Court File No.
Federal Court of Appeal File: A-73-24 (Lead Appeal)

IN THE SUPREME COURT OF CANADA
(on Appeal from the Federal Court of Appeal)

B E T W E E N :

ATTORNEY GENERAL OF CANADA

Applicant
(Appellant on Appeal)

-and-

CANADIAN CIVIL LIBERTIES ASSOCIATION

Respondent
(Respondent on Appeal)

-and-

ATTORNEY GENERAL OF ALBERTA and
ATTORNEY GENERAL OF SASKATCHEWAN

Interveners

Court File No.
Federal Court of Appeal File: A-74-24

IN THE SUPREME COURT OF CANADA
(on Appeal from the Federal Court of Appeal)

A N D B E T W E E N :

ATTORNEY GENERAL OF CANADA

Applicant
(Appellant on Appeal)

-and-

CANADIAN CONSTITUTION FOUNDATION

Respondent
(Respondent on Appeal)

-and-

ATTORNEY GENERAL OF ALBERTA and
ATTORNEY GENERAL OF SASKATCHEWAN

Interveners

Court File No.
Federal Court of Appeal File: A-75-24

IN THE SUPREME COURT OF CANADA
(on Appeal from the Federal Court of Appeal)

A N D B E T W E E N :

ATTORNEY GENERAL OF CANADA

Applicant
(Appellant on Appeal)

-and-

EDWARD CORNELL AND VINCENT GIRCYS

Respondent
(Respondent on Appeal)

Court File No.
Federal Court of Appeal File: A-29-23

IN THE SUPREME COURT OF CANADA
(on Appeal from the Federal Court of Appeal)

A N D B E T W E E N :

ATTORNEY GENERAL OF CANADA

Applicant
(Appellant on Appeal)

-and-

CANADIAN CIVIL LIBERTIES ASSOCIATION

Respondent
(Respondent on Appeal)

Court File No.
Federal Court of Appeal File: A-30-23

IN THE SUPREME COURT OF CANADA
(on Appeal from the Federal Court of Appeal)

B E T W E E N :

ATTORNEY GENERAL OF CANADA

Applicant
(Appellant on Appeal)

-and-

CANADIAN CONSTITUTION FOUNDATION

Respondent
(Respondent on Appeal)

APPLICANT'S MEMORANDUM OF ARGUMENT

(Pursuant to s. 40(1) of the *Supreme Court of Canada act* and Rule 25 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW AND SUMMARY OF FACTS

A. Overview

1. The proposed appeal concerns the principles that apply when the Governor-in-Council (GIC) proclaims a public order emergency under the *Emergencies Act* (the Act) in response to an urgent and fast-moving crisis. It deals with the first ever use of this Act and raises mainly three issues of public importance: First, what principles should courts apply when reviewing a proclamation under the Act? Second, did the measures adopted here—prohibiting public assemblies reasonably expected to breach the peace and operationalizing the freezing of participants' bank accounts—unjustifiably limit *Charter* rights? Third, can the GIC (a body that makes legally enforceable decisions) and Cabinet (a body that provides political approval) be treated as one and the same? These issues warrant granting leave.

2. On the first issue, in deciding how best to respond to an unprecedented and rapidly evolving crisis in real time, and whether to proclaim a public order emergency, the GIC faced a difficult task on February 14, 2022. By that point, participants in the "Freedom Convoy" had blockaded highways and Canada's busiest border crossings, and had occupied downtown Ottawa for weeks, with no end in sight. Then intelligence emerged that individuals at the Coutts, Alberta border blockade had a cache of firearms and were plotting to kill RCMP officers.

3. In these extraordinary circumstances, the GIC decided, based on the information available, that it was necessary to declare an emergency and take targeted and temporary measures to peacefully and permanently bring the crisis to a swift end. The measures had their intended effect and the emergency proclamation was revoked after nine days. Months later, following an exhaustive inquiry, the Public Order Emergency Commission (POEC) concluded that the threshold for invoking the Act was met, and the measures taken were constitutional. However, both the Federal Court and the Federal Court of Appeal later reached an opposite conclusion.

4. Those courts applied the wrong principles on judicial review. They should have asked, based on the information available to the GIC at the time, whether the GIC acted reasonably in finding reasonable grounds to conclude that a public order emergency existed. Instead, they asked, with the benefit of hindsight, whether there were reasonable grounds to believe that a public order emergency existed. While both courts cited *Vavilov* in name, they did something very different in

practice: they applied their *own* view of what was reasonable. Compounding this flawed approach, they reversed the burden of proof on judicial review and conducted their *own* interpretation of the relevant statutory provisions, adopting an unreasonably rigid interpretation of broad and open-ended concepts in the Act, including "threat" and "serious violence." This non-deferential approach hamstrings governments' ability to respond effectively to future crises, neuters the Act, and conflicts with this Court's administrative law jurisprudence, including *Vavilov*. It amounts to second-guessing with the benefit of 20/20 hindsight, effectively depriving the GIC of the decision-making authority conferred by Parliament.

5. On the second issue, the Court of Appeal's *Charter* analysis was likewise flawed. The Court of Appeal not only misinterpreted the *Charter*, but also failed to properly account for the measured and temporary nature of the prohibition of public assemblies reasonably expected to lead to a breach of the peace and the measures required to operationalize the freezing of "designated persons'" accounts—both of which targeted a permanent and peaceful end to the crisis. Both represented reasonable means of achieving that objective. The lower courts' requirement that the GIC accept alternatives that would achieve that objective less effectively—or possibly not at all—is inconsistent with the Court's *Charter* jurisprudence.

