23**

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

(…)

menaces envers la sécurité du Canada Constituent des menaces envers la sécurité du Canada les activités suivantes :

a) l'espionnage ou le sabotage visant le Canada ou préjudiciables à ses intérêts, ainsi que les activités tendant à favoriser ce genre d'espionnage ou de sabotage;

b) les activités influencées par l'étranger qui touchent le Canada ou s'y déroulent et sont préjudiciables à ses intérêts, et qui sont d'une nature clandestine ou trompeuse ou comportent des menaces envers quiconque;

c) les activités qui touchent le Canada ou s'y déroulent et visent à favoriser l'usage de la violence grave ou de menaces de violence contre des personnes ou des biens dans le but d'atteindre un objectif politique, religieux ou idéologique au Canada ou dans un État étranger;

d) les activités qui, par des actions cachées et illicites, visent à saper le régime de gouvernement constitutionnellement établi au Canada ou dont le but immédiat ou ultime est sa destruction ou son renversement, par la violence.

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but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d). (*menaces envers la sécurité du Canada*)

La présente définition ne vise toutefois pas les activités licites de défense d'une cause, de protestation ou de manifestation d'un désaccord qui n'ont aucun lien avec les activités mentionnées aux alinéas a) à d). (*threats to the security of Canada*)

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11

Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Charte canadienne des droits et libertés

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Garantie des droits et libertés

Droits et libertés au Canada

1 La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Fundamental Freedoms

2 Everyone has the following fundamental freedoms:
(…)
(b) freedom of thought, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association
(…)

Libertés fondamentales

2 Chacun a les libertés fondamentales suivantes :
(…)
b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
c) liberté de réunion pacifique;
d) liberté d'association.
(…)

Legal Rights

Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Garanties juridiques

Vie, liberté et sécurité

7 Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

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Search or seizure

8 Everyone has the right to be secure against unreasonable search or seizure.

(…)

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(…)

Fouilles, perquisitions ou saisies

8 Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

(…)

Primauté de la Constitution du Canada

52 (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

(…)

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Canadian Bill of Rights, SC 1960, c 44

Déclaration canadienne des droits, SC 1960, c 44

Preamble

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

Préambule

Le Parlement du Canada proclame que la nation canadienne repose sur des principes qui reconnaissent la suprématie de Dieu, la dignité et la valeur de la personne humaine ainsi que le rôle de la famille dans une société d'hommes libres et d'institutions libres;

Il proclame en outre que les hommes et les institutions ne demeurent libres que dans la mesure où la liberté s'inspire du respect des valeurs morales et spirituelles et du règne du droit;

Et afin d'expliciter ces principes ainsi que les droits de l'homme et les libertés fondamentales qui en découlent, dans une Déclaration de droits qui respecte la compétence législative du Parlement du Canada et qui assure à sa population la protection de ces droits et de ces libertés,

En conséquence, Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète :

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

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;

(…)

Construction of law

2 Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to (…)

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;

(…)

Interprétation de la législation

2 Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la Déclaration canadienne des droits, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme (…)

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ANNEX B

INVOCATION MEMORANDUM

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MEMORANDUM FOR THE PRIME MINISTER

INVOKING THE *EMERGENCIES ACT* TO END NATION-WIDE PROTESTS AND BLOCKADES

(Decision Sought)

SUMMARY

- s.39 [redacted]
- The EA came into force in 1988, and is meant to be used as a measure of last resort. The Act authorizes action when one of four types of emergencies is declared – in this instance: a public order emergency which is an emergency that arises from threats to the security of Canada that is so serious as to be a national emergency. A national emergency is an urgent, temporary and critical situation that seriously endangers the health and safety of Canadians that cannot be effectively dealt with by the provinces or territories, or that seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada. It must be a situation that cannot be effectively dealt with by any other law of Canada. All measures taken under the EA must be exercised in accordance with the *Canadian Charter of Rights and Freedoms* (*Charter*) and should be carefully circumscribed to avoid being overbroad. Additional information on the EA is provided under **Tab B**.
- Since February 10, 2022, you have convened three Incident Response Group (IRG) meetings with key Ministers, including the Minister of Public Safety who, under the *Emergency Management Act*, is responsible for providing national leadership and coordination among

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government departments and agencies on emergency management activities in cooperation with the provinces. The President of the Queen's Privy Council and Minister of Emergency Preparedness, Minister of National Defence, Deputy Prime Minister and Minister of Finance, Minister of Justice and Attorney General of Canada, Minister of Transport, Minister of Intergovernmental Affairs, Infrastructure and Communities, and senior government officials were also in attendance.

- s.39 [redacted]

- While the demonstrations started out relatively peaceful, they have grown more complex and expanded into multiple locations in the country. The movement is considered to be highly organized, well financed, and is feeding a general sense of public unrest that could continue to escalate with severe risks to public security, economic stability and international relations. The economic impact to date is estimated at approximately 0.1 per cent of Canada's gross domestic product (GDP) per week, however the impact on important trade corridors and the risk to the reputation of Canada as a stable, predictable and reliable location for investment may be jeopardized if this continues. Solicitor-Client Priv. [redacted] Solicitor-Client Priv. [redacted] Solicitor-Client Priv. [redacted] A more detailed threat assessment is being provided under separate cover.

- The objective of invoking this legislation would be to take a proportional approach, with time-limited measures that would supplement provincial and territorial authorities to address the current situation. These would not displace or replace their authorities, nor would they derogate provinces and territories' authority to direct their police forces. Rather, these measures would aim to assist in bringing an end to the illegal activities observed across the country. s.39 [redacted]

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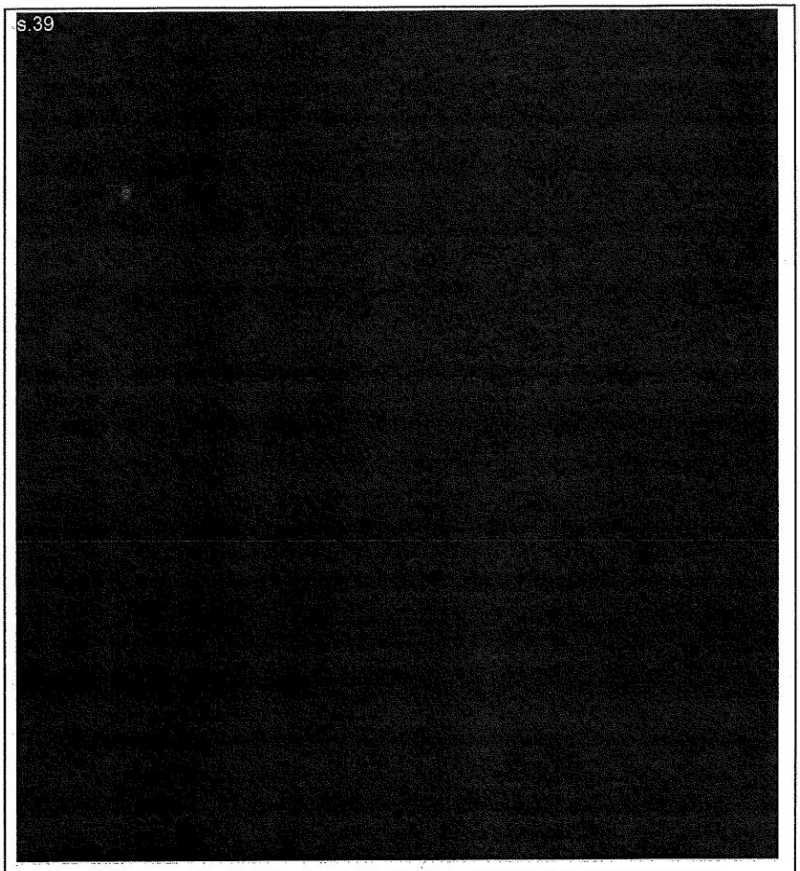
s.39



- On February 14, 2022, you convened a First Ministers Meeting to discuss with Premiers and seek their views on this scenario and the measures being explored. The Premiers expressed a variety of views – those closest to the situation (e.g., the Premier of Ontario) were completely supportive of invoking the EA and moving forward with robust measures. A large number of other Premiers expressed concern about the need to act carefully to avoid enflaming the underlying

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sentiment they considered to lie behind the protest, which they linked to public health measures including federal vaccine mandates. These Premiers were not seeing the local manifestations of this movement yet in their jurisdictions. The Premier of Quebec had a strong negative reaction to the proposal, saying that he would oppose the application of federal emergency legislation in Quebec. This First Ministers Meeting will meet the requirements for consultation with the provinces under the EA. A letter will also be sent to First Ministers to set out more clearly the assessment of the underlying risks facing Canada and the nature of the measures that would be taken to respond.

Recommendation

- PCO recommends you approve, s.39 s.39 declaring a public order emergency under the EA.
- s.39
- s.39 These measures would be monitored closely, including through regular Deputy Ministers meetings and subsequent IRG meetings, as required. Regular updates would also be provided to you and your office as the situation evolves. Further advice will also follow on the required Parliamentary processes.
- **Do you agree?**

Background

- The "Freedom Convoy 2022" was the first manifestation of this growing movement. It began centered on anti-government sentiments related to the public health response to the COVID-19 pandemic. Trucker convoys began their journey from various points in the country, and the movement arrived in Ottawa on Friday, January 28, 2022. Since, the movement has

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only continued to gain momentum across the country, with significant increase in numbers in Ottawa as well as protests and blockades spreading in different locations, including strategic ports of entry (e.g., Ambassador Bridge, Ontario; Coutts, Alberta; and Emerson, Manitoba). Additional details are provided under **Tab D**.

- Participants of these activities have adopted a number of tactics that are disrupting the peace, impacting the Canadian economy, and feeding a general sense of public unrest – either in favor or against the movement. This has included slow roll activity, slowing down traffic and creating traffic jams, in particular near POEs, as well as reports of protesters bringing children to protest sites to limit the level and types of law enforcement intervention. Earlier today, RCMP made 11 arrests related to the protest at the border in Coutts, Alberta and also seized a cache of firearms with a large quantity of ammunition indicating that there are definitely elements within this movement that have intentions to engage in violence.
- The movement has moved beyond a peaceful protest, and there is significant evidence of illegal activity underway.

Initial Municipal and Provincial Responses

- Municipal and provincial authorities have attempted to manage the different demonstrations under their existing authorities, with varying degrees of success. The Ottawa Police Service has publicly admitted that the situation in Ottawa has overwhelmed its officers, and has consistently sought additional resources to assist with enforcement of municipal bylaws. The City of Ottawa is planning on filing an injunction on February 14, 2022, and the Attorney General (AG) of Ontario and AG of Canada are expected to seek leave to intervene.
- On February 11, 2022, the Province of Ontario declared a province-wide state of emergency under its *Emergency Management and Civil Protection Act* (EMCPA), in response to the interference with transportation and other critical infrastructure throughout the province, which is preventing the movement of people and delivery of essential goods.
- Measures that have since been implemented under these emergency measures include: fines and possible imprisonment for protesters refusing to leave, with penalties of $100,000 and up to one year of imprisonment for non-compliance.

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- On February 12, 2022, the Ontario Government also enacted legislation under the EMPCA (Ontario Regulation 71/22) making it illegal and punishable to block and impede the movement of goods, people and services along critical infrastructure.

- Through ongoing bilateral discussions at the officials and ministerial levels, no other province has signaled its intent to take steps similar to Ontario. Alberta has indicated that its *Critical Infrastructure Defence Act* provides substantial measures for law enforcement to use.
- On February 14, you convened a First Ministers Meeting with Premiers of all provinces and territories (PTs). During this meeting, Premiers expressed a variety of views – those closest to the situation (e.g., the Premier of Ontario) were completely supportive of invoking the EA and moving forward with robust measures. A large number of other Premiers expressed concern about the need to act carefully to avoid enflaming the underlying sentiment they considered to lie behind the protest which they linked to public health measures including federal vaccine mandates. These Premiers were not seeing the local manifestations of this movement yet in their jurisdictions. The Premier of Quebec had a strong negative reaction to the proposal, saying that he would oppose the application of federal emergency legislation in Quebec.

Federal Action

- Most law enforcement activities in response to the convoy have fallen with the municipal and provincial jurisdiction. A number of RCMP resources have been made available in response to requests from lead jurisdictions. The RCMP is currently assisting in various affected areas across the country and is focused on areas where enforcement or the risk of escalation is most acute, in addition to locations where it is the provincial police of jurisdiction, under its contract policing program (e.g., Coutts, Alberta, and Emerson, Manitoba).
- Nothing in the invocation implies a role for the Canadian Armed Forces (CAF) in the response to this emergency. Planning does continue to explore whether, how and when military assets could be used to advise and assist with the management of the situation. This could include CAF providing available resources and equipment support such as towing operations. CAF could also be deployed to support law enforcement in certain situations, in response to a request from a province/territory. A

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decision to deploy the CAF would be taken pursuant to authorities in the *National Defence Act* and not the EA.

- A full list of measures explored and being undertaken by other federal departments and agencies are outlined in **Tab E**.

Test for Declaring a Public Order Emergency

- In order to declare a public order emergency, the EA requires that there be an emergency that arises from threats to the security of Canada that is so serious as to be a national emergency.
- Threats to the security of Canada does not include lawful advocacy protest or dissent, unless carried out in conjunction with any of the following activities:
  - espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,
  - foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,
  - activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and
  - activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada.
- A national emergency is an urgent, temporary and critical situation that seriously endangers the health and safety of Canadians that cannot be effectively dealt with uniquely by the provinces or territories, or that seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada. It must be a situation that cannot be effectively dealt with by any other law of Canada.

PCO Comment

- PCO is of the view that the examples of evidence collected to date Solicit, Solicitor-Client Priv. support a determination that the two criteria required to declare a public order emergency pursuant to the EA have been met.

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- Specifically, PCO is of the view that while municipal and provincial authorities have taken decisive action in key affected areas, such as law enforcement activity at the Ambassador Bridge in Windsor, considerable effort was necessary to restore access to the site and will be required to maintain access. The situation across the country remains concerning, volatile and unpredictable. While there is no current evidence of significant implications by extremist groups or international sponsors, PCO notes that the disturbance and public unrest is being felt across the country and beyond the Canadian borders, which may provide further momentum to the movement and lead to irremediable harms – including to social cohesion, national unity, and Canada's international reputation. In PCO's view, this fits within the statutory parameters defining threats to the security of Canada, though this conclusion may be vulnerable to challenge.
- In addition, PCO is of the view that this is a national emergency situation that is urgent, critical, temporary and seriously endangers the health and safety of Canadians that cannot be effectively dealt with uniquely by the provinces or territories.
- For these reasons, PCO is of the view that it is in the national interest to move ahead with declaring a public order emergency, pursuant to the EA.

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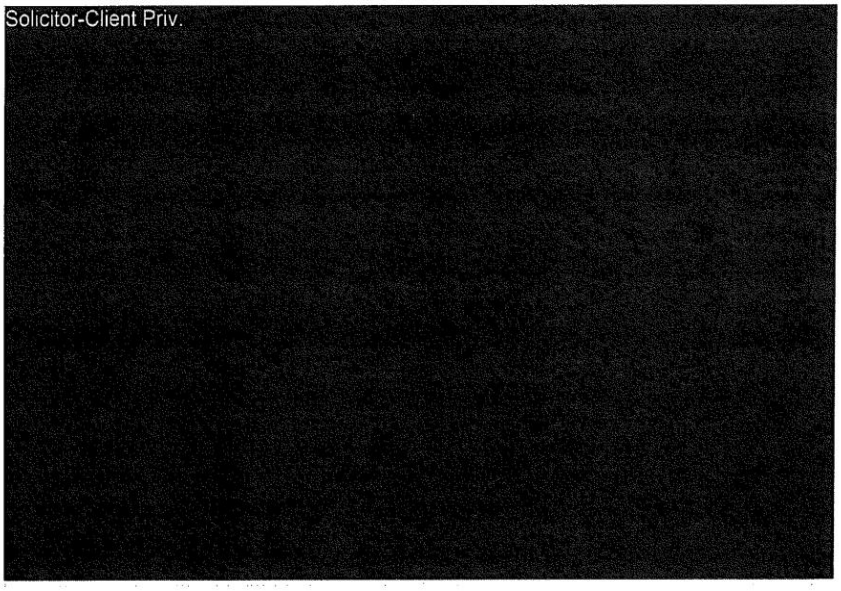

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[redacted]

Intergovernmental Considerations

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[redacted]

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s.39 [redacted]

- Continued engagement and collaboration with provinces and municipalities, will be essential to continue to respect jurisdictional authorities and inherent provisions of the EA.

Parliamentary Strategy

- A strong parliamentary strategy will be required to ensure support by Members of Parliament. A motion supporting the proclamation must be passed in both Houses of Parliament within seven days of the declaration.
- The House of Commons is sitting the week of February 14, 2022, and is adjourned the week of February 21, 2022. The Senate is adjourned the week of February 14, 2022, and is scheduled to return on February 22, 2022, for three days. Should an emergency be declared on February 14, 2022, a motion for the confirmation of the declaration would have to be tabled by March 2, 2022, in the House of Commons (but it could be tabled earlier).
- The motion is to be considered by each chamber the sitting day after it is tabled in each respective chamber, and is debated without interruption until the House is ready for the question, at which point a vote will take place. Should either the House or the Senate defeat the motion, the declaration is revoked immediately.
- s.39 [redacted]
- There is no legal requirement to have both Houses deal with the motion concurrently.

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- The EA also requires additional Parliamentary measures, including standing up a Joint House and Senate Committee and an eventual Public Inquiry. PCO will provide further advice on these matters in the coming days.

Communications Strategy

- The manner in which the Government manages its communications around the decision to invoke a public order emergency will be equally important. While the public may support decisive action, this support could decrease with time if measures are perceived as disproportional or ineffective.
- There is a strong possibility that the Government's decision could anger and potentially escalate action by protesters and their sympathizers. PCO notes that a robust and proactive communications strategy would need to demonstrate the need for these measures including the national importance of removing illegal blockades and restoring public order and the rule of law as well as dealing with the underlying threats and risks behind some elements of this movement. Explaining the concrete nature of the measures to be taken, as well as clarifying what the EA does and does not allow enforcement authorities to do will be essential.
- Further, public communications should emphasize the fair and proportionate action taken by government, that is time limited, and subject to robust accountability provisions. The goal of the measures – strengthening the public's trust in its institutions, including policing services and their ability to enforce the law – needs to be clear. The Government could also lean on likeminded messaging from external stakeholders and partners to support the need for the measures at this time.

Specific Measures

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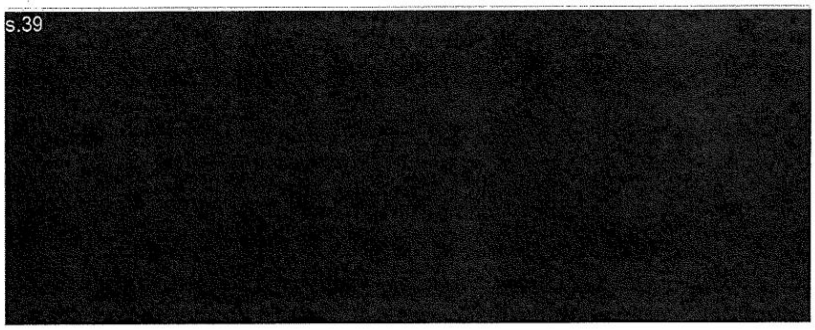

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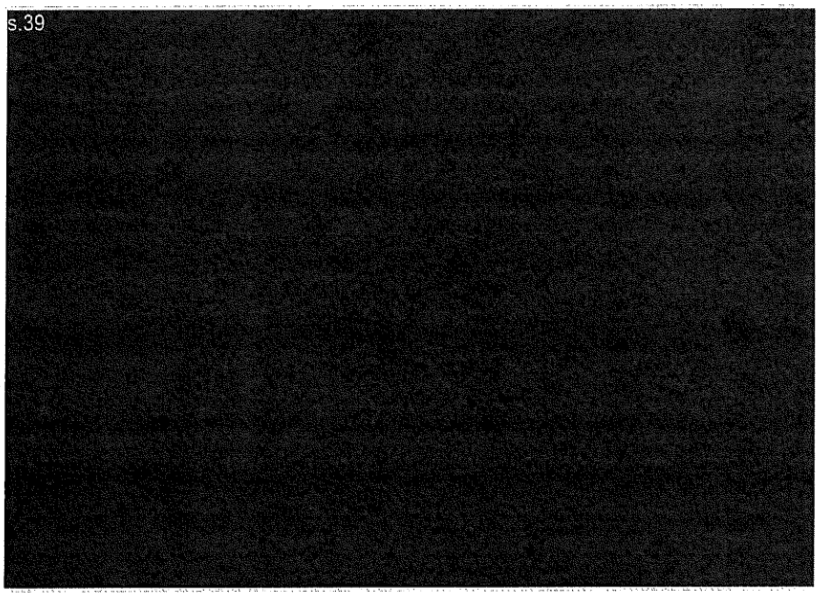

- PCO believes that, combined, these measures will provide decision makers and law enforcement the authorities required to act, the means to do so, as well as introduce measures to dissuade and prevent further resurgence of this type in the short term.

Approved electronically by

Janice Charette

Attachments

Mainville/Proulx/Setlakwe/Tupper/Drouin

February 14, 2022 Declaration of Public Order Emergency Explanation pursuant to subsection 58(1) of the *Emergencies Act*

Declaration of Public Order Emergency

On February 14, 2022, the Governor in Council directed that a proclamation be issued pursuant to subsection 17(1) of the *Emergencies Act* declaring that a public order emergency exists throughout Canada that necessitates the taking of special temporary measures for dealing with the emergency.

In order to declare a public order emergency, the *Emergencies Act* requires that there be an emergency that arises from threats to the security of Canada that are so serious as to be a national emergency. Threats to the security of Canada include the threat or use of acts of serious violence against persons or property for the purpose of achieving a political or ideological objective. A national emergency is an urgent, temporary and critical situation that seriously endangers the health and safety of Canadians that cannot be effectively dealt with by the provinces or territories, or that seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada. It must be a situation that cannot be effectively dealt with by any other law of Canada. Any measures taken under the Act must be exercised in accordance with the Canadian Charter of Rights and Freedoms and should be carefully tailored to limit any impact on Charter rights to what is reasonable and proportionate in the circumstances.

The *Proclamation Declaring a Public Order Emergency* made on February 14, 2022 specified that the public order emergency is constituted of:

(i) the continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force, which blockades are being carried on in conjunction with activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada,

(ii) the adverse effects on the Canadian economy — recovering from the impact of the pandemic known as the coronavirus disease 2019 (COVID-19) — and threats to its economic security resulting from the impacts of blockades of critical infrastructure, including trade corridors and international border crossings,

(iii) the adverse effects resulting from the impacts of the blockades on Canada's relationship with its trading partners, including the United States (U.S.), that are detrimental to the interests of Canada,

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(iv) the breakdown in the distribution chain and availability of essential goods, services and resources caused by the existing blockades and the risk that this breakdown will continue as blockades continue and increase in number, and

(v) the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians.

The proclamation specifies six types of temporary measures that may be necessary to deal with the public order emergency:

(i) measures to regulate or prohibit any public assembly — other than lawful advocacy, protest or dissent — that may reasonably be expected to lead to a breach of the peace, or the travel to, from or within any specified area, to regulate or prohibit the use of specified property, including goods to be used with respect to a blockade, and to designate and secure protected places, including critical infrastructure,

(ii) measures to authorize or direct any person to render essential services of a type that the person is competent to provide, including services related to removal, towing and storage of any vehicle, equipment, structure or other object that is part of a blockade anywhere in Canada, to relieve the impacts of the blockades on Canada's public and economic safety, including measures to identify those essential services and the persons competent to render them and to provide reasonable compensation in respect of services so rendered,

(iii) measures to authorize or direct any person to render essential services to relieve the impacts of the blockade, including measures to regulate or prohibit the use of property to fund or support the blockade, to require any crowdfunding platform and payment processor to report certain transactions to the Financial Transactions and Reports Analysis Centre of Canada and to require any financial service provider to determine whether they have in their possession or control property that belongs to a person who participates in the blockade,

(iv) measures to authorize the Royal Canadian Mounted Police (RCMP) to enforce municipal and provincial laws by means of incorporation by reference,

(v) the imposition of fines or imprisonment for contravention of any order or regulation made under section 19 of the *Emergencies Act*; and

(vi) other temporary measures authorized under section 19 of the *Emergencies Act* that are not yet known.

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These measures have been implemented by the *Emergency Measures Regulations* and the *Emergency Economic Measures Order*.

Section 58(1) of *the Emergencies Act* requires that a motion for confirmation of a declaration of emergency, signed by a Minister of the Crown, together with an explanation of the reasons for issuing the declaration and a report on any consultation with the lieutenant governors in council of the provinces with respect to the declaration, be laid before each House of Parliament within seven sitting days after the declaration is issued.

Background leading to the declaration of emergency

The "Freedom Convoy 2022" was the first manifestation of this growing movement centered on anti-government sentiments related to the public health response to the COVID-19 pandemic. Trucker convoys began their journey from various points in the country, and the movement arrived in Ottawa on Friday, January 28, 2022. Since then, the movement has only continued to gain momentum across the country, with significant increase in numbers in Ottawa as well as protests and blockades spreading in different locations, including strategic ports of entry (e.g., Ambassador Bridge, Ontario; Coutts, Alberta; and Emerson, Manitoba).

Participants of these activities have adopted a number of tactics that are threatening, causing fear, disrupting the peace, impacting the Canadian economy, and feeding a general sense of public unrest – either in favour or against the movement. This has included harassing and berating citizens and members of the media, slow roll activity, slowing down traffic and creating traffic jams, in particular near ports of entry, as well as reports of protesters bringing children to protest sites to limit the level and types of law enforcement intervention. The movement has moved beyond a peaceful protest, and there is significant evidence of illegal activity underway. Regular citizens, municipalities and the province of Ontario have all participated in court proceedings seeking injunctive relief to manage the threats and impacts caused by the convoy's activities, and a proposed class-action has been filed on behalf of residents of Ottawa.

Anecdotal reports of donations from outside Canada to support the protesters were given credence when, on February 13, 2022, hackers of the crowdfunding website, GiveSendGo.com, released hacked data that revealed information about donors and the amount of donations directed to the protesters. According to the Canadian Broadcasting Corporation's February 14, 2022 analysis of the data, 55.7% of the 92,844 donations made public were made by donors in the U.S., compared to 39% of donors located in Canada. The remaining donors were in other countries, with the U.K. being the most common. The amount donated by U.S. donors totaled $3.6 million (USD). Many of the donations were made anonymously.

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Requests for Assistance and Consultations

The federal government has been in contact with its provincial counterparts throughout this situation. Some requests for federal support to deal with the blockades were from:

- the City of Ottawa for policing services;
- the Province of Ontario with respect to the Ambassador Bridge in Windsor, Ontario; and
- the Province of Alberta with respect to tow truck capacity at the Coutts port of entry.

For further details on the consultations, please see the Report to the Houses of Parliament: *Emergencies Act* Consultations.

Emergency Measures Taken by Ontario and other provinces

On February 11, 2022, the Province of Ontario declared a province-wide state of emergency under its Emergency Management and Civil Protection Act, in response to the interference with transportation and other critical infrastructure throughout the province, which is preventing the movement of people and delivery of essential goods.

Measures that have since been implemented under these emergency measures include: fines and possible imprisonment for protesters refusing to leave, with penalties of $100,000 and up to one year of imprisonment for non-compliance.

On February 12, 2022, the Ontario Government also enacted legislation under the *Emergency Management and Civil Protection Act*, (Ontario Regulation 71/22) making it illegal and punishable to block and impede the movement of goods, people and services along critical infrastructure. New Brunswick has announced that it will update its *Emergency Act* to prohibit stopping or parking a vehicle or otherwise contributing to the interruption of the normal flow of vehicle traffic on any road or highway. Nova Scotia similarly issued a directive under its *Emergency Management Act* prohibiting protests from blockading a highway near the Nova Scotia-New Brunswick border.

No other province has signaled its intent to take similar steps.

As detailed in the Reasons below, the convoy activities have led to an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency.

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Reasons for Public Order Emergency

The situation across the country remains concerning, volatile and unpredictable. The decision to issue the declaration was informed by an assessment of the overall, national situation and robust discussions at three meetings of the Incident Response Group on February 10, 12 and 13, 2022.

The intent of these measures is to supplement provincial and territorial authorities to address the blockades and occupation and to restore public order, the rule of law and confidence in Canada's institutions. These time-limited measures will be used only where needed depending on the nature of the threat and its evolution and would not displace or replace provincial and territorial authorities, nor would they derogate provinces and territories' authority to direct their police forces. The convoy activities and their impact constituting the reasons for the emergency as set out in the *Proclamation Declaring a Public Order Emergency* are detailed below:

i. the continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force, which blockades are being carried on in conjunction with activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada;

The protests have become a rallying point for anti-government and anti-authority, anti-vaccination, conspiracy theory and white supremacist groups throughout Canada and other Western countries. The protesters have varying ideological grievances, with demands ranging from an end to all public health restrictions to the overthrow of the elected government. As one example, protest organizers have suggested forming a coalition government with opposition parties and the involvement of Governor General Mary Simon. This suggestion appears to be an evolution of a previous proposal from a widely circulated "memorandum of understanding" from a group called "Canada Unity" that is taking part in the convoy. The "memorandum of understanding" proposed that the Senate and Governor General could agree to join them in forming a committee to order the revocation of COVID-19 restrictions and vaccine mandates.

Tactics adopted by protesters in support of these aims include slow roll activity, slowing down traffic and creating traffic jams, in particular near ports of entry, as well as reports of protesters bringing children to protest sites to limit the level and types of law enforcement intervention. The intent of the protestors at ports of entry was to impede the importation and exportation of goods across the Canada-U.S. border in order to achieve a change in the Government of Canada's COVID health measures in addition to other government policies.

Trucks and personal vehicles in the National Capital Region continue to disrupt daily life in Ottawa and have caused retail and other businesses to shutter. Local tow truck drivers have refused to work with governments to remove trucks in the blockade. The Chief of the Ottawa

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Police Service resigned on February 15, 2022 in response to criticism of the police's response to the protests.

Convoy supporters formerly employed in law enforcement and the military have appeared alongside organizers and may be providing them with logistical and security advice, which may pose operational challenges for law enforcement should policing techniques and tactics be revealed to convoy participants. There is evidence of coordination between the various convoys and blockades.

Violent incidents and threats of violence and arrests related to the protests have been reported across Canada. The RCMP's recent seizure of a cache of firearms with a large quantity of ammunition in Coutts, Alberta, indicated that there are elements within the protests that have intentions to engage in violence. Ideologically motivated violent extremism adherents may feel empowered by the level of disorder resulting from the protests. Violent online rhetoric, increased threats against public officials and the physical presence of ideological extremists at protests also indicate that there is a risk of serious violence and the potential for lone actor attackers to conduct terrorism attacks.

To help manage these blockades and their significant adverse impacts, the *Emergency Measures Regulations* prohibit certain types of public assemblies ("prohibited assemblies") that may reasonably be expected to lead to a breach of the peace by: (i) the serious disruption of the movement of persons or goods or the serous interference with trade; (ii) interference with the functioning of critical infrastructure; or (iii) the support the threat or use of acts of serious violence against persons or property. They also prohibit individuals from (i) participating or causing minors to participate in prohibited assemblies; (ii) travelling to or within an area where prohibited assemblies are taking place, or causing minors to travel to or within 500 metres of a prohibited assembly, subject to certain exceptions; and (iii) directly or indirectly using, collecting, providing, making available or soliciting property to facilitate or participate in a prohibited assembly or to benefit any person who is facilitating or participating in a prohibited assembly. Foreign nationals are also prohibited from entering Canada with the intent to participate or facilitate a prohibited public assembly, subject to certain exceptions.

The *Emergency Management Regulations* also designate certain places as protected and provide that they may be secured, including Parliament Hill and the parliamentary precinct, critical infrastructures, official residences, government and defence buildings, and war memorials.

ii. the adverse effects on the Canadian economy — recovering from the impact of the pandemic known as the coronavirus disease 2019 (COVID-19) — and threats to its economic security resulting from the impacts of blockades of critical infrastructure, including trade corridors and international border crossings.

Trade and transportation within Canada and between Canada and the U.S. is highly integrated. Border crossing, railway lines, airports and ports of entry are integrated and are adversely

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affected where one or more of the components is blockaded or prevented from operating under normal capacity.

Trade between Canada and the U.S. is crucial to the economy and the lives and welfare of all Canadians. Approximately 75% of Canadian exports go to the U.S., generating approximately $2 billion in imports/exports per day and $774 billion in total trade between the two countries in 2021.

Blockades and protests at numerous points along the Canada–U.S. border have already had a severe impact on Canada's economy. Protests at the major ports of entry at the Ambassador Bridge in Windsor, Ontario; Emerson, Manitoba; Coutts Alberta; and, Pacific Highway in British Columbia, each of which is critical to the international movement of people and goods, required the Canada Border Services Agency (CBSA) to suspend services.

An essential trading corridor, the Ambassador Bridge is Canada's busiest crossing, handling over $140 billion in merchandise trade in 2021. It accounted for 26% of the country's exports moved by road in 2021 ($63 billion out of $242 billion) and 33% of the country's imports ($80 billion out of $240 billion). Since the blockades began at the Ambassador Bridge, over $390 million in trade each day with Canada's most important trading partner, the U.S., has been affected, resulting in the loss of employee wages, reduced automotive processing capacity and overall production loss in an industry already hampered by the supply shortage of critical electronic components. This bridge supports 30% of all trade by road between Canada and the U.S. The blockades in Coutts, Alberta, and Emerson, Manitoba, have affected approximately $48 million and $73 million in trade each day, respectively. These recent events targeting Canada's high volume commercial ports of entry have irreparably harmed the confidence that our trading partners have in Canada's ability to effectively contribute to the global economy and will result in manufacturers reassessing their manufacturing investments in Canada, impacting the health and welfare of thousands of Canadians.

In addition, throughout the week leading up to February 14, 2022, there were 12 additional protests that directly impacted port of entry operations. At two locations, Pacific Highway and Fort Erie, protestors had breached the confines of the CBSA plaza resulting in CBSA officers locking down the office to prevent additional protestors from gaining entry.

More specifically, disruptions at strategic ports of entry in Alberta, British Columbia, Manitoba and Ontario prior to the declaration of the emergency included:

- Ambassador Bridge, Windsor, Ontario: The busiest crossing along the Canada-U.S. border had been blocked since February 7, 2022. After an injunction was issued on February 11, 2022, law enforcement started to disperse protesters. On February 13, 2022, police enforcement action continued with reports of arrests being made and vehicles towed. As of the evening of February 13, 2022, the Ambassador Bridge has been fully reopened, and no delays at the border crossing are being reported, but efforts continue to ensure that the bridge remains open.

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- Sarnia, Ontario: On February 8, 2022, two large groups of protestors conducted a blockade of the provincial highway leading to and from the Sarnia Blue Water Bridge. This port of entry is Canada's second busiest border crossing with imports and exports serving the oil and gas, perishable foods, livestock and automotive sectors. The protest resulted in the suspension of all outbound movement of commercial and traveller vehicles to the U.S. along with reduced inbound capacity for incoming conveyances. The Ontario Provincial Police (OPP) were able to restore order to the immediate area of the port of entry after ten hours of border disruption. On February 9, 2022, members of one of the protest groups established a highway blockade approximately 30 kilometres east of Sarnia on the provincial highway, resulting in the diversion of international traffic to emergency detour routes to gain access to the border. This activity continued until February 14, 2022 when access to the portion of the highway was restored.

- Fort Erie, Ontario: On February 12, 2022, a large protest targeted the CBSA Peace Bridge port of entry at Fort Erie, Ontario. This port of entry is Canada's third busiest land border crossing responsible for millions of dollars in international trade each day of perishable goods, manufacturing components and courier shipments of personal and business goods being imported and exported. The protest disrupted inbound traffic for a portion of the day on February 12, 2022 and resulted in the blockade of outbound traffic until February 14, 2022 when the OPP and Niagara Regional Police were able to restore security of the trade corridor linking the provincial highway to the border crossing.

- Emerson, Manitoba: As of February 13, 2022, vehicles of the blockade remain north of the port of entry. Some local traveller traffic was able to enter Canada, however commercial shipments are unable to use the highway North of Emerson resulting in disruptions to live animal, perishable and manufactured goods shipments into Canada and exports to the U.S. The protesters have allowed some live animal shipments to proceed through the blockade for export to the U.S.

- Coutts, Alberta: The blockade began on January 29, 2022, resulting in the disruption of Canada and U.S. border traffic. This port of entry is a critical commercial border point for the movement of live animals, oil and gas, perishable and manufactured goods destined for Alberta and western Saskatchewan. As of February 14, 2022, the RCMP, who is the police of jurisdiction pursuant to the provincial Police Service Agreement, have arrested 11 individuals and seized a cache of weapons and ammunition. Four of these individuals were charged with conspiracy to commit murder, in addition to other offences. The RCMP restored access to the provincial highway North of Coutts on February 15, 2022 and border services were fully restored, but efforts continue to ensure that it remains open.

- Vancouver, British Columbia (BC), and Metro area: On February 12, 2022, several vehicles including a military-style vehicle broke through an RCMP barricade in south

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> Surrey, BC, on their way to the Pacific Highway port of entry. Protesters forced the highway closure at the Canada-U.S. border in Surrey.

In addition, on February 12, 2022, police in Cornwall, Ontario warned of potential border delays and blockages due to protests.

These blockades and protests directly threaten the security of Canada's borders, with the potential to endanger the ability of Canada to manage the flow of goods and people across the border and the safety of CBSA officers and to undermine the trust and coordination between CBSA officials and their American partners. Additional blockades are anticipated. While Ontario's *Emergency Management and Civil Protection Act* authorizes persons to provide assistance, it specifically does not compel them to do so. Tow truck operators remain free to decline requests to tow vehicles that were part of the blockades and they have refused to render assistance to the government of Ontario. It was beyond the capacity of the province of Ontario to ensure in a timely manner that tow trucks could be used to clear vehicles. The emergency measures now allow the federal Minister of Public Safety and Emergency Preparedness or any other person acting on their behalf to immediately compel individuals to provide and render essential goods and services for the removal, towing or storage of any vehicle or other object that is part of a blockade and provides that reasonable compensation will be payable. Individuals who suffer loss or damage because of actions taken under these Regulations may apply for compensation.

Threats were also made to block railway lines, which would result in significant disruptions. Canada's freight rail industry transports more than $310 billion worth of goods each year on a network that runs from coast to coast. Canada's freight railways serve customers in almost every part of the Canadian economy: from manufacturing to the agricultural, natural resource, wholesale and retail sectors. In addition, freight railways have Canadian operating revenues of more than $16 billion a year. The impact on important trade corridors and the risk to the reputation of Canada as a stable, predictable and reliable location for investment may be jeopardized if disruptions continue. The current federal and provincial financial systems are ill-equipped to mitigate the adverse effects of the economic impact without additional measures. The *Emergency Economic Measures Order* requires a comprehensive list of financial service providers to determine whether any of the property in their possession or control belong to protesters participating in the illegal blockades and to cease dealing with those protesters. Financial service providers who would otherwise be outside federal jurisdiction are subject to the Order. Given the ability to move financial resources between financial service providers without regard to their geographic location or whether they are provincially- or federally-regulated, it is essential that all financial service providers be subject to the Order if protesters are to be prevented from accessing financial services. The importance of this measure is highlighted by the Canadian Broadcasting Corporation's recent reporting about the crowdfunding website, GiveSendGo.com, which indicated that the majority of the donations to the protests were made by donors outside of Canada.

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Before the new measures, in respect of insurance, provinces would only be able to cancel or suspend policies for vehicles registered in that province. Protestors from different provinces would not be subject to, for example, the Government of Ontario's powers under its declaration of a state of emergency to cancel licenses of vehicles participating in blockades or prohibited assemblies. The emergency measures now require insurance companies to cancel or suspend the insurance of any vehicle or person while that person or vehicle is taking part in a prohibited assembly as defined under the new *Emergency Measures Regulations*.

iii. the adverse effects resulting from the impacts of the blockades on Canada's relationship with its trading partners, including the U.S., that are detrimental to the interests of Canada

The U.S. has expressed concerns related to the economic impacts of blockades at the borders, as well as possible impacts on violent extremist movements. During a call with President Joe Biden on February 11, 2022, the critical importance of resolving access to the Ambassador Bridge and other ports of entry as quickly as possible was discussed, given their role as vital bilateral trade corridors, and as essential to the extensive interconnections between our two countries.

Disruptions at ports of entry have significant impacts on trade with U.S. partners and the already fragile supply chain, and have resulted in temporary closures of manufacturing sites, job loss, and loss of revenues. One week of the Ambassador Bridge blockade alone is estimated to have caused a total economic loss of $51 million for U.S. working people and businesses in the automotive and transportation industry. Consequently, the protests have been the cause of significant criticism and concern from U.S. political, industry and labour leaders.

The Governor of Michigan has issued several statements expressing her frustration with the ongoing protests and blockade and the damage they are doing to her state and constituents. Similar frustrations have been voiced by the General President of the International Brotherhood of Teamsters and the Canada-U.S. Business Association. The blockades and protests are of such concern to the U.S government that the Department of Homeland Security Secretary has offered its assistance in ending the protests.

More generally, the protests and blockades are eroding confidence in Canada as a place to invest and do business. Politicians in Michigan have already speculated that disruptions in cross border trade may lead them to seek domestic, as opposed to Canadian, suppliers for automotive parts.

iv. the breakdown in the distribution chain and availability of essential goods, services and resources caused by the existing blockades and the risk that this breakdown will continue as blockades continue and increase in number

Canada has a uniquely vulnerable trade and transportation system. Relative to global competitors, Canadian products travel significantly further, through challenging geography and climate conditions. Moreover, trade and transport within Canada, and between Canada and the U.S. is highly integrated.

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The closure of, and threats against, crucial ports of entry along the Canada-U.S. border has not only had an adverse impact on Canada's economy, it has also imperiled the welfare of Canadians by disrupting the transport of crucial goods, medical supplies, food, and fuel across the U.S.-Canada border. A failure to keep international crossings open could result in a shortage of crucial medicine, food and fuel.

In addition to the blockades along the border, protesters attempted to impede access to the MacDonald-Cartier International Airport in Ottawa and threatened to blockade railway lines. The result of a railway blockade would be significant. As noted above, Canada's freight rail industry transports more than $310 billion worth of goods each year on a network that runs from coast to coast. Canada's freight railways serve customers in almost every part of the Canadian economy: from manufacturing, to the agricultural, natural resource, wholesale and retail sectors.

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v. the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians

The protests and blockades pose severe risks to public safety. While municipal and provincial authorities have taken decisive action in key affected areas, such as law enforcement activity at the Ambassador Bridge in Windsor, considerable effort was necessary to restore access to the site and will be required to maintain access.

There is significant evidence of illegal activity to date and the situation across the country remains concerning, volatile and unpredictable. The Freedom Convoy could also lead to an increase in the number of individuals who support ideologically motivated violent extremism (IMVE) and the prospect for serious violence. Proponents of IMVE are driven by a range of influences rather than a singular belief system. IMVE radicalization is more often caused by a combination of ideas and grievances resulting in a personalized worldview. The resulting worldview often centres on the willingness to incite, enable or mobilize violence.

On February 14, 2022, the RCMP arrested numerous individuals in Coutts, Alberta associated with a known IMVE group who had been engaged with the protests and seized a cache of firearms with a large quantity of ammunition, which indicates that there are elements within this movement that intend to engage in violence. Four of these individuals were charged with conspiracy to commit murder, in addition to other offences.

Since the convoy began, there has been a significant increase in the number and duration of incidents involving criminality associated with public order events related to anti-public health measures and there have been serious threats of violence assessed to be politically or ideologically motivated. Two bomb threats were made to Vancouver hospitals and numerous suspicious packages containing rhetoric that references the hanging of politicians and potentially noxious substances were sent to offices of Members of Parliament in Nova Scotia. While a link to the convoy has not yet been established in either case, these threats are consistent with an overall uptick in threats made against public officials and health care workers. A number of

threats were noted regarding the Nova Scotia-New Brunswick border demonstration set for February 12, 2022, including a call to bring “arms” to respond to police if necessary. An Ottawa tow truck operator reported that he received death threats from protest supporters who mistakenly believed he provided assistance to the police.

The Sûreté du Québec (SQ) has been dealing with multiple threats arising from the protests. In early February, 2022, the SQ was called in to provide protection to the National Assembly in response to the convoy protests in Quebec City. Some individuals associated with the protests had threatened to take up arms and attack the National Assembly. This led to all parties at the National Assembly strongly denouncing all threats of violence. While that protest was not accompanied by violence, the threat has not ended; the protesters have stated that they plan to return on February 19, 2022. At the same time, the SQ is also dealing with threats of protests and blockades along Quebec’s border with New York State. This requires the SQ to deploy resources to establish checkpoints and ensure that crucial ports of entry remain open.

Other incidents which have occurred during the course of the blockades point to efforts by U.S.-based supporters of IMVE to join protests in Canada, or to conduct sympathetic disruptive blockades on the U.S. side of ports of entry. In some cases, individuals were openly carrying weapons. U.S.-based individuals, some openly espousing violent extremist rhetoric, have employed a variety of social media and other methods to express support for the ongoing blockades, to advocate for further disruptions, and to make threats of serious violence against Canadian law enforcement and the Government of Canada.

Several individuals with U.S. status have attempted to enter Canada with the stated purpose of joining the blockades. One high profile individual is known to have openly expressed opposition to COVID-19-related health measures, including vaccine mandates and has attempted to import materials to Canada for the express purpose of supporting individuals participating in the blockades.

As of February 14, 2022, approximately 500 vehicles, most of them commercial trucks, were parked in Ottawa’s downtown core. There have been reports of protesters engaging in hate crimes, breaking into businesses and residences, and threatening law enforcement and Ottawa residents.

Protesters have refused to comply with injunctions covering downtown Ottawa and the Ambassador Bridge and recent legislation enacted by the Ontario Government under the *Emergency Management and Civil Protection Act* (Ontario Regulation 71/22), which makes it illegal and punishable to block and impede the movement of goods, people and services along critical infrastructure. In Ottawa, the Ottawa Police Service has been unable to enforce the rule of law in the downtown core due to the overwhelming volume of protesters and the Police’s ability to respond to other emergencies has been hampered by the flooding of Ottawa’s 911 hotline, including by individuals from outside Canada. The occupation of the downtown core has also hindered the ability of emergency medical responders to attend medical emergencies in a timely way and has led to the cancellation of many medical appointments.

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The inability of municipal and provincial authorities to enforce the law or control the protests may lead to a further reduction in public confidence in police and other Canadian institutions.

The situation in downtown Ottawa also impedes the proper functioning of the federal government and the ability of federal government officials and other workers to enter their workplaces in the downtown core safely.

Furthermore, the protests jeopardize Canada's ability to fulfil its obligations under the Vienna Convention on Diplomatic Relations as a host of the diplomatic community and pose risks to foreign embassies, their staff and their access to their diplomatic premises.

Conclusion

The ongoing Freedom Convoy 2022 has created a critical, urgent, temporary situation that is national in scope and cannot effectively be dealt with under any other law of Canada. The blockades of the ports of entry have disrupted the transportation of crucial medicine, goods, fuel and food to Canadians and are causing significant adverse effects on Canada's economy, relationship with trading partners and supply chains. These trade disruptions, the increase in criminal activity, the occupation of downtown Ottawa and the threats of violence and presence of firearms at protests – along with the other reasons detailed above – constitute a public order emergency, an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency. The types of measures set out in the February 14, 2022 *Proclamation Declaring a Public Order Emergency* are necessary in order to supplement.

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Report to the Houses of Parliament: Emergencies Act Consultations

February 16, 2022

Background and the Requirement to Consult

On February 14, 2022, the Governor in Council declared a public order emergency under the Emergencies Act. Section 25 of the Act requires the Governor in Council to consult the Lieutenant Governor in Council of each province with respect to a proposal to declare a public order emergency. A report of these consultations must be laid before each House of Parliament within seven sitting days after the declaration is issued, in accordance with section 58 of the Act.

Engagement

Since the crisis began in late January, federal ministers and officials have continuously engaged provinces and territories, municipalities, and law enforcement agencies to assess the situation and to offer the support and assistance of the Government of Canada. Staff in the Prime Minister's Office and in various Minister's offices had ongoing communications with Premiers' offices and related ministers' offices throughout this period. Examples of engagement with provincial, municipal, and international partners include the following:

- There has been regular engagement with the City of Ottawa in relation to requests for federal support. This includes the request from the City of Ottawa for policing services (February 7, 2022 letter to the Prime Minister from the Ottawa Mayor and the Chair of the Ottawa Police Services Board).

- The Prime Minister spoke to the Mayor of Ottawa on January 31 and February 8, 2022 about the illegal occupation in Ottawa.

- Trilateral meetings took place on February 7, 8, and 10, 2022 with the President of the Queen's Privy Council for Canada and Minister of Emergency Preparedness, the Minister of Public Safety, the Mayor of Ottawa, the City Manager of Ottawa, and the Chief of Ottawa Police Services. The Minister also spoke with the Solicitor General of Ontario on February 7, 2022 to discuss the work of the tripartite table.

- Staff from the Office of the President of the Queen's Privy Council for Canada and Minister of Emergency Preparedness have been in regular contact with the Office of the Premier of Ontario, as well as the Deputy Mayor of Ottawa.

- The President of the Queen's Privy Council for Canada and Minister of Emergency Preparedness also spoke with the President of the Canadian Association of Chiefs of Police on February 3 and 13, 2022 on support for the Ottawa Police Service.

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- The President of the Queen's Privy Council for Canada and Minister of Emergency Preparedness also spoke with the President of the Federation of Canadian Municipalities on February 3, 2022 about the situation in Ottawa.

- There has also been regular engagement with municipal and provincial officials concerning the Ambassador Bridge, including on a request for assistance received from the City of Windsor on February 9, 2022.

- The Prime Minister spoke with the Premier of Ontario on February 9, 2022, and the Minister of Intergovernmental Affairs, Infrastructure and Communities spoke with the Premier of Ontario (February 10 and 11, 2022) regarding measures being taken by the Province in relation to the Ambassador Bridge.

- The Prime Minister spoke to the Mayor of Windsor on February 10, 2022 about the blockade at the Ambassador Bridge.

- The Prime Minister spoke with the President of the United States on February 11, 2022. The leaders discussed the critical importance of resolving access to the Ambassador Bridge and other ports of entry as quickly as possible.

- The Minister of Transport spoke with Ontario's Minister of Transportation on February 9, 2022 about the blockades at border crossings. The Minister also spoke with the Mayor of Windsor on February 11, 2022 concerning the Ambassador Bridge.

- Staff from the Office of the President of the Queen's Privy Council for Canada and Minister of Emergency Preparedness and the Office of the Minister of Intergovernmental Affairs, Infrastructure and Communities have also been in regular contact with the City of Windsor.

- The Minister of Public Safety engaged the Premier of Ontario on February 9, 2022. The Minister has also been in regular contact with the Mayor of Ottawa and the Mayor of Windsor, including trough the tripartite discussions. His staff have also engaged with both Mayors' offices. The Office of the Minister of Intergovernmental Affairs, Infrastructure and Communities engaged the Office of the Minister of Transportation of Ontario on February 7, 2022, and was in regular contact with the Office of the Premier of Ontario.

    - The Office of the Prime Minister has also had ongoing discussions with the Office of the Premier of Ontario regarding the Ottawa, Windsor, and Sarnia blockades in the weeks leading up to the declaration. These conversations made it clear that more federal support was needed.

    - There has been regular engagement with provincial officials concerning the Coutts port of entry, including the Province's request for assistance in relation to

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tow truck capacity (February 5, 2022 letter to Ministers of Public Safety and Emergency Preparedness from the Alberta Minister of Municipal Affairs).

- The Minister of Public Safety engaged with the Premier of Alberta on February 2 and 9, 2022, and with the Premier and the Acting Minister of Justice and Solicitor General of Alberta on February 7, 2022. The Minister also engaged the Acting Minister of Justice and Solicitor General of Alberta on February 1, 5, and 9, 2022.

- The Minister of Transport spoke with Alberta's Minister of Transportation on February 5 and 9, 2022.

- The Minister of Intergovernmental Affairs, Infrastructure and Communities communicated with the Premier of Alberta on February 10 and 11, 2022.

- Ministers also engaged counterparts in other provinces:

- The Minister of Transport spoke with Manitoba's Minister of Transportation and Infrastructure on February 12, 2022 concerning the Emerson port of entry.

- The President of the Queen's Privy Council for Canada and Minister of Emergency Preparedness spoke with the Minister of Public Safety and Solicitor General and Deputy Premier of British Columbia on February 5 and 13, 2022 to discuss protests in Victoria and how the federal government could assist if circumstances required, including mutual emergency legislation.

- In support of his Cabinet colleagues and on behalf of the Prime Minister, the Minister of Intergovernmental Affairs, Infrastructure and Communities also communicated with the premiers of Nova Scotia (February 12, 2022), New Brunswick (February 12, 2022), Newfoundland and Labrador (February 12, 2022), and British Columbia (February 13, 2022) to ask about the current status and to offer federal support to help the provinces respond to the disruption and blockades.

- Federal, provincial, and territorial (FPT) officials have also met on a multilateral and bilateral basis, including the following:

- Public Safety Canada officials shared information on the ongoing situation and the use of authorities. This included:

- The FPT Crime Prevention and Policing Committee (CPPC) held an ad hoc meeting on February 7, 2022 at the deputy minister level.

