Federal Court of Appeal | Cour d'appel fédérale

Date: 20260116

Dockets: A-73-24 (Lead appeal)
A-29-23
A-30-23
A-74-24
A-75-24
A-76-24

Citation: 2026 FCA 6

CORAM: **DE MONTIGNY C.J.**
LASKIN J.A.
MACTAVISH J.A.

Docket: A-73-24 (Lead appeal)

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

Respondent

and

ATTORNEY GENERAL OF ALBERTA and
ATTORNEY GENERAL OF SASKATCHEWAN

Interveners

Docket: A-29-23

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

Respondent

Docket: A-30-23

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

CANADIAN CONSTITUTION FOUNDATION

Respondent

Docket: A-74-24

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

CANADIAN CONSTITUTION FOUNDATION

Respondent

and

ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF SASKATCHEWAN

Interveners

Docket: A-75-24

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

EDWARD CORNELL and VINCENT GIRCYS

Respondents

Docket: A-76-24

AND BETWEEN:

CANADIAN FRONTLINE NURSES and KRISTEN NAGLE

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on February 4 & 5, 2025.

Judgment delivered at Ottawa, Ontario, on January 16, 2026.

REASONS FOR JUDGMENT BY: THE COURT

Federal Court of Appeal | Cour d'appel fédérale

Date: 20260116

Dockets: A-73-24 (Lead appeal)
A-29-23
A-30-23
A-74-24
A-75-24
A-76-24

Citation: 2026 FCA 6

CORAM: **DE MONTIGNY C.J.**
LASKIN J.A.
MACTAVISH J.A.

Docket: A-73-24 (Lead appeal)

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

Respondent

and

ATTORNEY GENERAL OF ALBERTA and
ATTORNEY GENERAL OF SASKATCHEWAN

Interveners

Docket: A-29-23

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

Respondent

Docket: A-30-23

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

CANADIAN CONSTITUTION FOUNDATION

Respondent

Docket: A-74-24

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

CANADIAN CONSTITUTION FOUNDATION

Respondent

and

ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF SASKATCHEWAN

Interveners

Docket: A-75-24

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

EDWARD CORNELL and VINCENT GIRCYS

Respondents

Docket: A-76-24

AND BETWEEN:

CANADIAN FRONTLINE NURSES and KRISTEN NAGLE

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT BY THE COURT

Table of Contents

[1] These appeals raise important and complex issues of constitutional and administrative law in the context of the first ever use of the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.) (the Act or the *Emergencies Act*). More specifically, it results from the *Proclamation Declaring a Public Order Emergency*, S.O.R./2022-20 (the Proclamation) issued by the Governor General in Council (GIC) on February 14, 2022, declaring that it had reasonable grounds to believe a public order emergency existed under subsection 17(1) of the *Emergencies Act*, which necessitated special temporary measures. That Proclamation was followed, on February 15, 2022, by the *Emergency Measures Regulations*, S.O.R./2022-21 (the Regulations) and the *Emergency Economic Measures Order*, S.O.R./2022-22 (the Economic Order).

[2] These measures were taken in the midst of what came to be known as the "Freedom Convoy 2022" (the Convoy), which consisted of hundreds of vehicles converging on the national capital on January 28, 2022, protesting Canada's public health response to the COVID-19 pandemic and the new vaccination requirements for cross-border truckers. The public authorities were also preoccupied by a number of border blockades, the more serious of which occurred at the Sweetgrass-Coutts, Alberta border crossing and at the Ambassador Bridge in Ontario.

[3] The Proclamation, the Regulations and the Economic Order were challenged by a number of applicants. The Canadian Civil Liberties Association (CCLA) and the Canadian Constitution Foundation (CCF) also brought applications on the basis of public interest standing. The Attorney General of Alberta was also granted leave to intervene before the Federal Court in the CCLA and CCF files to make submissions on several non-constitutional questions.

[4] On January 29, 2024, Justice Mosley of the Federal Court (the Federal Court) granted in part the four applications. He found that the reasons provided for the decision to declare a public order emergency did not satisfy the requirements of the *Emergencies Act,* and that certain of the temporary measures adopted to deal with the protests infringed section 8 and paragraph 2(b) of the *Canadian Charter of Rights and Freedoms – Part I of the Constitution Act, 1982* being Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.) (Charter) and were not justified under section 1 of the Charter.

[5] This Court is seized with the appeals of the Attorney General of Canada (AGC or the appellant) in files A-73-24, A-74-24 and A-75-24, whereby he challenges the Federal Court's finding that the declaration of a public order emergency was unreasonable and that some provisions of the Regulations and of the Economic Order violated the Charter (*Canadian Frontline Nurses v. Canada (Attorney General)*, 2024 FC 42 [*Nagle*]). We are also seized of the cross-appeals by the CCLA and the CCF, whereby these two organizations ask that the order be varied to include that the Regulations infringed paragraph 2(c) of the Charter in a manner that is not justified under section 1 of the Charter.

[6] Kristen Nagle (Ms. Nagle) and Canadian Frontline Nurses (CFN) also appeal the Federal Court's decision to dismiss their application because they lacked standing (file A-76-24).

[7] Finally, this Court is seized of the interlocutory appeals brought by the AGC in files A-29-23 and A-30-23. These appeals challenge the decision of the Federal Court to grant the motions brought by the CCLA and the CCF under Rule 312 of the *Federal Courts Rules*,

S.O.R./98-106, to admit in the judicial review proceeding a selection of documents, transcripts, and witness summaries produced during the Public Order Emergency Commission (POEC)'s proceedings. These appeals were held in abeyance pending the decision on the judicial reviews and have now been consolidated with the main appeals.

[8] For the reasons that follow, we are of the opinion that every appeal before this Court should be dismissed. The Federal Court correctly determined that the declaration of a public order emergency was unreasonable and that parts of the Regulations and Economic Order infringed paragraph 2(b) and section 8 of the Charter. We are satisfied that the paragraph 2(b) infringement sufficiently accounts for the related right to assemble under paragraph 2(c), and decline to address the cross-appeal. As for the preliminary matters, the Federal Court made no reviewable error with regards to standing or in admitting evidence that was before the POEC.

I. CONTEXT

[9] There is no need to go into every particular of the events leading up to the Proclamation, Regulations and Economic Order. The detailed history of those events was thoroughly canvassed by the POEC, established by Order in Council (P.C. 2022-392) on April 25, 2022, and was also aptly summarized by the Federal Court in its reasons. That being said, it is nevertheless essential to summarize the context within which the government decided to act, as it provides the backdrop against which the reasonableness of the government's use of the *Emergencies Act* ought to be assessed. As noted by the Federal Court, the parties are largely in agreement about what happened; their disagreements have more to do with the legal characterization of those

events, whether they meet the requirements set out in the *Emergencies Act* and how they colour the reasonableness of the decision made by the GIC to declare a public order emergency.

[10] On November 19, 2021, the Public Health Agency of Canada announced that as of January 15, 2022, certain groups of travellers, including essential service providers such as truck drivers who had been exempt from vaccine requirements upon entering Canada would now be required to be fully vaccinated.

A. *The City of Ottawa*

[11] As a result of these travel restrictions, the Convoy left Prince Rupert, bound for Ottawa, on January 22, 2022. Initially a trucker-led demonstration, it grew in size and gathered supporters along its way. When it arrived in Ottawa on January 28, 2022, it consisted of thousands of protesters and hundreds of vehicles, including many large transport trucks. The downtown core and Parliamentary Precinct were ground to a halt by the ensuing occupation of the blockade of Convoy trucks and other vehicles.

[12] While many Convoy participants were peaceful, the Convoy also included high-decibel noise disruptions such as honking and fireworks. Exhaust fumes permeated the air and seeped into neighbouring properties. There were reported incidents of harassment, assaults, and intimidation. As the Federal Court noted, this created “intolerable conditions for many residents and workers in the district” (*Nagle* at para. 35).

[13] From January 30 to February 2, 2022, the participants in the Convoy protest began to erect structures and started to organize themselves for a more prolonged occupation, claiming they would not budge until all COVID-19 mandates were revoked. The Ottawa Police Service (OPS) was seemingly unable to impede them from doing so. The OPS launched several criminal investigations into the desecration of national monuments, as well as threatening/illegal/intimidating behaviour toward police officers, but they were clearly outnumbered. The OPS Chief declared on February 2, 2022, that "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" (*Nagle* at para. 36).

[14] On February 3, 2022, the Mayor of Ottawa requested additional resources from the Federal and Ontario governments to deal with the situation. That same day, Convoy organizers held a press conference and stated that they would remain in Ottawa until all COVID-19 mandates were removed. On February 6, 2022, the Mayor declared a state of emergency.

[15] On February 7, 2022, the Provincial Operations Intelligence Bureau of the Ontario Provincial Police (OPP) identified the Convoy as a "threat to national security" and requested 1,800 additional police officers. A ten-day interim injunction was also granted by the Ontario Superior Court of Justice to silence the truck horns and to prevent parking by-law breaches in downtown Ottawa.

[16] From February 8 to 10, 2022, the Convoy numbered about 418 vehicles, almost 25% of which had children present, hampering police responses and leading to concerns for the

children's safety. Convoy participants and their supporters also engaged in a concerted effort to flood Ottawa's emergency services with excessive calls designed to overwhelm their capacity to respond. Donations to fund the protest were received by a crowdfunding site, the majority of which were made by U.S.-based donors.

[17] On February 10, 2022, the Prime Minister convened and met with the Incident Response Group (IRG), an advisory body made up of Cabinet members and senior public servants whose role is to advise the Prime Minister in the event of a national crisis. Further meetings of that body were held on February 12 and 13. More will be said later about the information that was considered by the IRG during these meetings. Suffice it to say that there was information to the effect that extremist elements were taking part in the protests. They identified participants who were members of an extremist organization, known as Diagolon, whose founder was arrested in January 2022 before coming to protest in Ottawa, after police found firearms, prohibited magazines, ammunition, and body armour at his home. Other protesters were also wearing yellow Star of David emblems tagged with "anti-vaxx" or displaying flags with swastikas, Confederate flags, and Nazi SS symbols.

[18] On February 11, 2022, the government of Ontario declared a province-wide state of emergency in response to interference with critical infrastructure throughout the province, which prevented the movement of people and delivery of essential goods. That same day, the Prime Minister and the President of the United States discussed the ongoing illegal blockades taking place across Canada, including at or near Canada-U.S. border crossings, and their impact on North American trade.

[19] As of February 14, 2022, the day the Proclamation was issued, there were about 500 trucks and other vehicles in downtown Ottawa.

[20] During the occupation, one of the organizing groups, Canada Unity, presented a "memorandum of understanding" between itself, the Senate of Canada, and the GIC proposing to form a joint committee to assume government functions in return for which the Convoy would cease its occupation of Ottawa. The Federal Court accepted that this illustrated "an effort by some of those involved in the Convoy to interfere with the democratic process and undermine the government" (*Nagle* at para. 44). It also acknowledged that materials in the tribunal record included information that extremist elements were a part of the protest.

[21] In parallel to the events in Ottawa, protests of the same nature were also taking place at various border crossings between the U.S. and Canada.

B. *Elsewhere in Ontario*

[22] Three more blockades took place in Ontario: at the Ambassador Bridge in Windsor, the Sarnia Blue Water Bridge, and the Peace Bridge port of entry, respectively the first, second, and third busiest border crossings in Canada.

[23] The Ambassador Bridge blockade began on February 6, 2022. On February 11, 2022, the Superior Court of Justice granted an injunction to end this blockade and on February 13, 2022,

the police were able to remove participants. Despite traffic having resumed, the City of Windsor declared a state of emergency the next day.

[24] The blockade at the Sarnia Blue Water Bridge began on February 8, 2022, and access was restored on February 14, 2022.

[25] The Peace Bridge blockade began on February 12, 2022, but by February 14, 2022, provincial and regional police were able to restore the flow of traffic.

C. *Alberta*

[26] On January 29, 2022, a blockade began at the Sweetgrass-Coutts border crossing in Alberta. On February 5, 2022, Alberta's Minister of Municipal Affairs sought federal assistance, including the provision of equipment and personnel to help displace about 70 large vehicles and 75 personal and recreational vehicles. The Alberta Minister noted that the Royal Canadian Mounted Police (RCMP) had exhausted all local and regional options to alleviate the disruption at the border.

[27] Eventually, the police were able to set up a checkpoint at Milk River, 18 km away from Coutts. By February 11, 2022, about 250 additional Convoy vehicles were gathered at the checkpoint, but only about 40 vehicles remained in the town of Coutts itself.

[28] On February 14, 2022, the RCMP arrested eleven individuals, four of whom were charged with conspiracy to commit murder in addition to other offences. It also seized a large cache of weapons, including 14 firearms, a large supply of ammunition, high-capacity magazines, and body armour, some of which were marked with the Diagolon insignia.

D. *Manitoba*

[29] On February 10, 2022, a fifth blockade began in Emerson, Manitoba, at the port of entry. Up to 75 vehicles were involved in the blockade. It appears that cargo like medical supplies and livestock were allowed to pass. Nevertheless, the Premier of Manitoba requested urgent and immediate federal action to dismantle the blockade on February 11, 2022.

E. *British Columbia*

[30] On February 12, 2022, an incident took place in South Surrey, British Columbia, where protestors broke through a RCMP barricade and forced the closure of the border. The police arrested 16 people in relation to this blockade by February 14, 2022, and the next day, the border was cleared and traffic resumed.

II. INVOCATION OF THE *EMERGENCIES ACT*

[31] As mentioned above, the Prime Minister convened the IRG on February 10, 12 and 13, 2022. On February 13, 2022, the full Cabinet met to discuss the situation. On that occasion, the

question of whether to invoke the *Emergencies Act* was delegated to the Prime Minister, who had the benefit of a memorandum from the Acting Clerk of the Privy Council (the Invocation Memorandum) recommending the invocation of the *Emergencies Act*.

[32] On February 14, 2022, the Governor General accepted the Prime Minister's recommendation to invoke the *Emergencies Act.* Pursuant to subsection 17(1), she issued the Proclamation, declaring that there were reasonable grounds to believe a public order emergency existed which necessitated special temporary measures. The Proclamation identified five aspects of this public order emergency justifying the invocation of the *Emergencies Act*:

(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,	**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 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	**c)** les effets néfastes découlant des blocages sur les relations qu'entretient le Canada avec ses

partners, including the United States, that are detrimental to the interests of Canada,	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;

[33] The Proclamation further specified special temporary measures that may be necessary for dealing with the emergency:

(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,	**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 — 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	**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

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,

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 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.

[34] On February 15, 2022, the GIC enacted the Regulations, and the Economic Order, pursuant to subsection 19(1) of the *Emergencies Act*.

[35] The Regulations created three key prohibitions backed by the threat of conviction and imprisonment. First, subsection 2(1) prohibited participation in a public assembly that may be reasonably expected to lead to a breach of the peace by (a) causing serious disruption to the movement of persons, goods or trade, (b) interference with critical infrastructure, or (c) support of threats or use of acts of serious violence.

[36] Subsection 4(1) prohibited travelling to an area where a section 2 assembly is taking place, subject to limited exemptions.

[37] Section 5 prohibited anyone from directly or indirectly collecting or providing property to facilitate or participate in a section 2 assembly, or for the purpose of benefiting a person who is facilitating or participating in an assembly.

[38] Complementing these provisions, section 6 designated protected places (such as Parliament Hill and government buildings) that can be secured under the Regulations.

[39] Sections 7 to 9 enabled the Minister of Public Safety and Emergency Preparedness, the Commissioner of the RCMP or a person acting on their behalf to require the assistance of heavy tow truck operators to remove transport trucks and provided for reasonable compensation for

essential goods and services rendered at such request. Finally, section 10 created offences for the failure to comply with the Regulations.

[40] The accompanying Economic Order required banks, credit unions, insurance companies, crowdfunding platforms, and others to freeze the assets and accounts of “designated persons”. “Designated persons” included individuals engaged, directly or indirectly, in an activity prohibited by sections 2 to 5 of the Regulations. Pursuant to section 3 of the Economic Order, the above institutions also had a duty to determine whether they were in possession of property owned, held, or controlled by or on behalf of a “designated person”. If they were, they had to register with the Financial Transaction and Reports Analysis Center of Canada, pursuant to subsection 4(1). And pursuant to section 5, these entities also had to disclose, without delay, to the RCMP or Canadian Security Intelligence Service (CSIS), (a) the existence of property in their possession or control that they had reason to believe was owned, held or controlled by or on behalf of a designated person, and (b) any information about a transaction or proposed transaction in respect of property referred to in paragraph (a).

[41] On the same day the Regulations and the Economic Order were issued, access to the Coutts border crossing in Alberta was restored. The Emerson blockade in Manitoba was cleared the following day, on February 16, 2022.

[42] On February 16, 2022, a motion to confirm the Proclamation was brought before the House of Commons pursuant to section 58 of the *Emergencies Act*. Pursuant to that provision, an explanation for the reasons for issuing the declaration (the Section 58 Explanation) and a report

on any consultation with the Lieutenant Governors in Council of the provinces with respect to the declaration must be laid before each House of Parliament within seven sitting days after the declaration is issued. The Section 58 Explanation and this consultation report were tabled before each House on February 16, 2022.

[43] From February 15 to 23, 2022, the RCMP disclosed information from the OPP, OPS, and its own investigations on about 57 entities and individuals to financial institutions, resulting in the temporary freezing of about 257 accounts of "designated persons" under the Economic Order.

[44] From that point on, the Convoy protests lost momentum, as protestors started to leave Ottawa. From February 17 to February 21, 2022, local police arrested 196 people, 110 of whom were charged with offences. The police also removed 115 vehicles and dismantled the blockades on Ottawa streets.

[45] On February 21, 2022, the motion to confirm was adopted by the House of Commons. It was then tabled in the Senate on February 22, 2022.

[46] By then, however, the RCMP was communicating to the financial institutions that they no longer believed the "designated persons" they identified were engaging in the activities prohibited by the Regulations and the Economic Order.

[47] On February 23, 2022, the Proclamation was revoked. As a result, the Regulations and the Economic Order were terminated. The same day, the government of Ontario lifted its state of emergency.

[48] On March 3, 2022, a Special Joint Committee on the Declaration of Emergency was established pursuant to the requirements of subsection 62(1) of the *Emergencies Act*. The parliamentary review committee's purpose was to review the "exercise of powers and the performance of duties and functions pursuant to a declaration of emergency".

[49] On April 25, 2022, an Order in Council was issued to the effect that an inquiry be held into the circumstances leading to the declaration of a public order emergency and the measures taken for dealing with it. The public inquiry was tasked to report before both Houses by February 20, 2023.

[50] The POEC reviewed documents and heard from numerous witnesses, including the Prime Minister and eight other ministers. On February 17, 2023, the POEC Commissioner, Justice Paul Rouleau, issued his report concluding that the threshold for invoking the public order emergency was met.

III. THE PARTIES

[51] The first application for judicial review of the GIC's decisions was filed by Ms. Nagle and the CFN on February 17, 2022 (file T-306-22). At the time of the application, Ms. Nagle was

a registered nurse and a member and director of the CFN. Her registration was suspended by the Ontario College of Nurses as a result of complaints about her actions at other protests against vaccine mandates.

[52] As for the CFN, it is incorporated under the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23. It holds itself out to be a "proud advocate of medical freedom", and its mission statement "is to unite nurses across Canada, educate the public and ensure that Canadian healthcare reflects the highest ethical standards".

[53] Ms. Nagle arrived in Ottawa on January 28, 2022, and stayed in a hotel room close to the protest sites with her husband and children. She claims that she provided support to other participants during the protests. As for the CFN, there was no evidence before the Federal Court of any active participation other than through the person of Ms. Nagle. Neither Ms. Nagle nor the CFN were identified by the RCMP to financial service providers as an individual or entity to whom the Regulations and the Economic Order applied. Their bank accounts were not frozen.

[54] The second application was filed by the CCLA on February 18, 2022 (file T-316-22). The CCLA is an independent, non-profit, non-governmental organization dedicated to defending and promoting human rights and civil liberties and has been granted leave to intervene in numerous cases before courts of many jurisdictions. It brought its application on the basis of public interest standing.

[55] The third application was brought by the CCF on February 22, 2022 (file T-347-22). It describes itself as an independent national and non-partisan charity that seeks to protect constitutional freedoms through education, communication and litigation. Like the CCLA, it has appeared before all levels of courts in Canada brought its application on the basis of public interest standing.

[56] The fourth application was filed on February 23, 2022, by Jeremiah Jost, Edward Cornell, Vincent Gircys and Harold Ristau (file T-382-22). They are all Canadian citizens who claim direct standing based on their participation in the Ottawa protest.

[57] As previously mentioned, the Attorney General of Alberta was granted leave by the Federal Court on May 5, 2022, to intervene in the CCLA (A-73-24) and CCF (A-74-24) files to make submissions on non-constitutional questions. The Attorney General of Alberta was also granted leave to intervene in these same two files before this Court by an Order dated May 6, 2024. The Attorney General of Saskatchewan was similarly granted intervenor status and leave to make submissions on non-constitutional questions before this Court in the CCLA and CCF files by an Order of this Court dated August 14, 2024.

IV. DECISIONS UNDER APPEAL

[58] Before ruling on the merits of the applications for judicial review, the Federal Court made a few preliminary rulings, some of which are subject to an appeal before this Court.

[59] First, it dismissed the AGC's motion to strike out the judicial review applications for mootness. The AGC argued that the applications no longer raised a live issue and that an order would have no practical effect because the legislative instruments underpinning the remedies sought were no longer in effect. The respondents did not dispute that there was no longer a live controversy but contended that the Court should nonetheless exercise its discretion to hear the applications in accordance with the factors set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 at pp. 358-362.

[60] The Federal Court found that an adversarial context continued to exist, and that the respondents had built a record upon which judicial review of the decision to issue the Proclamation and related instruments could occur. It also opined that judicial economy did not foreclose hearing the applications, and that uncertainty as to when and how the *Emergencies Act* can be invoked would necessarily create a "social cost" to the extent that the government could take similar measures in the future without guidance of the courts on their reasonableness or compliance with the Charter. Finally, it was of the view that the requirement for the GIC to believe on reasonable grounds (as opposed to be "of the opinion" under the original wording of bill C-77 that was to become the *Emergencies Act*) that an emergency existed before a proclamation can be issued, was indicative that there would be an opportunity for judicial review.

[61] Second, the Federal Court granted the Rule 312 motions brought by the CCLA and CCF to admit into the record of the judicial review proceeding a selection of documents, transcripts, and witness summaries produced during the POEC's proceedings. More particularly, four

documents related to the recommendation from the Clerk of the Privy Council to the Prime Minister to invoke the powers of the *Emergencies Act*, including a memorandum for the Prime Minister from the Clerk of the Privy Council with the subject "Invoking the Emergencies Act to End Nation-Wide Protests and Blockages" (appended in redacted form to the reasons of the Federal Court). Other documents related to a policing plan developed in February 2022 and police assessment of the tools available to address the protests during that time, and to threat assessments conducted by CSIS. These appeals (A-29-23 and A-30-23) were held in abeyance pending the decision on the judicial review and have now been consolidated with the main appeals.

[62] To admit new evidence under Rule 312, two preliminary requirements must be satisfied: 1) the evidence must be admissible on the application for judicial review; and 2) the evidence must be relevant to an issue that is properly before the reviewing court (see *Forest Ethics Advocacy Assoc. v. National Energy Board*, 2014 FCA 88 [*Forest*] at paras. 4-6). As for admissibility, evidence that was not before the decision-maker at the time of its decision is generally inadmissible. There are three limited exceptions to this general rule: to allow for the admission of background information, to highlight the complete absence of evidence before a decision-maker, and to deal with procedural defects that cannot be found in the record of the decision-maker (see *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at paras. 19-20).

[63] With respect to admissibility, the Federal Court found that the Invocation Memorandum, which sets out a summary of the situation with the test to be met under the *Emergencies Act* and

a recommendation from the Clerk of the Privy Council, was clearly admissible under the background information exception. It also accepted that the excerpts of the POEC testimony of the Prime Minister and of the Clerk of the Privy Council and Deputy Clerk should similarly be admitted into evidence.

[64] With respect to the policing plan, two documents were admitted under the "absence of evidence" exception: an e-mail sent from the Commissioner of the RCMP to the Chief of Staff in the Office of the Minister of Public Safety dated February 13 and 14, 2022 explaining her view that all available tools to address the protests had yet to be exhausted, as well as an excerpt from the testimony of the RCMP Commissioner in which she explained that she was not able to present either the policing plan or her view about the available tools to the IRG on February 13, 2022.

[65] Finally, five documents relating to the threat assessments conducted by CSIS were also held to be admissible as both background evidence and evidence of a lack of evidence. These documents included an exhibit consisting of an excerpt from the POEC's *in camera* and *ex parte* hearing held for the examination of three senior officials from CSIS and the Integrated Terrorism Assessment Centre, confirming the Director's evidence that at no point did CSIS assess that the protests in Ottawa and elsewhere constituted a threat to the security of Canada within the meaning of section 2 of the *Canadian Security Intelligence Act*, R.S.C. 1985, c. C-23 (*CSIS Act*).

[66] In coming to that conclusion, the Federal Court rejected the AGC's core submission that the decision-maker under the *Emergencies Act* is the GIC and not the Cabinet. According to the

AGC, the Cabinet cannot qualify as a federal board, commission or other tribunal under sections 2 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, because it does not exercise powers conferred under an Act of Parliament. Indeed, when Parliament enacted the *Emergencies Act*, it expressly gave the powers under subsections 17(1) and 19(1) to make the Proclamation, the Regulations and the Economic Order, to the GIC and not to any individual minister or to a collective of ministers.

[67] Relying on one of its earlier decisions in the same matter (*Canadian Constitution Foundation v. Attorney General of Canada*, 2022 FC 1233 [*Canadian Constitution Foundation*]), the Federal Court found that the AGC's position was constitutionally correct but ignored the constitutional convention and the practical functioning of the executive, pursuant to which decisions of the GIC are *de facto* made by Cabinet and not by the GIC itself. It also rejected the AGC's submission that allowing into evidence recollections of events provided by the Prime Minister, the Clerk, and other witnesses, months after the Orders in Council were made, would be contrary to the purpose of a judicial review, which is to review the reasonableness of a decision at the time it was made. As the Federal Court observed, the AGC had an opportunity to challenge the accuracy of any of the testimony before the POEC but did not do so. In any event, any discrepancy between the witnesses' sworn recollection and what actually transpired would go to weight, and not to admissibility.

[68] As for the second requirement, the relevance of the potential new evidence, the AGC made no submissions on this question and the Federal Court accepted CCLA and CCF's arguments that the additional evidence originating from the proceedings before the POEC was

relevant to the determination as to whether Cabinet had reasonable grounds to declare a public order emergency under section 17 of the *Emergencies Act*.