6. On the third issue, the courts wrongly conflated two distinct bodies: the GIC (a body whose decisions are legally binding) and Cabinet (a political body whose decisions are not). Parliament expressly chose to give the GIC the power to proclaim a public order emergency under the Act. The GIC is a legal entity that is distinct from the political committee known as the Cabinet. The courts' decision to collapse this distinction and admit documents not before the GIC has serious and widespread implications—both legal and practical—across a broad range of government activities, well beyond the context of emergency responses.

7. The proposed appeal offers an ideal forum in which to address these issues of public importance. Indeed, this crisis was of such importance that an extensive public inquiry was commissioned, as s. 63 of the Act required. While the nature and purpose of the POEC differed from those of the court proceedings below, their opposite conclusions create inconsistency and underscore the need for this Court's intervention and guidance.

A. Summary of Facts

1) Freedom Convoy 2022 and Occupation of Ottawa

8. In November 2021, the Public Health Agency of Canada announced the end of a vaccine exemption for entry to Canada for essential service providers and truck drivers.[1] On January 22, 2022, the "Freedom Convoy" departed from Prince Rupert, B.C., gathering supporters along its way for a planned demonstration in Ottawa. Six days later, the Convoy, consisting of thousands of protesters and hundreds of vehicles, arrived in Ottawa. The ensuing occupation of much of the downtown core, and the blockade by Convoy trucks and other vehicles, became entrenched.[2]

9. The conditions in Ottawa were, in the application judge's words, "intolerable."[3] The Convoy included high-decibel noise disruption caused by protesters—trucks honking, air horns, train whistles, street parties, and fireworks set off near residences. Exhaust fumes permeated the air and seeped into neighbouring properties. Containers of flammable diesel fuel needed to keep vehicles and equipment running were also present, including next to Parliament Hill. Reports of harassment, assaults, and intimidation arose.[4]

10. The Convoy also included extremist elements. For example, Ms. Nagle, one of the applicants below, was in contact with Jeremy MacKenzie, the founder of the extremist group Diagolon, during her time in Ottawa. Before coming to Ottawa, Mr. MacKenzie was arrested in January 2022 after police found firearms, prohibited magazines, ammunition, and body armour at his home. Diagolon insignia would later be found on body armour seized when arrests were made at the Coutts border blockade. Visible symbols of hate, including yellow Stars of David and swastikas, were held or worn by some protesters.[5]

11. Authorities were overwhelmed. The Ottawa Police Service (OPS) were outnumbered and unable to deal with the situation. The Mayor of Ottawa declared a state of emergency. The Ontario

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[1] *Canadian Frontline Nurses v Canada (AG)*, 2024 FC 42 at para 31 [**FC Reasons**], Application for Leave to Appeal Record, Tab 3B [**ALAR**].
[2] FC Reasons at paras 33-37; Explanation pursuant to subsection 58(1) of the *Emergencies Act*, included in Annex B to the FC Reasons [**Annex B / s. 58 Explanation**], ALAR, Tab 2A, p . 9.
[3] FC Reasons at para 35.
[4] FC Reasons at para 35; Annex B / s. 58 Explanation, ALAR, Tab 2A, p. 9.
[5] FC Reasons at paras 41-43, 51; Annex B / s. 58 Explanation, ALAR, Tab 2A, p. 11.

Provincial Police (OPP) identified the Convoy as a "threat to national security" and the OPS requested an additional 1,800 officers from other agencies. A Superior Court judge granted a ten-day injunction to "silence the honking horns" and prevent other by-law breaches.[6]

12. On February 11, 2022, Ontario declared a state of emergency in response to interference with critical infrastructure throughout the province. That same day, the Prime Minister and the President of the USA discussed the blockades and their impact on trade (as described below).[7]

13. As of February 14, 2022, there were about 500 trucks and other vehicles in downtown Ottawa and, in the application judge's words, the situation stood at "an impasse."[8] Tow truck drivers had refused to work with governments to remove trucks, former law enforcement and military personnel had appeared with Convoy organizers to provide logistical and security advice, and children had been brought to the occupation to limit law enforcement intervention. Injunctions had proven ineffective, police were unable to enforce the rule of law, and the OPS police chief would resign the next day. Protesters also attempted to impede access to the airport and threatened to blockade rail lines.[9]

2) Border Blockades

14. On January 29, 2022, a blockade began near the Sweetgrass–Coutts border crossing, which disrupted border traffic at a critical commercial border point between Canada and the United States. On February 5, 2022, Alberta's Minister of Municipal Affairs wrote to Canada's Minister of Public Safety and Emergency Preparedness seeking "federal assistance that includes the provision of equipment and personnel to move approximately 70 semi-tractor trailers and approximately 75 personal and recreational vehicles." The letter noted that the RCMP "have exhausted all local and regional options to alleviate the week-long service disruptions at this important international border." By February 11, 2022, 200 to 250 additional vehicles had gathered at Milk River, the police checkpoint set up to limit access to the Coutts blockade. [10]

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[6] FC Reasons at paras 36-40.
[7] FC Reasons at para 40; Annex B / s. 58 Explanation, ALAR, Tab 2A, p. 10.
[8] FC Reasons at paras 53 and 249.
[9] FC Reasons at paras 39, 63; Annex B (and here)/ s. 58 Explanation, ALAR, Tab 2A, pp. 11, 17.
[10] FC Reasons at para 46; Annex B / s. 58 Explanation, ALAR, Tab 2A, p. 14.