- The FPT CPPC Committee met at the assistant deputy minister level on February 1 and 11, 2022.

- Discussions took place with assistant deputy ministers from Ontario, Manitoba, and Alberta on February 13, 2022, and with Ontario and Manitoba on February 14, 2022.

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- Transport Canada officials gathered and shared information with PT transport ministries on PT tools/actions being considered to manage the convoys, including potential infraction and enforcement regimes under the respective jurisdictions' motor vehicle safety legislation. This included:

- The ADM-level table of the Council of Minsters Responsible for Transportation and Highway Safety met twice, on February 4 and 8, 2022.

- Calls took place with Alberta and Ontario on February 5, 2022, with Ontario on February 6 and 7, 2022, and with Alberta on February 7, 2022.

The Government of Canada also engaged Indigenous leaders regarding the blockades. For example, the Minister of Crown-Indigenous Relations spoke with the National Chief of the Assembly of First Nations, the President of the Inuit Tapiriit Kanatami, the President of the Métis National Council, the Grand Chief of Akwesasne, and the Grand Chief of the Manitoba Southern Chief's Organization.

The decisions on next steps and to consult premiers on the Emergencies Act was informed by all of the federal ministerial and senior official engagement with provinces since the onset of the crisis.

Consultations on the Emergencies Act with First Ministers

The Prime Minister convened a First Ministers' Meeting on February 14, 2022, to consult premiers on whether to declare a public order emergency under the Emergencies Act. The Prime Minister was joined by the Minister of Intergovernmental Affairs, Infrastructure and Communities, the Minister of Justice and Attorney General of Canada, and the Minister of Public Safety. All premiers participated.

The Prime Minister explained why the declaration of a public order emergency might be necessary and formally consulted premiers. The Minister of Justice outlined potential measures the Government of Canada was contemplating to take under the Emergencies Act to supplement the measures in the provinces' jurisdiction and respond to the urgent and unprecedented situation. The Prime Minister asked what measures could be supplemented through the Emergencies Act by using proportional, time-limited authorities.

Each 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 at the meeting. Some premiers indicated support for the proposed measures as necessary to resolve the current situation, noting they would be focused on targeted areas, time-limited, and would be subject to ongoing engagement. Other premiers did not feel the Emergencies Act was needed at this time, arguing that provincial and municipal governments have sufficient authority to address the situation in their respective jurisdictions. Some premiers expressed caution that invoking the Emergencies Act could escalate the situation.

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While the views expressed at the First Ministers' Meeting were shared in confidence, premiers provided their perspectives in public statements following the First Ministers' Meeting.

- The Premier of Ontario said he supports the federal government's decision to provide additional tools to help police resolve the situation in the nation's capital. He said he expressed to the Prime Minister that these measures should be targeted and time-limited.

- The Premier of Newfoundland and Labrador said that he supports invoking the Emergencies Act on a time limited basis to bolster the response to deal with unacceptable behaviour within blockades, infringing on the rights of law-abiding Canadians.

- British Columbia's Minister of Public Safety and Solicitor General and Deputy Premier also said that the Province supported the use of the Emergencies Act, according to media reports.

- The Premier of Quebec said that he opposed the application of the Emergencies Act in Quebec, stating that municipal police and the Sûreté du Québec have control of the situation, and arguing that the use of the Act would be divisive.

- The Premier of Alberta tweeted that Alberta's Government is opposed to the invocation of the Emergencies Act, arguing that Alberta has all the legal tools and operational resources required to maintain order. He also expressed concern that invocation of the Emergencies Act could escalate a tense situation.

- The Premier of Saskatchewan issued the following tweet: "The illegal blockades must end, but police already have sufficient tools to enforce the law and clear the blockades, as they did over the weekend in Windsor. Therefore, Saskatchewan does not support the Trudeau government invoking the Emergencies Act. If the federal government does proceed with this measure, I would hope it would only be invoked in provinces that request it, as the legislation allows."

- The Premier of Manitoba issued a statement in which she noted that the situation in each province and territory is very different and she is not currently satisfied the Emergencies Act should be applied in Manitoba. She said that in her view, the sweeping effects and signals associated with the never-before-used Emergencies Act are not constructive in Manitoba, where caution must be taken against overreach and unintended negative consequences.

- The Premier of New Brunswick, the Premier of Nova Scotia, and the Premier of Prince Edward Island have also commented that they do not

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believe the Emergencies Act is necessary in their respective provinces, stating that policing services have sufficient authority to enforce the law.

- The premiers of Yukon, the Northwest Territories, and Nunavut provided feedback during the First Ministers' Meeting, although have not issued public statements.

During the First Ministers' 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.

There was further engagement with provinces following the First Ministers' Meeting and prior to the Government of Canada's decision to declare a public order emergency on February 14, 2022:

- 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 Government of Canada's decision was made on February 14, 2022 to offer briefings to premiers' offices, and to explain the role of provinces and territories under the Emergencies Act.

- The Minister of Intergovernmental Affairs, Infrastructure and Communities communicated with his Quebec counterpart on the Emergencies Act. The Minister of Canadian Heritage and Quebec Lieutenant also connected with Quebec's Deputy Premier and Minister of Public Safety and Quebec's Minister of Finance, and officials from the Prime Minister's Office engaged with the Office of the Premier of Quebec.

- The Minister of Intergovernmental Affairs, Infrastructure and Communities also engaged the Premier of Ontario and received feedback from the Premier of Saskatchewan.

- The Office of the Prime Minister spoke with the Office of the Premier of Ontario and the Office of the Premier of Newfoundland and Labrador on February 14, 2022 to explain the rationale and implementation of the Emergencies Act.

The Prime Minister considered all of the comments shared at the First Ministers' Meeting, as well as the many other sources of information and intelligence. He announced his intention to invoke the Emergencies Act with targeted, time-limited measures that would complement provincial and municipal authorities late in the day on February 14, 2022.

On February 15, 2022 the Prime Minister wrote to all premiers, outlining the reasons why the Government of Canada decided to declare a public order emergency and described the types of measures that would be available under the Act. The letter responded to issues raised during the discussion, particularly on whether the declaration of a public order emergency should apply nationally. For example, the letter emphasized that the measures would be applied to targeted

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areas; that measures would supplement, rather than replace, provincial and municipal authorities; that these are tools that could be employed by police of local jurisdiction, at their discretion; and that the Royal Canadian Mounted Police would be engaged only when requested by local authorities. The letter also emphasized the Government of Canada's strong interest in further engagement and collaboration with provinces and territories on these issues.

Next Steps

Consistent with the Emergencies Act's requirements, the Government of Canada is committed to ongoing consultation and collaboration with the provinces and territories to ensure that the federal response complements the efforts of their governments. Ongoing consultation will also be necessary should there be a need to modify or extend existing orders under the Emergencies Act.

Supported by their officials, Ministers engaged with their counterparts following the First Ministers' Meeting, and will continue to engage provinces and territories on an ongoing basis. They will be available to quickly respond to specific issues or situations, as they arise. More recent engagement includes:

- The Minister of Justice and Attorney General of Canada spoke with his Quebec counterpart on

February 14, 2022 about the Emergencies Act.

The Minister of Transport spoke with British Columbia's Minister of Transportation and Infrastructure on February 14, 2022 about blockades at border crossings. The Ministers discussed how the Emergencies Act can assist law enforcement.

The Minister of Transport spoke with Nova Scotia's Minister of Public Works on February 15, 2022 and provided an overview of the emergency measures being taken under the Emergencies Act.

On February 15, 2022, representatives from the Justice Minister's Office spoke with the Mayor of Winnipeg about the Emergencies Act. In a statement on February 15, 2022, the Mayor said he is grateful the federal government is "taking action to make additional tools available to assist with the quick and peaceful end to the unlawful occupations."

A briefing for PT Deputy Ministers of Intergovernmental Affairs took place on February 15, 2022. A follow-up meeting is scheduled for February 17, 2022. FPT Deputy Ministers of Intergovernmental Affairs will continue to engage on these issues through regular and ongoing communications.

A briefing is planned for February 16, 2022 for Assistant Deputy Ministers in provincial and territorial ministries of Public Safety, Transportation, the Solicitor General, and Intergovernmental Affairs.

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Collaboration through policing services will also continue. On February 15, 2022, the Interim Chief of the Ottawa Police Service stated that with new resources from policing partners and tools from both the provincial and federal governments, the Ottawa Police Service believe they now have the resources and power to bring a safe end to this occupation. Ottawa's Deputy Police Chief further commented that there is collaboration on the application of the Emergencies Act in Ottawa.

- There will be weekly engagement by the Minister of Public Safety with his provincial and territorial counterparts.

- The Government of Canada will continue to gather and assess feedback through these ongoing engagements to assess the orders and Regulations under the Emergencies Act and to ensure a coordinated and effective response on behalf of Canadians.

- Annex:

• Letter from the Prime Minister to premiers

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-306-22 T-316-22 T-347-22 T-382-22
STYLE OF CAUSE:	Canadian Frontline Nurses and Kristin Nagle v Attorney General of Canada
AND BETWEEN:	Canadian Civil Liberties Association v Attorney General of Canada
AND BETWEEN:	Canadian Constitution Foundation v Attorney General of Canada and Attorney General of Alberta
AND BETWEEN:	Jeremiah Jost, Edward Cornell, Vincent Gircys and Harold Ristau v Governor-in-Council, His Majesty in Right of Canada, Attorney General of Canada and Minister of Public Safety and Emergency Preparedness
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 3-5, 2023
REASONS FOR JUDGMENT:	MOSLEY J.
DATED:	JANUARY 23, 2024
AMENDED:	JANUARY 29, 2024

APPEARANCES:

David G. Cowling Alexander Boissonneau-Lehner	FOR THE APPLICANTS (Canadian Frontline Nurses, Kristin Nagle)
~~Brandon Chung~~ ~~Ewa Krajewska~~ Ewa Krajewska Brandon Chung	FOR THE APPLICANTS (Canadian Civil Liberties Association)

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Sujit Choudhry Janani Shanmuganathan	FOR THE APPLICANTS (Canadian Constitution Foundation)
Mandy England Shaheer Meenai	FOR THE INTERVENER (Attorney General of Alberta)
Blair D Ector Bath-Sheba van den Berg	FOR THE APPLICANTS (Jeremiah Jost, Edward Cornell, Vincent Gircys, Harold Ristau)
Christopher Rupar Jeff Anderson John Provart David Aaron Kathleen Kohlman	FOR THE RESPONDENTS (Attorney General of Canada & Governor in Council, His Majesty in Right of Canada)

SOLICITORS OF RECORD:

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Henein Hutchinson LLP Toronto, Ontario	FOR THE APPLICANTS
~~Choudry Law~~ Haki Chambers Global Goddard & Shanmuganathan LLP Toronto, Ontario	FOR THE APPLICANTS
~~Loberg Foster LLP~~ ~~Calgary, Alberta~~ Alberta Justice Edmonton, Alberta	FOR THE INTERVEN~~O~~ER
Justice Canada Toronto, Ontario	FOR THE RESPONDENTS
Justice Canada Edmonton, Alberta	

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headnote, 355, 360-361, 363 and 369-370

T-2252-91

CNG Transmission Corporation (*Applicant*)

v.

National Energy Board, ANR Pipeline Company, Rochester Gas & Electric Corporation, St. Clair Pipelines Limited, TransCanada PipeLines Limited (*Respondents*)

INDEXED AS: CNG TRANSMISSION CORP. v. CANADA (NATIONAL ENERGY BOARD) (T.D.)

Trial Division, Cullen J.—Ottawa, October 3, 4 and 18, 1991.

Judicial review — Prerogative writs — Certiorari — Application to quash National Energy Board (NEB) decision to review refusal of respondent companies' application for authorization to construct pipeline — Applicant submitting competing pipeline proposal — Former Board Chairman consultant to respondent, contacting Chairman directly (contrary to Board policy) to arrange meeting between Chairman, Vice-Chairman and representatives of unsuccessful pipeline companies — Presenting negative reactions to refusal and suggestions as to how NEB should proceed in light of allegedly changed circumstances — Applicant unrepresented at meeting — Board deciding to abridge review process — Given terms of National Energy Board Act, procedural nature of decision and type of function exercised, principle of fairness applied, although not to same degree as to hearing on merits — Manner of conducting meeting unfair — Applicant denied reasonable opportunity to address issue of whether should be review — Reasonable apprehension of bias — Although NEB members should not be precluded from meeting with industry representatives, meeting should have been limited to procedural matters.

Judicial review — Prerogative writs — Prohibition — Application to prohibit eleven named National Energy Board members from participating in review of refusal of application for authorization to construct pipeline — Subsequent to refusal, meeting between Board Chairman, Vice-Chairman and representatives of unsuccessful companies — Meeting violated audi alteram partem principle of fairness — Application allowed with respect to Chairman and Vice-Chairman — Given substantive nature of discussions, and their participation in decision to review refusal, reasonable apprehension of bias — Denied as to Board members who received minutes of meeting.

T-2252-91

CNG Transmission Corporation (*requérante*)

c.

Office national de l'énergie, ANR Pipeline Company, Rochester Gas & Electric Corporation, St. Clair Pipelines Limited, TransCanada PipeLines Limited (*intimés*)

RÉPERTORIÉ: CNG TRANSMISSION CORP. c. CANADA (OFFICE NATIONAL DE L'ÉNERGIE) (Ire INST.)

Section de première instance, juge Cullen—Ottawa, 3, 4 et 18 octobre 1991.

Contrôle judiciaire — Brefs de prérogative — Certiorari — Demande en vue de l'annulation de la décision par laquelle l'Office national de l'énergie (ONÉ) a décidé de réviser le refus d'accorder aux compagnies intimées l'autorisation de construire un pipeline — La requérante, une concurrente, a présenté une proposition concernant le pipeline — L'ancien président de l'Office était conseiller de l'intimée et a communiqué directement avec le président de l'ONÉ (contrairement à la politique de l'Office) en vue d'organiser une rencontre avec lui ainsi qu'avec le vice-président et les représentants des compagnies de pipelines perdantes — Ils ont fait part de réactions défavorables au refus et ont fait des suggestions au sujet de la manière dont l'ONÉ devait procéder compte tenu de présumés faits nouveaux — La requérante n'était pas représentée à la réunion — L'Office a décidé d'abréger la procédure de révision — Compte tenu des dispositions de la Loi sur l'Office national de l'énergie, de la nature de la décision, qui portait sur la procédure, et du genre de fonction exercée, les principes de l'équité s'appliquaient, mais pas dans la même mesure que dans le cas des audiences au fond — La manière dont la réunion s'est déroulée était inéquitable — La requérante s'est vu refuser une occasion raisonnable de se prononcer sur l'opportunité d'une révision — Crainte raisonnable de partialité — Il n'y a pas lieu d'interdire aux membres de l'ONÉ de rencontrer les représentants du secteur d'activité, mais la réunion n'aurait dû porter que sur des questions de procédure.

Contrôle judiciaire — Brefs de prérogative — Prohibition — Requête visant à interdire à onze membres désignés de l'Office national de l'énergie de participer à toute révision du refus d'accorder l'autorisation de construire un pipeline — À la suite du refus, il y a eu une rencontre avec le président et le vice-président de l'Office ainsi qu'avec les représentants des sociétés perdantes — La réunion violait le principe audi alteram partem — La demande a été accueillie en ce qui concerne le président et le vice-président de l'ONÉ — Étant donné que des questions de fond ont été discutées et que le président et le vice-président avaient participé à la décision de réviser le refus, il existait une crainte raisonnable de partialité — La demande est rejetée en ce qui concerne les membres de l'Office qui ont reçu le procès-verbal de la réunion.

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Energy — National Energy Board deciding to review refusal of respondents' application for authorization to construct pipeline and to abridge review process — Applicant not given opportunity to address issue of whether should be review — Respondents given two opportunities to make case, one of which at private meeting in absence of applicants — Consideration of National Energy Board Act, procedural nature of decision and function exercised — Board's powerful mandate accompanied by heavy responsibility to be fair — Breach of audi alteram partem principle of fairness — Decision to review quashed — NEB Chairman and Vice-Chairman prohibited from participating in any review as present at private meeting and participating in decision to review refusal.

This was an application for *certiorari* to quash the National Energy Board's (NEB) decision to review its refusal of the respondent companies' application for authorization to construct a pipeline and for prohibition prohibiting 11 named NEB members from participating in a rehearing. The applicant had submitted a competing proposal for the transportation of gas received from the Canadian pipeline system to New York state. Both proposals required regulatory approval in Canada and the United States. After the NEB refusal was released, the U.S. Federal Energy Regulatory Commission (FERC) approved the respondents' proposal conditional upon NEB approval. Mr. Edge, a former NEB Chairman and now consultant to a parent company of a respondent company, contacted the present Chairman to arrange a meeting with the latter, Vice-Chairman and legal counsel. Board policy/rules require that all contacts with the Board be made through the Secretary. At the meeting the respondent companies expressed negative reactions to the NEB decision, made representations on aspects of the case and expressed the view that the FERC decision was a changed circumstance which justified review. The Chairman and Vice-Chairman indicated that they did not think that the Board would initiate a review of its own volition, and it was agreed that the respondent companies would submit a section 21 review application in which they could request that the review process be expedited. Board members received a summary of this meeting. As agreed, a section 21 review application was filed and a copy forwarded to the applicant, which requested an opportunity to address the issue of whether a review should take place. Without responding thereto, the Board decided to abridge the review process, having been "persuaded by the applicants' arguments" that a review was justified. Board Rules require the Board to hear public comment on whether a decision should be reviewed, but it also has the power to dispense with any provision of the Rules. The issues were whether the NEB decision to review was subject to the principles of fairness; and if so, whether the meeting with the respondent companies raised a reasonable apprehension of bias or constituted a denial of natural justice and breach of the requirements of fairness as a result of the breach of the *audi alteram partem* principle.

Énergie — L'Office national de l'énergie a décidé de réviser le refus d'accorder aux intimés l'autorisation de construire un pipeline et d'abréger la procédure de révision — La requérante n'a pas eu l'occasion de se prononcer sur l'opportunité d'une révision — Les intimés ont eu deux occasions de faire valoir leur point de vue, dont l'une à huis clos et en l'absence des requérantes — Examen de la Loi sur l'Office national de l'énergie, de la nature de la décision, qui portait sur la procédure, et de la fonction exercée — L'Office a un mandat important qui s'accompagne d'une lourde responsabilité d'agir équitablement — Violation du principe audi alteram partem — Décision d'effectuer une révision annulée — Il est interdit au président et au vice-président de l'ONÉ de participer à une révision étant donné qu'ils étaient présents à la réunion à huis clos et qu'ils ont participé à la décision de réviser le refus.

Il s'agissait d'une demande en vue de l'obtention d'un *certiorari* annulant la décision qu'avait prise l'Office national de l'énergie (ONÉ) de réviser son refus d'autoriser les compagnies intimées à construire un pipeline et en vue de l'obtention d'un bref de prohibition interdisant à onze membres désignés de l'ONÉ de procéder à une nouvelle audition de l'affaire. La requérante, une concurrente, avait présenté une proposition en vue du transport du gaz en provenance du réseau canadien de pipelines vers l'État de New York. Les deux propositions présentées exigeaient l'approbation des organismes canadien et américain de réglementation. Après que le refus de l'ONÉ eut été communiqué, la Federal Energy Regulatory Commission (la FERC) américaine a approuvé la proposition des intimées sous réserve de l'agrément par l'ONÉ. M. Edge, autrefois président de l'ONÉ et maintenant conseiller de la société mère d'une compagnie intimée, a communiqué avec le président actuel de l'ONÉ pour organiser une réunion avec lui, ainsi qu'avec le vice-président et un conseiller juridique de l'ONÉ. La politique et les règles de l'Office exigent que toutes les communications qui lui sont destinées soient adressées au secrétaire. À la réunion, les représentants des compagnies intimées ont fait part de leur réaction défavorable à la décision de l'ONÉ; ils ont fait des observations sur certains aspects de l'affaire et ont exprimé l'opinion selon laquelle la décision de la FERC constituait un fait nouveau qui justifiait la révision du refus. Le président et le vice-président de l'ONÉ ont fait savoir qu'ils ne pensaient pas que l'Office procéderait à une révision de sa propre initiative; il a été convenu que les compagnies intimées présenteraient une demande de révision fondée sur l'article 21, dans laquelle elles pourraient demander que l'ONÉ accélère la procédure de révision. Les membres de l'Office ont reçu un résumé de cette réunion. Tel que convenu, une demande de révision fondée sur l'article 21 a été présentée et une copie a été envoyée à la requérante, qui a demandé qu'on lui accorde l'occasion de se prononcer sur l'opportunité d'une révision. Sans répondre à la demande, l'Office a décidé d'abréger la procédure de révision, puisqu'il avait été «persuadé par les arguments des requérants» qu'une révision était justifiée. Les Règles de l'Office exigent que ce dernier entende en public les observations concernant l'opportunité de réviser une décision, mais l'Office a également le pouvoir de dispenser de l'application de toute disposition des Règles. Il s'agissait de savoir si la décision de l'ONÉ d'effectuer une révision était

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Held, the application for *certiorari* should be allowed; the application for prohibition should be allowed only with respect to the Chairman and Vice-Chairman.

Upon consideration of the terms of the *National Energy Board Act*, the procedural nature of the decision and the type of function exercised by the Board, it had to be concluded that procedural fairness did apply although not to the same degree as with respect to hearings into the merits. It could be argued that the applicant had been prejudiced by the denial of the opportunity to address the issue of whether a review should take place, when the respondents had been given two opportunities to make out their case, one of which took place privately and in the absence of any of the parties opposed in interest. The rules of fairness cover the *audi alteram partem* and the *nemo judex in causa sua debet esse* rules.

As to reasonable apprehension of bias, the problem with the Board's decision was that the source of the idea to abridge the review procedure came from a group representing the losing pipeline interests during a private meeting with the Chairman and Vice-Chairman. Had it come from the NEB itself without input from outside sources, there would be no problem.

The Board has a powerful mandate which is accompanied by a heavy responsibility to be fair, not to favour one side to the detriment of the other, or not to seem to do so. A meeting to discuss procedure would have been appropriate, even if held with only some of the participants and on the clear understanding that it was to discuss procedure only. The meeting should have been stopped when it became apparent that matters other than procedure were to be introduced for discussion.

In light of all the circumstances, there was a reasonable apprehension of bias. NEB members should not be precluded from meeting with members of the "industry". Preliminary discussions or meetings do not automatically trigger a reasonable apprehension of bias. However, the extraordinary circumstances warranted intervention. The context of and overall substance of what transpired was a determining factor, bearing in mind the NEB's mandate as well as its policies and procedures. The NEB was on notice that the "losing party" would be filing an application for review; the Chairman and Vice-Chairman met with certain pipeline representatives who made up the "losing parties"; the meeting was arranged through direct contact by the former Chairman, who was acting on behalf of one of the pipeline companies, with the Chairman, which was contrary to the NEB's rules and policy; significant and substantive

assujettie aux principes de l'équité et, dans l'affirmative, si la réunion avec les représentants des compagnies intimées soulevait une crainte raisonnable de partialité ou constituait un déni de justice naturelle et un manquement à l'obligation d'agir équitablement par suite de la violation du principe *audi alteram partem*.

Jugement: la demande de *certiorari* devrait être accueillie; la demande de bref de prohibition devrait être accueillie uniquement en ce qui concerne le président et le vice-président de l'ONÉ.

Après avoir examiné les dispositions de la *Loi sur l'Office national de l'énergie*, la nature de la décision, qui portait sur la procédure, et le genre de fonction exercée par l'Office, la Cour a conclu que les règles de l'équité procédurale s'appliquaient, mais pas dans la même mesure que dans le cas des audiences au fond. On pourrait soutenir que la requérante avait subi un préjudice par suite du refus de lui accorder l'occasion de se prononcer sur l'opportunité d'une révision, dans la mesure où les intimés se sont vu accorder deux occasions de faire valoir leur point de vue, dont l'une à huis clos et en l'absence des parties ayant des intérêts opposés aux leurs. Les règles de l'équité comprennent les règles *audi alteram partem* et *nemo judex in causa sua debet esse*.

En ce qui a trait à la question de la crainte raisonnable de partialité, le problème que posait la décision de l'Office était que l'idée d'abréger la procédure de révision avait été proposée par un groupe qui représentait les compagnies perdantes au cours d'une réunion à huis clos avec le président et le vice-président de l'ONÉ. Si l'ONÉ avait rendu la décision de sa propre initiative sans être influencé par des tiers, il n'y aurait pas eu de problème.

L'Office a un mandat important qui s'accompagne d'une lourde responsabilité d'agir équitablement, de ne pas favoriser une partie au détriment de l'autre et de ne pas donner cette impression. Il était à propos de tenir une réunion pour discuter de la procédure même si quelques-unes des parties seulement y participaient, pourvu qu'il soit clairement entendu qu'il y serait question de procédure seulement. Il aurait fallu mettre fin à la réunion lorsqu'il est devenu évident que des questions autres que des questions de procédure seraient abordées en vue d'être examinées.

Compte tenu des circonstances, il existait une crainte raisonnable de partialité. Il ne devrait pas être interdit aux membres de l'ONÉ de rencontrer des représentants du «secteur d'activité». Des discussions ou réunions préliminaires ne suscitent pas automatiquement de crainte raisonnable de partialité. Cependant, les circonstances extraordinaires justifient une intervention. Le contexte de la rencontre et son contenu dans l'ensemble constituaient un facteur décisif, compte tenu du mandat de l'ONÉ ainsi que de ses politiques et procédures. L'ONÉ avait été avisé que la «partie perdante» déposerait une demande de révision; le président et le vice-président de l'ONÉ ont rencontré certains représentants des «parties perdantes»; cette réunion avait été tenue après que l'ancien président, qui agissait pour le compte d'une des compagnies, eut communiqué directement avec le président, ce qui était contraire aux

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issues were discussed; arguments were advanced in support of representatives' positions and ideas were advanced as to how the NEB should proceed, i.e. that the NEB should initiate a review on its own volition. A few days later an application for review was filed and shortly thereafter the NEB decided to conduct a review, stating that it had acceded to the applicants' arguments. The meeting and the way it was conducted were unfair to the applicant and others involved in the original proceeding who did not have a reasonable or fair opportunity to address the issue of whether the review should take place.

The participation of the Chairman and Vice-Chairman in the meeting, given what was discussed and their participation in the decision to review, gave rise to a reasonable apprehension of bias. They should be prohibited from participating in any review or rehearing. It would not be appropriate to prohibit the other NEB members from participating in a review just because they received minutes of the meeting.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

National Energy Board Act, R.S.C., 1985, c. N-7, ss. 3(1) (as am. by S.C. 1990, c. 7, s. 3), 4, 6 (as am. *idem*, s. 4), 7(2), 8(*b*), 11, 21 (as am. *idem*, s. 10).

CASES JUDICIALLY CONSIDERED

APPLIED:

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170; (1990), 75 D.L.R. (4th) 385; [1991] 2 W.W.R. 145; 2 M.P.L.R. (2d) 217; 69 Man. R. (2d) 134; 46 Admin. L.R. 161; 116 N.R. 46; *Energy Probe v. Atomic Energy Control Board*, [1984] 2 F.C. 227; (1984), 8 D.L.R. (4th) 735; 5 Admin. L.R. 165; 13 C.E.L.R. 66; 43 C.P.C. 13 (T.D.); affd [1985] 1 F.C. 563; (1984), 15 D.L.R. (4th) 48; 11 Admin. L.R. 287; 13 C.E.L.R. 162; 56 N.R. 135 (C.A.).

COUNSEL:

J. H. Smellie and *D. K. Wilson* for applicant CNG Transmission Corporation.
Nicol J. Schultz and *Susan Brown* for intervenor Tennessee Gas Pipeline Company.
John J. Marshall, Q.C. for respondent St. Clair Pipelines Limited.
H. G. Intven and *Robert B. Cohen* for respondent TransCanada PipeLines Limited.
T. Bradbrooke Smith, Q.C., T. Gregory Kane and *Rowland J. Harrison* for respondents Rochester Gas & Electric Corporation and ANR Pipeline Company.

règles et à la politique de l'ONÉ; des questions de fond importantes ont été abordées, des arguments ont été invoqués à l'appui de la position des représentants et des idées ont été avancées sur la manière dont l'ONÉ devrait procéder, c'est-à-dire, entreprendre une révision de sa propre initiative. Quelques jours plus tard, une demande de révision a été déposée et peu de temps après, l'ONÉ a décidé d'y donner suite et a affirmé qu'il avait retenu les arguments des requérantes. La réunion et la manière dont elle s'est déroulée étaient inéquitables à l'égard de la requérante et d'autres parties à l'instance originale qui n'avaient pas eu une occasion raisonnable ou équitable de se prononcer sur l'opportunité de la révision.

La participation du président et du vice-président de l'ONÉ à la réunion, compte tenu de ce qui a été discuté, et leur participation à la décision de procéder à la révision, pouvait susciter une crainte raisonnable de partialité. Il y a lieu de leur interdire de participer à toute révision ou de procéder à une nouvelle audition de l'affaire. Il n'est pas opportun d'interdire aux autres membres de l'ONÉ de participer à une révision uniquement parce qu'ils ont reçu le procès-verbal de la réunion.

LOIS ET RÈGLEMENTS

Loi sur l'Office national de l'énergie, L.R.C. (1985), chap. N-7, art. 3(1) (mod. par. L.C. 1990, chap. 7, art. 3), 4, 6 (mod., idem, art. 4), 7(2), 8*b*), 11, 21 (mod., idem, art. 10).

JURISPRUDENCE

DÉCISIONS APPLIQUÉES:

Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville), [1990] 3 R.C.S. 1170; (1990), 75 D.L.R. (4th) 385; [1991] 2 W.W.R. 145; 2 M.P.L.R. (2d) 217; 69 Man. R. (2d) 134; 46 Admin. L.R. 161; 116 N.R. 46; *Enquête énergie c. Commission de contrôle de l'énergie atomique*, [1984] 2 C.F. 227; (1984), 8 D.L.R. (4th) 735; 5 Admin. L.R. 165; 13 C.E.L.R. 66; 43 C.P.C. 13 (1re inst.); conf. par [1985] 1 C.F. 563; (1984), 15 D.L.R. (4th) 48; 11 Admin. L.R. 287; 13 C.E.L.R. 162; 56 N.R. 135 (C.A.).

AVOCATS:

J. H. Smellie et *D. K. Wilson* pour la requérante, CNG Transmission Corporation.
Nicol J. Schultz et *Susan Brown* pour l'intervenante, Tennessee Gas Pipeline Company.
John J. Marshall, c.r., pour l'intimée, St. Clair Pipelines Limited.
H. G. Intven et *Robert B. Cohen* pour l'intimée, TransCanada PipeLines Limited.
T. Bradbrooke Smith, c.r., T. Gregory Kane et *Rowland J. Harrison* pour les intimées, Rochester Gas & Electric Corporation et ANR Pipeline Company.

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Margery A. Fowke for respondent National Energy Board.

SOLICITORS:

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Fraser & Beatty, Ottawa, for intervenor Tennessee Gas Pipeline Company.
Macleod, Dixon, Calgary, for respondent St. Clair Pipelines Limited.
McCarthy, Tétrault, Toronto, for respondent TransCanada PipeLines Limited.
Stikeman, Elliott, Toronto, for respondents Rochester Gas & Electric Corporation and ANR Pipeline Company.
Law Branch National Energy Board, Calgary, for respondent National Energy Board.

The following are the reasons for order rendered in English by

CULLEN J.: This is an application by CNG Transmission Corporation (CNG) for *certiorari* quashing the decision of the respondent National Energy Board (NEB), dated August 9, 1991, to proceed with an internal review of an NEB decision dated July 4, 1991 in respect of Hearing Order GH-1-91 and for prohibition prohibiting 11 named members of the NEB from participating in any review or rehearing of the July 4, 1991 decision.

GROUNDS OF THE MOTION

The applicant submits that the circumstances surrounding the NEB's decision of August 9, 1991 give rise to a reasonable apprehension of bias on the part of the named NEB members and constitute a denial of natural justice and a breach of the requirements of fairness.

BACKGROUND

The facts of this case concern two groups of large pipeline companies which are competing for authorizations to transport gas to the upper New York state market. Both groups propose to transport gas received from the Canadian pipeline system of Trans-

Margery A. Fowke pour l'intimé, l'Office national de l'énergie.

PROCUREURS:

Osler, Hoskin & Harcourt, Ottawa, pour la requérante, CNG Transmission Corporation.
Fraser & Beatty, Ottawa, pour l'intervenante, Tennessee Gas Pipeline Company.
Macleod, Dixon, Calgary, pour l'intimée, St. Clair Pipelines Limited.
McCarthy, Tétrault, Toronto, pour l'intimée, TransCanada PipeLines Limited.
Stikeman, Elliott, Toronto, pour les intimées, Rochester Gas & Electric Corporation et ANR Pipeline Company.
Contentieux de l'Office national de l'énergie, Calgary, pour l'intimé, l'Office national de l'énergie.

Ce qui suit est la version française des motifs de l'ordonnance rendus par

LE JUGE CULLEN: La Cour est saisie de la requête de CNG Transmission Corporation (CNG) en vue d'obtenir un bref de *certiorari* annulant la décision de l'intimé, l'Office national de l'énergie (ONÉ) en date du 9 août 1991 de procéder à la révision administrative de sa propre décision en date du 4 juillet 1991, à l'égard de l'ordonnance d'audience GH-1-91 et un bref de prohibition interdisant aux onze membres nommés de l'ONÉ de participer à toute révision de la décision du 4 juillet 1991 ou de procéder à une nouvelle audition de l'affaire.

MOTIFS DE LA REQUÊTE

Selon la requérante, les faits qui ont entouré la décision rendue par l'ONÉ le 9 août 1991 donnent lieu à une crainte raisonnable de partialité de la part des membres nommés de l'ONÉ. Ils constitueraient également un déni de justice naturelle et un manquement à l'obligation d'agir équitablement.

HISTORIQUE

Les faits en l'espèce intéressent deux groupes d'importantes compagnies de pipelines qui se font concurrence pour être autorisés à transporter du gaz vers les marchés du nord de l'État de New York. Ces deux groupes proposent de transporter du gaz en pro-

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Canada PipeLines Limited (TransCanada). One group, consisting of TransCanada, ANR Pipeline Company (ANR), Rochester Gas & Electric Corporation (RG&E) and St. Clair Pipelines Limited. (St. Clair), proposes that the gas reach the market by means of a new pipeline in New York State called the Empire State Pipeline. This pipeline would connect with the TransCanada system at the Niagara River near Chippewa, Ontario. To reach the Niagara River connecting point, TransCanada proposes to construct a 20.6 km pipeline, known as the Blackhorse Extension, and related facilities. This proposal requires approvals from both the Canadian and U.S. energy regulatory authorities. The Empire facility would pass through market areas traditionally served by CNG. The second group, consisting of CNG and Tennessee Gas Pipeline Company (Tennessee), proposes that the gas be taken from the TransCanada system at an existing connecting point on the Niagara River near Lewiston, New York. In such a proposal the Blackhorse Extension would not be required but would require new compression facilities and expansion of existing pipeline facilities in New York. This proposal also requires regulatory approvals both in Canada and the U.S.

venance du réseau canadien de pipelines, exploité par TransCanada PipeLines Limited (TransCanada). L'un des groupes, composé des compagnies TransCanada, ANR Pipeline Company (ANR), Rochester Gas & Electric Corporation (RG&E) et St. Clair Pipelines Limited. (St. Clair), propose d'acheminer le gaz vers les marchés en question au moyen d'un nouveau pipeline dans l'État de New York appelé le «Empire State Pipeline». Ce pipeline serait relié au réseau TransCanada à la rivière Niagara, près de Chippewa (Ontario). Pour atteindre le point de jonction de la rivière Niagara, TransCanada propose de construire un pipeline de 20,6 km, nommé «prolongement de Blackhorse», et les installations connexes. Cette proposition requiert l'agrément des organismes canadien et américain de réglementation en matière d'énergie. L'installation «Empire» passerait dans des territoires dont les marchés avaient été approvisionnés jusque là par CNG. Le second groupe, composé de CNG et de Tennessee Gas Pipeline Company (Tennessee) propose d'acheminer le gaz du réseau TransCanada en passant par un point de jonction existant sur la rivière Niagara près de Lewiston (New York). Selon cette proposition, le prolongement de Blackhorse ne serait pas nécessaire. Cependant, il faudrait construire de nouvelles installations de compression et agrandir les installations actuelles du pipeline dans l'État de New York. Cette proposition requiert également l'agrément des organismes de réglementation au Canada et aux États-Unis.

On July 20, 1989, TransCanada filed an application with the NEB for authority to construct the Blackhorse Extension and related facilities. By Hearing Order No. GH-1-91 the NEB set the matter down for public hearing at Niagara Falls, Ontario for April 22, 1991. Evidence was heard in Niagara Falls between April 22 and 26, 1991, and oral argument was heard in Ottawa on May 6, 1991.

Le 20 juillet 1989, TransCanada a déposé une demande auprès de l'ONÉ pour obtenir l'autorisation de construire le prolongement de Blackhorse et les installations connexes. Dans l'ordonnance d'audience GH-1-91, l'ONÉ a convoqué une audience publique pour instruire l'affaire à Niagara Falls (Ontario), le 22 avril 1991. Les témoignages ont été recueillis à Niagara Falls entre le 22 et le 26 avril 1991 et les plaidoiries orales ont été entendues à Ottawa le 6 mai 1991.

In a letter dated January 28, 1991 (see exhibit B to affidavit of Henry Edwards Brown (Brown)), TransCanada, through a Mr. Varga, "requested the Board release its decision with reasons or alternatively its decision without reasons, the Board's Order and Conditions of approval relating thereto for the Blackhorse Extension. Application by July 3, 1991, with reasons

Dans une lettre datée du 28 janvier 1991 (voir la pièce B annexée à l'affidavit de Henry Edwards Brown (Brown)), TransCanada, représentée par un certain M. Varga, [TRADUCTION] «a demandé à l'Office de rendre sa décision motivée ou, à titre subsidiaire, sa décision non motivée, l'ordonnance de l'Office à l'égard du prolongement de Blackhorse

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to follow thereafter as soon as possible." Mr. Varga had cited a cogent rationale for this request.

On July 4, 1991, the NEB issued its decision (GH-1-91) denying TransCanada's application with reasons to follow.

On July 9, 1991, the U.S. Federal Energy Regulatory Commission (FERC) granted authorization for construction of the Empire State Pipeline conditional upon NEB approval of the Blackhorse extension. The FERC dismissed without prejudice CNG's and Tennessee's application for authorization to construct their proposed pipeline and facilities.

On July 11, 1991, Mr. Varga again pressed for an early release of reasons for decision preferably by July 22, 1991. He also indicated that TransCanada anticipated filing a review application (Exhibit D to affidavit of Brown).

On July 16, 1991, Mr. Edge, a consultant acting on behalf of Coastal Corp. (parent company of ANR), contacted the NEB Board Chairman to arrange a meeting with NEB officials on July 23, 1991. Mr. Edge is a former member and Chairman of the NEB. This meeting was eventually held on July 29, 1991.

On July 25, 1991 the NEB issued its reasons in respect of the GH-1-91 decision. The NEB indicated that its decision was based on a finding that the proposed Blackhorse extension facilities were not needed and that the New York markets could be served in a timely fashion by less expensive and environmentally superior means.

On July 29, 1991, Mr. Edge and representatives of The Coastal Group, RG&E and St. Clair (note: Mr. Bergsma is V.P. of Union Gas and appeared as a witness in the NEB hearing in his capacity as President of St. Clair), met with Chairman Priddle, Vice-Chairman Fredette and a member of the NEB's legal staff. The pipeline representatives expressed negative

ainsi que les conditions d'agrément qui s'y rapporteraient, et ce, avant le 3 juillet 1991, en publiant ses motifs ultérieurement, dès que possible». M. Varga avait invoqué des motifs convaincants au soutien de cette demande.

Le 4 juillet 1991, l'ONÉ a rendu sa décision (GH-1-91) par laquelle il rejetait la demande de TransCanada, motifs à suivre.

Le 9 juillet 1991, l'organisme de réglementation américain, la Federal Energy Regulatory Commission (FERC) autorisait la construction de l'«Empire State Pipeline», sous réserve de l'agrément, par l'ONÉ du prolongement de Blackhorse. La FERC a rejeté, sous toutes réserves, la demande d'autorisation que CNG et Tennessee avaient faite pour construire le pipeline et certaines installations.

Le 11 juillet 1991, M. Varga a encore une fois prié l'ONÉ de communiquer les motifs de sa décision le plus tôt possible, de préférence avant le 22 juillet 1991. Il a également fait savoir que TransCanada prévoyait déposer une demande de révision (pièce D annexée à l'affidavit de Brown).

Le 16 juillet 1991, M. Edge, conseil au service de Coastal Corp. (la compagnie mère d'ANR), a communiqué avec le président de l'ONÉ pour organiser une réunion avec des fonctionnaires de l'ONÉ le 23 juillet 1991. M. Edge est un ancien membre et président de l'ONÉ. Cette réunion a finalement été tenue le 29 juillet 1991.

Le 25 juillet 1991, l'ONÉ a publié ses motifs à l'égard de la décision GH-1-91. L'Office a fait savoir que sa décision s'appuyait sur une conclusion selon laquelle les installations proposées du prolongement de Blackhorse n'étaient pas nécessaires et selon laquelle les marchés new-yorkais pouvaient être approvisionnés en temps utile par des moyens moins coûteux et moins dommageables pour l'environnement.

Le 29 juillet 1991, M. Edge et des représentants du groupe Coastal, RG&E et St. Clair (nota: M. Bergsma est vice-président de Union Gas et a comparu comme témoin à l'audience de l'ONÉ en sa qualité de président de St. Clair) ont rencontré le président Priddle, le vice-président Fredette et un membre du service juridique de l'ONÉ. Les représentants des

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views and reactions to the NEB's decision; they made representations on aspects of the case and expressed the view that the FERC decision was a changed circumstance upon which the GH-1-91 decision was based and therefore a review of the decision was warranted. Mr. Edge proposed that the NEB initiate a review on its own volition. The Chairman and Vice-Chairman indicated that they did not think it likely that the NEB would initiate such a review. It was then agreed that those corporations represented at the meeting could submit a section 21 review application in which they could request that the review process be expedited by the NEB. This expeditious review would be achieved by dispensing with the two-step review process and proceeding directly with a review on the merits with a short but fair comment period. At the outset of the meeting Mr. Priddle agreed to report back to the members of the NEB on the results of the meeting. A few days later, the 11 members named in this motion received a summary of the meeting.

compagnies de pipelines ont exprimé des opinions et des réactions défavorables à la décision de l'ONÉ. Ils ont également présenté des observations sur certains aspects de l'affaire et ont déclaré que la décision de la FERC constituait un fait nouveau par rapport à ceux sur lesquels la décision GH-1-91 était fondée, si bien qu'il y avait lieu de réviser la décision. M. Edge a suggéré que l'ONÉ entreprenne une révision de sa propre initiative. Le président et le vice-président ont fait savoir que, selon eux, il était peu probable que l'ONÉ agisse en ce sens. Il a ensuite été entendu que les compagnies représentées à la réunion pourraient présenter une demande de révision fondée sur l'article 21 dans laquelle elles pourraient demander que l'ONÉ accélère le processus de révision. Cette révision pourrait être accélérée si l'on se dispensait du processus de révision en deux étapes pour procéder directement à une révision quant au fond au cours de laquelle les parties disposeraient d'une période courte mais équitable afin de faire des commentaires. Au début de la réunion, M. Priddle avait accepté de communiquer les résultats aux autres membres de l'ONÉ. Quelques jours plus tard, les onze membres nommés dans la présente requête ont reçu un résumé de la réunion.

On August 2, 1991, TransCanada, on behalf of itself, ANR, St. Clair and RG&E filed an application with the NEB for review of the GH-1-91 decision, pursuant to section 21 of the *National Energy Board Act* [R.S.C., 1985, c. N-7 (as am. by S.C. 1990, c. 7, s. 10)] (the Act). The applicants relied on the FERC decision as a changed circumstance to justify the review. The applicants also requested, on the grounds of urgency, that the Board dispense with the two-stage review process contemplated in Part V of the Board's Draft Rules of Procedure.

Le 2 août 1991, TransCanada, agissant en son propre nom et pour le compte d'ANR, St. Clair et RG&E, a déposé une demande auprès de l'ONÉ pour faire réviser la décision GH-1-91, en application de l'article 21 de la *Loi sur l'Office national de l'énergie* [L.R.C. (1985), chap. N-7 (mod. par L.C. 1990, chap. 7, art. 10)] (la Loi). Les requérants ont fait valoir que la décision de la FERC constituait un fait nouveau qui justifiait la révision. Invoquant l'urgence, les requérants ont également demandé que l'Office se dispense de suivre le processus de révision en deux étapes visé par la Partie V des Règles de procédure de l'Office dans leur forme provisoire.

Although CNG and Tennessee received no formal notice, they did receive a copy of TransCanada's review application and wrote to the NEB requesting a reasonable and fair opportunity to address the issue of whether a review should take place at all.

Bien que CNG et Tennessee n'aient pas été officiellement avisées, elles ont reçu une copie de la demande de révision de TransCanada et elles ont demandé par écrit à l'ONÉ de leur accorder une occasion raisonnable et équitable de se prononcer sur l'opportunité même d'une révision.

No response was received to this request, but on August 9, 1991, the NEB decided to abridge the

Cette demande est restée sans réponse. Cependant, le 9 août 1991, l'ONÉ a décidé d'abréger le proces-

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review process and advised that it had been "persuaded by the applicants' arguments" that a review was justified.

ISSUES

The decision being attacked is the decision of August 9, 1991 to abridge the review process and initiate a review of the merits of the GH-1-91 decision. Essentially what has to be determined is whether this decision should be quashed on the basis that the NEB's conduct with respect to the July 29 meeting with certain pipeline representatives raises a reasonable apprehension of bias on the part of the NEB or constitutes a denial of natural justice and a breach of the requirement of fairness as a result of the breach of the *audi alteram partem* principle and whether prohibition should issue against any or all members of the NEB.

APPLICANT'S POSITION

The applicant CNG submits that in hearing and deciding on the Blackhorse extension the NEB clearly exercised a quasi-judicial function and is subject to the rules of natural justice and procedural fairness and that it is equally clear that the NEB performs a quasi-judicial function when conducting a review or rehearing application pursuant to section 21. Therefore, the NEB and its members must be seen to act impartially. All parties must be given a fair opportunity to make representations. The NEB must not hear evidence or representations of one side behind the back of others.

The applicant argues that the circumstances are such as to give rise to a reasonable apprehension of bias. At the meeting of July 29 advice was given on important underpinnings of the very application that was filed with the NEB on August 2, 1991. The significance of this advice, according to the applicant, is evident in the structure of the August 2 application for review which essentially mirrored the proposal advanced by Mr. Priddle and Mr. Fredette at the private meeting on July 29. Further, that a reasonable person can only conclude that the decision of Mr. Priddle, Mr. Fredette and the other members of the

sus de révision et a fait savoir qu'il avait été [TRADUCTION] «persuadé par les arguments des requérants» qu'une révision était justifiée.

LES QUESTIONS EN LITIGE

La requérante conteste la décision du 9 août 1991 d'abréger le processus de révision et d'entreprendre la révision de la décision GH-1-91 quant au fond. Essentiellement, la Cour doit statuer s'il y a lieu d'annuler cette décision au motif que la manière dont l'ONÉ avait agi en participant à la réunion du 29 juillet avec certains représentants des compagnies de pipelines soulève une crainte raisonnable de partialité de sa part ou constitue un déni de justice naturelle et un manquement à l'obligation d'agir équitablement du fait qu'il n'a pas respecté le principe *audi alteram partem*. Enfin, la Cour doit décider s'il y a lieu de décerner un bref de prohibition contre les membres de l'ONÉ, ou certains d'entre eux.

THÈSE DE LA REQUÉRANTE

La requérante CNG prétend que l'ONÉ exerçait manifestement une fonction quasi judiciaire lorsqu'il a entendu les parties au sujet du prolongement Blackhorse et lorsqu'il a statué à cet égard, si bien qu'il est assujetti aux règles de la justice naturelle et de l'équité procédurale. Selon elle, il est également clair que l'ONÉ exerce une fonction quasi judiciaire lorsqu'il est saisi d'une demande de révision ou de nouvelle audition en application de l'article 21. Par conséquent, l'ONÉ et ses membres doivent visiblement agir sans partialité. Il faut donner à toutes les parties une occasion équitable de présenter des observations. L'ONÉ ne doit pas entendre des témoignages ou des observations d'une partie à l'insu des autres.

Selon la requérante, les faits en l'espèce soulèvent une crainte raisonnable de partialité. En effet, à la réunion du 29 juillet, des membres de l'Office ont fourni des conseils sur des matières qui se sont avérées être des assises importantes de la demande déposée auprès de l'ONÉ le 2 août 1991. Selon la requérante, l'importance de ces conseils ne fait pas de doute vu la manière dont la demande de révision du 2 août a été rédigée, laquelle reprenait pour l'essentiel la proposition avancée par MM. Priddle et Fredette à la réunion à huis clos du 29 juillet. En outre, selon la requérante, une personne raisonnable est nécessaire-

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NEB who received the notes of the private meeting may have been influenced by the course of conduct leading to the August 9 decision. The NEB stated that it had been "persuaded by the applicants' arguments" that a review was warranted, to which the applicant CNG asked the question "which arguments", those advanced at the private meeting or in the application for review?

The applicant CNG also submits that the NEB's course of conduct breached the principle of *audi alteram partem* in that the NEB heard evidence and representations from one side behind the back of the other. The applicant maintains that the NEB gave no opportunity to interested parties, such as CNG, to address the preliminary issue of whether the GH-1-91 decision should be reviewed, as is normally required by the Board's Draft Rules.

The applicant also alleges that the events took place in the face of established external and internal policies of the NEB regarding contact by outside parties with the NEB or its members, which include that NEB members or staff never discuss the merits of a particular application or offer an opinion on the likelihood of success of an application as these are matters upon which the NEB must adjudicate and decide.

The applicant maintains that by virtue of their participation in the private meeting, their gratuitous advice on important underpinnings of the application for review, which was formally submitted a few days later, and their active participation in the August 9 decision, Mr. Priddle and Mr. Fredette must be disqualified from participating in any review or rehearing of the GH-1-91 decision. Further, that in the circumstances, the disqualification should be extended to those additional individuals named in the notice of motion.

RESPONDENTS' POSITION

The various respondents have submitted separate arguments, which are basically similar. All submit

ment amenée à conclure que la décision de M. Priddle, M. Fredette et les autres membres de l'ONÉ qui ont reçu les notes de la réunion à huis clos a pu être influencée par la conduite des parties jusqu'à la décision du 9 août. L'ONÉ a affirmé qu'il avait été [TRADUCTION] «persuadé par les arguments des requérants» qu'une révision était justifiée. Or, la requérante CNG s'est demandée de quels arguments il s'agissait: ceux qui avaient été avancés à la réunion à huis clos ou ceux qui étaient énoncés dans la demande de révision?

La requérante CNG prétend également qu'en agissant comme il l'a fait, l'ONÉ a violé le principe *audi alteram partem* dans la mesure où il a entendu des témoignages et des observations d'une partie à l'insu de l'autre. La requérante soutient que l'ONÉ n'a donné aucune occasion aux parties intéressées, notamment CNG, de se prononcer sur la question préliminaire relative à l'opportunité de réviser la décision GH-1-91, comme l'exigent normalement les Règles de l'Office dans leur forme provisoire.

La requérante allègue également que l'ONÉ a agi contrairement aux politiques qu'il avait lui-même établies à l'égard de ses propres membres et de ses rapports avec les tiers, notamment le cas où ces derniers communiquent avec l'Office ou ses membres. Ainsi, selon ces politiques, les membres ou les employés de l'ONÉ ne doivent jamais discuter du fond d'une demande donnée, ni donner un avis sur l'issue de celle-ci puisqu'il s'agit là de questions sur lesquelles l'ONÉ doit statuer.

La requérante soutient que de par leur participation à la réunion à huis clos, leurs conseils gratuits sur des matières qui se sont avérées être des assises importantes de la demande de révision officiellement présentée quelques jours plus tard et leur participation active à la décision du 9 août, MM. Priddle et Fredette doivent être dessaisis de toute révision de la décision GH-1-91 ou de toute nouvelle audition de l'affaire. En outre, vu les circonstances, les autres personnes nommées dans l'avis de requête devraient également être dessaisies de l'affaire.