[69] Finally, the Federal Court found that it would be in the interest of justice to expand the record and to accept a selection of evidence from the POEC, as the documents would provide necessary background and context, and benefit the Court in understanding the policing input that was before the decision-maker. As for the risk raised by the AGC, that granting the CCLA and CCF motions would impinge on the POEC's process and create parallel proceedings, the Federal Court pointed out that the duty of the Court on judicial review is different (though it admittedly overlaps to some extent) from the mandate of the POEC. While the latter is tasked with examining the political situation that gave rise to the protests and making recommendations going forward, the role of the Court on judicial review is to determine whether the invocation of the *Emergencies Act* and the related regulations were consistent with the law. The *Emergencies Act* itself was designed with both a public inquiry and judicial review in mind.

[70] The third preliminary ruling that is the subject of an appeal before this Court is the Federal Court's decision to dismiss Ms. Nagle and CFN's application for lack of standing. In its reasons, the Federal Court found that Ms. Nagle and CFN lacked standing and that Ms. Nagle did not bring her application with clean hands.

[71] As noted by the Federal Court, Ms. Nagle and CFN's claim to direct standing was essentially based on their potential liability under the terms of the Regulations and Economic Order, despite the fact that the Proclamation had been revoked. The Federal Court agreed with

the respondent that it was inconceivable and highly speculative that Ms. Nagle or CFN would be charged with an offence more than a year after the February 2022 events. Moreover, the Federal Court was of the view that Ms. Nagle did not bring her application for judicial review with clean hands. She circumvented the Court's instructions against broadcasting a virtual hearing to which she had been granted remote access during her stay motion on February 25, 2022. Moreover, her cross-examination was "replete with examples of her efforts to avoid answering questions", and her responses "lacked transparency and candour" (*Nagle* at para. 183). This behaviour continued at the judicial review hearing, when lead counsel for Ms. Nagle and CFN used his time to make what the Federal Court described as "inappropriate and offensive political statements" (*Nagle* at para. 184). Finally, the Federal Court was satisfied, after having read their written and heard their oral submissions, that Ms. Nagle and CFN brought nothing of value to these proceedings (*Nagle* at para. 185).

[72] In its reasons, the Federal Court also found that Messrs. Jost and Ristau lacked direct standing; only Messrs. Cornell and Gircys had direct standing, as they had accounts that were frozen under the Economic Order. Finally, the Federal Court found that both CCLA and CCF had public interest standing. On appeal, only Ms. Nagle and CFN disputed the Federal Court's findings on standing.

[73] On the substantive issues, the Federal Court found that the decision to declare a public emergency order was unreasonable, as it did not satisfy the legal constraints of the *Emergencies Act*. Essentially, the Federal Court held that the Proclamation did not meet the requirements of subsection 17(1) of the *Emergencies Act* because: (1) there were no threats to the security of

Canada within the meaning of section 2 of the *CSIS Act*, and (2) there was no national emergency, more specifically one that exceeded the capacity or authority of a province to deal with it and that could not effectively be dealt with under any other law of Canada, as required by the section 3 definition in the *Emergencies Act*.

[74] The Federal Court applied the reasonableness standard to the GIC's decision to declare a public order emergency pursuant to subsection 17(1) of the *Emergencies Act*. In applying that standard, the Federal Court recognized that the question was "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 section 17 of the Act", defining "reasonable grounds" as the "point where credibly-based probability replaces suspicion" (*Nagle* at para. 202).

[75] With respect to the existence of a "national emergency", the Federal Court found that the *Emergencies Act* required the federal government to wait while the provinces or territories determined whether they had the capacity or authority to deal with the threat at hand. It recognized that while most protesters may have had a benign intent, others had a darker purpose and were prepared to resist efforts by the police to dismantle the existing blockades and set up new ones. In its view, however, those threats were being dealt with by the police of provincial and local jurisdiction outside of Ottawa.

[76] The Federal Court also found that the First Ministers' meeting of February 14, 2022, satisfied the *Emergencies Act* requirement to consult with the provinces and territories before declaring an emergency. While it accepted that the *Emergencies Act* does not require unanimous

agreement from the provinces before the federal government can act, it noted that most Premiers informed the Prime Minister that invocation of the *Emergencies Act* was not required in their provinces, as they could deal with the situation with their legislation and law enforcement authorities.

[77] In his February 15, 2022, letter to all Premiers, the Prime Minister explained the reasons why the GIC decided to declare a public order emergency and emphasized that the measures would be applied to targeted areas. Yet, the Proclamation stated that the emergency "exists throughout Canada", which in the Federal Court's view was "an overstatement of the situation known to the Government at that time". It also rejected the AGC's argument that new blockades could emerge, because Cabinet had not justified this conclusion in the face of "the evidence available to Cabinet…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" (*Nagle* at paras. 248-249).

[78] The Federal Court also found that the Prime Minister's February 15, 2022 letter to the Premiers did not directly address paragraph 3(a) of the *Emergencies Act*, which requires that the situation exceed the capacity or authority of a province. It found that, as of that date, this requirement had been met only in Ontario due to the situation in Ottawa. It was not clear to the Federal Court why tow truck drivers could not have been compelled to assist in moving vehicles under provincial legislation. It saw no obstacle to assembling the large number of police officers from other forces ultimately used to assist the OPS in removing blockade participants. It found it was debatable whether the OPS was unable to enforce the rule of law in downtown Ottawa due

to the overwhelming volume of protesters, or whether it was instead due to a failure of leadership and determination, and the mistaken assumption that the protest would be short-lived (*Nagle* at paras. 250 and 252).

[79] Ultimately, the Federal Court stated its conclusion with respect to the existence of a national emergency in the following paragraphs:

> [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*…

[80] With respect to "threats to the security of Canada", the Federal Court found that the GIC lacked reasonable grounds to believe that a threat to national security existed within the meaning of section 16 of the *Emergencies Act*. Although it acknowledged that the harm being caused to Canada's economy, trade, and commerce was very real and concerning, it found that this did not constitute threats or use of serious violence to persons or property (*Nagle* at paras. 296-297).

[81] First, the Federal Court conceded that 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 Proclamation. Applying a deferential standard of review, it would have found that the threshold was satisfied. But the words "threats to the security of Canada" do not stand alone in the *Emergencies Act* and are constrained by the incorporation of section 2 of the *CSIS Act*. The only relevant part of that provision (paragraph (c)) describes threats to the security of Canada as "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". As there was no doubt that the activities in question had such a purpose, the Federal Court focused on the meaning of "serious violence" in relation to both persons and property (*Nagle* at para. 265).

[82] In relation to persons, the Federal Court relied on *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*], to conclude that "serious violence" in the context of the *CSIS Act* does not require threats of violence, or actual violence, rising to the level of death or endangerment of life, but means substantial rather than negligible harm, meeting at least the definition of "bodily harm" in the *Criminal Code*, R.S.C. 1985, c. C-46, section 2. As for serious violence to property, it considered that it could encompass *Criminal Code* offences relating to destruction or damage to property, including critical infrastructure, but does not encompass the type of economic disruption that resulted from the border crossing blockades (*Nagle* at paras. 280-281). It further opined that the "reasonable grounds to believe" standard will be met "where there is an objective basis for the belief which is based on compelling and credible information" (*Nagle* at para. 282).

[83] The Federal Court found that CSIS's assessment that there were no threats to the security of Canada within the meaning of section 2 of the *CSIS Act* had to be given some weight but was not determinative. Furthermore, it accepted that the ultimate decision to declare a public order emergency was "highly discretionary", but was nevertheless of the view that the determination of whether the objective legal thresholds were met is not and attracts no special deference since there is only room for a single reasonable interpretation of the statutory provisions (*Nagle* at paras. 284 and 288).

[84] While the Federal Court agreed that the events at the time were concerning, it was not satisfied that the evidence disclosed an objective basis, based on compelling and credible information, for the GIC's belief that there were threats or use of serious violence to persons or property. Reports of violent incidents and threats of violence and arrest were "vague and unspecified". The weapons seizure at Coutts remained the sole act or threat of serious violence and it had been dealt with by the RCMP under the authority of the *Criminal Code*. The Proclamation's fifth ground for invoking the *Emergencies Act* referred to the potential for an increase in the level of unrest and violence. Yet, except for the situation in Ottawa, the record did not indicate that local police were unable to deal with the protests (*Nagle* at paras. 290 and 294).

[85] In Ottawa, 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. But in the Federal Court's view, although the harassment of residents, workers, and business owners, and the general infringement of the right to peaceful enjoyment of public spaces was "highly objectionable", it did not amount to serious violence or threats of serious violence.

[86] In the end, the Federal Court concluded that the other grounds for invoking the *Emergencies Act* specified in the Proclamation "would have been sufficient to meet the test of "threats to the security of Canada", had those words remained undefined in the statute". But the test for declaring a public order emergency under the *Emergencies Act* requires that each element be satisfied, including the definition imported from the *CSIS Act*. In its view, while the harm to Canada's economy, trade and commerce was very real and concerning, it did not constitute threats or the use of serious violence to persons or property.

[87] The Federal Court then considered whether the Regulations and the Economic Order violated the rights and freedoms guaranteed by the Charter, and if so, whether these breaches were justified under section 1. In particular, it asked whether the prohibitions in the Regulations violated paragraphs 2(b), (c), and (d). It also considered whether the Economic Order infringed section 8.

[88] With respect to paragraph 2(b) of the Charter, the Federal Court found that the Regulations were overbroad to the extent that they criminalized the entire protest and limited the right to expression of protesters who wanted to convey dissatisfaction with government policies. Accordingly, it determined that the freedom of expression of peaceful protestors who did not participate in the actions of those disrupting the peace was infringed.

[89] On paragraph 2(c), the Federal Court concluded that the Regulations did not breach the right to peaceful assembly because they applied only to anti-government protests that were likely to result in a breach of the peace. In its view, gatherings that employ physical force and impede

local residents' ability to carry out the functions of their daily lives in order to compel agreement with the protesters' objective are not constitutionally protected.

[90] As for paragraph 2(d), the Federal Court found no breach of freedom of association because people were free to communicate with each other in pursuit of their collective goals and form whatever organization they thought necessary to do so elsewhere. No appeal has been taken from this finding.

[91] The Federal Court also found that the Regulations did not breach section 7 of the Charter. Despite the fact that the Regulations interfered with or deprived the respondents of their life, liberty or security of the person, that deprivation was in accordance with the principles of fundamental justice because it was temporary and subject to judicial review. This conclusion has not been challenged before this Court.

[92] On the other hand, the Federal Court found that the Economic Order breached section 8 of the Charter, because it effectively enlisted financial institutions as subordinates of the government, bringing them within the scope of section 8 of the Charter. Two provisions of the Economic Order were particularly problematic. Subsection 2(1) empowered financial institutions to freeze – and therefore seize – the assets of any "designated person". For most members of the public, governmental actions that result in the content of a bank account becoming unavailable to the account holder would be understood as a seizure. Similarly, it found that section 5, which required financial institutions to disclose to the RCMP private information, such as what money people have and how they spent it, authorized "searches" because the person to whom that

information related to had a reasonable expectation of privacy in their private financial and transactional records.

[93] The Federal Court found that these searches and seizures were not reasonable for the purpose of section 8 of the Charter because the Economic Order failed to require reasonable grounds before a search was conducted. The RCMP superintendent who oversaw the implementation of the Economic Order confirmed on cross-examination that the RCMP required only bare belief before freezing accounts and accessing the underlying financial information. For the Federal Court, this failure to require some objective standard breached section 8.

[94] While acknowledging that the objective pursued by the Government (clearing out the blockades) when they enacted the measures was pressing and substantial, the Federal Court determined that the Regulations and the Economic Order failed the minimal impairment test because they were applied throughout Canada, and also because there were less impairing alternatives available. Of particular concern to the Federal Court was that there was no standard applied to determine whether someone should be the target of the measures, and no process to allow them to question that determination.

[95] Lastly, while the Federal Court found that the *Canadian Bill of Rights*, S.C. 1960, c. 44 (*Bill of Rights*), applies to the *Emergencies Act*, the Regulations and the Economic Order, it rejected the respondents' position that the *Bill of Rights*' due process provisions required the special measures to be put on hold while counsel and courts were engaged and the hearing

conducted. In its view, 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.

[96] In its penultimate conclusion, the Federal Court confessed that it had been leaning toward the appellant's position at the beginning of the proceedings. In a paragraph that has been the subject of much emphasis by counsel for the appellant, and on which we will have more to say later, the Federal Court candidly wrote:

> [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 [*Emergencies Act*] 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 and continue to have considerable sympathy for those in government who were confronted with the 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 that that which was before the GIC.

[97] The Federal Court went on to acknowledge the impact the CCLA and CCF's involvement and informed legal argument had on its thinking, and concluded that the decision to issue the Proclamation does not bear the hallmarks of reasonableness, and was not justified in relation to the relevant factual and legal constraints that were required to be taken into consideration.

V. ISSUES

[98] The parties and the interveners have raised a number of issues on appeal and cross-appeal. In our view, all of these issues can be distilled into two overarching questions:

1. Was the GIC's decision to declare a public order emergency under the *Emergencies Act* reasonable?

2. Did the Federal Court err in finding that the Regulations and the Economic Order were contrary to paragraph 2(b) and section 8 of the Charter and are not saved under section 1?

[99] For reasons that will be spelled out more fully in the analysis, we are of the view that it is not necessary to deal with the arguments raised by the CCF and CCLA cross-appeal with respect to paragraph 2(c) of the Charter. As will also be explained later, the arguments by two parties (Ms. Nagle and CFN) and one intervener (the Attorney General of Saskatchewan) relating to the *Bill of Rights* are not properly before this Court.

[100] Before dealing with these substantive questions, however, two preliminary issues must be addressed. First, we must determine whether the Federal Court erred in finding that Ms. Nagle and CFN lacked standing or in dismissing their application because they lacked clean hands. Second, we must also decide whether the Federal Court erred in granting leave to CCLA and CCF to file additional material produced during the proceedings of the POEC.

VI. ANALYSIS

A. *Preliminary issues*

[101] When the Federal Court's decision that is being challenged was not made by that Court sitting in its judicial review capacity, but rather as a first instance decision-maker, it is uncontroversial that the applicable standard of review is that set out in *Housen v. Nikolaisen*, 2002 SCC 33: see, for example, *Laurentian Pilotage Authority v. Corporation des Pilotes de Saint-Laurent Central Inc.*, 2019 FCA 83 [*Laurentian Pilotage*] at paras. 28-29; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139 at paras. 37-39; *Canada v. Long Plain First Nation*, 2015 FCA 177 at para. 88; *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 at paras. 25-26. Accordingly, the standard of correctness will apply on questions of law, whereas questions of fact and mixed fact and law from which no question of law is extricable will be reviewed on the palpable and overriding error standard.

[102] As a result, the Federal Court's decision that Ms. Nagle and CFN lacked direct standing and that their application should be dismissed for lack of clean hands attracts the palpable and overriding error standard of review. These determinations were clearly of a factual nature for the most part and tangentially involved the application of well-established legal principles to the facts as they were found.

[103] On the AGC's appeal of the Federal Court's Rule 312 decision to supplement the record with additional materials, the central issue revolves around the identification of the decision-

maker whose decision was under review. If, as argued by the AGC, the sole decision-maker was the GIC, only the record that was before that body was relevant and admissible on judicial review. If, on the other hand, we accept (as did the Federal Court) the argument submitted by CCLA and CCF that the powers conferred by the *Emergencies Act* were *de facto* and by convention exercised by Cabinet, then the disputed documents were properly admitted into evidence. This debate is clearly one of a legal nature, and therefore the applicable standard of review must be the correctness standard.

(1) Did the Federal Court err in finding that Ms. Nagle and CFN lacked standing or in dismissing their application because they lacked clean hands?

[104] On appeal before this Court, Ms. Nagle and CFN submit that the Federal Court erred in (1) finding that Ms. Nagle and CFN did not have direct standing; (2) finding that they did not come with clean hands or bring any value to the proceeding, and (3) denying them the right to be heard.

[105] With respect to standing, Ms. Nagle and CFN contend that they were still potentially subject to liability under the provisions of the Economic Order, because they fell within the meaning of "designated persons" of that instrument despite its subsequent revocation. They rely on the proposition in section 43 of the *Interpretation Act*, R.S.C. 1985, c. I-21, pursuant to which the repeal of an enactment does not affect any obligation or offence committed under the provisions of the enactment. While they make this argument as part of their mootness submission before this Court, it doesn't affect the gist of their claim. They also contend that they were directly affected because even if their accounts were not frozen, the Proclamation, the

Regulations and the Economic Order had a prejudicial effect on CFN's rights and its ability to fundraise, to sustain their own participation and support the participants in the Convoy.

[106] Ms. Nagle and CFN also argue that there is no evidentiary basis for the finding of litigation misconduct. They claim that the Federal Court simply did not like Ms. Nagle's evidence, and that this was not a principled basis to remove them from the case. They also submit that Ms. Nagle's conduct at the stay motion was the result of her naiveté and misunderstanding of the Court's policy with respect to screen captures and falls far short of the type of conduct that would justify removing a party from a judicial proceeding.

[107] Finally, Ms. Nagle and CFN argue that the Federal Court breached the *audi alteram partem* rule. After having told them that it did not need to hear their submissions on standing during the motion hearing on mootness and standing and that it would hear them then on the merits, the Federal Court later ruled that they lacked direct standing and did not have clean hands without ever hearing their submissions on the standing question. This, in their view, constitutes a violation of their right to procedural fairness. As for the Federal Court's finding that their lead counsel's arguments were offensive and inappropriate, they respond that their lead counsel was duty-bound to "fearlessly" and "zealously" advance their arguments.

[108] In our view, none of these arguments have merit. After having carefully considered the record, we are unable to find any error in the Federal Court's decision that would rise to the level of palpable and overriding error. As this Court stated in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46, "[p]alpable and overriding error is a highly deferential

standard of review […]. “Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall” (cited with approval by the Supreme Court of Canada in *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38).

[109] Pursuant to section 18.1 of the *Federal Courts Act*, a person seeking direct standing in an application for judicial review must establish that they are “directly affected” by the matter in respect of which relief is sought. In other words, a person seeking direct standing must establish that the challenged decision directly affects their rights, imposes an obligation on them, or causes them harm: see *Unifor v. Vancouver Fraser Port Authority*, 2017 FC 110 at para. 29; *Friends of the Canadian Wheat Board v. Canada (Attorney General)*, 2011 FCA 101 at para. 21; *League for Human Rights of B’nai Brith Canada v. Canada*, 2010 FCA 307 [*B’nai Brith*] at para. 58; *Laurentian Pilotage* at paras. 31-32.

[110] The Federal Court acknowledged that courts should not give the words “directly affected” a restricted meaning. Yet the evidence must show more than a mere interest in a matter, as it also stated (*Nagle* at para. 159), and any direct effects must be non-speculative (see *Hupacasath First Nation v. Canada (MFAIT)*, 2015 FCA 4 at para. 104). The rationale behind this requirement is to ensure that scarce judicial resources are devoted to real controversies, and therefore to avoid as much as possible the “unnecessary proliferation of marginal or redundant suits”: *Canadian Council of Churches v. Canada (MEI)*, [1992] 1 S.C.R. 236, 88 D.L.R. (4th) 193 at p. 252.

[111] We agree with the Federal Court that neither Ms. Nagle nor CFN meet the "directly affected" requirement. At no point were they named a "designated person" or a "designated entity" under the Economic Order, and none of their accounts were ever frozen. Indeed, they were never the subject of any measures taken under the *Emergencies Act*. In those circumstances, the Federal Court could find that Ms. Nagle and CFN's argument had no "air of reality" and that it was "inconceivable" that any public authority would come to investigate and prosecute any hypothetical offences at this late stage in the aftermath of the February 2022 events.

[112] Nor do we find any palpable and overriding error in the Federal Court's finding that section 43 of the *Interpretation Act* was meant to address historical crimes discovered long after the statute has been amended. On the contrary, the involvement of Ms. Nagle and CFN during the short period of time when the Proclamation was in force was discoverable by the authorities at the time.

[113] Purely financial considerations are not a sufficient basis for granting standing: *Island Timberlands LP v. Canada (Minister of Foreign Affairs)*, 2009 FCA 353 at para. 7. In any event, there was no evidence on the record as to any temporary reduction in donations or to the alleged impact of the Proclamation on Ms. Nagle and CFN's ability to fundraise and express their views.

[114] Finally, we also agree with the Federal Court that in the unlikely event that charges were brought in relation to offences Ms. Nagle and CFN may have committed between February 14 and 22 of 2022, they would always have the possibility to challenge the constitutionality of the impugned provisions pursuant to which the charges had been brought.

[115] Likewise, the Federal Court made no error in dismissing Ms. Nagle and CFN's application for lack of clean hands. It is well established that courts may decline judicial review remedies to a party that engages in misconduct, such as failing to show good faith, transparency and candour: see *Homex Realty v. Wyoming*, [1980] 2 S.C.R. 1011, 116 D.L.R. (3rd) 1 at pp. 1033-1038; *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2006 FCA 14 at paras. 9-11. As summarized at paragraph 71 of these reasons, the Federal Court found and described at least four instances of such misconduct, including posting photos of the court proceedings on Instagram, broadcasting the hearing, avoiding answering questions during cross-examination, and inappropriate and offensive statements by their lead counsel.

[116] As for counsel's behaviour, we recognize that it is a lawyer's duty to act fully and fearlessly in advancing their clients' cause. But there is a line not to be crossed, and looking at the transcript we are unable to find a palpable and overriding error in the Federal Court's discretionary finding that Ms. Nagle and CFN's lead counsel had crossed that line in making what it described as "inappropriate and offensive political statements", "clearly intended to play to the audience observing the hearing remotely" (*Nagle* at para. 184).

[117] As for the new bias and fairness arguments, we agree with the AGC that they are meritless, and in any event should have been raised in the Court below.

[118] Moreover, the alleged bias appears to relate to the state of mind and motivation of those who issued the Proclamation, the Regulations and the Economic Order; to that extent, the

argument goes to the reasonableness of the decision, and not to the standing or lack of clean hands of Ms. Nagle and CFN.

[119] The fairness argument is equally devoid of any factual basis. Not only did the Federal Court hear from Ms. Nagle and CFN's counsel at the hearing after asking him to cease his inappropriate and offensive political statements, but Ms. Nagle and CFN's second counsel also made submissions on the merits of the judicial review. There was certainly nothing improper for the Federal Court to remind Ms. Nagle and CFN's lead counsel that his role was to make legal argument and not politically charged remarks, and ultimately to find that his submissions brought nothing of value to the proceedings. We would even venture to add that the Federal Court judge would not have fulfilled his judicial duties had he not acted the way he did.

[120] For all of the foregoing reasons, we would dismiss the appeal brought by Ms. Nagle and CFN, with costs.

(2) Did the Federal Court err in granting leave to CCLA and CCF to file additional material produced during the proceedings of the POEC?

[121] The AGC argues that the Federal Court erred in granting CCLA and CCF's Rule 312 motion to file an affidavit attaching a selection of evidence produced in the context of the POEC. As previously mentioned, that evidence pertained to (1) the recommendations that the Clerk of the Privy Council gave to the Prime Minister regarding the use of the *Emergencies Act*, (2) the policing plan and the police's assessment of the tools available to address the situation on the

ground in February 2022, and (3) the intelligence assessment of the threat situation prior to the declaration of a public order emergency in February 2022.

[122] It is not disputed that the record on judicial review is normally limited to the material that was before the administrative decision-maker, because they are the ones who have been empowered by Parliament to determine the merits of matters assigned to them. Reviewing courts are only tasked with assessing the correctness or reasonableness of the decision-maker's decisions, and must therefore confine themselves to the evidentiary record that was before the original decision-maker: *Access Copyright* at paras. 14-19; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263 at paras. 22-28; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 [*Tsleil-Waututh Nation*] at paras. 85-87.

[123] For a motion to file additional evidence to succeed, an applicant must satisfy the Court that the evidence is admissible and relevant to the issue before the Court: *Forest* at para. 4. Once these preliminary requirements are met, the applicant must then convince the Court that it should exercise its discretion in favour of granting the Rule 312 motion. In the exercise of that discretion, the Court will be guided by the following considerations:

> a) Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?
>
> b) Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?
>
> c) Will the evidence cause substantial or serious prejudice to the other party?

Holy Alpha and Omega Church of Toronto v. Canada (Attorney General), 2009 FCA 101 at para. 2.

[124] Applying these legal principles, the Federal Court found that all but one of the exhibits attached to the affidavit of Cara Zwibel were admissible either because the evidence was before the decision-maker, or because it falls into one of the recognized exceptions for a reviewing court receiving evidence in an application for judicial review. More specifically, the evidence was found to provide general background information that could assist the Court in understanding the issues relevant to the judicial review, and/or to highlight the complete absence of evidence before the administrative decision-maker with respect to a particular finding (*Access Copyright* at para. 20).

[125] The AGC disputes this finding and argues that the Federal Court erred in law in finding that the Cabinet was the body that exercised the powers under the *Emergencies Act*. Relying on the wording of subsections 17(1) and 19(1) of the *Emergencies Act*, the AGC claims that Parliament expressly gave the powers to make the Proclamation, the Regulations and the Economic Order to the GIC, to the exclusion of all others. On the basis of that premise, the AGC argues that the POEC evidence was inadmissible, because it includes government documents that were before the Cabinet and the Prime Minister but not before the GIC, and because it includes testimony before the POEC regarding deliberations of the Cabinet and one of its committees, the IRG, but not those of the GIC. Closely related to this argument is the submission that the Federal Court's analysis was tainted by evidence that was not before the GIC at the time of its decision,

and the Federal Court relied on “after the fact” evidence to augment or “bootstrap” its reasoning for the decision.

[126] With all due respect, accepting this argument would turn back the clock of our constitutional history and undo many of the constitutional conventions that have evolved over the course of more than a century, adapting the formal text of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) to the requirements of the democratic principle. Indeed, the quote from the late Professor Hogg, Canada’s most prominent constitutional lawyer, that the Federal Court cited at paragraph 36 of its reasons in *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2023 FC 118 [*CCLA*], provides a full answer to that argument:

> “[m]odern statutes […] always grant powers to the Governor General in Council […] when they intend to grant powers to the cabinet […] in the certain knowledge that the conventions of responsible government will shift the effective power into the hands of the elected ministry where it belongs”: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021), at § 1:14, Convention and law [Hogg]. Thus, “[w]here the Constitution or a statute requires that a decision be made by the “Governor General in Council” […] [t]he cabinet (or a cabinet committee) to which routine Privy Council business has been delegated) will make the decision, and send an “order” or “minute” of the decision to the Governor General for signature (which by convention is automatically given) [”]: Hogg at § 9:5, The Cabinet and the Privy Council [emphasis added in the decision below].