15. The morning of February 14, 2022, the RCMP executed search warrants and seized a cache of weapons at Coutts, including 14 firearms, a large supply of ammunition, high-capacity magazines, and body armour, some of which was marked with Diagolon's insignia. Eleven arrests were made and four individuals were charged with conspiracy to commit murder, in addition to other offences.[11]

16. On February 6, 2022, a second blockade began, this time at the Ambassador Bridge linking Windsor, Ontario and Detroit, Michigan. This is Canada's busiest land border crossing, supporting 30% of all trade by road with the USA and over $390 million in daily trade. The blockade resulted in a loss of employee wages, reduced automotive processing capacity, and overall production loss in the automotive industry, which was already hampered by a supply shortage of critical electronic components. Although the police removed blockade participants on February 13, 2022, access to the Ambassador Bridge remained limited and the City of Windsor declared a state of emergency on February 14, 2022.[12]

17. On February 8, 2022, a third blockade targeted access to and from the Blue Water Bridge between Sarnia, Ontario and Port Huron, Michigan, resulting in the suspension of all outbound movement of commercial and traveller vehicles to the United States, along with reduced inbound capacity, at Canada's second-busiest border crossing.[13]

18. On February 12, 2022, a fourth blockade emerged, targeting the Peace Bridge port of entry at Fort Erie, Ontario, which is the third-busiest land border crossing between Canada and the United States, responsible for millions of dollars in international trade each day. The protest disrupted inbound traffic for a portion of the day on February 12, 2022, and resulted in a blockade of outbound traffic until February 14, 2022.[14]

19. Also on February 12, 2022, vehicles broke through an RCMP barricade in Surrey, British Columbia, heading to the Pacific Highway port of entry, and forced the highway closure at the

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[11] FC Reasons at para 51; Annex B / s. 58 Explanation, ALAR, Tab 2A, pp 14, 18.
[12] FC Reasons at paras 47-48; Annex B / s. 58 Explanation, ALAR, Tab 2A, p 13.
[13] FC Reasons at para 48; Annex B / s. 58 Explanation, ALAR, Tab 2A, p 14.
[14] FC Reasons at para 49; Annex B / s. 58 Explanation, ALAR, Tab 2A, p 14.

Canada–US border in Surrey. This was the fifth border blockade across Canada. As of February 15, 2022, 16 people had been arrested in relation to the blockades.[15]

20. On February 10, 2022, a sixth blockade began, this one north of the Emerson, Manitoba port of entry. The Premier of Manitoba sent a letter dated February 11, 2022, to the Prime Minister urging "immediate and effective federal action regarding the blockade activity now unfolding at […] Emerson […]. These evolving and increasing border disruptions—in Manitoba and elsewhere across the country—require the reasoned and balanced national leadership that only you and the federal government can provide."[16]

3) Proclamation of a Public Order Emergency

21. Following consultations with the provinces,[17] on February 14, 2022, the GIC issued a Proclamation declaring that it had reasonable grounds to believe a public order emergency existed under s. 17(1) of the Act,[18] which necessitated special temporary measures. The Proclamation identified five aspects of the public order emergency: (1) continuing blockades by persons, and vehicles and continuing threats to oppose removal of the blockades, including by force; (2) adverse effects on the Canadian economy and threats to Canada's economic security resulting from the blockades of critical infrastructure; (3) adverse effects of the blockades on Canada's relationship with trading partners; (4) the breakdown in the distribution chain and availability of essential goods, services, and resources; and (5) the potential for an increase in the level of unrest and violence, threatening safety and security.[19]

22. The next day, the GIC exercised its powers to make the *Emergencies Measures Regulations* (the *Regulations*), which among other things prohibited public assemblies that might reasonably expected to lead to a breach of the peace by causing serious disruption to the movement of persons, goods, or trade; interference with critical infrastructure; or support of the threat or use

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[15] FC Reasons at para 50; Annex B / s. 58 Explanation, ALAR, Tab 2A, p 15.
[16] FC Reasons at para 49; Annex B / s. 58 Explanation, ALAR, Tab 2A, p 14.
[17] Report to the Houses of Parliament: Emergencies Act Consultations, included in Annex B to the FC Reasons [**Annex B / Consultation Report**], ALAR, Tab 6A, pp 481-88.
[18] *Emergencies Act,* RSC 1985, c 22 (4th Supp), s. 17.
[19] *Proclamation Declaring a Public Order Emergency*, SOR/2022-20, ALAR, Tab 2B, p 22.

of acts of serious violence.[20] The *Regulations* also designated protected places (e.g., Parliament Hill),[21] provided for reasonable compensation for essential goods and services, enabled authorities to require the assistance of heavy tow truck operators, and created offences for failure to comply with the *Regulations*.[22]

23. The *Emergency Economic Measures Order* (the *Economic Order*) contained provisions to further the *Regulations'* prohibition on public assemblies expected to lead to a breach of the peace, defined a "designated person" as anyone participating in such assemblies, and required certain actions from financial institutions, including the freezing of accounts.[23]

24. On February 16, 2022, pursuant to s. 58 of the Act, the Public Safety Minister brought a motion before the House of Commons to confirm the Proclamation of the public order emergency. An explanation of the reasons for issuing the Proclamation (the s. 58 Explanation), and a report on consultations with the Lieutenant Governors-in-Council of the provinces (the Consultation Report), were also tabled before both Houses of Parliament that day. The s. 58 Explanation provides the reasoning for the GIC's discretionary decision to declare a public order emergency.[24]

25. The Proclamation worked. 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 service providers, resulting in the temporary freezing of about 257 accounts. On February 15, 2022, the RCMP restored access to the Coutts border crossing and the Emerson blockade was cleared the next day. From February 17 to 21, 2022, the police arrested 196 protesters in Ottawa and charged 110 criminally. The police also removed 115 vehicles and dismantled the blockades.[25]