THÈSE DES INTIMÉS

Les divers intimés ont chacun présenté des arguments distincts, lesquels reviennent essentiellement

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that the decision to initiate a review of the GH-1-91 decision was not a decision or order of an administrative nature required by law to be made on a judicial or quasi-judicial basis. They have characterized the decision as procedural and preliminary in nature, as interim with no final rights, privileges or licences affected. The question whether GH-1-91 should be varied or rescinded remains to be determined in the NEB's ongoing review proceeding. As such, the NEB is not required to hold hearings in these matters. At worst, it is submitted that the NEB was obliged to comply with the duty of fairness. TransCanada maintains that the rules of procedural fairness, including the *audi alteram partem* rule (it would follow that reasonable apprehension of bias would also be included), generally do not apply to preliminary decisions. TransCanada argues that the decision to initiate the review would not have an important impact on CNG or the other parties because they would have a full opportunity to participate in the review proceeding to attempt to persuade the NEB that the decision should not be changed. At most the applicant CNG has lost its right to have "two or more kicks at the can". Therefore, no substantive rights were lost. The respondents add that interested parties were served with the application for review, which included the request to abridge the review procedure, and therefore were afforded an opportunity to respond and comment on this request.

au même. Tous prétendent que la décision d'entreprendre une révision de la décision GH-1-91 ne constituait pas une décision ou une ordonnance de nature administrative qui devait être rendue conformément à un processus judiciaire ou quasi judiciaire en vertu d'une règle de droit. Selon eux, la décision était d'ordre procédural et préliminaire. En outre, elle était provisoire, de sorte qu'aucun droit, privilège ou autorisation n'avait été définitivement touché. Il appartient toujours à l'ONÉ de décider, dans le cadre de l'instance de révision en cours s'il y a lieu de modifier ou d'annuler la décision GH-1-91. Comme tel, l'ONÉ n'est pas obligé de tenir des audiences sur ces questions. Au pis aller, prétendent les intimés, l'ONÉ était tenu de respecter l'obligation d'agir équitablement. Selon TransCanada, les règles de l'équité procédurale, notamment la règle *audi alteram partem*, ne s'appliquent généralement pas à des décisions préliminaires (il en irait de même, par voie de conséquence, du critère de la crainte raisonnable de partialité). TransCanada plaide que la décision d'entreprendre la révision n'aurait pas de conséquences importantes à l'égard de CNG ou des autres parties dans la mesure où il leur serait tout à fait loisible de participer à l'instance de révision pour tenter de convaincre l'ONÉ de maintenir sa décision. La requérante CNG a, tout au plus, perdu son droit à plusieurs «essais». Par conséquent, la requérante n'a perdu aucun droit quant au fond. Les intimés ajoutent que les parties intéressées se sont fait signifier la demande de révision, laquelle comprenait la demande d'abréger la procédure de révision. Ainsi, elles ont eu l'occasion de répondre et de commenter cette demande.

It is also submitted that even if the principles of fairness are ordinarily applicable to applications to review or to rehear, the NEB has a discretion by virtue of Rule 5 to abridge those rules in special circumstances. In this case, the NEB simply chose to exercise its discretion under its own procedures and the respondents note that a reviewing Court should exercise caution in overruling the legitimate exercise of discretion by a specialized tribunal such as the NEB.

Les intimés prétendent également que même si les principes de l'équité s'appliquent normalement aux demandes de révision ou de nouvelle audition, l'ONÉ a le pouvoir discrétionnaire, en vertu de la Règle 5, d'abréger ces règles dans des cas particuliers. En l'espèce, l'ONÉ a simplement choisi d'exercer son pouvoir discrétionnaire à l'égard de sa propre procédure et les intimés font remarquer qu'une Cour appelée à exercer un contrôle judiciaire doit se garder de contrecarrer l'exercice légitime du pouvoir discrétionnaire d'un tribunal spécialisé comme l'ONÉ.

With respect to the issue of reasonable apprehension of bias, the respondent TransCanada maintains

En ce qui a trait à la question de la crainte raisonnable de partialité, l'intimé TransCanada soutient que

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that the mere fact that a Board member participated in a preliminary meeting of a procedural or investigative nature does not give rise to a reasonable apprehension of bias. It therefore follows that the receipt of minutes of such a meeting also does not raise a reasonable apprehension of bias. This respondent further maintains that the fact that the members present at the July 29 meeting may have had discussions with other NEB members who participated in the decision to initiate the review does not give rise to the reasonable apprehension of bias on the part of those other members so as to justify their exclusion from the review. The respondent argues that it would trivialize the principle *nemo judex in causa sua debet esse* to find a reasonable apprehension of bias in these circumstances. Moreover, it would unduly fetter tribunals, such as the NEB, which have a broad supervisory and regulatory mandate over an industry. The NEB should not be precluded from meeting with members of the industry or learning about significant developments relevant to decisions made.

le simple fait, pour un membre de l'Office d'avoir participé à une réunion préliminaire qui avait pour objet la procédure ou l'obtention de renseignements ne saurait susciter une crainte raisonnable de partialité. Par conséquent, le fait d'avoir reçu le procès-verbal de cette réunion ne saurait non plus susciter une telle crainte. Toujours selon cette intimée, le fait que les membres qui ont participé à la réunion du 29 juillet aient pu s'entretenir avec d'autres membres de l'ONÉ, lesquels ont participé à la décision d'entreprendre la révision, ne saurait susciter une crainte raisonnable de partialité, de la part de ces derniers, qui justifierait qu'ils soient exclus de la révision. Selon l'intimée, une conclusion selon laquelle ces faits justifient une crainte raisonnable de partialité priverait de tout son sens la maxime *nemo judex in causa sua debet esse*. En outre, une telle conclusion entraverait indûment les tribunaux administratifs chargés d'exercer un mandat général de surveillance et de réglementation à l'égard d'un secteur d'activité, comme c'est le cas de l'ONÉ. Il ne doit pas être interdit à l'ONÉ de rencontrer les membres du secteur d'activité visé, ni de prendre connaissance de développements importants sur les décisions qu'il doit prendre.

The respondents submit that CNG's allegation of the breach of the *audi alteram partem* rule only applies to the application for *certiorari* and not to prohibition as CNG and the other parties had a full opportunity to make their case on the matters discussed at the July 29 meeting during the course of the NEB's ongoing review proceeding. It is further submitted that the issuance of prohibition against all members of the NEB would frustrate the purposes of the Act. In summary, it is argued that the CNG application represents an attempt to judicialize the process of the NEB, particularly in respect of meetings held while no "relevant proceedings" were ongoing and in respect of a procedural or preliminary nature made in the course of fulfilling the NEB's mandate under the Act.

Les intimés prétendent que l'allégation de CNG selon laquelle il y a aurait eu violation de la règle *audi alteram partem* s'applique seulement à la demande de *certiorari* et non à la demande de prohibition puisque CNG et les autres parties ont eu toute latitude pour faire valoir leurs arguments au sujet des questions abordées à la réunion du 29 juillet pendant l'instance de révision en cours de l'ONÉ. Les intimés prétendent également que le fait de décerner un bref de prohibition contre tous les membres de l'ONÉ aurait pour effet de contrecarrer les objets de la Loi. En résumé, les intimés prétendent que la demande de CNG constitue une tentative de judiciarisation du processus de l'ONÉ, notamment à l'égard de réunions tenues alors qu'il n'y avait aucune [TRADUCTION] «instance pertinente» pendante et à l'égard de décisions d'ordre procédural ou préliminaire rendues pendant que l'ONÉ remplissait son mandat prévu par la Loi.

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STATUTORY CONTEXT—THE NATIONAL ENERGY BOARD

The NEB derives its powers from the *National Energy Board Act*, R.S.C., 1985, c. N-7, as amended. Section 11 stipulates that the NEB is a "court of record". It is given a broad mandate to discharge various functions under the Act, including the granting of authorizations to construct pipelines and related facilities. Subsection 3(1) [as am. by S.C. 1990, c.7, s. 3] of the Act provides that the NEB consist of not more than nine members appointed by the Governor in Council; in addition, up to six temporary members may be appointed at any one time (section 4). As of June 1, 1991, the following were members of the NEB: R. Priddle (Chairman); J. G. Fredette (Vice-Chairman); R. B. Horner, Q.C.; W. G. Stewart; D. B. Gilmour; A. Côté-Verhaaf; M. Musgrove; C. Bélanger; R. Illing; D. B. Smith (temporary member) and K. W. Vollman (temporary member). A quorum consists of three members, (subsection 7(2)). The Chairman is designated by the Governor in Council under section 6 [as am. *idem*, s. 4] of the Act as the chief executive officer of the NEB to have supervision over and direction of the work and staff of the NEB.

Section 21 of the Act empowers the NEB to review, vary or rescind any order or decision made by it or to rehear any application before deciding it.

Pursuant to section 8 of the Act, the NEB may make rules respecting, *inter alia*, the procedure for making applications, representations and complaints to the Board, the conduct of hearing and generally the manner of conducting any business before the Board, (paragraph 8(*b*)). The NEB's Draft Rules Part V provide that applications for review are required to be filed with the Secretary of the NEB and must be served on every person who was a party to the original proceeding. The party served then has 20 days in which to submit a written statement, file it and serve it. The applicant then has 10 days in which to submit a reply (Rules 41, 42 and 43). It is an established practice of the NEB, as prescribed by Rule 45 (Determination), to deal with applications for review in a two-step process. First, the NEB determines whether

CADRE LÉGISLATIF—L'OFFICE NATIONAL DE L'ÉNERGIE

L'ONÉ exerce ses pouvoirs en vertu de la *Loi sur l'Office national de l'énergie*, L.R.C. (1985), chap. N-7 et ses modifications. L'article 11 prévoit que l'ONÉ est une «cour d'archives». Son mandat général consiste à exercer diverses fonctions prévues par la Loi, notamment celle d'autoriser la construction de pipelines et d'installations connexes. Aux termes du paragraphe 3(1) [mod. par L.C. 1990, chap. 7, art. 3] de la Loi, l'ONÉ est composé d'au plus neuf membres nommés par le gouverneur en conseil; en outre, jusqu'à six membres temporaires peuvent être nommés à une époque donnée (article 4). Au 1er juin 1991, les personnes suivantes étaient membres de l'ONÉ: R. Priddle (président), J. G. Fredette (vice-président), R. B. Horner, c.r., W. G. Stewart, D. B. Gilmour, A. Côté-Verhaaf, M. Musgrove, C. Bélanger, R. Illing, D. B. Smith (membre temporaire) et K. W. Vollman (membre temporaire). Le quorum est constitué de trois membres, (paragraphe 7(2)). Le président est désigné par le gouverneur en conseil, en vertu de l'article 6 [mod., idem, art. 4] de la Loi, pour agir comme premier dirigeant de l'ONÉ. À ce titre, il en assure la direction et contrôle la gestion de son personnel.

L'article 21 de la Loi accorde à l'ONÉ le pouvoir de réviser, annuler ou modifier ses ordonnances ou décisions ou procéder à une nouvelle audition avant de statuer sur une demande.

En vertu de l'article 8 de la Loi, l'ONÉ peut établir des règles régissant notamment les modalités de présentation des demandes, observations et plaintes, le déroulement de ses audiences et, de façon générale, la manière de traiter les affaires dont il est saisi (alinéa 8*b*)). La Partie V des Règles de l'ONÉ dans leur forme provisoire prévoit que les demandes de révision doivent être déposées auprès de la secrétaire de l'ONÉ et doivent être signifiées à toutes les personnes qui étaient parties à l'instance originale. Ces parties ont ensuite vingt jours à compter de la signification pour présenter une déclaration écrite, la déposer et la faire signifier. Le requérant dispose alors de dix jours pour présenter une réponse (Règles 41, 42 et 43). Aux termes de la Règle 45 (Décision), l'ONÉ a pour pratique établie de traiter les demandes de

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a decision should be reviewed once it hears from interested parties, i.e., public comment on the question of whether the decision should be reviewed. Second, if it decides to review, the NEB then disposes of the application or determines the appropriate procedures to govern the conduct of that review. However, under Rule 5 of the Draft Rules, the NEB has the power to dispense with, vary or supplement any provisions of these Rules and under Rule 7 the NEB has the power to abridge the time prescribed in the Rules for the review.

COMMENTS

I agree with the respondent's view that the decision of August 9 to abridge the two-step review process in respect of the GH-1-91 decision is not quasi-judicial in nature but is a procedural decision. Therefore the question that I have to deal with is whether the NEB is obliged to comply with the principles of fairness and if so, to what extent does the fairness go? I disagree with TransCanada's argument that procedural fairness does not apply in the circumstances as the NEB's decision is a preliminary decision. I think the proper approach to resolving the question of whether procedural fairness applies is the approach noted by Sopinka J. in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at page 1191:

> The content of the rules of natural justice and procedural fairness were formerly determined according to the classification of the functions of the tribunal or other public body or official. This is no longer the case and the content of these rules is based on a number of factors including the terms of the statute pursuant to which the body operates, the nature of the particular function of which it is seized and the type of decision it is called upon to make. This change in approach was summarized in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879. I stated (at pp. 895-96):
>
> Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the

révision selon une procédure en deux étapes. Dans un premier temps, l'ONÉ décide s'il y a lieu de réviser une décision après avoir entendu les parties intéressées, c'est-à-dire les commentaires publics sur l'opportunité de réviser la décision. Dans un deuxième temps, s'il décide de réviser, l'ONÉ statue alors sur la demande ou décide des procédures appropriées qui régiront le déroulement de cette révision. Cependant, en vertu de la Règle 5 des Règles dans leur forme provisoire, l'ONÉ a le pouvoir de dispenser de l'application de ces Règles, de les modifier ou d'y suppléer. En vertu de la Règle 7, l'ONÉ a le pouvoir d'abréger les délais prescrits par les Règles en matière de révision.

COMMENTAIRES

Je partage l'avis de l'intimé selon lequel la décision du 9 août d'abréger la procédure de révision en deux étapes à l'égard de la décision GH-1-91 n'est pas de nature quasi judiciaire mais constitue plutôt une décision d'ordre procédural. Par conséquent, je dois décider si l'ONÉ est tenue de se conformer aux principes de l'équité et jusqu'où va cette obligation, le cas échéant. Je n'accepte pas l'argument de TransCanada selon lequel les règles de l'équité procédurale ne s'appliquent pas en l'espèce dans la mesure où la décision de l'ONÉ a été rendue à titre préliminaire. J'estime que la question de savoir si les règles de l'équité procédurale s'appliquent doit être résolue selon l'approche exposée par le juge Sopinka dans l'arrêt *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170, à la page 1191:

> Le contenu des règles de justice naturelle et de l'équité procédurale était autrefois déterminé en fonction de la classification des tâches du tribunal administratif ou d'un autre organisme ou fonctionnaire publics. Ce n'est plus le cas et le contenu de ces règles dépend désormais de plusieurs facteurs, dont les termes de la loi en vertu de laquelle agit l'organisme en question, la nature de la tâche particulière qu'il a à remplir et le type de décision qu'il est appelé à rendre. Ce changement d'approche se trouve résumé dans l'arrêt *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879, où j'affirme (aux pp. 895 et 896):
>
> Aussi bien les règles de justice naturelle que l'obligation d'agir équitablement sont des normes variables. Leur contenu dépend des circonstances de l'affaire, des dispositions législatives en cause et de la nature de la question à trancher. La distinction entre elles s'estompe donc lorsqu'on approche du bas de

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scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates. [Emphasis added.]

It has been argued that the principles of fairness normally applied in respect of NEB hearings into the merits of a case should not be applied with the same rigour to the process by which the NEB determines to rehear. I agree that the degree of procedural fairness to be applied in this case should be lower, but fairness should still apply. In the circumstances it can be argued that the applicant CNG has been prejudiced by the NEB decision in that the respondents ANR, St. Clair and RG&E have been effectively given two opportunities to make out their case, one of which took place privately and in the absence of any of the parties opposed in interest. Further, CNG has been denied the opportunity to address the issue of whether a review should take place.

The jurisprudence is clear on the fact that the rules of fairness cover the *audi alteram partem* rule and the *nemo judex* rule: *Energy Probe v. Atomic Energy Control Board*, [1984] 2 F.C. 227 (T.D.); affd by [1985] 1 F.C. 563 (C.A.). As Reed J. noted in the *Energy Probe* case, at page 234, "I have no doubt that the duty to act fairly as enunciated by the Supreme Court of Canada in the *Nicholson* case must include a requirement for an unbiased decision maker. Any other conclusion would undercut the whole concept of the requirement of a duty of fairness."

With respect to the question of reasonable apprehension of bias, there is no dispute that the issue is not whether the members named are actually biased (and counsel for the applicant made it quite clear they were not making such an allegation) but whether the circumstances could properly cause a reasonably well-informed person to have a reasonable apprehension of a biased appraisal or judgment by the

l'échelle dans le cas de tribunaux judiciaires ou quasi judiciaires et du haut de l'échelle dans le cas de tribunaux administratifs ou exécutifs. C'est pourquoi on ne détermine plus maintenant le contenu des règles à suivre par un tribunal en essayant de le ranger dans la catégorie de tribunal judiciaire, quasi judiciaire, administratif ou exécutif. Au contraire, on décide du contenu de ces règles en tenant compte de toutes les circonstances dans lesquelles fonctionne le tribunal en question. [Je souligne.]

Les intimés ont plaidé que les principes de l'équité qui s'appliquaient normalement à l'égard des audiences de l'ONÉ quant au fond d'une affaire ne devraient pas être appliqués avec la même rigueur au processus par lequel l'ONÉ décide de procéder à une nouvelle audition. Je reconnais que le degré d'équité procédurale à appliquer en l'espèce doit être moins élevé. Cependant, il fallait quand même agir équitablement. Dans le cas qui nous intéresse, on peut soutenir que la décision de l'ONÉ a causé un préjudice à la requérante CNG dans la mesure où les intimés ANR, St. Clair et RG&E se sont effectivement vu accorder deux occasions de faire valoir leur cause, dont l'une à huis clos et en l'absence des parties ayant des intérêts opposés aux leurs. Qui plus est, CNG s'est vu priver de l'occasion de débattre de l'opportunité d'une révision.

Selon la jurisprudence, il est clair que les règles de l'équité comprennent les règles *audi alteram partem* et *nemo judex*: *Enquête énergie c. Commission de contrôle de l'énergie atomique*, [1984] 2 C.F. 227 (1re inst.); confirmé par [1985] 1 C.F. 563 (C.A.). Comme l'a affirmé le juge Reed, à la page 234 de la décision *Enquête énergie*, «Je suis certain [sic] que l'obligation d'agir équitablement énoncée par la Cour suprême dans l'arrêt *Nicholson* doit comporter la condition que l'auteur d'une décision soit impartial. Toute autre conclusion saperait entièrement le concept de l'exigence d'une obligation d'équité».

En ce qui a trait à la question de la crainte raisonnable de partialité, toutes les parties admettent que la question en litige n'est pas de savoir si les membres nommés ont effectivement un parti pris. Les avocats de la requérante ont d'ailleurs tenu à préciser qu'ils ne faisaient aucune allégation en ce sens. Il s'agirait plutôt de décider si les faits en l'espèce sont susceptibles de susciter, chez une personne raisonnablement

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member, however unconscious or unintentional it might be.

The major problem with the NEB's decision is that the source of the idea to abridge the review procedure came from a group representing the losing pipeline interests during a private meeting with certain members of the NEB, notably the Chairman and the Vice-Chairman. Had the decision come from the NEB itself without any input from outside sources, it could not be subject to attack as the Act does allow for procedural changes.

It is clear, certainly, that had Chairman Priddle and Vice-Chairman Fredette met on July 29, 1991 with counsel for National Energy Board (NEB) to discuss the FERC decision, following which counsel's report was sent to all members of the NEB, such a meeting, and the consequential notification, was wholly within the powers given to the NEB. This would, in my view, be within the NEB's mandate and certainly it would have been appropriate if counsel's report stated that they had considered the FERC report and decided not to review the decision on their own volition, but would await any development that might be pursued by corporations under the provisions of section 21. No case could be made that the Court should interfere in those circumstances and if it did so it would clearly be judicializing the process of the NEB.

The real issue here is: did the meeting that was actually held on July 29, 1991 and initiated by Mr. Edge and attended by representatives of the Coastal Group, RG&E and St. Clair, warrant the Court's attention as suggested by the applicant and as disputed by the respondents. In my view, yes, bearing in mind that both parties accepted that the Court must consider all the circumstances. As indicated earlier, the FERC decision was made on July 9, 1991 and within the week Mr. Edge contacted the NEB Chairman to arrange a meeting with NEB officials for July 23, 1991. The Board's policy/rules require that all contacts with the Board be made through the Secretary. This policy is outlined in a NEB letter, dated

bien informée, une crainte raisonnable que le membre fera preuve de partialité, même inconsciente ou involontaire dans son évaluation ou son jugement.

Le principal défaut de la décision de l'ONÉ tient du fait que l'idée d'abréger la procédure de révision avait été proposée par un groupe qui représentait les compagnies de pipelines qui avaient perdu en première instance au cours d'une réunion à huis clos avec certains membres de l'ONÉ, notamment son président et son vice-président. Si l'ONÉ avait rendu la décision de sa propre initiative sans être influencé par des tiers, celle-ci n'aurait pas été susceptible de contestation puisque la Loi permet à l'Office de modifier sa procédure.

Si le président Priddle et le vice-président Fredette avaient rencontré l'avocate de l'ONÉ le 29 juillet 1991 pour discuter la décision de la FERC et qu'ensuite le rapport de l'avocate avait été envoyé à tous les membres de l'ONÉ, une telle rencontre et l'avis qui aurait suivi auraient sans aucun doute relevé entièrement des pouvoirs accordés à l'ONÉ. À mon avis, cette manière de procéder aurait été conforme au mandat de l'ONÉ et elle aurait certainement été appropriée si l'avocate, dans son rapport, avait énoncé qu'ils avaient examinés le rapport de la FERC et qu'ils avaient décidé de ne pas réviser la décision de sa propre initiative, mais qu'ils attendraient plutôt que les compagnies en cause prennent l'initiative en application de l'article 21. Dans ce cas, nul n'aurait pu demander à la Cour d'intervenir. En effet, une telle intervention reviendrait manifestement à judiciariser la procédure de l'ONÉ.

En l'espèce, la véritable question en litige est la suivante: la réunion qui a effectivement été tenue le 29 juillet 1991 à l'initiative de M. Edge et à laquelle ont participé des représentants du groupe Coastal, RG&E et St. Clair justifie-t-elle l'intervention de la Cour, comme le prétend la requérante et comme le conteste les intimés? À mon sens, il faut répondre par l'affirmative vu que les deux parties ont reconnu que la Cour devait examiner les faits dans leur ensemble. Comme il a été mentionné précédemment, la décision de la FERC a été rendue le 9 juillet 1991 et dans la semaine qui a suivi, M. Edge a communiqué avec le président de l'ONÉ pour organiser une réunion avec des fonctionnaires de l'ONÉ le 23 juillet 1991. Or, la

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April 23, 1980, (exhibit M to affidavit of Brown), addressed to all companies under the NEB's jurisdiction and specifically states:

> If for any reason representatives of the industry subject to the Board's jurisdiction wish to meet with the Board or a member, a communication should be addressed to the Secretary outlining the purpose of the meeting and the topics to be discussed. The communication and the Secretary's response would form part of the Board's public record.

Mr. Edge would have been aware of that and also aware of the fact that he was in clear violation of them when he contacted the Chairman directly. I suspect that if it had been anyone other than Mr. Edge, Mr. Priddle would have pointed out to him that any such contact should be made through the Secretary. This was not put to Mr. Edge and it is not surprising given the fact that he had a long and distinguished career with the Board, and I suspect Mr. Priddle responded as most objective observers would expect him to and did not put this admonition to Mr. Edge.

Further, a NEB memorandum dated July 21, 1987 (exhibit B to affidavit of Brown), directed to all staff from the then acting Secretary provides in part that:

> The Board has an obligation to make itself and its staff available for consultation with applicants on matters such as procedure, filing requirements, etc., but should never discuss the merits of a particular application or offer an opinion on the likelihood of success of an application, as these are matters upon which the Board must adjudicate and render a decision.

It is clear that Mr. Priddle and other Board members were apprehensive about a meeting before the NEB issued its reasons in respect of GH-1-91. In a letter dated August 30, 1991 to counsel for the applicant Mr. F. J. Morel, A/General Counsel, (exhibit R to affidavit of Brown), we found the following:

> You are correct in assuming that Board members other than the Chairman and Vice Chairman of the Board were aware of the

politique et les règles de l'Office exigent que toutes les communications qui lui sont destinées soient adressées à la secrétaire. Cette politique est énoncée dans une lettre de l'ONÉ en date du 23 avril 1980 (Pièce M annexée à l'affidavit de Brown) adressée à toutes les compagnies qui relèvent de la compétence de l'ONÉ. Cette politique est libellée en ces termes:

> [TRADUCTION] Si, pour quelque raison que ce soit, des représentants d'un secteur d'activité qui relève de la compétence de l'Office souhaitent rencontrer les membres de l'Office ou l'un d'eux, ils doivent s'adresser à la secrétaire en précisant le but de la réunion et les sujets qui y seront abordés. La demande et la réponse de la secrétaire font alors partie du dossier public de l'Office.

M. Edge devait connaître cette politique et devait également savoir qu'il y contrevenait manifestement lorsqu'il a communiqué directement avec le président. Or, si un autre que M. Edge avait tenté de communiquer avec lui de la sorte, je soupçonne que M. Priddle l'aurait informé qu'il devait passer par la secrétaire. M. Edge n'a pas été ainsi informé, ce qui n'est guère surprenant, au demeurant, puisqu'il avait longtemps occupé un poste important à l'Office. J'ai également l'impression que M. Priddle a réagi comme la plupart des gens auraient pu objectivement s'y attendre et qu'il n'a pas servi cet avertissement à M. Edge.

En outre, une note de service de l'ONÉ en date du 21 juillet 1987 (Pièce B annexée à l'affidavit de Brown), adressée à tout le personnel de la secrétaire par intérim de l'époque, prévoyait notamment ce qui suit:

> [TRADUCTION] L'Office et son personnel sont tenus d'informer les requérants sur tout ce qui touche la procédure, les exigences en matière de dépôt et les autres questions de cet ordre mais ne doivent jamais discuter du fond d'une demande donnée ou offrir un avis sur l'issue de celle-ci puisqu'il s'agit là de questions sur lesquelles l'Office doit statuer.

Il est clair que M. Priddle et d'autres membres de l'Office craignaient de participer à une réunion avant que l'ONÉ ne prononce ses motifs à l'égard de la décision GH-1-91. Dans une lettre datée du 30 août 1991 adressée à l'avocat de la requérante, Me F. J. Morel, avocat général adjoint, (Pièce R annexée à l'affidavit de Brown), nous avons relevé le passage suivant:

> [TRADUCTION] Vous avez raison de présumer que des membres de l'Office autres que le président et le vice-président avaient

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29 July meeting. However, I have ascertained that the opening paragraphs of the notes of the 29 July meeting that were provided to you, is [*sic*] not quite accurate when it refers to a brief discussion among members of the meeting prior to its taking place. In fact during an informal meeting of the Board that took place on 22 July 1991, the Chairman of the Board informed the members present at the meeting that Mr. C.G. Edge, acting on behalf of Coastal, had contacted the Administrative Assistant to the Chairman to request a meeting on 23 July with Board officials regarding the GH-1-91 decision. Members expressed the view that such a meeting could better take place after publication of the GH-1-91 reasons for decision on 25 July. The meeting requested by Mr. Edge was consequently postponed to 29 July 1991.

connaissance de la réunion du 29 juillet. Cependant, j'ai appris que les paragraphes introductifs des notes prises au cours de la réunion du 29 juillet qui vous ont été fournies ne sont pas tout à fait exacts dans la mesure où il y est mentionné que les membres auraient discuté brièvement entre eux de la réunion avant que celle-ci n'aie lieu. En fait, au cours d'une réunion officieuse de l'Office qui a eu lieu le 22 juillet 1991, le président a informé les membres qui y étaient présents que M. C.G. Edge, agissant au nom de Coastal, avait communiqué avec l'adjoint administratif du président pour demander la tenue d'une réunion le 23 juillet avec des fonctionnaires de l'Office au sujet de la décision GH-1-91. Les membres ont affirmé qu'il serait plus opportun de tenir une telle réunion après la publication des motifs de la décision GH-1-91, le 25 juillet. Par conséquent, la réunion demandée par M. Edge a été remise au 29 juillet 1991.

In my view it was wrong to have such a meeting unless Mr. Priddle was convinced that it was to discuss procedure only. The NEB has a powerful mandate and with it goes a heavy responsibility to be fair, not to favour one side to the detriment of the other, or not to seem to do so. A meeting to discuss procedure is appropriate, even, in my view, if held with only some of the participants and on the clear understanding that it is to discuss procedure only. Mr. Priddle had no way of knowing that they would be discussing other than procedure when he acquiesced to Mr. Edge's request for a meeting. However, upon receipt of the document handed in by Mr. Edge, entitled "Board Action", the Chairman, Vice-Chairman and counsel should have been aware that Mr. Edge was seeking more than procedural guidance. Secondly, members of the corporations expressed their negative reaction to the reasons that had been published by the Board. Other matters of substance were discussed and the introduction of any one of them should have been stopped or the meeting should have been cancelled. I will refer to these later.

À mon avis, il était inopportun de tenir une telle réunion si M. Priddle n'était pas convaincu qu'il y serait seulement question de procédure. L'ONÉ s'est vu confier un puissant mandat qui s'accompagne d'une lourde responsabilité d'agir équitablement, de ne pas favoriser une partie au détriment de l'autre et de ne pas donner cette impression. Il est à propos de tenir une réunion pour discuter de procédure et ce, à mon avis, même si quelques-unes des parties seulement y participent pourvu qu'il soit clairement entendu qu'il y sera question de procédure seulement. M. Priddle n'avait aucun moyen de savoir que des questions autres que la procédure seraient abordées lorsqu'il a acquiescé à la demande de M. Edge pour la tenue d'une réunion. Cependant, lorsqu'ils ont reçu le document que leur avait remis M. Edge, intitulé [TRADUCTION]«Mesures que devrait prendre l'Office», le président, le vice-président et l'avocate de l'Office auraient dû savoir que M. Edge cherchait à obtenir davantage que des directives en matière de procédure. De plus, les représentants des compagnies ont exprimé leurs réactions défavorables aux motifs publiés par l'Office. D'autres questions de fond ont été abordées. Or, il aurait fallu immédiatement cesser toute discussion à leur égard ou bien annuler la réunion. Je traiterai ces questions plus loin.

Given the importance of this meeting, it is appropriate that the report prepared by counsel for the NEB be reproduced here, along with a document headed "Board Action" "which was used by Mr. Edge for his presentation" (exhibit C to affidavit of Brown).

Vu l'importance de cette réunion, il convient de reproduire ci-dessous le rapport rédigé par l'avocate de l'ONÉ ainsi qu'un document intitulé [TRADUCTION] «Mesures que devrait prendre l'Office» [TRADUCTION] «lequel a été employé par M. Edge aux fins de sa présentation» (Pièce C annexée à l'affidavit de Brown).

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Blackhorse Meeting 29 July 1991

Representations from Messrs. Geoff Edge (Consultant), Jim Cordes (President, Coastal), John Bergsma (VP, Union) and David Laniak (Senior VP, RG&E)

Messrs. Mr. Priddle and Fredette and Ms. Fowke in attendance.

Mr. Priddle said that with the decision and reasons now published, a meeting can now appropriately take place. It has no formal status in the Board's processes. He would however report back to Members on the meeting which had been briefly discussed among them.

After receiving their reaction to the reasons (not positive) Cordes pointed out that FERC has now found that Tennessee is not a viable alternative, as it was when the panel made its decision. In their view this is new information which results in changed circumstances.

RG&E reiterated its position that Tennessee is not an acceptable transportation supplier. Tennessee was not interested in the expansion until RG&E started to look at it itself and expressed interest in becoming a part owner. RG&E questioned whether Tennessee could provide service without construction.

The parties emphasized the need for the facilities so that cogens could get financing.

They pointed out that NYPSC and FERC made decisions on the NY market and to have them overturned by another regulatory body in another jurisdiction is unfortunate. Edge put forward the proposition that normally a regulatory body respects another regulatory body's decision. He suggested that in this instance the Board should give weight to where the other regulatory action is taking place. He noted that the bulk of the facilities are in the USA. Parties wondered whether the panel could have reached the same decision if the Tennessee option was not an option.

Bergsma contrasted the NEB decision with the favourable FERC decision on the St. Clair connecting facilities. He went on to discuss the market and how several parties will now be looking for US gas because Canadian gas would not give them competitive diversity. Sourcing through the US is cheaper than alternative Canadian arrangements. End users have to make their arrangements now because they don't have the luxury of waiting any longer. They need approved transport as well as firm gas supply.

Edge wondered how the Board could evaluate the Canadian public interest without knowing what the US decision is: there may be something that needs balancing against the US deci-

[TRADUCTION] Réunion du 29 juillet 1991 au sujet du projet «Blackhorse»

Observations de MM. Geoff Edge (conseil), Jim Cordes (président de Coastal), John Bergsma (v-p de Union) et David Laniak (v-p directeur de RG&E)

Étaient présents: MM. Priddle et Fredette, M^me^ Fowke.

M. Priddle a affirmé qu'une réunion pouvait être régulièrement tenue du fait que la décision et les motifs de celle-ci avaient été publiés. Selon lui, la réunion ne revêtait aucun caractère officiel en ce qui concerne la procédure de l'Office. Cependant, il s'est engagé à faire un compte rendu de la réunion aux autres membres, lesquels en avaient brièvement discuté entre eux.

Après avoir entendu leurs réactions (défavorables) aux motifs de la décision, M. Cordes a fait remarquer que la FERC avait conclu que Tennessee ne représentait pas un choix viable, contrairement à ce qui était le cas au moment où l'Office avait rendu sa décision. À leur avis, il s'agissait là de faits nouveaux.

RG&E a réitéré sa position selon laquelle Tennessee n'était pas un transporteur acceptable. Tennessee ne s'était pas intéressée à l'expansion tant que RG&E n'avait pas commencé à examiner cette possibilité elle-même et exprimé son intérêt de devenir un copropriétaire. RG&E s'est demandée si Tennessee pouvait fournir le service si, par ailleurs elle ne pouvait pas construire les installations.

Les parties ont insisté sur le besoin de construire les installations pour assurer le financement des compagnies.

Elles ont signalé que la NYPSC et la FERC avaient rendu des décisions à l'égard du marché new-yorkais et qu'il était malheureux qu'un organisme réglementaire dans un autre ressort rende une décision contradictoire. M. Edge a affirmé que normalement, un organisme de réglementation respectait la décision d'un homologue. Dans le présent cas, selon lui, l'Office devrait accorder de l'importance au lieu où était exercé l'autre mesure de réglementation. Il a fait remarquer que la plupart des installations étaient situées aux États-Unis. Les parties se sont demandées si l'Office aurait rendu la même décision si le projet de la compagnie Tennessee n'était plus susceptible d'être réalisé.

M. Bergsma a comparé la décision de l'ONÉ à la décision favorable de la FERC à l'égard des installations de jonction St. Clair. Il a ensuite abordé la question des marchés et a affirmé que plusieurs parties choisiraient maintenant de se procurer leur gaz des États-Unis puisque le gaz canadien ne serait plus concurrentiel. Selon lui, il est moins cher de s'approvisionner aux États-Unis qu'au Canada. Les consommateurs doivent choisir leur source d'approvisionnement tout de suite car ils ne peuvent plus se permettre d'attendre davantage. Ils ont besoin d'un moyen de transport autorisé ainsi qu'une offre ferme de gaz.

M. Edge s'est demandé comment l'Office pouvait évaluer l'intérêt public canadien sans connaître la décision américaine: selon lui, il y avait peut-être lieu de soupeser certains facteurs à

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sion. He proposed that the Board initiate a review on its own motion to place the FERC decision on the record. This would save time which is of the essence. Edge's proposal is attached.

The members indicated that they did not think it likely that the Board would initiate a review on its own motion. It was agreed that the parties could submit a s. 21 application. Since a primary concern is timing they could request in that application that the review process be expedited: that the two-step process be done away with by the Board finding that there is *prima facie* evidence of changed circumstances and proceed directly to a review on the merits with a short (although fair) comment period.

There was, of course, no indication by members as to particular timing much less that the Board would go to an immediate review upon receiving an application. Fredette pointed out the importance of the applicants supplying a convincing explanation of the relevant FERC decision. (At the ANE dinner that evening, George Hugh indicated that TCPL has a review application in hand.)

BOARD ACTION:

- Initiate a review of the decision (s. 21(1)), of its own motion (s. 15(3)).
- A review under s. 21(1) is in the nature of an appeal. As such, it can be confined to the specific grounds giving rise to the review, without the need to reconsider the whole Blackhorse proceeding, and can be dealt with by the Board as a whole or a panel of its members.
- Take judicial notice of the FERC Decision, on the basis that it has, inter alia, denied certification of the alternative means by which the proposed markets can be served and has approved the Empire State Pipeline application.
- Notify parties that the Board will receive submissions on the issue of whether the FERC Decision is a changed circumstance that required review of the Blackhorse Decision and has, *inter alia*, rendered nugatory the Board's conclusion "that, through expansion of TransCanada's existing Niagara Line, the proposed markets can be served in a timely fashion by less expensive and environmentally superior means".
- Convene a proceeding on not more than two weeks' notice, to hear oral argument on this issue only.
- Alternatively, fix a two week period for written submissions.

la lumière de la décision américaine. Selon lui, l'Office devrait entreprendre une révision de sa propre initiative pour que la décision de la FERC soit consignée au dossier. En effet, le temps pressait, à son avis et cette mesure hâterait les choses. La proposition de M. Edge est annexée au présent rapport.

Les membres de l'Office ont affirmé qu'à leur avis, il était peu probable que celui-ci entreprît une révision de sa propre initiative. Il a été convenu que les parties pourraient présenter une demande fondée sur l'article 21. Puisque le temps pressait, elles pourraient demander à l'Office d'accélérer la procédure de révision, de dispenser de la procédure en deux étapes au motif qu'il existe une preuve *prima facie* de faits nouveaux et de procéder directement à une révision quant au fond où les parties disposeraient d'une période, courte mais équitable pour soumettre leurs commentaires.

Bien entendu, les membres n'ont pas précisé le temps que prendrait une telle procédure et ils n'ont pas affirmé, *a fortiori* que l'Office procéderait à une révision immédiate sur réception d'une demande. M. Fredette a signalé qu'il était important que les requérants fournissent une explication convaincante quant à la pertinence de la décision de la FERC. (Au cours du dîner de l'ANE le soir même, George Hugh a affirmé que la demande de TCPL était déjà rédigée).

MESURES QUE DEVRAIT PRENDRE L'OFFICE:

- Entreprendre une révision de la décision (art. 21(1)) de sa propre initiative (art. 15(3)).
- Une révision fondée sur l'art. 21(1) tient de la nature d'un appel. Comme tel, il est possible d'en limiter le cadre de manière à ce qu'elle porte uniquement sur les motifs particuliers qui y donnent lieu, sans qu'il ne soit nécessaire de réexaminer l'ensemble des procédures relatives au projet Blackhorse; elle peut être traitée par l'Office siégeant au complet ou par un comité de quelques-uns de ses membres.
- Prendre connaissance judiciaire de la décision de la FERC en tenant compte notamment du fait qu'elle a refusé d'autoriser les autres moyens par lesquels les marchés proposés pouvaient être approvisionnés et du fait qu'elle a autorisé la demande de «Empire State Pipeline».
- Aviser les parties que l'Office recevra leurs arguments sur la question de savoir si la décision de la FERC constitue un fait nouveau qui nécessite la révision de la décision «Blackhorse» et qu'elle a notamment rendu inopérante la conclusion de l'Office selon laquelle [TRADUCTION] «l'expansion du pipeline Niagara, déjà exploité par TransCanada permettra d'approvisionner les marchés proposés en temps utile par des moyens moins dispendieux et moins dommageables à l'environnement».
- Convoquer une audience après avoir donné un préavis d'au plus deux semaines pour entendre des plaidoiries orales sur cette question seulement.
- À titre subsidiaire, fixer une période de deux semaines pour recevoir des plaidoiries écrites.

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– Indicate if possible this week whether the Board will initiate a review, so that a formal application for review, if necessary, can be made expeditiously.

Unhappily, as there were no minutes of the meeting, we have no way of knowing precisely who dominated the meeting or who may have made the representations and what emphasis was placed on the various representations made by the respondents.

We do know, however, that Mr. Priddle began the meeting by stating that with the decision and reasons now published, "A meeting can now appropriately take place." He put all on notice that this meeting did not have a formal status in the Board's processes but that he would report back to the members "on the meeting which had been briefly discussed among them."

Next, I was somewhat taken aback to hear that the respondents made, and the Chairman and Vice-Chairman heard, negative comments on the reasons for the decision. One could hardly expect that they would be positive but I think one is entitled to assume that this should hardly be an item on the agenda dealing with procedure. Apparently Mr. Cordes felt it necessary to point out the decision of FERC. In my view, this is offensive because the Board is deemed to be fully apprised of FERC's decisions and particularly one so intimately involved with the Board's own decision. Again, this is hardly the time, place, or manner in which the issue of changed circumstances should be raised. The substantive issue raised by RG&E is even more inappropriate in these circumstances, particularly when CNG and Tennessee are not present to rebut these comments. The other substantive issue made is that: "The parties emphasized the need for the facilities so that cogens could get financing."

Again, in the next paragraph, the respondents are pointing out further issues of substance, namely, that the NEB's decision was in conflict with NYPSC and FERC, that it was unfortunate, and that normally a

– Aviser, cette semaine si possible, si l'Office entreprendra une révision pour qu'une demande officielle de révision, si nécessaire, puisse être présentée rapidement.

Malheureusement, la réunion n'a fait l'objet d'aucun procès-verbal, de sorte que nous n'avons aucun moyen de savoir précisément qui l'a dominée, ni de connaître les auteurs des observations qui y ont été présentées ou l'importance qui aurait été accordée aux diverses observations des intimés.

Cependant, nous savons que M. Priddle a ouvert la réunion en affirmant que [TRADUCTION] «(celle-ci) pouvait être régulièrement tenue» du fait que la décision et les motifs de celle-ci avaient été publiés. Il a avisé tous les participants que cette réunion ne revêtait aucun caractère officiel en ce qui concernait la procédure de l'Office mais qu'il en ferait un compte-rendu aux autres membres [TRADUCTION] «lesquels en avaient brièvement discuté entre eux».

Ensuite, j'ai été plutôt stupéfait d'entendre que les intimés avaient fait des commentaires défavorables au sujet des motifs de la décision et que le président et le vice-président les avaient entendus. Certes, l'on ne pouvait s'attendre à ce qu'ils s'en déclarassent satisfaits. Cependant, j'estime que l'on est en droit de présumer qu'il n'y avait certainement pas lieu à ce que cette question figure à l'ordre du jour d'une réunion en matière de procédure. Apparemment, M. Cordes croyait nécessaire de signaler la décision de la FERC. À mon avis, cette intervention était déplacée dans la mesure où l'Office est réputé être bien informé des décisions de la FERC, surtout une décision si étroitement liée à celle qu'avait lui-même rendu l'Office. Encore une fois, ce n'était ni le moment, ni l'endroit, ni la manière de soulever la question des faits nouveaux. La question de fond soulevée par RG&E était encore plus déplacée en l'occurrence, notamment parce que CNG et Tennessee n'étaient pas présentes pour réfuter ces commentaires. Les parties ont abordé une autre question de fond lorsqu'elles ont [TRADUCTION] «insisté sur le besoin de construire les installations pour assurer le financement des compagnies».

Encore une fois, au paragraphe suivant, les intimés soulèvent d'autres questions de fond, à savoir que la décision de l'ONÉ était en conflit avec celles de la NYPSC et de la FERC, que ceci était malheureux et

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regulatory body respects another regulatory body's decision. Throughout that whole paragraph we in effect have Mr. Edge making the case, not only for a review, but also what conclusions should be reached by the Board given the fact that FERC and NYPSC have declared the Tennessee option was not an option. Mr. Bergsma, for his part, "went on to discuss the market and how several parties will now be looking for US gas because Canadian gas would not give them competitive diversity. Sourcing through the US is cheaper than alternative Canadian arrangements." This whole paragraph indicates once again that the meeting was replete with substantive issues. Then we read where Mr. Edge wondered how the Board could evaluate the Canadian public interest without knowing what the United States decision was and then made the substantive point that the Board should review on its own volition.

It is also clear that a decision was taken by the Board, namely, that they would not be initiating a review on their own volition and then went on to suggest or recommend or point out the most expeditious way of getting the respondents' point of view across.

And finally we hear from Mr. Fredette that it is important for the applicants to supply a convincing explanation of the relevant FERC decision. This may have been obvious, as suggested by the respondents, but when the Vice-Chairman says it, it pretty well drives it home. The Chairman and the Vice-Chairman, and possibly counsel if she was consulted, reached the conclusion that the FERC decision was not a changed circumstance which would move them to review their decision on their own volition. They were not satisfied, and Mr. Fredette said that it was important that the applicants supply a convincing explanation of the relevant FERC decision.

There can be no question that this meeting and the conduct of it were unfair to the applicant and others. Of real concern to me are the following:

que normalement un organisme de réglementation respectait la décision d'un homologue. Tout au long de ce paragraphe, M. Edge se trouve en fait à présenter des arguments en faveur d'une révision et même les conclusions auxquelles l'Office devrait arriver vu que la FERC et la NYPSC avaient déclaré que le projet de Tennessee n'aurait pas lieu. Pour sa part, M. Bergsma a [TRADUCTION] «ensuite abordé la question des marchés et a affirmé que plusieurs parties choisiraient maintenant de se procurer leur gaz des États-Unis puisque le gaz canadien ne serait plus concurrentiel. Il serait moins cher de s'approvisionner aux États-Unis qu'au Canada». Tout ce paragraphe montre encore une fois que plusieurs questions de fond avaient été abordées au cours de cette réunion. Nous lisons ensuite que M. Edge s'était demandé comment l'Office pouvait évaluer l'intérêt public canadien sans connaître la décision américaine et qu'il a ensuite soulevé la question de fond selon laquelle l'Office devrait entreprendre une révision de sa propre initiative.

Il est également clair que l'Office a rendu une décision, à savoir qu'il ne devrait pas entreprendre une révision de sa propre initiative. Il a ensuite suggéré, recommandé ou signalé aux intimés la manière la plus rapide de faire valoir leur position.

Enfin, M. Fredette signale qu'il serait important que les requérants fournissent une explication convaincante quant à la pertinence de la décision de la FERC. Comme l'ont suggéré les intimés, cela allait peut-être de soi. Cependant, venant de la part du vice-président, cette évidence tenait davantage d'un conseil qu'ils auraient intérêt à suivre. Le président, le vice-président et peut-être l'avocate de l'Office, dans l'hypothèse où elle avait été consultée, en sont arrivés à la conclusion que la décision de la FERC ne représentait pas un fait nouveau qui pourrait les inciter à réviser leur décision de leur propre initiative. Ils n'étaient pas convaincus, si bien que M. Fredette a affirmé qu'il était important que les requérants fournissent une explication convaincante quant à la pertinence de la décision de la FERC.

Il est indéniable que cette réunion et son déroulement étaient inéquitables à l'égard de la requérante et d'autres. Je suis notamment troublé par les faits suivants:

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1. Mr. Edge did not contact the Board through the Secretary but went directly to the Chairman, which was clearly contrary to rules and policy of the Board, and Mr. Edge knew it.

2. Mr. Edge had requested a meeting which would have been held under his timetable before the reasons for the order came out, seemingly an indication that they wanted to have some impact on the reasons and in all likelihood on the decision itself.

3. This was a meeting where significant, substantive issues were discussed and arguments advanced by the respondents in support of their strongly held views.

4. If the respondents wanted to know whether the FERC decision represented a changed circumstance which would move the Board to act under its own volition, a letter, through the Secretary, would have been sufficient to secure that information. It was inappropriate in my view to advance ideas about why they should do so and more particularly that it was done at this meeting.

5. If anything, the respondents made the obvious point that matters were in a mess as a result of two different decisions from two different tribunals. However, they then argued or represented that the NEB decision was the decision to be reviewed.

6. When the Board indicated it had decided to conduct a review, it stated that it was acceding to the "applicants' arguments" but as counsel for CNG pointed out, were these arguments made at the meeting or were they made on the application, or both?

7. The respondents left that meeting in the full knowledge that if they wanted a review they would have to initiate it themselves and also that they had to come up with a convincing explanation of the relevant FERC decision. They also had good reason to believe the process would be expedited, i.e., "proceed directly to a review on the merits with a short (although fair) comment period."

1. M. Edge n'a pas communiqué avec l'Office en s'adressant à la secrétaire. Il est plutôt entré directement en rapport avec le président, ce qui était manifestement contraire aux règles et aux politiques de l'Office, au su de M. Edge.

2. M. Edge avait demandé la convocation d'une réunion et il avait souhaité qu'elle fût tenue avant la publication des motifs de l'ordonnance, ce qui semble indiquer qu'il voulait influencer les motifs et, vraisemblablement, la décision elle-même.

3. D'importantes questions de fond ont été abordées au cours de cette réunion et les intimés y ont soulevé des arguments au soutien de leurs positions fermement arrêtées.

4. Si les intimés voulaient savoir si la décision de la FERC représentait un fait nouveau qui pourrait inciter l'Office à agir de sa propre initiative, une lettre adressée à la secrétaire aurait suffi pour obtenir ce renseignement. À mon avis, il était inopportun d'exposer les raisons pour lesquelles il devrait le faire, particulièrement que cela ait été fait à cette réunion.

5. Dans un premier temps, les intimés ont signalé que la situation était confuse du fait que deux tribunaux avaient rendu des décisions contradictoires, ce qui était l'évidence même. Cependant, ils ont ensuite présenté des arguments ou des observations selon lesquels il revenait à l'ONÉ de réviser sa décision.

6. Lorsque l'Office a fait savoir qu'il avait décidé d'entreprendre une révision, il a affirmé qu'il faisait droit aux arguments des requérants; cependant, comme l'ont signalé les avocats de CNG, l'Office ne précise pas s'il s'agissait des arguments présentés à la réunion, ceux qui figuraient dans la demande ou des deux.

7. Lorsqu'ils ont quitté cette réunion, les intimés savaient fort bien que s'ils voulaient une révision, ils devraient en prendre l'initiative eux-mêmes et qu'ils devraient également fournir une explication convaincante quant à la pertinence de la décision de la FERC. Ils avaient aussi de bonnes raisons de croire que les procédures seraient accélérées, c'est-à-dire que l'Office [TRADUCTION] «procéder(ait) directement à une révision quant au fond où les parties disposeraient

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8. The counsel's report was not sent to any of the parties, and only received by CNG August 22, 1991 (exhibit L) after Mr. Smellie's letter of 15 August 1991 (Exhibit K). The respondents made the point that nothing was secret and it was always available to the applicant if asked for. Here one cannot ask for something one doesn't know exists.

All of which can be described at best as an "extremely indiscreet mode of proceeding."

In light of the circumstances noted above, including the fact that the NEB had been on notice that TransCanada was likely to file a review application, I agree with the applicant that a reasonably informed person could envisage that the NEB was going to be asked at some point to make some decision and that there was some risk that the information discussed at the meeting could possibly find its way into such a decision.

After reviewing the arguments, I agree with the respondents that NEB members should not be precluded from meeting with members of the "industry" and that a reasonable apprehension of bias is not automatically triggered as a result of preliminary discussions or meetings. Clearly a situation where a party whose application for pipeline construction has been granted meets with NEB members to discuss when pipeline construction can commence would not warrant and should not warrant judicial interference. However, in the case before me we have a number of extraordinary circumstances which have raised a number of concerns and which I feel warrant intervention. As such, a determining factor in my coming to this decision was the context of and the overall substance of what transpired, bearing in mind the NEB's mandate as well as its policies and procedures. This was not merely a situation where an NEB member participated in a preliminary meeting of a procedural or investigative nature. Instead, we have a situation where the NEB is on notice that the "losing party" would be filing an application for a review; the Chairman and Vice-Chairman meet with certain pipeline representatives who make up the "losing

8. Le rapport de l'avocate de l'ONÉ n'a pas été envoyé aux parties. CNG ne l'a reçu que le 22 août 1991 (Pièce L), soit après la lettre de Me Smellie du 15 août 1991 (Pièce K). Les intimés ont plaidé que cette lettre n'avait rien de secret et que la requérante aurait toujours pu se la procurer si elle l'avait demandée. Il est toutefois impossible de demander une chose dont on ignore l'existence, comme en l'espèce.

Dans l'ensemble, la procédure suivie par l'ONÉ peut être qualifiée, au mieux, d'«extrêmement indiscrète».

À la lumière de ce qui précède, notamment le fait que l'ONÉ avait été avisé que TransCanada allait vraisemblablement déposer une demande de révision, je souscris à la thèse de la requérante selon laquelle une personne raisonnablement informée pouvait envisager que l'ONÉ allait être appelé, à un moment donné, à rendre une décision et qu'il y avait un risque que les sujets abordés pendant la réunion pouvaient peut-être influer sur celui-ci.

Après avoir examiné les arguments qui m'ont été présenté, je partage l'avis des intimés selon lesquels il ne devrait pas être interdit aux membres de l'ONÉ de rencontrer des représentants du secteur d'activité en cause et des discussions ou réunions préliminaires ne suscitent pas automatiquement de crainte raisonnable de partialité. Manifestement, une intervention judiciaire n'est pas justifiée dans un cas où la partie dont la demande de construction de pipelines a été accordée rencontre les membres de l'ONÉ pour discuter du moment où les travaux peuvent commencer. Cependant, en l'espèce, plusieurs faits extraordinaires amènent des questions suffisamment troublantes pour justifier l'intervention de la Cour, à mon avis. Ainsi, un des facteurs décisifs qui m'a amené à statuer en ce sens a été le contexte de cette rencontre et son contenu dans l'ensemble, eu égard au mandat de l'ONÉ, ses politiques et ses procédures. Il ne s'agissait pas simplement d'un cas où un membre de l'ONÉ avait participé à une réunion préliminaire en matière de procédure ou ayant pour objet de recueillir des renseignements. Il s'agissait plutôt d'une situation dans laquelle l'ONÉ avait été avisé que la «partie perdante» déposerait une demande de révision. Le

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parties"; this meeting is arranged through direct contact by the former Chairman, who is now acting on behalf of one of the pipeline companies, with the Chairman, which is contrary to the rules and policy of the NEB; significant and substantive issues are discussed; arguments are advanced in support of representatives' position and ideas are advanced as to how the NEB should proceed, i.e., that the NEB should initiate a review on its own volition. A few days later an application for review is filed and shortly after that the NEB decides to conduct a review and states that is has acceded to the applicants' (in the section 21 application) arguments.