[127] On that basis, the Federal Court dismissed the AGC’s argument and found that the attempt to distinguish the Cabinet from the GIC “is dissociated from constitutional convention and the practical functioning of the executive”, adding that decisions of the GIC “are *de facto* made by Cabinet and not by the GIC itself” (*CCLA* at para. 34).

[128] In coming to this conclusion, the Federal Court relied on its earlier decision in *Canadian Constitution Foundation*, which dealt with a similar application filed by CCF. In its response to CCF's request to produce records related to the Proclamation under Rule 317, the AGC had listed six documents: the Orders in Council relating to the Proclamation, the Regulations and the Economic Order, as well as the Proclamation, the Regulations and the Economic Order themselves. The submissions to the GIC and the GIC's record of decision regarding these legal instruments were withheld on the grounds of Cabinet confidentiality under section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (CEA). The CCF then brought a motion contending that the response to its Rule 317 request was incomplete and sought an order that the AGC deliver the minutes of the meetings of the IRG on February 10, 12 and 13, 2022. Prior to the hearing of the CCF's motion, the AGC delivered annotated and redacted agendas and minutes of the three IRG meetings, as well as minutes of the Cabinet meeting, which now form part of the Certified Tribunal Record. As a result, the Federal Court did not have to rule on CCF's motion which, for all intents and purposes, became moot.

[129] Much as it did in the decision that is now before us, the Federal Court not only relied on Professor Hogg's statement quoted earlier, but also on the unacceptable consequence of the argument put forward by the AGC, which would result in effectively preventing any Court from reviewing materials relied upon by Cabinet even where confidentiality under section 39 of the CEA was never invoked. Had the AGC prevailed, the record before the Federal Court in this case would have consisted only of the instruments under review, the Section 58 Explanation, and the certificates issued by the Clerk of the Privy Council pursuant to section 39, to the effect that the information sought to be disclosed constitutes a confidence to the Cabinet. Yet, it is very clear

from the legislative history of the *Emergencies Act* that Parliament's intent was to ensure that Canadians would have the ability to seek judicial review of the reasonableness of the decision to invoke this exceptional measure. Indeed, Cabinet is authorized by section 17 to issue a proclamation only if it believes "on reasonable grounds" that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency. This is to be contrasted with the wording of the section 4 of the *War Measures Act, 1914*, 5 George V, c. 2, according to which the proclamation was "conclusive evidence" that war, invasion, or insurrection, real or apprehended, exists and had existed. This provision was interpreted in *Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co.*, [1923] 3 D.L.R. 629 (U.K. J.C.P.C.) at p. 635, [1923] A.C. 695 as conferring a broad discretion on Cabinet, and as being essentially an issue of "statesmanship" upon which a Court of law "is loathe to enter". We shall have more to say about the legislative history of the *Emergencies Act* in our analysis of the substantive issues.

[130] To argue, as does the AGC, that the GIC is the "sole decision maker" under the *Emergencies Act* is antithetical to the principles of democracy and to the firmly established constitutional convention of responsible government. It is well understood since the early days of the Confederation that the GIC does not act on her own, but must act on the advice of Cabinet, which is the only active part of the Privy Council. Except for a few remaining "reserve powers" (such as the right to dismiss a Prime Minister or dissolve the House of Commons when the government remains in office after having lost the confidence of the House), the GIC has no choice but to confirm Cabinet's advice. The notion that the GIC was convened separately from the Cabinet and exercised the powers Parliament gave to it under subsections 17(1) and 19(1) of the *Emergencies Act* is therefore a fiction, as no such meeting ever took place. The same is true

of the requirement that the GIC consult with the Lieutenant Governors of each province, pursuant to subsection 25(1) of the *Emergencies Act*. Clearly, neither the GIC nor the Lieutenant Governors were the ones attending these meetings.

[131] In the case at bar, the decision to invoke the *Emergencies Act* was effectively made by the Prime Minister, to whom Cabinet had delegated its powers, and he made that decision on the basis of the same information that was available to Cabinet and with the benefit of the discussions that had taken place at Cabinet meetings.

[132] These principles relating to the relationship between the GIC and Cabinet have been constantly upheld by the Supreme Court. In *Att. Gen. of Can. v. Inuit Tapirisat et al.*, [1980] 2 S.C.R. 735, 115 D.L.R. (3rd) 1 at pp. 741 and 757, the Court had to consider, on judicial review, a decision of the GIC made under section 64 of the *National Transportation Act*, R.S.C. 1970, c. N-17, in force at the time, which allowed appeals from decisions of the Canadian Radio-television and Telecommunications Commission to the GIC. The Court unhesitatingly treated the GIC and the Cabinet as equivalent, describing appeals to the GIC as "Cabinet appeals" and referring to the respondents as the Governor General and the members of Cabinet "collectively described in the style of cause as the Governor in Council". The Court went on to explain at pages 754 and 755 that the supervisory power of section 64 is "vested in members of the Cabinet", that "[u]nder s. 64 the Cabinet, as the executive branch of government, was exercising the power delegated by Parliament", and that the Cabinet had a broad discretion to decide appeals unless otherwise directed in the enabling statute. See also, to the same effect: *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver*

Island Railway (Re), [1994] 2 S.C.R. 41, 114 D.L.R. (4th) 193 at p. 119; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 [*Canadian National Railway*] at para. 40.

[133] The convention of responsible government was also the substantive basis for the Court's decision in *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) at pp. 546-547, that the GIC's decisions are *de facto* made by Cabinet, because "democratic principles dictate that the bulk of the Governor General's powers be exercised in accordance with the wishes of the leadership of that government, namely the Cabinet".

[134] It is also worth noting that this Court has similarly used the words "Cabinet" and "Governor in Council" interchangeably. In *Tsleil-Waututh Nation*, the Court stated (at para. 19):

> Mixed in with its motion are issues concerning section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, the provision that allows Canada to assert that certain information considered by the Governor in Council, commonly called the Cabinet, cannot be disclosed.

See also *China Mobile Communications Group Co., Ltd. v. Canada (Attorney General)*, 2023 FCA 202, where a confidence of the Queen's Privy Council for Canada was equated with a Cabinet confidence.

[135] Indeed, the jurisprudence of this Court is replete with cases where the GIC has been treated as the equivalent of the Cabinet, in all kinds of situations. For example, the Court stated in *B'nai Brith* (at para. 78) that "[i]n practical terms, then, a statute that vests decision-making in the Governor in Council implicates the decision-making of Cabinet, a body of diverse policy

perspectives representing all constituencies within government". See also, *inter alia, Dixon v. Canada (Governor in Council)*, [1997] 3 F.C. 169 (C.A.F.), 149 D.L.R. (4th) 268; *Alberta Wilderness Association v. Canada (Attorney General)*, 2013 FCA 190 [*Alberta Wilderness Association*]; *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140; *Thamotharem v. Canada (Citizenship and Immigration)*, 2007 FCA 198.

[136] It is quite telling that the AGC, faced with this abundance of doctrinal and jurisprudential authorities, did not see fit to refer the Court to any precedent in support of its unorthodox position. Moreover, that position appears to contradict the appellant's own practice. The CCLA and the CCF quite properly drew the Court's attention to a number of publicly available federal government's manuals on public administration according to which the Cabinet is treated as the equivalent to the GIC: see the *Guide to Making Federal Acts and Regulations*, 2nd edition (Ottawa: Privy Council Office, 2001), CanLIIDocs 235, at pp. 3 and 7; *A Guide for Ministers and Secretaries of State* (Ottawa: Privy Council Office, 2002), online, at p. 32; *Open and Accountable Government* (Ottawa: Privy Council Office, 2015), online, at p. 66.

[137] Finally, as mentioned above, the AGC delivered annotated and redacted agendas and minutes of three IRG meetings and minutes of the February 13, 2022, Cabinet meeting in response to the CCF's motion, which now form part of the Certified Tribunal Record. At the time, the AGC did not challenge the admissibility or relevance of these documents and certainly did not claim that they related to the deliberations of the wrong decision-maker.

[138] For all of the foregoing reasons, we are of the view that the Federal Court did not err in finding that Cabinet was the real decision-maker, and in granting the CCLA and CCF's joint motion under Rule 312 to file an affidavit attaching a selection of evidence from the POEC. Of course, this finding in no way pre-determines the weight to be given to those documents.

[139] The AGC did not question the relevance of the new evidence that CCLA and CCF sought to introduce into the record, nor did he seriously argue that the Federal Court erred in exercising its discretion in favour of granting the order under Rule 312. In our view, the Federal Court did not commit an error of law or a palpable and overriding error of fact or mixed fact and law in admitting the additional evidence, as it was either before the decision-maker (as is the case of the Invocation Memorandum), or fell within one of the accepted exceptions to that rule (by providing critical background understanding or showing the complete absence of evidence before the decision-maker).

[140] To the extent that the evidence was admissible and relevant, and that the Federal Court made no reviewable error in the exercise of its discretion, it cannot be argued that its analysis has been tainted by the expanded record since it was properly before it. It is not sufficient for the AGC to argue that the Federal Court erred in using "after-the-fact" evidence to "bootstrap" the reasoning for a decision, or to claim that it used an expanded record and the benefit of hindsight to assess the reasonableness of the decision to declare a public order emergency. The AGC had to show that the additional evidence was not before the Cabinet at the time the decision was made, or did not fall within one of the exceptions to that rule. In our view, the AGC failed to do so.

[141] As for the argument that Cabinet cannot qualify as a federal board, commission or other tribunal under sections 2 and 18.1 of the *Federal Courts Act* because its existence is a matter of constitutional convention and it therefore cannot be granted powers by Parliament, it is entirely devoid of merit. The reality is that Cabinet is the only active part of the Privy Council, and in most matters is the supreme executive authority: see *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at para. 18, where the Supreme Court explained that Cabinet confidentiality is required to ensure full and frank exchanges among the elected representatives tasked with the heavy responsibility of "making government decisions". For all intents and purposes, therefore, Cabinet exercises the powers vested in the Privy Council. Accordingly, its decisions must be reviewable by the Federal Courts. The same logic would apply at the provincial level.

[142] In any event, Cabinet has been formally recognized in many statutes such that its legal status is no longer in dispute. The CEA, for example, regulates access to the "Confidences of the Queen's Privy Council of Canada" (subsection 39(1)) and defines a number of documents where such information is contained (subsection 39(2)). All these documents are described by reference to "Council" the definition of which is given at subsection 39(3) in the following terms:

39(3) For the purposes of subsection (2), ***Council*** means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.	**39(3)** Pour l'application du paragraphe (2), ***Conseil*** s'entend du Conseil privé de la Reine pour le Canada, du Cabinet et de leurs comités respectifs.

[143] The same definition of "Council", in relation to Confidences of the King's Privy Council for Canada, can be found in the *Access to Information Act*, R.S.C. 1985, c. A-1, subsection 69(2), the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, subsection 196(2), and the

Privacy Act, R.S.C. 1985, c. P-21, subsection 70(2). All these definitions clearly confer legal status on the Cabinet and its committees, if only with respect to the regulation of access to Cabinet confidences. If Cabinet did not have legal status, it would make no sense for Parliament to regulate the records of such a body. The jurisprudence of this Court is replete with cases referring to these definitions and identifying the Cabinet as the decision-maker: see, for example, *Alberta Wilderness Association*; *Tsleil-Waututh Nation*; *Canadian Coalition for Firearm Rights v. Canada (Attorney General)*, 2025 FCA 82.

[144] We are therefore of the view that Cabinet is a "federal board, commission, or other tribunal" for the purposes of section 18.1 of the *Federal Courts Act*, and that its decisions can be reviewed by the Federal Court to the extent that it exercises, *de facto*, the powers conferred to the GIC by statute. In these reasons, we will therefore use "GIC" and "Cabinet" interchangeably.

B. *The administrative law issues*

(1) The legal framework

[145] The *Emergencies Act* was enacted in 1988, with a view to addressing the criticisms that had been levelled at its predecessor, the *War Measures Act*, R.S.C. 1985, c. W-2 (*WMA*) and its use during the October Crisis in 1970 (the version in effect in 1970 had essentially the same wording). The only requirement to bring it into effect and confer exceptional powers upon the GIC was not very exacting and of a purely formal nature. The issuance of a proclamation by Her

Majesty, or under the authority of the GIC, was sufficient and that decision was unconstrained and largely left to the discretion of the federal Cabinet. Section 2 of the *WMA* read as follows:

2. The issue of a proclamation by Her Majesty or under the authority of the Governor in Council shall be conclusive evidence that war, invasion or insurrection, real or apprehended, exists and has existed for any period of time therein stated, and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists.	**2.** La prise d'une proclamation par Sa Majesté, ou sous l'autorité du gouverneur en conseil, est une preuve concluante que l'état de guerre, d'invasion ou d'insurrection, réelle ou appréhendée, existe et a existé pendant toute la période de temps qui y est énoncée et que cet état continue jusqu'à ce que, par une proclamation ultérieure, il soit déclaré qu'il a pris fin.

[146] The *Emergencies Act* is far more detailed, both in terms of the various types of emergencies that it is meant to address and with respect to the conditions to be met for the Act to be brought into operation. For the purposes of a Public Order Emergency, the only type of emergency with which we are concerned here, section 17 lays out a number of objective prerequisites to which Cabinet must turn its mind before issuing a proclamation.

[147] First, pursuant to subsection 17(1), it must believe, "on reasonable grounds", that a "public order emergency" exists that necessitates the taking of special temporary measures for dealing with the emergency. Consultation must also take place with the provinces before Cabinet issues a declaration of a public order emergency in each province in which the effects of the emergency occur (subsections 17(1) and 25(1)). If the effects of the emergency are confined to one province, subsection 25(3) goes even further: a public order emergency may not be declared unless "the province has indicated to the Governor in Council that the emergency exceeds the capacity or authority of the province to deal with it".

[148] Second, the declaration of a public order emergency must specify, as provided by subsection 17(2):

(a) concisely the state of affairs constituting the emergency;	**a)** une description sommaire de l'état d'urgence;
(b) the special temporary measures that the Governor in Council anticipates may be necessary for dealing with the emergency; and	**b)** l'indication des mesures d'intervention que le gouverneur en conseil juge nécessaires pour faire face à l'état d'urgence;
(c) if the effects of the emergency do not extend to the whole of Canada, the area of Canada to which the effects of the emergency extend.	**c)** si l'état d'urgence ne touche pas tout le Canada, la désignation de la zone touchée.

[149] Interestingly, section 16 defines two key concepts for the operationalization of subsection 17(1):

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*)	***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*)
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*)	***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)*

[150] Closely related to these definitions are the definitions of a "national emergency" found in section 3 of the *Emergencies Act*, and of "threats to the security of Canada" found in section 2 of the *CSIS Act*:

***Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.)**	***Loi sur les mesures d'urgence*, L.R.C. (1985), ch. 22 (4e suppl.)**
3 For the purposes of this Act, a ***national emergency*** is an urgent and	**3** Pour l'application de la présente loi, une situation de crise nationale résulte d'un concours de

critical situation of a temporary nature that	circonstances critiques à caractère d'urgence et de nature temporaire, auquel il n'est pas possible de faire face adéquatement sous le régime des lois du Canada et qui, selon le cas :
(a) 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.	
***Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23**	***Loi sur le Service canadien du renseignement de sécurité*, L.R.C. (1985), ch. C-23**
2 ***threats to the security of Canada*** **means**	**2** ***menaces envers la sécurité du Canada*** Constituent des menaces envers la sécurité du Canada les activités suivantes :
(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,	**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) 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;	**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) 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	**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) 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,	**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.
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*)

[151] As previously mentioned, the Federal Court found that the decision to issue the Proclamation was unreasonable and *ultra vires* the Act. The Court came to that conclusion essentially because it found that the requirements of the Act were not met.

[152] First, there was no national emergency justifying the invocation of the Act and the decision to do so was therefore unreasonable and *ultra vires.* In the Federal Court's opinion, the evidence did not support the conclusion that the protests could not have been effectively dealt with under other laws of Canada or that it exceeded the capacity or authority of a province. Second, the Court also concluded that the GIC did not have reasonable grounds to believe that a threat to national security existed within the meaning of the Act, because the evidence did not disclose an objective basis, anchored in compelling and credible information, for the GIC's belief in the existence of a threat or use of acts of serious violence against persons or property.

[153] The AGC challenges both findings on a number of grounds. Before assessing the arguments put forward by the AGC, we will first consider the applicable standard of review.

(2) The standard of review

[154] There is no dispute between the parties as to the role of this Court on an appeal from a judicial review. It is by now well established that this Court must determine whether the Federal Court identified the appropriate standard of review and applied it correctly: *Agraira v. Canada (MPSEP)*, 2013 SCC 36 at para. 15. In performing this role, there is no room for deference. As Justice Deschamps aptly described this process in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 247, this Court must "[step] into the shoes" of the Federal Court and review the decision for itself: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10-12.

[155] The AGC argues that the Federal Court correctly selected the appropriate standard of review, namely reasonableness, and recited the relevant principles from *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], but erred in the application of this standard. Instead of starting with the reasons provided in the Section 58 Explanation with a view to determining if they were transparent, intelligible and justified in light of the relevant factual and legal constraints, the Federal Court allegedly applied its own interpretation of the Act, performed its own assessment of the evidence with the benefit of hindsight and additional materials not before the GIC, and then made its own findings about whether the circumstances amounted to a national emergency.

[156] Before assessing this claim, we pause briefly to address the Attorney General of Saskatchewan's submission that the GIC's decision to invoke the Act should be assessed against

the standard of correctness. This more exacting standard would be required because the failure by the GIC to meet the preconditions found in the Act would mean that the GIC not only acted *ultra vires* the Act but also beyond the constitutional authority of Parliament to invoke the emergencies power.

[157] The short answer to this submission is that no party to the appeals has challenged the constitutional validity of the Act on division of powers grounds. As an intervener, the Attorney General of Saskatchewan must take the issues on appeal as they have been framed by the parties. The Federal Court dealt with judicial review proceedings under administrative law principles, and the appeals of that decision are brought before this Court under the same principles. This is not to say that constitutional law principles can have no bearing on the assessment of the reasonableness of the decision made by the GIC to invoke the Act. That consideration, however, is not sufficient to transform a challenge to the legality of an executive or administrative decision into a full-fledged constitutional attack on the legislation under which that decision was made.

[158] When applying the reasonableness standard, a reviewing court must start with a posture of judicial restraint and deference for the legislature's choice to delegate decision making authority. A reviewing court must take a "reasons first" approach that evaluates the administrative decision-maker's justification for its decision: *Vavilov* at para. 84; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*] at para. 8. In other words, a reviewing court must show respectful attention to the decision-maker's reasons, seeking to understand the reasoning process followed to arrive at the conclusion (*Vavilov* at para. 84). Stated differently, a reviewing court "must focus on the decision the administrative decision

maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place" (*Vavilov* at para. 15).

[159] As to what it means for a decision to be reasonable, the Supreme Court in *Vavilov* made it clear that it requires consideration of both the outcome of the decision and the reasoning process that led to the outcome. In a nutshell, a reasonable decision is one "that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para. 85). Among the legal and factual considerations that can constrain an administrative decision-maker, the governing statutory scheme will usually be the most salient aspect of the legal context relevant to a particular decision (*Vavilov* at para. 108).

[160] Context is also relevant. As the Supreme Court has stated in a number of cases, "reasonableness is a single standard that takes its colour from the context": see, for example, *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59, and the cases cited at para. 89 in *Vavilov*. The Supreme Court has clarified, however, that reasonableness remains a single standard. Despite the diversity of decisions in terms of complexity and importance, "elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court". Context will only constrain what is reasonable for an administrative decision-maker to decide in their specific case.

[161] As this Court stated in *Bank of Montreal v. Canada (Attorney General)*, 2021 FCA 189 [*Bank of Montreal*] at para. 4, stepping into the reviewing court's shoes does not mean ignoring the reasons given by that court in rejecting an application. To the extent the reviewing court appears to have given a complete answer to the arguments advanced by the parties, an appellant bears a "strong tactical burden" to show that the reviewing court's reasoning was flawed.

[162] In the case at bar, the AGC submits that no such tactical burden applies because the Federal Court's reasons do not provide a complete answer on all issues. Yet, such a bald statement, without any further explanation, is not sufficient to do away with the teaching of *Bank of Montreal*. The fact that the AGC disagrees with the Federal Court's reasoning cannot be sufficient to negate the burden he bears on appeal. A careful reading of the Federal Court's reasons show that it did indeed address all the issues that were put to it. Indeed, the time and effort that the AGC spent, both in his written and oral arguments, to counter the Federal Court's reasoning bears witness to the exhaustive nature of that reasoning.

[163] As previously mentioned, the AGC submits that the Federal Court recited the relevant principles from *Vavilov*, but failed to apply the approach it demands. In particular, the AGC claims that the Federal Court acted as if it was the first instance decision-maker and, in so doing, applied for all intents and purposes a correctness standard of review. To illustrate that point, the AGC made the following points at the hearing:

- Under the heading of "Substantive Issues", the Federal Court raised a number of questions: Was the decision to issue the Proclamation unreasonable and *ultra vires* the Act? Was there a national emergency? Was the "threats to the security of Canada"

threshold met? Was there evidence of threats or use of acts of serious violence? In the AGC's view, these were all appropriate questions for the GIC but not for a reviewing judge.

- The Federal Court said very little about the Section 58 Explanation, and did not even summarize it. It simply said at paragraph 68 of its reasons that the Section 58 Explanation constitutes the reasons for the decision. Moreover, at paragraph 100 it gave its free-standing interpretation of the legal framework without saying how the GIC interpreted that framework, and then proceeded to give its own *de novo* analysis on the issues that it saw as arising from the Act.
- In the Federal Court's analysis, the Section 58 Explanation played only a secondary role, and in some instances no role at all. In assessing whether there was a national emergency, for example, the Federal Court spends ten paragraphs making its own findings of fact, questioning the GIC's assessment of the situation and interpreting the Act itself, before even mentioning the Section 58 Explanation and then comparing the GIC's views to its own.
- The Federal Court made the same error in its analysis on whether there were threats or use of acts of serious violence. Again, it did not start with an assessment of the Section 58 Explanation, but looked at the facts and the law as if it was the first instance decision-maker. It came to its own conclusion as to the threshold to be met for the GIC to have reasonable grounds to believe that a threat to national security existed within the meaning of the Act, and determined for itself that the harms identified in the Section 58 Explanation were not sufficient to meet that threshold.

[164] In our view, the Federal Court was well aware of its proper role on judicial review. In its discussion of the standard of review, the Federal Court first noted that "deference is warranted" and that "it is not the role of the Court to reweigh the evidence or the relative importance given by the decision maker to any relevant factor", citing for that proposition the decision of the Supreme Court in *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para. 111 and *Vavilov* at para. 13.

[165] The AGC also submitted, much as he did before the Federal Court, that reasonableness takes its colour from the context of the Act, and that due consideration ought to be given to the fact that the GIC is "at the apex of the Canadian executive" and to the precautionary and preventive approach to addressing emergencies that is reflected in the language used in the Act. This context, coupled with the wording of subsection 17(1), should have led the Court to adopt a highly deferential attitude towards the GIC, with respect both to its interpretation of the Act and to its assessment of the existence of a public order emergency.

[166] In our view, this argument misses the crucial distinction between the ultimate decision to invoke the Act by way of a proclamation, and the prerequisites that must be met before that decision can be made. There is no disagreement between the parties that the decision to invoke the Act is highly discretionary and attracts a high degree of deference, not only because Cabinet sits at the apex of the executive and makes decisions on the basis of wide considerations of policy and public interest, but also because of the fluid, unpredictable, and fast-moving nature of an emergency situation. The same cannot be said, however, of the objective legal requirements that have to be met before the GIC can exercise its legitimate discretion.

[167] The Federal Court correctly acknowledged the importance of that distinction, aptly noting that whether there were 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 is to be determined on an objective standard, whereas the decision to invoke the Act is discretionary, as is apparent from the language of section 17 ("may, by proclamation, so declare").

[168] Both the Supreme Court and this Court have reiterated that reviewing courts must pay attention to the nature of decisions and to the language chosen by the legislature in describing the limits of a decision-maker's authority. In *Vavilov,* for example, the Supreme Court stressed that a decision-maker will have more flexibility when the language used in the enabling legislation is broad, open-ended or highly qualitative (like "in the public interest"): *Vavilov* at para. 110; *Catalyst Paper Corp. v. North Cowichan (District),* 2012 SCC 2. In the same vein, administrative decision-makers will be less constrained when they are vested with a broad scope of discretion, or where they make public interest determinations based on multifaceted considerations of policy and public interest: see, for example, *FortisAlberta Inc. v. Alberta (Utilities Commission),* 2015 ABCA 295 at paras. 171-172; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 [*Entertainment Software*] at paras. 28-32.

[169] On the other hand, when the power-conferring statute is specifically worded and laden with legal content and well-known juridical concepts, the decision-maker's discretion to interpret the relevant provision will be more constrained: *Vavilov* at para. 110; *Gitxaala Nation v.*

Canada, 2016 FCA 187 at para. 153, citing *Canadian National Railway*; *Public Mobile Inc. v. Canada (Attorney General)*, 2011 FCA 194 at para. 29; *Canada v. Kabul Farms Inc.*, 2016 FCA 143 at paras. 24-25.

[170] In the case at bar, the AGC's suggestion that the decision at issue is a discretionary one to which significant deference ought to be afforded is undercut by the preamble to the Act, which makes clear that the GIC, in employing the powers under the Act, is subject to the Charter and must have regard to the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 arts 9—14 (entered into force 23 March 1976, accession by Canada 19 May 1976).

[171] Moreover, the wording of subsection 17(1) is quite circumscribed and cannot be interpreted as conferring unconstrained discretion. The "belief on reasonable grounds" concept has been the subject of numerous judicial pronouncements, and the definition of "public order emergency" as found in section 16 refers to objective standards and to a clear definition in the *CSIS Act* which makes this provision "more akin to the legal determinations courts make, governed by legal authorities, not policy" (*Entertainment Software* at para. 34, cited by the Federal Court in *Nagle* at para. 288).

[172] The AGC's argument that the GIC should enjoy a high degree of discretion not only in making the ultimate decision to issue the Proclamation under the Act but also in interpreting the requirements to be met before coming to that conclusion could well have carried the day, as the

Federal Court acknowledged, had Parliament decided not to define what is a public order emergency. As it stated at paragraph 287 of its reasons:

> 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.

[173] This is entirely consistent with *Vavilov*, where the Supreme Court opens its analysis of the first constraint bearing on an administrative decision:

> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures… Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion…

[174] The AGC relied on the POEC Report, where Commissioner Rouleau observed that the Act's provisions include "broad, open-ended concepts such as 'threat' and 'serious', that leave scope for reasonable people to disagree" (POEC Report, vol. 3, at p. 232).