26. On February 21, 2022, the motion to confirm the declaration of the public order emergency passed in the House of Commons. That same day, the RCMP advised financial service providers that they no longer believed the individuals or entities previously disclosed were engaged

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[20] *Emergency Measures Regulations*, SOR/2022-21, s 2(1), ALAR, Tab 2C, p 26.
[21] *Regulations,* s 6; ALAR, Tab 2C, pp 27-28.
[22] *Regulations,* s 7-9 and 10; ALAR, Tab 2C, pp 28-29.
[23] *Regulations,* s 2(1); ALAR, Tab 2C, pp 27-28; *Emergency Economic Measures Order*, SOR/2022-22, ss 1-6; ALAR, Tab 2D, pp 30-33.
[24] FC Reasons at paras 56-77, 218; Annex B / Consultation Report, ALAR, Tab 6A, pp 481-88.
[25] FC Reasons at paras 54-56, 58.

in conduct or activities covered under the *Regulations*.[26] On February 23, 2022, the GIC revoked the declaration of an emergency, only nine days after it was proclaimed.[27]

4) The Public Order Emergency Commission

27. On April 25, 2022, in compliance with s. 63(1) of the Act, the GIC issued an Order-in-Council that commissioned a public inquiry into the circumstances that led to the Proclamation being made and the measures taken for dealing with the emergency.[28] The POEC heard hundreds of hours of testimony from 76 witnesses. Eight ministers and numerous senior officials were examined and cross-examined in open hearings. Over 85,000 documents were received, of which 8,900 were marked as exhibits.[29] On February 17, 2023, the POEC Commissioner, Justice Paul Rouleau, issued his final report concluding that "the very high threshold for invocation was met."[30]

5) Federal Court's Decision

28. On judicial review of the decision to declare an emergency, the application judge purported to apply the *Vavilov* reasonableness standard of review.[31] But in practice, he reached his *own* conclusion: "I conclude that there was no national emergency justifying the invocation of the [Act] and the decision to do so was therefore unreasonable and *ultra vires*."[32] In reaching this conclusion, he candidly acknowledged that he was revisiting the GIC's decision "with the benefit of hindsight" and "a more extensive record" than was before the GIC, and "[h]ad I been at their tables at that time, I may have agreed that it was necessary to invoke the Act."[33]

29. Applying this approach, the application judge found that the GIC lacked reasonable grounds to believe that a threat to national security existed under s. 16 of the Act. He reasoned there could be "only one reasonable interpretation" of the provisions in question: his own.[34]

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[26] FC Reasons at para 59.
[27] FC Reasons at para 60.
[28] See Order in Council, P.C. 2022-0393, April 25, 2022; FC Reasons at para 62.
[29] Public Order Emergency Commission, News Release (February 17, 2023).
[30] *Report of the Public Inquiry into the 2022 Public Order Emergency*, vol 1 (Ottawa: His Majesty the King in Right of Canada, 2023), p 247 [**POEC Report**].
[31] FC Reasons at paras 192, 201.
[32] FC Reasons at paras 241-255.
[33] FC Reasons at para 370.
[34] FC Reasons at para 372.

Although he acknowledged that the harm being caused to Canada's economy, trade, and commerce was very real and concerning, he found that this did not constitute threats or the use of serious violence to persons or property within the meaning of the Act.[35]

30. The application judge also found the circumstances did not exceed the capacity or authority of a province under s. 3(a) of the Act. It was "not clear" to him why tow-truck drivers could not have been compelled to assist under provincial laws, and he saw "no obstacle" to assembling the large number of police officers from other forces ultimately used to remove blockaders. He found it "debatable" whether the OPS was unable to enforce the rule of law in Ottawa due to the overwhelming volume of protesters or due to a "failure of leadership" and a "mistaken assumption" the protest would be short-lived.[36]

31. With respect to the *Charter*, the application judge found that the *Regulations* were overbroad and breached s. 2(b) by preventing peaceful protest.[37] But he found that the *Regulations* did not breach either freedom of peaceful assembly under s. 2(c) or freedom of association under s. 2(d).[38] However, he found that the *Economic Order's* freezing of accounts and information sharing provisions breached s. 8 of the *Charter*.[39] In a combined s. 1 analysis, the application judge found none of the infringements minimally impairing.[40]

6) Federal Court of Appeal's Decision

32. The Court of Appeal considered at some length whether the record should be limited to the record before the GIC because it—not Cabinet—made the Proclamation. The court rejected this point, stating that the distinction between the GIC and Cabinet was a "fiction," the GIC and Cabinet are "equivalent," "the GIC's decisions are *de facto* made by Cabinet," "Cabinet was the real decision-maker," and "the decision to invoke the *Emergencies Act* was effectively made by

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[35] FC Reasons at paras 278-297.
[36] FC Reasons at paras 241-255, esp. 250 and 252.
[37] FC Reasons at paras 304-309.
[38] FC Reasons at paras 310-317.
[39] FC Reasons at paras 325-341.
[40] FC Reasons at paras 351-359.

the Prime Minister, to whom Cabinet had delegated its powers."[41] As a result, the court found no error in consideration of materials beyond those that were included in the submission to the GIC.