Clearly the July 29 meeting and how it was conducted were unfair to the applicant and others involved in the original proceeding. Further, in the circumstances I do not think that the applicant and other interested parties can be said to have had a reasonable or fair opportunity to address the issue of whether the review should even take place.

I am also of the view that Messrs. Priddle and Fredette's participation in the July 29 meeting, given what was discussed at this meeting and their participation in the August 9 decision to proceed with a review of the GH-1-91 decision, gives rise to a reasonable apprehension of bias which a reasonably well-informed person could properly have, of a biased appraisal and judgment of the issue.

Therefore, for the reasons noted above, the application for *certiorari* will be granted quashing the decision of the NEB, dated August 9, 1991, to proceed with an internal review of the NEB decision dated July 4, 1991 in respect of Hearing Order GH-1-91.

With respect to the application for prohibition, on the basis of the evidence I cannot find that the named members of the NEB, other than Messrs. Priddle and Fredette, should be prohibited from participating in

président et le vice-président de l'Office ont rencontré certains représentants des compagnies de pipelines qui comptaient parmi les «parties perdantes». Cette réunion avait été tenue après que l'ancien président, qui agit maintenant pour le compte d'une des compagnies de pipelines, a communiqué directement avec le président, ce qui est contraire aux règles et aux politiques de l'ONÉ. Des questions de fond importantes ont été abordées au cours de cette réunion. Les représentants ont soulevé des arguments au soutien de leur position, en plus d'avancer des idées sur la manière dont l'ONÉ devrait procéder, c'est-à-dire entreprendre une révision de sa propre initiative. Quelques jours plus tard, ils ont déposé une demande de révision et peu de temps après, l'ONÉ a décidé d'y donner suite et a affirmé qu'il avait accueilli les arguments des auteurs de la demande fondée sur l'article 21.

Manifestement, la réunion du 29 juillet et la manière dont elle s'est déroulée étaient inéquitable à l'égard de la requérante et d'autres parties à l'instance originale. De plus, en l'espèce, je ne crois pas que l'on puisse dire que la requérante et les autres parties intéressées ont eu une occasion raisonnable ou équitable de se prononcer sur l'opportunité de la révision.

Je suis également d'avis que la participation de MM. Priddle et Fredette à la réunion du 29 juillet, compte tenu de ce qui y a été discuté et leur participation à la décision du 9 août de procéder à la révision de la décision GH-1-91, peut susciter, chez une personne raisonnablement bien informée, une crainte raisonnable que cette question sera évaluée et jugée avec partialité.

En conséquence, pour les motifs énoncés ci-dessus, la Cour décernera un bref de *certiorari* annulant la décision de l'ONÉ, en date du 9 août 1991, de procéder à une révision administrative de sa propre décision en date du 4 juillet 1991 à l'égard de l'ordonnance d'audience GH-1-91.

En ce qui a trait à la demande de prohibition, vu la preuve, je ne puis conclure qu'il y a lieu d'interdire aux membres nommés de l'ONÉ autres que MM. Priddle et Fredette de participer à une révision de la

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any review or rehearing of the July 4, 1991 decision. I agree with the respondents' position that the issuance of a writ of prohibition against the other NEB members would not be appropriate in the circumstances. Therefore, prohibition will be granted prohibiting Messrs. Priddle and Fredette from participating in any review or rehearing of the July 4, 1991 decision in respect of Hearing Order GH-1-91.

The applicant is entitled to its costs.

décision du 4 juillet 1991 ou de procéder à une nouvelle audition de l'affaire. Je souscris à l'argument des intimés selon lequel il ne serait pas opportun en l'espèce de décerner un bref de prohibition contre les autres membres de l'ONÉ. En conséquence, la Cour décernera un bref de prohibition interdisant à MM. Priddle et Fredette de participer à toute révision de la décision du 4 juillet 1991 à l'égard de l'ordonnance d'audience GH-1-91 ou de procéder à une nouvelle audition de l'affaire.

La requérante a droit à ses dépens.

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paras. 178 to 183

Federal Court | Cour fédérale

Date: 20240213

Docket: T-1274-23

Citation: 2024 FC 242

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Ottawa, Ontario, February 13, 2024

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

YAVAR HAMEED

Applicant

and

PRIME MINISTER AND MINISTER OF JUSTICE

Respondents

JUDGMENT AND REASONS

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I. Letter from Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023

[1] At its core, this matter concerns the following letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated, May 3, 2023 (English translation of Exhibit KKK of the Applicant's Record, Volume 1, as set out in Schedule A of this Judgment and Reasons):

> The Right Honourable Justin Trudeau
>
> Dear Prime Minister:
>
> As Chief Justice of Canada and Chairperson for the Canadian Judicial Council, I must express my deep concern with regard to the significant number of vacancies within Federal Judicial Affairs and the government's inability to fill these positions in a timely manner.
>
> The current situation is untenable, and I fear that this will result in a crisis for our justice system, which is already facing many challenges. Access to justice and the health of our democratic institutions are at risk.
>
> As you undoubtedly know, there are currently 85 vacancies within Federal Judicial Affairs across the country. Some courts have had to deal with a 10 to 15% vacancy rate for years now. It is also not uncommon for positions to remain vacant for several months, if not years, in some cases. As a concrete example, over half of the positions at the Manitoba Court of Appeal are currently vacant. Key chief justice and associate chief justice positions are also being filled at a very slow pace. In fact, there have recently been considerable delays in appointments to chief justice positions in a number of provinces, including Alberta, Ontario and Prince Edward Island. The chief justice of Manitoba position has been vacant for six months now, and the associate chief justice positions in the Court of King's Bench for Saskatchewan and the Superior Court of Quebec have been vacant for over a year. No clear explanation justifies these delays.
>
> It should be noted that the difficulties brought on by the judge shortage are exacerbating an already critical situation within several courts—namely a serious lack of resources due to chronic

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underfunding by the provinces and territories. However, while several factors explain the crisis currently facing our justice system, the appointment of judges in due course is a solution within reach that could help quickly and effectively improve the situation. Given this obvious fact and the critical situation we are faced with, the government's inertia regarding vacancies and the absence of satisfactory explanations for these delays are disconcerting. The slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice. In this context, these delays in appointments send a message that this is simply not a priority for the government.

On behalf of the Canadian Judicial Council, I can attest to the fact that chief justices and associate chief justices across the country are satisfied with the quality of recent appointments and are thrilled with the addition of new judge positions in recent budgets. We also recognize that your government has made efforts to establish a more independent, transparent and impartial appointment process for federally appointed judges. It would be unfortunate if the failure to improve the pace of federal judicial appointments across the country were to ultimately discredit this process.

I recently had the opportunity to meet with the Minister of Justice and discuss this matter with him. The Chief Justices also have very good relationships with the Minister and his office, and we are confident that he is willing to make every effort to remedy the problems I have outlined.

Despite all these efforts, it is imperative for the Prime Minister's Office to give this issue the importance it deserves and for appointments to be made in a timely manner. It is essential that the vacant positions within the judiciary be filled diligently to ensure that judicial branch functions properly. In the past, the Canadian Judicial Council has urged governments to make judicial appointments more quickly. This time, we have serious concerns that without concrete efforts to remedy the situation, we will soon reach a point of no return in several jurisdictions. The consequences will make headlines and have serious repercussions on our democracy and on all Canadians. This situation requires your immediate attention.

The positions that have been left vacant are having significant impacts on the administration of justice, the operations of our courts and the health of our judges. Canadian Judicial Council

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members recently took it upon themselves to provide a more comprehensive overview of the difficulties faced by their respective courts. The findings are appalling.

Despite all our judges' professionalism and dedication, the staffing shortage inevitably results in additional delays in hearing cases and rendering judgments. Chief justices have indicated that, because judges are overburdened, delays in setting cases are unavoidable and hearings need to be postponed or adjourned. What's more, even when cases are heard, judgments are slow to be rendered because judges need to spend more time sitting, leaving them less time to deliberate. The analysis framework in *R. V. Jordan*, 2016 SCC 27, with respect to the accused's right to be tried within a reasonable time pursuant to the *Canadian Charter of Rights and Freedoms*, also plays an important role in that regard. It provides that, before superior courts, criminal charges must be tried within 30 months, save in exceptional circumstances. If a trial has not ended within that timeframe, a stay of proceedings may be ordered. Many chief justices say that as part of their efforts to respect the timelines prescribed by Jordan, they are currently forced to choose the criminal matters that "deserve" to be heard most. Despite their best efforts, stays of proceedings are pronounced against individuals accused of serious crimes, such as sexual assault or murder, because of delays that are due, in part or in whole, to a shortage of judges. For example, the Court of King's Bench of Alberta has reported that over 22% of ongoing criminal cases are passing the 30-month deadline and that 91% of those cases involve serious and violent crimes. Furthermore, the necessary urgency in processing criminal cases means the courts' role in civil cases is being neglected. The justice system is consequently at risk of being perceived as useless for civil matters. These types of situations represent a failure of our justice system and are likely to fuel public cynicism and undermine their trust in our democratic institutions.

These ongoing vacancies also have a serious impact on judges themselves. Faced with a chronic work overload and increased stress, judges are increasingly going on medical leave, which has a domino effect on their colleagues, who then must carry an additional workload. It is also becoming difficult for judges of certain courts to find the necessary time to complete training, including training that is considered mandatory. This situation does not bode well for ensuring a healthy and thriving judiciary. If current issues persist, it could also become difficult to attract high-quality candidates for judge positions.

This is already the case in British Columbia.

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Richard Wagner

II. Summary and conclusions

[2] This is the Applicant's request for judicial resolution of a dispute between himself and the Chief Justice of Canada and Canadian Judicial Council on the one hand, and the Prime Minister and Minister of Justice on the other.

[3] By the foregoing letter, the Chief Justice of Canada and Canadian Judicial Council requested the Prime Minister to fill a very large number of vacant Superior Court and Federal Courts judicial positions across Canada.

[4] The requested number of vacancies have not been filled. While appointments were made over the last 8 months, during the same period new vacancies have been created by resignation or otherwise. This significant and unacceptably large number of vacancies remains essentially unchanged. The facts are there were 79 vacancies when this application was filed in June 2023, and 75 vacancies as of February 1, 2024 according to the Federal Commissioner of Judicial Affair's website [FCJA]: https://www.fja-cmf.gc.ca/appointments-nominations/judges-juges-eng.aspx.

[5] Neither the Prime Minister and two successive Ministers of Justice have remedied this critical situation in the 9 months since the request by our Chief Justice of Canada and Canadian Judicial Council.

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[6] With the greatest respect, the Court finds the Prime Minister and Minister of Justice are simply treading water. They have failed to take the actions requested by the Chief Justice of Canada and the Canadian Judicial Council. And with the greatest respect, they have also failed all those who rely on them for the timely exercise of their powers in relation to filling these vacancies. Also failed are all those who have unsuccessfully sought timely justice in the Superior Courts and Federal Courts across Canada.

[7] As a consequence, a point not contested, the Court finds the Prime Minister and Minister of Justice have refused the request made by the Chief Justice of Canada and Canadian Judicial Council.

[8] The Respondents offered no justification for their decision to refuse the request to fill these judicial vacancies.

[9] As a matter of well-established convention, also not disputed, the Prime Minister and Minister of Justice have effective and exclusive control over, and in the Court's view, they have the concomitant responsibility to appoint judges to the Superior Courts across Canada, and the Federal Courts. It is not doubted that no such appointments may be made without their advice and consent.

[10] Notably, the advice and consent of the Respondents must be directed to either the Governor General (by the Minister of Justice in the case of provincial Superior Court judges, or by the Prime Minister in the case of relevant Chief Justices), or to the Governor in Council (by

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the Minister of Justice in the case of judges of the Federal Courts or by the Prime Minister in the case of relevant Chief Justices): see *Democracy Watch v Canada (Attorney General)*, 2023 FC 31 [*Democracy Watch*] [per Southcott J].

[11] The level of vacancies is now, as the letter describes and which is not contested, at both a crisis and critical level. Other words used by the Chief Justice of Canada and Canadian Judicial Council to describe the impact of the ongoing failure to fill vacancies include “appalling” and “untenable.”

[12] The Court is given no explanation or justification by the Respondents of this untenable situation. Notably, the Respondents filed no evidence to dispute what I accept as expert opinions of both the Chief Justice of Canada and the Canadian Judicial Council. Their unequalled individual and collective experience, knowledge and expertise in relation to the state of the federally appointed judicial vacancies across Canada was not questioned in any way.

[13] In these circumstances, the Court finds no reason to discount or disregard the evidence and submissions of the Chief Justice of Canada and Canadian Judicial Council to the Respondents. I find the responsibilities of the Prime Minister and Minister of Justice to meaningfully engage their powers with respect to filling the critical and untenable level of judicial vacancies across our federal judiciary may not be ignored.

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[14] With the greatest respect, this Court faced with these assessments by such credible entities, accepts the views of the Chief Justice of Canada and the Canadian Judicial Council as set out in their letter to the Prime Minister.

[15] On this basis the Court has no hesitation in concluding the current level of vacancies is untenable, and at a minimum, requires the judicial response afforded in the following Judgment.

[16] The Court comes to this conclusion because the same constitutional convention giving the Respondents advice-giving responsibility respecting federal judicial appointments obviously entails their responsibility to fill judicial vacancies in a timely manner, that is, within a reasonable time. It would be absurd to suggest the “rule of law”, essential to the proper function of the nation and enshrined in the preamble to the *Constitution Act, 1982,* exists at the whim of the executive government. The rule of law may not be critically and negatively impacted simply by what the Court finds the Respondents’ unjustified and persistent failure to advise the Governor General and or Governor in Council to fill this critical and unacceptably high level of judicial vacancies.

[17] How long should it take to fill a sufficient number of vacancies? In the Court’s view the answer is plain and obvious: these vacancies must be materially reduced within a reasonable time to a reasonable level.

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[18] What is a reasonable or sufficient level of vacancies? The Court was provided with no reason the number of vacancies may not be reduced to the mid-40s: there were only 46 vacancies in the Spring of 2016, for example.

[19] That said, the number of vacancies in an ideal world should be very low, and it seems to me this is a matter to be determined by Parliament. In some cases it may be that all relevant vacancies must be filled, as where serious crimes are not prosecuted in a timely way such that victims, the public and accused are denied justice. That may not be possible in other cases, but as noted, no evidence was provided by the Respondents. This is a matter in respect of which the Respondents should obviously engage with the Chief Justice of Canada and relevant Chief Justices / Associate Chief Justices and in respect of which the Canadian Judicial Council, having come this far, should provide (as perhaps it has) specific guidance.

[20] By way of remedy, the Court may, and in this case will recognize and declare the constitutional convention that judicial vacancies on the provincial Superior Courts and Federal Courts must be filled within a reasonable time. The Court will make this declaration in its expectation that the number of vacant positions will be materially reduced to the mid-40s being the number of federal vacancies in Spring of 2016. In this manner, the Court expects the crisis and critical situation to be resolved.

[21] Specifically, the Court's declaration is:

> 1. All federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of

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> Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.
>
> 2. Appointments to fill judicial vacancies under section 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act* must be made within a reasonable time of the vacancy.
>
> 3. Appointments to fill current judicial vacancies are required for the reasons set out in the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023 set out in paragraph 1 and Schedule A to these Reasons for Judgment.
>
> 4. The Court makes Declarations 2 and 3 above in its expectation that the number of said judicial vacancies will be materially reduced in a reasonable time such that the total number of judicial vacancies returns to the mid-40s, that is, to the number of federal judicial vacancies in the Spring of 2016; in this manner the Court expects the untenable and appalling crisis, and critical judicial vacancy situation found by this Court as identified by the Chief Justice and Canadian Judicial Council will be resolved.

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[22] I encourage the parties, and or the Chief Justice of Canada and or the Canadian Judicial Council to seek further direction and relief from this Court in the event this Court's Judgment is not satisfied or in issue.

[23] I now turn to a number of legal issues raised by the parties, at the conclusion of which the Court's Judgment will issue.

III. The Application

[24] The Applicant applies for a writ of *mandamus* pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] to compel the Prime Minister and the Minister of Justice [Respondents] to appoint judges to fill vacancies in the superior courts across

Canada including the Federal Courts. By law, these appointments are to be filled either by the Governor General pursuant to section 96 of the *Constitution Act, 1867*, 30 & 31 Vict, c 3, reprinted in RSC 1985 [*Constitution Act, 1867*] in respect of Provincial Superior Court judges, or by the Governor in Council pursuant to section 5.2 of the *Federal Courts Act* in respect of judges of the Federal Court and Federal Court of Appeal [Federal Courts].

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[25] The Applicant asks that such vacancies be filled i.e., that appointments be made within certain timelines, namely within the later of three months of the date of this Court's Order, or within nine months of their having become aware the positions would be vacated, and does so by analogy to practices developed by this Court in immigration cases.

[26] In the alternative, the Applicant asks the Court to declare that:

> a. The Prime Minister and Minister of Justice are in violation of their duties to appoint judges to the vacancies in the superior courts under section 96 of the *Constitution Act, 1867*, and section 5. 2 of the *Federal Courts Act*; and
>
> b. A reasonable interpretation of the requirement to appoint judges in section 96 of the *Constitution Act, 1867*, and section 5.2 of the *Federal Courts Act* is that, absent exceptional circumstances, the appointments shall be made within nine months of the date of the applicable Minister becomes aware that a position will be vacated, or three months after a position is vacated, whichever is later.

[27] It is noteworthy that while the Prime Minister and Minister of Justice are named parties against whom relief is sought, the Applicant (who confirmed his position at the hearing) does not name either the Governor General or the Governor in Council as parties, notwithstanding it is

they who by the *Constitution Act, 1867* or *Federal Courts Act* respectively hold the legal power to make these appointments.

[28] While the Applicant filed evidence in support of his Application, including of course the letter from the Chief Justice of Canada and Canadian Judicial Council, the Respondents filed no evidence disputing the same. Indeed, the Respondents filed no evidence at all.

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[29] Instead, the Respondents raise and wholly rely on a number of procedural and technical objections, none of which - and with the greatest respect - the Court accepts.

IV. The Applicant

[30] The Applicant is a human rights lawyer in Ottawa. Called to the bar of Ontario 22 years ago, the Applicant regularly litigates in the Federal Court, the Ontario Superior Court of Justice, and Ontario's Court of Appeal. None of this is in dispute.

[31] In his affidavit, the Applicant states (and it is not disputed) that over the past several years he has experienced significant delays in litigation proceedings in the Superior Courts on behalf of vulnerable clients. In addition to this general information, which I accept, the Applicant provides concrete evidence of delay in the form of uncontested correspondence to him from the Ottawa Superior Court of Justice Trial Coordinator concerning a case of his that was adjourned in which the Trial Coordinator attributed the delay to the fact "[T]he court is experiencing a lack of judicial resources as of late." I accept this because the note to that effect is exhibited and is undisputed.

V. Applicant's facts on federal judicial vacancies are accepted

[32] The Applicant also set out the following material facts which the Court accepts.

[33] As of the filing of this Application in June 2023, there were 79 superior court vacancies (including those in the Federal Courts) across Canada. This represents almost 7 percent of the total federally appointed judiciary.

[34] 79 vacancies represents a very significant increase from the Spring of 2016 at which time there were only 46 vacancies.

[35] It is also the case that many vacancies are of very great duration.

[36] These facts are also illustrated in the following tables produced and deposed to by the Applicant, the accuracy of which was not seriously disputed. The Court accepts this table into evidence:

Table 1: Vacancies

Court	Retiree or Act creating vacant position	Date position became vacant	Days vacant as of July 11, 2023	Exhibit
FC	*BIA, 2018*	21-Jun-18	1846	
FC	*BIA, 2019*	21-Jun-19	1481	
FC	*BIA, 2019*	21-Jun-19	1481	
FC	*BIA, 2019*	21-Jun-19	1481	
ONSC	*BIA, 2021*	29-Jun-21	742	

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ONSC	*BIA, 2021*	29-Jun-21	742	
ONSC	*BIA, 2021*	29-Jun-21	742	
ONSC	*BIA, 2021*	29-Jun-21	742	
ONSC	*BIA, 2021*	29-Jun-21	742	
FCA	*BIA, 2021*	29-Jun-21	742	
TCC	*BIA, 2021*	29-Jun-21	742	
BCCA	David Franklin Tysoe	01-Jan-22	556	**F**
ABKB	Donna L. Shelley	02-Jan-22	555	**G**
ABKB	Alan D. Macleod	13-Jan-22	544	**H**
ABKB	Kristine Eidsvik	07-Feb-22	519	**I**
BCSC	Robert Jenkins	15-Jun-22	391	**J**
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
BCSC	*BIA, 2022*	23-Jun-22	383	
BCSC	*BIA, 2022*	23-Jun-22	383	
BCSC	*BIA, 2022*	23-Jun-22	383	
SKKB	*BIA, 2022*	23-Jun-22	383	
SKKB	*BIA, 2022*	23-Jun-22	383	
SKKB	*BIA, 2022*	23-Jun-22	383	
ABKB	*BIA, 2022*	23-Jun-22	383	

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ABKB	*BIA, 2022*	23-Jun-22	383	
NUCJ	*BIA, 2022*	23-Jun-22	383	
FCA	*BIA, 2022*	23-Jun-22	383	
TCC	*BIA, 2022*	23-Jun-22	383	
BCSC	Grace Choi	14-Jul-22	362	**K**
ABCA	Catherine Anne Fraser	30-Jul-22	346	**L**
BCCA	Richard B. T. Goepel	24-Aug-22	321	**M**
BCSC	Barry Davies	04-Sept-22	310	**K**
BCSC	William Grist	06-Sept-22	308	**K**
BCSC	Elaine Adair	31-Dec-22	192	**N**
BCSC	Arne Silverman	31-Dec-22	192	**N**
BCSC	James Williams	18-Jan-23	174	**N**
QCCA	France Thibault	26-Apr-23	76	**O**
ABCA	Marina Paperny	29-Apr-23	73	**P**
BCSC	George Macintosh	30-Apr-23	72	**Q**
ABCA	Barbara Veldhuis	01-May-23	71	**P**

[37] The Applicant also deposed to a table illustrating how quickly vacancies have been filled in the recent past. Again, the accuracy of this table was not seriously challenged. The Court accepts this table:

Table 2: Vacancies filled in less than 90 days

Appointee	Court	Date position Vacant	Date Appointed	Days Vacant	Exhibit
Philip W. Osborne	NLSC	Aug 4, 2021	Aug 6, 2021	2	**R**
Monica Biringer	TCC	Aug 4, 2021	Aug 6, 2021	2	**S**
Lisa Silver	ABKB	April 21, 2023	April 24, 2023	3	**T**

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Allison Kuntz	ABKB	April 21, 2023	April 24, 2023	3	**T**
Kent J. Teskey	ABKB	April 21, 2023	April 24, 2023	3	**T**
Suzanne Stevenson	ONSC	Jan 30, 2020	Feb 3, 2020	4	**U**
Colin D. Clackson	SKKB	Dec 1, 2020	Dec 11, 2020	10	**V**
Robert W. Armstrong	ABKB	Jan 12, 2021	Feb 8, 2021	27	**W**
Lauren Blake	BCSC	Mar 31, 2021	Apr 27, 2021	27	**X**
Mark L. Edwards	ONSC	Jan 1, 2021	Feb 8, 2021	38	**Y**
Sherry L. Kachur	ABKB	Apr 26, 2020	June 3, 2020	38	**Z**
Marylène Pilote	NBKB	Dec 31, 2020	Feb 8, 2021	39	**AA**
Michael A. Marion	ABKB	Mar 4, 2022	Apr 20, 2022	47	**BB**
Jonathan M. Coady	PESC	May 3, 2022	June 21, 2022	49	**CC**
Karen Wenckebach	YKSC	Sept 30, 2020	Nov 19, 2020	50	**DD**
Leonard Marchand	BCCA	Feb 1, 2021	Mar 24, 2021	51	**EE**
Peter Kalichman	QCCA	Mar 1, 2021	Apr 27, 2021	57	**FF**
Meghan McCreary	SKCA	Apr 2, 2022	June 6, 2022	65	**GG**
Leonard Ricchetti	ONSC	Jan 31, 2020	Apr 6, 2020	66	**HH**
J. Ross Macfarlane	ONSC	Dec 15, 2022	Feb 20, 2023	67	**II**
Denise LeBlanc	NBKB	Mar 31, 2022	June 6, 2022	67	**JJ**
Lobat Sadrehashemi	FC	Jan 29, 2021	Apr 6, 2021	67	**KK**
Sophie Lavallée	QCCA	July 25, 2020	Oct 1, 2020	68	**LL**
Julie Bergeron	ONSC	Mar 28, 2022	June 6, 2022	70	**MM**
Nancy M. Carruthers	ABKB	Feb 7, 2022	Apr 20, 2022	72	**BB**
Diane Rowe	NSSC	Mar 1, 2020	May 14, 2020	74	**NN**
Eleanor J. Funk	ABKB	May 23, 2021	Aug 6, 2021	75	**OO**
Calum U.C. MacLeod	ONSC	Dec 30, 2019	Mar 16, 2020	77	**PP**

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Charles C Chang	ONSC	Apr 4, 2022	June 27, 2022	84	**QQ**
Lorne Sossin	ONCA	Sept 2, 2020	Nov 26, 2020	85	**RR**
Spencer Nicholson	ONSC	June 15, 2020	Sept 8, 2020	85	**SS**
Jana Steele	ONSC	Feb 25, 2020	May 22, 2020	87	**TT**

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[38] The Applicant also produced and deposed to a table illustrating how quickly various Chief Justice and Associate Chief Justice vacancies have been filled recently. This table is also accepted:

Table 3: Chief Justice and Associate Chief Justice Appointments

Appointee	Position	Vacant Date	Appointed Date	Days Vacant	Exhibit
Marc Richard	CJ NB	Apr 27, 2018	May 4, 2018	7	**UU**
Faye E. McWatt	ACJ ONSC	Nov 10, 2020	Dec 21, 2020	41	**VV**
Deborah K. Smith	ACJ NSSC	Apr 30, 2019	June 24, 2019	55	**WW**
Malcolm Rowe	SCC	Sept 1, 2016	Oct 28, 2016	57	**XX**
Manon Savard	CJ QC	Apr 8, 2020	June 11, 2020	64	**YY**
Suzanne Duncan	CJ YK	July 25, 2020	Oct 1, 2020	68	**ZZ**
Shannon Smallwood	CJ NT	July 11, 2022	Sept 22, 2022	73	**AAA**
Michael J. Wood	CJ NS	Feb 1, 2019	Apr 17, 2019	75	**BBB**
Tracey K. DeWare	CJ NBKB	Mar 20, 2019	June 4, 2019	76	**CCC**

[39] Finally, the Applicant attests to three instances of public judicial retirement notice announcements, which this table is also accepted:

Table 4: Public Retirement Notices

Retiree	Court	Notice Date	Vacant Date	Days Notice to Public	Exhibit

Robert J. Bauman	BCCA	Jan 10, 2023	Oct 1, 2023	264	**DDD**
Robert G. Richards	SKCA	Mar 17, 2023	Aug 31, 2023	167	**EEE**
Marc Noël	FCA	Mar 29, 2023	Aug 1, 2023	125	**FFF**

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[40] The Respondents also objected to this evidence. However, I accept it for the reasons outlined below, including the fact these tables are based on publicly available information which information itself was not objected to by the Respondents. I also accept this evidence because it is confirmed in some material respects by the Chief Justice of Canada and Canadian Judicial Council's letter dated May 3, 2023.

VI. The Court accepts the facts and opinions of the Chief Justice of Canada and Canadian Judicial Council

[41] With great respect, and for the reasons set out, I accept the facts and opinions expressed by the Chief Justice of Canada and the Canadian Judicial Council in terms of the facts and consequences of delays in appointing judicial vacancies.

[42] The Court does so because, to begin with, the Canadian Judicial Council is composed of 44 members and includes all federally appointed Chief Justices and Associate Chief Justices of all provincial Superior Courts and the Federal Courts across Canada. The Chief Justice of Canada is the Chair of the Canadian Judicial Council on whose behalf the Chief Justice also wrote. These Chief Justices and Associate Chief Justices are responsible for managing the proper flow of criminal and civil cases within their respective courts.

[43] Notably, the Respondents raise no doubts concerning and do not dispute that these Chief Justices and Associate Chief Justices have unequalled knowledge of the critical situation and crisis in respect of which they wrote.

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[44] Therefore, as the Chief Justice of Canada and Canadian Judicial Council wrote, I accept that some courts have had to deal with a 10 to 15% vacancy rate for years. I also accept it is not uncommon for positions to remain vacant for several months, if not years, in some cases:

> As you undoubtedly know, there are currently 85 vacancies within Federal Judicial Affairs across the country. Some courts have had to deal with a 10 to 15% vacancy rate for years now. It is also not uncommon for positions to remain vacant for several months, if not years, in some cases. As a concrete example, over half of the positions at the Manitoba Court of Appeal are currently vacant. Key chief justice and associate chief justice positions are also being filled at a very slow pace. In fact, there have recently been considerable delays in appointments to chief justice positions in a number of provinces, including Alberta, Ontario and Prince Edward Island. The chief justice of Manitoba position has been vacant for six months now, and the associate chief justice positions in the Court of King's Bench for Saskatchewan and the Superior Court of Quebec have been vacant for over a year. No clear explanation justifies these delays.

[45] The Chief Justice and Canadian Judicial Council wrote, it is not contradicted and I again accept, that delays in filling vacancies inevitably causes delays in prosecuting and determining serious violent crimes, such as sexual assault and murder, and other criminal and civil cases. In this connection, as an example, the Court of King's Bench of Alberta has reported that over 22% of ongoing criminal cases are passing the 30-month deadline and that 91% of those cases involve serious and violent crimes. Furthermore, the necessary urgency in processing criminal cases means the courts' role in civil cases is being neglected:

> Despite all our judges' professionalism and dedication, the staffing shortage inevitably results in additional delays in hearing cases and rendering judgments. Chief justices have indicated that, because judges are overburdened, delays in setting cases are unavoidable and hearings need to be postponed or adjourned. What's more, even when cases are heard, judgments are slow to be rendered because judges need to spend more time sitting, leaving them less time to deliberate. The analysis framework in *R. v. Jordan*, 2016 SCC 27, with respect to the accused's right to be tried within a reasonable time pursuant to the *Canadian Charter of Rights and Freedoms*, also plays an important role in that regard. It provides that, before superior courts, criminal charges must be tried within 30 months, save in exceptional circumstances. If a trial has not ended within that timeframe, a stay of proceedings may be ordered. Many chief justices say that as part of their efforts to respect the timelines prescribed by Jordan, they are currently forced to choose the criminal matters that "deserve" to be heard most. Despite their best efforts, stays of proceedings are pronounced against individuals accused of serious crimes, such as sexual assault or murder, because of delays that are due, in part or in whole, to a shortage of judges. For example, the Court of King's Bench of Alberta has reported that over 22% of ongoing criminal cases are passing the 30-month deadline and that 91% of those cases involve serious and violent crimes. Furthermore, the necessary urgency in processing criminal cases means the courts' role in civil cases is being neglected. The justice system is consequently at risk of being perceived as useless for civil matters. These types of situations represent a failure of our justice system and are likely to fuel public cynicism and undermine their trust in our democratic institutions.

[46] In terms of the exacerbating consequences of delays ("government's inertia") in filling judicial vacancies on the critical situation of Canada's Superior Court and Federal Courts systems, the Chief Justice of Canada and Canadian Judicial Council wrote, and I accept that the slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice. In this context, these delays in appointments send a message that this is simply not a priority for the government:

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> It should be noted that the difficulties brought on by the judge shortage are exacerbating an already critical situation within several courts—namely a serious lack of resources due to chronic underfunding by the provinces and territories. However, while several factors explain the crisis currently facing our justice system, the appointment of judges in due course is a solution within reach that could help quickly and effectively improve the situation. Given this obvious fact and the critical situation we are faced with, the government's inertia regarding vacancies and the absence of satisfactory explanations for these delays are disconcerting. The slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice. In this context, these delays in appointments send a message that this is simply not a priority for the government.

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[47] The Court is compelled to note Canadians access to justice without delay is and has been enshrined in various constitutional and quasi-constitutional documents since the *Magna Carta (Great Charter of Liberties)* of 1215 which promised: “To no one will we sell, to no one will we refuse or delay, right or justice.” See *Magna Carta*, article 40, *Select Documents of English Constitutional History*, London: MacMillan & Co., London 1918. With respect, I conclude the inevitable and untenable delayed justice caused by the executive government of Canada goes to the very heart of this 800-year-old promise and unacceptably denies access to justice without delay.

[48] In this connection I add that in the Canadian criminal context, section 11(b) of the *Canadian Charter of Rights and Freedoms* [*Charter*] guarantees “any person charged with an offence has the right to be tried within a reasonable time.” This was commented upon in detail in *R v Jordan*, 2016 SCC 27 where the Supreme Court of Canada applied section 11(b) of the *Charter* to set presumptive time limits for trials. The consequences of delay and not being tried

within a reasonable time are discussed by Moldaver, Karakatsanis and Brown JJ for the majority at paragraphs 19-26:

> [19] As we have said, the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.
>
> [20] Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence.
>
> [21] At the same time, we recognize that some accused persons who are in fact guilty of their charges are content to see their trials delayed for as long as possible. Indeed, there are incentives for them to remain passive in the face of delay. Accused persons may seek to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay of proceedings. This operates to the detriment of the public and of the system of justice as a whole. Section 11(b) was not intended to be a sword to frustrate the ends of justice (*Morin*, at pp. 801-2).
>
> [22] Of course, the interests protected by s. 11(b) extend beyond those of accused persons. Timely trials impact other people who play a role in and are affected by criminal trials, as well as the public's confidence in the administration of justice.
>
> [23] Victims of crime and their families may be devastated by criminal acts and therefore have a special interest in timely trials (*R. v. Askov*, 1990 CanLII 45 (SCC), [1990] 2 S.C.R. 1199, at pp. 1220-21). Delay aggravates victims' suffering, preventing them from moving on with their lives.

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> [24] Timely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the "worry and frustration [they experience] until they have given their testimony" (*Askov*, at p. 1220). Repeated delays interrupt their personal, employment or business activities, creating inconvenience that may present a disincentive to their participation.
>
> [25] Last but certainly not least, timely trials are important to maintaining overall public confidence in the administration of justice. As McLachlin J. (as she then was) put it in *Morin*, "delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice" (p. 810). Crime is of serious concern to all members of the community. Unreasonable delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community's sense of justice (see *Askov*, at p. 1220). Failure "to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures" (p. 1221).
>
> [26] Extended delays undermine public confidence in the system. And public confidence is essential to the survival of the system itself, as "a fair and balanced criminal justice system simply cannot exist without the support of the community" (*Askov*, at p. 1221).

[49] In terms of the significant ("appalling") negative impacts delayed vacancies create for the federally appointed judiciary, the Chief Justice of Canada and Canadian Judicial Council conclude and the Court accepts it is imperative for the Prime Minister and his office to give this issue the importance it deserves, and for appointments to be made in a timely manner. They say it is essential that the vacant positions within the federal judiciary be filled diligently to ensure the judicial branch functions properly. In the past, the Canadian Judicial Council has urged governments to make judicial appointments more quickly. This time, the Chief Justice of Canada and Canadian Judicial Council have serious concerns that without concrete efforts to remedy the situation, Canada's federal judiciary will soon reach a point of no return in several jurisdictions.

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The consequences will make headlines and have serious repercussions on our democracy and on all Canadians:

> Despite all these efforts, it is imperative for the Prime Minister's Office to give this issue the importance it deserves and for appointments to be made in a timely manner. It is essential that the vacant positions within the judiciary be filled diligently to ensure that judicial branch functions properly. In the past, the Canadian Judicial Council has urged governments to make judicial appointments more quickly. This time, we have serious concerns that without concrete efforts to remedy the situation, we will soon reach a point of no return in several jurisdictions. The consequences will make headlines and have serious repercussions on our democracy and on all Canadians. This situation requires your immediate attention.
>
> The positions that have been left vacant are having significant impacts on the administration of justice, the operations of our courts and the health of our judges. Canadian Judicial Council members recently took it upon themselves to provide a more comprehensive overview of the difficulties faced by their respective courts. The findings are appalling.
>
> These ongoing vacancies also have a serious impact on judges themselves. Faced with a chronic work overload and increased stress, judges are increasingly going on medical leave, which has a domino effect on their colleagues, who then must carry an additional workload. It is also becoming difficult for judges of certain courts to find the necessary time to complete training, including training that is considered mandatory. This situation does not bode well for ensuring a healthy and thriving judiciary. If current issues persist, it could also become difficult to attract high-quality candidates for judge positions.
>
> This is already the case in British Columbia.

[50] In terms of the (“untenable”) consequences for access to justice and the health of democratic institutions, the Chief Justice or Canada and Canadian Judicial Council wrote and the Court accepts appointments need to be made in a timely manner because the current situation is untenable, and they both fear that this will result in a crisis for our justice system, which is

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already facing many challenges. The Court accepts their evidence that access to justice and the health of our democratic institutions are at risk, that the justice system is consequently at risk of being perceived as useless for civil matters, and that the types of situations represent a failure of our justice system and are likely to fuel public cynicism and undermine trust in our democratic institutions. They conclude and I accept that the current situation is untenable:

> The current situation is untenable, and I fear that this will result in a crisis for our justice system, which is already facing many challenges. Access to justice and the health of our democratic institutions are at risk.
>
> Furthermore, the necessary urgency in processing criminal cases means the courts' role in civil cases is being neglected. The justice system is consequently at risk of being perceived as useless for civil matters. These types of situations represent a failure of our justice system and are likely to fuel public cynicism and undermine their trust in our democratic institutions.
>
> In this context, these delays in appointments send a message that this is simply not a priority for the government.

[51] The Chief Justice of Canada and Canadian Judicial Council also found the vacancy crisis is having a “serious” impact on judges themselves, on their health in terms of medical leave, and on their training. The situation does not bode well for ensuring a healthy and thriving judiciary. If current issues persist, it could also become difficult to attract high-quality candidates for judicial positions, all of which conclusions this Court respectfully accepts:

> These ongoing vacancies also have a serious impact on judges themselves. Faced with a chronic work overload and increased stress, judges are increasingly going on medical leave, which has a domino effect on their colleagues, who then must carry an additional workload. It is also becoming difficult for judges of certain courts to find the necessary time to complete training, including training that is considered mandatory. This situation does not bode well for ensuring a healthy and thriving judiciary. If current issues persist, it could also become difficult to attract high-

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> quality candidates for judge positions. This is already the case in British Columbia.

[52] Neither Respondent gave any explanation or reason to justify this crisis situation, either to the Chief Justice of Canada or the Canadian Judicial Council, or to this Court. The Chief Justice of Canada and Canadian Judicial Council wrote and I have to agree that "[N]o clear explanation justifies these delays."

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[53] Notably also, the Respondents did not object to any of the assessments in the letter. This Court has no hesitation in accepting the expert assessments by the Chief Justice of Canada and Canadian Judicial Council that the slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice:

> The slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice. In this context, these delays in appointments send a message that this is simply not a priority for the government.

VII. Demands made to the Respondents

[54] In addition to the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of May 3, 2023, which and with respect I consider a request for these purposes, on June 16, 2023, Applicant's counsel sent a letter to Canada's Minister of Justice, with the subject line "vacant judicial appointments" stating he echoes the request of the Chief Justice of Canada and respectfully requests to fill these vacancies in a timely manner.

[55] On June 17, 2023, the Applicant's lawyer sent the same letter, but addressed to the Prime Minister again echoing the request of the Chief Justice of Canada and the Canadian Judicial Council and respectfully requests the Prime Minister fill these vacancies in a timely manner.

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[56] The Applicant received no response to either letter. And, in any event, as already seen, the number of vacancies has not gone down as requested by the Chief Justice of Canada and Canadian Judicial Council; in fact, according to the FCJA, the number superior count vacancies is 75 as of February 1, 2024, which is almost identical to the 79 vacancies when this application was commenced in June 2023.

[57] In this connection and in the Court's respectful view, reports on the public website of the FCJA may be accepted for the truth thereof, it being a highly professional and completely impartial and credible federal source of data in relation to federal judicial vacancies and appointments across Canada. See: *Barakat v Andraos,* 2023 ONSC 582 where Justice Trimble at paragraph 24 reviews the jurisprudence on judicial notice and government websites (most of which is of this Court). This Court agrees with and adopts their conclusions and applies them to the FCJA:

> A court may take judicial notice of facts can come from government and NGO websites provided that the government or organization has a reputation for credibility (see: *Araya v. Nevsun Resources Ltd*, 2017 BCCA 401 at par 24, *Mahjoub v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1503 at paras. 72–75, *Buri v. Canada (Minister of Citizenship and Immigration), 2001 FCT 1358, [2001] F.C.J. No. 1867* (Fed T.D.) at para. 22 and *Kazi v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 178, [2002] F.C.J. No. 223 (Fed. T.D.) at paras. 28, 30).

VIII. Issues

[58] The Applicant raises the following issues:

1. Should the Court order *mandamus*?
2. Should the Court order a declaration?

[59] The Respondents raise the following issues:

1. As a preliminary matter, whether the Applicant's affidavit evidence is admissible and relevant;
2. Whether the Federal Court has jurisdiction over the subject matter of the application;
3. Whether the Applicant has private interest standing or should be granted public interest standing to adjudicate the issues raised in the application;
4. Whether the requirements of *mandamus* have been met; and
5. Whether the Court should grant the Applicant's alternative request for declaratory relief.

IX. Relevant statutory provisions

[60] The following sections of the *Constitution Act, 1867* are relevant:

Exclusive Powers of Provincial Legislatures	**Pouvoirs exclusifs des législatures provinciales**
Subjects of exclusive Provincial Legislation	**Sujets soumis au contrôle exclusif de la législation provinciale**
92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,	**92** Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :

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[…]	[…]
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.	**14.** L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux;
[…]	[…]
VII. Judicature	**VII. Judicature**
Appointment of Judges	**Nomination des juges**
96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.	**96** Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.
[…]	[…]
Salaries, etc., of Judges	**Salaires, etc. des juges**
100 The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.	**100** Les salaires, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick) et des cours de l'Amirauté, lorsque les juges de ces dernières sont alors salariés, seront fixés et payés par le parlement du Canada.
General Court of Appeal, etc.	**Cour générale d'appel, etc.**

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101 The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.	**101** Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.
[Emphasis added]	[Je souligne]

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[61] The following sections of the *Federal Courts Act* and *Interpretation Act*, RSC 1985, c I 21 are relevant:

Federal Courts Act	***Loi sur les Cours fédérales***
Appointment of judges	**Nomination des juges**
5.2 The judges of the Federal Court of Appeal and the Federal Court are to be appointed by the Governor in Council by letters patent under the Great Seal.	**5.2** La nomination des juges de la Cour d'appel fédérale et de la Cour fédérale se fait par lettres patentes du gouverneur en conseil revêtues du grand sceau.
[…]	[…]
Extraordinary remedies, federal tribunals	**Recours extraordinaires : offices fédéraux**
18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	**18 (1)** Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against	**a)** décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement

any federal board, commission or other tribunal; and

[…]

déclaratoire contre tout office fédéral;

[…]

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.

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.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut:

(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

[…]

[Emphasis added]

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;

[…]

[Je souligne]

Interpretation Act

Loi d'interprétation

Definitions

Définitions

General definitions

35 (1) In every enactment,

Définitions d'application générale

35 (1) Les définitions qui suivent s'appliquent à tous les textes.

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[…]	[…]
Governor General in Council or Governor in Council means the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada; (gouverneur en conseil ou gouverneur général en conseil)	gouverneur en conseil ou gouverneur général en conseil Le gouverneur général du Canada agissant sur l'avis ou sur l'avis et avec le consentement du Conseil privé de la Reine pour le Canada ou conjointement avec celui-ci. (Governor General in Council or Governor in Council)

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X. Submissions and Analysis

A. *Jurisdiction of the Federal Court*

(1) The *ITO* test

[62] The starting point for this assessment is the Supreme Court of Canada's decision in *ITO-International Terminal Operations Ltd v Miida Electronics Inc,* [1986] 1 SCR 752 [*ITO*] at p.767. In *ITO* the Supreme Court sets a three-part test for construing the Federal Court's jurisdiction. In this connection it is worth noting the predecessor of the Federal Courts was set up by the same Act of Parliament that established the Supreme Court of Canada. Such statutes require interpretation in the constitutional setting:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s.101 of the *Constitution Act, 1867*.

[63] The Applicant submits the Federal Court has jurisdiction to hear this application and grant the relief sought. In this he relies on jurisprudence of this Court, jurisprudence of the Federal Court of Appeal and jurisprudence of the Supreme Court of Canada all of which mandate a broad, fair and liberal approach to this Court's jurisdiction.

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[64] The Respondents disagree. They argue the Federal Court lacks jurisdiction to hear and decide this application.

[65] In this respect the Court determines that the leading jurisprudence is *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 [*Liberty Net*] per Bastarache J. In *Liberty Net*, the Supreme Court endorsed a fair and liberal approach to the Federal Court's jurisdiction. Justice Bastarache for the majority at pp. 657 and 658 states:

> These are the historical and constitutional factors which led to the development of the notion of inherent jurisdiction in provincial superior courts, which to a certain extent has been compared and contrasted to the more limited statutory jurisdiction of the Federal Court of Canada. But in my view, there is nothing in this articulation of the essentially remedial concept of inherent jurisdiction which in any way can be used to justify a narrow, rather than a fair and liberal, interpretation of federal statutes granting jurisdiction to the Federal Court. The legitimate proposition that the institutional and constitutional position of provincial superior courts warrants the grant to them of a residual jurisdiction over all federal matters where there is a "gap" in statutory grants of jurisdiction, is entirely different from the proposition that federal statutes should be read to find "gaps" unless the words of the statute explicitly close them. The doctrine of inherent jurisdiction raises no valid reasons, constitutional or otherwise, for jealously protecting the jurisdiction of provincial superior courts as against the Federal Court of Canada.
>
> [Emphasis added]

[66] Notably and central to this Court's conclusion in this regard, is the Supreme Court of Canada's plain rejection of a narrow interpretation of the Federal Court's jurisdiction in favour of a fair and liberal interpretation of statutes granting jurisdiction to the Federal Court set out in *Liberty Net*.

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[67] Of interest, the Supreme Court in *Windsor (City) v Canadian Transit Co.*, 2016 SCC 54 [*Windsor*], pointed to by the Respondents, neither addresses nor considers the Supreme Court of Canada's own previous decision in *Liberty Net*.

[68] Upon reflection and due consideration, the Court will follow *Liberty Net* and persuasive post-*Windsor* jurisprudence and approach the determination of Federal Court's jurisdiction in fair and liberal manner, and not narrowly as the Respondents proposed.

[69] To begin this, the Court adopts a fair and liberal approach because it agrees with Justice Mactavish (as she then was) in *Deegan v Canada (Attorney General)*, 2019 FC 960 [*Deegan*]:

> [224] In contrast to the inherent jurisdiction enjoyed by provincial superior courts, the Supreme Court held in *Windsor Bridge* that the Federal Courts have only the jurisdiction that has been conferred on them by statute, and that they are without inherent jurisdiction: at paragraph 33. This of course begs the question: if the Federal Courts' jurisdiction is constrained by the fact that they are statutory courts created under section 101 of the *Constitution Act, 1867*, how is it that the jurisdiction of the Supreme Court of Canada—another statutory court created under section 101 of the *Constitution Act, 1867*—is not similarly constrained?
>
> [225] Indeed, as the Federal Court of Appeal observed in *Lee*, "the Supreme Court and the Federal Courts (through their predecessor, the Exchequer Court) are both statutory courts under section 101 of the *Constitution Act, 1867*, born at the same time from a single joint statute: *Supreme and Exchequer Court Act*, S.C. 1875, c. 11": above, at paragraph 13. The Federal Court of Appeal went on to

> observe in *Lee* that "the Supreme Court and the Federal Courts must be seen as identical twins" in terms of their ability to manage their processes and proceedings, that is, their plenary powers: *Lee*, above, at paragraph 13.
>
> …
>
> [227] The fact is that the Federal Court is neither an inferior court nor an administrative tribunal: *Lee*, above, at paragraph 12; *Bilodeau-Massé*, above, at paragraph 72. It is, rather, a superior court of record having civil and criminal jurisdiction: *Federal Courts Act*, section 4. As a superior court, the Federal Court has plenary jurisdiction to determine any matter of law arising out of its original jurisdiction. This includes constitutional jurisdiction in matters that are properly before the Court.
>
> [Emphasis added]

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[70] Justice Mactavish followed *Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604 [*Bilodeau-Massé*], where Justice Martineau concluded at paragraph 72 that "the grant of jurisdiction under the *Federal Courts Act* should not be interpreted in a narrow fashion." In this respect Justice Martineau adopts the reasoning of the Supreme Court in *Liberty Net* as does this Court:

> [78] As a result, as the Supreme Court noted in *Canadian Liberty Net*, "[i]n a federal system, the doctrine of inherent jurisdiction does not provide a rationale for narrowly reading federal legislation which confers jurisdiction on the Federal Court" (at paragraph 35). Thus, because this involves the Federal Court's general administrative jurisdiction over federal administrative tribunals, "[t]his means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a plenary jurisdiction" (*Canadian Liberty Net*, at paragraph 36) (my emphasis). If section 44 of the *Federal Courts Act* gives the Federal Court jurisdiction to grant an injunction in enforcing the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, this is all the more reason to argue that in the context of an action against the Crown or an application for judicial review, the inherent or residual jurisdiction of the provincial

> superior courts in matters involving the constitution or *habeas corpus* in no way affects the "plenary jurisdiction" exercised by the Federal Court under sections 17 and 18 of the *Federal Courts Act*.
>
> [Emphasis added]

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[71] To the same effect are the reasons of Justice Roussel (as she then was) in *PH v Canada (Attorney General)*, 2020 FC 393 [*PH*] at paragraphs 42 and 43. Justice Roussel declined to follow *Windsor*, holding:

> [42] With the greatest of respect to the Supreme Court of Canada, I do not consider myself bound by these *obiter* comments. The facts in this case differ from those in *Windsor*. That case dealt with the application of a municipal bylaw to a federal undertaking. The applicant was not seeking relief under an Act of Parliament and under a federal right, but was seeking relief under the *Constitution Act, 1867*. In this case, sections 18 and 18.1 of the Act grant this Court the jurisdiction to issue declaratory relief against the Parole Board of Canada. There is no need to interpret this Court's jurisdiction restrictively because this Court is a statutory court rather than a court of inherent jurisdiction. Although it is not a "superior court" within the meaning of section 96 of the *Constitution Act, 1867*, this Court is nevertheless comparable to a superior court when it exercises its general supervisory jurisdiction over federal boards, such as the Parole Board of Canada. Sections 18 and 18.1 of the *Act* do not remove the jurisdiction of provincial superior courts to grant a constitutional declaration against a federal board. However, the *Act* does create concurrent jurisdiction in cases where the Federal Court has been granted jurisdiction by an Act of Parliament (ss 18 and 18.1 of the *Act*) and the *ITO* test is otherwise met, as is the case here.
>
> [43] I do not intend to comment any further on the majority's *obiter* comments in Windsor. I accept and adopt as my own the reasoning of my colleagues who recently found that this Court does indeed have the jurisdiction to issue general declarations of invalidity for the purpose of section 52 of the *Constitution Act, 1982* (*Deegan v Canada (Attorney General)*, 2019 FC 960 at paras 212-240; *Fédération des francophones de la Colombie-Britannique v Canada (Employment and Social Development)*, 2018 FC 530 at paras 55-65; *Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604 at paras 38-88). I also rely on the statements made by the Federal Court of Appeal in *Lee v Canada*

> *(Correctional Service)*, 2017 FCA 228 regarding the plenary powers of the Federal Courts. As I do not find it useful to repeat their analysis in these reasons, I refer the parties and the reader to the cited portions of those decisions.
>
> [Emphasis added]

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[72] As did Justice Roussel (as she then was), I also rely on the determinations of the Federal Court of Appeal in *Lee v Canada (Correctional Service)*, 2017 FCA 228 regarding the plenary powers of the Federal Courts emanating from their constitutional status as courts, as set out at paragraphs 8-12:

> [8] The idea is that the Federal Courts' plenary powers emanate from their constitutional status as courts, not from any particular legislative provision in the *Federal Courts Act*, R.S.C. 1985, c. F-7 or the *Federal Courts Rules*. The Federal Courts are not just ordinary agencies of government but rather part of the judicial branch within the constitutional separation of powers. If courts are to be courts and to fulfil their function as part of the judicial branch, they must have certain plenary powers to manage their processes and proceedings.
>
> [9] Cases decided by the Supreme Court after *Liberty Net* have alluded to these powers—in one case at the level of obiter in a single paragraph, and in another case buried as an afterthought in a endnote: see, respectively *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 19 and *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617. Perhaps because the treatment of the powers is brief, both cases fail to cite *Liberty Net*. But both loosely suggest that the Federal Courts' plenary powers are "necessarily incidental" to statutory powers already granted, rather than powers stemming from the Federal Court's status as courts within the judicial branch.
>
> [10] In fact, in terms of the powers the Federal Courts have, *Cunningham* seems to place the Federal Courts on the same footing as administrative tribunals and other administrative functionaries throughout the government. But Cunningham is not the only word on this point.
>
> [11] Again, there is *Liberty Net.* And in a brief comment in another case, the Supreme Court seems to have recognized the Federal

> Courts as superior courts established under the federal power in the *Constitution Act*, 1867 to create federal courts, not just as mere administrative functionaries: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 136 (not cited in *Cunningham* and *Windsor*); see also the clear text of section 4 of the *Federal Courts Act*.
>
> [12] In my view, the Supreme Court's holdings in *Charkaoui* and *Liberty Net* are unassailable. The Federal Courts cannot be equated to administrative tribunals. As is suggested in *Liberty Net*, the Federal Courts—like the Supreme Court, the provincial courts (both superior and otherwise), the Tax Court and military courts—are fully fledged courts within the judicial branch and, by virtue of this, have all the plenary powers of courts to manage their processes and proceedings.
>
> [Emphasis added]

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[73] This Court also agrees with Justice Martineau in *Bilodeau-Massé* that access to justice concerns, the unique fact that the Federal Court is fully bilingual and bijural forum, and that the Federal Court is nationally accessible, strongly militate in favour a fair and liberal approach to the Federal Court's jurisdiction.