[175] But first of all, at the risk of stating the obvious, the mandate of the Commission was entirely different from the role of the Courts on judicial review. As the Commissioner himself stated, his role was to inquire into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency, as per section 63 of the Act. Conversely, the role of the Federal Court on judicial review (and of this Court on appeal) is to adjudicate the

lawfulness of the Proclamation (POEC Report, vol. 3, at pp. 207-208). Accordingly, the opinions and findings of the Commissioner are not binding on the courts, as the Commissioner acknowledged. Second, and more importantly, we agree with the CCLA that open-endedness is not sufficient to convert an objective inquiry about reasonable grounds into a discretionary exercise of power. In any event, as we have indicated above, as general a concept as "threat" may be, it has been particularized by the definition given to that term in section 2 of the *CSIS Act*, to which the definition of "threats to the security of Canada" at section 16 of the Act refers.

[176] One must not lose sight, moreover, of the history of the Act and of the context in which it was adopted. Parliament's choice to precisely circumscribe Cabinet's discretion under the Act must be considered against the backdrop of its predecessor, the *WMA*, in which, as discussed above, section 2 provided that the issue of a proclamation "shall be conclusive evidence that war, invasion or insurrection, real or apprehended, exists and has existed for any period of time therein stated".

[177] Because the *WMA* did not define any of the circumstances that could justify Cabinet to invoke it, and provided that Cabinet's determination that one of these statutory triggers existed was conclusive evidence, courts were left powerless to judicially review the use of the exceptional powers granted to the government by that statute, as previously mentioned (para. 129 of these reasons).

[178] During the parliamentary debates leading to the adoption of the Act, there were several indications that the express purpose of the "reasonable grounds" standard was to empower courts

to judicially review emergency proclamations on an objective basis. Bill C-77 originally provided that Cabinet could declare a public order emergency if it was "of the opinion" that an emergency existed. Minister Beatty explained that replacing this requirement with the more stringent "reasonable grounds" standard:

> […] will give someone who wants to contest the government's decision to invoke a declaration of a national emergency the ability to take us to court, if they believe it has been frivolously done. It will guarantee Canadians the ability that the courts could rule on whether the government had reasonable grounds to believe that a national emergency existed.

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, Legislative Committee on Bill C-77, 33-2 (February 23, 1988) at 1315 (Hon Perrin Beatty).

[179] Speaking to the changes that had been brought to the original Bill as a result of a committee hearings, the Parliamentary Secretary to the Minister of National Defence, Mr. Bud Bradley, similarly had this to say:

> Let me now turn to a second general category of amendments. Several important changes have been made to enhance the manner in which the Government's use of the Act will be overseen by the courts and by Parliament. Perhaps the most important of these is the change in wording in about 20 subsections to ensure that judgments made about the necessity for exceptional measures must now be based on "reasonable grounds" rather than the unqualified "opinion" of the Governor in Council. This change means that all important decisions by the Governor in Council relating to the invocation and use of the emergency power will be challengeable in the courts.

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, Second Reading, House of Commons Debates, 33-2 (April 25, 1988) (Bud Bradley).

[180] This context and the drafting history of the Act, along with the exacting thresholds found in subsection 17(1) that must be met before Cabinet can issue a proclamation, are key factors that must be considered when interpreting the Act and assessing the reasonableness of a proclamation. The fact that Cabinet sits at the apex of the Canadian executive and that it must take a precautionary and preventive approach to addressing emergencies does not affect the standard or degree of scrutiny by the reviewing court (*Vavilov* at para. 89). At the end of the day, a decision will be reasonable not only if it bears the hallmarks of reasonableness (justification, transparency and intelligibility), but also if it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para. 99). And as part of the legal constraints, the wording of the relevant provisions of the Act, interpreted with the modern principles of statutory interpretation, is the most salient aspect to be considered in assessing the reasonableness of the decision at issue in this appeal.

[181] To summarize, we would agree with the AGC that the decision by the GIC to issue a proclamation involves a broad range of policy and public interest factors. Such an exercise calls for a balancing of competing interests and a decision on how best to use public resources in fast-moving situations that is best left to the GIC. That discretion, however, can only be exercised once the various legal thresholds found in subsection 17(1) of the Act have been met. In other words, the GIC must be able to show that it had reasonable grounds to believe that a public order emergency (as defined in section 16 of the Act) existed and necessitated the taking of special temporary measures before being able to use its discretion to issue a proclamation.

[182] Before concluding this discussion relating to the standard of review, a word must be said about the comments made by the Federal Court in the last paragraph of its conclusions. The AGC made much of paragraph 370, which we again quote here in full:

> 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 [Act] 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 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.

[183] The AGC relies heavily on that paragraph as evidence that the Federal Court misguided itself in its application of the reasonableness standard and revisited the GIC's decision with the benefit of hindsight. It may indeed appear curious to find such a candid admission at the very end of the Federal Court's reasons. It is not for us, however, to speculate as to what exactly the Federal Court had in mind and why it felt compelled to express sympathy for those who had to decide whether or not to issue the Proclamation. We have not been persuaded that paragraph 370 taints the whole reasoning of the Federal Court or fatally undermines its findings. To the extent that the Federal Court allegedly erred in some of its conclusions because it considered events that took place after February 14, 2022, we will address these arguments in the course of our analysis.

[184] In any event, it is not the decision of the Federal Court that we are reviewing, but that of the GIC. It is the latter that must pass muster, when assessed against the standard of reasonableness. The fact that the Federal Court may have agreed on February 14, 2022 that it

was necessary to invoke the Act is irrelevant and would by no means make that decision reasonable. It only means that judges, if they were put in the same situation as senior officials at the highest rank of government, would sometimes err and make mistakes. What matters, on judicial review, is whether the decision that is challenged is reasonable in light of the facts and the law that were before the decision-maker at the time the decision was made. This is the exercise we must undertake.

(3) Did the GIC have reasonable grounds to believe that a threat to national security existed within the meaning of the Act?

[185] The AGC submits that the Federal Court erred in its interpretation of the expression "threats to the security of Canada" as defined in section 16 of the Act, and in its interpretation of "serious violence" as used in section 2 of the *CSIS Act*, to which section 16 of the Act refers. The AGC also contends that the Federal Court erred in substituting its own view as to whether there were reasonable grounds to believe a threat to the security of Canada existed.

[186] Under subsection 17(1) of the Act, Cabinet must "believe, on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency" before it can so declare by proclamation. Section 16, in turn, defines a "public order emergency" as "an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency". Finally, section 16 provides that the phrase "threats to the security of Canada" has the meaning assigned by section 2 of the *CSIS Act* (reproduced above at paragraph 148).

[187] Of the four activities, there is no dispute that the only relevant one for the purpose of these proceedings is the third one (i.e., "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"). The AGC, however, argues that the Federal Court erred by interpreting the notion of "threats to the security of Canada" exclusively by reference to its meaning in the context of the *CSIS Act*. This would be tantamount, in his view, to giving CSIS the authority to declare a public order emergency. The meaning of the phrase under section 2 of the *CSIS Act*, and CSIS's views on whether the situation on February 14, 2022, engaged that language, did not govern the GIC's task given the different legislative purposes and contexts.

[188] The AGC relies on the modern approach to statutory interpretation, pursuant to which different decision-makers acting in different legislative contexts can reach different interpretations even if the statutory language is similar or even the same. Accordingly, the Federal Court should have taken into consideration the different mandates of CSIS, which is primarily to investigate threats requiring security intelligence, and of Cabinet under the Act, which is to regulate public assemblies, control public services, compel essential services, and imposes penalties for contravening orders and regulations.

[189] In our view, these arguments miss the point. First of all, no party argued that CSIS's opinion, that there were no threats to the security of Canada, ought to be determinative of whether Cabinet could invoke the Act. This is not to say, however, that CSIS's opinion is not an

important factor in assessing the reasonableness of Cabinet's decision. It was, as evidenced by the following paragraph of the Federal Court's reasons:

> [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.

[190] In terms of statutory interpretation, there is no doubt that context and purpose must be taken into consideration when interpreting a statute or any other legislative or regulatory instrument. But words still matter. As the Supreme Court stated in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 112, citing *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724 at p. 735, the plain and ordinary meaning of a provision is "the natural meaning which appears when the provision is simply read through".

[191] This approach is particularly apposite when it is clear from the record that words have been carefully chosen. As noted by the Federal Court, Parliament could have chosen not to provide a definition of "threats to the security of Canada" (as it did, for example, in the *International Transfer of Offenders Act*, S.C. 2004, c. 21, paragraph 10(1)(*a*)), in which case the threshold might well have been found to be met on a deferential standard of review. Similarly, Parliament could have opted to define that expression for the particular purpose of the Act, as it did for many other terms (including "national emergency"), and to broaden the definition of "threats to the security of Canada" to include economic threats if it so wished. Instead, Parliament decided to adopt the well-known definition found in the *CSIS Act*, as it has done in

nine other federal statutes: see *Access to Information Act*, subparagraph 16(1)(*a*)(iii); *Aeronautics Act*, R.S.C. 1985, c. A-2, subsections 4.82(5) and (14); *Citizenship Act*, R.S.C. 1985, c. C-29, subsection 19(1); *Corrections and Conditional Release Act*, subparagraph 183(2)(*a*)(iii); *Excise Tax Act*, R.S.C. 1985, c. E-15, subparagraph 295(5.05)(*a*)(i); *Income Tax Act*, R.S.C. 1985, c. 1, subparagraph 241(9)(*b*)(i) and paragraph 241(9.1)(*b*); *Privacy Act*, subparagraph 22(1)(*a*)(iii); *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, subsection 2(1); *Security Offences Act*, R.S.C. 1985, c. S-7, paragraph 2(a). Such a conscious choice must be given effect.

[192] As noted by both the CCF and CCLA, it appears from the parliamentary debates surrounding the adoption of the Act that the decision to adopt the definition of "threats to the security of Canada" found in the *CSIS Act* was a deliberate choice to rely on a definition that was well-trodden and had received exhaustive scrutiny by Parliament in the recent past: see the statement in the House of Commons of the Honourable Perrin Beatty, who was the sponsor of the Act, in *House of Commons Debates*, vol. 9, 2nd Session, 33rd Parl., November 16, 1987, p. 10810.

[193] The approach suggested by the AGC also faces another obstacle. If we were to give a different interpretation to the expression "threats to the security of Canada" in the Act from that found in the *CSIS Act* because of the different contexts, one would have to tweak the meaning of these words in all of the other nine different statutes in which this expression is found to take into consideration all of their various contexts. We would then end up with up to eleven different meanings for the same words. Not only would that result in absurd consequences, but it would

offend the clear intent of Parliament to link the use of the same words in a number of statutes to the definition provided in the *CSIS Act*.

[194] Maybe even more importantly, nowhere has the AGC spelled out precisely how the different context of the Act changes the meaning of "threats to the security of Canada". One can only surmise that in his view, these words impose a lower threshold on Cabinet when making use of the extensive powers conferred by the Act than on CSIS when acting pursuant to the *CSIS Act*. However, that begs the question: why would the "threats to the security of Canada" be interpreted less stringently when applying the Act than when applying the *CSIS Act*?

[195] One could be forgiven for thinking that, if anything, the "threats to the security of Canada" should be interpreted more strictly in the context of the Act than in the context of the *CSIS Act*. After all, the powers conferred on Cabinet once a public order emergency has been declared are much broader and more susceptible to interfere with civil liberties than the powers given to CSIS when investigating a threat to the security of Canada. Under the latter, the phrase "threats to the security of Canada" only operates as a threshold for CSIS to exercise its intelligence-gathering mandate for specific activities and for taking measures to reduce such threats (subsection 12(1) and section 12.1). These powers are severely constrained, first by the obligation to obtain a warrant if the threat reduction measures taken would limit a right or freedom guaranteed by the Charter, and second by the express mention that these measures exclude law enforcement powers and the power to detain people (subsection 12.1(4) and paragraph 12.2(1)(*e*)).

[196] The Act, by contrast, goes much further. Once a public order emergency is declared, Cabinet can restrict public assembly and travel, and create criminal offences for any contravention of an order or regulation made under section 19 of the Act. These powers are much more intrusive, and result in more dramatic consequences, for the persons caught within their ambit.

[197] To claim that the threshold for declaring a public order emergency, which allows Cabinet to make use of a vast array of draconian powers without any prior authorization, could be lower than the threshold for using the surveillance powers and the more circumscribed threat reduction measures under the *CSIS Act*, would make little sense in our view. If anything, it should be the reverse. Be that as it may, Parliament has decided to apply the same standard in both contexts, and the AGC has not provided any cogent reason not to give effect to its intention.

[198] The AGC further submits that the Federal Court erred in its interpretation of "serious violence" in two respects. While the Federal Court accepted the AGC's submission that the threat of "serious violence" in paragraph (c) of the definition of "threats to the security of Canada" in section 2 of the *CSIS Act* need not involve the use or attempted use of violence to endanger the life or safety of another person or to inflict severe psychological damage within the meaning of section 752 of the *Criminal Code*, the AGC argued that it erred in holding that violence or threats of violence to persons must nevertheless rise to "at least [the level] contemplated by the term 'bodily harm' in the Criminal Code", i.e., "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" (*Nagle* at para. 280). According to the AGC, the concept of

"bodily harm" has no application in the context of the Act, nor even in the context of the *CSIS Act*, and "serious violence" simply means something more than "minor" forms of violence such as throwing tomatoes at politicians.

[199] We have not been convinced by the AGC's submission, which would have the effect of giving very little meaning to the use of the qualifier "serious" associated with violence in the definition of "threats to the security of Canada". In our view, the Federal Court could reasonably conclude that substantial harm (which the Supreme Court analogized to the notion of "serious" threats in *Suresh* at para. 90), in the context of violence or threats of violence against persons, must rise at the very least to the level contemplated by the term "bodily harm" in the *Criminal Code*.

[200] In the absence of any definition of the terms "serious violence", the *Criminal Code* can provide helpful guidance. In *R. v. C.D.*; *R. v. C.D.K.*, 2005 SCC 78 at para. 20, the Supreme Court had to define the notion of "serious bodily harm" to which the definition of "serious violent offence" in the *Youth Criminal Justice Act*, S.C. 2002, c. 1 referred. Relying on the definition of "bodily harm" in section 2 of the *Criminal Code* and on the dictionary definition of "serious", the Court held that "serious bodily harm" means "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". The *Criminal Code* also considers a "serious personal injury offence" to be one that involves the "use or attempted use of violence" or endangers the life or safety of another person, or inflicts severe psychological damage: see *Criminal Code*,

section 752; *R. v. Goforth*, 2005 SKCA 12 at para. 21, cited in *R. v. Steele*, 2014 SCC 61 at para. 39.

[201] Bearing in mind that Cabinet implicitly relied on paragraph (c) of the definition of "threats to the security of Canada" in section 2 of the *CSIS Act* in declaring a public order emergency, which appears to have been primarily directed at terrorism (Canada, Parliament, Senate, Special Committee of the Senate on the Canadian Security Intelligence Service, *Delicate Balance: A Security Intelligence Service in a Democratic Society*, November 1983 [Pitfield Report] at p. 13), it might also be apposite to consider subparagraph (*b*)(ii) of the definition of "terrorist activity" as found in subsection 83.01(1) of the *Criminal Code*. Pursuant to that definition, a terrorist activity only captures an act or omission that intentionally "(A) causes death or serious bodily harm to a person by the use of violence, (B) endangers a person's life, [or] (C) causes a serious risk to the health or safety of the public or any segment of the public".

[202] All these definitions support the Federal Court's finding that "serious violence" requires harm at least of the level contemplated by the term "bodily harm".

[203] There is a well-known principle of statutory interpretation that the same words should be given the same meaning, both within a statute and across statutes: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217. The Supreme Court gave effect to that presumption with respect to the use of the word "appeal" in *Vavilov* (at para. 44), and we see no reason to diverge from that presumption in the present context. As Professor Sullivan stated in an earlier version of her treatise, "…other things being equal, interpretations that minimize the

possibility of conflict or incoherence among different enactments are preferred": *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 288, quoted in *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at para. 30.

[204] Obviously, this presumption of consistency applies with greater strength to statutes dealing with the same subject matter. And it is no doubt true that the context of national security and intelligence differs in some respects from that of a national emergency. But as previously mentioned, Parliament expressly chose to use the definition of "threats to the security of Canada" (and its embedded reference to "serious violence") found in the *CSIS Act* to operationalize the Act. Moreover, as previously seen, Cabinet is empowered to make any contravention of an order or regulation adopted under section 19 of the Act a criminal offence, which makes it all the more acceptable to rely on the *Criminal Code* definition and jurisprudence to interpret undefined terms in the *CSIS Act*.

[205] The AGC also submits that the Federal Court erred in finding that it was "unable to find the term [serious violence] encompasses the type of economic disruption that resulted from the border crossing blockades, troubling as they were" (at para. 281). The AGC also argues that the Federal Court erred in concluding that although "harm being caused to Canada's economy, trade and commerce, was very real and concerning, it did not constitute threats or the use of serious violence to persons or property" (at para. 296). According to the AGC, these conclusions were not the Federal Court's to make.

[206] In our view, this argument is flawed for at least two reasons. First, the Federal Court did accept the AGC's argument that economic disruption could amount to "serious violence" to property in some circumstances. The Federal Court made it clear that serious violence to property could encompass the various offences relating to destruction or damages to property found in the *Criminal Code*, and gave as an example the destruction or damage to critical infrastructure that takes down energy supply required to heat homes and run industries.

[207] What the AGC is really arguing before us is that rendering critical infrastructure unusable creates the same danger to Canadians' safety and security as physical damage to that infrastructure and amounts to serious violence with respect to property. In the Proclamation, Cabinet invoked three reasons of an economic nature as justification to declare a public order emergency: the adverse effects on the Canadian economy and threats to its economic security resulting from the impacts of blockades of critical infrastructures, the adverse effects resulting from the impacts of the blockades on Canada's relationship with its trading partners, and the breakdown in the distribution chain and availability of essential goods, services and resources caused by the existing (and potential additional) blockades. Interestingly, the Section 58 Explanation expanded on these risks in speculative language. The following extracts are quite revealing:

> 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. (Explanation, p. 9)
>
> 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. (Explanation, p. 9)

> 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. (Explanation, p. 10)
>
> 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. (Explanation, p. 11)

[208] In light of the text, context and purpose of paragraph (c) of the definition of "threats to the security of Canada" in section 2 of the *CSIS Act*, this expansive interpretation of "serious violence" to property is unwarranted and unreasonable. It could stifle all kinds of protests and demonstrations that blockade pipelines, nuclear plants, railway lines and other kinds of infrastructure to advance a cause. There is no indication, either in the definition itself of "threats to the security of Canada" in the *CSIS Act* or in the debates surrounding the adoption of that definition, that the kind of economic disruptions described in the Section 58 Explanation could be the basis for declaring a public order emergency. As previously mentioned, the adoption of the Act was clearly meant to curb the excesses and prevent the abuses that occurred under the *WMA*. The reference to the definition of "threats to the security of Canada" in the *CSIS Act*, which itself requires threat or use of acts of "serious violence", was meant to assuage the concerns that pure economic considerations, especially those of a speculative or tentative nature, would not prevail over democratic values and fundamental freedoms of assembly and expression.

[209] To that extent, we share the view of the Federal Court that it is up to Parliament to revisit the definition of "threats to the security of Canada" if it is of the view that it does not adequately

cover the various types of harms that may result from an emergency situation, such as those of an economic nature. For the time being, we must take the Act as it reads, and not as the AGC would like it to read. It would stretch beyond rationality the meaning of the words “serious violence”, when applied to property, if they were to encompass purely economic consequences or speculative disruption of essential goods and services.

[210] As for the second criticism levelled by the AGC, it was undoubtedly incumbent on the Federal Court, as part of its reasonableness review, to give meaning to paragraph (c) of the definition of “threats to the security of Canada” in section 2 of the *CSIS Act* as it is a critical legal constraint bearing on the GIC’s decision to invoke the Act. As previously mentioned, for a decision to be reasonable it must be justified in relation both to the relevant factual and legal constraints that bear on the decision. As was reiterated by the Supreme Court in *Mason* at paragraph 69, the decision-maker must show, in its reasons or otherwise, that it was alive to the text, context and purpose of the enabling statutory provision. Therefore, it was very much the role of the Federal Court as the reviewing court to look into the Section 58 Explanation and to discern the interpretation of paragraph (c) of the definition of “threats to the security of Canada” in section 2 of the *CSIS Act* flowing from the record.

[211] Having carefully considered the governing statutory scheme and the other legal constraints that bear on the decision to declare a public order emergency, we must now turn to the evidence that was before Cabinet at the time the decision was made.

[212] Relying on the Section 58 Explanation, the AGC claims that there were considerable cumulative threats of serious violence to individuals, including the threat of lethal violence. Having carefully read that document, we agree with the Federal Court that there is very little hard evidence of any actual serious violence or threats of it, except at Coutts; otherwise, the Section 58 Explanation focuses mostly on the economic impact of the blockades, on speculation as to what might happen if the protests were not brought to an end, and on unsubstantiated and vague reports from unidentified sources.

[213] In the section dealing with the "potential" for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians, it is stated, for example, that "[t]here 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" (Section 58 Explanation, Appeal Book (AB), Vol. 4, Tab 13.2, p.1324) (emphasis added).

[214] Similarly, we find another vague statement in the Section 58 Explanation: "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. (…) While a link to the convoy has not yet been established in either case [bomb threats to Vancouver hospitals and suspicious packages sent to MPs in Nova Scotia], these

threats are consistent with an overall uptick in threats made against public officials and health care workers" (emphasis added).

[215] The Section 58 Explanation also refers to threats arising from protests at the Nova Scotia-New Brunswick border and in Quebec City, and to efforts by U.S.-based supporters to join protests in Canada, without providing any details save for saying that in some cases individuals were carrying weapons. As for the situation in Ottawa, the Section 58 Explanation again makes vague assertions such as "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 "[t]he 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".

[216] The only clear instance of threats of serious violence is the blockade that took place at Coutts, Alberta. The Section 58 Explanation states that "numerous individuals" associated with a known ideologically motivated violent extremism group who had been engaged with the protest were arrested and that the RCMP seized a cache of firearms with a "large quantity" of ammunition. To the extent that evidence adduced before the POEC can be considered by this Court, the AGC also referred us to the testimony of the Minister of Public Safety and the Clerk of the Privy Council to the effect that the discovery of a large quantity of weapons and ammunition at Coutts seriously elevated the level of concern and the potential for gun violence.

[217] The potential for serious violence, particularly at Coutts but also, to a lesser extent, in Ottawa and at other border locations, was certainly cause for concern. Indeed, it appears to have been a major factor in the decision of Cabinet to recommend the invocation of the Act. It must nevertheless be considered within the broader context of the information that was available to Cabinet and to the Prime Minister of February 14, 2022.

[218] It is not in dispute that Cabinet had access to a CSIS threat assessment. The Director of CSIS, Mr. David Vigneault, confirmed as much in his interview with the POEC, and confirmed it in the *in camera* hearing. In the summary of that interview, it is stated that "[h]e felt an obligation to clearly convey the Service's position that there did not exist a threat to the security of Canada as defined by the Service's legal mandate": CSIS Interview Panel Summary (Unclassified extracts) (August 29, 2022), Exhibit H, Affidavit of Cara Zwibel (dated December 11, 2022), AB, Vol. 1, Tab 11.12, p. 526. He confirmed that evidence in the *in camera*, *ex parte* hearing, saying that "at no point did the Service assess that the protests in Ottawa or elsewhere (the "Freedom Convoy") constituted a threat to the security of Canada under section 2 of the CSIS Act": Summary of Commission *in camera* hearing with CSIS (extracts) (November 5, 2022), Exhibit I, Zwibel Affidavit, AB, Vol. 1, Tab 11.13, pp. 529-530.

[219] Of course, the CSIS assessment that there were no threats to the security of Canada was not determinative and could not bind Cabinet. The Federal Court and the respondents agree that the GIC was not limited to considering the intelligence collected by CSIS or by its analysis of that intelligence. Because of its expertise in investigating threats to the security of Canada, however, CSIS's threat assessment should nevertheless have carried substantial weight; after all,

it is one of CSIS's principal activities to investigate, analyse, and retain information and intelligence on security threats: *X(Re),* 2016 FC 1105 at para. 159, citing the Pitfield Report at para. 28.

[220] If Cabinet was not satisfied with CSIS's threat assessment, it was always open to it to ask for further information and analysis from CSIS, the RCMP, or other relevant federal departments or agencies. In fact, it appears from the record that an alternative threat assessment was requested by the Clerk of the Privy Council on February 14, 2022. Without going into the details of what happened on that day, what is clear is that no alternative threat assessment was ever prepared before the invocation of the Act.

[221] In the Invocation Memorandum which was prepared by the Clerk of the Privy Council and that ended up being the last piece of advice that went to the Prime Minister, we find the mention that "[a] more detailed threat assessment is being provided under separate cover" (Invocation Memorandum, p. 2; AB, Vol. 1, Tab 5, p. 189). Yet the Clerk testified that "there was no written detailed threat assessment provided under separate cover": Commission Testimony of Clerk Charette and Deputy Clerk Drouin (excerpts) (November 18, 2022), Exhibit D, Zwibel Affidavit, AB, Vol. 1, Tab 11.8, p. 419.

[222] Apart from the fact that no further threat assessment was provided to the Prime Minister prior to his decision to declare the public order emergency, this Memorandum is significant because it was the "culmination … of the public service advice to the prime minister", in the Clerk of the Privy Council's own words: Public Order Emergency Commission Testimony of

Clerk Charette and Deputy Clerk Drouin (November 18, 2022), AB, Vol. 6, Tab 13.8.4, p. 3245. What is remarkable is that it does not contain discussion of any discrete risks of "serious violence". In the background part of this heavily redacted document, we find in very broad strokes a mere reiteration of the general concerns about disruption of the peace, the impacts on the Canadian economy, and a "general sense" of public unrest. There is also a vague reference to "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": Invocation Memorandum, AB, Vol. 6, Tab 13.8.2, p. 3217.

[223] In the part of the Memorandum providing advice to the Prime Minister, the only portion dealing with the "threats to the security of Canada" reads as follows:

> …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. (Invocation Memorandum, AB, Vol. 1, Tab 11.6, p. 391)

[224] In light of all the foregoing, has the appellant met his burden to show that the GIC had reasonable grounds to believe that a threat to national security existed within the meaning of the Act when it declared a public order emergency? Was there a reasonable basis in the record to support the GIC's opinion? As troubling as the discoveries of weapons and ammunition at Coutts, the talk of overthrowing the government, the serious disturbances occasioned by the

Convoy in Ottawa and the potential for serious violence that it created, and the economic impact of the blockades at various points of entry may have been, were they sufficient to meet the test of "threats to the security of Canada"? Like the Federal Court, we are of the view that they were not.