33. Turning to the administrative law issues, the Court of Appeal held that the GIC's decision attracted no deference with respect to the "objective legal requirements that have to be met before the GIC can exercise its legitimate discretion."[42] It stated that judicial review of a decision to invoke the *Emergencies Act* "commands an *exacting* standard," not a *deferential* one.[43] It then considered whether, on the record before it, the GIC had reasonable grounds to believe a threat to national security existed within the meaning of the Act, as interpreted by the court.[44] Despite acknowledging that "[t]he potential for serious violence […] was certainly cause for concern" and "[t]he federal government was facing a serious crisis […] that had the potential to escalate into serious violence,"[45] the court found "very little hard evidence of any actual serious violence or threats of it, except at Coutts."[46] In its view, "[a]s disturbing and disruptive the blockades and the Convoy protests in Ottawa could be, they fell well short of a threat to national security."[47]

34. The Court of Appeal also found no national emergency. The court reasoned that because the Act authorizes the GIC to "intrude into core areas of provincial jurisdictions," the Act must be "read down," "especially with respect to the definition of 'national emergency' in section 3 of the Act."[48] The court also put the burden on the GIC: "it is for the decision-maker to establish the reasonableness of its decision."[49] Applying those principles, the court found—on its own review of the record, nearly four years after the crisis—"a lack of evidence that the situation, critical as it was, could not be dealt with effectively with the existing laws of Canada."[50] The court also suggested that "the issue was first and foremost an issue of resources," and "nothing prevented the

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[41] *Canada (AG) v Canadian Civil Liberties Association*, 2026 FCA 6 at paras 130-133, 138 [**FCA Reasons**] [emphasis added], ALAR, Tab 4A.
[42] FCA Reasons at para 166.
[43] FCA Reasons at para 225.
[44] FCA Reasons at paras 185.
[45] FCA Reasons at para 440.
[46] FCA Reasons at paras 212, 217.
[47] FCA Reasons at para 232.
[48] FCA Reasons at paras 247-250.
[49] FCA Reasons at para 258.
[50] FCA Reasons at para 261.

provincial government from augmenting the capacity of the OPS."[51] The court concluded that "provinces should be left to determine for themselves how best to deal with a critical situation."[52]

35. On the *Charter*, the Court of Appeal found that the *Regulations* limited freedom of expression under s. 2(b) unjustifiably. It found the *Regulations* "criminaliz[ed] entire protests" and that less impairing alternatives were available.[53] For example, it suggested that *Regulations* could have been limited to pockets of the country, rather than applying nationally.[54] Or they could have applied only to *people*—not *assemblies*—that might reasonably lead to a breach of the peace.[55]

36. Despite determining that the freezing of accounts did not breach s. 8 of the *Charter*, and that the *Economic Order* "did not involve an encroachment on individuals' bodily integrity," the Court of Appeal found the information-sharing provisions in this *Order* authorized unreasonable "searches into individuals' personal financial information and the sharing of this information with others."[56] The court found this s. 8 infringement was not justified under s. 1.

PART II - QUESTIONS IN ISSUE

37. The proposed appeal raises three issues of public importance:

a) First, what principles should courts apply when reviewing a proclamation of a public order emergency under the Act?

b) Second, did the emergency measures adopted here unjustifiably limit *Charter* rights?

c) Third, can the GIC and Cabinet be treated as one and the same?

PART III - STATEMENT OF ARGUMENT

A. Emergency Proclamations Demand Deference

38. As the Court of Appeal noted, this case "raise[s] important and complex issues of constitutional and administrative law in the context of the first ever use of the *Emergencies Act.*"[57]

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[51] FCA Reasons at para 268.
[52] FCA Reasons at para 286.
[53] FCA Reasons at paras 349, 370.
[54] FCA Reasons at para 371.
[55] FCA Reasons at para 372.
[56] FCA Reasons at para 453.
[57] FCA Reasons at para 1.

The first of those issues concerns the principles that apply when courts review a proclamation of a public order emergency under the Act. The significance of this issue is not limited to proclamations under the Act. Rather, it has implications for a range of situations where statutory delegates, in exercising their statutory powers, must make difficult judgment calls about how best to respond to economic threats, national security concerns, domestic crises, cyber threats, breakdowns in public order, public health emergencies, or other fast-moving situations on limited information and in real time.

39. Under *Vavilov*, the court must start with the decision maker's reasons and assess whether they demonstrate an internally coherent and rational chain of analysis that is justified in relation to the factual and legal constraints at the time.[58] In conducting this analysis, the court must take a "reasons first" approach focusing on the decision maker's justification for its decision.[59] The reasons must be read in light of the record before the decision-maker and with due sensitivity to the administrative context.[60] Throughout, the burden is on the party challenging the decision to show it is unreasonable.[61]

40. The courts below did something very different. Rather than starting with the GIC's reasons—the s. 58 Explanation—and asking whether the GIC acted reasonably in finding reasonable grounds to believe a public order emergency existed within the meaning of the Act, they started with their *own* interpretation of the statutory requirements and asked, with the benefit of hindsight and materials that were *not* before the GIC at the time, whether there were reasonable grounds to believe a public order emergency existed. In this way, the courts each fell into the same fundamental error: they conducted their own analysis of the Act and the evidence and used their own conclusions as a yardstick for assessing the reasonableness of the GIC's conclusions. This approach lacks the respectful deference *Vavilov* and *Mason* demand.[62]

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[58] *Canada (MCI) v Vavilov*, 2019 SCC 65 at para 99 [***Vavilov***].
[59] *Vavilov* at para 84; *Mason v Canada (MCI)*, 2023 SCC 21 at paras 8, 60.
[60] *Vavilov* at paras 91-94, 106-108; *Tsleil-Waututh Nation v Canada (AG),* 2017 FCA 128 at paras 85-87 [***TWN***].
[61] *Vavilov* at para 100.
[62] *Vavilov* at paras 83, 97, 103; *Mason* at paras 61-62.