[74] Moreover, the case at hand calls for the resolution of a quintessentially federal issue involving purely federal powers, in preference to a multiplicity of parallel proceedings in many different provincial court systems with attendant delays, possible inconsistent decisions, needless duplication overlap, expense and waste of judicial resources. Justice Martineau in *Bilodeau-Massé* states:

> [69] In short, justice is not in competition with itself: access to justice must prevail in every case, which favours a broad construction of the jurisdiction conferred on this Court by the *Federal Courts Act*. In this sense, the Federal Court is part of the solution, and it would be wrong to want to associate it with the problem of the increasing number of jurisdictions. When it created a national court of first instance, Parliament could very well have

> left it to the courts mentioned in section 129 of the *Constitution Act, 1867*, and to the other provincial courts created under subsection 92(14) of the *Constitution Act, 1867*, to exercise their traditional jurisdiction in civil and criminal matters, while making adjustments over time, if necessary, for the purposes of the "laws of Canada". But what characterizes the Federal Court is not only its nature as a national court (trial and appeal). Its composition also ensures national continuity (section 5.3 of the *Federal Courts Act*) and the maintenance of Canadian bijuralism (common law and civil law). However, like section 6 of the *Supreme Court Act*, section 5.4 of the *Federal Courts Act* provides for effective representation of Quebec, with a minimum and large number of judges (at least five judges of the Federal Court of Appeal and at least 10 judges of the Federal Court) who must have been judges of the Court of Appeal or of the Superior Court of Quebec or members of the Bar of Quebec. It is an eloquent legislative demonstration of Parliament's wish to create a pan-Canadian court that is particularly well adapted to Canada's reality and bijuralism.
>
> [Emphasis added]

[75] Further, there is no body of provincial law in dispute. This case relates to the federal power to make federal judicial appointments and an obvious disagreement between our most senior and most experienced judicial office holders including the Chief Justice of Canada and Canadian Judicial Council on the one hand, and the executive government including the Prime Minister and Minister of Justice on the other.

[76] There is no issue of competing jurisdiction. There is no "pretence" of provincial law in this case that exclusively involves the application of federal law in an area of undisputed federal jurisdiction. See *Girouard v Canada (Attorney General)*, 2020 FCA 129, at paragraph 108:

> [108] In stipulating that the Governor General appoints judges of the superior courts and has the authority to remove them (on address of the Senate and House of Commons) and that Parliament fixes and provides their salaries, the *C.A., 1867* clearly ousts provincial jurisdiction on any matters relating to these issues.

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[77] And see *Deegan* per Mactavish J.:

> [232] There is, moreover, an existing body of federal law that is essential to the disposition of the case that nourishes the statutory grant of jurisdiction. The Impugned Provisions form part of the federal *Income Tax Act* and the *Implementation Act*, federal legislation implementing an agreement with a foreign state governing the sharing of information under a bilateral tax treaty. It also bears noting that no body of provincial law is implicated in this proceeding, and that the case does not involve competing spheres of jurisdiction. The case thus involves the application of federal law in an area of federal jurisdiction.
>
> [Emphasis added]

(2) First prong of *ITO*

[78] With this guidance, and to recall, prong one of *ITO* requires that "[T]here must be a statutory grant of jurisdiction by the federal Parliament." In my view, sections 18 and 18.1 of the *Federal Courts Act* constitute a statutory grant of jurisdiction by the federal Parliament to this Court to grant declaratory relief against any federal board: this point was expressly decided by the Court in *PH* at paragraphs 38 and 42. I therefore conclude the first prong of *ITO* is met.

[79] In this connection, and while the Respondents accept section 18.1 of the *Federal Courts Act* confers jurisdiction to the Federal Court to grant declaratory relief against any "federal board, commission or other tribunal" they argue it does not apply to the Prime Minister or Minister of Justice.

[80] With respect, I disagree. First of all, this submission does not apply in relation to appointments under section 5.2 of the *Federal Courts Act* given the Supreme Court of Canada's opposite conclusion in *Strickland v Canada (Attorney General)*, 2015 SCC 37:

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> [64] At this point, it seems to me that the language of the Act conferring "exclusive original jurisdiction" can be taken as a clear and explicit expression of parliamentary intent. Similarly, as presently advised I see no reason to doubt that the Governor in Council, when exercising "jurisdiction or powers conferred by or under an Act of Parliament" is a "federal board, commission or other tribunal" within the meaning of s. 2 the *Act.*

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[81] And I see no reason to accept the Respondents' narrow construction in terms of granting declaratory relief in relation to appointments under section 96 of the *Constitution Act, 1867*. In this connection, I take the same view of the authority conferred on this Court by paragraphs 18(1)(a) and 18.1(3)(a) of the *Federal Courts Act* as that taken to section 44 of the *Federal Courts Act* by the Supreme Court of Canada in *Liberty Net* and by this Court in *Bilodeau-Massé*, namely that "the Federal Court can be considered to have a plenary jurisdiction". This is further confirmed in *Deegan* and *PH*. I am not persuaded to depart from concurrent findings of my colleagues, nor to disagree with the Supreme Court of Canada's determination in *Liberty Net*.

(3) Second and third prongs of *ITO*

[82] The second step in *ITO* is that "[t]here must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction."

[83] The third step in *ITO* is that the law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*.

[84] The Applicant submits that federal law includes federal common law. As outlined below, I agree. In particular, the Applicant argues federal common law includes law surrounding the

modalities of federal judicial appointments, including judicial recognition of constitutional conventions that such appointments may only be made on the advice and consent of Cabinet, and the Prime Minister or Minister of Justice. Again I agree.

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[85] The Applicant submits that constitutional conventions may be recognized by courts as laws. But it is also well established that constitutional conventions may not be enforced by the courts.

[86] The Respondents argue that constitutional conventions, while being rules regulating conduct as between constitutional actors (a conclusion the Court accepts), are not laws for the purposes of the second prong of *ITO*. As I understand their argument, it is based on the rule that constitutional conventions may not be enforced by the Courts, from which they conclude constitutional conventions may not support step two of *ITO*.

[87] Through post-hearing submissions, the Court entertained additional arguments on this and related points as to whether federal common law and constitutional conventions may establish this Court's jurisdiction per *ITO* on the issue of filling vacancies on the provincial Superior Courts and Federal Courts.

[88] The Respondents argue the common law cited by the Applicant relates to the interpretation of legal principles governing reviewability of conventional actors and constitutional conventions, falling under the law of justiciability. The Respondents submit and rely on *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989]

2 SCR 49, where Chief Justice Dickson at pp.90-91 said that the law of justiciability involves "a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue…"

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[89] The Applicant, in reply on this point, submits he is not relying on the common law of justiciability, but rather the common law regarding the transfer of power and duties from the Governor General to the Prime Minister and the Minister of Justice as a result of constitutional conventions. The Applicant submits this body of common law was created in the context of merits determinations about substantive legal rights, duties, and powers, citing the decisions to be discussed later namely *Acadian Society of New Brunswick v Right Honourable Prime Minister of Canada*, 2022 NBQB 85 [*Acadian Society*], *Conacher v Canada (Prime Minister),* 2010 FCA 131 [*Conacher*], and *Democracy Watch* [per Southcott J].

[90] In post-hearing submissions, the Respondents submit justiciability is common law, but does not have a federal character. The Respondents argue the concept of justiciability flows from the constitutional separation of power, and is inherently neither federal nor provincial. I disagree.

[91] The Applicant submits this is false, relying on *Quebec North Shore Paper v CP Ltd*, [1977] 2 SCR 1054 [*Quebec North Shore Paper*] for the proposition that when common law relates to both a provincial and federal issue, at p.1063, "it is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province." The Applicant advances the argument here that when the common law about the transference of

powers and duties by constitutional convention relates to provincial actors, it is provincial common law. When it relates to federal actors, he submits it is federal common law.

[92] I agree with the Applicant in this respect.

[93] Lastly, the Respondents submit that if the Court finds that constitutional conventions are federal common law, they do not constitute an existing body of federal law essential to the disposition of this application, per the second prong of *ITO*. The Respondents submit justiciability is no more essential to the disposition of this application than it is to any other application, and is insufficient to satisfy the second prong of *ITO* given the high threshold on the party asserting the Court's jurisdiction.

[94] The Applicant, again in reply, submits this is incorrect and the Respondents mischaracterize the nature of the common law being relied upon in this case. Further, the Applicant asserts the Respondents argument comparing the federal common law to other applications to determine whether it is more essential to the disposition of this case is not found in the jurisprudence on the application of the *ITO* test.

[95] Lastly, the Applicant submits that just because the legal duty relied on to compel the appointment of provincial Superior Court judges is not created by a federal law, does not mean federal law is not essential to the disposition of the application. Again I agree with the Applicant. The Applicant submits the remedy does not need to be expressly created or conferred by federal law for the Federal Court to have jurisdiction; it is enough that a body of federal law has an

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impact on the matter at every turn. For this, the Applicant correctly relies on *Rhine v The Queen*, [1980] 2 SCR 442, where Chief Justice Laskin stated at p. 447:

> At every turn, the Act has its impact on the undertaking so as to make it proper to say that there is here existing and valid federal law to govern the transaction which became the subject of litigation in the Federal Court. It should hardly be necessary to add that "contract" or other legal institutions, such as "tort" cannot be invariably attributed to sole provincial legislative regulation or be deemed to be, as common law, solely matters of provincial law.

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[96] Having considered the matter, the Court is not persuaded the lack of enforceability at law renders federal constitutional conventions incapable of being considered federal laws for the purposes of *ITO*.

[97] To begin with, there is no jurisprudence to that effect.

[98] In addition, taking a fair and liberal interpretation to the Federal Court's jurisdiction per *Liberty Net, Lee, Deegan, Bilodeau-Massé* and *PH,* I am persuaded that constitutional conventions in relation to the appointment of federal judges by the Governor General and Governor in Council pursuant to section 96 of the *Constitution Act,1867* and section 5.2 of the *Federal Courts Act* do constitute federal laws essential to the disposition of this case and which nourishes the statutory grant of jurisdiction for the purposes of *ITO*.

[99] Upon review, and with respect, this Court concludes that a "federal law" for the purposes of the second step of *ITO* (and "a law of Canada" for the purposes of the third step, given there is here "clearly an overlap between the second and third" prong per Wilson in *Roberts v Canada*, [1989] 1 SCR 322 [*Roberts*]), includes federal statutes, federal regulations *and* federal common

law. This conclusion is endorsed by Chief Justice Laskin in *Quebec North Shore Paper* at p. 1063. There the Supreme Court unanimously held common law associated with the Crown's position as a litigant [it] is federal law:

> Stress is laid, however, on what the Privy Council said in discussing the application of s. *30(d)* of the *Exchequer Court Act*, the provision giving jurisdiction to the Exchequer Court in civil actions where the Crown is plaintiff or petitioner. I do not take its statement that "sub-s. (d) must be confined to actions ... in relation to some subject matter legislation in regard to which is within the legislative competence of the Dominion" as doing anything more than expressing a limitation on the range of matters in respect of which the Crown in right of Canada may, as plaintiff, bring persons into the Exchequer Court as defendants. It would still be necessary for the Crown to found its action on some law that would be federal law under that limitation. It should be recalled that the law respecting the Crown came into Canada as part of the public or constitutional law of Great Britain, and there can be no pretence that that law is provincial law. In so far as there is a common law associated with the Crown's position as a litigant it is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province, and is subject to modification in each case by the competent Parliament or Legislature. Crown law does not enter into the present case.
>
> [Emphasis added]

[100] Furthermore, Chief Justice Laskin in *Quebec North Shore Paper* at pp.1066 states:

> It is also well to note that s. 101 does not speak of the establishment of Courts in respect of matters within federal legislative competence but of Courts "for the better administration of the laws of Canada". The word "administration" is as telling as the plural words "laws", and they carry, in my opinion, the requirement that there be applicable and existing federal law, whether under statute or regulation or common law, as in the case of the Crown, upon which the jurisdiction of the Federal Court can be exercised. Section 23 requires that the claim for relief be one sought under such law.
>
> [Emphasis added]

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[101] In *McNamara Construction et al v The Queen*, [1977] 2 SCR 654 at pp.658-659, Chief Justice Laskin again writing for the Supreme Court states:

> In *Quebec North Shore Paper Company v. Canadian Pacific Limited*, (a decision which came after the judgments of the Federal Court of Appeal in the present appeals), this Court held that the quoted provisions of s. 101, make it a prerequisite to the exercise of jurisdiction by the Federal Court that there be existing and applicable federal law which can be invoked to support any proceedings before it. It is not enough that the Parliament of Canada have legislative jurisdiction in respect of some matter which is the subject of litigation in the Federal Court. As this Court indicated in the *Quebec North Shore Paper Company* case, judicial jurisdiction contemplated by s. 101 is not co-extensive with federal legislative jurisdiction. It follows that the mere fact that Parliament has exclusive legislative authority in relation to "the public debt and property" under s. 91(1A) of the *British North America Act* and in relation to "the establishment, maintenance and management of penitentiaries" under s. 91(28), and that the subject matter of the construction contract may fall within either or both of these grants of power, is not enough to support a grant of jurisdiction to the Federal Court to entertain the claim for damages made in these cases.

[102] Then at p. 659, Chief Justice Laskin states: "[i]n the *Quebec North Shore Paper Company* case, this Court observed, referring to this provision, that the Crown in right of Canada in seeking to bring persons in the Exchequer Court as defendants must have founded its action on some existing federal law, whether statute or regulation or common law."

[103] In *Roberts*, Madam Justice Wilson expansively reviewed the issue and concludes that indeed federal law includes federal common law, writing for the Court at pp. 330 and 331:

> While there is clearly an overlap between the second and third elements of the test for Federal Court jurisdiction, the second element, as I understand it, requires a general body of federal law covering the area of the dispute, i.e., in this case the law relating to Indians and Indian interests in reserve lands, and the third element requires that the specific law which will be resolutive of the

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> dispute be "a law of Canada" within the meaning of s. 101 of the *Constitution Act, 1867*. No difficulty arises in meeting the third element of the test if the dispute is to be determined on the basis of an existing federal statute. As will be seen, problems can, however, arise if the law of Canada which is relied on is not federal legislation but so-called "federal common law" or if federal law is not exclusively applicable to the issue in dispute.
>
> [Emphasis added]

[104] The Supreme Court of Canada per Wilson J. also concluded at pp. 339-340:

> If Professor Evans is saying in the above-quoted paragraph that only federal legislation can meet the description of a "law of Canada" within the meaning of s. 101, I think he must be wrong since Laskin C.J. clearly includes "common law" as existing federal law inasmuch as he says that the cause of action must be founded "on some existing federal law, whether statute or regulation or common law". Professor Evans may be right that *Quebec North Shore* and *McNamara Construction* deny the existence of a federal body of common law co-extensive with the federal legislature's unexercised legislative jurisdiction over the subject matters assigned to it. However, I think that the existence of "federal common law" in some areas is expressly recognized by Laskin C.J. and the question for us, therefore, is whether the law of aboriginal title is federal common law.
>
> [Emphasis added]

[105] In this context the Court finds that constitutional conventions concerning the appointment of the judiciary of Superior Court and Federal Courts such as already determined by this Court, and for the purposes of both the second and third element of *ITO*, constitute the required "general body of federal law covering the area of the dispute" identified by Wilson J in *Roberts*.

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[106] In this connection, our highest Court in *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 [*Repatriation Reference*] at p. 882, confirms courts may determine and recognize the existence of constitutional conventions, as this Court does in the matter before it now.

[107] In addition, while the Supreme Court in *Repatriation Reference* confirms courts have no authority *to enforce* constitutional conventions, it appears to me this rule is irrelevant in the case at hand. I say this because in this case this Court will issue a declaration, but will not order *mandamus*. This Court remains free to *declare* the existence of constitutional conventions.

[108] Therefore this Court's decision to grant declarations in the case at hand fits harmoniously with the *Repatriation Reference*. The following passage from the *Repatriation Reference* confirms both that courts may recognize constitutional conventions and that they may not enforce them:

> Another example of the conflict between law and convention is provided by a fundamental convention already stated above: if after a general election where the opposition obtained the majority at the polls the government refused to resign and clung to office, it would thereby commit a fundamental breach of convention, one so serious indeed that it could be regarded as tantamount to a coup d'état. The remedy in this case would lie with the Governor General or the Lieutenant Governor as the case might be who would be justified in dismissing the ministry and in calling on the opposition to form the government. But should the Crown be slow in taking this course, there is nothing the courts could do about it except at the risk of creating a state of legal discontinuity, that is, a form of revolution.

B. *What federal common law or constitutional conventions apply in this case*

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[109] As submitted by the Applicant, I agree some constitutional conventions have the effect of transferring power from the legal holder to another official or institution. In coming to this conclusion I respectfully adopt *Acadian Society* per Chief Justice DeWare, citing with approval the late Professor Peter Hogg's text at paragraph 18:

> [18] The Respondents refer the Court to constitutional scholarship explaining the nature and importance of constitutional conventions as well as their lack of justiciability. Professor Hogg's discussion of convention at 1.10 in Constitutional Law of Canada, 5th edition, where he comments:
>
> > An extraordinary feature of the system of responsible government is that its rules are not legal rules in the sense of being enforceable in the courts. They are conventions only. The exercise of the Crown's prerogative powers is thus regulated by conventions, not laws. Conventions are the topic of the next section of this chapter.
> >
> > 1.10 – Conventions
> >
> > (a) – Definition of conventions
> >
> > Conventions are rules of the constitution that are not enforced by the law courts. Because they are not enforced by the law courts, they are best regarded as non-legal rules, but because they do in fact regulate the working of the constitution, they are an important concern of the constitutional lawyer. What conventions do is to prescribe the way in which legal powers shall be exercised. Some conventions have the effect of transferring effective power from the legal holder to another official or institution.
> >
> > Consider the following examples. (1) The *Constitution Act, 1867*, and many Canadian statutes, confer extensive powers on the Governor General or on the Governor General in Council, but a convention stipulates that the Governor General will exercise those powers only in accordance with the advice of the cabinet or in some cases the Prime Minister. (2) The *Constitution Act, 1867* makes the Queen, or the Governor General, an essential party

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> to all federal legislation (s. 17), and it expressly confers upon the Queen and the Governor General the power to withhold the royal assent from a bill that has been enacted by the two Houses of Parliament (s. 55), but a convention stipulates that the royal assent shall never be withheld.
>
> If a convention is disobeyed by an official, then it is common, especially in the United Kingdom, to describe the official's act or omission as "unconstitutional". But this use of the term unconstitutional must be carefully distinguished from the case where a legal rule of the constitution has been disobeyed. Where unconstitutionality springs from a breach of law, the purported act is normally a nullity and there is a remedy available in the courts. But where "unconstitutionality" springs merely from a breach of convention, no breach of the law has occurred and no legal remedy will be available.
>
> [Emphasis added]

[110] The foregoing establishes constitutional convention may effectively transfer effective power from the legal holder to another official or institution. The fact they may not be enforced at law is irrelevant in this case.

(1) Constitutional convention concerning judicial appointment advice-giving roles of the Prime Minister and Minister of Justice

[111] I note in *Conacher* the Federal Court of Appeal indicated courts arguably may consider not only the powers of the Governor General but the advice-giving role of the Prime Minister. That is what the Applicant now asks this Court to do now: to find there has been a transference of the legal powers and duties from the Governor General or Governor General in Council, to the

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Prime Minister and Minister of Justice in their advice-giving roles. In this connection, see Stratas J.A. at paragraph 5:

> [5] Various conventions are associated with the Governor General's status, role, powers, and discretions. Some of these conventions, which are open to debate as to their scope, concern the Prime Minister's advice to the Governor General about the dissolution of Parliament and how the Governor General should respond: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., Vol. 1, loose-leaf (Toronto: Carswell, 2007), at pages 9-29 to 9-33. In our view, given the connection between the Governor General and the Prime Minister in this regard, the preservation of the Governor General's powers and discretions under subsection 56.1(1) arguably may also extend to the Prime Minister's advice-giving role. In any event, it seems to us that if Parliament meant to prevent the Prime Minister from advising the Governor General that Parliament should be dissolved and an election held, Parliament would have used explicit and specific wording to that effect in section 56.1. Parliament did not do so. In saying this, we offer no comment on whether such wording, if enacted, would be constitutional.
>
> [Emphasis added]

[112] In fact, this Court recognized a constitutional convention in relation to the advice-giving role of the Prime Minister and Minister of Justice in relation to appointments of judges under section 96 of the *Constitution Act, 1867*, just as the Federal Court of Appeal indicated it might in *Conacher*. Importantly, this Court recognized a constitutional convention in *Democracy Watch*, a decision of Justice Southcott. In *Democracy Watch*, this Court recognized that the powers of both the Governor General under section 96 of the *Constitution Act, 1867* and the powers of the Governor in Council under section 5.2 of the *Federal Courts Act*, have been transferred as a matter of constitutional convention to the Governor in Council (the federal Cabinet) and Prime Minister and Minister of Justice.

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[113] The Court very respectfully adopts the conclusions of my colleague Justice Southcott in *Democracy Watch* at paragraph 9:

> [9] By constitutional convention, when appointing judges to provincial superior courts, the Governor General acts on the advice of the Committee of the Privy Council of Canada. Similarly, the GIC, which appoints judges to the Federal Court, the Federal Court of Appeal, and the Tax Court of Canada, is defined in the *Interpretation Act*, RSC 1985, c I-21, as the Governor General acting on the advice or consent of the Privy Council for Canada. The Privy Council is composed of all the ministers of the Crown, who meet in the body known as Cabinet (see *League for Human Rights of B'Nai Brith Canada v Attorney General (Canada)*, 2010 FCA 307 [*B'Nai Brith*] at para 77). As such, all federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice [Minister]. (In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet. For simplicity, these Reasons will refer to the advice to Cabinet being provided by the Minister.)
>
> [Emphasis added]

[114] The Respondents argue this application does not meet the criteria established by the *ITO* test because the Prime Minister and Minister of Justice (the only named Respondents) may give advice (and consent) but are not the legal actors named in either section 96 of the *Constitution Act, 1867* (the Governor General) or the Governor in Council in the case of section 5.2 of the *Federal Courts Act*. The Respondents correctly note they alone are vested the relevant legal powers to fill judicial vacancies.

[115] While I agree the legal jurisdiction and power to fill vacancies lie with the Governor General under section 96 of the *Constitution Act, 1867* and with the Governor in Council under section 5.2 of the *Federal Courts Act*, constitutional conventions place those decisions in practice on Cabinet, the Prime Minister and the Minister of Justice who are named in this

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proceeding and whose advice-giving authority has already been confirmed by Southcott J., in *Democracy Watch*.

[116] As will be seen later in these reasons, the failure of the Applicant to name the legal actors is fatal to the Applicant's claim for *mandamus*.

[117] But that is not the end of the matter in terms of the alternative claim for declarations, where the issue becomes whether Justice Southcott's determination of the relevant advice-giving powers may be incorporated into a declaration.

[118] As stated at paragraph 9 of *Democracy Watch*, Justice Southcott concluded and put the convention this way:

> All federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.

[119] With respect, there is no obstacle in making a declaration to the same effect as Justice Southcott's conclusion. In support, I note the Respondent in *Conacher v Canada (Prime Minister)*, 2009 FC 920 (an application for judicial review before Justice Shore) made related arguments submitting the decision then at hand was for the Governor General to make, and that the Prime Minister and Cabinet's advice was not legally binding on the Governor General. Therefore, the Respondents submit here that the relief sought in this application pursuant to section 18.1 of the *Federal Courts Act* is not available. I disagree.

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[120] Indeed, Justice Shore rejected this argument, and was affirmed by the Federal Court of Appeal (*Conacher v Canada (Prime Minister),* 2010 FCA 131) which confirmed that the Federal Court has jurisdiction over direct exercises of Crown prerogative because they emanate from a federal source. At paragraph 68, Justice Shore stated:

> [68] The case of *Black v. Canada (Prime Minister),* above, shows that the Federal Court has jurisdiction over direct exercises of Crown prerogative because they emanate from a federal source. Although some prerogatives are reviewable, the Court must still determine whether a particular prerogative is justiciable. The hallmark of justiciability is whether the exercise of prerogative affects the rights or legitimate expectations of an individual. In the present case, no legal rights or legitimate expectations were affected, other than a claim having been made under the *Charter*, thus, the Prime Minister's advice is not reviewable. That being said, paragraph 18.1(4)(*f*) of the *Federal Courts Act* gives the Court the power to review, if, in fact, a decision maker acted "contrary to law" which is what the applicants imply in regard to section 56.1 of the *Canada Elections Act*.
>
> [Emphasis added]

[121] The Federal Court of Appeal in upholding Justice Shore, per Stratas J.A., determined:

> [5] Various conventions are associated with the Governor General's status, role, powers, and discretions. Some of these conventions, which are open to debate as to their scope, concern the Prime Minister's advice to the Governor General about the dissolution of Parliament and how the Governor General should respond: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., Vol. 1, loose-leaf (Toronto: Carswell, 2007), at pages 9-29 to 9-33. In our view, given the connection between the Governor General and the Prime Minister in this regard, the preservation of the Governor General's powers and discretions under subsection 56.1(1) arguably may also extend to the Prime Minister's advice-giving role. In any event, it seems to us that if Parliament meant to prevent the Prime Minister from advising the Governor General that Parliament should be dissolved and an election held, Parliament would have used explicit and specific wording to that effect in section 56.1. Parliament did not do so. In saying this, we offer no comment on whether such wording, if enacted, would be constitutional.

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[122] With respect therefore, the constitutional conventions identified by Justice Southcott form part of Canada's federal constitutional common law in the sense they are judge-made rules which the courts are entitled and may recognize in the appropriate case through the Court's declaratory power, notwithstanding they are not laws that may been enforced by the courts.

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[123] The Court was not pointed to any jurisprudence in which the distinction argued by the Respondents between *recognition* on the one hand, and *enforcement* of constitutional conventions on the other hand, results in the refusal of a declaration outlining the constitutional convention. .

(2) Constitutional convention to fill vacancies within a reasonable time

[124] The Chief Justice of Canada and the Canadian Judicial Council have requested that the vacancy crisis facing Canada's federal judiciary be remedied by filling vacant positions. I have accepted the facts and opinions of the Chief Justice of Canada and Canadian Judicial Council as expert evidence in this proceeding. They make an unanswerable case requiring this Court to take steps to cause the untenably high number of vacancies to be filled.

[125] The letter speaks for itself. It is set out above. The Court has already quoted extensively from it and needs not do so again. Obviously the root of the vacancy crisis is delay by the Governor General and Governor in Council in appointing judges to fill the critical and "appalling" level of federal judicial vacancies. It is apparent to this Court that the central issue is that judicial vacancies are not being filled within a reasonable time. And with respect, the Court is persuaded that the vacancy crisis is caused by delay – (unjustified "government inertia"

according to the letter) – by the Prime Minister and Minister of Justice in giving the required and necessary advice and consent to the Governor General and or Governor in Council to fill these critical vacancies. The Respondents filed no evidence to rebut any of this.

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[126] It seems to me given Parliament has determined what it considered an appropriate number of judges required by the Superior Courts, including the Federal Courts, as it has in legislation authorizing that number of appointments, such appointments must be made within a reasonable time of the vacancy. The alternative would allow the current untenable and crisis number of vacancies to remain unacceptably high with the negative consequences set out in the letter, plus the added negative consequence of effectively permitting Canada's executive government to ignore the express will of Parliament.

[127] In response, the Respondents effectively argue they are under no duty to advise the Governor General or Governor in Council to make appointments under either section 96 or 5.2. They say that how long they may decline to deal with the crisis backlog of vacancies is not for the courts but wholly for them. I disagree.

[128] The Respondents' position is not supportable in this case. The Court is satisfied based on the letter of the Chief Justice of Canada and Canadian Judicial Council relied on by the Applicant, and the evidence before the Court, that the backlog of vacancies is legally untenable and must be reduced.

[129] In the Court's view, the acknowledged constitutional convention that it is the exclusive authority of the Respondents to advise in respect of vacancies necessarily implies the related constitutional convention that judicial vacancies must be filled as soon as possible after vacancies arise, except in exceptional circumstances.

[130] In this connection, nothing suggests *Democracy Watch*, which affirmed the existence of the convention, is the last word on the subject. The Court is certainly not persuaded that the framing of the convention in *Democracy Watch* was ever intended to justify the "untenable", "appalling", "crisis" and "critical" vacancy situation now existing in the federal judiciary.

[131] In my view, the Court should now recognize that the relevant constitutional conventions include not only the responsibility to take steps to fill vacancies as soon as possible, but in this appalling and critical situation, to materially reduce the present backlog to what it was as recently as the Spring of 2016, that is to reduce the vacancies to the mid-40s across the federally appointed provincial Superior Courts and Federal Courts.

[132] In addition to declaring the constitutional convention set out above as found by Justice Southcott in *Democracy Watch*, the Court will declare the constitutional convention that appointments to fill vacancies shall be made within a reasonable time, and that the vacancy situation described by the Chief Justice of Canada and Canadian Judicial Council shall be materially reduced to what it was in the Spring of 2016.

[133] In the result, the Court will issue declarations as follows:

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> 1. All federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.
>
> 2. Appointments to fill judicial vacancies under section 96 of the *Constitution Act, 1867* and section 5.2 of the Federal *Courts Act* must be made within a reasonable time of the vacancy.
>
> 3. Appointments to fill current judicial vacancies are required for the reasons set out in the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023.
>
> 4. The Court makes Declarations 2 and 3 above in its expectation that the number of the judicial vacancies will be materially reduced in a reasonable time such that the total number of judicial vacancies returns to the mid-40s, that is, to the number of federal judicial vacancies in the Spring of 2016; in this manner the Court expects the untenable and appalling crisis and critical judicial vacancy situation found by this Court as identified by the Chief Justice and Canadian Judicial Council will be resolved.

C. *Admissibility of the Applicant's affidavit evidence*

[134] I will briefly canvass some of the technical and procedural objections raised by the Respondents in the alternative to their jurisdictional arguments.

(1) The Applicant's tables are admissible

[135] I have dealt with this already, but would repeat and add as follows, to confirm what has already been stated and found by the Court.

[136] The Respondents challenge the tables referred to above in the Applicant's affidavit, primarily alleging they contain inadmissible opinion evidence. The Applicant disagrees. In my

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respectful view, the tables should and will be accepted as evidence in this proceeding for the following reasons.

[137] In my view, these tables represent the aggregation by the Applicant of bare-bone raw statistical data the Applicant compiled from a great number of documents all of which are publicly available and obtained from federal and provincial websites, as identified and exhibited. The tables are also in the Court's view, useful aids in the analysis of the facts of this case. I see no point in going through the voluminous but uncontested record on which the tables are based simply to satisfy such unwarranted insistence.

[138] Also, the Respondents accept the documents on the basis of which these tables are produced, do not question to application of simple math to the many calendar dates, and point to no inaccuracies. To emphasize neither Respondent challenges the substance of the facts reported in these tables. The Respondents filed no contrary evidence although they had ample time and opportunity to do so. I therefore accept the tables for the facts they set out.

[139] The Court is also of the view the information in these tables is relevant to the Applicant's case in terms of the tests for *mandamus* (although *mandamus* is dismissed) and declaratory relief (which is granted) set out in *Apotex v Canada (Attorney General)*, [1994] 1 FC 742 (FCA), aff'd [1994] 3 SCR 1100 [*Apotex*] and *SA v Metro Vancouver Housing Corp*, 2019 SCC 4 [*Metro Vancouver Housing Corp*]. I respectfully conclude the objections of the Respondents in this respect are unfounded.

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[140] I appreciate the onus is on the Applicant to make his case. In my respectful view the Applicant has made his case. Notably, his evidence in this respect is confirmed and corroborated on the national scale by both the Chief Justice of Canada and the Canadian Judicial Council.

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[141] To confirm, I accept there were 46 vacancies in the spring of 2016, that there were 79 vacancies by July 1, 2023, that delays in appointing federal judges across Canada average 504 days with a midpoint of 383 days, that 32 Superior Court appointments were made in less than 90 days since 2020, and that the appointment of Chief Justices and Associate Chief Justices since 2016 took an average 57 days. I also accept that appointments in some cases have been made with the benefit of some additional notice in advance of the actual vacancy.

(2) Evidence drawn from the *Budget Implementation Acts* is accepted

[142] I also accept that Parliament has enacted a series of *Budget Implementation Acts* which variously increased the number of positions that might be filled under sections 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act*. I am entitled to take judicial notice of Acts of Parliament: see *Canada Evidence Act*, RSC 1985,c C 5, section 17:

> **17** Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the lieutenant governor in council of any province or colony that, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province or colony, whether enacted before or after the passing of the *Constitution Act, 1867*.

[143] The relevant *Budget Implementation Acts* relied upon by the Applicant in his affidavit are:

a. *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12 ("*BIA, 2018*");

b. *Budget Implementation Act, 2019, No. 1*, SC 2019, c 29 ("*BIA, 2019*");

c. *Budget Implementation Act, 2021, No. 1*, SC 2021, c 23 ("*BIA, 2021*");

d. *Budget Implementation Act, 2022*, No. 1, SC 2022, c 10 ("*BIA, 2022*").

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[144] In this connection, the Respondents do not dispute any of the information relied upon by the Applicant drawn from these statutes. I therefore accept the Applicant's evidence in this respect.

(3) Speculation that provinces have not created relevant vacant judicial positions rejected

[145] The Respondents argue vacancies to which appointments may be made by the Governor General (i.e., under section 96 of *Constitution Act, 1867*) may not be filled if the relevant provincial legislature has not created the relevant judicial position that is vacant for the Governor General to fill under section 96 of *Constitution Act, 1867*. No one disagrees with that assertion. I likewise agree no appointments may be made under section 5.2 of the *Federal Courts Act* to the Federal Courts for the Governor in Council to fill unless Parliament has created a judicial position(s) that is (are) vacant.

[146] However, other than stating these undisputed propositions, the Respondents filed no evidence to rebut the submissions of the Applicant or the contents of the letter from the Chief Justice of Canada and Canadian Judicial Council. While the Respondents' argument is valid in

the abstract, I am therefore unable to give it any force in this case. Without a shred of evidence, the Respondents position that the Provinces (or Parliament with respect to the Federal Courts) is or are at fault must fail.

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[147] The Respondents also submit much of the Applicant's affidavit should be struck on three main grounds: 1) it contains hearsay; 2) it contains opinion, argument, or legal opinion; and 3) it is not relevant to issues before the Court.

(4) Improper hearsay including letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister

[148] With respect to improper hearsay, the Respondents submit the affidavit includes media articles, reports, and letters that the Applicant did not author himself, that are relied upon for the truth of their contents to establish facts for this application.

[149] Principally, and among other things, the Respondents allege Exhibit KKK should be struck because it was tendered for the truth of its contents. Exhibit KKK is the email exchange between Applicant's counsel and a Radio-Canada/CBC journalist in which counsel requested and the journalist gave the Applicant's counsel a copy of the letter from the Chief Justice of Canada and the Canadian Judicial Council to the Prime Minister referred to throughout these Reasons.

[150] As I understand the Respondents they say the letter may not be considered because it contains impermissible information from a third party and not from the Applicant himself. They say the letter is hearsay.

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[151] I disagree. The letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister was widely publicized at the time, and extensively quoted by both English and French media. In my view the letter was not tendered for the truth of its contents, but as proof the Chief Justice of Canada and Canadian Judicial Council made a demand and request that the vacancies be filled and that the demand was worded as it was. I come to the same conclusion for Exhibit HHH from the Federation of Ontario Law Associations.

[152] In addition, the letter itself appears not to be publicly available. However, the record contains additional information confirming the letter was sent and received; both the Chief Justice of Canada and Prime Minister have said it was: see Applicant's Record, Volume 1, Exhibits LLL and MMM.

[153] The unchallenged evidence is that Applicant's counsel requested a copy of the letter from a journalist at Radio Canada/CBC who had written and published a report about the letter. The Radio-Canada/CBC journalist sent the Applicant an email copy of the letter in response to the Applicant's request.

[154] In my view, the copy exhibited in the Court's record meets the test of necessity. The letter was provided by a reputable source in whose business one might expect him to have

received such a letter. I have no reason to doubt the honesty or truthfulness of the journalist. The letter was published widely. The Respondents do not suggest the exhibit is fabricated or unreliable. The letter was not disavowed and was indeed subsequently referenced by both the sender and recipient: see Applicant's Record, Volume 1, Exhibits LLL and MMM.

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[155] I find it more likely than not the letter as set out in the journalist's email was sent and received as stated on its face.

[156] The Court reviewed the letter with Counsel for the Respondents at the hearing on several occasions. At no time was it suggested the Chief Justice of Canada was not qualified to write the letter on his behalf or for the Canadian Judicial Council.

[157] No one cast doubt on the qualifications or expertise of the Chief Justice of Canada or Canadian Judicial Council members, individually or collectively, to form the opinions expressed. Indeed, no one suggested the exhibited letter was not sent, its contents were not disputed, and no doubt was cast on the proposition that the letter exhibited what the letter said.

[158] In all the circumstances, the Court concludes the letter is admissible because it is both necessary and reliable as an exception to the hearsay rule: *Telus Communications Inc v Telecommunications Workers Union*, 2005 FCA 262 at paragraphs 25-26; *Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 at paragraph 30.

[159] Given the absence of any evidence on this point from the Respondents, the Court accepts and adopts what it finds the credible and evidence-based facts and opinions of the Chief Justice of Canada and Chair of Canada's collective federally-appointed senior most judiciary, and Canadian Judicial Council as expressed in the letter.

(5) Opinion and argument submissions rejected

[160] The Respondents also argue the Applicant's affidavit contains his opinion and the opinion of others that are irrelevant to the issues. In particular, the Respondents seek the following:

> a) Paragraphs 17, 18, 19, 20, 24 and 26 should be struck because they contain opinions and/or are irrelevant.
>
> b) Paragraphs 27, 29, 30, 31, 33, 34, 36 and 37 (as well and Exhibits HHH, III, JJJ, KKK, LLL and MMM attached thereto) shoud be struck because they contain improper hearsay.
>
> c) Paragraphs 38 to 49 should be struck because they contain improper hearsay, argument and opinion.

[161] As stated by Justice Noël at the Federal Court of Appeal in *Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 at paragraph 2, the purpose of an affidavit is "to adduce facts relevant to the dispute without gloss or explanation."

[162] However, by this I do not understand an affidavit which betrays a belief in the facts presented is inadmissible and must be struck in its entirety, particularly where, as here, the central facts are gathered up from a great number of original sources the veracity of which the Respondents do not question, not to mention they are corroborated by our Chief Justice of

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Canada and the Canadian Judicial Council. It is, with respect a question of degree. I am not persuaded to strike the entire affidavit.

[163] However, paragraphs 17, 20, 24, 26, 29, and 39-49 of the affidavit summarize in his own words the Applicant's views as to the content of the exhibits relied upon. This is unnecessary and they will be struck.

D. *Mandamus not granted*

[164] I turn now to the relief requested. The Applicant requests an order of *mandamus* compelling the Prime Minister and Minister of Justice to appoint judges to each of the vacancies in the superior courts across Canada by the later of the following two dates:

> a) Three months of the date of the order, or
>
> b) Nine months of having become aware that the position would be vacated.

[165] The Applicant states, it is not disputed and the Court agrees the test for *mandamus* is set out by the Federal Court of Appeal in *Apotex* as follows. Notably, all branches of the test for *mandamus* must be met; failure on one disentitles an applicant to relief:

> 1. There must be a legal duty to act;
>
> 2. The duty must be owed to the applicant;
>
> 3. There must be a clear right to performance of that duty, in particular;
>
> a. The applicant has satisfied all conditions precedent giving rise to the duty; and
>
> b. The was;

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i. A prior demand for performance of the duty;

ii. A reasonable time to comply with the demand unless refused outright; and

iii. A subsequent refusal which can be either expressed or implied, e.g. by unreasonable delay;

4. Where the duty sought to be enforced is discretionary, certain additional principles apply;

5. No adequate remedy is available to the applicant;

6. The order sought will have some practical value or effect;

7. The Court finds no equitable bar to the relief sought; and

8. On a balance of convenience, an order of *mandamus* should be issued.

(1) Legal Duty to Act lies with non-parties

[166] The Applicant submits the Respondents have the legal duty to appoint judges pursuant to section 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act*.

[167] Under the theory of transference discussed above, it is not disputed and I find the Respondents by constitutional convention have the sole authority to advise and give consent as to who and when the Governor General and or Governor in Council makes appointments to fill federal judicial vacancies.

[168] Because it is a convention, I am not persuaded there is an enforceable legal duty on the named Respondents in this case. The applicable legal duty in this case lies on the Governor General to make appointments in the case of section 96 of the *Constitution Act, 1867*, and the

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Governor in Council under section 5.2 of the *Federal Courts Act* as set out by Justice Southcott in *Democracy Watch*.

[169] However the jurisprudence is universal that courts may not compel the Governor General or Governor in Council to follow a constitutional convention. In other words, it appears there is nothing this Court can do to enforce the constitutional convention even if the Governor General were to unconstitutionally reject the advice of Cabinet. This is thoroughly discussed above.

[170] That said, and even accepting as I do that by constitutional convention certain powers of the Governor General and Governor in Council under sections 96 and 5.2 are now effectively transferred to Cabinet, the Minister of Justice and the Prime Minister, it remains the law that the assent of the Governor General and Governor in Council to the advice offered is and remains a statutory legal requirement under section 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act*.

[171] The Court has no power to amend the language of either section 96 or section 5.2 to remove the references to the Governor General and or the Governor in Council.

[172] Given the Applicant's decision not to name either the Governor General or the Governor in Council as parties, the Court declines to issue *mandamus* in this case.

[173] The tests for *mandamus* being conjunctive, all must be met. Having failed the first, it is not necessary to consider the remaining test.

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[174] Therefore the request for *mandamus* will be dismissed.

E. *Applicant has public interest standing*

[175] The Respondents further alleged the Applicant had no standing to bring this application. The Applicant argued that he meets the tests for both private interest standing and public interests standing.

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[176] With respect, the Court finds the Applicant meets the test for public interest standing. It is not necessary to consider the private interest standing test for *mandamus* because, as discussed above, the Court is not granting *mandamus*.

[177] The Applicant deposes and it is not disputed that he is affected by judicial vacancies as counsel representing vulnerable clients:

> 8. Over the past few years, I have experienced significant delays in the litigation proceedings I have brought in superior courts on behalf of vulnerable clients. These delays have harmed my clients, who often do not have the resources to wait years for justice. These delays exacerbate trauma for some clients and create additional pressure for clients to settle legitimate claims for a lesser amount than might be obtained in court because they do not have the financial resources to pay their bills while waiting for a trial date to be set or a judgement to be rendered.
>
> 9. For example, I represented Margaret Godard, a victim of workplace sexual harassment, in a civil action before the Ontario Superior Court of Justice. After many years of pre-trial proceedings, the court confirmed that a trial date was set for the week of October 17, 2022. However, mere days beforehand, on October 13, 2022, the Trial Coordinator informed me that there were no judges available to preside over the matter, so it would have to be cancelled, and the earliest available new hearing date would be December 12, 2022. The email chain containing this correspondence is attached as Exhibit “A”.

[178] The test for public interest standing is set out by the Supreme Court of Canada in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown East Side*]. At paragraph 37, Justice Cromwell for the majority identifies three factors to consider in exercising discretion to grant public interest standing:

> a. There is a serious justiciable issue raised;
>
> b. The plaintiff has a real stake or a genuine interest in it; and
>
> c. In all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.

[179] The Applicant meets all three tests.

[180] The first test is met. The issue is serious and justiciable, and accords with paragraph 73 of *Democracy Watch* where the appropriateness of judicial involvement in a matter was explored with the following questions: the issues are entirely legal, the factual basis not being contested; the issue is not abstract of hypothetical, is not simply a disagreement with a government opinion as indeed the Respondents provided no opinion to justify or explain their decisions, it is appropriate for the courts to engage on this issue as others have not, the issuance of a declaration is expected to have practical effect assuming the Court's Judgment is respected by the Respondents.

[181] I also find the Applicant has a real stake and genuine interest in this issue. He represents clients whose right to access justice in a reasonable time and without unreasonable delay is infringed or denied.

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[182] *Downtown Eastside* at paragraph 44 recognizes the third issue entails asking if the manner the proceeding is undertaken is a reasonable and effective means to bring the challenge to court. In *League for Human Rights of B'Nai Brith Canada v Attorney General (Canada)*, 2010 FCA 307, Justice Stratas recognized at paragraph 61 a "concern that an overly restrictive approach to public interest standing would immunize government from certain challenges."

[183] In my respectful view, this Application is a reasonable and effective manner in all the circumstances of bringing this issue before the courts, particularly as it concerns an issue in respect of which the government should not be immunized from challenge. The issue raised is obviously an important one for the Chief Justice of Canada and the Canadian Judicial Council.

[184] Frankly in my discretion this case is one that should be addressed because of its importance not just to the Applicants but to the federally appointed judiciary as a whole, and is of great importance to the Canadian public who need access to the courts and wish to see criminal and civil justice dispensed without unreasonable delay and impediments such as caused by the untenable level of vacancies, as stated by the Chief Justice of Canada and the Canadian Judicial Council, and whose submissions have been accepted by this Court.

[185] See the Court's discussion under Parts V and VI and elsewhere above.

F. *Declaratory Relief*

[186] While *mandamus* will not be granted, in the alternative the Applicant requests declarations that:

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> A. the Prime Minister and Minister of Justice are in violation of their duties to appoint judges to the vacancies in the superior courts under s. 96 of the *Constitution Act, 1867*, and s. 5.2 of the *Federal Courts Act*; and
>
> B. A reasonable interpretation of the requirement to appoint judges in s. 96 of the *Constitution Act, 1867*, and s. 5.2 of the *Federal Courts Act* is that, absent exceptional circumstances, the appointments shall be made within nine months of the date the applicable Minister becomes aware that a position will be vacated, or three months after a position is vacated, whichever is later.

(1) Declaratory relief granted

[187] For the reasons outlined above, the Court will not grant the first declaration which seeks the same relief requested by way of *mandamus* which the Court has declined to grant.

[188] Turning to the second declaration sought, the test for granting declaratory relief is stated by the Supreme Court of Canada in *Metro Vancouver Housing Corp* at paragraph 60. Declaratory relief is appropriate where a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought.

[189] In my respectful view, this case meets these requirements but a declaration will not be granted in the terms sought.

[190] First, as extensively considered already, the Court has jurisdiction to hear the matter and to grant the specified relief pursuant to section 18 and 18.1 of the *Federal Courts Act*.

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[191] Second, I agree the dispute is real and not theoretical. The Applicant's assertions are in material respects corroborated and confirmed by the Chief Justice of Canada and Canadian Judicial Council, there are approximately 80 judicial vacancies in the provincial Superior Courts and Federal Courts across the country, and unquestionably these vacancies pose serious and critical challenges to the functioning of our courts, access to justice, timely determination of serious criminal cases and civil actions and other consequences as set out in the letter from the Chief Justice of Canada and Canadian Judicial Council.

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[192] Indeed, no one can review the words of the Chief Justice of Canada and the Canadian Judicial Council in their letter, understanding nothing has changed in the intervening 9 months, and suggest the dispute between Canada's federally appointed judiciary and the Prime Minister and his Minister of Justice is in any way theoretical.

[193] I have already found per (c) of the test that the party raising the issue has a genuine interest in its resolution and therefore have granted him public interest standing. I also find the Respondents have an interest in opposing the declaration being sought, thus satisfying (d) of the tests for a declaration.

(2) Appointments shall be made within a reasonable time

[194] The Court is not persuaded to accept the timelines proposed by the Applicant within which these "appalling" and unacceptably high vacancies levels should be filled. The situation as outlined by the Chief Justice of Canada and Canadian Judicial Council is clearly critical and untenable and thus most serious, and therefore in the Court's view may not simply be ignored.

[195] Very unfortunately, the Court has no reason to expect the situation will change without judicial intervention. The Respondents filed no evidence to justify why the “appalling”, “untenable” and “crisis” situation created by the unacceptably high number of vacancies has not yet been remedied by the Prime Minister, and now by two successive Ministers of Justice.

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[196] While timelines are routinely ordered for hearings before immigration officials in immigration cases, I am not persuaded the situation of judicial appointments is analogous. The classic immigration situations does not usually involve delay caused by a shortage of decision makers but delay in obtaining evidence often from foreign governments. To the contrary, the sole issue in this case is the critical vacancy situation.

[197] While the Respondents cite *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paragraph 11 for the proposition that “a declaration can only be granted if it will have practical utility, that is, if it will settle a ‘live controversy’ between the parties,” in my respectful view the Court is entitled to expect the Respondents - particularly the Respondent Minister of Justice who in his capacity as Attorney General of Canada is the chief law officer of the Crown - to obey the law.

[198] The Court has no reason to believe a declaration in this case will be ignored. Rather, the Court has every expectation and entitlement to proceed on the opposite presumption. Indeed, in *Assiniboine v Meeches*, 2013 FCA 114 the Federal Court of Appeal holds that declaratory relief declares what the law is, without ordering any sanction or specific action that must be done. The

Federal Court of Appeal also holds that compliance by government actors (i.e., the state) is expected:

> 12 … [A] declaratory judgment is binding and has legal effect. A declaration differs from other judicial orders in that it declares what the law is without ordering any specific action or sanction against a party. Ordinarily, such declarations are not enforceable through traditional means. However, since the issues which are determined by a declaration set out in a judgment become res judicata between the parties, compliance with the declaration is nevertheless expected, and it is required in appropriate circumstances.
>
> 13. Declaratory relief is particularly useful when the subject of the relief is a public body or public official entrusted with public responsibilities, because it can be assumed that such bodies and officials will, without coercion, comply with the law as declared by the judiciary. Hence the inability of a declaration to sustain, without more, an execution process should not be seen as an inadequacy of declaratory orders against public bodies and public officials.
>
> 14 …[The] proposition that public bodies and their officials must obey the law is a fundamental aspect of the principle of the rule of law, which is enshrined in the Constitution of Canada by the preamble to the Canadian Charter of Rights and Freedoms. ... Thus, a public body or public official subject to a declaratory order is bound by that order and has a duty to comply with it. If the public body or official has doubts concerning a judicial declaration, the rule of law requires that body or official to pursue the matter through the legal system. ... The rule of law can mean no less.
>
> 15 … As further noted in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at par. 62, the assumption underlying the choice of a declaratory order as a remedy is that governments and public bodies subject to that order will comply with the declaration promptly and fully. However, should this not be the case, the Supreme Court of Canada has laid to rest any doubt about the availability of contempt proceedings in appropriate cases in the event that public bodies or officials do not comply with such an order. As noted by Iacobucci and Arbour JJ. at par. 67 of *Doucet-Boudreau*: “[o]ur colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings

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> against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases" (emphasis added).

[199] Given this, and with respect, the Court has concluded no timelines should be ordered as proposed at least at this time. That may change of course if the underlying situation does not, in respect of which the Court is not asked to speculate.

[200] For the reasons set out above, the Court declares that:

1. All federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.

2. Appointments to fill judicial vacancies under section 96 of the *Constitution Act*, 1867 and section 5.2 of the *Federal Courts Act* must be made within a reasonable time of the vacancy.

3. Appointments to fill current judicial vacancies are required for the reasons set out in the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023, reproduced herein.

4. The Court makes Declarations 2 and 3 above in its expectation that the number of said judicial vacancies will be materially reduced within a reasonable time such that the total number of judicial vacancies returns to the mid-40s, that is, to the number of federal judicial vacancies in the Spring of 2016; in this manner the Court expects the untenable and appalling crisis and critical judicial vacancy situation found by this Court as identified by the Chief Justice and Canadian Judicial Council will be resolved.

   [Emphasis added]

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XI. Conclusion

[201] The Court grants the application in part. The request for an order of *mandamus* is dismissed, as is the request for the first declaration. However declarations will be issued.