[225] As previously mentioned, judicial review of the reasonableness of Cabinet's decision to declare a public order emergency commands an exacting standard because Parliament chose to circumscribe its power with much more precision than was the case under the *WMA*. Under that statute, the notion of "war, invasion or insurrection, real or apprehended" that could trigger a proclamation of the GIC was left undefined. Moreover, the determination that such a state of affairs existed was left to the entire discretion of Cabinet, since the issuance of a proclamation was "conclusive evidence" of war, invasion, or insurrection.

[226] It was to avoid the excesses and abuses that occurred under the *WMA* and to prevent them from occurring again that Parliament adopted the Act. Not only are the key operational concepts now narrowly defined (such as the notion of "public order emergency", "threats to the security of Canada", and "national emergency"), but the exercise by Cabinet of its authority to bring the Act into effect is constrained by the requirement that it believes, "on reasonable grounds", that a public order emergency exists and necessitates the taking of special temporary measures for dealing with it. That language clearly signals Parliament's intent that Cabinet's decisions be amenable to judicial review.

[227] In the wake of *Vavilov*, the "reasonable grounds" requirement must necessarily be consistent with the framework provided in that decision. The AGC agrees with that understanding, but emphasizes throughout his submissions that Cabinet's reasons for its decision need only comport with *Vavilov's* requirement for an internally coherent and rational chain of analysis. Yet this is only one leg of the reasonableness analysis. As the Supreme Court makes clear at paragraph 85, "…a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (emphasis added).

[228] Throughout his submissions, the AGC insists on the "highly discretionary" nature of the decision made by the GIC to declare a public order emergency and the "broad discretion" entrusted by Parliament to the GIC in that respect. This is no doubt true, provided that the legal requirements enshrined in the Act have been met. In the same vein, we agree with the AGC that the proper question on judicial review is not whether there was actually a threat to the security of Canada when the GIC exercised its discretion to make a declaration, but whether the GIC acted reasonably in finding reasonable grounds to believe there was such a threat. But that belief will not be based on reasonable grounds if it is based on insufficient evidence or if that evidence is not sufficient to meet the legal standards prescribed in the Act.

[229] The AGC further submits that the GIC was not bound to wait for any further assessments by CSIS, police, or other authorities before declaring a public order emergency, nor was it required to wait for the eruption of violence. Again, these arguments miss the point. While these are potentially valid and relevant considerations to weigh when exercising the discretion to

invoke the Act, there is a prerequisite to the exercise of that discretion: the GIC must have reasonable grounds to believe, based on compelling and credible information, that threats to the security of Canada as described in section 2 of the *CSIS Act* existed. As we demonstrate, this evidence was lacking here.

[230] As *Vavilov*, again, makes clear, a reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (at para. 85). The governing statutory scheme "is likely the most salient aspect of the legal context relevant to a particular decision" (at para. 108). This is particularly apposite in the case at bar, considering the context in which the Act was adopted and the narrow definition given to key concepts such as "threats to national security" and "national emergency". In light of the demanding language of section 2 of the *CSIS Act* to which the Act refers to circumscribe the "threats to the security of Canada", we fail to see how the purely economic consequences of the blockades and the speculative disruption of the free flow of goods and services rise to the level of serious violence against property.

[231] As for the threat or use of acts of serious violence against persons, when properly understood as requiring bodily harm, the evidence is quite simply lacking. Aside from the economic disturbance, the only incident of violence put forward by the AGC was the seizure of a cache of firearms and ammunition at Coutts, as well as vague reports of harassment, intimidation, and assault, and the fact that the police forces in Ottawa were overwhelmed. In our view, this is insufficient to satisfy the compelling and credible information requirement to justify the conclusion that there were reasonable grounds to believe that there was a threat or use of acts

of serious violence. Declaring a public order emergency is a very serious matter, considering the extraordinary powers vested in the executive branch of the federal government once the Act is invoked, and for that reason the exacting requirements set out by Parliament must be strictly adhered to.

[232] As disturbing and disruptive the blockades and the Convoy protests in Ottawa could be, they fell well short of a threat to national security. This was borne out by CSIS's own threat assessment, and the fact that although an alternative threat assessment was requested, the GIC invoked the Act before it was completed is another critical factor.

[233] When all these legal and factual considerations are taken into account, we fail to see how the GIC could "reasonably believe" that a threat to national security existed at the time the decision to invoke the Act was made. Like the Federal Court, we are of the view that on a proper interpretation of the Act, consistent with its exacting language and with the context of its adoption, the evidence was insufficient to conclude that there was an objective basis (supported by credible and compelling information) for the belief that a "threat to the security of Canada" existed.

(4) Did the GIC have reasonable grounds to believe that there was a national emergency?

[234] We have already found that Cabinet, on the evidence that was before it and on a proper interpretation of the Act, did not have reasonable grounds to believe that a threat to national security existed. We will now turn to the second prerequisite, that the threats to the security of

Canada are so serious as to be a national emergency. Section 3 defines a “national emergency” as an “urgent and critical situation of a temporary nature” that 1) “seriously endangers the lives, health or safety of Canadians”, 2) “exceed[s] the capacity or authority of a province to deal with it”, and (3) “cannot be effectively dealt with under any other law of Canada”. Section 3 also sets out another kind of national emergency in reference to a situation that would seriously threaten the federal government’s ability to preserve Canada’s sovereignty, security and territorial integrity, but it has not been alleged that the protests rose to that level.

[235] The AGC argues that the Federal Court erred in concluding that the requirement of a “national emergency” was not met. According to the AGC, Cabinet demonstrated in its Section 58 Explanation that it understood the meaning of “national emergency”. It states in its second paragraph that 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”. The AGC also claims that the facts, at the time, reasonably supported the Cabinet’s finding that there were reasonable grounds to believe such a national emergency existed.

[236] Relying on the weapons cache discovered at Coutts, and on protests and blockades that continued to pop up across the country, the AGC submits that it was reasonable for Cabinet to consider that there were threats of serious violence national in scope, that could not be resolved in a localized or piecemeal fashion, and that the measures allowed by the Act needed to be

applied across Canada to be effective. To downplay those threats as isolated incidents that were resolved without violence, as did the Federal Court, was in the AGC's view "hindsight bias on full display".

[237] The AGC also contends that Cabinet acted reasonably in finding reasonable grounds to believe that the public order emergency could not have been effectively dealt with under any other law of Canada. On this point, the AGC submits that the phrase "laws of Canada" refers to federal statutes, regulations and common law. This condition only requires a broad and general consideration of federal laws as a whole. It does not require a review of every specific statute or evidence showing ineffectiveness. Moreover, the question is not whether existing federal laws could apply but whether they would be effective in dealing with the situation.

[238] The AGC further submits that the question to be answered by the Federal Court was not whether Cabinet believed the situation could have been dealt with effectively under existing laws, but rather whether Cabinet acted reasonably in concluding that there were reasonable grounds to believe the situation could not be dealt with effectively under existing laws given the information then available. Not only was that question never answered, but no existing tools were ever identified with the capacity to resolve the crisis. More particularly, the provisions of the *Criminal Code* relating to unlawful assemblies and riots do not address the national nature of the threat, and are aimed at suppressing riots or unlawful assemblies already in progress as opposed to preventing them. The suggestion that existing laws of Canada could have been used to deal effectively with the crisis is therefore entirely speculative, whereas the targeted measures of the Act effectively brought the crisis under control.

[239] Finally, the AGC argues that Cabinet had reasonable grounds to believe that the emergency exceeded the capacity or authority of the provinces. In that respect, the appellant claims that section 3 of the Act is not about whether provincial laws can effectively deal with the emergency, but rather, whether the emergency extends beyond provincial borders, preventing any one province from resolving the issue, or whether at least one province indicates that the emergency is beyond its capacity or authority.

[240] Moreover, the "capacity" and "authority" of a province under section 3 of the Act must be distinguished. Authority refers to a province's legislative power, whereas capacity is the concrete ability to cope with a situation. In Ottawa, for example, the police service was overwhelmed by the protests and did not have the capacity to take action. Section 3 also refers to the capacity of "a" province and not multiple or most provinces. Therefore, the Federal Court's observation that the existing laws appeared to be sufficient everywhere except in Ottawa is irrelevant. The protests were geographically dispersed, mobile, and constantly evolving, and required a national approach. Furthermore, the requests from provinces for federal assistance to resolve the blockades at some ports of entry demonstrate provincial incapacity.

[241] Reading from the Section 58 Explanation, there is no doubt that Cabinet was aware of the threshold to be met for a situation to amount to a "national emergency". It states in the first paragraph of its reasons for finding a public order emergency that "[t]he situation across the country remains concerning, volatile and unpredictable", and reiterates that preoccupation in its conclusion. It also alludes to a risk of serious violence and the potential for lone actors to conduct terrorist attacks resulting from violent online rhetoric, increased threats against public

officials, and the physical presence of ideological extremists at protests. It also asserts that the 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", and notes that there has been a significant increase in serious threats of violence assessed to be politically or ideologically motivated.

[242] These concerns, as troubling as they might have been, were found in the preceding section of these reasons to be insufficient to ground a reasonable belief that a threat to national security existed at the time of the Proclamation. In the absence of any further explanation, we fail to see how they could now be relied upon to establish that the situation was of such a magnitude that it seriously endangered the lives, health or safety of Canadians. The trade-related impacts of the protests were not without repercussions for commerce, but there is nothing in the Section 58 Explanation suggesting that anyone's health and safety were seriously at stake, nor is there any evidence in the record to that effect. Indeed, the appellant did not seriously try to make that case, and rather focused his attention (much like the respondents and the interveners) on the second and third requirement mentioned above of the definition of what constitutes a national emergency.

[243] Before addressing the "provincial capacity and authority" and the "unavailability of any other law of Canada" requirements, some interpretative tools must be taken into consideration.

[244] As previously mentioned (*supra*, para. 173), *Vavilov* made it clear that the legislative scheme is the most salient aspect to be considered in assessing the reasonableness of a decision.

When Parliament has circumscribed a decision-maker's discretion with precise and exacting definitions, the acceptable approaches to decision making will correspondingly be restricted (*Vavilov* at para. 108). This is a choice that Parliament made consciously, intent on preventing the excesses to which the *WMA* gave rise, and heed must be paid to that clear intention. Courts must therefore ensure that Cabinet does not overextend the scope of its authority beyond what was intended when determining the reasonableness of the interpretation relied upon in coming to a decision.

[245] A second reason why the specific conditions underlying the existence of a national emergency must be strictly adhered to is the impact the Act (and its accompanying regulations) may have on an individual's life. Again, we quote from *Vavilov* at paragraph 133:

> Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain its decision best reflects the legislature's intention.

[246] In the case at bar, this is far from a mere possibility. As will become apparent later on, we are of the view that the Regulations violated paragraph 2(b) and section 8 of the Charter.

[247] A third, and most important, reason to require a robust justification for the finding of a national emergency rests with the constitutional underpinning of the Act itself. While the AGC is correct that no party has challenged the constitutional validity of the Act *per se* on division of powers grounds, the interpretation (especially with respect to the definition of "national emergency" in section 3 of the Act) must still be informed by and consistent with the distribution of legislative powers as found in the *Constitution Act, 1867*. An interpretation of the Act or of

one of its provisions that would bring it outside the confines of the "national emergency" branch of the introductory part of section 91 must be rejected and could certainly not be found to be a reasonable exercise of the powers conferred on Cabinet by Parliament.

[248] This is a well-established principle of Canadian constitutional law, and it has often been referred to as the "reading down" doctrine. It derives from the presumption of constitutionality, to the extent that the enacting legislative body is presumed to have meant to enact a statute which does not transgress the limits of its constitutional powers. For example, the *Federal Courts Act* has been read down to exclude from the jurisdiction of the Federal Court cases that are governed by provincial law; that interpretation was mandated by section 101 of the *Constitution Act, 1867*, pursuant to which the *Federal Courts Act* was enacted, which authorizes the establishment of federal courts only for the purpose of deciding cases governed by federal law: see *Quebec North Shore Paper v. C.P. Ltd.*, [1977] 2 S.C.R. 1054. For other examples, see: *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3. See also: P.W. Hogg and W. Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2021), section 15.15.

[249] In *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, Justice Beetz (writing for himself and Justice de Grandpré) characterized the dramatic impact that the use of the emergency power has on the normal distribution of powers as "a temporary pro tanto amendment of a federal constitution by the unilateral action of Parliament" (at p. 463). As a result, he expressed the view in his dissent that courts cannot decide that a suspension of the Constitution is legitimate unless

Parliament has expressly invoked that power, despite there being no such requirement in the *WMA*. Without going as far, Justice Ritchie (writing on behalf of three other judges) shared Justice Beetz's view with respect to the use of the emergency power. Significantly, he was of the opinion that the conditions required to declare a national emergency existed "where there can be said to be an urgent and critical situation adversely affecting all Canadians and being of such proportions as to transcend the authority vested in the Legislatures of the Provinces and thus presenting an emergency which can only be effectively dealt with by Parliament" in the exercise of its emergency power (at p. 436).

[250] Interestingly, the wording of the definition of a "national emergency" at section 3 of the Act closely tracks the language used by Justices Ritchie and Beetz in *Re: Anti-Inflation Act*. This is further indication, in our view, that Parliament intended that power to be used sparingly and in the most exceptional circumstances. Because the Act authorizes Cabinet to intrude into core areas of provincial jurisdictions, it must only be used as a last resort if the federal nature of the Constitution is to be preserved. This is consistent with the addition, at the Committee stage, not only of a statutory definition of a "national emergency", but also of the requirement that the urgent and critical situation be of the sort that cannot be effectively dealt with under any other law of Canada (the "last resort" clause). These amendments came about as a response to those who were of the view that the original Bill C-77 did not include adequate safeguards to circumscribe the declaration of an emergency. At the Third Reading of the Bill, Mr. Bud Bradley (Parliamentary Secretary to the Minister of National Defence) explained that clause in the following terms:

> The definition of "national emergency" as now formulated captures the four elements common to all the proposals put to the committee. It represents the

> distilled consensus of the collective wisdom of the highly qualified people whose advice we were fortunate to receive. The four elements incorporated in a new definition of national emergency are: first, the notion of urgency; second, the temporary character of the abnormal situation; third, the inadequacy of the normal legal framework; and finally, the presence of a serious threat, either to the security of the country as a whole, or to public safety in circumstances which exceed provincial capabilities.

[251] It is with these interpretative, jurisprudential, and constitutional constraints in mind that we will now endeavour to assess the law and the facts to determine whether Cabinet's conclusion that there was a national emergency justifying the invocation of the Act was reasonable.

[252] When assessing whether Cabinet could reasonably believe that the emergency could not have been dealt with effectively under any other law of Canada, the AGC submitted that a broad and general assessment is called for. What Cabinet is required to consider is not whether any specific statute would be effective to deal with the situation, but rather whether the existing laws of Canada, taken together, can adequately deal with the whole situation. The AGC added that the term "effective" should not be understood as meaning whether existing federal laws could apply, but whether they would be truly effective in curtailing the situation in a safe and timely way.

[253] Neither the respondents nor the interveners dispute these assertions, and they are to some extent a red herring. In a time of emergency, Cabinet could not reasonably be expected to look at every statute, regulation, or common law power with a view to determining whether any of these tools could conceivably be resorted to before acting. While the Act is meant to be an instrument of last resort, it cannot be construed as a straitjacket, imposing on Cabinet unrealistic conditions before it can face up to a situation that could truly endanger the health and safety of Canadians. We agree with the appellant that such an interpretation would produce intolerable results.

[254] That being said, there are a number of well-known offences in the *Criminal Code* that give police officers the power to arrest and charge protesters for a host of illegal behaviours, such as the various assault provisions (sections 266, 267, 270 and 270.01), carrying weapons to a public meeting (section 89), causing a disturbance by fighting/shouting/swearing, causing a disturbance by impeding/molesting persons, or disturbing occupants of a dwelling in an apartment complex (section 175), fleeing a police officer (section 320.17), fraudulently concealing property (section 341), inciting hatred in public place (section 319), and intimidating by blocking or obstructing a highway (section 423).

[255] Section 127 of the *Criminal Code* also makes it an offence to disobey an order of a court, such as the interlocutory injunction issued by the Ontario Superior Court of Justice on February 14, 2022, in which it ordered compliance with certain municipal by-laws that empowered the police to ticket the protesters and clear out the vehicles causing the blockade. That order also directed the OPS, and any police service assisting them, to assist in the enforcement of the injunction.

[256] It appears from the minutes of the IRG's final meeting on February 13 that consideration was also given to deploying the Canadian Armed Forces. Indeed, the *National Defence Act*, R.S.C. 1985, c. N-5 at subsection 273.6(2), grants Cabinet the power to authorize the military to "provide assistance in respect of any law enforcement matter", as long as (a) such assistance is in the "national interest", and (b) the matter "cannot be effectively dealt with" without the assistance of the military. The provinces can also requisition the Canadian Forces to aid in the suppression of a riot or a disturbance of the peace that is beyond their powers.

[257] The AGC retorts that Cabinet acted reasonably in finding, on reasonable grounds, that military force would not have provided a safe and effective means of resolving the crisis. It may well be that the military did not have equipment readily available or suitable to assist in the towing of vehicles, or the training required for crowd control, as suggested by the AGC in his written submissions. Unfortunately, we will never know because the minutes of the IRG's final meeting were redacted. Nor do we know whether, and to what extent, the relevant *Criminal Code* provisions to which we referred earlier were considered and why they were thought to be insufficient to deal effectively with the border blockades and the disruption created by the Convoy in Ottawa. Neither the Section 58 Explanation nor the Invocation Memorandum provided any clues on these issues.

[258] It is no answer for the AGC to argue now, *ex post facto*, that the military did not have either the training or the equipment to assist the police. It was incumbent on Cabinet to provide that evidence, since it is for the decision-maker to establish the reasonableness of its decision.

[259] In a similar fashion, the AGC argued before this Court that the *Criminal Code* provisions that criminalize unlawful assemblies and authorize the use of force to disperse them do not address the national nature of the threat and are aimed at suppressing unlawful assemblies and riots already in progress as opposed to preventing their formation. Once again, these potential explanations are nowhere to be found in the Section 58 Explanation or in the Invocation Memorandum, and they amount either to an afterthought or to buttressing the reasons provided by Cabinet in the Section 58 Explanation, something expressly prohibited by *Vavilov* (at

para. 96). This shortcoming is particularly egregious in the context of a legislative scheme whose language is particularly exacting and which is so clearly meant to be a tool of last resort.

[260] In any event, a careful reading of the Section 58 Explanation and of the Invocation Memorandum reveals that Cabinet believed the emergency could not have been dealt with effectively under any other law of Canada not because the existing laws of Canada were lacking but, more crucially, because the police forces were overwhelmed and unable (sometimes even unwilling) to enforce the law. Indeed, the Section 58 Explanation is long on the various disruptions created by the protesters in Ottawa and at some ports of entry, and on the potentially volatile and unpredictable consequences of those illegal activities, but short on why and how the Proclamation would help police forces to deal more effectively with the situation.

[261] The Federal Court concluded that there was no national emergency justifying the invocation of the Act because there was a lack of evidence that the situation, critical as it was, could not be dealt with effectively with the existing laws of Canada. At paragraph 254, the Court wrote:

> 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 […]

[262] In our view, this finding of fact is supported by the record. First of all, we note that the RCMP Commissioner advised Cabinet that, as of the morning the Act was invoked, the police had not yet exhausted their toolkit:

> …I am of the view that we have not yet exhausted all available tools that are already available through the existing legislation. There are instances where

> charges could be laid under existing authorities for various Criminal Code offences occurring right now in the context of the protest. The Ontario Provincial Emergencies Act just enacted will also help in providing additional deterrent tools to our existing toolbox.
>
> E-mail exchange between RCMP Commissioner Brenda Lucki and Mike Jones, Chief of Staff in the Office of the Minister of Public Safety (February 14, 2022), Zwibel Affidavit, Exhibit E (AB, Vol. 6, Tab 13.8.5, p. 3252). See also RCMP Situation Report (February 13, 2022 (AB, Vol. 9, Tab 13.1.9.4, p. 5334))

[263] This assessment is supported by the RCMP situation report of February 14, 2022. This report, which appears to have been made in the afternoon of February 14, 2022, therefore at most a few hours after the invocation of the Act, shows that the vast majority of Convoy protests outside of Ottawa had been successfully managed through communication and negotiation over the preceding 10-12 days. Normal operations had resumed at the Ambassador Bridge in Windsor.

[264] As for Coutts, the same report indicates that there had been a successful operation overnight, that several arrests had been made, that weapons and ammunition had been seized, and that the government of Alberta had provided a number of tow trucks to assist in the removal of vehicles and was working on an injunction to provide assistance to keep the area free of other protests: AB, Vol. 9, Tab 13.19.4, p. 5291. This is indeed confirmed by the Section 58 Explanation, which adds that border services were fully restored on February 15, 2022: AB, Vol. 4, Tab 13.2, p. 1321.

[265] As troubling and concerning as the situation at Coutts may have been at the time, the record shows that it was effectively dealt with for all intents and purposes before the Proclamation, and there is no explanation as to how the Regulations enacted in its wake

contributed in any way to restoring public order. The AGC's claim that the effectiveness of existing laws is entirely speculative is therefore spurious; what is speculative is the AGC's submission that the *Criminal Code* "riot" measures could have led to clashes between police, Convoy participants and counter-protesters. This is clearly not sufficient to meet the thresholds of a "national emergency" as defined in the Act and to suspend the federal nature of our Constitution.

[266] As for the situation prevailing in Ottawa, it appears from the Section 58 Explanation that the concern had more to do with leadership issues within the OPS and the willingness of some of its members to enforce the law. After noting that the Chief of the OPS resigned on February 15, 2022 "in response to criticism of the police's response to the protests", the Section 58 Explanation suggests that the main justification for the claim that there were no existing laws that could effectively deal with the emergency was a lack of resources:

> 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 inability of municipal and provincial authorities to enforce the law or control the protests may lead to further reduction in public confidence in police and other Canadian institutions.
>
> AB, Vol. 1, Tab 5, pp. 211-213.

[267] This is a far cry from the requirement that there be no other law of Canada that could effectively be used to deal with a situation that endangers the lives, health or safety of Canadians. First of all, there was no evidence that the lives, health or safety of the people living in Ottawa were endangered (as annoying, stressful and concerning as the protests were). But more

importantly, what was lacking to re-establish public order was not more legal tools beyond what was already available, but more policing resources. If the issue was that the OPS could not enforce the rule of law, new laws would not be helpful, and neither the Regulations nor the Economic Order provided for an increase in the operational capacity of the police, as noted by the Federal Court (at para. 231).

[268] In any event, if the issue was first and foremost an issue of resources, the Section 58 Explanation is deficient to the extent that it does not address the possibility of deploying the OPP. As noted again by the Federal Court, nothing prevented the provincial government from augmenting the capacity of the OPS through the deployment of additional police from within the province. Under the statute in force at the time, *Police Services Act*, R.S.O. 1990, c. P.15, subsection 42(2) allows a member of a "police service" (i.e., municipal police officers and OPP officers) to act as such throughout Ontario, which includes the power to enforce provincial offences and the *Criminal Code* (which includes municipal by-laws via section 127). Moreover, the *Interprovincial Policing Act, 2009*, S.O. 2009, c. 30, section 11, enables municipal police forces and the OPP to appoint police officers immediately from other provinces on an urgent basis, thereby granting them the same powers as municipal police and the OPP – that is, to enforce municipal by-laws, provincial laws, and the *Criminal Code*.

[269] Finally, RCMP officers always possess the power to enforce the *Criminal Code* throughout Canada, even in those provinces (like Ontario) where they have not been contracted to provide for the enforcement of the criminal law. While there is a longstanding practice not to

exercise these powers when there is a provincial police force, there is no legal barrier preventing it, and it would be far less exceptional than invoking the Act.

[270] We are therefore of the view (like the Federal Court) that, on the basis of the record, Cabinet could not reasonably come to the conclusion that existing provincial capacity and authority could not effectively address the situation. The Section 58 Explanation and the Invocation Memorandum do not explain how this exacting requirement to establish the existence of a national emergency has been met. In coming to this conclusion, we are mindful of the historical context within which the Act was adopted and of the constitutional strictures that must necessarily constrain its interpretation.

[271] This is not to say that the Act, along with the Regulations and the Economic Order adopted thereunder, was not convenient and did not provide helpful, effective tools to restore public order and bring back some normality to the chaotic and, at times, threatening situations that erupted in different corners of the country. However, this is not the test set out in the Act. To bring about a temporary suspension of the division of powers between Parliament and the provincial legislatures requires more than convenience, and the lack of any compelling explanation as to why Cabinet was of a contrary view only compounds the issue.

[272] Turning next to the requirement of provincial incapacity or authority, the AGC argues that the Federal Court erred when it stated that the Act appears to require Cabinet to wait, when the country is threatened by serious and dangerous situations, to allow provinces to decide for

themselves whether they have the capacity or authority to deal effectively with the situation. This interpretation, it is submitted, would produce intolerable results.

[273] We agree with the AGC that Cabinet cannot sit idly and wait indefinitely until the provinces have determined if they have both the jurisdiction and the tools to effectively address a situation that seriously endangers the health and safety of Canadians. This would not only lead to intolerable results but would also be manifestly irresponsible. Nor does section 58 require that every province agrees with the federal assessment that a public order emergency exists. Subsection 25(1) only requires that the provinces be consulted. This obligation to consult does not vest in any one province the power to veto the Proclamation. The only situation where the consent of a province is required is where the effects of the emergency are confined to one province. Pursuant to subsection 25(3), Cabinet may not issue a declaration of a public order emergency in such a case unless the province indicates that the emergency exceeds its capacity or authority to deal with it.

[274] That being said, the ultimate question to be answered is whether Cabinet's determination that the provinces did not have the capacity or authority to deal effectively with the situation is reasonable, taking into account the legal and factual context. In our view, it cannot be, for a number of reasons.

[275] When consulted a few hours before the Act was invoked, most provinces expressed the view that provincial capacity and authority were not exceeded, and that the invocation of the Act would be divisive, unconstructive and unnecessary. Only Ontario, British Columbia and

Newfoundland appear to have supported the use of the Act, on a time-limited basis: see Report to the Houses of Parliament: Emergencies Act Consultations, AB, Vol. 6, Tab 13.9.2, at pp. 3419-3421.

[276] Yet, Cabinet failed to engage in any meaningful way with these submissions. Neither the Invocation Memorandum nor the Section 58 Explanation grapples with the input provided by the provinces, not only from the call that took place on the morning of February 14, 2022 but also from the extensive consultation that took place from the outset of the Convoy crisis. This is a serious deficiency. As stated in *Mason* (at para. 74, citing *Vavilov* at para. 128), "a decisionmaker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it".

[277] This is particularly troubling in the context of a legislative provision providing that Cabinet may not issue a declaration of public emergency if, when only one province is affected, that province is of the view that it has the capacity and authority to deal with it. If the input of a single province (admittedly in a context where it is the only one affected) carries so much weight, one would expect that the opposition of several provinces would at least be seriously considered instead of seemingly being disregarded.