41. This lack of deference manifested in several ways. First, although the Act sets out legal requirements that must be satisfied before the GIC can proclaim a public order emergency,[63] that does not give courts licence to interpret those requirements afresh on a correctness standard. Rather, they must still start with the GIC's reasons addressing the Act and ask whether they are reasonable. Any other approach fails to show due respect to Parliament's decision to delegate this authority to the GIC.

42. Second, although the Act requires the GIC to have "reasonable grounds to believe" that a public order emergency exists, that does not give courts licence to decide for themselves whether, on the record before them, those reasonable grounds existed. The Federal Court asked whether "there was [a] national emergency justifying the invocation of the *EA*."[64] The Court of Appeal asked whether "the GIC ha[d] reasonable grounds to believe that a threat to national security existed."[65] But neither asked the right question: whether the GIC acted *reasonably* in finding reasonable grounds to believe a public order emergency existed. That is not the same as asking whether reasonable grounds existed.

43. Third, although the Act requires the GIC to provide reasons for its decision, that does not reverse the burden of proof on judicial review. As *Vavilov* instructs, the party seeking review always bears the burden of showing that the decision is unreasonable.[66] Yet the Court of Appeal said the very opposite: it put the burden on *the GIC* to show that its decision was reasonable.[67] This reversal is inconsistent with *Vavilov*.

44. The lower courts' non-deferential approach raises issues of public importance not only in its inconsistency with *Vavilov*, but also its inconsistency with the Act and the practical realities of emergency decision-making. Unlike courts who may review decisions with the benefit of time and more information, emergency decision makers often must make decisions in real time based on limited information. The Act recognizes this reality. For example, it sets a standard—"reasonable grounds to believe," not a "balance of probabilities"—sensitive to the nature of public order

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[63] FCA Reasons at para 166.
[64] FC Reasons at paras 241-255.
[65] FCA Reasons at para 185 (heading).
[66] *Vavilov* at para 100.
[67] FCA Reasons at para 258.

emergencies, which are urgent and fast-moving. Yet the approach adopted by the courts below effectively neuters the Act: it sets an extremely high, if not unattainable, bar for invocation.

45. To illustrate, in interpreting the "objective legal requirements" set out in the Act, the Court of Appeal held that the words "serious violence against persons" required "harm at least of the level contemplated by the term 'bodily harm'"—imposing a criminal law standard.[68] The court also held that "serious violence" against property could not include acts rendering critical infrastructure unusable.[69] On this standard, a complete blockade of ports—something explicitly discussed as a potential threat to national security at the Legislative Committee leading up to the enactment of the Act[70]—could not reasonably qualify as "serious violence" under the Act. That would be the case even if, as here, the economic harm interrupted the distribution of essential resources such as medical supplies, food, and fuel.[71] This unduly narrows the potential scope of emergencies the GIC may use the Act to respond to, short of war and insurrection.

46. The narrow and exacting approach adopted by the courts below also requires the GIC to settle for measures that may be less effective—or completely ineffective—in responding to urgent and fast-moving situations. For example, the Court of Appeal suggested that the GIC could have adopted measures targeting only limited pockets of the country.[72] But as noted in the s. 58 Explanation, the emergency was truly national in scope: no one could have predicted where the next blockade or breach of the peace might arise, and funding was a national concern.[73]

47. The Court of Appeal also suggested that the *Regulations* could have applied only to *people*—not *assemblies*—that might reasonably lead to a breach of the peace.[74] But this approach is unrealistic and unworkable: how could authorities possibly identify and determine in advance which specific individuals—distinct from the assembly as a whole—might lead to a breach of the peace? The Court, like some of the respondents, even suggested that the GIC should have

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[68] FCA Reasons at paras 166, 200-202.
[69] FCA Reasons at paras 207-209.
[70] House of Commons Committees, Legislative Committee on Bill C–77, *Evidence,* 33–2, Vol 1, No 7, p 32 (Mr. Crofton).
[71] FC Reasons at para 251 and Annex B / s. 58 Explanation, ALAR, Tab 2A, p 17.
[72] FCA Reasons at para 371.
[73] Annex B / s. 58 Explanation (and here and here), ALAR, Tab 2A, pp 13, 15-16, 19.
[74] FCA Reasons at para 372.

authorized the military to provide assistance.[75] That is an extraordinary suggestion: it would have resulted in a much *greater* intrusion on rights and freedoms, and a much *greater* level of public disorder and chaos than already existed.

48. The Court of Appeal reasoned that its narrow and restrictive interpretation was justified due to the need to "read down" the Act, and especially the words "national emergency," to avoid intrusions on provincial powers.[76] But there was simply no basis for "reading down" the Act at all, seeing as its constitutionality under the emergency branch of the Peace Order and Good Government power was not challenged. There is no basis for reading down valid legislation to make it fit something closer to the court's view of the ordinary division of powers in an emergency.

49. Ultimately, the Court of Appeal concluded that "provinces should be left to determine for themselves how best to deal with a critical situation" – including deciding "not to exercise [their] powers."[77] The statutory interpretation principle of *expressio unius* – "the expression of one thing is the exclusion of the other" – does not support this conclusion. The affirmative wording of s. 19(3) of the Act only requires to GIC to "not unduly impair the ability of any province *to take measures*, under an Act of the legislature of the province, *for dealing with* an emergency in the province." Indeed, the Court's interpretation reads in a provincial veto on the GIC's ability to make orders and regulations once an emergency is declared. This goes far beyond the Act's requirement to not unduly impair provincial efforts and, to the extent possible, work in concerted action.