XII. Costs

[202] The parties agreed that if the Applicant is successful he would receive all inclusive costs of $1500.00 but if the Applicant is not successful, the parties would bear their own costs. In my discretion these agreements are reasonable. The Applicant having succeeded for the most part, the Court awards him costs in the all-inclusive sum of $1,500.00 payable by the Respondents.

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JUDGMENT in T-1274-23

THIS COURT'S JUDGMENT is that:

1. The Application is granted in part.
2. It is hereby declared:
    1. That all federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.
    2. That appointments to fill judicial vacancies under section 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act* must be made within a reasonable time of the vacancy.
    3. That appointments to fill current judicial vacancies are required for the reasons set out in the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023 set out in paragraph 1 and Schedule A to these Reasons for Judgment.
    4. That the Court makes Declarations 2 and 3 above in its expectation that the number of said judicial vacancies will be materially reduced in a reasonable time such that the total number of judicial vacancies returns to the mid-40s, that is, to the number of federal judicial vacancies in the Spring of 2016; in this manner the Court expects the untenable and appalling crisis, and critical judicial vacancy situation found by this Court as identified by the Chief Justice and Canadian Judicial Council will be resolved.

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3. While I will not seize myself of this matter, the Court may provide guidance or resolution of related issues if requested.

4. Paragraphs 17, 20, 24, 26, 29, and 39-49 are struck from the Applicant's affidavit.

5. The Respondents shall pay the Applicant $1500.00 all inclusive costs.

"Henry S. Brown"
Judge

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SCHEDULE A

Nicholas Pope

From: DANIEL LEBLANC <daniel.leblanc@radio-canada.ca>

Sent: June 16, 2023 9:18 AM

To: Nicholas Pope

Subject: Re: Wagner CJ's May 3 letter to PM

Good morning, here is the letter.

Le 3 mai 2023

Le très honorable Justin Trudeau

Monsieur le Premier ministre.

En tant que juge en chef du Canada et président du Conseil canadien de la magistrature, je dois vous faire part de ma très grande inquiétude concernant le nombre important de postes vacants au sein de la magistrature fédérale et l'incapacité du gouvernement à combler ces postes en temps opportun.

La situation actuelle est intenable et je crains qu'elle ne résulte en une crise pour notre système de justice, qui fait déjà face à de multiples défis. L'accès à la justice et la santé de nos institutions démocratiques sont en péril.

Vous le savez sans doute, il y a à l'heure actuelle 85 postes vacants au sein de la magistrature fédérale à travers le pays. Certains tribunaux doivent composer depuis des années avec un taux de postes vacants se situant entre 10 et 15 pour cent. Il n'est d'ailleurs pas rare de voir des postes demeurer vacants pendant plusieurs mois, voire, même dans certains cas, pendant des années. À titre d'exemple concret, la moitié des postes à la Cour d'appel du Manitoba sont présentement vacants. Les nominations aux postes clés de juges en chef et de juges en chef associés se font également à un rythme très lent. À cet effet, il y a récemment eu des délais considérables dans les nominations au poste de juge en chef dans nombre de provinces, incluant l'Alberta, l'Ontario et l'Île-du-Prince-Édouard. Le poste de juge en chef du Manitoba est quant à lui vacant depuis maintenant six mois, et les postes de juges en chef associés à la Cour du Banc du Roi de la Saskatchewan et à la Cour supérieure du Québec sont vacants depuis plus d'une année. Aucune explication claire ne justifie ces délais.

Il faut préciser que les difficultés engendrées par la pénurie de juges exacerbent une situation déjà critique au sein de plusieurs tribunaux, confrontés à un manque criant de ressources, en raison d'un sous-financement chronique de la part des provinces et territoires. Toutefois, bien que plusieurs facteurs expliquent la crise à laquelle fait face notre système de justice

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actuellement, la nomination des juges en temps utile est une solution à portée de main, qui permettrait d'améliorer la situation de manière rapide et efficace. Compte tenu de ce fait évident et de la situation critique à laquelle nous sommes confrontés, l'inertie du gouvernement quant aux postes vacants et l'absence d'explications satisfaisantes pour ces retards sont déconcertantes. La lenteur des nominations est d'autant plus difficile à comprendre que la plupart des vacances judiciaires sont prévisibles, notamment celles générées par les départs à la retraite, pour lesquelles les juges donnent généralement un préavis de plusieurs mois. Dans ce contexte, les retards quant aux nominations envoient un signal qu'elles ne sont tout simplement pas une priorité pour le gouvernement.

Au nom du Conseil canadien de la magistrature, je peux attester que les juges en chef et juges en chef adjoints de tout le pays sont satisfaits de la qualité des récentes nominations et se réjouissent de l'ajout de nouveaux postes de juge dans les derniers budgets. Nous reconnaissons d'ailleurs que votre gouvernement a déployé des efforts afin d'instaurer un processus de nomination plus indépendant, transparent et impartial pour les juges de nomination fédérale. Il serait malheureux que le rythme perfectible des nominations à la magistrature fédérale à travers le pays discrédite ultimement ce processus.

J'ai eu récemment l'occasion de rencontrer le ministre de la Justice et de discuter avec lui à ce sujet. Les juges en chef entretiennent d'ailleurs de très bonnes relations avec le ministre et son cabinet et nous sommes confiants qu'il est disposé à déployer tous les efforts nécessaires pour remédier aux problèmes que je viens d'exposer.

Malgré tous ces efforts, il est impératif que le Cabinet du Premier ministre accorde à cette question l'importance qu'elle mérite et que les nominations soient faites en temps opportun. Il est en effet primordial de combler les postes vacants au sein de la magistrature avec diligence, afin d'assurer le bon fonctionnement du pouvoir judiciaire. Le Conseil canadien de la magistrature a dans le passé exhorté les gouvernements à procéder aux nominations judiciaires plus rapidement. Cette fois, nous craignons sérieusement que, sans des efforts concrets pour remédier à la situation, nous atteignions très bientôt un point de non-retour dans plusieurs juridictions. Les conséquences feront les manchettes et seront graves pour notre démocratie et l'ensemble des Canadiens et Canadiennes. La situation exige votre attention immédiate.

Les postes laissés vacants ont des impacts significatifs sur l'administration de la justice, le fonctionnement de nos tribunaux et la santé des juges. Les membres du Conseil canadien de la magistrature ont récemment entrepris de dresser un portrait plus complet des difficultés rencontrées dans leurs tribunaux respectifs. Les constats sont accablants.

Malgré tout le professionnalisme et le dévouement de nos juges, le manque d'effectifs se traduit nécessairement par des délais additionnels pour entendre des causes et rendre des jugements. Les juges en chef rapportent que, puisque les juges sont surchargés, les délais pour fixer des affaires sont inévitables et des audiences doivent être reportées ou ajournées. De plus, même lorsque les affaires sont entendues, les jugements tardent parfois à être rendus, puisque les juges doivent siéger davantage, ce qui leur laisse moins de temps pour délibérer. Le cadre d'analyse de l'arrêt R. c. Jordan, 2016 CSC 27, quant au droit de l'accusé

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d'être jugé dans un délai raisonnable en vertu de la Charte canadienne des droits et libertés, joue également un rôle important à cet égard. Il prévoit que, devant les cours supérieures, les accusations pénales doivent être traitées dans un délai maximum de 30 mois, sauf circonstances exceptionnelles. Si un procès n'est pas achevé dans ce délai, un arrêt des procédures peut être ordonné. Plusieurs juges en chef mentionnent qu'en s'efforçant de respecter le délai prévu dans Jordan, ils sont actuellement contraints de choisir les affaires pénales qui « méritent » le plus d'être entendues. Malgré tous leurs efforts, des arrêts de procédure sont prononcés contre des individus accusés de crimes graves, comme des agressions sexuelles ou des meurtres, en raison de délais dus, en partie ou en totalité, à une pénurie de juges. À titre d'exemple, la Cour du Banc du Roi de l'Alberta rapporte que plus de 22 pour cent des affaires pénales en cours dépassent le délai de 30 mois et que 91 pour cent de ces affaires concernent des crimes graves et violents. Par ailleurs, l'urgence de traiter les affaires pénales a aussi pour effet d'écarter les affaires civiles du rôle des tribunaux. Pour celles-ci, le système de justice risque de plus en plus d'être perçu comme inutile. De telles situations démontrent une faillite de notre système de justice et sont susceptibles d'alimenter le cynisme auprès du public, et d'ébranler la confiance de ce dernier dans nos institutions démocratiques.

L'impact des postes laissés vacants sur les juges eux-mêmes est aussi non négligeable. Faisant face à une surcharge de travail chronique et à un stress accru, il est de plus en plus fréquent de voir des juges placés en congés médicaux, ce qui a un effet domino sur leurs collègues qui doivent alors porter un fardeau additionnel. Par ailleurs, il devient difficile pour les juges de certains tribunaux de trouver le temps nécessaire pour suivre des formations, y compris celles dites obligatoires. Cette situation n'augure rien de positif pour assurer une magistrature saine et prospère. Si les difficultés actuelles perdurent, il pourrait également devenir plus difficile d'attirer des candidatures de qualité aux postes de juge.

C'est d'ailleurs déjà le cas en Colombie-Britannique.

Richard Wagner

Le ven. 16 juin 2023, à 07 h 40, Nicholas Pope <npope@hameedlaw.ca> a écrit :

Hi Daniel,

I’m a lawyer in Ottawa. I read your story on Chief Justice Wagner’s May 3, 2023, letter to the Prime Minister about judicial vacancies. Would you be able to share a copy of this letter with me?

Thanks,

Nicholas Pope
Lawyer (he/him)
Phone: 613.656.6917 | Fax: 613.232.2680 | npope@hameedlaw.ca
43 Florence Street | Ottawa, Ontario, Canada | K2P 0W6
www.hameedlaw.ca

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1274-23
STYLE OF CAUSE:	YAVAR HAMEED v PRIME MINISTER AND MINISTER OF JUSTICE
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 15, 2023
JUDGMENT AND REASONS:	BROWN J.
DATED:	FEBRUARY 13, 2024

APPEARANCES:

Nicholas Pope	FOR THE APPLICANT
David Aaron Dylan Smith	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Hameed Law Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS

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January 25, 2024

Le 25 janvier 2024

ORDER
MOTION

ORDONNANCE
REQUÊTE

INTERNATIONAL AIR TRANSPORT ASSOCIATION, AIR TRANSPORTATION ASSOCIATION OF AMERICA, DBA AIRLINES FOR AMERICA, DEUTSCHE LUFTHANSA AG, AIR FRANCE, S.A., BRITISH AIRWAYS PLC, AIR CHINA LIMITED, ALL NIPPON AIRWAYS CO., LTD., CATHAY PACIFIC AIRWAYS LIMITED, SWISS INTERNATIONAL AIRLINES LTD., QATAR AIRWAYS GROUP Q.C.S.C., AIR CANADA, PORTER AIRLINES INC, AMERICAN AIRLINES, INC., UNITED AIRLINES INC., DELTA AIR LINES INC., ALASKA AIRLINES INC., HAWAIIAN AIRLINES INC., AND JETBLUE AIRWAYS CORPORATION V. CANADIAN TRANSPORTATION AGENCY AND ATTORNEY GENERAL OF CANADA
(Fed.) (40614)

CÔTÉ J.:

UPON APPLICATIONS by Council of Canadians with Disabilities, National Pensioners Federation and Public Interest Advocacy Centre (jointly), Gábor Lukács, Société québécoise de droit international and Abdallah Zoghbi for leave to intervene in the above appeal;

AND THE MATERIAL FILED having been read;

IT IS HEREBY ORDERED THAT:

The motion for leave to intervene by Abdallah Zoghbi is dismissed.

The motions for leave to intervene by Council of Canadians with Disabilities, National Pensioners Federation and Public Interest Advocacy Centre (jointly), Gábor Lukács and Société québécoise de droit international are granted and the three (3) interveners shall be entitled to each serve and file a single factum, not to exceed ten (10) pages in length, on or before March 6, 2024.

The three (3) interveners are granted permission to present oral arguments not exceeding five (5) minutes each at the hearing of the appeal.

The appellants are granted permission to serve and file a single factum in reply to all interventions, not to exceed five (5) pages in length, on or before March 13, 2024.

The interveners are not entitled to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties.

Pursuant to Rule 59(1)(*a*) of the *Rules of the Supreme Court of Canada*, the interveners shall pay to the appellants and the respondents any additional disbursements resulting from their interventions.

Suzanne Côté

J.S.C.C.
J.C.S.C.

paras 141-158, particularly 156

SUPREME COURT OF YUKON

Citation: *Mercer v Yukon (Government of)*, 2023 YKSC 59

Date: 20231103
S.C. No. 20-A0032
Registry: Whitehorse

2023 YKSC 59 (CanLII)

BETWEEN:

ROSS MERCER
TRENT ANDREW JAMIESON
DOUGLAS CRAIG WALKER
ALLAN PATRICK MYTRASH
MARTIN GREGORY LOOS
JAN ERIK MARTENSSON
CLAYTON ROBERT THOMAS

PLAINTIFFS

AND

THE GOVERNMENT OF YUKON
MINISTER OF COMMUNITY SERVICES OF THE YUKON TERRITORY
ATTORNEY GENERAL OF THE YUKON TERRITORY

DEFENDANTS

Before Chief Justice S.M. Duncan

Counsel for the Plaintiffs — Vincent Larochelle

Counsel for the Defendants — Catherine J. Boies Parker, KC, and Alexander Kirby

REASONS FOR DECISION

I. OVERVIEW

[1] The civil state of emergency declared in the Yukon in response to the COVID-19 pandemic between March 2020 and March 2022[1] was unprecedented. This summary trial application is about the constitutionality of the legislation (*Civil Emergency*

[1] (Except between August 25, 2021, and November 8, 2021).

Measures Act, RSY 2002, c 34 ("*CEMA*")) that authorized this declaration, and the exercise of certain powers by the Minister of Community Services and the Executive Council, also referred to as Cabinet. The plaintiffs say *CEMA* is unconstitutional because it allowed the Executive Council in the Yukon to govern during the state of emergency without any effective oversight by or accountability to the legislature, or review by the judiciary.

[2] Determining this question requires an understanding of legal principles that have developed over years of constitutional interpretation. The principles relate to the structure and inter-relationship of the three branches of government – legislative, executive, and judicial – and the nature of emergency circumstances, understood in the context of the *CEMA* legislation, and the facts of the pandemic in the Yukon.

[3] The plaintiffs seek a declaration that *CEMA* is inconsistent with constitutional principles and norms and as a result is of no force and effect, to the extent of the inconsistency. They further seek a declaration that s. 10 of *CEMA* is of no force and effect because it ousts the jurisdiction of this Court.

[4] The plaintiffs argue that *CEMA* represents an unconstitutional surrender of Yukon legislative authority. The plaintiffs say the *Yukon Act,* SC 2002, c 7 (the "*Yukon Act"*), including the preamble referring to responsible government, creates a legislature designed to make policy choices in the context of the rule of law, democracy, Parliamentary sovereignty, responsible government and the separation of powers, some of the unwritten principles emanating from the *Constitution Act, 1867*. The plaintiffs say these principles inform the structure set out in the *Yukon Act* establishing the three separate branches of government. The plaintiffs argue that *CEMA* is unconstitutional

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because it allows the executive branch of the Yukon to decide policy and make law without any effective oversight by or accountability to the legislature or the judiciary.

[5] The defendants acknowledge that *CEMA* conveys extraordinary powers. But this is consistent with Canadian authority that upholds the ability of legislatures to delegate broad powers, particularly in emergency circumstances, and to limit the liability of the Crown. The defendants say that nothing in *CEMA* infringes the accountabilities of the responsible Minister, the Cabinet, and the legislature, nor does it remove the jurisdiction of the Court. *CEMA* is the product of the deliberations of a democratically elected body.

[6] The plaintiffs' application is dismissed. Authoritative jurisprudence supports the ability of the legislature to delegate a broad range of powers to the executive branch. Nothing in the text of the *Yukon Act* prevents the delegated powers set out in *CEMA*. That delegation of power is the result of the democratic process by which *CEMA* was enacted. The powers are constrained by the limits in *CEMA* itself – a temporally limited state of emergency and the authorization of only those orders or acts considered advisable for the purpose of the state of emergency. Judicial review is preserved and can be used to challenge executive orders that violate the *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982* (the "*Charter*") or that exceed the parameters of *CEMA*. The elimination of certain causes of action for damages or certain judicial remedies is not sufficient to constitute an ousting of the jurisdiction of the court.

[7] The plaintiffs are asking this Court to intervene inappropriately into the democratically elected legislature's choices about how to govern the Yukon in the context of an emergency. There is nothing in the text of the *Yukon Act*, or in the unwritten constitutional principles, or in the jurisprudence interpreting delegation of

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powers by the legislature, that authorizes this Court to invalidate *CEMA* for the reasons provided by the plaintiffs.

II. FACTUAL BACKGROUND AND CONTEXT

[8] Cases of COVID-19 were first reported in China in late 2019. COVID-19 is a virulent communicable air-borne respiratory disease that in some cases has caused severe illness and death. The first confirmed case appeared in Canada in January 2020. As of December 2022, over 48,000 people in Canada had died from COVID-19 and over 4.4 million people had been infected. The World Health Organization ("WHO") announced on March 11, 2020, that COVID-19 was a global pandemic, meaning it was an infectious disease spreading significantly in multiple countries around the world at the same time. It was not until May 2023 that the WHO stated COVID-19 no longer qualified as a global health emergency.

[9] In the beginning, little was known about the virus. Decisions to protect public health were made on the basis of incomplete and evolving information. Government responses in the Yukon, as elsewhere, included public health measures as well as financial and other relief from the economic consequences of the pandemic.

[10] The Yukon has particular characteristics that informed government responses to the COVID-19 pandemic. It is geographically isolated and has a small population; the health care system has limited capacity due to a restricted number of hospital beds and ventilators, and an insubstantial oxygen supply; it depends on visiting medical specialists and regular medical evacuations of patients with acute needs to larger centres in adjacent provinces; and there are vulnerable people throughout the Yukon

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and particularly in the Yukon communities, including First Nation people, many of whom were at greater risk of negative outcomes from COVID-19.

[11] On March 18, 2020, the Yukon Chief Medical Officer of Health declared a public health emergency under the *Public Health and Safety Act*, RSY 2002, c 176 ("*Public Health and Safety Act*").

[12] On March 19, 2020, the Legislative Assembly (the "Legislature") unanimously adopted a special Order to adjourn until October 1, 2020. The standing committees of the Legislature continued to meet remotely over the summer of 2020.

[13] On March 27, 2020, the Yukon Executive Council declared a state of emergency under s. 6(1) of *CEMA*. The declaration of the state of emergency must occur before powers under *CEMA* can be exercised.

[14] On June 12, 2020, the state of emergency was extended by the Executive Council for 90 days. Further 90-day extensions occurred on September 9, 2020, December 7, 2020, March 3, 2021, and May 27, 2021. The state of emergency ended on August 25, 2021. Then on November 8, 2021, a new state of emergency was declared as a result of the increased spread of COVID-19 at that time. It was renewed on February 3, 2022, but ended before the 90 days had expired, on March 17, 2022.

[15] When the Legislature resumed sitting on October 1, 2020, the following motion was introduced: "[t]hat this House supports the current state of emergency in Yukon". The sixteen members of the Legislature unanimously passed the motion on November 18, 2020, after vigorous debate on the motion itself and various proposed amendments. Between October 14 and November 18, 2020, four amendments were made to the motion, and all were defeated after debate.

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[16] On December 4, 2020, the Minister of Community Services moved another motion: “That it is the opinion of this House that the current state of emergency, established under the *Civil Emergency Measures Act* and expiring on December 8, [2020], should be extended.” A proposed amendment was debated and defeated and this main motion was carried unanimously.

[17] On December 8, 2020, a motion to create a Special Committee on Civil Emergency Legislation was passed unanimously. The committee was established by an Order of the Legislature to consider and identify options for modernizing *CEMA*, as well as to make recommendations on possible amendments. The Special Committee held public hearings to receive views and opinions of Yukoners and was authorized to call for persons, papers and records, and to sit during intersessional periods.

[18] Meanwhile, on November 30, 2020, Bill No. 302, an “*Act to Amend the Civil Emergency Measures Act*” was introduced. It proposed the following amendments to *CEMA*: increase legislative scrutiny over extending a state of emergency; require review of Ministerial Orders by the Legislature or a committee of the Legislature; and allow for more public input by having committees of the Legislature conduct public hearings on regulations and Ministerial Orders. This bill was defeated after first reading.

[19] On May 25, 2021, Bill No. 300 was introduced, proposing similar amendments to those that had been introduced in Bill No. 302 in November 2020 and defeated.

[20] Then on March 7, 2022, a new Bill No. 302 entitled “*Act to Amend the Civil Emergency Measures Act (2022)*” was introduced. It contained the same proposed amendments as the first Bill No. 302 introduced and defeated in November 2020, and the amendments in Bill No. 300 introduced on May 25, 2021. It added more language

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about legislative oversight similar to the federal *Emergencies Act,* RCS 1985, c 22 (4th Supp.). This new Bill No. 302 was defeated at second reading, after significant debate.

[21] On March 10, 2022, Bill No. 300 introduced on May 25, 2021, was removed by the Speaker from the Order Paper because it was similar to Bill No. 302 which had just been defeated.

[22] On March 17, 2022, the Yukon government announced the end of its state of emergency.

[23] On March 18, 2022, the Yukon government announced it was reviewing *CEMA* and the *Public Health and Safety Act*, to identify gaps, capture best practices, and identify areas for improved coordination through engagement with First Nations governments, municipalities and stakeholders throughout the Yukon. This was after a mandate letter dated July 5, 2021, was sent by the Premier to the Minister of Community Services, requesting that the Minister along with the Department of Health and Social Services review *CEMA* and the *Public Health and Safety Act* to improve Yukon's ability to address future emergencies.

[24] During the two states of emergency, the Minister of Community Services enacted many different orders affecting a broad range of subject areas, including but not limited to border closures, quarantines, government contracts and leases, limitation periods, licensing, and social assistance. None of the orders remains in effect. They lapsed with the termination of the state of emergency in March 2022.

[25] The Yukon government prepared a Yukon Government Pandemic Co-ordination Plan providing a framework guiding the Yukon government preparedness for and response to a health pandemic in or affecting the Yukon. It is publicly available and

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came into effect in March 2020. It is an accompaniment to another document, Yukon Government Emergency Co-ordination Plan dated December 2011, also publicly available. In addition, a plan entitled: “A Path Forward: Yukon’s plan for lifting COVID-19 restrictions” was released publicly in 2020 and updated in August 2021. It outlined the government’s response to COVID-19.

[26] The affidavit of Ross Mercer, relied on by the plaintiffs, describes the progress of COVID-19 in the Yukon; the effect of some of the executive orders made under *CEMA*, especially those related to travel and border restrictions, on him and his business; the inadequacy of the Legislature’s oversight and involvement in the executive’s repeated declarations of states of emergency and the making of orders; the positions taken by and the role of the opposition parties during the states of emergency; and a comparison of the Yukon with other jurisdictions in the timing and process of declaring states of emergency and timing of the closure of the legislature. His affidavit sets out his perspective as a member of the public, whose business was negatively affected by the imposition of executive orders during the states of emergency, on the content of the orders and the process followed in the making of the orders.

[27] The affidavit of Stephen Mills, relied on by the defendants, corrected some of the information in the Ross Mercer affidavit about the timing of adjournments of the legislatures in other jurisdictions and whether they declared civil emergencies or public health emergencies. I accept the defendants’ clarifications and corrections, based on Mr. Mills’ position as Deputy Minister of the Executive Council Office and Cabinet Secretary and independent verification through publicly available information.

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[28] Contrary to the plaintiffs' statement that the Yukon Legislature was adjourned for a longer period of time than any other jurisdiction, the legislature of Nova Scotia was adjourned between March 10, 2020, and March 9, 2021, except for one day in December 2020.

[29] The following provinces and territories declared civil states of emergency over the following time periods:

- Nova Scotia – March 22, 2020-March 20, 2022;
- Saskatchewan – March 18, 2020-July 9, 2021; and September 13, 2021-March 14, 2022;
- New Brunswick – March 19, 2020-July 30, 2021; and September 24, 2021-March 14, 2022;
- Manitoba – March 20, 2020-October 21, 2021;
- British Columbia – March 18, 2020-June 30, 2021;
- Ontario – March 17, 2020-July 24, 2020; January 14, 2021-February 9, 2021, and April 7, 2021-June 9, 2021;
- Prince Edward Island – April 16, 2020-June 28, 2020;
- Northwest Territories – March 24, 2020-July 7, 2020, and in the City of Yellowknife, November 6, 2020-March 3, 2022;
- Nunavut – in the City of Iqaluit May 4, 2021-December 9, 2021.

[30] Other provinces declared public health emergencies that were generally in effect for approximately a two-year period between March 2020 and the spring of 2022.

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III. PRELIMINARY MATTERS

A. Propriety of Parts of the Ross Mercer Affidavit

[31] The defendants object to many of the paragraphs in the affidavit of Ross Mercer because they contain hearsay, opinion, and argument. The defendants say these paragraphs contravene Rule 49(12) of the *Rules of Court* of the Supreme Court of Yukon and the law related to affidavits.

[32] Counsel for the plaintiffs conceded that several of the paragraphs contained opinion or argument and that they should be disregarded.

[33] Generally, affidavits are to set out facts without gloss or explanation.

> A basic rule for affidavit evidence is that a deponent should state relevant facts only, without gloss or explanation *(Duyvenbode v Canada (Attorney General)*, 2009 FCA 120). If opinion is to be given, the affiant should be qualified as an expert to give the opinion and its foundation should be provided (*Ross River Dena Council v The* Attorney General of Canada, 2008 YKSC 45 ("*Ross River Dena Council*") at para. 12, quoting from *Johnson v Couture*, 2002 BCSC 1804 at paras. 13-16). This Court at para. 11 of the *Ross River Dena Council* decision also adopted the finding in *Chamberlain v the School District No. 36 (Surrey)*, [1998] BCJ No. 29232 (SC) at para. 28: "Personal opinions or a deponent's reactions to events generally should not be included in affidavits". The court in that case further stated "argument on issues from deponents serves only to increase the depth of the court file and to confuse the fact-finding exercise." Argument should not be submitted in the "guise of evidence". [*Yukon Big Game Outfitters Ltd v Yukon (Government of)*, 2021 YKSC 51 at para .17].

[34] Only statements that would be permitted as evidence at trial should be included. Opinion is generally not acceptable unless it is in the form of expert opinion. Argument is not fact and should be reserved for written or oral submissions.

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[35] Hearsay evidence is admissible in an affidavit, if it is on information and belief and submitted as part of a pre-trial record or admitted with leave of the Court (Rule 49(12)).

[36] In this case, I agree with the defendants that paras. 28, 29, 36, 37, 56, 67, 71, 75, 95, 96, 97, 98, 99, 109, 110, and 111 constitute argument. If this were evidence attempted to be given by Mr. Mercer at trial, it would be given no weight. I will not give these paragraphs weight as a result (*Ross River* at para. 16).

[37] Paragraphs 33, 60, and 64 are challenged on the basis of opinion. I will allow these paragraphs to remain and be considered. They contain factual information and also describe the impacts on Mr. Mercer of some of the orders made under *CEMA* and the events that occurred under *CEMA*. His description of events does not contravene the rule against opinion evidence.

[38] Paragraphs 11, 12, 59, 61, and 70 are challenged because they constitute hearsay evidence. Paragraphs 11 and 12 are on information and belief and describe the negative impact of the border closures and travel restrictions on the drilling business of one the other plaintiffs, Trent Jamieson. His business was forced to operate short-handed on a number of projects because they could not access workers in neighbouring jurisdictions. In Mr. Jamieson's view this restriction was unnecessary because of the business' remote work environment. It is not explained why Mr. Jamieson did not file his own affidavit, although perhaps it was for reasons of efficiency.

[39] This is not a pre-trial record and leave to admit was not sought under Rule 49(12). I am unable to give any weight to these paragraphs. However, I note that

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Mr. Mercer stated clearly in other sections of his affidavit the negative effect of the border closures and travel restrictions on Yukon businesses, and I accept that evidence.

[40] Paragraphs 59, 61, and 70 describe the positions of the opposition parties and in one instance what they were told by the government. Although these three paragraphs are strictly hearsay, and no leave was sought under Rule 49(12), I will give them weight on the principled exception to the rule against hearsay of reliability and necessity. The attached newspaper articles as well as the Hansard excerpts in the record provide objective verification of the positions of the opposition parties. It would be onerous for the plaintiffs to provide affidavits from various members of the Legislature. The summaries set out in these paragraphs are helpful context.

B. Who is the Minister under CEMA?

[41] The plaintiffs argue that one of the many inadequacies of *CEMA* is that the Minister to whom the powers are delegated is not defined. The defendants note that the definition is found in s. 21 of the *Interpretation Act*, RSY 2002, c 125. It defines Minister as “the member of the Executive Council charged by order of the Commissioner in Executive Council with responsibility for the exercise of powers under the enactment”. In this case the *Government Organisation Act Schedule*, OIC 2014/174, assigned responsibility for the exercise of powers under *CEMA* to the Minister of Community Services.

IV. LEGISLATIVE CONTEXT

[42] The Constitution of Canada describes how Canada governs itself. It takes precedence over all other laws in the country. If a government passes a law that

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controverts the Constitution, it may be challenged in court and the court can declare all or part of that law unconstitutional and that it has no effect.

[43] The Constitution of Canada is partly written and partly unwritten. An important part of the written Constitution is the *Constitution Act, 1867.* It created the Dominion of Canada and it describes the structure of Canada's government and how powers are divided between the federal and provincial governments.

[44] An other significant written part of the Constitution is the *Constitution Act, 1982*. It patriated the Constitution from the British Parliament, and contains the *Charter*, protection of Aboriginal rights, and an amending formula. While the 1982 Constitution as well as certain other laws form part of the Constitution of Canada, they are not relevant to this case.

[45] The unwritten part of the Constitution exists in part because the *Constitution Act, 1867* is based on the Constitution Act of the United Kingdom, which is completely unwritten and consists of principles and conventions. Courts are responsible for interpreting unwritten constitutional principles, which have been described as "assumptions upon which the text is based" (*Reference re Secession of Quebec*, [1998] 2 SCR 217 ("*Reference Secession*") at para. 49). These principles are described further below.

[46] The *Constitution Act, 1867* establishes three branches of government – the legislature, the executive and the judiciary.

> All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. … [*Ontario v Criminal Lawyers' Association of Ontario,* 2013 SCC 43 at para. 29]

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[47] The *Constitution Act, 1867* establishes a central federal government as well as ten provinces. As noted above, there is an exclusive division of powers between the federal government (s. 91) and the provincial governments (s. 92). The three northern territories do not have provincial status and are not included in this constitutional division of powers (Pamela Muir, "The Constitutional Status of Yukon – A Normative Analysis" (2020) 50 *The Northern Review* 7("Muir article")).

[48] The territories are established by Acts of Parliament. In the Yukon, the federal *Yukon Act* sets out the powers of the Yukon government. These powers are similar to the powers given to the provinces in s. 92 of the *Constitution Act, 1867*. Sections 17-23 of the *Yukon Act* describe the powers of the Legislature. Section 18 itemizes many of those powers. Section 20 connects the *Yukon Act* to the *Constitution Act, 1867* by saying that nothing in s. 18 shall be construed to give the Legislature greater powers than are given to the legislatures of the provinces by ss. 92, 92A, and 95 of the *Constitution Act, 1867*.

[49] The *Yukon Act* can be abolished or amended by Parliament. The Legislature cannot amend the *Yukon Act*, because it is federal legislation. The plaintiffs suggest the Legislature is not a plenary body like Parliament or the provincial legislatures, because the *Yukon Act* contains further restrictions. Specifically, the federal government can disallow any law or portion of any law within one year after it is made (s. 25(2)); federal laws prevail in the event of a conflict with territorial laws (s. 26) – a codification of the unwritten principle of paramountcy; and the Legislature's powers to appropriate funds authorized by Parliament to defray public service expenses and to pass any legislative instrument to appropriate public revenue or tax is constrained (ss. 29 and 30). The

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Yukon Act also requires that the federal government consult with the Executive Council in the Yukon before any amendment or repeal of the *Yukon Act*, (s. 56(1)) and the Legislature may make recommendations to the federal minister about amendment or repeal (s. 56(2)). These statutory protections, along with the facts that 1) Parliament has never attempted to amend or repeal the *Yukon Act* unilaterally; 2) the *Yukon Act* is inextricably connected with the operation of the Yukon First Nation final agreements, which have constitutional protection; and 3) the Yukon has evolved to having a fully representative, responsible public government, functioning like a province, means there is a strong argument that the *Yukon Act* operates like the Constitution in the Yukon (Muir article, at 14, 16,18, and 20).

[50] However, the constitutional status of the *Yukon Act* has not been considered by the courts. This issue is not directly before me in this litigation and I do not decide it here. The plaintiffs did not fully develop or pursue their argument that the Legislature is not a plenary body under the *Yukon Act* or that the *Yukon Act* may offer less protection for the fundamental structure of the institutions of governance than the *Constitution Act, 1867*. Further, the plaintiffs relied in their oral argument on the text of the *Yukon Act* for their argument that *CEMA* is unconstitutional. The plaintiffs also rely on the unwritten principles emanating from the jurisprudence interpreting the Constitution.

[51] The defendants do not object to the plaintiffs' reliance on the *Yukon Act*, the *Constitution Act*, *1867* and the unwritten constitutional principles as well as the jurisprudence interpreting the Constitution and its principles for their argument that *CEMA* is unconstitutional.

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[52] I have accepted for the purpose of this litigation that the constitutional challenge to *CEMA* can be made on the basis of the *Yukon Act,* the *Constitution Act, 1867* and the jurisprudence related to the Constitution including unwritten constitutional principles.

V. ISSUES

[53] The plaintiffs raise two main issues. The first is whether ss. 6-10 of *CEMA* create a constitutionally impermissible shift of legislative power and authority to the executive, insulated from judicial review. The second issue is whether s. 10 of *CEMA* ousts the core jurisdiction of the courts by immunizing certain persons and the Crown from legal challenge to actions taken under *CEMA* as well as by eliminating the remedies of injunction and *mandamus* on judicial review.

[54] Sections 6, 7, and 8 of *CEMA* provide the mechanism for and timing of a declaration of a state of emergency and the imposition of a plan. For the first issue, the plaintiffs focus on s. 9 of *CEMA*, which describes the powers of government in a state of emergency as follows:

> 9 Government may act in state of emergency
>
> (1) Despite any other Act, when a state of emergency has been declared to exist under section 6 or 7, the Minister may do all things considered advisable for the purpose of dealing with the emergency and, without restricting the generality of the foregoing, may
>
> (a) do those acts considered necessary for
>
> (i) the protection of persons and property,
>
> (ii) maintaining, clearing and controlling the use of roads and streets,
>
> (ii) requisitioning or otherwise obtaining and distributing accommodation, food and clothing and providing other welfare services,

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> (iv) providing and maintaining water supplies, electrical power and sewage disposal,
>
> (v) assisting in the enforcement of the law,
>
> (vi) fighting or preventing fire, and
>
> (vii) protecting the health, safety and welfare of the inhabitants of the area;
>
> (b) make regulations considered proper to put into effect any civil emergency plan; and
>
> (c) require any municipality to provide assistance as considered necessary during the emergency and authorize the payment of the cost of that assistance out of the revenues of the Government of the Yukon.
>
> …
>
> (3) Despite any other Act, when a state of emergency has been declared to exist under section 6 or 7, every public servant and every member of the public service of the Yukon shall comply with the instructions and orders of the Minister in the exercise of any discretion or authority the public servant or public officer may have for and on behalf of the Government of the Yukon, whether statutory, delegated or otherwise, for responding to and dealing with the emergency.

[55] The second issue focuses on s. 10, which limits the liability of the Crown, municipalities, or other persons acting within the authority provided to them under *CEMA*, for acts done or not done in respect of the emergency. Section 10 provides:

> 10 Limitation of liability
>
> When a state of emergency has been declared to exist under section 6 or 7 the following persons are not liable for any damage caused by interference with the rights of others, and are not subject to proceedings by way of injunction or mandamus in respect of acts done or not done in respect of the emergency:

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> (a) a municipality or any person acting under the authority or direction of the Commissioner in Executive Council, the Minister or the civil emergency planning officer;
>
> (b) a municipality or any person who does any act in carrying out a civil emergency plan under this Act;
>
> (c) any person acting under the authority or direction of the municipality, its council, its civil emergency planning committee or its civil emergency co-ordinator;
>
> (d) despite any other Act, the Crown;
>
> (e) any person acting under a regulation made under paragraph 9(1)(b) or a bylaw made under paragraph 9(2)(c).

VI. ANALYSIS

Issue #1 – Does *CEMA* infringe the constitutional structure in the *Yukon Act* by shifting legislative power to the executive and preventing judicial review?

A. Positions of the Parties

i) Plaintiffs

[56] The plaintiffs say that *CEMA* is inconsistent with the structure of the *Yukon Act* that provides for three branches of government – legislative, executive, and judicial – each operating within their own sphere of activity. This structure is informed not only by the text of the *Yukon Act* but also by unwritten constitutional principles, identified by the plaintiffs as democracy, rule of law, separation of powers, responsible government, and parliamentary sovereignty. These principles assist in interpreting the text of the *Yukon Act*, the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of political institutions (*Reference Secession* at para. 52). The plaintiffs say a consideration of *CEMA* in the context of these principles and the text of the *Yukon Act*, reveals it as legislation that improperly interferes with the legislative and judicial realms,

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by giving powers or protections to the executive that intrude into those of the other two branches. The plaintiffs say there are limits on the delegation of powers by the Legislature, limits that come from the constitutional text (i.e. the *Yukon Act*) and unwritten constitutional principles. *CEMA* does not respect those limits and as such is unconstitutional. The plaintiffs refer to this as an improper delegation of the core competence of the Legislature.

[57] The plaintiffs say *CEMA* gives the executive subjective and unfettered discretion that shifts the relationships among the three branches of government in a way that is inconsistent with the constitutionally mandated structure and operation of government. The declaration by the executive of the state of emergency and the ability to order anything that is considered advisable in a state of emergency are decisions made by the executive on a subjective basis without any oversight by, input from, or accountability to the legislature. The executive also remains improperly insulated from judicial review under *CEMA*, according to the plaintiffs.

[58] More specifically, the plaintiffs describe the following four ways in which *CEMA* is unconstitutional.

[59] First, the plaintiffs say *CEMA* allows the executive to decide policy, thereby encroaching on power and responsibility that belongs exclusively to the legislature. *CEMA* causes the legislature to abdicate its legislative role.

[60] Second, the plaintiffs say *CEMA* contains no limit to the broad delegation of power to the executive. It states “[d]espite any other Act, … the Minister may do all things considered advisable for the purpose of dealing with the emergency …” (s. 9(1)). The plaintiffs say this unlimited ability to legislate and override any other statutory

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instruments is not a transfer of limited discretionary authority or the implementation of a policy choice of the Legislature. It is unconstrained, arbitrary, and an impermissible shift of legislative authority to the executive.

[61] Third, the plaintiffs say s. 9 of *CEMA* grants the Minister the entire legislative competence of the Yukon Legislature and more: specifically, the power to do things and enact regulations beyond the powers contemplated in ss. 17-23 of the *Yukon Act*. Examples are imposing quarantine and border closures.

[62] Fourth, the plaintiffs say the failure of *CEMA* to ensure a degree of supervision by the Legislature over the delegation of its power results in an unconstrained and unchecked executive.

[63] The plaintiffs advanced another argument during the oral hearing related to the text of the *Yukon Act*. Counsel said that the unwritten constitutional principles can be used to interpret ss. 17-23 of the *Yukon Act*, provisions that give certain powers to the Legislature. Further, the *Yukon Act* states in its preamble that the "Yukon is a territory that has a system of responsible government that is similar in principle to that of Canada" thereby codifying one of the unwritten constitutional principles, according to the plaintiffs. The combination of this text of the *Yukon Act* and the unwritten constitutional principles forms the basis for a declaration of unconstitutionality of *CEMA* in a way that is consistent with the defendants' interpretation of the *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 ("*City of Toronto*") decision.

ii) Defendants

[64] The Yukon government denies that *CEMA* is unconstitutional. *CEMA* is a product of the democratic process, and its validity is consistent with a long line of authority in

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Canada that permits legislatures to delegate many of their powers to the executive with few restrictions. There is no support in the jurisprudence for the plaintiffs' theory that a "core competence" of legislatures acts as a limit on their ability to legislate. The defendants describe this legal challenge as consistent with these many other decisions that allow for the delegation of powers by legislatures; there is nothing unique here that renders those authorities inapplicable. Unwritten constitutional principles cannot be used on their own to invalidate legislation, as confirmed by the Supreme Court of Canada in the *City of Toronto* decision.

[65] The defendants address each of the plaintiffs' specific arguments as follows.

[66] First, *CEMA* does not represent an abdication of legislative authority by allowing the executive to decide policy. There are many examples in Canada of a statute's delegation of a breadth of legislative powers, including the ability to decide policy, to the executive or other independent entities, the constitutionality of which has been confirmed by the courts. Further, the democratically elected Legislature duly enacted *CEMA* and the Legislature retains its ability to limit, amend, repeal, revoke *CEMA* or any part of it.

[67] Second, the powers delegated under *CEMA* are not arbitrary or without limits. *CEMA* sets out certain limits, such as the definition of emergency and the delegation of powers only in the context of an emergency. The executive can suspend or alter primary legislation through secondary orders (i.e. "[d]espite any other Act") but only in an emergency and for the purpose of dealing with the emergency. The jurisprudence confirms there is no constitutional prohibition against the delegation of powers by the legislature to the executive or an independent authority, even where those powers allow

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rules or laws to be made that prevail over inconsistent or conflicting existing legislation. Further, *CEMA* does not allow the executive to make changes to *CEMA* itself. The executive must act within the parameters of *CEMA*.

[68] Third, s. 9 of *CEMA* does not grant the entire legislative competence to the executive because they are subject to the parameters set out in *CEMA*. *CEMA* does not authorize unconstitutional exercises of power – i.e. powers beyond the scope of those given to the Legislature by the *Yukon Act*. Any such exercise would be subject to judicial review.

[69] Fourth, there is no authority for the proposition that the Legislature must carry out an active supervisory role over the entity to which its powers are delegated. The Legislature has an inherent supervisory authority over the exercise of delegated powers because it can alter or eliminate those delegated powers at any time.

[70] Addressing the plaintiffs' additional argument that the text of the *Yukon Act* combined with the unwritten constitutional principles can be used to challenge the constitutionality of *CEMA*, the defendants note for the above reasons, there is nothing in *CEMA* that offends the provisions of the *Yukon Act*, including the phrase "responsible government" in the preamble and the specific powers outlined in ss. 17-23.

B. Unwritten constitutional principles – can they independently invalidate legislation?

[71] The plaintiffs' written argument that *CEMA* is unconstitutional relies on the unwritten constitutional principles for this invalidation. However, the current state of the law does not allow unwritten constitutional principles on their own to invalidate legislation. The differing interpretations held by the plaintiffs and the defendants of the effect of the *City of Toronto* decision require further analysis here.

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[72] In the *City of Toronto* case, the Ontario legislature introduced new legislation (*Better Local Government Act, 2018*) in the midst of a City of Toronto election campaign that reduced the number of members of City Council from 47 to 25 by reducing the number of wards. The City and two groups of individuals challenged the constitutionality of this legislation based on an infringement of s. 2(b) of the *Charter*, freedom of expression. They also argued the legislation infringed the right to vote set out in s. 3 of the *Charter*. Relevant to the case at bar was the further argument that the unwritten constitutional principle of democracy invalidated the legislation.

[73] In holding that unwritten constitutional principles could not be used on their own to invalidate the legislation, the Supreme Court of Canada first referenced its previous decisions where it has recognized that our Constitution describes "an architecture of the institutions of state and of their relationship to citizens that connotes certain underlying principles … such as democracy and the rule of law" (para. 49). The Court referenced their general description of the internal architecture of the Constitution in the *Reference Secession* case as a "'basic constitutional structure'. The individual elements of the Constitution are linked to the others and must be interpreted by reference to the structure of the Constitution as a whole" (at para. 50).

[74] The unwritten principles such as democracy and the rule of law are not written in the text of the Constitution, but they are foundational and "it would be impossible to conceive of our constitutional structure without them" (*Reference Secession* at para. 51 and *City of Toronto* at para. 49). "The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood" (*Reference Secession* at para. 51; *City of Toronto* at para. 167). They have full legal force that is

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context dependent. “Their legal force lies in their representation of general principles within which our constitutional order operates and, therefore, by which the Constitution’s written terms – its *provisions* – are to be given effect” (*City of Toronto* at para. 54). The Court in *City of Toronto* identified two ways in which the principles can assist courts.

[75] The first way is by providing an interpretive aid to the text of the Constitution where it is “not itself sufficiently definitive or comprehensive” to answer a question (*City of Toronto* at para. 65). For example, the principles of judicial independence and rule of law have helped to interpret ss. 96-100 of the Constitution in a way that safeguards the core jurisdiction of the courts.

[76] The second way unwritten principles can assist is by developing structural doctrines that are not articulated in the text of the Constitution, but are necessary to the coherence of, and flowing by implication from, the architecture of the Constitution (*City of Toronto* at para. 56). They can fill important gaps and address questions on which the Constitution is silent. Examples of such structural doctrines developed through unwritten principles are the doctrine of full faith and credit, the obligation of the federal government to negotiate with a province once it has seceded, the suspension of a declaration of invalidity of legislation, and the doctrine of paramountcy (*City of Toronto* at para. 56).

[77] Here, one of the plaintiffs’ arguments is that the unwritten principles of rule of law, democracy, separation of powers, responsible government, and parliamentary sovereignty are sufficient to constitutionally invalidate *CEMA*. They argue that these principles constitutionally prohibit the shift in power from the legislature to the executive that *CEMA* authorizes. Below in section C, I will analyze the specific arguments raised

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by the plaintiffs. My comments in this section are limited to an explanation of why the use of unwritten principles as a foundation for the invalidity attack does not fit into the two ways described by the Supreme Court of Canada in the *City of Toronto* case that unwritten principles can assist courts.

[78] The plaintiffs argue that the finding in the *City of Toronto* decision that unwritten constitutional principles cannot on their own be used to invalidate legislation does not apply in this case. They say the deliberate omission of municipalities as part of the structure of governance in the Constitution is a distinguishing fact. There is therefore nothing in the text of the Constitution to which the unwritten principles can apply in the *City of Toronto* case. The plaintiffs say that if the unwritten principle of democracy were found to invalidate the *Better Local Government Act, 2018* (the provincial legislation at issue) this would in effect be an amendment to the Constitution because it would require that municipalities be included as part of its structure. This is distinguishable from the case at bar, where the structure of the *Yukon Act* includes the legislature, executive, and judicial branches, and the plaintiffs are challenging the shift of power among them. This textual anchor gives the unwritten principles a basis for the legal challenge. The unwritten principles can also be used as an interpretive aid to this text, one of the ways the Court states in *City of Toronto* that the unwritten principles can assist.

[79] I agree with the defendants' arguments in response that the plaintiffs' analysis is a misreading of the *City of Toronto* decision. First, the Court in that decision reviewed all of the authorities that could be relied on to argue that unwritten constitutional principles can be used to invalidate legislation and concluded after analysis that they cannot. Legislative competence cannot be narrowed or limited by the courts on the basis of

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unwritten principles such as democracy. In the *City of Toronto*, the Court noted that s. 92(8) of the Constitution gives the province "absolute and unfettered legal power" to legislate with respect to municipalities (*Ontario English Catholic Teachers' Assn v Ontario (Attorney General*), 2001 SCC 15 at para. 58). The courts cannot limit by relying on unwritten principles this provincial law-making authority that is part of the structure set out in the Constitution.

[80] Second, the deliberate omission of municipalities in the structure of the Constitution is not a distinguishing fact that makes the *City of Toronto* decision inapplicable to the case at bar. The Supreme Court of Canada referred to this deliberate omission when addressing the argument that the legislation at issue violated s. 3 of the *Charter*, which guarantees citizens the right to vote and run for office in provincial and federal elections and includes a right to effective representation (*City of Toronto* at para. 45). Section 3 does not extend to municipal elections. The Supreme Court of Canada concluded "there is no textual basis for an underlying constitutional principle [such as democracy] that would confer constitutional status on municipalities, or municipal elections" (at para. 82). The Supreme Court of Canada stated that if the unwritten principle of democracy required all elections to conform to the requirements of s. 3, including municipal elections, "the text of s. 3 would be rendered substantially irrelevant and redundant" (at para. 82). To apply the unwritten democratic principle in this way would result in an amendment to the constitutional text.

[81] In *City of Toronto,* the Supreme Court of Canada's conclusion on the role of the unwritten principle of democracy in invalidating legislation was:

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> [63] In sum, and contrary to the submissions of the City, unwritten constitutional principles cannot serve as bases for invalidating legislation. …

and

> [78] In this case, the democratic principle is relevant as a guide to the interpretation of the constitutional text. It supports an understanding of free expression as including political expression made in furtherance of a political campaign (*Reference re Prov. Electoral Boundaries (Sask.)*; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Switzman v. Elbling*, [1957] S.C.R. 285; *OPSEU*). But it cannot be used in a manner that goes beyond this interpretive role. **In particular, it cannot be used as an independent basis to invalidate legislation.** [emphasis added]

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[82] The Supreme Court of Canada in the *City of Toronto* noted several reasons why unwritten principles cannot be relied on to invalidate legislation. I will address two of them here as they are most relevant to the case at bar.

[83] First, there is a risk that reliance on principles that are "wholly untethered from the text" of the Constitution is an unwarranted intrusion by the court into legislative authority to amend the Constitution, "thereby raising fundamental concerns about the legitimacy of judicial review and distorting the separation of powers" (*City of Toronto* at para. 58). It is an invitation to the court to give the Constitution additional meaning well beyond the text, rather than limiting the use of unwritten principles to flesh out the existing text or establish structural doctrines that flow coherently and implicitly from the existing text and architecture.

[84] In the case at bar, the plaintiffs suggest that this Court rely on unwritten principles such as democracy, rule of law, separation of powers, and parliamentary sovereignty to invalidate legislation authorizing the executive to make orders in an emergency.

[85] To do this would amount to an attempt to write into the *Yukon Act* a specific limit on the ability of the Legislature to legislate for the Executive Council (s. 18(c)). Not only is this a misuse of the unwritten principles, but the judicial imposition of such a limit is inconsistent with the developed jurisprudence about delegation of legislative powers.

[86] Second, the Supreme Court of Canada in *City of Toronto* highlights the risks of the abstract nature and nebulous content of the unwritten principles. They can serve to decrease legal certainty and predictability, they may make existing principles in the Constitution redundant, and they may undermine the boundaries or limits of the rights set out in existing text. The Supreme Court of Canada says it is preferable to contest legislation considered unfair or improper through the text of the Constitution or the ballot box.

[87] Because of their nebulous, abstract character, the unwritten principles can be used in arguments that either support or invalidate the legislation at issue, leading to the reduction in legal certainty. In this case I do not agree that the law supports the use of unwritten principles to invalidate legislation on their own. But even if they could be used in this way, or used to interpret the text of the *Yukon Act*, the unwritten principles support the position of the defendants in this case.

[88] For example, the meaning of the rule of law, one of the principles relied on by the plaintiffs in the case at bar, was described by the Supreme Court of Canada in *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 ("*Imperial Tobacco*"), to have the following characteristics: 1) the same laws must apply to everyone, including government officials; 2) there is law that exists; 3) the state-individual relationship is regulated by law – that is, the relationship is legally founded. Under this definition, the

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defendants can argue that *CEMA* does not offend the rule of law: it applies to everyone, its provisions are written, and the citizens' relationship with the state under *CEMA* is legally based.

[89] The plaintiffs argue that the state-individual relationship is not legally founded under *CEMA* because the statute's allocation of power to the executive offends the existing architecture in the *Yukon Act*. The defendants counter that the existing jurisprudence (reviewed below) supports the delegation of powers in *CEMA*. I agree with the defendants' analysis.

[90] The plaintiffs also rely on parliamentary sovereignty as an unwritten principle to invalidate *CEMA*. They say the unchecked, unconstrained power *CEMA* gives to the executive undermines parliamentary sovereignty. The defendants say that *CEMA* was duly passed by the Legislature. As noted in the case of *R (on the application of Miller) v The Prime Minister*, [2019] UKSC 41 ("*Miller*") at para. 41, the Supreme Court of the United Kingdom stated that the constitutional principle of parliamentary sovereignty means that legislation itself ("laws enacted by the Crown in Parliament"), under the Constitution of the United Kingdom, remains "the supreme form of law". Similarly, in the decision of *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 ("*Pan-Canadian Securities*") at para. 73, the Supreme Court of Canada described parliamentary sovereignty as the legislature's authority to enact laws on its own and the authority to delegate, among other things, the power to make binding but subordinate rules and regulations, without restriction. In other words, "delegated power is rooted in and limited by the governing statute, which of course takes precedence over every

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exercise of power" (at para. 74). The legislature must retain the authority to revoke the delegated power.

[91] In the case at bar, *CEMA* gives the executive the ability to make orders "despite any other Act", but this is circumscribed by *CEMA* itself. The executive must make orders within the parameters of *CEMA* and only the legislature retains the power to revoke or amend *CEMA*. The defendants' argument that *CEMA* is consistent with parliamentary sovereignty is supported by the content of CEMA.