[278] The same logic applies in the context of a public order emergency extending to more than one province. Pursuant to subsection 25(2), Cabinet may issue a public order emergency before a province affected by the emergency has been consulted, if it is of the opinion that the province

cannot be adequately consulted without unduly jeopardizing the effectiveness of the proposed action. In such a case, however, the province must nevertheless be consulted before the motion for confirmation of the declaration is laid before either House of Parliament. This is further evidence that the requirement of consultation with the affected provinces is not mere rhetoric and is indeed an essential requirement.

[279] The AGC also submitted that provincial incapacity was demonstrated by the requests from some provinces for federal assistance to resolve the blockades at ports of entry: AB, Vol. 6, Tab 13.9.1, at pp. 3402-3403. There are several problems with this argument.

[280] First, there is no indication that Cabinet relied on these requests as a ground for establishing provincial incapacity. It is also to be noted that at least one of these requests (i.e., that of Manitoba) was made several days before the Act was actually invoked. This may explain why Manitoba (and Alberta, which also made a similar request) was of the view that the invocation of the Act was no longer necessary on the morning of February 14, 2022. Second, these requests could not reasonably be taken as proof, or even indicia, of nationwide inability supporting the decision to declare an emergency of national scope. Third, and perhaps most importantly, ordinary federal-provincial cooperation does not demonstrate that there is a national emergency; quite to the contrary, it is very much part of the fabric of a federal constitution. In the working paper that was released contemporaneously with the introduction of Bill C-77 in Parliament, the government of the day made it clear that “such federal assistance as might be provided without recourse to exceptional powers” was intended to be captured in the meaning of provincial capacity or authority: Emergency Preparedness Canada, Working Paper – Bill C-77:

An Act to provide for safety and security in Emergencies (1987), at p. 56. Although that discussion took place in the context of Part I of the Act, there is no reason to believe that it is not equally applicable to Part II.

[281] The AGC also contends, focusing on the use of the singular "province" in the definition of "national emergency" in section 3 of the Act, that the critical issue to be determined is "whether the emergency extends beyond provincial borders, preventing any one province from resolving the entire crisis, or at least one province having indicated the emergency is beyond its capacity or authority, such that the provinces collectively are unable to resolve the crisis". Such an argument, in our respectful opinion, cannot be sustained.

[282] First of all, this argument is inconsistent with subsection 33(2) of the *Interpretation Act*, which provides that words in the singular include the plural. This is borne out by the French version of the Act, which refers to "la capacité ou [les] pouvoirs d'intervention des provinces" (emphasis added). At the end of the day, whether an urgent and critical situation has reached the level of a national emergency is not a purely mathematical exercise; it must rest on an assessment of the nature and intensity of the facts and situation at hand.

[283] Moreover, the test of provincial incapacity cannot simply be that the emergency extends beyond provincial borders, such that no single province can resolve the entire crisis. Since provinces cannot act extra-territorially, it would mean that every time a situation extends beyond the borders of one province, the provincial capacity or authority test would be met. Such an

interpretation would clearly be inconsistent with the overall scheme and “last resort” character of the Act.

[284] There would be no need to consult each province in which the effects of the emergency occur, pursuant to subsection 25(1), if the Act could be invoked as soon as it was found that one province does not have the authority or capacity to deal effectively with the situation. In fact, subsection 25(3) is predicated on the notion that the effects of an emergency may be felt in only one province, in which case the declaration of a public order emergency will not be national in scope and ought to be confined to the province.

[285] The subtext of the AGC’s argument in this respect appears to be that the federal government is allowed to step in and declare a national emergency even if the provinces do not agree with the measures to be taken and are not prepared to implement them. This is an interpretation that should be resisted, both because it is inimical to the wording of section 3 and because it is inconsistent with the constitutional underpinning of the Act. The definition of a “national emergency” speaks of a situation that is of such proportion or nature as to exceed the capacity or authority of a province, not its willingness to act. Had Parliament intended a different interpretation, it could have worded the definition differently, for example by using the words “to exceed the borders of a province”.

[286] In a federation, provinces should be left to determine for themselves how best to deal with a critical situation, especially when it largely calls for the application of the *Criminal Code* by police forces. The emergency power (and, with it, the suspension of the constitutional

division of powers) cannot be employed to override a provincial government's decision not to exercise its powers, or to exercise them in a manner that does not conform with the preferences of the federal government. To the extent that a situation is not of such proportions or nature as to exceed the capacity or authority of the provinces, they should be left to their own devices. Of course, the federal government could nevertheless issue a declaration of a public order emergency if the situation seriously threatens its ability to preserve the sovereignty, security and territorial integrity of Canada, pursuant to the second branch of the national emergency definition at section 3 of the Act.

[287] For all of the above reasons, we are of the view that Cabinet did not have reasonable grounds to believe that a national emergency existed, taking into account the wording of the Act, its constitutional underpinning and the record that was before it at the time the decision was made. In light of the fact that the two other requirements to declare a public order emergency were not met either, we are therefore of the view that the Proclamation was unreasonable and *ultra vires*.

C. *The Charter Issues*

[288] The Preamble to the *Emergencies Act* states that in taking special temporary measures under the Act, the GIC is subject to the Charter.

[289] While the respondents have not challenged the constitutional validity of the *Emergencies Act*, they assert that certain of the temporary measures that were adopted to deal with the protests

infringed several provisions of the Charter. In particular, they argued before the Federal Court that the Regulations infringed several of the fundamental freedoms guaranteed by section 2 of the Charter. That is, the respondents submitted that the prohibition on public assemblies contained in section 2 of the Regulations, the prohibition on travel to an assembly in section 4, and the prohibition on providing property to facilitate or participate in a prohibited assembly in section 5 all inhibited basic and essential forms of democratic participation, infringing on the freedoms of expression, peaceful assembly and association guaranteed by paragraphs 2(b), (c) and (d) of the Charter.

[290] The respondents also argued that subsection 10(2) of the Regulations (which creates penalties for failure to comply with the temporary special measures, including fines of up to $5,000 and imprisonment for up to five years), engaged the liberty interest protected by section 7 of the Charter, and was geographically overbroad.

[291] Finally, the respondents argued that three provisions of the Economic Order infringed on protesters' section 8 right to be secure against unreasonable searches or seizures.

[292] The Federal Court dismissed the respondents' arguments as they related to paragraphs 2(c) and (d) of the Charter, as well as those relating to section 7. It found, however, that the Regulations violated paragraph 2(b) and section 8 of the Charter, and that these infringements had not been justified under section 1.

[293] No appeal has been taken from the Federal Court's judgment with respect to the alleged breaches of paragraph 2(d) and section 7 of the Charter.

[294] However, the AGC appeals from the Federal Court's judgment with respect to the paragraph 2(b) and section 8 infringements, as well as the finding that these infringements were not justified under section 1 of the Charter. The CCLA and the CCF cross-appeal, arguing that the Federal Court erred in finding that the Regulations did not violate paragraph 2(c) of the Charter, asserting as well that any infringement of protesters' freedom of assembly could not be justified under section 1.

[295] Each of these arguments will be addressed below. Before doing so, however, it is first necessary to address the standard of review to be applied to the Federal Court's findings with respect to the Charter issues.

(1) The standard of review to be applied to the Charter issues

[296] The Supreme Court held in *Vavilov* that the standard of correctness applies to constitutional questions: at para. 53. This is because constitutional questions require a final and determinate answer from the courts: at paras. 17, 55 and 57. More recently, in *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 [*Société des casinos*], the Supreme Court held that the standard of correctness applies to questions of law and of mixed fact and law in the Charter context. This includes findings as to whether the facts of a case satisfy the applicable legal test, as such questions involve the

weighing of the constitutional significance of the findings of fact made as to the claimants' situation by reference to the freedom at issue: at paras. 45, 94 and 97.

[297] In contrast, purely factual findings that can be isolated from the constitutional analysis are entitled to deference. This is because the rule of law does not require that there be a determinate and final answer to such questions, as pure questions of fact will vary from case to case: *Société des casinos* at para. 97.

(2) Paragraph 2(b) of the Charter

[298] Paragraph 2(b) of the Charter provides that everyone has "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". At issue here is subsection 2(1) of the Regulations, which provides that "[a] person must not participate in a public assembly that may reasonably be expected to lead to a breach of the peace" in various ways, including by "the serious disruption of the movement of persons or goods or the serious interference with trade". Also prohibited is "the interference with the functioning of critical infrastructure" and "the support of the threat or use of acts of serious violence against persons or property".

[299] Subsection 4(1) of the Regulations is also in issue. It provides that "[a] person must not travel to or within an area where an assembly referred to in subsection 2(1) is taking place". The respondents also challenge section 5 of the Regulations, which states that "[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".

[300] The Federal Court found that the impugned provisions of the Regulations were overbroad to the extent that they captured peaceful protesters who simply wanted to support the protest by standing on Parliament Hill carrying a placard ("peaceable protesters").

[301] Although such individuals would not likely have been the focus of enforcement efforts by the police, they could nevertheless have been subject to enforcement actions under the Regulations in the same way as someone who parked their truck on Wellington Street and behaved in a manner that could reasonably be expected to lead to a breach of the peace. This led the Federal Court to find that the right to freedom of expression of individual protesters who did not participate in the disruption of the peace was thus infringed.

[302] Insofar as the section 1 justification was concerned, the Federal Court found that the GIC had a pressing and substantial objective in enacting the Regulations, and that they were rationally connected to the goal of ending the blockades. The Court nevertheless found that the AGC had not established that protesters' right to freedom of expression had been 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 [*Hutterian Brethren*] at para. 194.

(a) *The AGC's arguments*

[303] The AGC submits that the Federal Court erred in finding that the Regulations unjustifiably limited protesters' freedom of expression under paragraph 2(b) of the Charter. The AGC states that the sole purpose of the Regulations was to address and dissuade participation in illegal activities across Canada in order to bring about a swift, orderly, and peaceful end to the circumstances that necessitated the Proclamation.

[304] According to the AGC, the temporary measures, including the Regulations, were limited, proportionate, and tailored to their objectives, while still respecting Charter rights. To the extent that the Regulations limited protesters' right to freedom of expression, any such limit was minimal, temporary, and justified in light of the unfolding public order emergency.

[305] The AGC further notes that not all activities associated with protests come within the purview of paragraph 2(b) of the Charter, and that it does not protect violent acts or threats of violence which undermine the rule of law.

[306] According to the AGC, activities that are purely physical—such as blockades that act through physical coercion—might bolster or supply infrastructure for a protest but do not themselves convey meaning. Consequently, they are not expressive activities within the scope of paragraph 2(b) of the Charter: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36 [*Irwin Toy*] at para. 41. The Regulations only prohibited participation in public assemblies that might reasonably be expected to breach the peace by disrupting the

movement of persons or goods, by seriously interfering with trade or with critical infrastructure, or by supporting the threat or use of serious violence. Such actions are not constitutionally protected or free from reasonable limits.

[307] To the extent that some forms of participation in the Convoy assemblies could be considered protected forms of political expression, the AGC submits that the Federal Court erred in finding that the limits on this expression were not justified under section 1 of the Charter. The AGC contends that these measures were a proportional means of achieving the goal of the Regulations, that is, to bring a peaceful end to the unlawful occupations and blockades with their significant adverse impacts, and to prevent their recurrence.

[308] The AGC notes that properly characterizing the Regulations' objective is essential in assessing the proportionality of the means chosen to achieve them. Here, the Federal Court described the purpose of both the Regulations and the Economic Order as being "to clear out the blockades that had formed as part of the protest". However, the Court's failure to appreciate how the measures operationalized this objective compromised its analysis.

[309] The AGC notes that the Regulations were enacted on February 15, 2022, the day after the arrests and discovery of a cache of firearms, high-capacity magazines and body armor bearing the "Diagolon" insignia at Coutts. Without the benefit of hindsight, the GIC could not have known that the border blockade at Coutts had in fact been finally resolved. Nor could the GIC have known that existing legislative tools were proving to be able to manage protests in Alberta. Moreover, the potential for an increase in the level of unrest and violence that would further

threaten the safety and security of Canadians was real, and the situation across Canada on February 14, 2022, remained "concerning, volatile and unpredictable": Section 58 Explanation at p. 4. Demonstrations were continuing to pop up, and it was impossible to know where the next blockade might arise. Blockades and occupations across the country were a national phenomenon that supported a national solution.

[310] The AGC further contends that the Federal Court erred in finding that the Regulations were not proportional, given that the limit on the protected freedom does not have to be "perfectly calibrated, judged in hindsight, but only that it be 'reasonable' and 'demonstrably justified'": *Hutterian Brethren* at para. 37. The AGC says that the measures chosen by the GIC in this case were minimally impairing, especially when considering the unique urgency and circumstances of the crisis at hand.

[311] According to the AGC, the Federal Court further erred by requiring the GIC to have accepted options that would have been less effective in achieving the Regulations' objectives. It was necessary for all individuals—even those who were simply "standing on Parliament Hill carrying a placard"—to be removed and denied further access to the protest site in order to shrink its footprint and ensure a safe and effective resolution that would re-establish public order permanently. The AGC argues that the Charter does not require absolute rules, unnecessary rigidity, or lack of common sense with respect to the private use of public spaces, and the Federal Court erred in equating the occupation of Canada's capital and active interference with the democratic process as being tantamount to core political protest.

[312] The AGC observes that over the course of the occupation, many government functions, including sittings of Parliament and general, day-to-day government administration, were undermined. As the Federal Court noted, conditions in downtown Ottawa were "intolerable" due to the protest that had become a blockade. While published images of people enjoying the hot tub and the bouncy castle set up near Parliament Hill suggested a benign intent on the part of protesters, "there were undoubtedly others present there and elsewhere at the blockades across the country with a darker purpose": *Nagle* at para. 243.

[313] The AGC submits that in a situation such as this, where interests and rights conflicted, it was not for the Federal Court to intervene simply because, with the benefit of hindsight, it thought of a better, less intrusive way to manage the problem. Deference is merited where the means chosen by the GIC fell "within a range of reasonable solutions to the problem confronted": *R. v. Sharpe*, 2001 SCC 2 [*Sharpe*] at para. 96; *Hutterian Brethren* at para. 85. During the limited period of invocation, peaceable protesters were free to protest outside of the restricted areas, and once order was re-established and the Proclamation had been revoked, peaceable protesters were once again able to resume their protests on Parliament Hill.

[314] The AGC says that the Regulations were thus minimally impairing, and their collective benefit outweighed any deleterious effects that they may have had. As a result, any breach of protestors' paragraph 2(b) right to freedom of expression was proportional and justified under section 1 of the Charter.

(b) *The respondents' arguments*

[315] The respondents submit that paragraph 2(b) of the Charter provides the broadest possible protection for freedom of expression, and that "the right to protest government action lies at the very core of the guarantee of freedom of expression": *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208 [*Figueiras*] at para. 69, citing *Ontario Teachers' Federation v. Ontario (Attorney General)*, [2000] O.J. No. 2094, 49 O.R. (3d) 257 (C.A.) [*Ontario Teachers' Federation*] at para. 34. Paragraph 2(b) further protects any expressive activity as long as there is an "attempt to convey meaning": *Irwin Toy* at para. 41. The purpose of protecting freedom of expression is to "ensure that everyone can manifest their thoughts, opinions, beliefs […] however unpopular, distasteful or contrary to the mainstream".

[316] While the AGC argues that the Regulations did not violate paragraph 2(b) of the Charter because they sought to end blockades and disruptive protest activity that fell outside its protection, he ignores the fact that the Regulations sought to end the blockades and the disruptions by stamping out entire protests. The Regulations did not just prohibit creating a blockade—they prohibited attendance at a protest where a blockade might occur in the future. The Regulations defined a "breach of the peace" to include not just blockades, but "disruptions" of the movement of people and of trade, threatening anyone who attended a protest where a breach of the peace might occur—regardless of what they were actually doing at the protest—with five years in prison, whether or not they participated in conduct actually leading to a breach of peace. The respondents thus submit that the Regulations enjoined activities that fell far short of violence.

[317] By criminalizing the entire protest, the Regulations limited the right to expression of peaceable protestors who wanted to convey their dissatisfaction with government policies, but who did not intend to participate in the blockades.

[318] The respondents say that the restriction on travel contained in section 4 of the Regulations was similarly overbroad, capturing individuals who simply walked over to a public assembly where someone else was disrupting the movement of traffic, even if the individual had no intention of helping or joining in with the disruption of movement. Moreover, by prohibiting anyone from providing "property" to those participating in such a broadly defined "public assembly," section 5 caught anyone who gave water or food to a person who was standing peacefully on Parliament Hill while others were disrupting traffic.

[319] Each of these individuals would be subject to up to five years imprisonment—not because of anything they were doing—but because they were at the same event as other people who either were or might breach the peace.

[320] Finally, the respondents say that the Federal Court did not err in finding that the limitation on freedom of expression created by the Regulations was not justified under section 1 of the Charter, as it was overbroad, capturing not just people who parked their trucks on Wellington Street in Ottawa, but also peaceable protesters. Both groups were subject to the same punishment—fines of up to $5,000.00 and up to five years in prison. There were, moreover, other, less impairing alternatives that were available to the GIC, including limiting the reach of

the Regulations to the places where the protests actually existed, instead of having them apply across Canada.

(c) *Analysis*

(i) Paragraph 2(b) of the Charter and Political Expression

[321] Freedom of expression is one of the four fundamental freedoms guaranteed by section 2 of the Charter.

[322] While paragraph 2(b) of the Charter guarantees freedom of expression, freedom of expression is not just a creation of the Charter. It is, rather, "one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society": *RWDSU v. Dolphin Delivery Ltd*., [1986] 2 S.C.R. 573, [1986] S.C.J. No. 75 [*Dolphin Delivery*]. Indeed, representative democracy "is in great part the product of free expression and discussion of varying ideas": both quotes at para. 12.

[323] Freedom of expression is described in section 2 of the Charter as a "fundamental freedom" "because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual": *Irwin Toy* at para. 41. Indeed, freedom of expression has been described as "a necessary feature of modern democracy": *Dolphin Delivery* at para. 14.

[324] The Supreme Court has further held that "[t]he connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee", and that "the nature of this connection is largely derived from the Canadian commitment to democracy": *R. v. Keegstra*, [1990] 3 S.C.R. 697, [1990] S.C.J. No. 131 [*Keegstra*] at para. 89. The Supreme Court has, moreover, repeatedly held that "liberal democracy demands the free expression of political opinion, and [has] affirmed that political speech lies at the core of the *Canadian Charter of Rights and Freedoms'* guarantee of free expression": *Harper v. Canada (Attorney General)*, 2004 SCC 33 [*Harper*] at paras. 1, 47, 66 and 84.

[325] Indeed, the Supreme Court has stated that "[p]olitical speech […] is the single most important and protected type of expression", that "lies at the core of the guarantee of free expression": *Harper* at para. 11 [our emphasis], citing *R. v. Guignard*, 2002 SCC 14 at para. 20; *Sharpe* at para. 23; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1989] 1 S.C.R. 877, [1998] S.C.J. No. 44 [*Thomson Newspapers*] at para. 92; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, [1991] S.C.J. No. 3 [*Committee for the Commonwealth of Canada*] at p. 175; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, [1998] S.C.J. No. 124 at p. 1336; *Irwin Toy* at para. 41.

[326] Given the importance of political speech and its place at the core of the freedom of expression guaranteed by paragraph 2(b) of the Charter, it "warrants a high degree of constitutional protection": *Harper* at para. 84, and can be restricted only for the most substantial and compelling reasons. Broad protection is, moreover, required at the paragraph 2(b) stage, as

governments can limit freedom of expression where they can justify the limitation under section 1 of the Charter: *Montréal (City) v. 2952-1366 Québec Inc*., 2005 SCC 62 at para. 79.

[327] The Supreme Court held in *Irwin Toy* that the first step in the paragraph 2(b) analysis requires that a court determine whether the activity being regulated falls within the sphere of conduct protected by freedom of expression. If the activity being regulated has expressive content and does not convey a meaning through a violent form, it is *prima facie* protected by paragraph 2(b) of the Charter: *Irwin Toy* at para. 41.

[328] The second step in the *Irwin Toy* analysis requires the court to determine whether the purpose or effect of the government action in question is to restrict freedom of expression: at para. 45. If it does, a breach of paragraph 2(b) is made out: *Irwin Toy* at para. 55. The third step in the analysis is then whether the breach of freedom of expression has been justified under section 1 of the Charter: *Weisfeld v. Canada*, [1995] 1 F.C. 68, 116 DLR (4th) 232 (FCA) [*Weisfeld*] at para. 42.

(ii) Step 1: Does the activity being regulated fall within the sphere of conduct protected by freedom of expression?

[329] In determining whether there had been a violation of the right to freedom of expression, a court must first determine whether the activity in question falls within the protected sphere of expression.

[330] In assessing whether something constitutes “expression”, paragraph 2(b) is content-neutral: that is, it does not consider the worthiness of the opinion in question. The purpose of

protecting freedom of expression is "to ensure that everyone can manifest their thoughts, opinions […] however unpopular, distasteful or contrary to the mainstream" they may be: *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at para. 59, citing *Irwin Toy* at para. 41. The only exception to this broad protection is for expressive acts involving or threatening violence.

[331] As noted, the AGC submits that while activities that are purely physical—such as blockades that operate through physical coercion—might bolster or supply infrastructure for a protest, they do not themselves convey meaning. Consequently, they are not expressive activities within the scope of paragraph 2(b) of the Charter: *Irwin Toy* at para. 41. The Regulations only prohibited participation in public assemblies that might reasonably be expected to breach the peace by disrupting the movement of persons or goods, by seriously interfering with trade or with critical infrastructure, or by supporting the threat or use of serious violence. According to the AGC, such actions are not constitutionally protected or free from reasonable limits.

[332] However, contrary to the AGC's contention that "purely physical" activities are not expressive, the Supreme Court has recognized that subject only to narrow exceptions, paragraph 2(b) of the Charter captures "any activity or communication that conveys or attempts to convey meaning": *Thomson Newspapers* at para. 81, citing *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, [1997] S.C.J. No. 85 at para. 31; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 at para. 34.

[333] In *Irwin Toy*, the Supreme Court recognized that paragraph 2(b) of the Charter guarantees freedom of expression, and not just freedom of speech, and that activities will be expressive if they attempt to convey meaning. Indeed, the Supreme Court specifically identified illegal or unauthorized parking as an example of non-verbal activity that could qualify as expressive if the rights claimant could demonstrate that the activity was performed to convey or to attempt to convey a meaning: *Irwin Toy* at paras. 41, 42. That is clearly the case here.

[334] The symbolic location of protests at border crossings and on the street in front of Parliament Hill also cannot be overlooked as it too conveyed meaning: *Weisfeld* at para. 29. This is because "the dissemination of an idea is most effective when there are a large number of listeners" and that "the economic and social structure of our society is such that the largest number of individuals, or potential listeners, is often to be found in places that are state property": *Committee for the Commonwealth of Canada* at para. 11. State property such as border crossings and Parliament Hill are thus ideal locations for persons wishing to communicate ideas.

[335] Given this, we are satisfied that the protests and blockades at issue in this case were activities that clearly attempted to convey meaning and constituted "expression" within the meaning of paragraph 2(b) of the Charter.

[336] Having found that the protesters' activities constituted "expression", the next question is whether there were circumstances that would warrant removing the expressive activities from the sphere protected by paragraph 2(b): *Irwin Toy* at para. 52.

[337] Although the Charter provides robust protection for protest activities, not all activities associated with protests fall within the scope of section 2 freedoms, including freedom of expression. As noted earlier, violent expression and expression that threatens violence is not protected by paragraph 2(b) of the Charter: *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para. 112; *Greater Vancouver Transportation Authority v. Canadian Federation of Students—British Columbia Component*, 2009 SCC 31 at para. 28; *Dolphin Delivery* at para. 20.

[338] Like violence itself, threats of violence "undermine the very values and social conditions that are necessary for the continued existence of freedom of expression" and "take away free choice and undermine freedom of action", undermining the rule of law: *R. v. Khawaja*, 2012 SCC 69 [*Khawaja*] at paras. 67 and 70.

[339] Protests are inherently disruptive: indeed, that disruption is part of the expression. Protesting is "a well-established expressive activity": *Figueiras* at para. 69. It has also been said that "the right to protest government action lies at the very core of the guarantee of freedom of expression": *Ontario Teachers' Federation* at para. 34.

[340] Moreover, as the Court of Appeal for Ontario has confirmed, "a protest does not cease to be peaceful simply because protestors are loud and angry": *Bracken v. Fort Erie (Town*), 2017 ONCA 668 at para. 51.

[341] The AGC says that the Regulations did not violate paragraph 2(b) of the Charter because they sought to end blockades and disruptive protest activity that fell outside its protection. The Regulations did more than that, however: they sought to end the blockades and disruptions by stamping out entire protests—affecting those involving violent acts as well as protesters engaged in entirely peaceful, non-violent activities.

[342] That is, the Regulations prohibited peaceful political protests, inhibiting basic and essential forms of non-violent democratic participation, including those involving protesters in Ottawa who chanted, carried signs, and expressed their political beliefs and opinions in an entirely peaceful manner. Moreover, as the respondents observed, the Regulations did more than simply prohibit the creation of blockades: they also prohibited attendance at a protest where a blockade might occur, regardless of what individuals were actually doing at the protest.

[343] It is true that some protesters did breach the peace by blockading downtown Ottawa, disturbing the peace with incessant noise from truck horns, train-type whistles, late night street parties, fireworks and constant megaphone-amplified cries of “freedom”. While undoubtedly disruptive and very annoying to residents of downtown Ottawa, this was non-violent expressive activity that manifestly attempted to convey protesters’ dissatisfaction with the federal government’s Covid policies.

[344] However, as the Federal Court found, the Regulations did not just catch people involved in non-peaceful activities such as those described in the previous paragraph, they also caught peaceable protesters. Such individuals would violate section 2 of the Regulations through their

mere presence at a protest in a non-violent capacity. These individuals could, moreover, have been subject to enforcement actions as much as someone who parked their truck on Wellington Street, or otherwise engaged in conduct that could lead to a breach of the peace.

[345] The Regulations thus criminalized mere attendance at the protests by anyone, whether or not they participated in the violent conduct or otherwise breached the peace. By criminalizing the entire protest, the Regulations limited the expressive rights of protestors who wanted to convey their dissatisfaction with Government policies in a peaceful, non-violent manner.

[346] The actions of such individuals did not warrant removing their expressive activities from the protected sphere under paragraph 2(b) of the Charter, as their activities did not convey meaning through a violent form. Their expressive activities were therefore *prima facie* protected by paragraph 2(b): *Irwin Toy* at para. 41.

(iii) Step 2: Does the purpose or effect of the Regulations restrict freedom of expression?