50. In the end, no one disputes that emergency measures should be a temporary means of last resort. But that does not mean those measures should be available only in the most dire and extreme circumstances. To protect the interests of Canada against both domestic and foreign threats, Canada's laws must be interpreted and applied in a way that permits the executive to take measures that respond effectively to crises like the one that unfolded in early 2022, without having to wait for additional negative, potentially violent, consequences to arise. While courts have a important role in ensuring the GIC acts reasonably in finding reasonable grounds to believe there is a public order emergency within the meaning of the Act, this does not include substitution of their own

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[75] FCA Reasons at paras 256-258.
[76] FCA Reasons at paras 247-250.
[77] FCA Reasons at para 286.

views as to whether there were reasonable grounds or second guessing difficult judgment calls made on limited information and in real time by those given the authority to make those calls.

51. This case thus raises issues of public importance with respect to what principles courts should apply when reviewing the reasonableness of the proclamation of a public order emergency. It also raises additional important issues with respect to how provincial incapacity is reasonably understood under the Act, and how concepts like "threats to the security of Canada" and "threat of serious violence" are to be reasonably interpreted, which the AGC intends to address on appeal.

B. Tailored Emergency Measures Complied with the *Charter*

52. There is also an issue of public importance raised by the Court of Appeal's conclusion that the *Regulations* unjustifiably infringed s. 2(b) of the *Charter* and the *Economic Order* unreasonably interfered with s. 8 privacy rights.[78] The Court of Appeal's decision imposes an unduly onerous burden in the context of an urgent public order emergency, at odds with this Court's clarification in *Taylor*[79] that minimal impairment is not a standard of perfection that operates with the benefit of hindsight. The Court of Appeal's proposed options would have been less effective and afforded no deference to the targeted measures chosen by the GIC as reasonable alternatives in the circumstances.

1) Section 2(b): Mischaracterization of purpose of *Regulations* created excessive s. 1 burden in emergency context

53. There is no real dispute the GIC had a pressing and substantial objective in making *Regulations*. However, the Court of Appeal's oversimplification of this objective as "clearing out the blockades" mischaracterized this objective in exactly the same manner as the Federal Court.[80] By failing to consider that the *Regulations* also aimed to end the intractable blockades *peacefully* and *permanently* (i.e., to prevent their recurrence), the Court conducted a flawed minimal impairment analysis that imposed an excessive s. 1 burden in the context of this emergency.

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[78] FCA Reasons at paras 288-474; *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, Sched. B to the *Canada Act 1982* (UK), c 11, ss. 2(b), 8 and 1.
[79] *Taylor v Newfoundland and Labrador*, 2026 SCC 5 at paras 208 and 245 [***Taylor***].
[80] Cp. FCA Reasons at para 360 and FC Reasons at para 351.

54. Contrary to the Court of Appeal's finding, the *Regulations* aimed to do more than clear out the blockades. Beyond prohibiting individual participation in an assembly that might reasonably be expected to lead a breach of the peace, the *Regulations* also prohibited travel to a prohibited assembly, travel or attendance of minors at these assemblies, and the provision of property to facilitate or participate in a prohibited assembly.[81] The purpose of the *Regulations* was not just to deter and punish unlawful blockaders, it was to permit law enforcement to clear the blockades in a safe and effective way that would prevent new ones from emerging.

55. The Court of Appeal's "reasonable alternatives" were misaligned with this purpose and would not have accomplished the GIC's goals. Suggesting that a carve-out for peaceful protestors (including "disruptive" protestors[82]) would be less impairing assumes that police officers could have walked among the crowd and picked out blockaders from the water-givers, or truck-drivers from their passengers. The GIC was not required to maintain essentially the same approach to law enforcement that had failed to permanently and peacefully end the blockades up to that point, rather than addressing the occupation holistically, as an organized and intractable undertaking.

56. Similarly, limiting the *Regulations'* application to Ontario and Alberta would not have addressed the objective of permanently ending blockades and preventing their recurrence. Border crossings across the country had been blockaded. The Court of Appeal's decision upends this Court's settled approach to minimal impairment,[83] including *Taylor*. In an emergency context, s. 1 does not require a standard of perfection, nor does it operate with the benefit of hindsight.[84]

2) Section 8: Information sharing in the *Economic Order* reasonable and not subject to criminal law standards

57. Although the Court of Appeal found that the temporary freezing of "designated persons'" accounts did not breach their s. 8 *Charter* rights, it held that the regulatory scheme to operationalize this uniquely dissuasive tool constituted an unreasonable search. With the benefit of hindsight, the Court of Appeal concluded there were a "number of deficiencies" in the *Economic Order*'s

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[81] *Regulations,* ss. 2-5; ALAR, Tab 2C, pp 26-27.
[82] FCA Reasons at para 339.
[83] *R v Sharpe*, 2001 SCC 2 at paras 85, 88, 89, 96, 103; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 58-63, 69, 85.
[84] *Taylor* at para 245.

information-sharing provisions—including the absence of any requirement for a warrant or prior authorization by a neutral arbiter, a "lax" standard of "reason to believe," a lack of a notice before personal financial information could be shared, and a lack of review mechanism.[85]

58. This s. 8 analysis proceeded on the basis that criminal law requirements were appropriate in assessing the reasonableness of this information sharing, when the primary purpose of the *Economic Order* was not to provide evidence of offences under the *Regulations*, but to provide what Commissioner Rouleau described as a "highly impactful" yet "proportionate" response to the unlawful protests by "encouraging protesters to leave without having to resort to force."[86]

59. There is an issue of public importance in whether the possibility of prosecution flowing from the information sharing required to operationalize the freezing of accounts necessitated the demanding requirements of criminal law investigative tools like wiretaps, when the real goal of this temporary and targeted emergency measure was to end the blockades peacefully and permanently. The Court of Appeal erred in finding the information sharing provisions did not strike a reasonable balance between privacy rights and the important objectives of the *Economic Order*, or were otherwise not a reasonable alternative under s. 1 of the *Charter*.[87]

C. GIC & Cabinet are Distinct & Not Legally Interchangeable

60. There is also an issue of public importance raised by the Court of Appeal's erroneous conflation of two distinct bodies, the GIC and Cabinet, in support of the Federal Court's expansion of the record in these judicial reviews.