[92] The plaintiffs further agree that *CEMA* offends the democratic principle because of the inability of the Legislature to debate, discuss, amend, or revoke any of the provisions or their effects.

[93] In fact, as the defendants note, proposed amendments to *CEMA* were introduced, debated, and ultimately defeated in the Legislature between October 14 and November 18, 2020. An all-party Special Committee on Civil Emergency Legislation was established to receive submissions and provide a report. The Yukon government announced in March 2022 it was reviewing *CEMA* to improve its ability to respond in an emergency. Further, the Legislature unanimously voted in favour of a declaration of a civil state of emergency on two occasions. All of this is consistent with democracy.

[94] Democracy guarantees parliamentary sovereignty (*Gateway Bible Baptist Church et al v Manitoba et al*, 2021 MBQB 218 ("*Gateway Bible*") at para. 32). Democracy has been described as "a political system of majority rule" (*Reference Secession* at para. 63). The Supreme Court of Canada has described it as "the process of representative and responsible government and the right of citizens to participate in the political process as voters" (*Reference Secession* at para. 65). Democratic legislatures

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and an executive accountable to them require ongoing discussion, exchange of ideas, compromise and negotiation, and a consideration of all views and voices. I agree with the defendants that the principle of democracy was upheld in this context.

[95] These examples of the application of the unwritten principles to the facts in the case at bar show they can be used in arguments about invalidity of the legislation or in support of the legislation. In this case, the unwritten principles are more supportive of the defendants' position. In any event, the lack of legal certainty and predictability that arises is a significant and valid reason why they cannot be used on their own to support a constitutional challenge to the invalidity of legislation.

[96] The plaintiffs' oral argument that the unwritten principles aid in the interpretation of the text of the *Yukon Act*, especially ss. 17-23 and the preamble referring to responsible government, also suffers from its inconsistency with the prevailing jurisprudence (reviewed below). The jurisprudence shows that the delegation of powers in *CEMA* does not offend the structure of governance set out in *Yukon Act.* While responsible government does appear in the preamble of the *Yukon Act,* converting it from an unwritten principle to a part of the written text, *CEMA* was democratically passed into law by the Legislature, the Legislature has the constitutional authority to delegate to the executive as set out in *CEMA* and within its parameters, and the Legislature retains the ability to amend, repeal, revoke, expand, or constrain *CEMA* or any part of it.

[97] The logical extension of the plaintiffs' arguments that the delegation of power in *CEMA* is unconstitutional is that the Court writes limits into the legislation that the Legislature did not intend. The following review of jurisprudence in addressing the

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plaintiffs' specific arguments explains why the plaintiffs' arguments are not supported by the law in Canada, as it has developed and currently exists.

C. Analysis of Plaintiffs' specific arguments

i) Delegation of powers including policy-making is not abdication of legislative responsibility

[98] The plaintiffs say that *CEMA* forces the Legislature to abandon its responsibility to decide policy to the executive. It does this by allowing the executive to make orders in multiple areas ranging from border controls and quarantine to licensing and access to information and privacy.

[99] Legal authority beginning in 1883, including authoritative academic commentary, supports the defendants' position that the delegation of authority in *CEMA* does not represent an abdication of legislative authority. The decision of the Court of Queen's Bench of Alberta (as it was then) in *R v Ingram*, 2021 ABQB 343 ("*Ingram*") at para. 31 (aff'd 2022 ABCA 97, leave denied [2022] SCCA No 145) comprehensively reviewed these authorities.

[100] In *Hodge v The Queen*, [1883] UKPC 59 at 11-12 ("*Hodge*"), the Judicial Committee of the Privy Council held that the provision of the *Constitution Act, 1867* giving provincial legislatures the exclusive authority to make laws for matters set out in s. 92 meant that they were not delegates of or mandated by the Imperial Parliament. The provincial legislatures had "authority as plenary and as ample within the limits prescribed by Sect. 92 as the Imperial Parliament … [w]ithin these limits of subjects and area the Local Legislature is supreme" (p. 12). In that case the Privy Council held that the provincial legislature had the power and competence under s. 92 to delegate power through statute to the municipality to issue tavern licences.

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[101] Building on this established authority of the legislature to delegate, the Court in *In Re George Edwin Gray* (1918), 57 SCR 150 ("*Re Gray*") at 156-157, held that an order in council made by the Governor in Council (the executive branch of Government) under s. 6 of the *War Measures Act, 1914* removing Mr. Gray's exemption from military service was constitutionally valid. Section 6 of the *War Measures Act*, *1914* authorized the Governor in Council to make any orders or regulations he deemed advisable "by reason of the existence of real or apprehended war, invasion or insurrection" (*Re Gray* at 156). Mr. Gray, who had been exempted from military service by statute, was ordered to report for duty. When he refused, he was arrested and detained. He argued his detention was unlawful because the powers conferred by s. 6 of the *War Measures Act, 1914* "were not intended to authorize the Governor-in-Council to legislate inconsistently with any existing statute, and particularly not so as to take away a right (the right of exemption) acquired under a statute" (*Re Gray* at 158).

[102] In dismissing Mr. Gray's argument, the Supreme Court of Canada wrote at 166-7 that the words of s. 6 of the *War Measures Act, 1914* were:

> … comprehensive enough to confer authority, for the duration of the war, to "make orders and regulations" concerning any subject falling within the legislative jurisdiction of parliament – subject only to the condition that the Governor-in-council shall deem such "orders and regulations" to be by reason of the existence of real or apprehended war, etc. advisable.

[103] The Supreme Court noted that the authority was limited in two ways: first, it was exercisable only during war, and second, the measures passed must have been deemed advisable by reason of war by the Governor in Council. The Court wrote at 170 and 182:

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> There is no attempt to substitute the executive for parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the legislature. The powers granted could at any time be revoked and anything done under them nullified by parliament, which parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law. …
>
> ….
>
> … At all events we, as a court of justice, are concerned with is to satisfy ourselves what powers Parliament intended to confer and that it possessed the legislative jurisdiction requisite to confer them. …

[104] The next authoritative decision on this issue was *Shannon v Lower Mainland Dairy Products Board*, [1938] 4 DLR 81 (PC). The Privy Council found it was within the powers of the provincial legislature to delegate legislative powers to the executive to set up a marketing board that would establish or approve schemes for the control and regulation within the province of transportation, packing, storage, and marketing of natural products and to vest in those boards any powers necessary or advisable to exercise those functions. This power gave to the boards a wide discretion to decide which products would be regulated and the scope and content of that regulation. The Privy Council wrote at p. 87:

> … Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament: and it is unnecessary to try to enumerate the innumerable occasions in which Legislatures … have entrusted various persons and bodies with similar powers to those contained in this Act.

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[105] Several more recent decisions from the Supreme Court of Canada have affirmed these principles. In *Pan-Canadian Securities Regulation* the Supreme Court of Canada held that a draft federal *Capital Markets Stability Act* did not exceed the trade and commerce power of the federal government under s. 91(2) of the *Constitution Act, 1867* because:

> [73] … Parliamentary sovereignty means that the legislature has the authority to enact laws on its own *and* the authority to delegate to some other person or body certain administrative or regulatory powers, including the power to make binding but subordinate rules and regulations. Accordingly, the power to make such rules and regulations is sometimes referred to as a "subordinate law-making power". This kind of delegation occurs quite frequently in the administrative state, where statutory schemes often merely "set out the legislature's basic objects", such that "most of the heavy lifting [gets] done by regulations, adopted by the executive branch of government under orders-in-council" (B. McLachlin, P.C., *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online), see also Hogg (5th ed.), at pp. 14-1 and 14-2).

[106] This observation of the development of the administrative state in Canada was echoed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, where they wrote:

> [202] … Parliament and the provincial legislatures have entrusted a broad array of complex social and economic challenges to administrative actors, including regulation of labour relations, welfare programs, food and drug safety, agriculture, property assessments, liquor service and production, infrastructure, the financial markets, foreign investment, professional discipline, insurance, broadcasting, transportation and environmental protection, among many others. Without these administrative decision-makers, "government would be paralyzed and so would the courts" (Guy Regimbald, *Canadian Administrative Law* (2nd ed. 2015) at p. 3).

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[107] Further, the Court of Appeal of British Columbia noted in *Sga'nism Sim'augit (Chief Mountain) v Canada (Attorney General)*, 2013 BCCA 49 ("*Sga'nism Sim'augit*") at para. 90 that "there is no constitutional prohibition against delegating powers to an independent authority, even where that authority is not functionally subordinate to Parliament or the Legislature".

[108] In *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 ("*Greenhouse Gas*"), the Supreme Court of Canada affirmed all of the above authorities on the issue of the legislature's ability to delegate, and referenced two additional authorities - *Reference As to the Validity of the Regulations in relation to Chemicals*, [1943] SCR 1, which affirmed *Re Gray*; and *R v Furtney*, [1991] 3 SCR 89, where the Court commented in *obiter* at 104:

> … The power of Parliament to delegate its legislative powers has been unquestioned, at least since the *Reference as to the Validity of the Regulations in Relation to Chemicals*. … The delegate is, of course, always subordinate in that the delegation can be circumscribed and withdrawn … [citations omitted].

[109] The Supreme Court of Canada in *Greenhouse Gas* upheld the delegation of legislative power to the executive. At issue was whether federal legislation that set minimum standards of greenhouse gas pricing was a matter of national concern, coming within Parliament's power to legislate for peace, order, and good government. The Court said:

> [85] This Court has consistently held that delegation such as the one at issue in this case is constitutional. Even broad or important powers may be delegated to the executive, so long as the legislature does not abdicate its legislative role. …

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[110] Respected academic commentators have explained and confirmed these findings. Peter Hogg in, *Constitutional Law of Canada* (5th ed.) (Toronto: Carswell 2011), looseleaf, stated:

> It is impossible for the federal Parliament or any provincial Legislature to enact all of the laws that are needed in its jurisdiction for the purpose of government in any given year. When a legislative scheme is established, the Parliament or the Legislature will usually enact the scheme in outline only, and will delegate to a subordinate body the power to make laws on matters of detail. The subordinate body (or delegate) to which this law-making power is delegated is most commonly the Governor in Council or the Lieutenant Governor in Council; each of these bodies is in practice the cabinet of the government concerned. Sometimes a power of law-making is delegated to a single minister, or a public corporation, or a municipality, or a school board, or an administrative agency, or a court. The body of law enacted by these subordinate bodies vastly exceeds in bulk the body of law enacted by the primary legislative bodies. (at s. 14.1 (a)).

[111] John Mark Keyes, in his book *Executive Legislation, Delegated Law Making by the Executive Branch* (Toronto: Butterworths, 1992): wrote: “the overwhelming weight of case law indicat[es] that there are few, if any, restrictions on delegating to the executive” (at 42). He described the primary constraint as the legislature’s retention of their power to amend or repeal delegating legislation, noting that “irrevocable delegation seems legally impossible given its conflict with parliamentary supremacy” (at 43).

[112] This unbroken line of authority, from *Hodge* to *Greenhouse Gas*, supported by authoritative academic commentary, shows that the legislature can delegate policy-making to the executive. In fact, in the modern administrative state, governments and the courts could not function without this kind of delegation. This delegation does not constitute abdication of the role of the legislature, as long as the delegated powers

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are rooted in the governing statute. Abdication would occur if the legislature also delegated such powers permanently and irrevocably to the executive, including the ability to amend, repeal, expand, or constrain the delegating legislation itself.

[113] In this case, the plaintiffs do not dispute in general the delegation necessary for the modern administrative state. They dispute the breadth and scope of the delegation authorized by *CEMA*.

[114] The Legislature has chosen through *CEMA* to allow the Minister to decide policy in the context of a state of emergency. States of emergency necessitate quick and decisive action. The policy-making authority given to the executive by *CEMA* is no different from the many examples in the cases referred to above and it is especially similar to the situation in *Re Gray,* the decision under the *War Measures Act, 1914*. Significantly, *CEMA* does not remove the ability of the Legislature to amend, repeal, revoke, constrain, or expand the legislation. The facts of this case show that proposed amendments were in fact debated, albeit defeated, in the Legislature several times while the state of emergency was ongoing. This demonstrates the retention of necessary legislative supervisory authority by the Legislature over the executive.

[115] While other jurisdictions may contain different legislative provisions that allow for less delegation or additional supervision and oversight of their legislatures, these legislative choices do not support a finding of constitutional invalidity of *CEMA*. Each jurisdiction determines through the democratic process of legislative debate and approval what its emergency legislation will contain. The plaintiffs' disagreement with the political and democratic choices made by the Legislature in passing *CEMA* and defeating proposed amendments, does not constitutionally invalidate the statute.

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[116] The adjournment of the Legislature between March 19 and October 1, 2020, is also not relevant to the determination of the constitutionality of *CEMA*. First, the adjournment for seven months was voted on and unanimously approved. The *Yukon Act* and the *Charter* provide for a constitutional maximum period of one year between sittings of the Legislature. Although the opposition parties requested later that the Legislature return on an earlier date, there was nothing unconstitutional in the Yukon government's decision to uphold the agreed upon adjournment.

[117] Second, the adjournment did not constitute an abdication of legislative powers. Legislatures in Canada are often adjourned for lengthy periods. For example, the Nova Scotia legislature was adjourned for one year during the pandemic.

[118] Finally, most of the executive orders were made under *CEMA* while the Legislature was sitting, thereby providing a form of supervision and a more expeditious process if challenges to any of the orders were necessary.

ii) CEMA does not confer arbitrary or limitless powers on Minister

[119] The plaintiffs say that *CEMA*'s authorization of the executive to make orders "despite any other Act" and without limit on scope and content makes it unconstitutional because its arbitrariness and limitlessness usurp legislative authority.

[120] As the Court noted in *Re Gray* (at 160) and confirmed in *Greenhouse Gas* (at para. 85), it is up to the legislature to determine the breadth, scope, and limits of the powers it decides to delegate. In *Re Gray*, the Supreme Court of Canada upheld the ability of the legislature to delegate making orders and regulations concerning any subject within the legislative jurisdiction of Parliament, as long as that power was circumscribed by the conditions in the governing statute. The Governor in Council was

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authorized during war time to make any orders or regulation “deemed necessary or advisable” (at 178) by reason of the existence “of real or apprehended war” (at 178). This included overriding other legislation enacted by Parliament.

[121] *CEMA* does the same thing – the executive is authorized to make orders despite any other act, but that can only occur under certain conditions. The Legislature thus placed limits on the powers conferred on the executive. These limits include those set out in ss. 1 and 6(1), which circumscribe the situation in which a state of emergency can be declared. Section 1 defines peacetime disaster[2], under which pandemic falls, and s. 6(1) restricts the ability of the Executive Council to declare a state of emergency by a finding that it meets the definition in s. 1. Once a state of emergency is declared, s. 9(1) further limits the powers to be exercised by the executive branch by restricting them to those “considered advisable for the purpose of dealing with the emergency” (s. 9(1)).

[122] *Re Gray* is an older authority and the *War Measures Act, 1914* has now been replaced by the federal *Emergencies Act*, RSC 1985, c. 22 (4th Supp.), which contains new supervisory and oversight provisions. However, this legislative choice made through the democratic process, does not make the principles in *Re Gray* inoperable or irrelevant. The findings in that decision, emanating from the wording of the *War Measures Act*, *1914* have been upheld in the many subsequent authorities reviewed above. The principles in *Re Gray* have been confirmed as recently as 2021 (*Greenhouse Gas*). It remains valid and binding authority.

[2] "peacetime disaster" means a disaster, real or apprehended, resulting from fire, explosion, flood, earthquake, landslide, weather, epidemic, shipping accident, mine accident, transportation accident, electrical power failure, nuclear accident or any other disaster not attributable to enemy attack, sabotage or other hostile action whereby injury or loss is or may be caused to persons or property in the Yukon.

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[123] The existence of the extraordinary context of a peacetime disaster and state of emergency as defined in *CEMA* justifies the ability of the Minister to suspend or alter primary legislation (other than the governing statute) through secondary orders. Those orders are subordinate, because they cannot exceed the limits of *CEMA* and are circumscribed by its provisions.

[124] A policy basis for this legislative choice is that the contextual circumstances in which the legislation was developed can change during a state of emergency, and consequently make that original legislation inadequate to address the emergency circumstances. The ability to suspend operation of other legislation can be necessary to meet the needs created by the emergency.

[125] Allowance for the ability of a statute to alter other primary legislation was endorsed by the Court of Appeal of British Columbia in *Sga'nism Sim'augit* in 2013:

> [90] … [T]here is no constitutional prohibition against delegating powers to an independent authority … That is so even where the delegate is authorized to make rules or laws which prevail over inconsistent or conflicting federal or provincial legislation as there is a presumption that the legislature did not intend "to make or empower the making of contradictory enactments" [citations omitted].

[126] *CEMA* authorizes the Minister to suspend primary legislation if necessary, only temporarily. Once the declaration of the state of emergency no longer exists, none of the powers exercised under *CEMA* by the executive is in force. Other statutory provisions that were overridden or altered regain their force and effect.

[127] While the delegated powers in *CEMA* have a subjective component and confer broad discretion, this breadth does not mean they are unlimited or unreviewable. The orders made under *CEMA* must accord "with the purposes and objects of the parent

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enactment read as a whole" (*Katz Group Canada Inc v Ontario (Health and Long-Term Care*), 2013 SCC 64 ("*Katz Group"*) at para. 24) and must be consistent "within the literal (and often broad) terminology of the enabling provision" (at para. 24). As noted above, *CEMA* does not authorize the executive to alter the terms of *CEMA* itself. The phrase "despite any other Act" refers only to other legislation, not the enabling legislation of *CEMA*, which can only be altered, revoked, or repealed by the Legislature.

[128] The Minister remains accountable to the executive and the Legislature in the exercise of his authority under *CEMA*. The Executive Council must retain the confidence of the Legislative Assembly.

iii) CEMA does not delegate the full legislative competence or authorize powers outside of s. 18 of the Yukon Act

[129] The plaintiffs argue that the Legislature has delegated its full panoply of powers to the executive through *CEMA*. However, the Legislature has placed limits on the delegation of powers within *CEMA*: the orders are impermanent, and their operation is conditional upon an existing state of emergency and for the purpose of dealing with emergency. As well the Legislature's exclusive retention of the ability to amend, repeal, revoke, expand, or constrain *CEMA* means its full legislative powers have not been delegated through *CEMA*.

[130] The plaintiffs further argue that some of the powers exercised by the Minister or the executive under *CEMA* extend beyond those powers authorized by s. 18 of the *Yukon Act* (similar to s. 92 of the *Constitution Act, 1867*). Examples they provide are the quarantine for returning residents and border control. These excessive powers they say render *CEMA* unconstitutional. The plaintiffs did not elaborate on their arguments about

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the exercise of powers beyond s. 18 of the *Yukon Act,* other than to identify these examples.

[131] The Supreme Court of Canada held in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para. 133, that any broad discretion conferred by a statute is subject to the constitutional constraints on the entity that conveys the discretion. Those constraints flow through to all regulations, by-laws, orders, decisions and any other legislative, administrative or judicial actions dependent on that statute for their validity.

[132] *CEMA* does not authorize the executive to exercise powers beyond those provided to the Legislature under the *Yukon Act*. While the powers permitted under *CEMA* are broad, they are circumscribed by those constitutional parameters. Moreover, even if the executive did exercise powers beyond the authority set out in *CEMA* this would not constitutionally invalidate *CEMA*. The remedy in that instance would be to challenge the exercise of that particular power through judicial review, not the enabling statute.

iv) CEMA is not unconstitutional for failing to give the Legislature an active supervisory role

[133] The plaintiffs argue that the absence in *CEMA* of an active supervisory role for the Legislature in the exercise of power by the executive makes it unconstitutional. They say the Legislature's failure to retain the power to end a declaration of a state of emergency, and the ability of a state of emergency to continue at the sole subjective discretion of the executive create invalidity.

[134] This argument overlooks the continued ability of the Legislature to amend, repeal, revoke, expand, or constrain the powers it has chosen to delegate at any time.

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This ability to nullify any of the powers remains with the Legislature and provides a supervisory function.

[135] In fact, in this case, the Legislature unanimously agreed to the declaration and subsequent extension of a state of emergency in November and December 2020. Proposed amendments to *CEMA* were debated and defeated in the Legislature several times during the ongoing state of emergency. The ultimate supervisory control by the Legislature was maintained through its ability to amend or revoke the *CEMA* provisions. The fact that such attempts were unsuccessful is a reflection of the democratic process at work, and not of the unconstitutionality of *CEMA*. As stated in *Re Gray* at 160:

> There are obvious objections of a political character to the practice of executive legislation in this country because of local conditions. But these objections should have been urged when the regulations were submitted to parliament for its approval, or better still, when the "War Measures Act" was being discussed. Parliament was the delegating authority, and it was for that body to put any limitations on the power conferred on the executive. …

[136] Similarly, the plaintiffs' objections to *CEMA*'s delegation of authority to the executive appear to be based on their political disagreement with the nature and scope of the decisions of the executive. Such objections do not equate to a valid challenge of constitutionality. If the Legislature is unable to make amendments to *CEMA* due to the views and votes of its elected representatives, the remedy for those in disagreement is at the ballot box, not through a challenge to the constitutionality of the valid legislation.

v) Conclusion on Issue #1

[137] Unwritten constitutional principles cannot be used on their own to invalidate *CEMA.* Those principles in any event are consistent with the valid constitutional status of *CEMA.* The existing jurisprudence supports the ability of the Legislature to delegate

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powers in the manner done by *CEMA.* The remedy of judicial review remains if the executive exercise powers outside of the parameters of *CEMA,* the *Yukon Act* or the *Charter.*

Issue #2 – Limitation of Liability and Ousting of Core Jurisdiction of Court

A. *Positions of Parties*

i) Plaintiffs

[138] The plaintiffs' challenge to s. 10 of *CEMA* is twofold: 1) the Crown is improperly immunized from liability for damages for actions taken during the state of emergency; and 2) proceedings in which coercive orders for the government to do or to refrain from doing something are inappropriately barred.

[139] The plaintiffs say that the grant of immunity from legal action to municipalities, government officials, and the Crown in s. 10 violates the doctrine of the core jurisdiction of the superior courts. This doctrine has its roots in the rule of law and has been expressed in authorities beginning with *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725. It provides that certain inherent powers of the courts are core to their function, such as the ability to control their own processes and to review exercise of public power.

[140] The plaintiffs say s. 10 results in a denial of access to the courts and undermines s. 38 of the *Yukon Act* and the rule of law. Section 38 of the *Yukon Act* provides: "[t]he Governor in Council shall appoint the judges of any superior, district or county courts that are now or may be constituted in Yukon". This section mirrors s. 96 of the *Constitution Act, 1867*. The plaintiffs say that if people cannot challenge government actions in court, they cannot hold the state to account (*Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 ("*Trial Lawyers*")

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at para. 40). The plaintiffs say *CEMA*'s insulation of executive actions from the judicial review remedies of injunctions and *mandamus* is a breach of s. 38 of the *Yukon Act*.

ii) Defendants

[141] As a preliminary matter, the defendants argue the plaintiffs lack both private interest and public interest standing to bring this challenge to s. 10. They say the plaintiffs are not directly affected by this section because they are not seeking damages or injunctive or *mandamus* relief against the Crown or any other person referenced in s. 10. They do not meet the test for public interest standing because they do not have sufficient interest in the proceeding, and they have not shown that this proceeding is a reasonable and effective manner in which the issue may be brought before the court (*Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 ("*Downtown Eastside*") at paras. 43 and 44).

[142] If the standing argument fails, the defendants argue that *CEMA* does not prevent access to the courts as required by s. 38 of the *Yukon Act*. Nor does *CEMA* eliminate the Court's ability to decide legal issues and enforce the law. The inability to sue certain people or institutions for actions taken in an emergency situation is not an unconstitutional intrusion, because only certain substantive rights are affected by *CEMA*, not the jurisdiction of the courts.

[143] The defendants further say that although *CEMA* removes the availability of some judicial review remedies, it does not eliminate all of them. The Court retains its ability to review government action and hold the government to account.

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B. *Standing of plaintiffs to challenge constitutionality of s. 10 of CEMA*

[144] Private interest standing requires the plaintiffs to be directly affected by the legislation they are challenging (*Campisi v Ontario*, 2017 ONSC 2884 at paras. 7-18; *District of Kitimat v Alcan Inc*, 2006 BCCA 75 at para. 92). Here, the plaintiffs are not directly affected by the operation of s. 10 of *CEMA*. They have not provided any facts to demonstrate their inability to have claims adjudicated or relief granted by this Court. They are not claiming damages against the Crown, nor are they seeking an injunction or *mandamus* against the Crown. Section 10 has not barred them from bringing this legal challenge. Part of the relief requested is for declarations of constitutional invalidity of ss. 6-9 of *CEMA* based on unauthorized delegation of powers, for which a factual connection was provided through affidavit evidence about the negative effects of some of the executive orders on the plaintiffs. However, no such facts are provided to connect the plaintiffs with the operation of s. 10. They have not established private interest standing.

[145] Public interest standing is a discretionary determination requiring consideration of three factors:

> (1) whether there is a serious justiciable issue raised;
>
> (2) whether the plaintiff has a real stake or a genuine interest in it; and
>
> (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts … [*Downtown Eastside* at para. 37].

[146] The onus is on the plaintiffs to persuade the court to grant standing based on these factors, applied purposively and flexibly (*Downtown Eastside* at para. 37). The

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determination of public interest standing is not to be done rigidly or in a formulaic way, but courts should take a generous and liberal approach in exercising their discretion.

[147] At the root of the law of standing is the need to strike a balance "between ensuring access to the courts and preserving judicial resources" (*Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 at 252 ("*Canadian Council of Churches*")). Courts have recognized that limitations on standing are necessary because not everyone who would like to litigate an issue, whether or not it affects them, should be entitled to do so (*Downtown Eastside* at para. 22).

[148] The Court in *Downtown Eastside* described three purposes of public interest standing (paras. 26-30). First, restrictions on standing are part of the gatekeeping function of the courts, to ensure they do not become overburdened with marginal or redundant cases, and to screen out "busybody" litigants – in other words, litigants who do not have a direct or special interest in the proceeding. Priority of scarce judicial resource allocation should be given to those with a personal stake in the outcome of a case.

[149] The second purpose of limiting standing was described as the courts needing the "benefit of contending points of view" of those most directly affected by the litigation to have the evidence and arguments presented thoroughly and carefully.

[150] The third purpose of limitations on standing is to ensure the courts play their proper role within our democratic system of government. The question to be litigated must be a justiciable one, that is, one that is appropriate for judicial determination.

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[151] The principle of legality underlies the development of standing in public interest cases. Legality means ensuring that the state acts in conformity with the Constitution and the law and no law can be immunized from challenge.

[152] In this case, weighing the three factors cumulatively and applying a purposive and flexible approach, I will grant the plaintiffs public interest standing to argue the constitutional validity of s. 10.

[153] First, there is no question that whether or not s. 10 infringes s. 38 of the *Yukon Act* is a serious justiciable issue. The defendants concede this.

[154] Second, a primary consideration in the factor of determining the nature of the plaintiffs' interest is the need to conserve scarce judicial resources. Here the case is already before the Court on issues where the plaintiffs' standing was not challenged. This s. 10 argument of the plaintiffs is a secondary one and did not take significant time at the hearing or occupy a large portion of the written materials. The legitimate concern about economical use of scarce judicial resources is not a significant factor here, since the Court is already adjudicating the litigation.

[155] Further, although there is no clear factual connection between the plaintiffs' circumstances and s. 10, more generally, the argument that *CEMA* infringes the constitutionally mandated separation of powers is already before the Court, albeit in the context of the legislature and the executive, not the judiciary. The plaintiffs' similar argument about s. 10 is consistent with their interest in ensuring the statute is constitutionally valid and in accordance with the structure of the Constitution.

[156] Third, the Supreme Court of Canada in *Downtown Eastside* confirmed an applicant does not need to show there is no other or even any other reasonable and

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effective means of bringing the matter before the court. Instead, the question to be asked is whether the proposed lawsuit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court (paras. 44 and 52).

[157] Examples of considerations for assessing this factor set out in *Downtown Eastside* include: 1) the applicant's resources, expertise, and ability to situate the issues in a concrete factual setting in bringing forth the claim; 2) whether the issues are of public interest and go beyond the interests of those most directly affected; 3) whether on a pragmatic approach there are realistic alternative means that provide a better context and more efficient use of judicial resources, such as parallel proceedings; and 4) whether the granting of public interest standing could prejudice challenges by others with more direct interest, or could affect those with direct interest who have deliberately refrained from suing (para. 51).

[158] In this case, the issues are clearly ones of public importance and public interest beyond the immediate interest of the plaintiffs. Determining the validity of a privative clause engages the concepts of access to justice and the proper role of the courts. There are no parallel proceedings on this issue, and a slim possibility at this time of other potential plaintiffs with more factual connections raising the same issues, because the state of emergency has not been in effect since March 2022. There is unlikely to be prejudice to others with a more direct interest. Although it would be preferable to determine this issue with a factual base, the facts that the parties are already before the Court making a constitutional validity argument about the same statute, the context is the same, the legal argument is related to the one already being made, and the issue is one of public interest, all favour the plaintiffs' public interest standing on this issue. This

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is a result of the flexible, purposive approach to public interest standing, a consideration of the factors cumulatively, as well as the way in which this issue engages the principle of legality, that is, the need for the court to ensure the government acts lawfully.

C. *Section 10 of CEMA does not infringe s. 38 of the Yukon Act*

[159] Section 38 of the *Yukon Act* mirrors s. 96 of the *Constitution Act, 1867*. As noted in *Trial Lawyers*, although its words refer only to the appointment of judges:

> [29] … [I]ts broader import is to guarantee the core jurisdiction of provincial superior courts: Parliament and legislatures can create inferior courts and administrative tribunals, but [t]he jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution" (*MacMillan Bloedel* at para. 15). ...

[160] Further, as said by the Court in *MacMillan Bloedel* "[i]n this way, the Canadian Constitution confers a special and inalienable status on what have come to be called the 'section 96 courts'" (para. 52). Government cannot enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction (*MacMillan Bloedel* at para. 37; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 SCR 3 at para. 88).

[161] The core jurisdiction of s. 96 courts is well described by the Supreme Court of Canada in *Trial Lawyers*. In that case, the Court found that the provincial government's decision to legislate hearing fees was unconstitutional because it effectively prevented access to the courts. The Court agreed with the finding of fact of the trial judge on the evidence that the hearing fees were unaffordable and limited access for litigants who

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did not come within the exemptions for those who were indigent or impoverished. In summarizing why this fact amounted to an infringement of s. 96, the Court wrote:

> [32] The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.

[162] The Supreme Court of Canada continued to describe the cases under s. 96 as either ones that transferred part of the core jurisdiction of the superior court to another decision-making body, or ones where privative clauses in legislation barred judicial review. These represented situations where laws denied "access to the powers traditionally exercised" (*Trial Lawyers* at para. 33) by superior courts, thereby impinging on their core jurisdiction.

[163] Examples of decisions where courts have struck down legislation for these reasons include:

- Legislation attempting to transfer jurisdiction of the superior courts to a statutory body (*Re Residential Tenancies Act, 1979*, [1981] 1 SCR 714).
- Legislation imposing barriers that denied litigants access to courts (*Trial Lawyers*).

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- Legislation with privative clauses that completely excluded the supervisory jurisdiction of the courts (*Crevier v The Attorney General of the Province of Quebec and Robert Cofsky*, [1981] 2 SCR 220).

[164] *CEMA* does not fall into any of these categories. By protecting the Crown, municipalities, and persons employed by those institutions from liability for damages for actions taken during a state of emergency, the legislation is not denying access to the courts. Instead *CEMA* limits the bases for the causes of action and the remedies to be obtained from the Court.

[165] The legislature can validly and legally abolish or create causes of action (see *Imperial Tobacco*; *Wells v Newfoundland,* [1999] 3 SCR 199 at 217; *Authorson v Canada (Attorney General)*, 2003 SCC 39). For example, the court in *Flette et al v The Government of Manitoba et al*, 2022 MBQB 104 ("*Flette*"), relied on the decision in *Alberta v Kingsway General Insurance Co*, 2005 ABQB 662, where the court held that Alberta's retroactive legislation extinguishing Kingsway's cause of action and barring similar actions against the government did not infringe s. 96. "The province has the authority to enact legislation concerning a particular right or property affecting the ability to bring an action in the superior court" (*Flette* at para. 145).

[166] The court in *Flette* further held that a section of a statute that barred actions related to *Children's Special Allowances Act*, SC 1992, c. 48, benefits for certain children, did not infringe s. 96. The court wrote that s. 92(13) (equivalent to s. 18(1)(j) of the *Yukon Act*) gives jurisdiction to the legislative branch to bar civil causes of action. That bar must be express, unambiguous, and clear. In other words, the legislature has

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the ability to determine the nature and content of laws, and what are legitimate issues to bring before the court.

[167] *CEMA* clearly, expressly, and unambiguously sets out the limitations on the ability of litigants to claim damages against the Crown, municipalities, and employees for actions taken in the state of emergency. This does not constitute an ousting of the Court's core jurisdiction as set out in s. 38. There is no constitutional right to damages or compensation.

[168] Judicial review is constitutionally guaranteed in Canada through the inherent power of superior courts to review administrative action and ensure it does not exceed its jurisdiction. The prohibition in s. 10 of the ability to seek relief by way of injunction or *mandamus* against the Crown and other government actors does not infringe s. 38 or the constitutional guarantee of judicial review as it does not preclude review of government action. Other remedies remain for judicial review. *Certiorari*, or a setting aside of the impugned legislation, is the most common judicial review remedy in public law. Also common are declarations, which although non-coercive, are required to be complied with by governments (*Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para. 248 per dissent on other points). Prohibition and *habeas corpus* also remain as remedies, as do remedies under s. 24(1) of the *Charter*, a general remedy of compensation where a *Charter* right has been infringed.

D. *Conclusion on Issue #2*

[169] The plaintiffs have public interest standing to argue this issue. Section 10 of *CEMA* does not oust the jurisdiction of the superior court to decide legal issues and

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enforce the law but instead it changes the content of the law within its jurisdiction. The right to sue for damages is not constitutionally guaranteed. The Court also retains the ability to judicially review actions and decisions taken under *CEMA* and the remedies of *certiorari*, declaration, *prohibition*, and *habeas corpus* all remain available.

VII. CONCLUSION

[170] The plaintiffs have a fundamental disagreement with the powers granted to the executive by *CEMA*. The effect of many of the executive orders made during the pandemic had significant negative impacts on their businesses. The economic and logistical hardships they experienced as well as the feelings of frustration, disaffection and distrust directed towards government are undeniable.

[171] However, the plaintiffs are asking this Court to assume an inappropriate role by placing limits on a duly enacted piece of legislation that legitimately delegates powers to the executive. *CEMA* delegates powers in a way that is consistent with legal authority from *Hodge* to *Greenhouse Gas* permitting these types of powers to be delegated because they are within the governing statute and are consistent with the statute.

[172] The plaintiffs seek a declaration that *CEMA* as a whole is inconsistent with constitutional principles and is of no force and effect. In the alternative, they seek the same declarations for s. 10 of *CEMA*.

[173] The limits sought to be imposed by the plaintiffs on *CEMA* are undefined, and to grant a declaration of no force and effect of all or part of *CEMA* would represent an unlawful intrusion by the judiciary into the jurisdiction of the legislature. Judicial restraint in constitutional cases is a sound approach. There is no reason to depart from that approach in this case.

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[174] The plaintiffs' application is dismissed. Costs may be spoken to in case management if the parties are unable to agree.

DUNCAN C.J.

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paras. 37-38 and 53

Cour fédérale | Federal Court

Date : 20240326

Dossier : T-325-20

Référence : 2024 CF 478

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Montréal (Québec), le 26 mars 2024

En présence de monsieur le juge Gascon

ENTRE :

MICHEL POTHIER

demandeur

et

PROCUREUR GÉNÉRAL DU CANADA

défendeur

JUGEMENT ET MOTIFS

I. Aperçu

[1] Le demandeur, M. Michel Pothier, était employé à titre d'agent de projet auprès de Ressources naturelles Canada [RNC] jusqu'à ce qu'il prenne ce qu'il considère être une retraite forcée en mars 2022. En novembre 2017, M. Pothier dépose une plainte de harcèlement et violence au travail contre son employeur, alléguant qu'entre les années 1998 et 2017, RNC l'aurait intimidé et menacé et qu'elle aurait rabaissé et minimisé son travail [Plainte]. Au

moment de sa Plainte, M. Pothier occupait un poste au sein du Centre d'information topographique de Sherbrooke.

[2] Suite au dépôt de la Plainte, Mme Paladini de la firme Expertise H2H [H2H] est mandatée à titre de « personne compétente » pour mener une enquête afin de produire un rapport sur les allégations de M. Pothier [Enquête externe]. Le rapport d'Enquête externe de Mme Paladini conclut que la Plainte de M. Pothier n'est pas fondée et que les éléments fournis par ce dernier ne répondent pas aux critères législatifs, normatifs ou jurisprudentiels correspondant à la définition de violence en milieu de travail. Après avoir pris connaissance du rapport d'Enquête externe et des recommandations de Mme Paladini, M. Pothier conteste le travail que cette dernière a effectué.

[3] Comme le prescrit la procédure prévue au *Code canadien du travail*, LRC 1985, ch L-2 [CCT], M. Pothier dépose alors une nouvelle plainte à l'encontre du rapport d'Enquête externe, alléguant le manque d'impartialité de Mme Paladini, son non-respect des règles d'équité procédurale dans le processus suivi lors de l'enquête, et son ignorance de plusieurs faits importants [Plainte CCT].

[4] RNC analyse la Plainte CCT de M. Pothier, conclut qu'il n'y a pas eu d'impartialité ou de manquement à l'équité procédurale dans le cadre de l'Enquête externe, et confirme que l'employeur ne poursuivra pas une nouvelle enquête de violence en lieu de travail eu égard aux allégations de M. Pothier. Vu l'absence d'un règlement entre les parties, le Comité local en santé et sécurité au travail [CLSST] mène alors une enquête [Enquête interne] afin de déterminer si M. Pothier a droit à la nouvelle enquête externe qu'il réclame. Dans le cadre de cette Enquête interne, le mandat du CLSST ne porte pas sur le contenu du rapport de Mme Paladini comme tel

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ou sur ses conclusions, mais uniquement sur les aspects liés au traitement de la Plainte de M. Pothier et au déroulement du travail effectué par Mme Paladini, afin de vérifier l'impartialité de cette dernière et le respect des règles d'équité procédurale au cours de l'Enquête externe. L'Enquête interne ne trouve pas de preuve ou de manquement qui pouvaient clairement démontrer que le travail effectué par H2H et Mme Paladini n'aurait pas été fait « de façon impartiale ». Le CLSST décide donc, en date du 24 février 2020, de ne pas autoriser la tenue d'une nouvelle enquête sur la Plainte de M. Pothier [Décision].

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[5] M. Pothier sollicite maintenant le contrôle judiciaire de cette Décision refusant de lui accorder une deuxième enquête externe avec un nouvel enquêteur compétent et impartial. Dans la même foulée, M. Pothier attaque indirectement les conclusions et recommandations tant de l'Enquête interne que de l'Enquête externe. M. Pothier allègue que, dans son Enquête externe, Mme Paladini n'aurait pas été impartiale en ignorant volontairement des faits importants, en omettant de vérifier certaines allégations et, surtout, en ne respectant pas l'équité procédurale. M. Pothier maintient également que son employeur et le CLSST auraient eux-mêmes erré dans leur analyse lors de l'Enquête interne, en concluant à l'absence de manquement à l'équité procédurale dans l'Enquête externe et en rejetant sa plainte de partialité à l'endroit de Mme Paladini.

[6] Pour les motifs qui suivent, la demande de contrôle judiciaire de M. Pothier sera accueillie en partie. Sur la question de partialité, il existe une forte présomption selon laquelle les décideurs exercent leurs fonctions de façon impartiale. Par conséquent, le fardeau à satisfaire pour soutenir une allégation de partialité est élevé. M. Pothier ne l'a pas rencontré en l'espèce. Toutefois, dans les circonstances particulières du présent dossier, je suis d'accord avec

M. Pothier que le refus du CLSST d'accepter la Plainte CCT est déraisonnable, car la Décision ne traite pas de tous les arguments de manquement à l'équité procédurale invoqués par M. Pothier à l'encontre de l'Enquête externe. Ainsi, la Décision doit être retournée au CLSST pour que ce dernier puisse procéder à un nouvel examen des arguments soulevés par M. Pothier.

[7] Cela dit, la Cour ne peut accorder l'essentiel des remèdes recherchés par M. Pothier dans sa demande de contrôle judiciaire, que ce soit au niveau du contenu du rapport de l'Enquête externe ou des différends que ce dernier a avec RNC depuis de longues années au sujet de sa classification et de sa description de travail.

II. Contexte

A. *Les faits*

[8] M. Pothier commence à travailler chez RNC depuis 1988. Au moment de sa « retraite » en mars 2022, il occupe un poste d'agent de projet (EG-03).

[9] Entre 2004 et 2017, M. Pothier entame plusieurs processus de grief contre son employeur.

[10] En 2004, il dépose un grief pour intimidation, harcèlement et représailles qui mène éventuellement à une entente pour changer quelques aspects de sa description de tâches. M. Pothier était d'avis que la description de son travail ne correspondait pas à son emploi d'alors.

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[11] En 2008, M. Pothier soumet une requête pour violation de l'entente intervenue et reproche à son employeur d'avoir minimisé et rabaissé son travail. La requête de M. Pothier est refusée.

[12] En 2009, M. Pothier dépose de nouveaux griefs concernant une rétrogradation alléguée. Selon lui, le directeur de son unité aurait dû lui offrir un poste de classification EN-SUR-02 sans concours, mais aurait refusé de même le transférer à un poste moindre de classification EN-SUR-01 en formation. La candidature de M. Pothier est refusée pour le concours EN-SUR-01, car le poste exige un baccalauréat en géomatique alors que M. Pothier détient un baccalauréat en informatique. Le syndicat transfère ces griefs de M. Pothier à l'arbitrage.

[13] En 2010, deux personnes qui, selon M. Pothier, exerçaient des rôles semblables au sien sont sélectionnées dans des postes classifiés EN-SUR-01. M. Pothier dépose alors un grief de dotation pour abus de pouvoir. Subséquemment, M. Pothier est retiré de son travail pour une durée indéterminée par son médecin de famille, pour des raisons reliées à sa santé mentale.

[14] En 2011, suite à son retour progressif au travail, M. Pothier dit avoir le sentiment, lors de son évaluation de rendement, que son gestionnaire rabaisse et minimise son travail. Après son évaluation, il est avisé qu'il doit quitter le bureau et qu'il a été mis en congé préventif payé à la suite des propos suivants qu'il aurait tenus : « on ne sait jamais ce qui pourrait arriver dans un contexte de conflit ». Subséquemment, Santé Canada le déclare inapte au travail lors d'une évaluation psychologique obligatoire effectuée suite à sa mise en congé.

[15] En 2012, M. Pothier reçoit une copie de son rapport d'inaptitude au travail suite à une demande d'accès effectuée aux termes de la *Loi sur l'accès à l'information*, LRC 1985, ch A-1.

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Le rapport indique qu'il est inapte au travail en raison d'un délire de persécution. M. Pothier fait alors plusieurs demandes pour rencontrer le psychiatre de son syndicat afin de déposer une contre-expertise. Ces demandes sont acceptées et la contre-expertise est reçue par Santé Canada à l'été 2012. À la fin de 2012, M. Pothier est avisé par Santé Canada qu'il est apte au travail et éligible à une médiation. En 2013, la médiation mène à une entente de retour progressif au travail.

[16] En 2013, les griefs portant sur la description de tâches de M. Pothier sont encore en cours et une deuxième tentative de médiation mène à l'ajout de deux phrases dans la description de son travail. M. Pothier est toutefois d'avis que cela n'est pas suffisant. En 2014, les griefs sont transférés à l'Alliance de la Fonction publique du Canada [AFPC].

[17] En 2017, les discussions commencent entre M. Pothier et l'AFPC. L'AFPC accepte de lui accorder une audience, mais détermine que M. Pothier n'effectuait pas les tâches d'un employé de niveau EN-SUR-02 ou EN-SUR-03 et que, pour pouvoir occuper un poste de niveau EN-SUR, il fallait avoir le statut d'ingénieur. M. Pothier estime que ces conclusions sont fausses.

[18] Plus tard en 2017, l'AFPC procède avec un examen de validation d'emploi avec le consentement de M. Pothier, vu l'échec des autres tentatives de règlement de ses différends. Le rapport final de validation d'emploi est envoyé à M. Pothier en octobre 2017. Ce rapport indique que la description de travail des postes EN-SUR-02 ou EN-SUR-03 ne correspond pas aux tâches effectuées par M. Pothier et que son grief pour contester la classification de son poste est mal fondé. M. Pothier estime que cela constitue un autre exemple de minimisation et de rabaissement de son travail.

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[19] Après la réception du rapport, M. Pothier avise son directeur, par l'entremise du syndicat local, qu'une plainte formelle de harcèlement sera déposée s'il ne modifie pas les conclusions du rapport. Entre-temps, deux collègues de M. Pothier obtiennent des postes de CS-02, ce qui amène M. Pothier à retourner en congé de maladie en raison de sa colère.

[20] La semaine suivante, soit le 30 novembre 2017, M. Pothier dépose sa Plainte de harcèlement contre son employeur, les directeurs, les gestionnaires et les ressources humaines responsables de son dossier dans le but d'obtenir une enquête de harcèlement externe pour violence en milieu de travail. Cette Plainte est déposée sous forme de grief en vertu de la partie XX du *Règlement canadien sur la santé et la sécurité au travail*, DORS/86-304 [Règlement]. M. Pothier y allègue que l'employeur l'aurait intimidé et menacé, et qu'il aurait rabaissé et minimisé son travail entre 1988 et 2017. Plus particulièrement, M. Pothier fonde les allégations de sa Plainte sur les éléments suivants : 1) le grief qu'il avait déposé pour contester le contenu de sa description de tâches remise par son employeur; 2) son insatisfaction quant au protocole d'entente conclu avec son employeur pour résoudre son grief portant sur sa description de travail; 3) la plainte qu'il avait déposée à l'égard du processus de dotation visant à pourvoir certains postes; 4) la décision de l'employeur lui ordonnant de quitter le lieu de travail pour raison d'incapacité médicale; et 5) le grief qu'il avait déposé pour contester la classification de son poste.

B. *L'Enquête externe*

[21] Suite au grief du 30 novembre 2017, l'Enquête externe est menée. Comme le processus l'exige dans un tel cas, l'employeur et l'employé ont choisi de concert une « personne compétente », soit Mme Paladini et la firme H2H, qui possèdent des connaissances, une

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formation et de l’expérience dans le domaine de la violence en milieu de travail, ainsi qu’une connaissance des textes législatifs applicables. Mme Paladini amorce donc une enquête afin de produire un rapport contenant ses conclusions et recommandations.

[22] Après avoir procédé à son enquête sur la Plainte de violence en milieu de travail de M. Pothier, Mme Paladini conclut que la Plainte n’est pas fondée puisque les allégations visées ne répondent pas à la définition de violence en milieu de travail qui se trouve dans le Règlement. Elle rend son rapport d’enquête à cet effet en octobre 2019.

[23] Dans un document très détaillé de plus d’une centaine de pages, Mme Paladini expose les diverses allégations de M. Pothier et ses conclusions quant à chacun des chefs de plainte qu’elle jugeait pertinents aux fins de son enquête. Elle indique dans son rapport qu’en plus du plaignant, Mme Paladini a rencontré cinq personnes « mises en cause » par M. Pothier ainsi que quatre témoins lors de son enquête. De plus, elle précise que son entrevue avec M. Pothier dure près de huit heures et que les notes qu’elle a prises sont signées par les deux parties. Les deux parties confirment d’ailleurs que les notes sont représentatives des échanges intervenus. Mme Paladini prend également en compte le grand volume de documents soumis par M. Pothier et par son employeur au cours du processus d’enquête.

C. *L’Enquête interne*

[24] Suite à la réception du rapport de l’Enquête externe, M. Pothier dépose une nouvelle plainte en vertu du paragraphe 127.1(1) du CCT. Il s’agit de la Plainte CCT. M. Pothier y allègue que Mme Paladini, la « personne compétente » désignée pour mener l’Enquête externe, n’était

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pas impartiale lors de son enquête, si bien qu'elle n'a pas respecté le droit de M. Pothier à l'équité procédurale.

[25] Le 20 novembre 2019, RNC partage les motifs de la plainte d'impartialité et de manquement à l'équité procédurale de M. Pothier avec Mme Paladini afin d'obtenir ses commentaires sur les allégations de M. Pothier. Après avoir reçu la réponse de Mme Paladini, le département des relations de travail de RNC analyse la Plainte CCT et recommande par écrit à l'employeur de la rejeter. RNC accepte la recommandation et confirme qu'il ne poursuivra pas une nouvelle enquête de violence en milieu de travail.

[26] En l'absence d'un règlement entre les parties, la Plainte CCT de M. Pothier est donc renvoyée au CLSST pour enquête, comme le prévoit la procédure en place au paragraphe 127.1 du CCT. Les représentants du CLSST contactent le conseiller principal en relations de travail de RNC affecté à la plainte de violence en milieu de travail de M. Pothier, Mme Paladini ainsi que M. Pothier pour des entrevues téléphoniques. Ultimement, le CLSST conclut par écrit qu'il n'y a pas de preuve ou de manquement qui démontreraient une partialité de la part de Mme Paladini ou de H2H, ni d'infraction par rapport à l'alinéa 20.9(1)a) du Règlement.

D. *La décision*

[27] Le CLSST, qui est composé d'un membre représentant les employés et d'un membre représentant l'employeur, tous deux désignés avec l'accord de M. Pothier, émet son rapport et sa décision le 24 février 2020. Dans son rapport, le CLSST indique que son enquête « doit déterminer si la firme/enquêteur et/ou leur travail a été impartiale [*sic*] dans le traitement » du dossier de M. Pothier. Le rapport ajoute qu'il est « important de mentionner que ce mandat

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n’adresse pas le contenu du rapport [de l’Enquête externe] lui-même ou ses conclusions, mais seulement les aspects liés au traitement et au déroulement du travail effectué afin de valider l’impartialité de la personne compétente effectuant l’enquête a été maintenue tout au long du processus ».

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[28] Dans son rapport, le CLSST cite dans son entièreté la Plainte CCT formulée par M. Pothier. Il est utile de la reproduire, et elle se lit donc comme suit :

> La présente est pour déposer une plainte officielle concernant le résultat du rapport d’enquête de harcèlement réalisé par la firme H2H. Je demande à ce qu’une nouvelle enquête externe soit réalisée avec un autre enquêteur compétent et impartial jugé par les parties tel que le mentionne la partie II du Code canadien du travail.
>
> L’enquêteur n’a pas été impartiale en ignorant volontairement des faits importants, en ne vérifiant pas certaines allégations mais surtout en ne respectant l’équité procédurale qu’une enquête nécessite. Bien que je lui ai demandé par écrit à plusieurs reprises, l’enquêteur a refusé de m’accorder plus de temps d’entrevue afin de pouvoir expliquer les 30 courriels contenants les preuves que j’allégaient [*sic*]. De plus, elle ne m’a pas permis de me donner l’occasion de me défendre et d’apporter d’autres preuves suite à des allégations des personnes accusées et des témoins qui sont fausses, incomplètes ou qui ont besoins de nuances.
>
> J’ai déposé une plainte au programme du travail mais M. Mario Thibault, enquêteur principal intérimaire, m’a mentionné que je devais absolument passer par le processus de règlement interne des plaintes avant de déposer une plainte au programme du travail. Vous devez donc répondre dans les plus brefs délais votre décision. Si vous refusez ma demande, le comité local de santé et sécurité au travail devra examiner cette plainte. Suite aux recommandations de ce dernier et/ou au refus de votre part de recommencer l’enquête externe, je pourrai alors déposer à nouveau ma plainte au programme du travail à M. Thibault afin qu’il puisse procéder dans cette affaire.

[29] Le rapport du CLSST conclut d'abord que le choix de Mme Paladini et de H2H pour effectuer l'Enquête externe a été fait de façon impartiale et qu'il n'y avait pas de conflit d'intérêts. Le rapport affirme ensuite que le déroulement de l'Enquête externe a été effectué de façon impartiale.

[30] Le CLSST détermine donc qu'il n'a pas trouvé de preuve ou de manquement qui pourraient démontrer clairement que le travail effectué par H2H et Mme Paladini n'a pas été fait de façon impartiale. Il conclut qu'il n'y a pas eu d'infraction au CCT et notamment au paragraphe 20.9(1)a) du Règlement. Le CLSST ajoute aussi une recommandation à la fin de son rapport, soit de « souhaiter aux deux parties de trouver un règlement acceptable de part et d'autre et ce, dans un avenir rapproché ».

E. *Les dispositions pertinentes*

[31] Les dispositions du Règlement qui étaient en vigueur à la fin de décembre 2017 se lisent comme suit :

20.9 (1) Au présent article, personne compétente s'entend de toute personne qui, à la fois :	**20.9 (1)** In this section, competent person means a person who
a) est impartiale et est considérée comme telle par les parties;	**(a)** is impartial and is seen by the parties to be impartial;
b) a des connaissances, une formation et de l'expérience dans le domaine de la violence dans le lieu de travail;	**(b)** has knowledge, training and experience in issues relating to work place violence; and

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c) connaît les textes législatifs applicables.

(c) has knowledge of relevant legislation.

