

Federal Court



Cour fédérale

Ottawa, January 23, 2024 – The Honourable Justice Richard Mosley of the Federal Court issued decisions today in files T-306-22, T-316-22, T-347-22 and T-382-22:

**IN THE MATTERS OF
CANADIAN FRONTLINE NURSES and KRISTEN NAGLE v. THE ATTORNEY
GENERAL OF CANADA;**

**CANADIAN CIVIL LIBERTIES ASSOCIATION v. ATTORNEY GENERAL OF
CANADA;**

**CANADIAN CONSTITUTION FOUNDATION v. THE ATTORNEY GENERAL OF
CANADA
and THE ATTORNEY GENERAL OF ALBERTA;**

**JEREMIAH JOST, EDWARD CORNELL, VINCENT GIRCYS and HAROLD
RISTAU v. GOVERNOR IN COUNCIL, HIS MAJESTY IN RIGHT OF CANADA,
ATTORNEY GENERAL OF CANADA, and MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Summary: Four groups applied for judicial review of the decision by the Governor in Council [GIC] to declare a Public Order Emergency under the *Emergencies Act*, [“*Emergencies Act*” or the “Act”].

The February 14, 2022 *Proclamation Declaring a Public Order Emergency* [the “*Proclamation*”] and the enactment of temporary special measures in order to deal with protests in various parts of the country—which included the occupation of the downtown core of Ottawa and blockades of ports of entry—were under review.

The Court granted standing to two people whose bank accounts were frozen and to two associations who argued on behalf of the public interest: the Canadian Civil Liberties Association of Canada [CCLA] and the Canadian Constitution Foundation [CCF]. The Attorney General of Alberta participated in response to an Amended Notice of Constitutional Question and was granted leave to intervene on several non-constitutional questions. The Governor in Council [Cabinet] was represented by the Attorney General of Canada.

Separate judgments have also been issued in respect of each application to reflect the Court’s conclusions on mootness, standing and the substantive issues.

This was the first time the Act was invoked since its enactment in 1988. The Proclamation, the Emergency Measures Regulations [the “*Regulations*”] and the Emergency Economic Measures Order [the “*Economic Order*”] adopted under the Act had a three-fold impact: a) they prohibited a range of activities relating to protests in designated areas, b) they required third parties to assist the police in ending the protests and c) they authorized financial institutions to disclose information on designated persons and entities to federal officials, and to suspend their accounts.

The Applicants/Parties raised issues which lead to the following three key questions:

1. Was the Proclamation unreasonable?

With respect to the first question, the Court considered the decision under the reasonableness standard of review and concluded that the answer was yes, the Proclamation was unreasonable and illegal (“*ultra vires*”) of the Act.

While the Court recognized that the occupation of downtown Ottawa and the blockades of the ports of entry were matters of serious concern calling for government and police action, the threshold of national emergency required by the Act was not met. Under paragraph 3(a) of the Act, a national emergency is an urgent and critical situation that exceeds the capacity or authority of the provinces to deal with it, and that cannot be effectively dealt with under any other law of Canada. The Proclamation applied the temporary special measures in all of Canada’s provinces and territories, despite the lack of evidence that it was necessary. Apart from the situation in Ottawa, the police were able to enforce the rule of law by applying the *Criminal Code* and other legislation.

While the conclusion that the Proclamation was illegal (“*ultra vires*”) was sufficient to dispose of the applications, the Court addressed the other issues should it be found to have erred in its findings on the first question.

Second, the Court considered the threshold for “threats to the security of Canada.” Section 2 (c) of the *Canadian Security Intelligence Service Act* [*CSIS Act*] defines threats to the security of Canada as “activities...directed towards 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.”

Under s. 17 of the *Emergencies Act*, the GIC required reasonable grounds to believe that the standard set out in section 2 of the *CSIS Act* had been met.

The evidence in the record before the Court did not support a finding that the impugned activities reached that threshold.

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

Concerning the *Charter*, the Court found that the Regulations infringed the guarantee of freedom of expression under s. 2(b), as they were overbroad in their application to persons who wished to protest but were not engaged in activities likely to lead to a breach of the peace.

The Economic Order infringed s. 8 of the *Charter* by permitting unreasonable search and seizure of the financial information of designated persons and the freezing of their bank and credit card accounts.

The infringement of sections 2(b) and 8 of the *Charter* were found to be not minimally impairing, and could not, therefore, be justified under s. 1 of the *Charter*.

The Court found that there was no infringement of the rights to freedom of peaceful assembly and of association in paragraphs 2(c) and (d) of the *Charter*. Any infringement of s. 7 respecting the liberty interests of the individual was found to be in accordance with the principles of fundamental justice and thus not a breach of the *Charter*.

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

Regarding the argument raised by the two men whose bank accounts were frozen, that their rights to due process and the peaceful enjoyment of property under the *Canadian Bill of Rights* were violated the Court found that there was no infringement.

In the result, the Applications for Judicial Review in files T-316-22 [CCLA], T-347-22 [CCF] and T-382-22 [Applicants Edward Cornell and Vincent Gircys] are granted in part and the application in T-306-22 is dismissed in full.