61. While the Court of Appeal described the AGC's position that these bodies are distinct as "unorthodox,"[88] it is anything but. Within our constitutional framework, Cabinet exists only as a matter of convention. It is a political body that provides a forum for Ministers to deliberate and express their views in private. As such, it does not exercise powers conferred under an Act of Parliament and it cannot qualify as a federal board under ss. 2 and 18.1 of the *Federal Courts Act.*[89]

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[85] FCA Reasons at paras 439, 445-458, 469; *Economic Order*, ss. 5 and 6.
[86] POEC Report, Vol 3, pp 264; Annex B / s. 58 Explanation, ALAR, Tab 2A, p 8.
[87] *Goodwin v B.C. (Superintendent of Motor Vehicles)*, 2015 SCC 46 at paras 55-57; *R v Law,* 2002 SCC 10 at para 23.
[88] FCA Reasons at para 136.
[89] *Federal Courts Act*, RSC 1985, c F-7, ss. 2 and 18.1.

62. This remains the case in the context of public order emergencies. Under ss. 17(1) and 19(1) of the Act, Parliament expressly gave the powers to proclaim an emergency and take temporary emergency measures to the GIC, to the exclusion of all others. Parliament did not give any powers to any individual minister, or to a collective of other ministers like the Cabinet. In so doing, Parliament ensured that certain requirements would be met in the exercise of these powers—namely, the making of legal instruments, their formal registration and their publication in the official *Canada Gazette*. None of these requirements attaches to Cabinet decisions.

63. This distinction does not undermine principles of democracy or responsible government, as the Court of Appeal erroneously suggested.[90] To the contrary, it respects Canada's system of government as a constitutional monarchy. In Canada, executive authority, including powers conferred under acts of Parliament, vests in the King, as represented by the Governor General, aided and advised by the Privy Council.[91] As a matter of constitutional convention and responsible government, the functions and duties of the Privy Council acting in this capacity are performed by a committee of ministers of the government of the day when specifically convened to provide such advice to the Governor General, i.e., the "Governor General in Council" (or GIC).[92]

64. As such, the political deliberations of Cabinet are separate from the advice tendered by the Privy Council to the Governor General in the making of legal decisions. That is evident in the fact that the record in this case discloses the existence of a separate Cabinet meeting on February 13, 2022, prior to the GIC being convened to perform its constitutionally assigned role and exercise the powers Parliament gave to it under ss. 17(1) and 19(1) of the Act on February 14 and 15, 2022. The Court of Appeal's finding that it is a "fiction" to claim the GIC was convened separately from Cabinet and that "no such meeting ever took place" is manifestly in error.[93] The GIC considered its own record consisting of the Minister's submission (which included the Minister's formal recommendation and the draft legal instruments, among other things) and recorded its own decision, which was registered and published in the *Canada Gazette*. This is not a fiction.

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[90] FCA Reasons at para 130.
[91] *Constitution Act, 1867*, 30 & 31 Vict, c 3, ss. 9-13.
[92] *Interpretation Act*, RSC 1985, c I-21, s. 35.
[93] Cp. FCA Reasons at paras 31 and 130.

65. There is an issue of broad public importance in the Court of Appeal's inappropriate expansion of the record and scope of judicial review to functionally include the political deliberations of Cabinet, on the basis that it is interchangeable with the GIC.[94] The words "Cabinet" and "Governor in Council" may sometimes be used loosely or colloquially in different contexts to reference executive authority,[95] but this does not establish that they are legally the same body—especially for judicial review purposes.[96] Even though other government actors were involved in the lead-up to the GIC's decisions to make the Proclamation, *Regulations*, and *Economic Order*—including the Incident Response Group (IRG), Cabinet, the Prime Minister, the Clerk of the Privy Council, the Prime Minister's National Security and Intelligence Advisor, and the RCMP Commissioner, amongst others—it is the GIC that remained the sole decision-maker. Similar considerations apply with respect to many other government decisions, and courts have not hesitated to accept their task is to review the GIC's decision in other cases.[97] The erroneous finding by the Court of Appeal to the contrary here raises a matter of broad public importance.

PART IV -SUBMISSIONS ON COSTS

66. The AGC seeks costs of this application.

PART V -NATURE OF ORDER SOUGHT

67. The AGC seeks an order granting leave to appeal and costs of the application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver and Toronto this 17th day of March, 2026.

John Provart for

MICHAEL A. FEDER, K.C. / JOHN PROVART / CONNOR BILDFELL / NICHOLAS DODOKIN

Counsel for the Applicant, the Attorney General of Canada

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[94] FCA Reasons at para 141.
[95] FCA Reasons at paras 134-136, 142-144.
[96] FCA Reasons at para 131.
[97] E.g., *TWN* at paras 111-116, 123-128, 138; *China Mobile Communications Group Co Ltd v Canada (AG)*, 2023 FCA 202 at paras 13-18, 37-46.

PART VI -TABLE OF AUTHORITIES

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13.	Public Order Emergency Commission, News Release (February 17, 2023). EN / FR	27
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14.	House of Commons Committees, Legislative Committee on Bill C–77, *Evidence,* 33–2, Vol 1, No 7, p 32 (Mr. Crofton)	45