(2) Dès qu'il a connaissance de violence dans le lieu de travail ou de toute allégation d'une telle violence, l'employeur tente avec l'employé de régler la situation à l'amiable dès que possible.

(2) If an employer becomes aware of work place violence or alleged work place violence, the employer shall try to resolve the matter with the employee as soon as feasible.

(3) Si la situation n'est pas ainsi réglée, l'employeur nomme une personne compétente pour faire enquête sur la situation et lui fournit tout renseignement pertinent qui ne fait pas l'objet d'une interdiction légale de communication et qui ne révèle pas l'identité de personnes sans leur consentement.

(3) If the matter is unresolved, the employer shall appoint a competent person to investigate the work place violence and provide that person with any relevant information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent.

(4) Au terme de son enquête, la personne compétente fournit à l'employeur un rapport écrit contenant ses conclusions et recommandations.

(4) The competent person shall investigate the work place violence and at the completion of the investigation provide to the employer a written report with conclusions and recommendations.

(5) Sur réception du rapport d'enquête, l'employeur :

(5) The employer shall, on completion of the investigation into the work place violence,

a) conserve un dossier de celui-ci;

(a) keep a record of the report from the competent person;

b) transmet le dossier au comité local ou au représentant, pourvu que les renseignements y figurant ne fassent pas l'objet d'une interdiction légale de

(b) provide the work place committee or the health and safety representative, as the case may be, with the report of the competent person, providing information whose

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communication et qu'ils ne révèlent pas l'identité de personnes sans leur consentement;

disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent; and

c) met en place ou adapte, selon le cas, les mécanismes de contrôle visés au paragraphe 20.6(1) pour éviter que la violence dans le lieu de travail ne se répète.

(c) adapt or implement, as the case may be, controls referred to in subsection 20.6(1) to prevent a recurrence of the work place violence.

(6) Les paragraphes (3) à (5) ne s'appliquent pas dans les cas suivants :

(6) Subsections (3) to (5) do not apply if

a) la violence dans le lieu de travail est attribuable à une personne autre qu'un employé;

(a) the work place violence was caused by a person other than an employee;

b) il est raisonnable de considérer que, pour la victime, le fait de prendre part à la situation de violence dans le lieu de travail est une condition normale de son emploi;

(b) it is reasonable to consider that engaging in the violent situation is a normal condition of employment; and

c) l'employeur a mis en place une procédure et des mécanismes de contrôle efficaces et sollicité le concours des employés pour faire face à la violence dans le lieu de travail.

(c) the employer has effective procedures and controls in place, involving employees to address work place violence.

[…]

…

20.2 Dans la présente partie, constitue de la violence dans le lieu de travail tout agissement, comportement, menace ou geste d'une personne à l'égard d'un employé à son lieu de

20.2 In this Part, "work place violence" constitutes any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be

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travail et qui pourrait vraisemblablement lui causer un dommage, un préjudice ou une maladie.	expected to cause harm, injury or illness to that employee.

[32] De leur côté, les dispositions du CCT applicables en l'espèce, et qui étaient en vigueur au 31 décembre 2020, sont les suivantes :

Processus de règlement interne des plaintes	***Internal Complaint Resolution Process***
Plainte au supérieur hiérarchique	**Complaint to supervisor**
127.1 (1) Avant de pouvoir exercer les recours prévus par la présente partie — à l'exclusion des droits prévus aux articles 128, 129 et 132 —, l'employé qui croit, pour des motifs raisonnables, à l'existence d'une situation constituant une contravention à la présente partie ou dont sont susceptibles de résulter un accident, une blessure ou une maladie liés à l'occupation d'un emploi doit adresser une plainte à cet égard à son supérieur hiérarchique.	**127.1 (1)** An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident, injury or illness arising out of, linked with or occurring in the course of employment shall, before exercising any other recourse available under this Part, except the rights conferred by sections 128, 129 and 132, make a complaint to the employee's supervisor.
Tentative de règlement	**Resolve complaint**
(2) L'employé et son supérieur hiérarchique doivent tenter de régler la plainte à l'amiable dans les meilleurs délais.	**(2)** The employee and the supervisor shall try to resolve the complaint between themselves as soon as possible.
Enquête	**Investigation of complaint**
(3) En l'absence de règlement, la plainte peut être renvoyée à l'un des présidents du comité local ou au représentant par l'une ou l'autre des parties.	**(3)** The employee or the supervisor may refer an unresolved complaint to a chairperson of the work place committee or to the health and

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Elle fait alors l’objet d’une enquête tenue conjointement, selon le cas :

a) par deux membres du comité local, l’un ayant été désigné par les employés — ou en leur nom — et l’autre par l’employeur;

b) par le représentant et une personne désignée par l’employeur.

Avis

(4) Les personnes chargées de l’enquête informent, par écrit et selon les modalités éventuellement prévues par règlement, l’employeur et l’employé des résultats de l’enquête.

Recommandations

(5) Les personnes chargées de l’enquête peuvent, quels que soient les résultats de celle-ci, recommander des mesures à prendre par l’employeur relativement à la situation faisant l’objet de la plainte.

Obligation de l’employeur

(6) Lorsque les personnes chargées de l’enquête concluent au bien-fondé de la plainte, l’employeur, dès qu’il en est informé, prend les mesures qui s’imposent pour remédier à la situation; il en avise au préalable et par écrit les personnes chargées de l’enquête, avec mention des

safety representative to be investigated jointly

(a) by an employee member and an employer member of the work place committee; or

(b) by the health and safety representative and a person designated by the employer.

Notice

(4) The persons who investigate the complaint shall inform the employee and the employer in writing, in the form and manner prescribed if any is prescribed, of the results of the investigation.

Recommendations

(5) The persons who investigate a complaint may make recommendations to the employer with respect to the situation that gave rise to the complaint, whether or not they conclude that the complaint is justified.

Employer’s duty

(6) If the persons who investigate the complaint conclude that the complaint is justified, the employer, on being informed of the results of the investigation, shall in writing and without delay inform the persons who investigated the complaint of how and when the employer will resolve the matter, and the

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délais prévus pour la mise à exécution de ces mesures.

employer shall resolve the matter accordingly.

(7) [Abrogé, 2013, ch. 40, art. 180]

(7) [Repealed, 2013, c. 40, s. 180]

Renvoi au ministre

Referral to the Minister

(8) La plainte fondée sur l'existence d'une situation constituant une contravention à la présente partie peut être renvoyée par l'employeur ou l'employé au ministre dans les cas suivants :

(8) The employee or employer may refer a complaint that there has been a contravention of this Part to the Minister in the following circumstances:

a) l'employeur conteste les résultats de l'enquête;

(a) where the employer does not agree with the results of the investigation;

b) l'employeur a omis de prendre les mesures nécessaires pour remédier à la situation faisant l'objet de la plainte dans les délais prévus ou d'en informer les personnes chargées de l'enquête;

(b) where the employer has failed to inform the persons who investigated the complaint of how and when the employer intends to resolve the matter or has failed to take action to resolve the matter;

c) les personnes chargées de l'enquête ne s'entendent pas sur le bien-fondé de la plainte.

(c) where the persons who investigated the complaint do not agree between themselves as to whether the complaint is justified.

Enquête

Investigation

(9) Le ministre chef fait enquête sur la plainte visée au paragraphe (8).

(9) The Head shall investigate the complaint referred to in subsection (8).

Pouvoirs du ministre

Duty and power of the Minister

(10) Au terme de l'enquête, le ministre :

(10) On completion of the investigation, the Minister

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a) peut donner à l'employeur ou à l'employé toute instruction prévue au paragraphe 145(1);	**(a)** may issue directions to an employer or employee under subsection 145(1);
b) peut, s'il l'estime opportun, recommander que l'employeur et l'employé règlent à l'amiable la situation faisant l'objet de la plainte;	**(b)** may, if in the Head's opinion it is appropriate, recommend that the employee and employer resolve the matter between themselves; or
c) s'il conclut à l'existence de l'une ou l'autre des situations mentionnées au paragraphe 128(1), donne des instructions en conformité avec le paragraphe 145(2).	**(c)** shall, if the Head concludes that a danger exists as described in subsection 128(1), issue directions under subsection 145(2).
Précision	**Interpretation**
(11) Il est entendu que les dispositions du présent article ne portent pas atteinte aux pouvoirs conférés au chef sous le régime de l'article 145.	**(11)** For greater certainty, nothing in this section limits the Head's authority under section 145.

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F. *La norme de contrôle*

[33] Comme l'a fait correctement valoir le défendeur, le Procureur général du Canada [PGC], pour ce qui est du mérite d'une décision administrative comme la Décision du CLSST, la norme de contrôle applicable est présumée être celle de la décision raisonnable (*Mason c Canada (Citoyenneté et Immigration)*, 2023 CSC 21 au para 7 [*Mason*]; *Canada (Ministre de la Citoyenneté et de l'Immigration) c Vavilov*, 2019 CSC 65 au para 25 [*Vavilov*]; *Société canadienne des postes c Syndicat des travailleurs et travailleuses des postes*, 2019 CSC 67 au para 27).

[34] Lorsque la norme de contrôle applicable est celle de la décision raisonnable, le rôle d'une cour de révision est d'examiner les motifs qu'a donnés le décideur administratif et de déterminer si la décision est fondée sur « une analyse intrinsèquement cohérente et rationnelle » et est « justifiée au regard des contraintes juridiques et factuelles auxquelles le décideur est assujetti » (*Mason* au para 64; *Vavilov* au para 85). La cour de révision doit donc se demander « si la décision possède les caractéristiques d'une décision raisonnable, soit la justification, la transparence et l'intelligibilité » (*Vavilov* au para 99, citant notamment *Dunsmuir c Nouveau-Brunswick*, 2008 CSC 9 aux para 47, 74).

[35] Il ne suffit pas que la décision soit justifiable. Dans les cas où des motifs s'imposent, le décideur administratif « doit également, au moyen de ceux-ci, *justifier* sa décision auprès des personnes auxquelles elle s'applique » [en italique dans l'original] (*Vavilov* au para 86). Ainsi, le contrôle en fonction de la norme de la décision raisonnable s'intéresse tant au résultat de la décision qu'au raisonnement suivi (*Vavilov* au para 87). L'exercice du contrôle selon la norme de la décision raisonnable doit comporter une évaluation rigoureuse des décisions administratives. Toutefois, dans le cadre de son analyse du caractère raisonnable d'une décision, la cour de révision doit adopter une méthode qui « s'intéresse avant tout aux motifs de la décision », examiner les motifs donnés avec « une attention respectueuse », et chercher à comprendre le fil du raisonnement suivi par le décideur pour en arriver à sa conclusion (*Mason* aux para 58, 60; *Vavilov* au para 84). La cour de révision doit adopter une attitude de retenue et n'intervenir que « lorsque cela est vraiment nécessaire pour préserver la légitimité, la rationalité et l'équité du processus administratif » (*Vavilov* au para 13). La norme de la décision raisonnable, je le souligne, tire toujours son origine du principe de la retenue judiciaire et de la déférence, et elle exige des cours de révision qu'elles témoignent d'un respect envers le rôle distinct que le

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législateur a choisi de conférer aux décideurs administratifs plutôt qu'aux cours de justice (*Mason* au para 57; *Vavilov* aux para 13, 46, 75).

[36] Il incombe à la partie qui conteste une décision de prouver qu'elle est déraisonnable. Pour annuler une décision administrative, la cour de révision doit être convaincue qu'il existe des lacunes suffisamment graves pour rendre la décision déraisonnable (*Vavilov* au para 100).

[37] En ce qui concerne les questions d'équité procédurale (laquelle englobe la partialité des décideurs), l'arrêt *Vavilov* n'en traite pas directement, et la démarche à adopter à cet égard dans le cadre d'une demande de contrôle judiciaire n'a donc pas été modifiée (*Vavilov* au para 23). Il a longtemps été reconnu que la norme de la décision correcte est la norme de contrôle qui s'applique pour savoir si un décideur administratif a respecté son devoir d'équité procédurale et les principes de justice fondamentale (*Établissement de Mission c Khela*, 2014 CSC 24 au para 79; *Canada (Citoyenneté et Immigration) c Khosa*, 2009 CSC 12 au para 43; *Heiltsuk Horizon Maritime Services Ltd c Atlantic Towing Limited*, 2021 CAF 26 au para 107).

[38] La Cour d'appel fédérale a toutefois affirmé à plusieurs reprises que les questions d'équité procédurale ne requièrent pas l'application des normes de contrôle judiciaire usuelles (*Association canadienne des avocats en droit des réfugiés c Canada (Immigration, Réfugiés et Citoyenneté)*, 2020 CAF 196 au para 35; *Lipskaia c Canada (Procureur général)*, 2019 CAF 267 au para 14; *Canadian Airport Workers Union c Association internationale des machinistes et des travailleurs et travailleuses de l'aérospatiale*, 2019 CAF 263 aux para 24–25; *Perez c Hull*, 2019 CAF 238 au para 18; *Chemin de fer Canadien Pacifique Limitée c Canada (Procureur général)*, 2018 CAF 69 aux para 33–56 [*CCP*]). Il s'agit plutôt d'une question juridique qui doit être évaluée en fonction des circonstances afin de déterminer si la procédure suivie par un

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décideur a respecté ou non les normes d'équité et de justice naturelle (*CCP* au para 56; *Huang c Canada (Citoyenneté et Immigration)*, 2018 CF 940 aux para 51–54 [*Huang*]). Cette analyse comporte l'examen des cinq facteurs contextuels non exhaustifs énoncés par la Cour suprême dans l'arrêt *Baker c Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 RCS 817 [*Baker*], à savoir : 1) la nature de la décision recherchée et le processus suivi par l'organisme public pour y parvenir; 2) la nature du régime législatif et les dispositions législatives précises en vertu desquelles agit l'organisme public; 3) l'importance de la décision pour les personnes visées; 4) les attentes légitimes de la personne qui conteste la décision; et 5) les choix de procédure que l'organisme fait lui-même et la nature du respect dû à l'organisme (*Vavilov* au para 77; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine c Lafontaine (Village)*, 2004 CSC 48 au para 5; *Baker* aux para 23–27).

[39] Il appartient à la cour de révision de se demander, « en mettant nettement l'accent sur la nature des droits substantiels concernés et les conséquences pour la personne, si un processus juste et équitable a été suivi » (*CCP* au para 54). Par conséquent, lorsqu'une demande de contrôle judiciaire porte sur l'équité procédurale et sur des manquements aux principes de justice fondamentale, la véritable question n'est pas tant de savoir si la décision était « correcte ». C'est plutôt de déterminer si, compte tenu du contexte particulier et des circonstances de l'espèce, le processus suivi par le décideur administratif était équitable et a donné aux parties concernées le droit de se faire entendre devant un décideur impartial ainsi que la possibilité complète et équitable d'être informées de la preuve à réfuter et d'y répondre. Les cours de révision n'ont pas à faire preuve de déférence envers le décideur administratif sur des questions ayant trait à l'équité procédurale.

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[40] Les questions d'équité procédurale et l'obligation d'agir équitablement, il faut le rappeler, ne concernent pas le bien-fondé ou le contenu d'une décision rendue, mais se rapportent plutôt au processus suivi. L'équité procédurale comporte deux volets : le droit d'être entendu et d'avoir la possibilité de répondre à la preuve qu'une partie doit réfuter; et le droit à une audition juste et impartiale devant un tribunal indépendant (*Therrien (Re)*, 2001 CSC 35 au para 82). Il est aussi bien établi que les exigences de l'obligation d'équité procédurale sont « éminemment variables », intrinsèquement souples et tributaires du contexte (*Vavilov* au para 77; *Baker* au para 21; *CCP* au para 40; *Canada (Procureur général) c Sketchley*, 2005 CAF 404 au para 113; *Foster Farms LLC c Canada (Diversification du commerce International)*, 2020 CF 656 aux para 43–52). L'obligation d'équité procédurale « ne réside pas dans un ensemble de règles adoptées » (*Green c Société du Barreau du Manitoba*, 2017 CSC 20 au para 53). La nature et l'étendue de l'obligation fluctuent plutôt en fonction du contexte particulier et des diverses situations factuelles examinées par le décideur administratif, ainsi que de la nature des différends à trancher (*Baker* aux para 25–26). Autrement dit, la question de savoir si une décision respecte les principes d'équité procédurale doit être tranchée au cas par cas.

III. Analyse

[41] La demande de contrôle judiciaire de M. Pothier porte primordialement sur le refus du CLSST d'accepter sa Plainte CCT invoquant l'impartialité de Mme Paladini dans ses fonctions de « personne compétente » désignée par le Règlement, le non-respect de l'équité procédurale lors de son Enquête externe, et le contenu du rapport d'Enquête externe. Subsidiairement, la demande de contrôle judiciaire porte également sur le caractère raisonnable de la Décision du

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CLSST, qui a pour effet de confirmer le rejet de la Plainte de violence en milieu de travail de M. Pothier.

[42] Je m'arrête un instant pour rappeler, comme je l'ai fait lors de l'audience, que la demande de contrôle judiciaire de M. Pothier soulève plusieurs arguments qui débordent largement la Décision de février 2020 du CLSST et que la Cour n'a pas à traiter dans le cadre du présent recours.

[43] En effet, dans son mémoire des faits et du droit, M. Pothier a longuement discuté de ses différends avec son employeur sur la classification du poste qu'il occupait, les descriptions de travail remises par l'employeur, la Plainte de harcèlement qu'il avait déposée, les allégations de discrimination à l'égard de l'employeur, les allégations de harcèlement à l'endroit du syndicat, son diagnostic de santé mentale, ou encore le devoir d'accommodement de son employeur, RNC. Il est manifeste que ces arguments vont largement au-delà de l'avis de demande de contrôle judiciaire et de la contestation de la Décision, et ils ne seront pas considérés par la Cour dans le présent jugement. Il n'appartient pas à la Cour de refaire le litige qui perdure depuis de longues années entre M. Pothier et son employeur au sujet de sa classification et de sa description de tâches. Je précise d'ailleurs que ces questions — assurément importantes pour M. Pothier — ne faisaient pas partie du mandat de Mme Paladini et de son Enquête externe portant sur la Plainte de harcèlement et de violence au travail de M. Pothier. De plus, la Décision du CLSST de février 2020 ne portait que sur la demande de M. Pothier de se faire accorder une nouvelle Enquête externe.

[44] Je rappelle que, d'une part, M. Pothier n'a pas formulé de demande de contrôle judiciaire à l'encontre du rapport d'Enquête externe portant sur sa Plainte de harcèlement et qu'au surplus,

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le CCT prévoit des mécanismes de révision de ce rapport d'Enquête externe dont M. Pothier s'est effectivement prévalu en logeant sa Plainte CCT.

[45] La Cour d'appel fédérale a maintes fois réitéré que les cours de justice ne doivent pas intervenir dans une instance administrative avant que celle-ci ne soit finalisée et que les parties à l'instance administrative n'aient épuisé toutes les voies de recours utiles qui leur sont ouvertes dans le cadre du processus administratif, sauf lorsque des circonstances exceptionnelles existent *(Dugré c Canada (Procureur général)*, 2021 CAF 8 aux para 34–37; *Alexion Pharmaceuticals Inc c Canada (Procureur général)*, 2017 CAF 241 aux para 47, 50; *Forner c Institut professionnel de la fonction publique du Canada*, 2016 CAF 35 au para 13; *CB Powell Limited c Canada (Agence des services frontaliers)*, 2010 CAF 61 aux para 30–33). Ainsi, lorsque le législateur confie le pouvoir de prendre des décisions à des organismes administratifs et établit un régime exclusif dans le cadre duquel des décideurs administratifs particuliers exercent certains pouvoirs — comme c'est le cas ici pour la contestation du rapport d'Enquête externe —, un demandeur ne peut passer outre ce régime et s'adresser directement à une cour de justice. Ces régimes administratifs sont destinés à disposer des droits d'un administré dans un contexte donné, et leur processus doit être suivi jusqu'au bout, à moins de circonstances exceptionnelles (*Nosistel c Canada (Procureur général)*, 2018 CF 618 aux para 51–53).

[46] Le recours dont M. Pothier devait se prévaloir pour contester le contenu du rapport d'Enquête externe et le processus suivi par l'enquêtrice était donc celui qu'il a amorcé en déposant sa Plainte CCT.

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A. *La question de partialité*

[47] L'argument central invoqué par M. Pothier dans sa Plainte CCT était l'impartialité de Mme Paladini. Selon la plainte formulée par M. Pothier, Mme Paladini n'aurait « pas été impartiale en ignorant volontairement des faits importants, en ne vérifiant pas certaines allégations mais surtout en ne respectant l'équité procédurale qu'une enquête nécessite ». M. Pothier estime que, malgré plusieurs demandes écrites de sa part, l'enquêtrice aurait refusé de lui accorder plus de temps d'entrevue afin de pouvoir expliquer les 30 courriels contenant les preuves qu'il alléguait. À cette fin, il avait demandé un deuxième entretien pour compléter sa description. Cet entretien n'a pas eu lieu, car Mme Paladini considérait avoir suffisamment d'éléments contextuels.

[48] Au nom de RNC, le PGC répond qu'il n'y a aucun élément de preuve dans le dossier qui permette d'appuyer un constat d'impartialité de la part de l'enquêtrice. Contrairement aux allégations de M. Pothier, affirme le PGC, le fait que certains faits ou éléments n'apparaissent pas dans le rapport d'Enquête externe de Mme Paladini ne suffit pas pour établir l'existence d'une crainte de partialité de sa part. De plus, le PGC souligne qu'une forte présomption existe selon laquelle les décideurs exercent leurs fonctions de façon impartiale, et que le fardeau de démontrer le contraire est élevé. Le PGC estime que le manque de preuve à cet effet dans le dossier suffit pour établir que M. Pothier n'a pas rencontré son fardeau.

[49] À cette fin, le PGC estime que M. Pothier n'a soulevé que son désaccord avec la conclusion tirée par l'enquêtrice — ce qui est insuffisant pour établir que cette dernière était partiale. Aussi, soumet le PGC, rien ne permet d'appuyer l'argument voulant que la Décision du CLSST soit erronée à cet égard.

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[50] Je partage l’avis du PGC sur cette question d’impartialité.

[51] Je suis satisfait que le processus d’enquête et les mesures rigoureuses prises par Mme Paladini lors de son enquête reflètent un processus d’enquête solide et rigoureux qui ne contient aucune preuve ou indication permettant d’établir que l’enquêtrice était impartiale.

[52] Sur la question de la partialité, les arguments avancés par M. Pothier semblent se limiter à une redite de ses arguments reprochant à l’enquêtrice d’avoir mal évalué la preuve au dossier. En somme, M. Pothier met en doute la partialité de Mme Paladini, car il considère qu’elle aurait fermé les yeux sur certains aspects de la preuve et en aurait tiré des inférences mal fondées. Aux dires de M. Pothier, les conclusions négatives à son endroit traduisent une prédisposition qu’avait l’enquêtrice.

[53] Le critère qu’il convient d’appliquer en ce qui a trait aux craintes de partialité est bien établi, et le standard à rencontrer est élevé. Il a notamment été énoncé dans l’arrêt *Baker*, où la Cour suprême a réitéré que, pour déterminer s’il y a une crainte raisonnable de partialité, il faut se demander « à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique » et si cette personne croirait, selon toute vraisemblance, que le décideur, « consciemment ou non, ne rendra pas une décision juste » (*Baker* au para 46). Dans l’arrêt *Committee for Justice and Liberty c L’Office national de l’énergie*, [1978] 1 RCS 369 [*Committee for Justice*], la Cour suprême a aussi déclaré que « la crainte de partialité doit être raisonnable et le fait d’une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet » (*Committee for Justice* à la p 394). Une crainte raisonnable de partialité ne peut donc reposer « sur de simples soupçons, de pures conjectures, des insinuations ou encore de simples

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impressions d'un demandeur ou de son procureur [et doit] être étayée par des preuves concrètes qui font ressortir un comportement dérogatoire à la norme » (*Arthur c Canada (Canada (Procureur général)*, 2001 CAF 223 au para 10; voir aussi *Gulia c Canada (Procureur général)*, 2021 CAF 106 aux para 22–23).

[54] Une allégation de partialité ne peut donc être soulevée à la légère et doit être démontrée au moyen de preuves concrètes. Ici, je n'en décèle aucune. Certes, je comprends que M. Pothier puisse être en profond désaccord avec la Décision du CLSST et avec le contenu du rapport d'Enquête externe, mais un désaccord sur l'appréciation de la preuve est insuffisant pour rimer avec une accusation de partialité. Au surplus, les allégations générales de M. Pothier selon lesquelles Mme Paladini aurait eu un parti pris ne résistent tout simplement pas à l'analyse. En fait, les motifs de l'enquêtrice démontrent plutôt une ouverture d'esprit de sa part : elle a multiplié les questions adressées à M. Pothier lors de son témoignage devant elle, et lui a fourni toutes les opportunités nécessaires pour expliquer sa version des faits. Des allégations de partialité ne peuvent se fonder sur de simples impressions d'un demandeur, et doivent plutôt être étayées par des preuves concrètes qui font ressortir un comportement dérogatoire à la norme. M. Pothier n'a soumis aucune preuve de cette nature en ce qui a trait aux démarches et analyses de l'enquêtrice dans son dossier.

[55] Une allégation de partialité est grave, et la Cour doit faire preuve de beaucoup de rigueur avant de tirer une conclusion de partialité (*Shahein c Canada (Citoyenneté et Immigration)*, 2015 CF 987 au para 21). De fait, « l'allégation de crainte raisonnable de partialité met en cause non seulement l'intégrité personnelle du [décideur], mais celle de l'administration de la justice toute [*sic*] entière » (*R c S (RD)*, [1997] 3 RCS 484 au para 113). Dans le dossier de M. Pothier,

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je ne vois tout simplement aucun indice de partialité dans le comportement ou les remarques de l'enquêtrice, et les conclusions du CLSST rejetant les allégations de partialité de M. Pothier ne contiennent aucune erreur justifiant l'intervention de la Cour.

B. *La question d'équité procédurale*

[56] Par ailleurs, M. Pothier soumet qu'en marge de son argument de partialité, il a également soulevé des manquements aux règles d'équité procédurale, et notamment à son droit de se faire entendre.

[57] Je reconnais que, dans sa Plainte CCT, M. Pothier semble confondre les notions de « partialité » et de manquements à « l'équité procédurale ». Comme je l'ai indiqué plus haut, l'équité procédurale comporte deux volets : 1) le droit d'être entendu et d'avoir la possibilité de répondre à la preuve qu'une partie doit réfuter; et 2) le droit à une audition juste et impartiale devant un décideur indépendant. Selon ce que M. Pothier a indiqué lors de l'audience devant la Cour, il semble qu'en parlant à la fois de manque d'impartialité et de manquements à l'équité procédurale, il faisait en fait référence aux deux volets de ce qui compose l'équité procédurale : le droit à un décideur impartial d'une part, et le droit d'être entendu et d'avoir la possibilité de répondre à la preuve qu'une partie doit réfuter, d'autre part.

[58] Aussi, je comprends que, quand M. Pothier disait que l'enquêtrice « n'a pas été impartiale en ignorant volontairement des faits importants, en ne vérifiant pas certaines allégations mais surtout en ne respectant l'équité procédurale qu'une enquête nécessite », il soulevait à la fois un manque de partialité et un défaut de se faire entendre. J'avoue que cette distinction n'était pas limpide dans les soumissions de M. Pothier mais il ressort de l'audience

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devant la Cour que, dans l'esprit de M. Pothier, ce dernier faisait assurément aussi référence au droit de se faire entendre lorsqu'il reprochait à Mme Paladini le « non-respect de l'équité procédurale ».

[59] Ainsi, M. Pothier soumet que Mme Paladini ne lui aurait pas permis de se défendre ni d'apporter d'autres preuves suite à des allégations et des témoignages de tiers qu'il qualifie comme étant faux, incomplets ou qui ont besoin de nuance. En lien avec ces allégations, M. Pothier estime qu'il y aurait eu un manquement aux règles d'équité procédurale puisque, selon lui, l'enquêtrice ne lui aurait pas donné l'occasion d'être entendu sur plusieurs questions. Le PGC répond que M. Pothier connaissait la preuve à réfuter et a amplement eu la possibilité d'y répondre — ce qui suffit à rendre équitable la procédure suivie lors de l'Enquête externe. En ce qui concerne plus spécifiquement l'opportunité de répondre aux autres témoignages, le PGC souligne que M. Pothier pouvait et aurait dû anticiper les témoignages des personnes interrogées, qu'il connaissait la preuve à réfuter et qu'il a eu la possibilité complète et équitable d'y répondre.

[60] Je suis d'accord avec le PGC en ce qui concerne le déroulement de l'Enquête externe, mais je ne suis pas convaincu qu'on peut faire le même constat en ce qui a trait à l'Enquête interne et à la Décision du CLSST.

[61] La jurisprudence enseigne que, dans le cadre d'une enquête comme celle de Mme Paladini, l'enquêtrice ou l'enquêteur a l'obligation de conduire une enquête rigoureuse et neutre (*Slattery c Canada (Commission des droits de la personne)*, [1994] 2 CF 574 (TD) au para 49 [*Slattery*], confirmé par (1996) 205 NR 383 (CA)). Ainsi, dans la décision *Slattery*, M. le juge Nadon fait état de cette obligation de rigueur et de neutralité dans les termes suivants :

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> [56] Il faut faire montre de retenue judiciaire à l'égard des organismes décisionnels administratifs qui doivent évaluer la valeur probante de la preuve et décider de poursuivre ou non les enquêtes. Ce n'est que lorsque des omissions déraisonnables se sont produites, par exemple lorsqu'un enquêteur n'a pas examiné une preuve manifestement importante, qu'un contrôle judiciaire s'impose. Un tel point de vue correspond à la retenue judiciaire dont la Cour suprême a fait preuve à l'égard des activités d'appréciation des faits du Tribunal des droits de la personne dans l'affaire *Canada (Procureur général) c. Mossop,* [1993] 1 R.C.S. 554.
>
> [57] Dans des situations où les parties ont le droit de présenter des observations en réponse au rapport de l'enquêteur, comme c'est le cas en l'espèce, les parties peuvent compenser les omissions moins graves en les portant à l'attention du décideur. Par conséquent, ce ne serait que lorsque les plaignants ne sont pas en mesure de corriger de telles omissions que le contrôle judiciaire devrait se justifier. Même s'il ne s'agit pas d'une liste exhaustive, il me semble que les circonstances où des observations supplémentaires ne sauraient compenser les omissions de l'enquêteur devraient comprendre : (1) les cas où l'omission est de nature si fondamentale que le seul fait d'attirer l'attention du décideur sur l'omission ne suffit pas à y remédier; ou (2) le cas où le décideur n'a pas accès à la preuve de fond en raison de la nature protégée de l'information ou encore du rejet explicite qu'il en a fait.
>
> [Je souligne.]

[62] L'enquêteur ou l'enquêtrice doit donc s'assurer que les parties sont informées de la substance de la preuve réunie lors de l'enquête et produite devant eux, et qu'elles aient la possibilité de répondre à cette preuve et de présenter toutes les observations pertinentes (*Syndicat des employés de production du Québec et de l'Acadie c Canada (Commission canadienne des droits de la personne),* [1989] 2 RCS 879 au para 33; *Best c Canada (Procureur général),* 2011 CF 71 au para 71, confirmé par 2011 CAF 351).

[63] Par ailleurs, comme règle générale, la Cour a décrit comme suit l'obligation d'équité procédurale qui doit régir les enquêtes comme celle de Mme Paladini :

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> [22] Selon la règle d'équité procédurale, un plaignant doit connaître les allégations formulées contre lui. Il n'a pas le droit d'en connaître les moindres détails, mais il devrait être informé des prétentions générales de la partie adverse. Le plaignant n'a pas le droit d'exiger les notes d'entrevues de l'enquêteur ou les déclarations obtenues des personnes interrogées. Il a le droit d'être informé du fond de l'affaire et de s'attendre à ce que l'enquêteur résume entièrement et fidèlement la preuve obtenue au cours de son enquête. Il doit avoir la possibilité de répondre. Il a également le droit d'être informé des commentaires de la partie adverse qui concernent des faits différents de ceux qui sont exposés dans le rapport d'enquête. Pour que l'erreur soit susceptible de révision, le plaignant doit démontrer que les renseignements ont été retenus à tort et que ces renseignements sont fondamentaux pour le résultat de la cause.
>
> [Je souligne.]
>
> *Miller c Canada (Commission des droits de la personne)* (1996), 112 FTR 195 au para 22 [*Miller*]).

[64] Je ne suis pas persuadé que M. Pothier a satisfait le fardeau élevé établi par la jurisprudence en ce qui a trait à l'Enquête externe.

[65] Plus particulièrement, le défaut d'avoir accordé à M. Pothier un deuxième entretien avec l'enquêtrice n'est pas suffisant pour conclure à un manquement à l'équité procédurale. M. Pothier a eu la chance d'être entendu par Mme Paladini pendant une longue période de huit heures et il a eu l'occasion de vérifier les notes prises lors de cet entretien. Il a également soumis plusieurs éléments de preuve et documents tout au cours de l'enquête. Dans son rapport, Mme Paladini a expliqué que tous les documents soumis ont été pris en compte — un fait qui a d'ailleurs été noté lors de l'Enquête interne. L'Enquête interne a également déterminé qu'il n'y avait « pas de preuves ou d'indications supportant le contraire ». Pour qu'une erreur soit susceptible de révision, le plaignant doit démontrer « que les renseignements ont été retenus à

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tort et que ces renseignements sont fondamentaux pour le résultat de la cause » (*Miller* au para 22). Ce n’est manifestement pas le cas ici.

[66] D’autre part, Mme Paladini a entendu plusieurs autres témoins et personnes « mises en cause » pour arriver à sa conclusion. M. Pothier reproche à l’enquêtrice de ne pas lui avoir accordé la possibilité de contre-interroger ou de soumettre des documents en réplique à ces témoignages, et que, ce faisant, celle-ci aurait commis un manquement à l’équité procédurale. Encore une fois, il convient de rappeler que « le plaignant n’a pas le droit d’exiger les notes d’entrevues de l’enquêteur ou les déclarations obtenues des personnes interrogées. Il a le droit d’être informé du fond de l’affaire et de s’attendre à ce que l’enquêteur résume entièrement et fidèlement la preuve obtenue au cours de son enquête » (*Miller* au para 22). Qui plus est, en ce qui concerne les omissions ou les fautes de soumettre une réplique dans de telles circonstances, « ce ne serait que lorsque les plaignants ne sont pas en mesure de corriger de telles omissions que le contrôle judiciaire devrait se justifier […] [ce qui arrive dans] les cas où l’omission est de nature si fondamentale que le seul fait d’attirer l’attention du décideur sur l’omission ne suffit pas à y remédier » (*Slattery* au para 57). Dans le présent dossier, il y avait amplement d’éléments de preuve soumis par M. Pothier pour « contrer » les points soulevés par les témoins et personnes « mises en cause ». Je ne suis pas convaincu que, dans ces circonstances, le défaut de soumettre une réplique constitue une omission de nature « si fondamentale que le seul fait d’attirer l’attention du décideur sur l’omission ne suffit pas à y remédier ».

[67] De surcroît, comme le PGC l’a fait remarquer, M. Pothier était en mesure d’anticiper les témoignages des personnes interrogées. En effet, M. Pothier connaissait très bien la preuve à réfuter et il a eu la possibilité complète et équitable d’y répondre. En effet, l’enquêtrice a

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rencontré M. Pothier lors d'une longue entrevue qui a duré huit heures. Et, avant la rencontre, elle a reçu de M. Pothier 30 courriels contenant des informations additionnelles. Enfin, suite à la rencontre, M. Pothier a reçu une copie des notes de leur rencontre et a pu commenter quant à l'exactitude de celles-ci.

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[68] Les conditions pour démontrer l'existence d'un manquement à l'équité procédurale sont donc loin d'être établies en ce qui concerne le déroulement de l'Enquête externe.

[69] La situation est toutefois plus problématique en ce qui concerne l'Enquête interne et la Décision au cœur de la demande de contrôle judiciaire de M. Pothier. Dans son rapport d'Enquête interne, le CLSST mentionne que « [l]es informations disponibles telles que le nombre de personnes interviewées, le nombre d'heures consacré [*sic*] par Mme Paladini, nos entretiens, ainsi que la richesse des documents fournis par toutes [*sic*] les parties, ont permis de prendre une décision dans ce dossier […] [et] nous n'avons pas trouvé de preuve ou de manquement qui peuvent démontrer clairement que le travail effectué par la firme Expertise H2H et par Mme Severine Paladini n'a pas été faite [*sic*] de façon impartiale » [je souligne].

[70] Mais, nulle part l'Enquête interne ne fait référence au non-respect des règles d'équité procédurale ou au droit de M. Pothier de se faire entendre. En d'autres mots, le CLSST n'a jamais traité directement des questions d'équité procédurale — au sens du droit de se faire entendre, soit le sens que M. Pothier donne à ce qu'il décrit comme étant l'équité procédurale. Je suis bien conscient que la formulation utilisée par M. Pothier dans sa Plainte CCT pouvait laisser croire que ses reproches d'un manque d'impartialité et de non-respect de l'équité procédurale rimaient à la même chose. Mais, lorsque lue dans son ensemble, je suis satisfait que la Plainte CCT soulevait à la fois des questions de partialité et un défaut de se faire entendre.

[71] L'Enquête interne menée par le CLSST suite à la Plainte CCT de M. Pothier peut être considérée comme une enquête « *de novo* ». Dans l'affaire *Girouard c Canada (Procureure générale),* 2018 CF 865 [*Girouard*], la Cour a déterminé qu'« en théorie ainsi qu'en pratique, un appel *de novo* prévoit qu'un dossier puisse être représenté à nouveau avec de la preuve par témoins ou autrement et à l'aide de nouvelles soumissions. Qui plus est, ce type d'appel se fait dans le cadre d'un système à deux (2) parties sous forme accusatoire ou contradictoire » (*Girouard* au para 159). C'est le cas ici.

[72] Dans la présente affaire, M. Pothier a eu la chance de présenter de nouvelles soumissions. De plus, le CLSST a pu examiner le rapport d'Enquête externe ainsi que plusieurs échanges de courriels et a subséquemment procédé à leur propre analyse du dossier en posant des questions et en tenant des entrevues avec M. Pothier ainsi que Mme Paladini et d'autres témoins. L'Enquête interne a également été dans le cadre d'un système à deux parties sous forme contradictoire.

[73] Dans une affaire semblable à celle de M. Pothier, où il y avait des allégations de manquements à l'équité procédurale dans le cadre d'une plainte de harcèlement (mais dans le cadre des Forces armées canadiennes), la Cour a déterminé qu'un examen *de novo* des griefs du demandeur avait été effectué puisque « le [deuxième examen] a bien pris en compte la norme de preuve, selon la prépondérance des probabilités, rappelant [au demandeur] qu'il avait le fardeau de démontrer le bien-fondé de ses allégations. Il a rendu sa décision par écrit, dûment motivée. Lorsqu'il a décidé de ne pas donner suite aux recommandations du Comité [de première instance], il a motivé sa décision de façon détaillée » (*Pindi c Canada (Procureur général),* 2023 CF 1252 au para 63).

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[74] Enfin, la décision *Blair c Canada (Défense nationale)*, 2017 CF 10 [*Blair*] enseigne qu'« un examen *de novo* suffira pour remédier à un manquement à l'équité procédurale lorsque la procédure, examinée dans son ensemble, était équitable » (*Blair* au para 36, citant *Walsh c Canada (Procureur général)*, 2015 CF 775 au para 51 [*Walsh*]). Dans l'affaire *Blair*, la Cour a également noté que « [c]omme le demandeur a eu plusieurs occasions de comprendre la preuve qui pesait contre lui et de présenter des observations, et comme le [décideur] a effectué un examen *de novo* et n'a pas tenu compte de la mise en garde et de la surveillance, ou des autres procédures fautives, il a été remédié à tout vice de procédure » (*Blair* au para 38). Dans le cas de M. Pothier, comme le souligne le PGC, l'Enquête interne a offert à M. Pothier la possibilité complète et équitable de commenter le rapport d'Enquête externe lors de sa rencontre avec le CLSST, ce qui contribue au fait que l'examen qu'a fait le CLSST puisse être considéré comme un examen *de novo*.

[75] Toutefois, dans les circonstances, le fait que M. Pothier ait eu droit à un processus *de novo* devant le CLSST ne répond pas entièrement aux allégations de manquements à l'équité procédurale.

[76] Dans l'arrêt *McBride c Canada (Défense nationale)*, 2012 CAF 181 [*McBride*], la Cour d'appel fédérale a expliqué que tout manquement à l'équité procédurale survenu dans le processus décisionnel peut être corrigé si les principes fondamentaux de l'équité procédurale sont appliqués lors de l'examen *de novo* (*McBride* aux para 41–45; *Walsh* au para 51; *Blair* au para 37).

[77] Dans le cas de M. Pothier, je ne suis pas convaincu que le fait d'avoir eu une procédure *de novo* devant le CLSST ait été suffisant pour corriger les manquements à l'équité procédurale

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qu’il a avancés dans sa Plainte CCT. Devant le CLSST, M. Pothier avait soulevé le fait qu’il n’avait pas eu son droit de réplique dans sa Plainte et que Mme Paladini ne lui avait pas permis d’avoir l’occasion de se défendre et d’apporter d’autres preuves suite aux allégations des personnes mises en cause et des témoins qui sont « fausses, incomplètes ou qui ont besoins de nuances ». Cependant, dans la Décision, le CLSST n’a pas clairement traité cette question.

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[78] Selon le cadre d’analyse établi par l’arrêt *Vavilov*, les motifs d’un décideur administratif comportent deux éléments connexes : le caractère suffisant d’une part, et la logique, la cohérence et la rationalité d’autre part (*Vavilov* aux para 96, 103–104). La logique, la cohérence et la rationalité d’une décision peuvent être remises en question lorsque les motifs sont entachés d’erreurs manifestes sur le plan rationnel, comme lorsque le décideur ignore les « questions et préoccupations centrales soulevées par les parties » (*Alexion Pharmaceuticals Inc c Canada (Procureur général)*, 2021 CAF 157 au para 13 [*Alexion*], citant *Vavilov* aux para 127–128). Bref, une décision ne sera pas raisonnable s’il est impossible de comprendre, lorsqu’on lit les motifs en corrélation avec le dossier, le raisonnement du décideur sur un point central (*Rajput c Canada (Citoyenneté et Immigration)*, 2022 CF 65 au para 34).

[79] Ici, dans sa Décision, le CLSST ne semble pas avoir considéré les arguments de M. Pothier sur les manquements à l’équité procédurale. Le fait qu’un décideur « n’ait pas réussi à s’attaquer de façon significative aux questions clés ou aux arguments principaux formulés par les parties permet de se demander s’il était effectivement attentif et sensible à la question qui lui était soumise » (*Vavilov* au para 128). Comme l’a déclaré la Cour d’appel fédérale dans l’arrêt *Alexion*, les points centraux d’une décision sont façonnés en partie par les questions et préoccupations centrales soulevées par les parties (*Alexion* au para 13, citant *Vavilov* aux

para 127–128). En l’espèce, M. Pothier avait signalé ses préoccupations quant aux manquements à l’équité procédurale dans le processus d’Enquête externe, mais la Décision du CLSST laisse l’impression que ces questions ont seulement été analysées sous la perspective de la partialité de l’enquêtrice. La question de l’atteinte à son droit de se faire entendre était, sans aucun doute, une question clé dans le dossier de M. Pothier. Le fait que le CLSST n’ait pas expliqué de façon plus claire et plus intelligible en quoi ce droit de M. Pothier de se faire entendre avait été respecté constitue une lacune grave et fondamentale dans son raisonnement qui, en l’espèce, justifie l’intervention de la Cour (*Vavilov* aux para 102–103, 127–128).

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[80] Même si j’interprète la Décision « de façon globale et contextuelle » et que je garde en tête que les cours de révision devraient chercher à « comprendre le fil du raisonnement suivi par le décideur » pour en arriver à sa conclusion (*Vavilov* aux para 84, 97), je ne suis pas convaincu que, tel qu’exposé, le raisonnement du CLSST est intelligible et répond adéquatement aux préoccupations soulevées par M. Pothier.

[81] Depuis l’arrêt *Vavilov*, une attention particulière doit désormais être portée au processus décisionnel et à la justification des décisions administratives. Un des objectifs préconisés par la Cour suprême du Canada dans l’application de la norme de la décision raisonnable est de « développer et de renforcer une culture de la justification au sein du processus décisionnel administratif » (*Vavilov* aux para 2, 143). Il ne suffit pas que la décision soit justifiable, et le décideur administratif doit également « *justifier* sa décision auprès des personnes auxquelles elle s’applique » [en italique dans l’original] (*Vavilov* au para 86). La cour de révision doit « s’assurer de bien comprendre le raisonnement suivi par le décideur » et déterminer « si la

décision possède les caractéristiques d'une décision raisonnable, soit la justification, la transparence et l'intelligibilité » (*Vavilov* au para 99).

[82] Or, dans le cas de M. Pothier, je ne suis pas convaincu que la Décision du CLSST soit conforme aux contraintes juridiques et factuelles pertinentes ayant une incidence sur le résultat et la question en litige (*Vavilov* aux para 105–107). Je reconnais que les motifs d'une décision administrative n'ont pas à être exhaustifs. En effet, la norme de contrôle de la décision raisonnable ne porte pas sur le degré de perfection de la décision, mais plutôt sur son caractère raisonnable (*Vavilov* au para 91). En revanche, il faut quand même que les motifs soient compréhensibles et justifient la décision administrative. Un décideur administratif a le devoir d'expliquer son raisonnement dans ses motifs (*Farrier c Canada (Procureur général),* 2020 CAF 25 au para 32 [*Farrier*]). Certes, le peu de détails donnés dans une décision ne la rend pas nécessairement déraisonnable, mais encore faut-il que les motifs permettent à la Cour de comprendre le fondement de la décision contestée et de déterminer si la conclusion tient la route. Ce n'est pas le cas ici pour la Plainte CCT de M. Pothier.

[83] En l'espèce, je suis particulièrement sensible au « principe de la justification adaptée » énoncé dans les arrêts *Vavilov* et *Mason* pour les cas où la décision du décideur administratif peut avoir des conséquences graves qui menacent la vie, la liberté, la dignité ou les moyens de subsistance d'un individu. En raison de ce principe, il échoit aux décideurs administratifs dans ces situations la « responsabilité accrue […] de s'assurer que leurs motifs démontrent qu'ils ont tenu compte des conséquences d'une décision et que ces conséquences sont justifiées au regard des faits et du droit » (*Vavilov* au para 135). Le cas de M. Pothier correspond à l'une de ces situations, et je crois respectueusement que la Décision ne répond pas à cette norme plus stricte.

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[84] Je fais une dernière observation. Dans *Vavilov*, la Cour suprême a effectivement souligné qu'une cour de révision possède une certaine discrétion quant à la réparation à accorder lorsqu'elle casse une décision déraisonnable, la majorité y allant d'une mise en garde contre le « va-et-vient interminable de contrôles judiciaires et de nouveaux examens » (*Vavilov* aux para 140–142). Ainsi, il peut parfois être indiqué de refuser de renvoyer une affaire à un décideur administratif « lorsqu'il devient évident aux yeux de la cour, lors de son contrôle judiciaire, qu'un résultat donné est inévitable, si bien que le renvoi de l'affaire ne servirait à rien » (*Vavilov* au para 142; *Mobil Oil Canada Ltd c Office Canada-Terre-Neuve des hydrocarbures extracôtiers*, [1994] 1 RCS 202 aux pp 228–230; *Entertainment Software Association c Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2020 CAF 100 aux para 99–100 [*Société canadienne des auteurs*]). Ceci peut aussi être le cas lorsque la correction de l'erreur n'aurait pas modifié le résultat existant et n'aurait aucune conséquence pratique, et qu'une seule conclusion est en fait possible (*Mines Alerte Canada c Canada (Pêches et Océans)*, 2010 CSC 2 au para 52; *Farrier* au para 31; *Robbins c Canada (Procureur général)*, 2017 CAF 24 aux para 16–22 [*Robbins*]). Cette discrétion d'accorder ou de ne pas accorder de réparation existe tant dans le contexte d'erreurs procédurales qu'en présence d'erreurs substantives (*Société canadienne des auteurs* au para 99).

[85] Toutefois, a précisé la Cour suprême, ce pouvoir discrétionnaire en matière de réparation doit être exercé avec retenue, car le choix de la réparation doit notamment « être guidé par la raison d'être de l'application de [la norme de la décision raisonnable], y compris le fait pour la cour de révision de reconnaître que le législateur a confié le règlement de l'affaire à un décideur administratif, et non à une cour » (*Vavilov* au para 140). Ainsi, lorsque la décision contrôlée selon la norme de la décision raisonnable ne peut être confirmée, il conviendra, la plupart du

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temps, de renvoyer l'affaire au décideur pour qu'il revoie sa décision, à la lumière des motifs donnés par la cour, et détermine alors s'il arrive au même résultat ou à un résultat différent (*Vavilov* au para 141; *Société canadienne des auteurs* au para 99; *Robbins* au para 17). En somme, le seuil à atteindre pour opter de ne pas remettre l'affaire au décideur administratif lorsque sa décision est jugée déraisonnable est élevé (*D'Errico c Canada (Procureur général)*, 2014 CAF 95 aux para 14–17).

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[86] Dans la mesure où la norme de la décision raisonnable loge à l'enseigne de la déférence et du respect de la légitimité et de la compétence des décideurs administratifs dans leur domaine d'expertise, la discrétion des cours de révision de ne pas retourner une décision déraisonnable au décideur administratif pour réexamen doit donc s'exercer soigneusement, avec prudence et parcimonie, et se limiter aux rares cas où le contexte ne peut qu'inéluctablement mener à un seul résultat et où l'issue ne laisse aucun doute. Ces situations feront plutôt figure d'exceptions. Les brèves remarques faites par la Cour suprême dans *Vavilov* sur l'exercice du pouvoir discrétionnaire en matière de réparation ne constituent pas une ouverture faite aux cours de révision pour se substituer au décideur administratif et s'immiscer dans le mérite de la décision à rendre, s'il est concevable que le décideur puisse arriver à une décision à la fois différente et raisonnable. Il serait pour le moins ironique que le pouvoir discrétionnaire de réparation associé à la norme de la décision raisonnable, une norme ancrée dans la reconnaissance et le respect du rôle dévolu aux décideurs administratifs, puisse devenir un ferment sur lequel pourrait aisément prospérer un transfert du pouvoir décisionnel des décideurs aux cours de justice chargées de leur surveillance (*Quele c Canada (Citoyenneté et Immigration)*, 2022 CF 108 aux para 31–35; *Dugarte de Lopez c Canada (Citoyenneté et Immigration)*, 2020 CF 707 aux para 29–35).

[87] Bien sûr, il se pourrait que, même informé des présents motifs sur l'erreur commise par le CLSST, un comité différemment constitué puisse raisonnablement reconduire la même décision et rejeter à nouveau la Plainte CCT de M. Pothier. Cependant, ce comité différemment constitué pourrait aussi arriver à une conclusion différente, plus favorable à M. Pothier. C'est au CLSST, et non à la Cour, qu'il appartient de mener cette évaluation. Je ne peux pas simplement présumer qu'une considération adéquate des questions de manquements au droit de se faire entendre ne changerait pas la donne devant le CLSST, et usurper l'autorité décisionnelle que le législateur a confiée au décideur administratif sur la question. Dans le présent dossier, je ne suis pas en mesure d'affirmer que le dossier va tellement à l'encontre de l'accueil de la Plainte CCT de M. Pothier qu'il ne servirait à rien de renvoyer l'affaire (*Lemus c Canada (Citoyenneté et Immigration*), 2014 CAF 114 au para 38).

C. *Le caractère raisonnable des enquêtes*

[88] Vu ce qui précède, je n'ai pas à déterminer davantage si les conclusions auxquelles ont abouti les Enquêtes externe et interne possèdent tous les attributs de décisions raisonnables.

IV. Conclusion

[89] Pour les motifs exposés ci-dessus, la demande de contrôle judiciaire présentée par M. Pothier est accueillie en partie.

[90] Compte du succès uniquement partiel de M. Pothier, aucuns dépens ne sont accordés.

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JUGEMENT au dossier T-325-20

LA COUR STATUE que :

1. La demande de contrôle judiciaire est accueillie en partie, sans dépens.

2. La décision et le rapport d'enquête du Comité local de santé et sécurité au travail [CLSST] daté du 24 février 2020 sont annulés et la plainte de M. Pothier est retournée au CLSST pour qu'elle soit examinée de nouveau par un comité nouvellement constitué.

« Denis Gascon »
Juge

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COUR FÉDÉRALE

AVOCATS INSCRITS AU DOSSIER

DOSSIER :	T-325-20
INTITULÉ :	MICHEL POTHIER c PROCUREUR GÉNÉRAL DU CANADA
LIEU DE L'AUDIENCE :	PAR VIDÉOCONFÉRENCE
DATE DE L'AUDIENCE :	24–25 OCTOBRE 2023
JUGEMENT ET MOTIFS :	GASCON J.
DATE DES MOTIFS :	LE 26 MARS 2024

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COMPARUTIONS :

M. Michel Pothier	POUR LE DEMANDEUR À SON PROPRE NOM
Me Patrick Turcot	POUR LE DÉFENDEUR

AVOCATS INSCRITS AU DOSSIER :

Procureur général du Canada Ottawa (Ontario)	POUR LE DÉFENDEUR