[347] The second step in the *Irwin Toy* analysis requires the court to determine whether the purpose or effect of the government action in question was to restrict freedom of expression: *Irwin Toy* at para. 45.

[348] As discussed in the previous section of these reasons, the effect of the Regulations was to criminalize attendance at public assemblies that may reasonably be expected to lead to a breach of the peace by anyone, including peaceable protesters.

[349] By criminalizing entire protests, the Regulations did not just limit the right to freedom of expression of those who were engaged in activities that breached the peace. They also limited the right to freedom of expression of protestors who wanted to convey their dissatisfaction with Government policies in a peaceful, non-violent manner, who did not intend to participate in the blockades or otherwise disrupt the movement of traffic or the functioning of critical infrastructure, and who did not support the threat or use of acts of serious violence against persons or property. Such individuals were nevertheless violating section 2 of the Regulations through their simple presence at a public assembly where a breach of peace was happening or might reasonably have happened or might happen in the future. The purpose and effect of the Regulations were thus to restrict the freedom of expression of such individuals.

[350] The restriction on travel contained in section 4 of the Regulations was similarly overbroad, capturing individuals who simply walked over to a public assembly where others were disrupting the movement of traffic or otherwise disrupting the peace, even if the individual had no intention of helping or joining in with the disruption of movement. Once again, such individuals were subject to prosecution, even if all they wanted to do was to stand quietly on public property in solidarity with other protesters.

[351] Moreover, by prohibiting anyone from providing “property” to those participating in such a broadly defined “public assembly,” section 5 of the Regulations caught anyone who gave food or water to people standing peacefully on Parliament Hill while others were disrupting traffic or otherwise breaching the peace. It also caught anyone who donated funds in support of peaceable

protesters who were adding their voices in support of the goals of the protests—clearly an expressive act.

[352] The purpose or effect of the Regulations was thus clearly to restrict the freedom of expression of these individuals.

[353] The next question then is whether this restriction on freedom of expression imposed by the Regulations can be justified under section 1 of the Charter.

(iv) Step 3: Can the limitation on protesters' freedom of expression imposed by the Regulations be justified under section 1 of the Charter?

[354] Section 1 of the Charter provides that rights protected by the Charter may be subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[355] To the extent that some forms of participation in the Convoy protests could be considered to be protected forms of political expression, the AGC submits that the Federal Court erred in finding that the limits placed on such expressive rights by the Regulations were not justified under section 1 of the Charter. The AGC says that the Regulations were a proportional means of achieving the government's goal, which was to bring about a peaceful end to the unlawful occupations and blockades with their significant adverse impacts, and to prevent their recurrence.

[356] The party seeking to uphold a limitation on a right or freedom guaranteed by the Charter bears the burden of demonstrating on a balance of probabilities that the infringement is justified: *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7 [*Oakes*] at paras. 66–67. We understand the parties to agree that the test to be applied in determining whether the Regulations are saved by section 1 of the Charter is that first articulated by the Supreme Court in *Oakes*.

[357] That is, to establish a section 1 justification, the AGC must demonstrate that the objectives of the Regulations were pressing and substantial. The AGC must further demonstrate that the impairment of the rights at issue was proportional to the importance of those objectives, in that the means chosen were rationally connected to the objectives of the Regulations, and that they impair the Charter rights minimally or "as little as possible": *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295, [1985] S.C.J. No. 17 at para. 139. That is, whether "the law falls within a range of reasonable alternatives": see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, [1995] S.C.J. No. 68 [*RJR-MacDonald Inc.*] at para. 160.

[358] The proportionality inquiry attempts to guide the balancing of competing individual and group interests protected by section 1 of the Charter: *Keegstra* at para. 42.

[359] The infringing measures must, moreover, be justified based on a "rational inference from evidence or established truths": *RJR-MacDonald Inc.* at para. 128. Bare assertions will not suffice: evidence, supplemented by common sense and inference, is needed: *Sharpe* at para. 78.

[360] There is no real dispute between the AGC and most of the respondents that the Government had a pressing and substantial objective in enacting the Regulations, namely clearing out the blockades that had formed as part of the protests. The CCF and CCLA further acknowledge that the Regulations were rationally connected to the goal of ending the blockades. The issue that divides the parties is whether the measures set out in the Regulations were minimally impairing, that is, whether protesters' right to freedom of expression was infringed as little as is reasonably possible.

[361] The AGC notes that properly characterizing the Regulations' objective is essential in assessing the proportionality of the means chosen to achieve them. Here, however, the Federal Court went no further than describing the purpose of both the Regulations and the Economic Order as being "to clear out the blockades that had formed as part of the protest". Although the Federal Court accepted that this purpose was pressing and substantial and that the measures chosen by the GIC were rationally connected to it, the AGC says that the Court's failure to appreciate how the measures operationalized it compromised its analysis.

[362] As noted earlier, the AGC contends that the Federal Court erred in finding that the Regulations were not proportional, as section 1 of the Charter "does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be 'reasonable' and 'demonstrably justified'": *Hutterian Brethren* at para. 37. It is also not necessary to show that Parliament adopted the least restrictive means of achieving its goal in order to establish that the measures taken minimally impaired the rights in issue. Rather, it will be sufficient if the means

adopted fall within a range of reasonable solutions to the problem confronted, leaving a reasonable margin of actions available to the state.

[363] The AGC submits that, to the extent that the Regulations limited protesters' right to freedom of expression, the measures chosen by the GIC in this case were minimally impairing as any such limit was minimal, temporary, and justified in light of the unique urgency and circumstances of the unfolding public order emergency.

[364] The Supreme Court tells us, however, that a law must "be reasonably tailored to its objectives" and that "it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account": *Sharpe* at para. 96 [underlining in the original].

[365] As noted, the AGC submits that the Regulations were carefully tailored and fell within the range of reasonable alternatives for practically resolving the blockades and occupations. According to the AGC, the Federal Court erred by failing to consider whether, at the relevant time, the GIC reasonably considered that the protests could spread, and that national measures were necessary. Instead, the AGC says the Federal Court came to its own hindsight-driven conclusion, without affording the GIC the deference required under section 1 of the Charter.

[366] As a result of the occupation, many government functions were undermined and conditions in downtown Ottawa had become intolerable due to the blockade. Considering this, the AGC says that the Federal Court erred by requiring the GIC to have accepted options that

would have been less effective in achieving the Regulations' objectives, and that it was necessary for all individuals to be removed and denied further access to protest sites in order to ensure a safe and effective resolution that would re-establish public order permanently.

[367] Moreover, where, as here, the interests and rights of the parties conflicted, the AGC says that it was not open to the Federal Court to intervene merely because, with the benefit of hindsight, it thought of better, less intrusive ways to manage the problem. The Federal Court erred by failing to accord deference where the means chosen by the GIC fell within a range of reasonable solutions to the problem confronted. Peaceable protesters were free to protest outside of the restricted areas, and once order had been re-established and the Proclamation was revoked, peaceable protesters were once again able to resume their protests on Parliament Hill.

[368] In light of these considerations, the AGC says that the Regulations were minimally impairing, and their collective benefit outweighed any deleterious effects that they may have had. As a result, any limitation of protestors' paragraph 2(b) right to freedom of expression was proportional and justified under section 1 of the Charter.

[369] The respondents submit that one less-impairing way to have achieved the government's goal would have been to limit the geographic reach of the Regulations to the places where protests actually existed, instead of having them apply nationally. For example, the reach of the Regulations could have been limited to Ontario, which faced the most intransigent situations. While this was the case at the time that the Regulations were enacted, the AGC submits that the Government could not have assumed that the situations would remain constant.

[370] We agree, but note that even if the GIC could not have known on February 15, 2022, that existing legislative tools were proving effective in Alberta, or have known with any degree of certainty that the border blockade at Coutts had in fact been finally resolved by the time that the *Emergencies Act* was invoked and the Regulations enacted, there were other, less impairing alternatives that were available to the GIC.

[371] For example, the GIC would have known on February 15, 2022, that the geographic reach of the Regulations could have been limited to Ontario and Alberta, where protests had been most active. The Regulations could then have been amended to cover other jurisdictions in the future, if necessary. This is not a "hindsight driven" suggestion. The wording of the *Emergencies Act* specifically contemplates that public order emergencies do not need to be declared nationally, but can extend "only to a specified area of Canada": subsection 19(2).

[372] Another way that the Regulations could have been made less impairing would have been to limit their application to those individuals actually disrupting the flow of traffic or otherwise behaving in a manner that could reasonably be expected to lead to a breach of the peace. The GIC could have created an exception within the Regulations for peaceable protesters.

[373] As discussed earlier, while the Regulations captured protesters who parked their trucks on Wellington Street and refused to move, disrupting the flow of traffic or who otherwise behaved in a manner that could reasonably be expected to lead to a breach of the peace, the Regulations also caught peaceable protesters. The Regulations were clearly not minimally impairing as they related to these individuals.

[374] That is, the GIC could have achieved the federal government's goal by limiting the reach of the Regulations to participants in the blockades themselves, instead of creating a prohibition on participating in a protest that involved a blockade. Rather than prohibiting participation in a protest that involved a blockade, the GIC could have prohibited the creation of blockades, tying its prohibition to the act of interrupting the normal flow of traffic, differentiating peaceable protesters from those creating blockades.

[375] Indeed, prohibiting the creation of blockades was the approach taken in Nova Scotia and Ontario in their emergencies measures responses, both of which were enacted prior to February 15, 2022.

[376] Nova Scotia's *Highway Blockade Ban* (Direction of the Minister under a Declared State of Emergency (Section 14 of the *Emergency Management Act*) (22-002) (dated January 28, 2022)) tied its prohibition to the specific act of interrupting the "normal flow of vehicle traffic", differentiating those who were peacefully protesting the government from those who were creating blockades and disrupting traffic. The directive also refrained from imposing criminal sanctions. Instead, it created fines of between $3,000 and $10,000 for individuals and $20,000 and $100,000 for corporations.

[377] Ontario's emergency regulation similarly limited the prohibitions to those actually engaged in the specific harm of blockades. The *Critical Infrastructure and Highways Regulation*, O. Reg. 71/22, prohibited people from impeding access to critical infrastructures and highways, giving police the power to order a person to move or to remove objects such as trucks, if they

had reasonable grounds to believe that the person was contravening the Regulation. If the person failed to comply, police could remove the object.

[378] The Federal Court thus did not err in finding that the limitations on freedom of expression created by subsection 2(1) of the Regulations had not been justified under section 1 of the Charter, as the scope of the Regulations was overbroad, and thus not minimally impairing.

[379] Section 4 of the Regulations was similarly overbroad. It captured peaceable protesters who simply walked over to a public assembly where others were disrupting the movement of traffic, even if they had no intention of helping or joining in the disruption of movement. These individuals were caught by the Regulations and subject to up to five years imprisonment, not because of anything they were doing but because they were at the same event as other people who either were breaching or might breach the peace.

[380] Moreover, by prohibiting anyone from providing “property” to those participating in a “public assembly”, section 5 of the Regulations caught people who provided food or water to peaceable protesters, while others were disrupting traffic, once again limiting the expressive rights of people who had done nothing to breach the peace.

[381] The minimal impairment analysis does not ask whether the GIC chose the “most effective” option for achieving its objective. Indeed, “the court need not be satisfied that the alternative would satisfy the objective to exactly the same extent or degree as the impugned

measure”: *Hutterian Brethren* at para. 55. It asks instead whether there was another option, less impairing of Charter rights, that was “sufficient”.

[382] As explained above, there were a number of options open to the GIC that would have been less broad, and less impairing of individuals’ expressive rights. Consequently, the AGC has failed to establish that the Regulations were minimally impairing, or that their collective benefit outweighed any deleterious effects that they may have had. As a result, the breach of protestors’ paragraph 2(b) right to freedom of expression was not justified under section 1 of the Charter.

(3) Section 8 of the Charter

[383] Section 8 of the Charter provides that “[e]veryone has the right to be secure against unreasonable search or seizure”.

[384] The Federal Court found that subsections 2(1) and sections 5 and 6 of the Economic Order contravened section 8 of the Charter and had not been justified under its section 1. The AGC submits that the Federal Court erred in finding that these provisions breached section 8 of the Charter, and that even if they did, the Court further erred in failing to find that any such breach was justified under section 1 of the Charter.

[385] Paragraph 2(1)(*a*) of the Economic Order directed specified classes of financial institutions to cease “dealing in any property […] 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". Paragraph 2(1)(*b*) of the Economic Order required such financial institutions to cease "facilitating any transaction related to a dealing referred to in paragraph (a)", whereas paragraph 2(1)(*c*) of the Economic Order required financial institutions to cease "making available any property, including funds or virtual currency, to or for the benefit of a designated person or to a person acting on behalf of or at the direction of a designated person". Finally, paragraph 2(1)(*d*) of the Economic Order required financial institutions to cease "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".

[386] The term "designated person" was defined in section 1 of the Economic Order as being "any individual or entity that is engaged, directly or indirectly, in an activity prohibited by sections 2 to 5 of the *Emergency Measures Regulations*".

[387] Section 5 of the Economic Order required financial institutions to disclose, without delay, to the Commissioner of the RCMP or to the Director of CSIS, "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". Financial institutions also had to disclose any information they may have had "about a transaction or proposed transaction in respect of [that] property".

[388] The types of finance-related institutions caught by the reporting requirements are listed in section 3 of the Economic Order. They included banks, crowdfunding platforms, and other such financial institutions and organizations. Section 3 of the Economic Order further provided that

these institutions “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”.

[389] Section 6 of the Economic Order provided that the Government of Canada, as well as provincial or territorial institutions “may disclose information to any entity set out in section 3, if the disclosing institution is satisfied that the disclosure will contribute to the application of this Order”.

(a) *The AGC’s arguments*

[390] The AGC states that the sole purpose behind the enactment of the Economic Order was to help discourage participation in activities prohibited by sections 2 through 5 of the Regulations.

[391] The AGC notes that section 8 of the Charter is designed to promote privacy interests and not property rights. Consequently, it does not apply to government actions “merely because those actions interfere with property rights”. To constitute a “seizure”, “there must be a superadded impact upon privacy rights occurring in the context of administrative or criminal investigation[s]”. Where property is taken by governmental action for reasons other than as part of an administrative or criminal investigation, a “seizure” under the Charter has not occurred: both quotes from *R. v. Laroche*, 2002 SCC 72 [*Laroche*] at para. 53.

[392] The Federal Court held that governmental action that results in funds in a bank account being unavailable to the account holder would be understood by most people to amount to the

"seizure" of the account. However, the AGC submits that this fails to consider the need for the governmental action to occur in the context of an administrative or criminal investigation for a section 8 violation to occur.

[393] According to the AGC, subsection 2(1) of the Economic Order did not place any property under the state's control to further either an administrative or a criminal investigation. Rather, it authorized temporary measures to bring the public order emergency to an end. It applied only to "designated persons" while they were engaged in specified prohibited activities, and its sole purpose was to discourage such participation. Subsection 2(1) required only that financial institutions "cease dealing" with or suspend services to such persons. Once the "designated person" stopped engaging in prohibited activities, the provision would cease to apply to them.

[394] This was consistent with the Economic Order's objective, the AGC says, which was to encourage individuals engaged in the illegal blockades to safely disperse and to prevent blockades from re-forming. Given that this objective was unrelated to an administrative or criminal investigation, it follows that any action taken pursuant to subsection 2(1) of the Economic Order did not constitute a "search" or a "seizure" for the purposes of section 8 of the Charter.

[395] In the submission of the AGC, the Federal Court further erred in finding that the information-sharing provisions in sections 5 and 6 of the Economic Order provided for "seizures". The AGC does not dispute that authorizing and requiring the sharing of personal financial information (which, it is submitted, are better understood as involving "searches"),

would engage the protection of section 8 of the Charter. However, he says that properly interpreted, searches under sections 5 and 6 of the Economic Order would be reasonable.

[396] The AGC submits that the Federal Court did not engage in the necessary interpretive exercise in finding that sections 5 and 6 of the Economic Order infringed section 8 of the Charter, and that it further erred by applying criminal Charter standards in a non-criminal context.

[397] Insofar as the interpretation of sections 5 and 6 of the Economic Order is concerned, the AGC submits that the Federal Court failed to have regard to the relevant considerations in assessing whether the law authorizing a search or seizure was reasonable in a non-criminal context, including the purpose and nature of the scheme and the mechanism of seizure: *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 [*Goodwin*]. These factors support the reasonableness of the information-sharing authorized by the Economic Order, and the failure of the Federal Court to consider them tainted its entire analysis.

[398] The Federal Court further erred, according to the AGC, in failing to explain how the information-sharing provisions failed to incorporate an objective legal standard, as paragraph 5(a) of the Economic Order required that financial institutions have "reason to believe" that the property in their possession or control was held by or on behalf of a "designated person".

[399] Given the urgency of the situation, the AGC contends that the GIC had a reasonable basis for concluding that the perceived harms existed, and the measures chosen by the GIC were

minimally impairing under the circumstances. The Economic Order had to apply across Canada in order to be effective in disrupting the funding of blockades and occupations, as participants came from across the country, as did their financial support. The failure to exempt joint account holders from the reach of the Economic Order also does not mean that its measures were not minimally impairing, as allowing for continued access to funds for joint account holders would have permitted ready circumvention of the Economic Order and undermined its deterrent effect.

[400] Consequently, the AGC says that the Federal Court erred in finding that the Economic Order unreasonably interfered with protesters' privacy rights, thereby infringing section 8 of the Charter. In addition, any limit on protesters' privacy rights imposed by the Economic Order was proportional and justified under section 1 of the Charter.

(b) *The respondents' arguments*

[401] The respondents submit that subsection 2(1) of the Economic Order authorized "seizures" within the meaning of section 8 of the Charter. While accepting that the detention of property, in itself, does not amount to a "seizure" for Charter purposes, the respondents say there was here the "superadded impact upon privacy rights" required by the Supreme Court in *Laroche* at para. 53. That impact arises here because of the close connection between subsection 2(1) of the Economic Order and subsection 10(2) of the Regulations, which criminalized participation in public assemblies that could reasonably be expected to lead to breaches of the peace. The Regulations also criminalized travelling to one of these public assemblies, and the supporting of

participants involved in such assemblies. Anyone breaching the Regulations was deemed to be a "designated person" under the Economic Order.

[402] The respondents further note that the Economic Order required financial institutions to gather private information about participants in public assemblies which constituted evidence of offences under the Regulations, and to turn that information over to the police. The Economic Order contained no limits as to what the police could do with that information, and no guidance was provided as to why it was being given to the police, if not to enforce subsection 10(2) of the Regulations.

[403] The respondents observe that a search will be reasonable under section 8 of the Charter if it is authorized by law, if the law itself is reasonable, and if the search is carried out in a reasonable manner: *R. v. Collins*, [1987] 1 S.C.R. 265, [1987] S.C.J. No. 15 [*Collins*] at para. 23; see also *Hunter et al. v. Southam Inc*., [1984] 2 S.C.R. 145, [1984] S.C.J. No. 36 [*Hunter*]. The Supreme Court has further held a reasonable provision authorizing a search had to create a system of prior authorization determined by a neutral third party not involved in the investigation, on the standard of "reasonable and probable grounds to believe".

[404] The respondents note that the AGC has conceded that the wholesale disclosure of private financial information authorized by sections 5 and 6 of the Economic Order constituted "searches", thus engaging the protection of section 8 of the Charter, and that such searches were authorized by law. The only question, as far as the AGC is concerned, is whether such searches were reasonable.

[405] The respondents note that no prior authorization by a neutral third party was required before searches could be carried out under the information-sharing provisions of the Economic Order. It was the financial institutions themselves that had to decide whether someone was a "designated person". If the financial institution decided that they were, the institution then had to disclose potentially vast amounts of personal information about that person to the RCMP or CSIS.

[406] The respondents further state that the Economic Order also failed to require that the RCMP have reasonable and probable grounds before a search could be conducted, requiring financial institutions to disclose information "without delay" any time they had "reason to believe" that someone was a "designated person". The Economic Order did not define or provide any guidance as to what this standard required, or how a financial institution was supposed to assess it.

[407] Although the respondents accept that some search powers can be authorized on less than the "reasonable and probable grounds" threshold, they say that "reasonable suspicion" searches are usually justified where the intrusion on privacy is more limited than it is here. In any event, the respondents contend that no search power can be predicated entirely on someone merely having a "reason to believe". They say that bare belief essentially amounts to hunches or mere suspicions, which are an insufficient basis on which to intrude upon an expectation of privacy: *R. v. MacKenzie*, 2013 SCC 50 at para. 41.

[408] Finally, the respondents submit that the search and seizure powers in the Economic Order cannot be justified under section 1 of the Charter as the justificatory analysis cannot focus solely on the government's objective of bringing a peaceful end to the protests. The analysis must also consider whether the GIC did so in a manner that respected its obligations under the Charter.

(c) *Analysis*

[409] The Supreme Court observed in *Goodwin* that section 8 of the Charter provides protection for individuals' privacy interests, whether they be personal, territorial or informational. This protection "is essential not only to human dignity, but also to the functioning of our democratic society". At the same time, the Court observed that section 8 "permits *reasonable* searches and seizures in recognition that the state's legitimate interest in advancing its goals or enforcing its laws will sometimes require a degree of intrusion into the private sphere": both quotes from *Goodwin* at para. 55 [emphasis in original].

[410] The purpose of section 8 of the Charter is thus to protect individuals' reasonable expectation of privacy against unwarranted intrusions by the State: *Hunter*.

[411] The first question for determination is whether subsection 2(1), sections 5 and 6 of the Economic Order authorized searches or seizures.

(i) Did the Economic Order authorize searches or seizures?

[412] A "search" occurs when a government entity examines or inspects something belonging to a person who has a reasonable privacy interest in it: *R. v. Tessling*, 2004 SCC 67 at para. 18. It is well-established that individuals have a reasonable expectation of privacy in their financial information: *R. v. Bykovets*, 2024 SCC 6 at para. 38, citing *R. v. Spencer*, 2014 SCC 43 at para. 31.

[413] A "seizure" is the "taking of a thing from a person by a public authority without that person's consent": *R v. Dyment*, [1988] 2 S.C.R. 417, [1988] S.C.J. No. 82 at para. 26.

[414] Subsection 2(1) of the Economic Order empowered financial institutions to freeze the assets of "designated persons". The respondents say that this amounted to "seizures" within the meaning of section 8 of the Charter.

[415] As noted earlier, the AGC observes that the detention of property does not, by itself, amount to a "seizure" for Charter purposes: there must be a superadded impact upon privacy rights occurring in the context of administrative or criminal investigation for there to be a "seizure".

[416] Section 8 of the Charter protects privacy rights—it does not protect against restrictions on the enjoyment of property. While individuals whose accounts were frozen in accordance with subsection 2(1) of the Economic Order may not have been able to access their bank accounts for brief periods, their privacy rights were not affected, as their confidential financial information

was not disclosed to anyone (including law enforcement), and the provision did not, in any way, contribute to the investigative process in the way that other sections of the Economic Order did. Consequently, we are not persuaded that subsection 2(1) of the Economic Order authorized "searches" or "seizures" for the purpose of section 8 of the Charter.

[417] Insofar as the information-sharing provisions of the Economic Order are concerned, section 5 required financial institutions to disclose private financial information regarding "designated persons" to the RCMP or CSIS, while section 6 empowered governments or their institutions to disclose private information belonging to "designated persons" to financial institutions.

[418] The AGC submits that sections 5 and 6 of the Economic Order did not place any property under the state's control to further either an administrative or a criminal investigation. Rather, they authorized the collection and sharing of information to support temporary financial measures aimed at peacefully ending the illegal blockades across Canada and preventing them from re-forming to bring the public order emergency to an end.

[419] That said, the AGC concedes that sections 5 and 6 of the Economic Order authorized "searches", while submitting that any searches carried out under the authority of these provisions were reasonable, an issue that will be addressed further on in these reasons.

[420] Before considering whether the measures taken under the Economic Order were reasonable, however, it is first necessary to consider the nature of the government activity at issue in this case.

(ii) The nature of the government activity authorized by the Economic Order

[421] In assessing whether the disputed provisions of the Economic Order infringed section 8 of the Charter, it is necessary to determine the nature of the government activity at issue in this case. This is because "the characterization of a search or seizure as either criminal or regulatory is relevant in assessing its reasonableness": *Goodwin* at para. 60.

[422] That is, where the purpose of the law in question is regulatory (or administrative) and not criminal, it may be subject to less stringent standards: *Goodwin* at para. 60; see also *R. v. McKinlay Transport Ltd*., [1990] 1 S.C.R. 627, 72 O.R. (2d) 798 at pp. 641, 647, *per* Wilson J.

[423] As noted earlier, the AGC contends that to engage the provisions of section 8 of the Charter, actions taken under the information-sharing provisions of the Economic Order had to be carried out as part of an investigation, whether it be criminal, regulatory or administrative. Given that the sole purpose behind the enactment of the Economic Order was to discourage participation in activities prohibited by sections 2 through 5 of the Regulations, it follows that actions taken under these provisions did not amount to "unreasonable searches" for the purposes of section 8 of the Charter.

[424] However, in determining the appropriate characterization of the information-sharing provisions of the Economic Order and the nature and purpose of the scheme that it created, the Economic Order cannot be read in a vacuum. Sections 5 and 6 of the Economic Order interact with the Regulations in such a way as to engage penal sanctions and facilitate criminal investigations.

[425] The enabling legislation for the Economic Order is paragraph 19(1)(*e*) of the *Emergencies Act*. It creates summary conviction and indictable offences for the contravention of any order or regulation made under the provision. Persons convicted of summary conviction offences faced fines of up to five hundred dollars, terms of imprisonment not exceeding six months or both. Those convicted of indictable offences faced fines of up to five thousand dollars, imprisonment not exceeding five years or both. These offences are replicated in subsection 10(2) of the Regulations, which applies in relation to breaches of sections 2 to 5 of the Regulations.

[426] That is, as noted earlier, sections 2 to 5 of the Regulations create a series of prohibited acts, including prohibitions on participating in a public assembly that may reasonably be expected to lead to a breach of the peace (section 2), travelling to or within an area where such a public assembly is taking place (section 4) and providing property to facilitate or participate in such a public assembly or to benefit any person who is facilitating or participating in such an activity (section 5).

[427] The Economic Order applied to “designated persons”, which it defined as “any individual or entity that is engaged, directly or indirectly, in an activity prohibited by sections 2 to 5 of the

Emergency Measures Regulations". In other words, the Economic Order applied to individuals who faced prosecution for breach of the Regulations.

[428] That this was the focus of the Economic Order is borne out by the evidence of Denis Beaudoin. In 2022, Mr. Beaudoin was the Director of Financial Crime, Federal Policing Criminal Operations with the RCMP, and he was responsible for overseeing the use of the economic measures put in place under the *Emergencies Act* proclamation. Mr. Beaudoin developed the processes used by the RCMP for verifying and sharing information with financial institutions under the Economic Order.

[429] Mr. Beaudoin stated in his affidavit that the RCMP shared two main types of information with financial service providers during the eight days that the Economic Order was in effect. The first was information obtained from the OPP and the OPS with respect to individuals already identified as part of their criminal investigations into the illegal protests and blockades. The second type of information shared with financial service providers related to trucks and other vehicles located in downtown Ottawa.

[430] According to Mr. Beaudoin, the RCMP and other law enforcement agencies focused their efforts on identifying and disclosing information pertaining to individuals and entities who were actively involved in illegal actions, either by organizing or influencing illegal activities or by being present at the illegal protests.

[431] While the primary purpose of the Economic Order may have been to help discourage participation in activities prohibited by sections 2 through 5 of the Regulations, the Economic Order allowed RCMP officers to gather private financial information that constituted evidence of offences under the Regulations, and to turn that information over to provincial and local police. Nothing in the Economic Order placed any limit on what these police forces could do with that information, and it appears that they would have been free to use it to prosecute the offences created under the Regulations.

[432] Considerations such as the purpose and nature of the scheme and the mechanism of seizure suggest that the information-sharing authorized by sections 5 and 6 of the Economic Order requires relatively close scrutiny in assessing whether the law authorizing the seizure was reasonable, so as to ensure the state did not unreasonably interfere with protesters' privacy interests: *Goodwin* at para. 63.

(iii) Were searches or seizures under sections 5 and 6 of the Economic Order reasonable?

[433] The AGC contends that the information-sharing provisions in sections 5 and 6 of the Economic Order struck a reasonable balance between protesters' privacy rights and the important objectives of the Economic Order.

[434] We do not agree.

[435] As noted earlier, section 8 of the Charter permits reasonable searches and seizures, recognizing that, in some situations, the state's legitimate interest in advancing its goals or

enforcing its laws will require a degree of intrusion into the private sphere: *Goodwin* at para. 55. In assessing whether a law authorizing a search or seizure is reasonable, a court must determine whether, given the situation at hand, "the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals": *Goodwin* at para. 55, citing *Hunter* at pp. 159–160.

[436] How then are the competing individual and state interests to be reconciled?

[437] The Supreme Court has held that a search will be reasonable under section 8 of the Charter if it is authorized by law, if the law itself is reasonable, and if the search is carried out in a reasonable manner: *Collins* at para. 23.

[438] That said, the Supreme Court has generally declined to set a "hard and fast" test for reasonableness, preferring a flexible approach: *Goodwin* at para. 57, citing *Thomson Newspapers* at p. 495. The Supreme Court has, however, identified certain considerations that may be helpful in the reasonableness analysis, including "the nature and the purpose of the legislative scheme [...]; the mechanism [...] employed and the degree of its potential intrusiveness; and the availability of judicial supervision": *Del Zotto v. Canada*, (C.A.) [1997] 3 F.C. 40, 147 D.L.R. (4th) 457 at para. 13, per Strayer J.A., in dissenting reasons adopted by the Supreme Court in [1999] 1 S.C.R. 3, 169 D.L.R. (4th) 130.

[439] Searches or seizures conducted without a warrant—such as those authorized by the Economic Order—are considered to be presumptively unreasonable: *Goodwin* at para. 56; *Hunter* at p. 161. The burden of establishing reasonableness thus rests with the state.

[440] The federal government was facing a serious crisis when the Economic Order was enacted—one that had the potential to escalate into serious violence. Preventing this from occurring was clearly a pressing and substantial objective. However, while we have found that freezing the bank accounts of individuals taking part in public assemblies that may reasonably have been expected to lead to a breach of the peace did not interfere with individuals' privacy rights, the same cannot be said with respect to the information-sharing provisions contained in sections 5 and 6 of the Economic Order.

[441] As noted earlier, section 5 of the Economic Order required financial service providers to disclose "without delay" to the RCMP or to the Director of CSIS the existence of property in their possession or control where they had "reason to believe" the property was owned, held or controlled by a "designated person", and to disclose "any information about a transaction or proposed transaction" in respect of that property.

[442] That is, financial institutions were required to disclose individuals' confidential personal financial information to the police. This financial information potentially included evidence of the commission of offences created by subsection 10(2) of the Regulations.

[443] Section 6 of the Economic Order authorized the Government of Canada, amongst others, to disclose information to any of the financial service providers identified in section 3 of the Economic Order, if the disclosing government or institution was satisfied that the disclosure would contribute to the application of the Economic Order.

[444] As noted earlier, the information-sharing provisions applied only to "designated persons"— that is, people who had been identified as having committed offences under sections 2 to 5 of the Regulations. These were thus individuals who potentially faced sanctions, including substantial fines and periods of imprisonment.

[445] There was no warrant requirement and no system of prior authorization by a neutral arbiter for searches conducted under section 5 of the Economic Order, nor was there any requirement that "designated persons" be given any advance notice that their personal financial information would be shared with the RCMP or CSIS. Indeed, Mr. Beaudoin states in his affidavit that "[t]he persons identified by the OPS and the OPP as suspects in their criminal investigation were not contacted prior to their information being shared" [our emphasis].

[446] While banks, crowdfunding platforms, and other financial institutions are not state actors, they were effectively deputized by the Economic Order to act as agents of the RCMP: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86 at para. 44. They were, moreover, required to turn account holders' personal financial information over to the RCMP or CSIS, based on the relatively lax "reason to believe" standard.

[447] Neither the Economic Order nor the Regulations specified a procedure by which financial service providers could identify individuals or entities that met the definition of "designated persons" under the Economic Order. While financial institutions were given the names of some such account holders by the RCMP, they were not provided with any information as to the methods that they should use to ensure their compliance with the Economic Order.

[448] It further appears that the implementation of the information-sharing provisions of sections 5 and 6 of the Economic Order was somewhat *ad hoc* and fraught with confusion. Financial services providers were required to determine "on a continuing basis" whether an account holder was participating in unlawful activities. They were, however, at a loss as to how to go about identifying any "designated persons" amongst their account holders, and they looked to the RCMP for guidance as there was nothing in the Economic Order to assist in this regard.

[449] According to RCMP meeting notes, the RCMP told financial service providers that it "could try to provide names of people arrested, to help the banks have a better picture of the status of the designated people on the ground". Beyond this, financial service providers were told by the RCMP to "leverage the news", and to rely on public knowledge, including information available over the internet and social media.

[450] The Economic Order also did not provide for any redress mechanism that would have allowed affected individuals to challenge either their status as a "designated individual" or the acquisition of their confidential banking information by the RCMP, CSIS or other police organizations.

(iv) Conclusion on the reasonableness of sections 5 and 6 of the Economic Order

[451] As explained below, we are not persuaded that searches under sections 5 and 6 of the Economic Order were reasonable within the meaning of section 8 of the Charter.

[452] The information-sharing provisions of the Economic Order permitted financial institutions, CSIS and the RCMP to intrude on the privacy of individuals based on potentially unfounded, subjective beliefs.

[453] While such searches did not involve an encroachment on individuals' bodily integrity in the way that the taking of a blood sample or an incursion into the homes of the affected individuals would, searches carried out under information-sharing provisions of the Economic Order nevertheless authorized intrusive searches into individuals' personal financial information and the sharing of this information with others. This is information that has been described as forming 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*, [1993] 3 S.C.R. 281, [1993] S.C.J. No. 97 at p. 293; *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, [1998] S.C.J. No. 42 at para. 19. It is thus information in which account holders had a reasonable expectation of privacy.

[454] Moreover, as was noted earlier, this information potentially included evidence of criminal offences under the *Emergencies Act* and the Regulations committed by the "designated persons".

[455] We further find that the information-sharing provisions of the Economic Order failed to provide adequate procedural safeguards. Not only did section 5 only require satisfaction of the low "reason to believe" standard, neither section 5 nor section 6 provided for any form of review mechanism. This absence is particularly troubling given that searches under sections 5 and 6 of the Economic Order occurred without any form of prior authorization: *R. v. Tse*, 2012 SCC 16 at para. 84. While a less exacting level of review may be sufficient in a regulatory context, the availability and adequacy of a review process is nonetheless relevant to the reasonableness analysis under section 8 of the Charter: *Goodwin* at para. 71.

[456] Also problematic is the lack of rigour contemplated in identifying individuals who may have been subject to the information-sharing provisions of the Economic Order. The suggestion that financial institutions may have been expected to rely on information they obtained from news or social media reports or the internet as to who amongst their customers was subject to section 5 of the Economic Order is troubling in the extreme.

[457] As the Supreme Court observed in *Goodwin*, "[t]he reliability of a search or seizure mechanism is directly relevant to the reasonableness of the search or seizure itself": above at para. 67. Citing its earlier decision in *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, the Supreme Court went on in *Goodwin* to observe that "[a] method of searching that captures an inordinate number of innocent individuals cannot be reasonable": *Goodwin* at para. 67, quoting *Chehil* at para. 51.

[458] These considerations lead inexorably to the conclusion that the information-sharing provisions of the Economic Order were unreasonable. Sections 5 and 6 of the Economic Order failed to strike a reasonable balance between the interests of the state and those of individuals subject to searches under the Economic Order, thereby infringing their section 8 rights.

[459] The final question, then, is whether the information-sharing provisions contained in sections 5 and 6 of the Economic Order have been justified under section 1 of the Charter. This question will be addressed next.

(v) Was the infringement of section 8 of the Charter justified under section 1?

[460] As noted earlier, the onus is on the AGC to justify the violation of a Charter right under section 1 of the Charter. To do so, it must be demonstrated, on a balance of probabilities, that there was a pressing and substantial objective behind the information-sharing provisions of the Economic Order. It must also be demonstrated that the means chosen to achieve that objective were proportionate in that they were rationally connected to the objective, the law was minimally impairing of the violated right and the deleterious and salutary effects of the law were proportionate to each other: *Oakes* at para. 70; *Goodwin* at para. 79.

[461] The AGC submits that any limits on protesters' privacy rights that may have been imposed by sections 5 and 6 of the Economic Order were a proportionate response to the situation as it existed on February 14, 2022. The AGC further contends that the information-sharing provisions of the Economic Order were structured to facilitate both the timely imposition of economic measures and the timely lifting of those measures.

[462] Given the unique urgency and circumstances of the crisis at hand, the AGC submits that Parliament had a reasonable basis for concluding that the perceived harms existed, and the measures chosen to address them were minimally impairing under the circumstances, with the result that they were justified under section 1 of the Charter. While other alternatives may have been conceivable, that alone does not establish a lack of proportionality or a Charter violation. The Economic Order fell within a range of reasonable alternatives, and its successful deterrent benefits outweighed any deleterious effects it may have had.

[463] The Federal Court did not agree, finding that the information-sharing provisions contained in sections 5 and 6 of the Economic Order did not minimally impair the right to be free from unreasonable searches and seizures.

[464] We agree with the Federal Court.

[465] Unlike other rights-creating provisions in the Charter, section 8 of the Charter itself includes a justificatory element, providing that people have the right to be secure against unreasonable searches or seizures.

[466] Because section 8 of the Charter requires that there be a robust and carefully tailored internal balancing analysis before a breach can be found, a finding that a search power is unreasonable under section 8 leaves little room for upholding the law under section 1: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 at para. 46; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 at para. 58.

[467] As previously noted, minimal impairment requires that the measures in question affect the rights as little as reasonably possible: *Frank v. Canada (Attorney General)*, 2019 SCC 1 at para. 66.

[468] In our view, the information-sharing provisions contained in sections 5 and 6 of the Economic Order fail the minimal impairment test because there were several less impairing alternatives available to the GIC.

[469] As explained in the previous section of these reasons, there were a number of deficiencies in the information-sharing scheme created by sections 5 and 6 of the Economic Order.

[470] The most egregious problem with the Economic Order, in our view, is that personal banking information belonging to individuals who were suspected of having committed offences under the Regulations could be shared with the RCMP and CSIS without a warrant or any form of prior authorization, which information could well have provided evidence of offences under the Regulations.

[471] There were several ways that the information-sharing scheme created by the Economic Order could have been made less impairing. In particular, the Economic Order could have specified that the information belonging to allegedly "designated persons" that was shared with the RCMP or CSIS by financial institutions could not subsequently be used by the RCMP or other police forces to investigate or prosecute individuals for breaching the prohibitions created by the *Emergencies Act* and the Regulations. Another way would have been to specify that such

information could only have been used to investigate or prosecute individuals with leave of a court.

[472] The risk of innocent individuals being wrongfully identified as “designated persons” could also have been reduced by ensuring that financial institutions had a reliable source of information regarding the activities of their customers, such that they were not expected to rely on news stories and the internet to decide whether their disclosure obligations had been triggered.

[473] There were other procedural safeguards that could have been included in the Economic Order to make it less impairing, including the satisfaction of a higher standard of suspicion as a prerequisite to information-sharing, and the creation of a review mechanism to allow affected individuals to challenge actions taken under the Economic Order. Another procedural safeguard would have required prior authorization before sharing confidential financial information with financial institutions, the RCMP, CSIS or local police.

[474] In the absence of any such measures, the AGC has failed to establish that the infringement of section 8 of the Charter resulting from sections 5 and 6 of the Economic Order was justified under section 1 of the Charter.

(4) The *Bill of Rights*

[475] The Preamble to the *Emergencies Act* provides that in taking special temporary measures under the Act, the GIC is subject to the provisions of both the Charter and the *Bill of Rights*. Two parties (Ms. Nagle and the CFN) and one intervener (the Attorney General of Saskatchewan) have raised arguments based on the *Bill of Rights* before this Court.

[476] Ms. Nagle and the CFN submit that subsection 2(1) of the Economic Order permits the seizure of property without due process of law, contrary to paragraph 1(a) of the *Bill of Rights*. However, neither Ms. Nagle nor the CFN had their accounts frozen under the Economic Order, and both were denied standing by the Federal Court and we have upheld that decision. Consequently, the *Bill of Rights* issues that Ms. Nagle and the CFN seek to raise are not properly before this Court.

[477] There are two respondents (Messrs. Cornell and Gircys) who had their bank accounts frozen under the Economic Order. However, they have not raised any arguments based on the *Bill of Rights* in this Court.

[478] The Attorney General of Saskatchewan contends that the Government of Canada can only freeze bank accounts in accordance with due process of law, and that the absence of even minimal procedural protections in the Economic Order as a precondition to the freezing of someone’s bank account means that due process was not accorded to affected individuals in this case.

[479] However, the Attorney General of Saskatchewan is not a party to this proceeding: it is an intervener. As such, its role is to make useful and different submissions on the issues that are before the Court and not to raise new issues: *R. v. McGregor*, 2023 SCC 4. Indeed, as this Court stated in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174 at para. 55, "interveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way". See also *Macciacchera (Smoothstreams.tv) v. Bell Media Inc*., 2023 FCA 180 at para. 20.

[480] The role of courts is, moreover, to decide the issues that are raised by the parties. They should not decide issues of law that are not necessary to resolve an appeal: *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, [1995] S.C.J. No. 36 at para. 6. Indeed, we would be going beyond our proper role if we were to decide the *Bill of Rights* issues in these circumstances, and we decline to do so.

D. *The cross-appeal – Do the Regulations violate paragraph 2(c) of the Charter?*

[481] Paragraph 2(c) of the Charter provides that everyone has the right to "freedom of peaceful assembly".

[482] The Federal Court dismissed the claim that several provisions of the Regulations infringed paragraph 2(c) of the Charter. The CCF and the CCLA cross-appeal from this aspect of

the Federal Court's judgment. They shall be referred to as the "cross-appellants" in this section of the reasons and the Attorney General shall continue to be referred to as the "AGC".

[483] The cross-appellants argued before the Federal Court that the Regulations' prohibition of public assemblies that may reasonably be expected to lead to a breach of the peace, as well as travel to and support for such assemblies, infringed paragraph 2(c) of the Charter. They asserted that section 2 of the Regulations prohibits assemblies before they occur, and before they became assemblies that fall outside of the scope of paragraph 2(c) of the Charter.

[484] The AGC submitted to the Federal Court that paragraph 2(c) of the Charter 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. The Regulations were carefully tailored to include exceptions, such that they did not apply to individuals who resided in, worked in, or had a reason to be in a specified area, other than to participate in or facilitate a non-peaceful assembly. The AGC further submitted that the decision to adopt such special measures calls for deference, particularly when addressing complex issues such as those that confronted the Government of Canada in mid-February of 2022. The measures chosen were, moreover, among several reasonable alternatives, and thus did not breach paragraph 2(c) of the Charter.

[485] In relatively cursory reasons, the Federal Court found that the Regulations did not breach the right to freedom of peaceful assembly provided for under paragraph 2(c) of the Charter. In coming to this conclusion, the Federal Court observed that subparagraph 19(1)(*a*)(i) of the *Emergencies Act* expressly authorized the making of orders or regulations that prohibit "any

public assembly that may reasonably be expected to lead to a breach of the peace". In other words, the Regulations could not infringe the freedom of peaceful assembly because they targeted only assemblies that breached the peace.

[486] The Federal Court concluded that the evidence before it "support[ed] 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": at para. 312.

[487] The Federal Court further found 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 protesters' objective], are not constitutionally protected": at para. 313. Consequently, the Federal Court found that there had been no breach of the Charter right to peaceful assembly.

[488] The cross-appellants contend that the Federal Court erred in coming to this conclusion, submitting that the Federal Court's finding with respect to paragraph 2(c) of the Charter cannot be reconciled with its finding that there had been a violation of paragraph 2(b)'s guarantee of freedom of expression, and was thus in error.

[489] That is, the cross-appellants submit that the Federal Court failed to consider that sections 2 and 4 of the Regulations did not just prohibit participation in public assemblies where there were blockades, but also participation in public assemblies where blockades may occur. Thus,

individuals were prohibited from travelling to or participating in public assemblies where no one was actually blockading and causing a breach of the peace.

[490] Given that the Federal Court had previously found that the Regulations violated the freedom of expression guarantee in paragraph 2(b) of the Charter because they applied to protesters who were not causing a breach of the peace, it is unclear why it found that the Regulations did not similarly violate the freedom of assembly of these peaceable protesters.

[491] According to the cross-appellants, the Regulations' infringement of paragraph 2(b) of the Charter rested on their criminalization of non-violent protesters, with the result that they necessarily infringed paragraph 2(c). Indeed, to the extent that an infringement of the freedom of expression guarantee in paragraph 2(b) is based on a factual matrix involving an assembly, it necessarily results in a breach of paragraph 2(c) as well.

[492] In support of this argument, the cross-appellants cite a number of cases which they say suggest that a finding that there has been an infringement of paragraph 2(b) of the Charter based on the limitation of non-violent protest necessitates there also being a paragraph 2(c) infringement, given that the Supreme Court has at times declined to deal with paragraph 2(c) of the Charter after reaching a conclusion on a paragraph 2(b) violation: citing *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [*Trinity Western University*] at para. 77; *Khawaja* at para. 66; *Figueiras* at para. 78; see also *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134 [*Trinity Bible Chapel*] at para. 67.

[493] There is no question that freedom of expression and freedom of assembly are closely related. Indeed, freedom of assembly has been described as "speech in action": *Ontario (A.G.) v. Dieleman* (1994), 20 O.R. (3d) 229, [1994] O.J. No. 1864 (Gen. Div.) at pp. 329–330. Moreover, in many cases (including this one) the factual matrix underpinning the paragraph 2(c) Charter claim is largely indistinguishable from that underpinning the paragraph 2(b) claim.

[494] For this reason, courts have often declined to address multiple section 2 Charter claims separately, holding that the finding of an infringement of one fundamental freedom—such as freedom of expression—is sufficient to account for both the expressive and associated rights of claimants.

[495] For example, in *Trinity Western University* the Supreme Court was called upon to review the decision of a provincial law society denying approval to a proposed law school that would require students to sign, as a condition of admission, a covenant committing to "voluntarily abstain" from a number of actions, including "sexual intimacy that violates the sacredness of marriage between a man and a woman".

[496] The majority of the Supreme Court held that the decision not to approve the university's proposed law school represented a proportionate balance between students' paragraph 2(a) right to freedom of conscience and religion and the Law Society's overarching objective of upholding and protecting the public interest in the administration of justice.

[497] Although claims were also advanced under paragraphs 2(b) and 2(c) of the Charter, the Supreme Court declined to deal with these claims. In addition to noting that the submissions of the parties had largely focussed on the religious freedom claim, the Court was satisfied that the paragraph 2(a) claim was "sufficient to account for the expressive, associational, and equality rights of TWU's community members in the analysis": *Trinity Western University* at para. 77.

[498] The Court of Appeal for Ontario came to a similar conclusion in *Figueiras*, a case involving police actions during the 2010 G20 summit in Toronto. Having found that a protester's paragraph 2(b) right to freedom of expression had been infringed, the Court went on to conclude that it was unnecessary to address the protester's paragraph 2(c) argument as "issues related to [the protester's] freedom of assembly are subsumed by the s. 2(b) analysis": at para. 78.

[499] The British Columbia Court of Appeal came to a similar conclusion in *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, 2009 BCCA 39 [*BC Teachers' Federation*] at para. 39, leave to appeal to SCC refused, 33113 (20 August 2009). There, the appellants alleged that the definition of the word "strike" in British Columbia's labour legislation infringed the right of union members to engage in political protests, contrary to paragraphs 2(b), (c) and (d) of the Charter.

[500] The British Columbia Court of Appeal found that the effect of the strike definition trenched on the freedom of expression guaranteed by paragraph 2(b) of the Charter. It went on to find that any paragraph 2(c) freedom of association issue in that case was subsumed under the

issues related to the right of free expression under paragraph 2(b): *BC Teachers' Federation* at para. 39.

[501] The most detailed discussion of this issue is found in the *Trinity Bible Chapel* case, a case involving capacity restrictions imposed by the Government of Ontario during the COVID-19 pandemic that limited attendance at indoor and outdoor gatherings, including religious gatherings. Two churches brought motions to set aside court orders made against them on the basis that the authorizing regulations infringed all four of section 2's fundamental freedoms. After determining that paragraph 2(a)'s guarantee of freedom of religion had been infringed, the motions judge declined to address arguments made under paragraphs 2(b), (c) or (d): *Ontario v. Trinity Bible Chapel et al.*, 2022 ONSC 1344 at para. 115.

[502] The Court of Appeal for Ontario upheld this decision, finding that the alleged infringement of the appellants' right to freedom of religion "accounted for their related rights to express their religious beliefs, assemble for the purpose of engaging in religious activity, and associate with others who share their faith.": *Trinity Bible Chapel* at para. 67.

[503] After reviewing the jurisprudence discussed above, the Court went on to hold that "where an examination of the factual matrix reveals that one claimed section 2 right subsumes others, it is not necessary to consider the other section 2 claims (though, of course, there is no bar to a judge doing so)". The Court went on to observe that "this approach is particularly apposite in the section 2 context where the rights are related fundamental freedoms, whereas it may have less

application across rights (for example, as between sections 2, 7, and 15 rights)": *Trinity Bible Chapel* at para. 71.

[504] The same may be said here.

[505] We are satisfied that protesters' paragraph 2(b) right to freedom of expression sufficiently accounted for their related right to associate with others who shared their views. Consequently, we decline to address the arguments raised by the cross-appeal, and it will be dismissed, without costs. That said, we should not be understood to be agreeing with the Federal Court's analysis of the paragraph 2(c) issue.

VII. CONCLUSION

[506] In light of the above reasons, we are of the opinion that the appeals by the AGC in files A-73-24, A-74-24 and A-75-24 should be dismissed, as should be the cross-appeals by the CCLA and CCF. Since neither the AGC nor the public interest litigants have requested costs, none will be awarded.

[507] The appeal by Ms. Nagle and the CFN in file A-76-24 should also be dismissed, with costs.

[508] Finally, the interlocutory appeals by the AGC in files A-29-23 and A-30-23 should similarly be dismissed, with costs.

"Yves de Montigny"
Chief Justice

"J.B. Laskin"
J.A

"Anne L. Mactavish"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-73-24 (Lead appeal) A-29-23 A-30-23 A-74-24 A-75-24 A-76-24
DOCKET:	A-73-24 (Lead appeal)
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. CANADIAN CIVIL LIBERTIES ASSOCIATION, ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF SASKATCHEWAN
AND DOCKET:	A-29-23
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. CANADIAN CIVIL LIBERTIES ASSOCIATION
AND DOCKET:	A-30-23
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. CANADIAN CONSTITUTION FOUNDATION
AND DOCKET:	A-74-24
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. CANADIAN CONSTITUTION FOUNDATION, ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF SASKATCHEWAN
AND DOCKET:	A-75-24

STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. EDWARD CORNELL and VINCENT GIRCYS
AND DOCKET:	A-76-24
STYLE OF CAUSE:	CANADIAN FRONTLINE NURSES and KRISTEN NAGLE v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 4 & 5, 2025
REASONS FOR JUDGMENT OF THE COURT BY:	DE MONTIGNY C.J. LASKIN J.A. MACTAVISH J.A.
REASONS DATED:	JANUARY 16, 2026

APPEARANCES:

Michael A. Feder, K.C. Connor Bildfell John Provart Nicholas Dodokin	FOR THE ATTORNEY GENERAL OF CANADA
Ewa Krajewska Brandon Chung	FOR THE CANADIAN CIVIL LIBERTIES ASSOCIATION
Sujit Choudhry Janani Shanmuganathan	FOR THE CANADIAN CONSTITUTION FOUNDATION
David Cowling Alexander Boissonneau-Lehner	FOR CANADIAN FRONTLINE NURSES AND KRISTEN NAGLE
Blair D. Ector Bath-Sheba van den Berg	FOR EDWARD CORNELL AND VINCENT GIRCYS

Mandy England Shaheer Meenai	FOR THE ATTORNEY GENERAL OF ALBERTA
Mitch McAdam, K.C.	FOR THE ATTORNEY GENERAL OF SASKATCHEWAN

SOLICITORS OF RECORD:

Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE ATTORNEY GENERAL OF CANADA
Henein Hutchison LLP Toronto, Ontario	FOR THE CANADIAN CIVIL LIBERTIES ASSOCIATION
Haki Chambers Global Toronto, Ontario Goddard & Shanmuganathan LLP Toronto, Ontario	FOR THE CANADIAN CONSTITUTION FOUNDATION
Johnstone & Cowling LLP Toronto, Ontario	FOR CANADIAN FRONTLINE NURSES AND KRISTEN NAGLE
Loberg Ector LLP Calgary, Alberta	FOR EDWARD CORNELL AND VINCENT GIRCYS
Alberta Justice, Legal Services Division Edmonton, Alberta	FOR THE ATTORNEY GENERAL OF ALBERTA
Saskatchewan Ministry of Justice and Attorney General Regina, Saskatchewan	FOR THE ATTORNEY GENERAL OF SASKATCHEWAN